SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

Ciera Moore,

Plaintiff,

-against-

Decision & Order

Catskill Oral Surgery, P.C., Karl E. Krause and William Brinkerhoff,

Defendant(s),

Motion Return Date: May 22, 2018
RJI No.: 52-40129-2018
Index No.: 1643-2016

Appearances: **Blustein, Shapiro, Rich & Barone, LLP**
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Catskill Oral Surgery, P.C., and
Karl E. Krause, D.D.S.
By: Anne M. Hurley, Esq.

McGUIRE, J.,

In this dental malpractice case, Defendant William Brinkerhoff, D.D.S., moves by notice of motion seeking an order of this Court dismissing the instant action against him with prejudice pursuant to CPLR §3216. Plaintiff Ciera Moore appears and opposes this motion. Defendants Catskill Oral Surgery, P.C., and Karl E. Krause, D.D.S., cross move for an order of this Court denying Defendant Dr. Brinkerhoff's motion to dismiss and seeking an order pursuant to CPLR

§3124 compelling all parties to appear for examinations before trial. Defendant Dr. Brinkerhoff appears and opposes this motion.

Background

This action arises out of an alleged extraction performed on Plaintiff Ciera Moore by Defendant Karl E. Krause, D.D.S., at Defendant Catskill Oral Surgery, P.C., located at 457 Broadway, Suite 17, Monticello, New York 12701, pursuant to the written instructions of Defendant Dr. Brinkerhoff. It is alleged that Defendant Dr. Brinkerhoff provided a referral slip on May 6, 2014, to Defendant Catskill Oral Surgery, P.C., indicating that Plaintiff's bottom left second molar (tooth #18) and lower right wisdom tooth (tooth #32) be removed, however Plaintiff believed based, upon the representations made, that it would be her lower left and right wisdom teeth that would be removed.

It is further alleged that on May 23, 2016, when Plaintiff Ciera Moore arrived at Defendant Catskill Oral Surgery, P.C., for the extraction, Defendant Dr. Krause discussed removing all four wisdom teeth prior to reaffirming that it was the bottom two wisdom teeth that were to be extracted. Thereafter, it is alleged, that instead of extracting the bottom two wisdom teeth Dr. Krause extracted Ciera Moore's bottom right wisdom tooth and bottom left second molar, the bottom left second molar being a healthy tooth which did not need to be extracted.

A Summons and Complaint was served on the Defendants on or about October 3, 2016, with Defendant Dr. Brinkerhoff having served an Answer on or about November 3, 2016, and Defendants Catskill Oral Surgery, P.C., and Dr. Krause, having served an Answer and cross-claim against Defendant Dr. Brinkerhoff on or about November 10, 2016. Thereafter, on or about December 14, 2016, Defendant Dr. Brinkerhoff served an Answer to the cross-claim.

Defendant Dr. Brinkerhoff's Motion to Dismiss Pursuant to CPLR §3216

In support of the motion to dismiss, Defendant William Brinkerhoff, DDS, sets forth that issue was joined when Defendant Dr. Brinkerhoff served an Answer on or about November 3, 2016. Defendant Dr. Brinkerhoff argues that despite correspondence and telephone calls there had been no movement on the case by Plaintiff Ciera Moore since Plaintiff responded to Defendant's demand for a Bill of Particulars on March 30, 2017. Defendant Dr. Brinkerhoff served Plaintiff with the CPLR §3216 ninety-day demand by certified and regular mail on January 16, 2018, the demand states "that failure to comply with this demand within ninety days will serve as a basis for a motion by defendant for dismissal of this action for unreasonable neglect to proceed with the prosecution of this action." The demand was received on January 19, 2018, and Defendant Dr. Brinkerhoff argues since ninety days has now expired as of April 19, 2018, without any further procedural activity from Plaintiff, he is entitled to a dismissal pursuant to CPLR §3216.

