

**U Joon Sung v Park**

2016 NY Slip Op 30354(U)

February 23, 2016

Supreme Court, New York County

Docket Number: 159279/15

Judge: Kathryn E. Freed

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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: PART 2

-----X  
U JOON SUNG,

Plaintiff,

-against-

ANDREW I. PARK, ESQ., JUNGHYUN CHOI, ESQ.,  
SIM & PARK, LLP, AND ANDREW PARK, P.C.,

Defendants.  
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**DECISION AND ORDER**

Index No.: 159279/15

Mot. Seq. No. 001

**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFF. IN SUPP.	1,2 (Exs. A-G)
NOT. OF CROSS MOT. AND AFF. IN SUPP.	3,4 (Exs. A-H)
REPLY AFF.	5 (Ex. A)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for legal malpractice, defendants Andrew I. Park, Esq., Junghyun Choi, Esq., Sim & Park, LLP, and Andrew Park, P.C. move, pursuant to CPLR 3211(a)(1), to dismiss the complaint. After oral argument, and after a review of the parties' papers and a review of the relevant statutes and case law, the motion is **denied**.<sup>1</sup>

**FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff U Joon Sung commenced a personal injury lawsuit after he was involved in a motor vehicle accident on April 25, 2009 ("the underlying action"). The Law Offices of Andrew Park,

<sup>1</sup>Plaintiff's cross motion relating to discovery issues has been resolved.

P.C., formerly known as Sim & Park, L.L.P., represented him in that matter, which was commenced on or about September 16, 2009. Ex. A.<sup>2</sup>

On or about February 25, 2010, a verified bill of particulars was served by Sim & Park on counsel for Thomas Hoffman and William Bennewitz, defendants in the underlying action.

The underlying action was marked off the trial calendar pursuant to the order of the Supreme Court, Queens County (Weiss, J.) dated September 15, 2011, after a defendant, Feng Ue Jin, appeared in the action, plaintiff accepted his answer, and the court noted that additional discovery was needed. Ex. D. The court noted that the action could be restored to the calendar by stipulation of all parties pursuant to CPLR 3404 once all discovery had been completed and the matter was ready for trial. Id.

Hoffman and Bennewitz thereafter moved, inter alia, for an order dismissing the complaint pursuant to CPLR 3404 due to plaintiff's failure to restore the matter to the calendar within one year after it was marked off or, in the alternative, pursuant to CPLR 3212 and Insurance Law 5102(d), for an order dismissing the complaint on the ground that plaintiff did not suffer a "serious injury," or for an order precluding Jin from testifying due to his failure to appear for deposition. Ex. E. By order dated February 11, 2013, and entered February 22, 2013, Justice Weiss granted defendants' motion to dismiss pursuant to CPLR 3404, reasoning that the action had been marked off the calendar for more than one year and was thus deemed abandoned. Id. Justice Weiss also noted that the motion was unopposed. Id.

Plaintiff thereafter moved to vacate the dismissal. By order dated September 18, 2013, and

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<sup>2</sup>Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Robert Alan Saasto, Esq. in support of defendants' motion.

entered September 25, 2013, Justice Weiss denied the motion, holding that plaintiff failed to establish a reasonable excuse for his default in failing to oppose defendants' motion. Ex. F. In a lengthy decision excoriating plaintiff's counsel, Justice Weiss noted, inter alia, "plaintiff's overall lack of diligence in prosecuting this case." Ex. F, at p. 4. Justice Weiss also noted that the medical evidence "is insufficient to demonstrate a meritorious cause of action," that "plaintiff failed to submit any competent medical evidence of a decreased range of motion of his cervical and lumbar spine and right shoulder roughly contemporaneous with the accident" and that "the affirmed MRI reports, especially the MRI of plaintiff's right shoulder, taken nine months after the accident, are insufficient to demonstrate that any condition revealed are [sic] causally related to the accident." Id., at p. 4.

Subsequently, plaintiff appealed Justice Weiss' order. By order dated April 1, 2015, the Appellate Division Second Department held, inter alia, that:

Even if [plaintiff] proffered a reasonable excuse for his default, he failed to demonstrate a potentially meritorious opposition to that branch of [defendants] motion which was pursuant to CPLR 3404 to dismiss the complaint. In addition, [plaintiff] failed to demonstrate a reasonable excuse for the 21-month delay in prosecuting this action after the action was marked off the trial calendar and to rebut the presumption of abandonment that arose pursuant to CPLR 3404 after it was marked off the trial calendar. Furthermore, [plaintiff] failed to demonstrate that [defendants] would not be prejudiced if the case were restored to the trial calendar, given the more than four-year delay between the date this action accrued and the date of [plaintiff's] motion. Accordingly, the Supreme Court properly denied [plaintiff's] motion to vacate the order entered February 22, 2013 and to restore the action to the trial calendar.

