

Kirk v Gupta

2017 NY Slip Op 32319(U)

October 27, 2017

Supreme Court, New York County

Docket Number: 805344/2013

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: PART 1

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RONALD KIRK, as Administrator of the Estate of
STEWART KIRK,

Plaintiff,

Index No. 805344/2013

-against-

Decision & Order

MANTU GUPTA, M.D. and COLUMBIA
PRESBYTERIAN MEDICAL CENTER,

Defendants.
-----X

MARTIN SHULMAN, J.:

In this action alleging medical malpractice and wrongful death, plaintiff moves pursuant to CPLR 5015(a)(1) to vacate this court's July 18, 2017 order. (dismissal order) issued pursuant to 22 NYCRR §202.27(b), dismissing this action based upon plaintiff's counsel's failure to appear for two scheduled court conferences.¹ Defendant Mantu Gupta, M.D.² (defendant) opposes the motion and cross-moves for relief pursuant to CPLR §3126 and/or 3124 based upon plaintiff's alleged defaults in providing discovery. Plaintiff does not oppose the cross-motion.

In support of the motion to vacate the dismissal order, plaintiff's counsel claims to have inadvertently failed to calendar the dates "due to them not being ordered by the

¹ The conferences were scheduled for June 6, 2017 and July 18, 2017.
² Defendant Dr. Gupta is the sole remaining defendant in this action, the co-defendant hospital having settled with plaintiff.

court³ or otherwise listed on the docket for this case.”⁴ He notes that he entered his appearance on plaintiff’s behalf on January 9, 2017, after prior counsel withdrew, and thereafter attended two court conferences. When defense counsel was allegedly late to those conferences, plaintiff’s counsel contacted them by email and telephone to confirm they were appearing. Contrarily, on the conference dates in question, plaintiff’s counsel states that no attempts were made to contact him to determine if he would be appearing.

Discussion

CPLR 5015(a)(1) provides in relevant part as follows:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of: 1. Excusable default . . .

To vacate a default judgment under CPLR 5015(a)(1), plaintiff must demonstrate a reasonable excuse for the default and a meritorious cause of action. *Navarro v Plus Endopothetik*, 105 AD3d 586 (1st Dept 2013). A determination of what constitutes a reasonable excuse for a default lies within the court’s sound discretion. *Perellie v Crimson’s Rest., Ltd.*, 108 AD2d 903, 904 (2d Dept 1985).

Defendant argues that relief pursuant to CPLR 5015(a) is not warranted because plaintiff fails to establish both of the foregoing elements. Specifically, defendant claims that plaintiff’s excuse of law office failure is insufficient and plaintiff fails to establish a

³ At the April 25, 2017 conference which plaintiff’s counsel attended, this court scheduled the next appearance for June 6, 2017.

⁴ This court’s computer records indicate that both conference dates were in fact on the court’s calendar. Presumably, counsel would have received notification of these dates from e-Track.

meritorious cause of action since no affidavit of merit is included. Defendants also maintain that vacating the default judgment is unwarranted in light of plaintiff's wilful refusal to appear for depositions and provide outstanding discovery.

This court finds that plaintiff has established both of the required elements for vacating the default. With respect to plaintiff's counsel's excuse for the default, although somewhat weak, this court may consider other factors, including "whether the default prejudiced the opposing party, whether it was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the strong public policy of resolving cases on their merits when possible (citations omitted)." *Toll Bros., Inc. v Dorsch*, 91 AD3d 755, 755-756 (2d Dept 2012).

Here, plaintiff's counsel's mistake was inadvertent.⁵ He filed this motion within three days of the dismissal order's entry and therefore does not evince an intent to abandon the action. Vacating the default also serves the strong public policy of resolving cases on their merits, and as discussed below, plaintiff's cause of action is potentially meritorious. Finally, there is little to no prejudice to defendant in that any delay resulting from the instant defaults was brief.

As to the second element, although no expert affirmation of merit is provided, the Court of Appeals held in *Mosberg v Elahi*, 80 NY2d 941, 942 (1992), that "[i]n medical malpractice actions expert medical opinion evidence is required to demonstrate merit,

⁵ Parenthetically, it is this court's general practice to ask counsel to attempt to contact opposing counsel if they are late for scheduled conferences. Although it is impossible to recall whether the court asked defense counsel to contact plaintiff's counsel on July 18, 2017, defense counsel does not address plaintiff's counsel's claim that he was not contacted on that date.

except as to matters within the ordinary experience and knowledge of laypersons.”

Here, plaintiff’s counsel states that the decedent plaintiff’s renal artery was cut during surgery and the surgeon’s failure to realize and repair it intraoperatively resulted in injury and his ultimate death. This statement is supported by and consistent with the pleadings and bills of particulars. Arguably, a layperson likely knows or can reasonably infer that cutting an artery will cause significant bleeding and lead to complications, possibly including death as alleged here. Accordingly, plaintiff sufficiently establishes a potentially meritorious cause of action.

Defendant’s cross-motion is granted without opposition to the extent that plaintiff is directed to comply with defendant’s demands annexed to the cross-motion at Exhibits G, H and I in accordance with the directives below. In the event of plaintiff’s failure to comply, the complaint shall be stricken.

Accordingly, it is

ORDERED that plaintiff’s motion is granted, the dismissal order is vacated and the action is restored to the calendar; and it is further

ORDERED that defendant’s cross-motion is granted to the extent that within 30 days of the electronic filing of this decision and order, plaintiff is directed to fully comply with defendant’s discovery demands attached to the cross-motion at Exhibits G, H and I; and it is further

ORDERED that in the event plaintiff fails to comply with the foregoing, the complaint will be stricken upon defense counsel electronically filing a proposed order striking the complaint, together with an affirmation detailing the default, and submitting a working copy thereof directly to chambers.

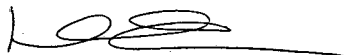
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Counsel for the parties are directed to appear for a status conference on
December 12, 2017 at 9:30 a.m. at Part 1, 60 Centre St., Room 325, New York, NY.

The foregoing is this court's decision and order.

Dated: October 27, 2017



Martin Shulman, J.S.C.