Plaintiff Ciera Moore, appears and opposes the motion. In opposition, it is argued, Plaintiff was justifiably delayed in not filing a note of issue as a result of Defendant Brinkerhoff's failure to provide outstanding discovery and failing to schedule a deposition. Plaintiff argues that as Defendant Dr. Brinkerhoff's culpable conduct contributed in Plaintiff's inability to file a note of issue, as discovery could not be completed, Plaintiff does not have to demonstrate that there is a meritorious cause of action.

Plaintiff notes that combined discovery demands were served, which included a notice to take an oral deposition, on Defendant Dr. Brinkerhoff via mail on March 30, 2017. Plaintiff further notes that Defendant Dr. Brinkerhoff responded on June 9, 2017, to the Plaintiff's discovery demands, but states that the response were "substantially inadequate"; the responses in

part stated that they would be supplemented in the future. Plaintiff states that, where Defendant Dr. Brinkerhoff responded, in reference to the various documents demanded, "[t]o the extent any exist, same will be provided under separate cover" and to date no additional documentation has been provided nor has Dr. Brinkerhoff informed Plaintiff that any of the searches have not resulted in responsive material.

In response, Defendant Dr. Brinkerhoff, argues that since the discovery responses were served by Defendant in June of 2017 Plaintiff has made no attempt to advise that discovery could not proceed as the responses were insufficient and Defendant further avers that to state that the responses were substantially inadequate is a mischaracterization and an exaggeration.

Secondly, Defendant Dr. Brinkerhoff avers that numerous telephone calls were made to Plaintiff's counsel to progress with discovery in this case. Defendant further contends that it is customary to take deposition in caption order, thus Plaintiff and Co-Defendants Catskill Oral Surgery, P.C., and Dr. Krause's should have been produced prior to Defendant, noting that counsel for Plaintiff and Co-Defendants have not attempted to produce their respective clients. To this end, Defendant Dr. Brinkerhoff, avers that Plaintiff's argument that Defendant Dr. Brinkerhoff ignored Co-Defendants' counsel's notice to take deposition, is without merit as Defendant Dr. Brinkerhoff is listed as the last party in the caption. Finally, Defendant Dr. Brinkerhoff submits that the opposition to the instant motion is the first he has heard from Plaintiff Ciera Moore in regard to this case in over a year.

Defendants Catskill Oral Surgery, P.C., and Karl E. Krause, D.D.S.'s Cross Motion

Co-Defendants Catskill Oral Surgery, P.C., and Karl E. Krause cross move for an order of this Court denying Defendant Dr. Brinkerhoff's motion seeking a dismissal pursuant to CPLR

§3216 and seek an order compelling the parties to appear for depositions pursuant to CPLR §3124.

In support of the cross motion it is argued that Defendants Catskill Oral Surgery, P.C., and Dr. Krause have a viable cross-claim against Defendant Dr. Brinkerhoff based upon their position that Dr. Krause performed the extraction upon the allegedly incorrect written instructions of Dr. Brinkerhoff. Furthermore, it is argued that their notice to take depositions directed to both Plaintiff Ciera Moore and Defendant Dr. Brinkerhoff remains outstanding.

Defendants Catskill Oral Surgery, P.C., and Dr. Krause argue that upon receipt of the ninety-day demand they contacted Defendant Brinkerhoff seeking withdrawal of the demand based upon the outstanding discovery demands and depositions, it is averred that no response was received, this request was then followed up in writing on February 8, 2018. It is also argued that Plaintiff Ciera Moore was not available for depositions throughout the year as she is a college student and only available when school is not in session.

Additionally, Defendants Catskill Oral Surgery, P.C., and Dr. Krause argue that the Court has discretion in deciding whether to dismiss an action for want of prosecution, noting the preference for resolving cases on their merits, stating that there has been activity on the case since the serving of the ninety-day demand which consisted of Co-Defendants' efforts. Defendants further note the relative youth of the Plaintiff and that there is approximately six months left on the statute of limitations as such this would not be a final determination of this case. Furthermore, it is submitted that as this matter has not run afoul of the statute of limitations it would merely create additional motion practice and could be cured with the recommencement of discovery.

