

**Kadah v Byrd**

2016 NY Slip Op 32734(U)

January 7, 2016

Supreme Court, Onondaga County

Docket Number: 2014EF361

Judge: Walter W. Hafner, Jr.

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**STATE OF NEW YORK COUNTY OF ONONDAGA  
SUPREME COURT**

**Present: Hon. Walter Hafner, Jr., ASCJ**

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**MIA KADAH,**

**Plaintiff,**

**v.**

**KEITH N. BYRD and ALPHONSO BRADSHAW  
Defendants**

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**DECISION AND ORDER  
INDEX NUMBER 2014EF361**

**DECISION and ORDER** on motion argued before the Hon. Walter Hafner, Jr., Acting Justice

of the Supreme Court, on December 3, 2015.

**APPEARANCES:** C. Daniel McGillicuddy, Esq.  
William Mattar, P.C.  
Attorneys for Plaintiff

Heather K. Zimmermann, Esq.  
Goldberg Segalla, LLP  
Attorneys for Defendants

In an Order dated September 14, 2015, the Court granted the Defendants' motion to dismiss the complaint pursuant to CPLR §§ 3121, 3124, and 3136 due to the Plaintiff's failure to attend a court-ordered Independent Medical Examination (IME) with Dr. Daniel Carr. That motion was granted after the Plaintiff failed to file any Response to the motion and failed to appear for motion argument on September 10, 2015.

The Plaintiff Mia Kadah, hereinafter "Ms. Kadah," filed a motion for leave to renew the prior motion or, in the alternative, a motion vacating the September 14, 2015 Order in its entirety. In support of the motion, Ms. Kadah filed an Attorney Affidavit of C. Daniel McGillicuddy. In his affidavit, Mr. McGillicuddy alleges that the motion was based on new facts not offered on the prior motion that would cause the Court to change its prior determination. In the alternative, Mr. Gillicuddy alleges that the

default on the prior motion was excusable, that Ms. Kadah has a meritorious defense to the prior motion, and that any delay was minimal and caused no prejudice to the Defendants.

In his affidavit, McGillicuddy alleges that on July 17, 2015, Ms. Kadah filed a Demand for SUM Arbitration with the American Arbitration Association. On August 13, 2015, Liberty Mutual filed a motion to stay SUM arbitration . That motion was assigned to this Court.

Ms. Kadah filed an Affidavit dated October 13, 2015. In said Affidavit, Ms. Kadah alleges that she appeared for the court-ordered IME on August 10, 2015, but was 15 minutes late. Ms. Kadah alleges that she was told by the receptionist to call her attorney to reschedule the IME. Ms. Kadah further alleges that there were no other patients in the waiting room at the time.

The Defendants moved to dismiss the Complaint on August 19, 2015. Mr. McGillicuddy alleges that on that date, he telephoned Defendants' attorney, Heather K. Zimmerman, Esq., and left a voicemail. Mr. McGillicuddy alleges that, in his voicemail, he explained, "the situation: Plaintiff arrived fifteen minutes late and, even though the waiting room was empty, was not seen by Dr. Carr. I asked for the independent medical examination to be rescheduled and for the motion to be withdrawn. I left both my personal cell phone number and office number."

Mr. McGillicuddy alleges that Ms. Zimmerman did not return his call. Mr. McGillicuddy alleges that he was under the mistaken impression that the motion was adjourned or withdrawn. Ms. Kadah argues that her motion for leave to renew should be granted, since Ms. Kadah made a good faith effort to appear at the court-ordered IME which did not constitute willful or contumacious conduct.

Ms. Kadah alleges, in the alternative, that the Court should vacate the September 14, 2015 Order pursuant to CPLR §5015(a). Ms. Kadah alleges the delay was minimal, caused no prejudice to the

Defendants and that she has offered a meritorious defense to the motion. Ms. Kadah also alleges the failure to respond to the Motion to Dismiss constituted law office failure and should not result in the extreme sanction of dismissal. Ms. Kadah alleges that this matter is tentatively settled for a global recovery of \$50,000 between three tortfeasors, pending resolution of a supplementary underinsured motorist protection issue with Ms. Kadah's insurance carrier, Liberty Mutual. Ms. Kadah also submitted a Memorandum of Law of Mr. McGillicuddy dated October 23, 2015. In the Memorandum of Law, Ms. Kadah alleges, in sum and substance, that the Defendants' Motion to Dismiss failed to contain evidentiary facts to support the Defendants' claim that Ms. Kadah failed to attend the court-ordered IME, as the only evidence submitted was a hearsay account of what Ms. Zimmerman was told by Dr. Carr's office.

