

Flores v Goldsmith

2017 NY Slip Op 32055(U)

September 27, 2017

Supreme Court, New York County

Docket Number: 805206/2012

Judge: Eileen A. Rakower

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

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BERNARDO FLORES,

Plaintiffs,

Index No.
805206/2012

**DECISION and
ORDER**

Mot. Seq. 3 & 4

- against -

PETER GOLDSMITH, MD.; BRUCE STERN, DPM:
and THE UNION HEALTH CENTER,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C

Plaintiff Bernardo Flores (“Flores”) commenced this medical malpractice action by filing the summons and complaint on August 2, 2012. Flores alleges that Defendants Peter Goldsmith M.D., (“Goldsmith”) and Bruce Stern, DPM, (“Stern”) failed to timely diagnose Flores’ left foot fracture. Flores also claims that Defendant The Union Health Center (“Union”) provided negligent treatment that resulted in the amputation of Flores’ right toe. Union and Goldsmith interposed their Answers on September 11, 2012 and October 22, 2012 respectively.¹ Thereafter the parties appeared for a preliminary conference on or about December 12, 2013.

Motion Sequence 003

On April 25, 2016, Flores entered a Stipulation of Discontinuance with Stern. (Union’s exhibit B) Thereafter Flores’ counsel, Alan C. Salzman, Esq., (“Salzman”) moved by Order to Show Cause to withdraw as counsel on May 16, 2017. (Union’s exhibit C) The Honorable Joan B. Lobis granted Salzman’s motion (the “May 16, 2017 Order) and directed Flores to appear on June 20, 2017 “with or without new counsel, if he/she wishes to continue any viable action he has . . .” (Union’s exhibit

¹ Stern did not electronically file an Answer on NYSCEF.

E at 3) The Order also provides that “if [Flores] fails to appear on that date, the case may be dismissed on that date.” (Union’s exhibit E at 3)

Union avers that on June 20, 2017, Union and Goldsmith appeared before the Court however Flores did not. Union claims that when it requested dismissal of this case pursuant to the May 16, 2017 Order, this Court afforded Flores “one final chance” to appear. (affirmation of Braverman at 2) The Court in its Compliance Conference Order directed the parties to appear for a conference on August 1, 2017 at 9:30 AM. The Court also ordered Union to serve notice of this conference on Flores.

On July 5, 2017, Union served notice of this conference on Flores by delivering a letter to a person of suitable age at Flores’ dwelling place located at 1964 Grand Concourse, Apartment 1F, Bronx NY 10457. (Union’s exhibit G) Union also mailed a copy of the letter to Flores at Flores’ address on July 6, 2017. (Union’s exhibit G) The letter provides in relevant part,

“We advise that the next conference is scheduled for August 1, 2017 at 9:30 a.m. before the Honorable Eileen Rakower at 71 Thomas Street, New York, New York. Please be further advised that should you fail to appear either by person or by counsel, we will renew our request that your Complaint be dismissed in its entirety with prejudice. Again, your failure to appear on August 1, 2017 may result in the Court dismissing your Complaint and all claims contained within the Complaint with prejudice as we will be requesting such dismissal on August 1, 2017.” (Union’s exhibit f)

On August 1, 2017, Union and Goldsmith appeared before the Court however Flores did not. Union now moves pursuant to CPLR 3216 for an Order dismissing this action on the grounds that Flores has failed to appear and prosecute this case.

Motion Sequence 004

For the same reasons, Goldsmith also moves pursuant to CPLR 3216 and 22 NYCRR 202.27 (b) for an Order dismissing this action.

Flores does not oppose Motion Sequence 003 or Motion Sequence 004.

Standards

CPLR 3216 provides in pertinent part,

“(a) Where a party unreasonably neglects to proceed generally, in an action or otherwise delays in the prosecution thereof against any party . . . the court . . . upon motion, with notice to the parties, may dismiss the party’s pleading on terms. Unless the order specifies otherwise, the Dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no . . . motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of Issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The . . . party seeking such relief . . . shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed . . .

(e) In the event that the party upon whom is served

the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.”

(CPLR 3216 [a], [b] [1] - [3], [3] [e])

22 NYCRR 202.27 (b) provides in relevant part that,

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: . . .

if the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.”

With respect to this provision, the First Department of the Appellate Division stated that “Supreme Court has the authority to dismiss an action based on a plaintiff’s failure to attend a scheduled court appearance . . . and may do so without providing notice to the parties of its intention in that respect.” (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008])

Discussion

In accordance with CPLR 3216 (b) (1), issue was joined in this case on October 22, 2012 when Goldsmith served its Answer. In accordance with CPLR 3216 (b) (2), six months have elapsed from the preliminary conference held on or about December 12, 2013. However, in violation of CPLR 3216 (b) (3), neither Union nor Goldsmith served a demand on Flores to “file a note of issue within ninety days after receipt of such demand . . .” Because Union and Goldsmith did not comply with this condition precedent, the Court cannot direct dismissal under CPLR 3216. (CPLR 3216 [b] [3])

However, the Court directs dismissal in accordance with 22 NYCRR 202.27 (b) because the Court “has the authority to dismiss an action based on a plaintiff’s failure to attend a scheduled court appearance . . .” (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008]) Flores failed to appear at the Court ordered conference held on June 20, 2017 in spite of the Honorable Joan B. Lobis’ directive that “if [Flores] fails to appear . . . the case may be dismissed . . .” (Union’s exhibit E at 3) Notwithstanding Flores’ failure to appear on June 20, 2017, this Court afforded Flores another opportunity to appear at a later conference held on August 1, 2017. Notice of this conference was served upon Flores (Union’s exhibit G) and reflected in the NYS Courts Electronic Filing system. However Flores still failed to appear on August 1, 2017.

Wherefore it is hereby,

ORDERED that Defendants The Union Health Center and Peter Goldsmith M.D’s Orders to Show Cause are granted and Plaintiff Bernardo Flores’s complaint in its entirety is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 27, 2017



Eileen A. Rakower, J.S.C.