

Yandell v Hillaire Farm Skilled Nursing & Rehabilitation Ctr., LLC

2015 NY Slip Op 30154(U)

January 28, 2015

Supreme Court, Suffolk County

Docket Number: 26179/2011

Judge: Jr., Andrew G. Tarantino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

- ORIGINAL -
if this stamp appears blue

COPY

SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 26179/2011
Orig. Date: 10/8/2014
Adj. Date: 10/14/2014
Motion Dec. 002: MotD

-----X
**BARBARA YANDELL, as Executor of the Estate
of WILLIAM T. YANDELL, and BARBARA
YANDELL, individually,**

Plaintiff(s),

**ORDER DENYING
REARGUMENT AND
GRANTING RENEWAL**

-against-

**HILLAIRE FARM SKILLED NURSING &
REHABILITATION CENTER, LLC,**
Defendant(s).

-----X

Upon consideration of the Notice of Motion for an order granting leave to renew and reargue the Order of the Court dismissing the complaint of the plaintiff Barbara Yandell, as Executor of the Estate of William T. Yandell, and Barbara Yandell, individually [collectively "Yandell"], for failure to prosecute dated July 15, 2014, the supporting affirmations and exhibits 1, and A through O, respectively, the affirmation in opposition on behalf of the defendant Hilaire Farm Skilled Living & Rehabilitation Center, LLC s/h/a/ Hilaire Farm Skilled Nursing and Rehabilitation Center, LLC ["Hilaire"], and exhibits A through E, and Yandell's reply affirmation and exhibit A, it is now

ORDERED that so much of Yandell's motion seeking reargument of the order of this Court dismissing the complaint for failure to prosecute dated July 15, 2014, is denied; and it is further

ORDERED that so much of Yandell's motion seeking renewal of the order of this Court dismissing the complaint for failure to prosecute dated July 15, 2014, is granted, and upon renewal, the Court modifies its prior decision by vacating so much of the order that dismissed the complaint, denies so much of the defendant's motion that sought dismissal of the complaint, and directs the parties to appear for a hearing in Part 50 on FEB 23, 2015 at 11 AM on the issue of what sanction is to be imposed upon Yandell's counsel for their failure to respond to the CPLR 3216 notice served upon them and admittedly received in their office on November 27, 2013.

1/29
x

The underlying facts are set forth in the order dated July 15, 2014, and will not be restated here except to inform the instant decision. This action alleging negligence, medical malpractice, wrongful death, and violation of Pub. Health Law §2801 has its origins in a fall that occurred in Hilaire's facility where the plaintiff's decedent was a patient on June 9, 2009. The plaintiff alleges that injuries and sequelae sustained as a result of the decedent's fall ultimately caused his death on August 7, 2010. When the action was commenced in 2011, the Justice assigned was the Hon. Hector D. LaSalle.¹ On February 5, 2014, this action and another related action entitled *Hilaire Rehab and Nursing f/k/a Huntington Village Rehab and Nursing v Barbara Yandell, as Executor of the Estate of William Yandell, and Barbara Yandell, individually*, Index No. 11562-2010, [Action No. 1 or "the collection action"], were transferred to this Court's IAS inventory.

By prior order dated February 1, 2012, (LaSalle, J.), the collection action and the instant medical malpractice/negligence/wrongful death action were joined for purposes of trial. The order also directed, inter alia, that "all motions shall be served upon counsel for all parties appearing in each joined action." Notably, the attorneys representing the respective parties in each action were different attorneys. In this action, the plaintiff's deposition was conducted on November 13, 2012; the defendant was not deposed before the action was dismissed in July of 2014.

The following narrative pertains to the instant action. On November 26, 2013, Hilaire's attorneys served a 90-day notice to resume prosecution upon Yandell's attorneys. There is no dispute that a person in plaintiff's counsel's office signed an acknowledgment of receipt of the 90-day notice the following day. Hilaire's counsel asserts that at a compliance conference on December 10, 2013, counsel for both parties discussed the fact that the 90-day notice had been served on Yandell's counsel and therefore, the defendant would not enter into a discovery schedule. Nevertheless, Yandell's counsel did not file a Note of Issue, or move to extend plaintiff's time to do so, or move to vacate the 90-day notice. Plaintiff's counsel has claimed that due to law office failure, the 90-day notice must have been mis-filed. As for the attorney who appeared at the compliance conference on December 10th, that attorney has not worked at plaintiff's counsel's office since around the time the 90-day notice was served.