The Defendants filed an Affirmation of Heather N. Zimmerman, Esq. dated November 25, 2015 in opposition to Ms. Kadah's Motion for Leave to Renew. Ms. Zimmerman alleges the Defendants have made diligent, good faith efforts for over a year to either have Ms. Kadah attend an IME or settle this matter. Ms. Zimmerman alleges Ms. Kadah previously failed to appear for a scheduled IME on July 7, 2014. Ms. Zimmerman alleges she and her office made several unsuccessful attempts to re-schedule the IME and collect the \$300 "no show" fee charged by Dr. Carr. On November 6, 2014, the Defendants filed their first Motion to Compel Ms. Kadah to attend an IME. On December 9, 2014, Mr. McGillicuddy informed Ms. Zimmerman that the matter had settled. For that reason, Ms. Zimmerman withdrew the first Motion to Compel on January 9, 2015.

Ms. Zimmerman alleges that on several occasions she unsuccessfully attempted to collect the \$300 "no-show" fee charged by Dr. Carr and obtain the settlement papers. Ms. Zimmerman alleges that

on January 23, 2015, Mr. McGillicuddy informed her that he was waiting for SUM consent from Ms. Kadah's insurance carrier, Liberty Mutual, which was delaying the production of the settlement documents. Ms. Zimmerman alleges that on February 10, 2015 Mr. McGillicuddy received a letter from Liberty Mutual denying SUM coverage. Ms. Zimmerman alleged that the Defendants were not notified of that denial.

Ms. Zimmerman alleges that on April 28, 2015 and May 4, 2015 she contacted Mr. McGillicuddy as to the status of the settlement documents. She was advised that Ms. Kadah was still awaiting SUM consent, even though SUM coverage had been denied. On May 14, 2015, the Defendants filed their second Motion to Compel Ms. Kadah to undergo an IME. Ms. Zimmerman alleges that on June 17, 2015, one day before motion argument, Mr. McGillicuddy wrote to the Court and stated his client was prepared to execute a release and requested an adjournment of the motion. Ms. Zimmerman alleges that at a June 18, 2015 settlement conference before the Court, Mr. McGillicuddy raised an entirely new settlement proposal. Ms. Zimmerman informed Mr. McGillicuddy that she needed to speak with her clients. The motion was marked off the calendar.

Ms. Zimmerman alleges that on June 23, 2015, she wrote Mr. McGillicuddy and requested that he provide her with the proposed settlement documents. After receiving no response to that inquiry, Ms. Zimmerman contacted the Court and requested that the second Motion to Compel be placed back on the calendar. In a letter dated July 7, 2015, the Court placed the second Motion to Compel on the July 16, 2015 calendar and informed the Parties that the Motion to Compel cannot remain pending awaiting a resolution of the SUM issue. On July 16, 2015, the Court granted the Motion to Compel and Ordered Ms. Kadah to appear for an IME at Dr. Carr's office on August 10, 2015 at 12:30 p.m.

Ms. Zimmerman alleges Ms. Kadah arrived at Dr. Carr's office at least one half hour late. In support of that position, the Defendants submitted an affidavit of Susan E. Rose, a paralegal at Ms. Zimmerman's office, Goldberg Segalla, LLP. Ms. Rose's Affidavit states that she was informed by someone at Dr. Carr's office that Ms. Kadah appeared for the IME 45 minutes late on August 10, 2015. The Defendants filed the Motion to Dismiss on August 19, 2015, which was returnable on September 10, 2015. Ms. Kadah failed to file any response to the Motion to Dismiss and did not appear for motion argument. On September 15, 2015, the Court granted the Motion to Dismiss. Ms. Zimmerman alleges that on that same day, September 15, 2015, Mr. McGillicuddy attempted to litigate the motion by sending letters to the Court.

Ms. Zimmerman submitted a copy of a letter sent by the Court Clerk to the Parties on August 20, 2015, confirming the motion return date. For that reason, Ms. Zimmerman alleges any belief by Mr. McGillicuddy that the motion was not returnable on September 10, 2015 is patently unreasonable. Ms. Zimmerman alleges that Ms. Kadah's motion fails because it fails to set forth a reasonable excuse for failing to raise these new facts in response to the motion. Ms. Zimmerman further alleges that the failure to respond to the Motion to Dismiss is part of a pattern of Ms. Kadah's delay, disobedience, and neglect in this matter. Ms. Zimmerman alleges that Ms. Kadah's failure to appear at the court-ordered IME was not a single, isolated, inadvertent mistake, but also part of a pattern of Ms. Kadah's delay, disobedience, and neglect.

Ms. Zimmerman alleges that Ms. Kadah has also failed to establish a meritorious cause of action against the Defendants, as Ms. Kadah has failed to file an Affidavit of Merit. Ms. Zimmerman alleges that if the Court were to grant Ms. Kadah's Motion to Renew, the Parties would be placed in the same

position as they were in May of 2014.