Ex. H to Pltf.'s Cross Mot.

On or about September 1, 2015, plaintiff commenced the captioned action for legal malpractice against the defendants. Ex. B. In the complaint, plaintiff alleges that, although he was, and is, entitled to recover for serious injuries he sustained in his automobile accident, defendants in

the captioned action negligently allowed the underlying action to be dismissed. Ex. B.

Defendants now move to dismiss the complaint on the ground that documentary evidence warrants the dismissal of the complaint as a matter of law. Plaintiff opposes the motion. In support of the motion, defendants submit the pleadings in the underlying and captioned actions, Justice Weiss' orders, and plaintiff's deposition transcript in the underlying action. In support of the cross motion, plaintiff submits, inter alia, the order of the Appellate Division, Second Department affirming Justice Weiss' order. Ex. H to Cross Mot.

#### **POSITIONS OF THE PARTIES:**

Defendants argue that Justice Weiss' September 18, 2013 determination that plaintiff had no meritorious claim because he failed to establish a claim of "serious injury" constituted a finding on the merits warranting the dismissal of the captioned action. They assert that the finding of no serious injury is supported by plaintiff's deposition testimony, which reflects that he was able to resume normal activities after the alleged accident.

In opposition, plaintiff argues that Justice Weiss never adjudicated the issue of whether plaintiff sustained a "serious injury" because his review was only limited to whether plaintiff had shown a meritorious claim sufficient to vacate his default pursuant to CPLR 3404. However, plaintiff urges, Justice Weiss never had to reach the issue of whether plaintiff established a meritorious claim for serious injury since he never established a reasonable excuse for his default.

In a reply affirmation in further support of their motion, defendants assert, inter alia, that Justice Weiss properly dismissed the underlying action because he deemed it abandoned.

**LEGAL CONCLUSIONS:**

A motion pursuant to CPLR 3211(a)(1) may be granted “only where the documentary evidence refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326-27 (2002).

Here, the documentary evidence submitted by defendants does not entitle them to the relief they request. The orders submitted by defendants may be considered as documentary evidence since they are “essentially undeniable.” See *Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs, Inc.*, 120 AD3d 431, 432 (1<sup>st</sup> Dept 2014), citing Siegel, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C3211:10, at 22. Those orders establish: 1) the underlying action was marked off the trial calendar (Ex. D); 2) defendants moved to dismiss the underlying based on plaintiff’s failure to restore the case to the calendar within one year and the motion was granted upon plaintiff’s failure to oppose the same (Ex. E); and 3) plaintiff’s motion to vacate his default in failing to oppose the defendant’s motion to dismiss the underlying action was denied based on plaintiff’s failure to establish a reasonable excuse for his default or a meritorious claim (Ex. F).

Contrary to defendants’ claim, Justice Weiss’ order dated September 18, 2013 and entered September 25, 2013 (Ex. F) does not conclude on the merits that plaintiff failed to establish a “serious injury” as a matter of law. In fact, it is well settled that a dismissal of a prior action between the same parties based on a failure to prosecute does not constitute a dismissal on the merits and does not bar a subsequent action based on the same facts. See *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891 (2d Dept 2013); *Morales v New York City Hous. Auth.*, 302 AD2d 571 (2d Dept 2003). It is evident from a reading of the order that Justice Weiss’ discussion of the likelihood of the merits of the “serious injury” claim was strictly confined to the issue of whether plaintiff’s

default could be vacated. If Justice Weiss' order were not clear enough, the order of the Appellate Division, Second Department confirms that the only issue before Justice Weiss was whether the order dismissing the complaint as abandoned should be vacated. Ex. H to Cross Mot.

To the extent defendants rely on plaintiff's deposition testimony to establish that he did not sustain a serious injury, that argument must fail, as such evidence does not typically qualify as documentary evidence. See *Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs, Inc.*, 120 AD3d 431, 432, supra, citing Siegel, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C3211:10, at 22. Thus, defendants' motion must be denied.

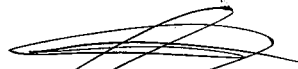
Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion is denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: February 23, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT