

Jacobs v Lenox Hill Hosp., Inc.
2018 NY Slip Op 32350(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 805079/2017
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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ESTATE OF ANNETTE JACOBS by EXECUTRIX
TAMARA E. JACOBS; and TAMARA E. JACOBS,
individually,

Plaintiff,

Index No.
805079/2017

**DECISION and
ORDER**

- against -

Mot. Seq. 003

LENOX HILL HOSPITAL, INC. and MARY MANNING
WALSH HOME,

Defendants.
-----X

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

On March 2, 2017, Plaintiff Tamara E. Jacobs ("Tamara") commenced this medical malpractice action by Summons and Complaint on behalf of herself and the estate of her mother Annette Jacobs ("Annette") (collectively "Plaintiffs"). Plaintiffs allege *inter alia* that Defendants Lenox Hill Hospital, Inc. ("Lenox Hill") and Mary Manning Walsh Home ("Mary Manning Walsh") departed from accepted standards of medical practice when they failed to treat Annette for pressure ulcers. (Jacobs complaint at 4) Among the other causes of actions alleged by Plaintiffs, Tamara claims loss of the services and support of Annette. Lenox Hill interposed an Answer on June 8, 2017 after the Honorable Joan B. Lobis, J.S.C., granted Lenox Hill's pre-answer motion to dismiss certain causes of actions. It does not appear from the New York State Court Electronic Filing system that Mary Manning Walsh filed an Answer.

This Court previously issued a compliance conference order on or about October 17, 2017 that provided, "Plaintiff's counsel has failed to Appear for a second Preliminary Conference . . . Accordingly, it is ORDERED that a preliminary

conference is scheduled for 10/24/17 [a]fter which the Court will consider motion practice to dismiss[.] Defendant to serve this Order on Plaintiffs [sic] by overnight mail within 2 days of this order's date." (Defendant's exhibit I) Defendants then electronically filed and served the compliance conference order by overnight mail to Plaintiffs' counsel, "Lazzaro Law Firm, P.C., 107 Library Place, Princeton, New Jersey 08540." On or about October 24, 2017, this Court issued a compliance conference order stating, "Plaintiffs' [sic] counsel has failed to appear for a third Preliminary Conference . . . Defendants may move by Order to Show Cause to have this case dismissed within 30 days." (Defendant's exhibit K) On or about November 16, 2017, Lenox Hill moved by Order to Show Cause to dismiss this action pursuant to 22 NYCRR 202.27. Plaintiffs did not oppose. On December 12, 2017, this Court granted without opposition the Order to Show Cause brought by Lenox Hill to dismiss the complaint in its entirety on the grounds that Plaintiffs failed to appear at three conferences ("Motion Sequence 002").

Presently before the Court is Plaintiffs' Order to Show Cause pursuant to CPLR § 5015 (a)(1) for an order vacating this Court's December 12, 2017 decision and order, restoring this action to the pre-trial calendar, and scheduling a pre-trial conference.

Factual Allegations

According to Plaintiffs, "Lenox Hill asserts that it mailed confirmation of the adjournment to Plaintiff's counsel, at 107 Library Place Princeton, New Jersey 08540. However, Plaintiff[s'] prior counsel never received any such correspondence, because 107 Library Place Princeton, New Jersey 08540 is Plaintiff's own personal address, not the address to Plaintiff's counsel." (affirmation of Mangan at 4) Allegedly, "It wasn't until Plaintiff, Tamara . . . received service to her own personal address of th[e] Order to Show Cause [on Motion Sequence 002] that she realized there was a problem with her prior counsel." (affirmation of Mangan at 1) Indeed, Plaintiffs claim that they wanted their prior counsel, Mr. Lazzaro, "to cooperate and allow [Mangan Ginsberg LLP] to substitute as counsel of record." (affirmation of Mangan at 2) However, "despite phone calls, emails and mail correspondence, [Mangan Ginsberg LLP] [was] unable to reach Plaintiff[s'] prior counsel." (affirmation of Mangan at 5)