Ms. Zimmerman alleges that even if this Court were to consider the merits of the Motion to Dismiss, that motion should still be granted due to the repeated delays in this matter caused by Ms. Kadah's failure to attend IMEs.

Ms. Kadah filed an Attorney Affidavit in Reply of Mr. McGillicuddy dated November 30, 2015. Ms. Kadah alleges this Court should grant the Motion for Leave to Renew and vacate the Order of September 14, 2015 on the grounds that public policy favors resolution of cases on their merits, citing *Kahn v. Stamp*, 109 AD3d 1097. Mr. McGillicuddy alleges that the default in responding to the Motion to Dismiss was the product of law office error and should be excused. Mr. McGillicuddy further alleges that no Affidavit of Merit regarding the cause of action was necessary since the Motion to Dismiss was granted by default. Mr. McGillicuddy alleges his burden was to establish a meritorious defense to the motion, specifically, that Ms. Kadah attempted to appear for the IME but was 15 minutes late.

The motion was argued by counsel on December 3, 2015.

The Court finds that Ms. Kadah's motion to re-new and her motion to vacate the September 14, 2015 Order should be denied. The Court finds Ms. Kadah has failed to establish a reasonable justification for the failure to raise the defenses now raised in the Motion to Dismiss. The Motion to Dismiss was properly filed by the Defendants and Ms. Kadah received notice. Additionally, one day after Mr. McGillicuddy left a phone message for Ms. Zimmerman, the Court Clerk advised the Parties, in writing, of the return date of the motion and the date for the submission of any Response. That letter, submitted as Exhibit F of Ms. Zimmerman's Affirmation, expressly informed the Parties "Any request for an adjournment must follow the rules set forth in 22 NYCRR §202.8(e)."

22 NYCRR §202.8(e) states:

(1) Stipulations of adjournment of the return date made by the parties shall be in writing and shall be submitted to the assigned judge. Such stipulation shall be effective unless the court otherwise directs. No more than three stipulated adjournments for an aggregate period of 60 days shall be submitted without prior permission of the court.

(2) Absent agreement by the parties, a request by any party for an adjournment shall be submitted in writing, upon notice to the other party, to the assigned judge on or before the return date. The court will notify the requesting party whether the adjournment has been granted.”

No written request for an adjournment was submitted to the Court or Ms. Zimmerman. In fact, Mr. McGillicuddy merely left a voicemail message with Ms. Zimmerman requesting an adjournment or withdrawal of the Motion to Dismiss and somehow believed his request was granted. He never contacted the Court or Ms. Zimmerman again regarding his request. The Court finds that to be patently unreasonable and in direct violation of the Court’s letter of August 20, 2015 and 22 NYCRR §202.8(e). Only the Court possessed the power to grant an adjournment and the Court was never apprised of the request. For that reason, the Court finds Ms. Kadah failed to establish a reasonable justification for the failure to present the proffered facts on the prior motion, as required by CPLR §2221(e)(3).

The Court further finds that Ms. Kadah failed to establish her default was excusable, as required by CPLR §5015(a)(1). While the Court agrees that public policy favors resolution of cases on their merits, the Defendants have established Ms. Kadah’s persistent neglect in the prosecution of this matter. The Defendants’ right to discovery, particularly their right to have Ms. Kadah examined by Dr. Carr has been repeatedly thwarted by Ms. Kadah for over a year. Whether she was 15 minutes or 45 minutes late for her court-ordered IME is, in this Court’s opinion, irrelevant.

The Court further finds that Ms. Kadah, through her counsel, has repeatedly represented to the Court and opposing counsel that an IME is unnecessary as, in his opinion, the matter was “settled.” The

matter obviously is not settled, as no stipulation of discontinuance has been filed. The Court further finds that Ms. Kadah misrepresented the status of the SUM issue, causing further delays, by not promptly informing the Court and opposing counsel that SUM coverage was denied by Liberty Mutual. For all these reasons, the Court finds Ms. Kadah's repeated failures to appear for an IME and the misrepresentations regarding the SUM issue constitutes a pattern of willful default or neglect that should not be excused by the Court, *Abbott v. Crown Mill Restoration Development, LLC*, 109 AD3d 1097, 1099, citing *Santiago v. New York City Health and Hosps.*, 10 AD3d 393

**NOW THEREFORE IT IS HEREBY**

**ORDERED**, that the Plaintiff, Mia Kadah's motion is **DENIED**, without costs. The papers upon which this Decision and Order is based are listed on EXHIBIT 1 attached hereto. This constitutes the Decision and Order of the Court.

**Dated: January 7, 2016**

ENTER,

  
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HON. WALTER HAFNER, JR.  
ACTING SUPREME COURT JUSTICE