

McClain-Ouattara v Stein
2016 NY Slip Op 32728(U)
July 29, 2016
Supreme Court, New York County
Docket Number: 101528/2010
Judge: Joan B. Lobis
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FILED

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

AUG 12 2016

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DELORES MCCLAIN-OUATTARA and TIEBA OUTTARA,

**COUNTY CLERK'S OFFICE
NEW YORK**

Plaintiff,

Index No. 101528/2010

-against-

Decision and Order

MARK STEIN, M.D., and ADVANCED UROLOGY, P.C.,

Defendants.

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In motion sequence number two in this medical malpractice action, defendants seek an order dismissing this case based on plaintiffs' failure to restore it by March 5, 2015, which is one year of the date it was marked off the trial calendar. Motion sequence three, by plaintiffs, seeks to restore the action. The motions are consolidated for disposition and resolved as follows.

Plaintiff filed the summons and complaint with this Court on February 4, 2010. Plaintiff's former counsel filed the Note of Issue on May 31, 2012. On August 20, 2013, this Court granted plaintiffs' counsel's motion to be relieved as attorney; the order included a thirty-day stay of the proceedings and scheduled a conference on October 22, 2013. The Court held conferences on October 22, 2013, December 3, 2013, and January 28, 2014. At each of these conferences, plaintiffs received additional time to obtain counsel. At a conference on March 4, 2014, when plaintiffs again stated that they did not have counsel, rather than providing even more time to plaintiffs the Court marked the case off the trial calendar. Under CPLR § 3404, plaintiffs had one year, or until March 4, 2015, to restore the action to the trial calendar, after which the case would be dismissed. The case is marked "disposed" in the Supreme Court Records On-Line Library.

Following a conference call with the Court in early January, the parties brought the motions to dismiss and to restore.

In their motion, defendants argue that plaintiffs' inaction for nearly two years warrants an order of dismissal, and that any motion to restore is untimely and must be denied. They contend that plaintiffs have not satisfied any of the requisite standards for restoring a case. They state that plaintiffs' pro se status is not a sufficient justification for their apparent abandonment of their lawsuit. They also claim that the action should be dismissed for failure to prosecute.

Plaintiffs filed their papers pro se, but subsequently retained counsel who submitted amended papers which more clearly set forth plaintiffs' legal position. Plaintiffs urge that their active participation in the litigation through March 4, 2014 shows they did not intend to abandon the action. They state the withdrawal of their prior counsel was a severe setback and search for counsel took a great deal of time, delaying their ability to restore this action. They state that their pro se status, while not an excuse, is a mitigating factor. They further allege that Ms. McClain-Ouattara's injuries have prevented her from acting more promptly. They state the delay has not prejudiced defendants because the medical records and other evidence has been preserved and the facts have not altered.

They allege, with the support of Dr. Donald A. Culley's expert affidavit,¹ that the case has merit. Plaintiffs' expert affidavit states, in particular, that defendants improperly

¹ Plaintiffs' supplemental papers include a supplemental affidavit of merit by Dr. Culley which amplifies the statements he made in the affidavit he originally provided to the then pro se plaintiffs.

diagnosed Ms. McClain-Ouattara with a urethral stricture when there was no evidence of stricture. Her actual problem, he alleges, was “high pressure low flow consistent with bladder outlet obstruction,” Culley Aff. ¶ 7, a condition for which there were several possible structural and functional causes which defendants did not consider. Moreover, he states, defendants did not provide any documentation that showed a urethral stricture existed. On the contrary, he states, both a cystoscopy dilatation and a urethrotomy indicated there was no stricture. Defendants deviated from the standard of care when they treated the patient for urethral stricture with no signs of a stricture and no consideration of other probable causes, he states. He also asserts that the failure to consider other causes was a deviation. He stated that there was proximate cause because the procedure defendants used “can cause unwanted damage to other tissues leading to an undesired outcome” and less invasive procedures would have alleviated this risk.” *Id.* Even if there had been urethral stricture, he contends, “the standard of care would have been urethral dilation rather than incision” Defendants object to the sur reply as inaccurate and conclusory and additionally provide the affidavit of Ms. McClain-Ouattara’s treating physician Dr. Nirit Rosenblum stating that, contrary to plaintiffs’ representation, she does not intend to testify at trial.

Under CPLR 3404, an action that has been marked off the calendar is automatically dismissed if it is not restored within one year. After that, however, the court retains the discretion to grant a motion to restore. Cippitelli v. Town of Niskayuna, 277 A.D.2s 540, 541 (3rd Dep’t 2000). To restore this action to the calendar, plaintiffs must show they have a reasonable excuse for their delay of over one year, they did not intend to abandon their lawsuit, there is no prejudice to defendants, and they have a meritorious claim. See Castillo v. City of New York, 6 A.D.3d 568, 568 (2nd Dep’t 2004). Plaintiffs have alleged that Ms. McClain-Ouattara’s illness and their initial

struggles to find counsel caused their delay. In addition, in her affidavits, Ms. McClain-Ouattara stated that she did not understand that she had only a one-year time frame in which to reactivate the case. Although defendants argue that this Court clearly informed plaintiffs of this fact and, indeed, it is this Court's practice to do so, plaintiffs claim this was not made clear to them. A lack of knowledge about the consequences of a failure to timely restore has been deemed a sufficient justification where the plaintiff is pro se. E.g., Cippitelli, 277 A.D.2d at 542 (finding, however, that court did not clearly communicate the consequence of delay). In their motion and in opposition to plaintiffs' motion, defendants do not assert prejudice other than in the conclusory sentence, "Allowing this case to continue after being basically inactive since 2013 (when former counsel moved to dismiss) will likely result in significant prejudice to the defendants." Reply to Sur-Reply, ¶ 32. This is insufficient to show prejudice. Finally, Dr. Culley's expert affidavit is sufficient to allege departures and proximate cause. Defendants' arguments that his statements are unsupported in the record and their other objections to the affidavit go to credibility and do not invalidate the affidavit for the purposes of this motion. Accordingly, it is

ORDERED that the motion to vacate is granted and the case is restored to the trial calendar, and the motion to dismiss is denied; and it is further

ORDERED that the parties are to appear in Part 6, 60 Centre Street room 345, on Tuesday, September 13, 2016 at 9:30 a.m. for a pretrial conference; and it is further

ORDERED that the motion to dismiss is denied.

Dated: *July 29*, 2016

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JB2
JOAN B. LOBIS, J.S.C.

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