Lenox Hill argues *inter alia* that "plaintiffs' [sic] counsel [Mr. Lazzaro of the Lazzaro Law Firm] was registered on NYSCEF and electronically filed the Summons and Complaint. (affirmation of Barresi at 2) According to Lenox Hill, "At

the forefront, it was the Lazzaro Law Firm that created the Summons and Complaint and listed the incorrect contact information.” (affirmation of Barresi at 10) Therefore, Lenox Hill argues that “plaintiff’s counsel Mr. Lazzaro was served and has received copies of all of the Orders and electronically filed documents throughout this litigation.” (affirmation of Barresi at 2) Lenox Hill also posits that Mr. Lazzaro was “registered on NYSCEF” and therefore would “would have been able to determine the conference dates and receive notifications regarding all electronically filed documents.” (affirmation of Barresi at 10) That Mr. Lazzaro never received notice of any scheduled conferences because the Court and defense counsel had the incorrect contact information, according to Lenox Hill, “cannot possibly be true and is not a valid excuse for the neglect of this case.” (affirmation of Barresi at 10)

Lenox Hill additionally asserts that “Mangan Ginsberg claims that the address in the Summons and Complaint belonged directly to Ms. Jacobs, Ms. Jacobs therefore directly received . . . the October 17, 2017 Order providing notice of the third Preliminary Conference date and the potential dismissal of plaintiff’s counsel.” (affirmation of Barresi at 8) Furthermore, Lenox Hill alleges that “Mangan Ginsberg LLP contacted defense counsel in early August of 2017 and advised that they were considering substituting in as plaintiff’s counsel.” (affirmation of Barresi at 8) Therefore, “Ms. Jacobs must have known that there were issues with her counsel since at least August of 2017 and yet continued to willfully neglect this action[,]” according to Lenox Hill. (affirmation of Barresi at 8)

Lenox Hill also asserts that “On October 16, 2017, a . . . good faith letter was sent to plaintiff[s’] counsel requesting the outstanding discovery prior to the October 17, 2017 Preliminary Conference . . . [and] as a courtesy, this correspondence was also sent to Mangan Ginsberg LLP.” (affirmation of Barresi at 4) However, “on October 17, 2017, neither plaintiff, Lazzaro Law Firm nor Mangan Ginsberg LLP appeared for the conference.” (affirmation of Barresi at 4) Similarly, “On October 24, 2017, despite . . . multiple notices, neither Plaintiff, the Lazzaro Law Firm nor Mangan Ginsberg LLP appeared for the third scheduled Preliminary Conference.” (affirmation of Barresi at 4) Lenox Hill further notes that on the return date for Motion Sequence 002, “[n]o attorney appeared from Mangan Ginsberg LLP despite having notice of this date. The plaintiff and counsel from Lazzaro Law Firm failed to appear as well.” (affirmation of Barresi at 5) As Lenox Hill summates, “Ms. Jacobs, Lazzaro Law Firm and Mangan Ginsberg LLP were on notice of multiple court appearances and oral arguments and still failed to ever appear.” (affirmation of Barresi at 9) “They were also on notice of the total lack of any discovery provided to defense counsel.” (affirmation of Barresi at 9) Accordingly, Lenox Hill contends

that “Defendants have been prejudiced as they have expended time and resources to appear [for] three preliminary conferences, file two prior motions and attempt to secure discovery multiple times, all to be ignored by plaintiff and counsel.” (affirmation of Barresi at 10) Lenox Hill alleges, “it is only plaintiff and/or her counsel’s fault that no discovery has been conducted.” (affirmation of Barresi at 12)

A review of this action in the New York State Courts Electronic Filing system, as of the date of this decision and order, indicates that Mr. Lazzaro of the Lazzaro Law Firm, P.C., is representing Plaintiffs.