In opposition to the cross motion, Defendant Dr. Brinkerhoff avers that contrary to Co-Defendants' counsel's assertion, a telephone conversation occurred wherein Defendant Dr. Brinkerhoff refused to withdraw the ninety-day demand as it was not directed at Co-Defendants but at Plaintiff. It is argued that Co-Defendant seeking to revive activity on the case during the ninety-day period of the demand does not amount to activity on the part of Plaintiff and does not obviate Plaintiff's obligations pursuant to CPLR §3216. Defendant Brinkerhoff argues that Plaintiff has failed to set forth a justifiable excuse for the delay in filing a note of issue nor did Plaintiff demonstrate a meritorious cause of action to avoid dismissal.

Findings of Fact and Conclusions of Law

Section 3216 of the Civil Practice Law and Rules permits either a defendant or the court to pursue a want of prosecution dismissal against a plaintiff, provided certain statutory conditions are met. When a defendant seeks to utilize CPLR §3216, the following preconditions need to be met: (1) issue has to have joined (see CPLR §3216[b][1]), either one year must have elapsed since the joinder of issue or six months must have elapsed since a preliminary conference order was issued (see CPLR §3216[b][2]); (2) the plaintiff must have been served a written demand by registered or certified mail requiring the plaintiff to resume prosecution of the action and to serve and file a note of issue within ninety (90) days of receipt of the demand and the demand must state that failure to comply with the demand will serve as a basis for a motion seeking dismissal of the action (see CPLR §3216[b][3]).

Plaintiff's failure to serve and file a note of issue within the ninety-day period, may result in the court's granting of a motion to dismiss unless plaintiff shows: (1) a justifiable excuse for the delay and (2) a good and meritorious cause of action (see CPLR §3216[e]).

Issue was joined in November of 2016, accordingly issue was joined for a year in November of 2017, thereafter Defendant Dr. Brinkerhoff served the demand by certified and regular mail, which was received on January 19, 2018, requiring Plaintiff to file a note of issue within ninety-days, with the requisite language (see CPLR §3216[b][1], [2] and [3]). Plaintiff failed to file the note of issue, move to vacate the demand or seek an extension of time within the ninety days. Based upon the foregoing, Defendant Dr. Brinkerhoff has met the statutory pre-conditions of seeking a dismissal for want of prosecution pursuant to CPLR §3216.

It is noted that plaintiff does not argue that the statutory conditions precedent to making the instant application were not met and did not file the note of issue once the ninety-day demand was received on January 19, 2018. "When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or extend the 90-day period." *Lee v. Rad,* 132 AD3d 643, 643 [2nd Dept. 2015]. A response short of filing the note of issue will trigger the provision contained in CPLR §3216[e] (see *Vasquez v. State*, 12 AD3d 917 [3rd Dept. 2004]). The Plaintiff now needs to demonstrate a "[...] justifiable excuse for the delay and a good and meritorious cause of action." CPLR §3216[e].

In general, a plaintiff can "[...] salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit. If plaintiff makes a sufficient showing, the court is prohibited from dismissing the action." *Baczkowski v. D.A. Collins Const. Co.,* 89 NY2d 499, 503, 678 NE2d 460, 462–63 [1997]. CPLR §3216 "[...] is extremely forgiving of litigation delay" *Ibid* at 503. Plaintiff herein argues that only a showing of a justifiable excuse for the delay in filing the note of issue is necessary based upon the culpable conduct of Defendant Dr. Brinkerhoff in completing discovery.

The courts have held that there are some exceptions to the requirement that plaintiff make a dual showing of both justifiable excuse for the delay and a meritorious cause of action; plaintiff is not required to demonstrate a meritorious cause of action where plaintiff can establish that the delay is occasioned by a discovery dispute precipitated by defendant (see *Lee v. Rad*, 132 AD3d 643 [2nd Dept. 2015]); or where defendant's refusal to comply with a notice to take depositions and failure to produce documents demanded prevented the note of issue from being filed (see *Donegan v. St. Joseph's Med. Ctr.*, 283 AD2d 152 [1st Dept. 2001]). However, "[a]bsent a showing that defendant deliberately denied or obstructed discovery, plaintiff's delay in obtaining discovery does not constitute a justifiable excuse for the failure to file a note of issue within the 90-day period [...]" *Schuman v. Raymond Corp.*, 174 AD2d 1040, 1040 [4th Dept. 1991], *lv. denied* 78 NY2d 858 [1991].