By Notice of Motion dated February 28, 2014, Hilaire served a motion to dismiss the complaint pursuant to CPLR 3216. The moving affirmation asserted, inter alia, that on the eve of the defendant's deposition scheduled for July of 2013, the plaintiff served a supplemental bill of particulars alleging new claims concerning failure to provide proper skin care, nutrition and hydration, and a claimed failure to maintain the decedent's dignity and quality of life. In view of the belated claims, the defendant refused to go forward with its scheduled deposition and advised plaintiff's counsel that plaintiff would have to make a motion requesting permission to amend

¹ On February 3, 2014, Governor Andrew M. Cuomo appointed Justice LaSalle to the Appellate Division Second Judicial Department.

Yandell v Hilaire Farm Skilled Nursing
Index No. 26179-2011
Page 3

the bill of particulars to add the new claims. Paragraph 14 of Hilaire's moving affirmation continued:

"The issue of the proposed amended pleading was addressed in Court on July 23, 2013 before former assigned Justice, Hector LaSalle. Your undersigned was present in Court. Your undersigned reiterated its position to plaintiff's counsel and advised the Court that it would not consent and stipulate to an amendment of the pleading. Accordingly, plaintiff's counsel was directed by Judge LaSalle's Part to file a motion for permission to amend."

On the instant motion for renewal of the Order dismissing the action, this Court has learned for the first time that the "mandate" to file a Motion to Amend the Bill of Particulars came not from Justice LaSalle, as previously implied, if not stated, in the original motion, but by Justice LaSalle's law clerk.

In weighing the various factors in the calculus of a dismissal motion for failure to prosecute, this Court assumed, incorrectly, that Yandell's attorney ignored a direct order by then Supreme Court Justice LaSalle to amend the bill of particulars so that defendant's depositions could proceed. The opposition to Yandell's motion to renew and reargue now clarifies (moving affirmation at ¶ 21), that this was not the case.

As to the motion to reargue, the plaintiff did not make a satisfactory showing that the Court overlooked or misapprehended matters of fact or law in granting Hilaire's motion to dismiss for failure to prosecute pursuant to CPLR 3216 (*see* CPLR 2221 [d][2]; *Central Mortg. Co. v. McClelland*, 119 A.D.3d 885, 991 N.Y.S.2d 87 [2d Dept. 2014] [motion for leave to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"]. Accordingly so much of Yandell's motion seeking reargument of the order of this Court dismissing the complaint for failure to prosecute dated July 15, 2014, is denied.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]). CPLR 3216 is "extremely forgiving" (*Baczowski v. Collins Constr. Co.*, 89 N.Y.2d 499, 503, 655 N.Y.S.2d 848, 678 N.E.2d 460) in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed". While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (*see* CPLR 3216[e]; *Picot v. City of New York*, 50 A.D.3d 757, 758, 855 N.Y.S.2d 237), such a dual showing is not strictly necessary to avoid dismissal of the action (*see* *Baczowski v. Collins Constr. Co.*, 89 N.Y.2d at 503-505, 655 N.Y.S.2d 848, 678 N.E.2d 460; *Gordon v. Ratner*, 97 A.D.3d 634, 635, 948 N.Y.S.2d 627;

Yandell v Hilaire Farm Skilled Nursing
Index No. 26179-2011
Page 4

Kadyimov v. MacKinnon, 82 A.D.3d 938, 918 N.Y.S.2d 770; *Davis v. Goodsell*, 6 A.D.3d at 383–384, 774 N.Y.S.2d 568).