Standard

Pursuant to CPLR § 5015, the court which rendered a judgment or order may, on motion, grant relief from the judgment or order upon the ground of “excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.” (CPLR § 5015[a][1]). To prevail on a motion to vacate a default judgment upon the ground of excusable default under CPLR § 5015(a)(1), the moving party must satisfy the burden of showing a “meritorious claim or defense” and “a reasonable excuse for the default.” (*Sheikh v. New York City Transit Auth.*, 258 AD2d 347, 348 [1st Dept 1999]; *Pena v. Mittleman*, 179 AD2d 607, 609 [1st Dept 1992]; *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dep’t 2007]). The determination of what constitutes a reasonable excuse for a default lies within the motion court’s discretion. (*Orimex Trading, Inc. v. Berman*, 168 AD2d 263 [1st Dept 1990]). “Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors.” (*Gecaj v Gjonaj Realty & Management Corp.*, 149 AD3d 600, 603 [1st Dept 2017].) In the context of motions to vacate orders of dismissal pursuant to 22 NYCRR 202.27, the movant must offer “a valid excuse for the failure to appear.” (*Latha Restaurant Corp. v Tower Ins. Co.*, 285 AD2d 437, 437 [1st Dept 2001].) If the failure to appear is “part of a pattern of delay, willful neglect or noncompliance with court orders,” vacatur is properly denied. (*id.*) Indeed, “[t]he repeated failure of the plaintiffs’ counsel to appear for scheduled conferences demonstrates a pattern of willful neglect which cannot be excused by [a] claim of law office failure.” (*Campenni v Ridgcroft Estates Owners, Inc.*, 261 AD2d 496, 497 [2d Dept 1999].)

Discussion

Plaintiffs have not satisfied their burden of showing “a reasonable excuse for the default” under CPLR § 5015 (a) (1). (*Sheikh v. New York City Transit Auth.*, 258 AD2d 347, 348 [1st Dept 1999].) That Plaintiffs’ counsel never received the court orders “because 107 Library Place Princeton, New Jersey 08540 is Plaintiff’s own personal address, not the address to Plaintiff’s counsel” is not a “a valid excuse for the failure to appear.” (*Latha Restaurant Corp. v Tower Ins. Co.*, 285 AD2d 437, 437 [1st Dept 2001]; affirmation of Mangan at 4) Indeed, this Court’s orders were electronically filed. Therefore, Mr. Lazzaro certainly had access to each order and continues to have such access because he remains listed as counsel for Plaintiffs in the New York State Courts Electronic Filing system. Accordingly, Mr. Lazzaro’s failure to appear at three court conferences on behalf of Plaintiffs’ is either “part of a pattern of . . . willful neglect or noncompliance with court orders.” (*Latha Restaurant Corp. v Tower Ins. Co.*, 285 AD2d 437, 437 [1st Dept 2001].) Indeed, this “pattern . . . cannot be excused by . . . law office failure.” (*Campenni v Ridgecroft Estates Owners, Inc.*, 261 AD2d 496, 497 [2d Dept 1999].) Even if Mr. Lazzaro provided the wrong address for his law practice, intentionally or otherwise, he still had access to every electronically uploaded court order in this action. Furthermore, assuming *arguendo* that Tamara lives at 107 Library Place Princeton, New Jersey 08540, Lenox Hill served to that address this Court’s October 17, 2017 order. Therefore, Tamara was on notice that “Plaintiff’s counsel . . . failed to Appear for a second Preliminary Conference” and that the Court rescheduled the conference for “10/24/17.” (Defendant’s exhibit I) Despite this notice, Plaintiffs failed to appear at the subsequent conferences resulting in further expense to Lenox Hill whose counsel routinely appeared at each court ordered conference.

Wherefore, it is hereby

ORDERED that Plaintiffs’ Order to Show Cause pursuant to CPLR § 5015 (a)(1) for an order vacating this Court’s December 12, 2017 decision and order, restoring this action to the pre-trial calendar, and scheduling a pre-trial conference is denied.

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

DATED: September 20, 2018



EILEEN A. RAKOWER, J.S.C.