Plaintiff served a response to Defendant Dr. Brinkerhoff's demand for a Bill of Particulars on or about March 30, 2017, and simultaneously served upon Defendant discovery demands and a notice to take an oral deposition of Defendant Dr. Brinkerhoff. Thereafter, on or about June 9, 2017, Dr. Brinkerhoff responded to Plaintiff's discovery demands, the responses contain some reservations and notifications that a search is being conducted for the demanded material which will thereafter be provided if it exists. Furthermore, Defendant responds to the demand for medical reports and or other writings by stating that there are twenty (20) pages and upon remittance of payment the documents will be provided.

Defendant Dr. Brinkerhoff's discovery response of June 2017 is primarily what Plaintiff now relies on to establish that there was a discovery dispute that would rise to the level of creating a justifiable excuse to prevent a dismissal pursuant to CPLR §3216, and not necessitate a showing of a meritorious cause of action.

Defendant's incomplete response to Plaintiff's discovery demands was served in June of 2017, approximately seven months prior to the service of the ninety-day demand, Plaintiff failed to either move to compel production of the documents/responses requested either prior to or after the service of the ninety-day demand. There is nothing in the record before the Court to demonstrate that Defendant Dr. Brinkerhoff was even on notice that there was in fact a discovery dispute. Plaintiff cannot rely on not needing to show a meritorious cause of action because Defendant caused or affirmatively contributed to the delay in filing a note of issue in these circumstances (see *Rowley v. Carl Zeiss, Inc.*, 270 AD2d 835 [4th Dept. 2000] *lv. denied* 710 NYS2d 238 [2000]).

Plaintiff further relies on Defendant Dr. Brinkerhoff's failure to appear for a deposition to establish that there is a discovery dispute. Upon review Plaintiff's notice to take oral deposition of Defendant Brinkerhoff, dated March 30, 2017, does not specify a date and time instead it states, "on a day and time to be agreed to by the parties". Plaintiff in conclusory fashion avers that Defendant Dr. Brinkerhoff refused to agree to a deposition time and date but offers no specifics as to the steps were taken to schedule the same. Even if Plaintiff were able to establish that Dr. Brinkerhoff had been dilatory in responding to Plaintiff's request to schedule a deposition this would not establish a justifiable excuse for the failure to timely respond to the ninety-day notice (see *Papadopoulas v. R.B. Supply Corp.*, 152 AD2d 552 [2nd Dept. 1989]).

Even when viewed in the light most favorable to Plaintiff Ciera Moore, the circumstances presented herein demonstrate nothing more than an incomplete response to a discovery demand. A plaintiff cannot rely upon a defendant's incomplete discovery response to justify failure to comply with a ninety-day demand, when plaintiff fails to move to compel production of the documents either before or after service of the ninety-day demand (see *Rowley v. Carl Zeiss, Inc.*,

270 AD2d 835 [4th Dept. 2000], *lv. denied* 710 NYS2d 238 [2000]). It is not reasonable to blame the delay of filing the ninety-day demand upon a defendant for failing to provide records when a plaintiff fails to demand the records or move to compel their production (see *Geise v. Wetherill*, 238 AD2d 952 [4th Dept. 1997]). Plaintiff Ciera Moore relies on there being a discovery dispute, however upon this record, there was no dispute, instead a failure upon Plaintiff's counsel to seek the discovery required to prosecute this action and as such incomplete discovery cannot be a justifiable excuse absent a showing of fault on the part of Defendant Dr. Brinkerhoff.

While the Court has "[...] discretion to deny a motion to dismiss when plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into CPLR 3216." *Baczkowski v. D.A. Collins Const. Co Ibid* at 504. This Court is mindful that to routinely deny applications such as the one now before it, after Plaintiff has ignored the ninety-day demand without an adequate excuse CPLR §3216 would be rendered meaningless (see *Baczkowski v. D.A. Collins Const. Ibid*).