The attorney for the plaintiff has failed to show a justifiable excuse for the failure to take some action after the 90-day notice was admittedly received in his office on November 27, 2013. Nevertheless, there is no doubt that the Court's mis-impression that the plaintiff had defied Justice LaSalle's order directing that a motion to amend be made so that defendant's depositions could go forward, was a substantial factor in weighing the various factors on the original motion and the ultimate decision to dismiss for failure to prosecute. In addition, on reargument, the plaintiff has presented evidence that she never intended to abandon the action by way of an affidavit demonstrating that leading up to the service of the 90-day notice, plaintiff's counsel served authorizations on September 11, 2013, and October 17, 2013, respectively, as well as copies of the plaintiff's marriage and driver's licenses in September, 2013, and a Consent to Release Form in November 2013. Further, according to computerized records maintained by the New York State Unified Court System, plaintiff's counsel also continued to appear at compliance conferences on February 14, 2014, March 25, 2014, and April 29, 2014 (*see Altman v. Donnenfeld*, 119 A.D.3d 828, 990 N.Y.S.2d 542 [2d Dept. 2014]; *Ramon v. Zangari*, 116 A.D.3d 753, 984 N.Y.S.2d 83 [2d Dept. 2014]).

With respect to the merit of the action, the underlying claims sound in negligence, wrongful death, medical malpractice, and violation of the Public Health Law. On the original motion the plaintiff only appended the Verified Complaint and the plaintiff's deposition testimony to demonstrate the merit of the action. On reargument, the plaintiff produced a physician affirmation of merit. The plaintiff previously served defense counsel with the same physician's expert witness disclosure. Defense counsel urges that the plaintiff has failed to provide a justification for not submitting the physician affirmation on the original motion.

A motion for leave to renew must be based upon new facts not offered on the prior motion which would change the prior determination, and must contain a reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221[e][2]; *Rose v. Levine*, 98 A.D.3d 1015, 951 N.Y.S.2d 880). However, "[t]he rule is not inflexible, and renewal may be granted in the court's discretion, in the interest of justice, even on facts that were known to the movant at the time of the original motion" (*Shin v. ITCI, Inc.*, 115 A.D.3d 736, 981 N.Y.S.2d 603 [2d Dept. 2014]; *Eddine v. Federated Dept. Stores, Inc.*, 72 A.D.3d 487, 487, 899 N.Y.S.2d 164; *see Adzer v. Rudin Mgt. Co., Inc.*, 50 A.D.3d 1070, 856 N.Y.S.2d 674; *Heaven v. McGowan*, 40 A.D.3d 583, 835 N.Y.S.2d 641).

In light of defense counsel's acknowledgment that she had already received a copy of the physician's opinion during expert witness disclosure, the Court exercises its discretion to consider the physician affirmation on renewal even though not included in opposition to the original motion to dismiss (*Shin v. ITCI, Inc.*, 115 A.D.3d 736, 981 N.Y.S.2d 603 [2d Dept.

Yandell v Hilaire Farm Skilled Nursing
Index No. 26179-2011
Page 5

2014].

Finally, any delay caused by the failure to move to amend the pleading due to the lapse of time is not sufficient, in and of itself, to justify adhering to the Court's original decision and dismissing the action. Here, that prejudice inheres at least as much to the plaintiff who has the ultimate burden of proof in the action.

The Court has considered the plaintiff's alternate argument that the 90-day notice was defective and finds that argument to be without merit. The plaintiff is directed to serve an Amended Bill of Particulars within fifteen days of entry of this Order or be precluded from doing so.

Plaintiff's counsel's acknowledged failure to respond to the 90-day notice even after the issue was discussed with its attorney at the December 10, 2013 compliance conference, warrants the imposition of sanctions in that the defendant has been put to a not insignificant cost for the instant motion practice. The attorneys for the parties are directed to appear for a hearing in Part 50 on FEB 23, 2015 at 11 AM on the issue of what monetary sanction is to be imposed upon Yandell's counsel for their failure to respond to the CPLR 3216 notice served upon them and admittedly received in their office on November 27, 2013.

This constitutes the Order of the Court.

Dated: JAN 28 2015



ANDREW G. TARANTINO, JR., A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION