

Ponton v Doctors Plastic Surgery, PLLC
2018 NY Slip Op 32403(U)
September 25, 2018
Supreme Court, New York County
Docket Number: 805205/2016
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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Belkys Ponton and Jose Wessin,

Plaintiffs,

Index No.
805205/2016

**DECISION and
ORDER**

- against -

Mot. Seq. 3

Doctors Plastic Surgery, PLLC and
Urmen Desai, M.D.,

Defendants.

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

Plaintiffs Belkys Ponton and Jesse Wessin ("collectively, "Plaintiffs") commenced this medical malpractice action by summons and complaint on May 17, 2016. Defendant Urmen Desai, M.D. ("Desai") served an Answer on July 15, 2016.¹

A preliminary conference was held on October 25, 2016 and compliance conferences were held on February 21, 2017; May 23, 2017; October 10, 2017 and December 19, 2017. Plaintiffs failed to appear for their depositions pursuant to the directives of those orders. Plaintiffs' attorneys (the firm of Dansker & Aspromonte Associates) moved to be relieved as counsel. On February 13, 2018, this Court granted their motion to be relieved. On February 14, 2018, the order was served upon Plaintiffs with notice of entry.

The February 13, 2018 order stayed this matter for a period of thirty days, within which time Plaintiffs were to retain a substitute attorney or be deemed to be proceeding pro se. The order further directed the parties to appear for a conference on March 27, 2018. No appearance by substitute counsel was filed, and Plaintiffs failed to appear for the March 27, 2018.

¹ Defendant, Doctors Plastic Surgery, PLLC, was previously discontinued from this action.

The Court then scheduled another conference for April 26, 2018. Desai's attorney notified Plaintiffs of the conference by first class mail. Plaintiffs failed to appear for the April 26, 2018 conference.

Additionally, on April 3, 2018, Desai served Plaintiffs via certified mail with a "90-Day Notice" pursuant to CPLR § 3216. The notice was served at the address identified for service by Plaintiffs' former counsel on the order to show cause to be relieved and notice of entry of the order granting that relief. The 90-day period set forth in the notice has expired and there have been no filings by Plaintiffs.

Legal Standards

CPLR § 3216(b) requires three conditions to be met before the court may dismiss a complaint for failure to prosecute: (1) issue must have been joined, (2) one year must have elapsed since issue has been joined in the action, and (3) the court or the party seeking the relief shall have served a written demand (the "90-day Notice") 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 the demand. The 90-day Notice must also state that default in complying with the demand within the ninety-day period will serve as a basis for a motion for dismissal. CPLR § 3216(e) sets forth that if a party fails to serve and file a note of issue within ninety days of receiving the 90-day Notice, the court may grant a motion to dismiss based on such failure unless the party "shows justifiable excuse for the delay and a good and meritorious cause of action."

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])

Pursuant to CPLR § 3126, a court may strike out pleadings when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a pleading is warranted when a party fails to comply with disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dept. 2006]).

Discussion

In the instant action, issue was joined by Desai on July 16, 2016, and one year has elapsed since issue was joined. Plaintiffs were served via certified mail with a “90 Day Notice” demanding that they resume prosecution of the action and serve and file a note of issue within ninety days, and warning that failure to comply will serve as a basis for a motion for dismissal. To date, Plaintiffs have failed to resume prosecution of the action and to serve and file a note of issue. Accordingly, Desai’s motion to dismiss the Complaint for lack of prosecution is granted.

Furthermore, Plaintiffs have failed to appear for depositions as directed by five court orders and failed to appear for two court conferences on March 27, 2018, and April 26, 2018. Plaintiffs’ repeated and unexplained conduct in failing to comply with court orders also warrants dismissal of their complaint.

Wherefore, it is hereby

ORDERED that defendant Urmen Desai, M.D.’s motion to dismiss this action is granted without opposition and the Clerk is directed to enter judgment in favor of said defendant dismissing this action in its entirety, together with costs and disbursements to said defendant, as taxed by the Clerk upon presentation of a bill of costs.

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

Dated: September ²⁵__, 2018


Eileen A. Rakower, J.S.C.