

Jones v Mount Sinai Hosp.

2015 NY Slip Op 30285(U)

March 4, 2015

Supreme Court, New York County

Docket Number: 805133/13

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NICOLE JONES, Individually and as Administratrix
of the Estate of LAWRENCE JONES a/k/a
LAWRENCE HY'KEEM EMMANUEL JONES,
Deceased,

Plaintiffs,

Index No. 805133/13

-against-

Decision & Order

THE MOUNT SINAI HOSPITAL,

Defendant.

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Martin Shulman, J.:

Defendant The Mount Sinai Hospital moves for an order dismissing this action for want of prosecution pursuant to CPLR §3216, and to strike the complaint pursuant to CPLR 3042 and CPLR §3126 based upon plaintiffs' alleged discovery defaults. Plaintiffs Nicole Jones, Individually and as Administratrix of the Estate of Lawrence Jones a/k/a Lawrence Hy'Keem Emmanuel Jones (plaintiffs) oppose the motion.

Plaintiffs commenced this action on April 17, 2013 alleging causes of action for *inter alia*, negligence/medical malpractice, wrongful death and loss of services. Plaintiffs allege that defendant's alleged failure to diagnose plaintiffs' decedent's viral myocarditis resulted in his death at the age of 19, less than 24 hours after his discharge from defendant hospital.

Defendant answered the complaint on or about June 27, 2013 and thereafter amended its answer. Simultaneously with the service of its initial answer, defendant also served plaintiffs with various discovery demands and a demand for a verified bill of particulars. Motion at Exhs. C and D. Upon plaintiffs'

prolonged failure to respond to defendant's demands, on May 22, 2014 defendant served a written demand pursuant to CPLR §3216(b) requiring plaintiffs to resume prosecution of the action and serve and file a note of issue within 90 days (90 day notice, Motion at Exh. F). The 90 day notice warned that failure to comply therewith would serve as a basis for a motion to dismiss for unreasonably neglecting to proceed. Upon plaintiffs' failure to comply with the 90 day notice,¹ defendant brought the within motion to dismiss.

Discussion

"CPLR 3216 is the general statutory authority for neglect-to-prosecute dismissals." *Baczkowski v Collins Constr. Co., Inc.*, 89 NY2d 499, 502 (1997).

As summarized in *Ramon v Zangari*, 116 AD3d 753, 754 (2d Dept 2014):

Where a 90-day demand to resume prosecution of an action pursuant to CPLR 3216 has been properly served, a plaintiff may avoid dismissal, as a matter of law, by either timely filing a note of issue or moving, before the default date, to vacate the notice or to extend the 90-day period (citations omitted). Even where a plaintiff has failed to pursue either of these options, however, 'the statute prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever the plaintiff has shown a justifiable excuse for the delay and the existence of a potentially meritorious cause of action' (citations omitted).

In the case at bar, defendants argue that this court lacks discretion to overlook plaintiffs' failure to comply with the 90 day notice and as such the

¹ Plaintiffs' counsel alleges that he did not receive the 90 day notice because his office relocated twice between January 2014 and April 2014 and defendant served it by mail to his prior office address. However, there is no indication in this record that plaintiffs' counsel ever notified defense counsel or the court of his changes of address. Plaintiffs also note that, although this case is electronically filed, the 90 day notice was never e-filed. Had it been e-filed, plaintiffs' counsel would have received notification of the filing by e-mail.

complaint must be dismissed. However, the Court of Appeals in *Baczowski*, *supra*, characterized CPLR §3216 as being “extremely forgiving of litigation delay” (*id.* at 503), and noted that “under the plain language of CPLR 3216, a court retains some discretion to deny a motion to dismiss, even when plaintiff fails to comply with the 90-day requirement and proffers an inadequate excuse for the delay.” *Id.* at 504. For this proposition the Court of Appeals cites CPLR §3216(e), which provides that the court “may” – not “must” – dismiss an action in such event. Notwithstanding the foregoing, the *Baczowski* court cautions that courts should exercise such “residual discretion” sparingly, lest CPLR §3216 be rendered meaningless. *Id.* at 504-505.

Under the circumstances presented and in this court’s “residual discretion”, the portion of defendant’s motion to dismiss the complaint pursuant to CPLR §3216 is denied. In opposition to the within motion, plaintiffs’ counsel, Joseph S. Hubicki, Esq., attributes the delays in this action to the unfortunate personal circumstances of Douglas Menagh, Esq., the sole member of plaintiffs’ then counsel, Menagh & Associates, PLLC. Specifically, in May 2013, one month after commencing this action, Menagh became critically ill and subsequently died in September 2013. During the period of Menagh’s illness Hubicki states that he had “no authority to act on behalf of the firm and there were lengthy negotiations regarding [his] succession to the firm’s cases.” Upon Menagh’s death proceedings were stayed pending the appointment of an estate representative and Hubicki finally was substituted as counsel in November 2013.

While this is a compelling excuse for the initial delays in this case,² it only partially excuses plaintiffs' default since Hubicki offers no explanation for plaintiffs' failure to respond to defendant's discovery demands subsequent to his November 2013 substitution as counsel. However, regardless of the partial deficiency of plaintiffs' excuse for delay, defendant served the 90 day notice predicated upon plaintiffs' discovery defaults, yet there is no indication that defense counsel made any efforts in good faith to resolve such issues as 22 NYCRR §202.7 requires. Instead, defendant proceeded to serve the 90 day notice without attempting to confer with plaintiffs' counsel, as evidenced by the affirmation of good faith submitted in support of this motion which identifies the service of same as the only attempt to resolve this matter.

This does not satisfy 22 NYCRR §202.7(a)'s requirement that counsel confer in an effort to resolve discovery disputes,³ which in turn does not warrant the summary dismissal of this action for lack of prosecution without giving plaintiffs a final opportunity to fulfill their discovery obligations and resume prosecuting this action. In denying dismissal pursuant to CPLR §3216, this court

² Defendant does not address the sufficiency of these allegations in reply, nor does defendant address the sufficiency of plaintiffs' showing of merit. See CPLR §3216(e).

³ 22 NYCRR §202.7[c] mandates that the affirmation of good faith accompanying a discovery motion "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." The affirmation of good faith herein contains no such information.

has also considered the relatively short amount of time of plaintiffs' unexcused default and the lack of any specific prejudice to defendant.

Turning to the portion of defendant's motion to strike the complaint pursuant to CPLR §3126 and 3042, plaintiffs served their verified bill of particulars simultaneously with the service of their opposition to this motion. Hubicki Aff. in Opp., Exh. C. Nonetheless, plaintiffs still remain in default of their discovery obligations, having not responded to defendant's remaining demands for written discovery, authorizations, etc. This continued default is unjustified. However, as stated above, defendant has failed to comply with 22 NYCRR §202.7 and as a result the relief requested under CPLR §3126 cannot be granted at this time. Nevertheless, under the circumstances and given this court's broad discretion in supervising discovery, a *sua sponte* order is warranted directing plaintiffs to respond to the outstanding demands (see directives below).

For all of the foregoing reasons, it is

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that plaintiffs shall respond to defendant's outstanding discovery demands on or before March 31, 2015.

Counsel for the parties are directed to appear for a preliminary conference on April 15, 2015 at 9:30 a.m., at 60 Centre St., Room 325, New York, New York.

The foregoing is this court's decision and order.

Dated: New York, New York
March 2, 2015



Martin Shulman, J.S.C.