Furthermore, Plaintiff is also required to demonstrate the existence of a meritorious cause of action when unable to establish an exception to the general rule that a dual showing of both a justifiable excuse and a meritorious cause of action (see CPLR §3216[e]). "The showing of merit required [is] an affidavit by one with personal knowledge of the facts and [requires] that materials be included in evidentiary form sufficient to defeat a summary judgment motion." *De Lisa v. Pettinato*, 189 A.D.2d 988, 988 [3rd Dept. 1993]. In order to demonstrate a meritorious cause of action plaintiff must do more than reiterate the allegations contained with the complaint (see *Mason v. Simmons*, 139 A.D.2d 880 [3rd Dept. 1988]). Plaintiff does not even attempt to demonstrate to the Court that there is a meritorious cause of action.

Plaintiff Ciera Moore has failed to demonstrate either a justifiable excuse for the delay or the existence of a meritorious cause of action. The Courts have also held where a plaintiff fails to demonstrate a justifiable excuse for the delay in prosecuting the action and a meritorious cause of action, it would be an abuse of discretion to deny the CPLR §3216 motion (see *Schuman v. Raymond Corp.*, 174 AD2d 1040 [4th Dept. 1991], *lv. denied* 78 NY2d 858 [1991]).

In regard to Co-Defendants Oral Catskill Surgery, P.C., and Dr. Krause's cross motion, although they have established a prima facie attempt to continue with discovery in this matter during the ninety-day period, attempts by the Co-Defendants does not obviate Plaintiff's obligations pursuant to CPLR §3216. The Court further notes that Dr. Brinkerhoff did not move to dismiss the Co-Defendants' cross claim which may be maintained in a third-party action (see *Soodoo v. LC, LLC*, 116 AD3d 1033 [2nd Dept. 2014]).

Conclusion

Based upon the forgoing, Defendant Dr. Brinkerhoff's motion seeking dismissal of the action pursuant to CPLR §3216 is granted to the extent that the dismissal is without prejudice, to dismiss with prejudice is not appropriate in this matter as neither party address the merits of the case. Accordingly, Defendants Catskill Oral Surgery, P.C., and Dr. Krause's motion seeking a denial of Defendant Dr. Brinkerhoff's motion is denied.

In light of the foregoing, it is hereby

ORDERED that Defendant William Brinkerhoff, D.D.S.'s motion seeking to dismiss the instant action is granted, without prejudice; and it is further

ORDERED that Defendants Catskill Oral Surgery, P.C., and Karl E. Krause, D.D.S.'s cross motion is denied; and it is further

ORDERED that this matter will be scheduled for a preliminary conference for all parties on **October 29, 2018, at 11:00am** to complete a discovery schedule.

This shall constitute the Decision and Order of this Court.

All papers, including the original copy of this Decision and Order, are being forwarded to the Office of the Sullivan County Clerk for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

Dated: Monticello, New York
October 2, 2018

ENTER:

HON. MICHAEL F. McGUIRE, A.J.S.C.

Papers Considered:

Motion to Dismiss Pursuant to CPLR §3216:

1. Notice of Motion with Affirmation in Support of Robyn S. Goldfarb, Esq., dated April 25, 2018, with Exhibits "A" through "F".
2. Affirmation in Opposition of Raymond P. Raiche, Esq., dated May 14, 2018, with Exhibits "A" through "C".
3. Reply Affirmation to Plaintiff's Affirmation in Opposition of Robyn S. Goldfarb, Esq., dated May 15, 2018, with Exhibit "A".

Cross Motion:

1. Notice of Cross Motion to Compel with Attorney Affidavit in Support of Cross Motion to Compel Discovery of Anne E. Hurley, Esq., dated May 9, 2018, with Exhibits "A" through "C".
2. Affirmation in Opposition to Co-Defendant's Cross-Motion Denying the Motion to Dismiss and to Compel Discovery of Robyn S. Goldfarb, Esq., dated May 14, 2018.