Matthews v Chaudhri
2018 NY Slip Op 33969(U)
March 26, 2019
Supreme Court, Broome County
Docket Number: 2013-2813
Judge: Jeffrey A. Tait

At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 30th day of November 2018.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

KATHLEEN H. MATTHEWS,

Plaintiff,

-against-

KAMRAN I. CHAUDHRI, M.D. and OPTHAMALIC ASSOCIATES OF THE SOUTHERN TIER, P.C.,

Defendants.

DECISION AND ORDER

Index No. 2013-2813
RJI No. 2014-0461-M

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the defendant Ophthalmic Associates of the Southern Tier, P.C. (defendant) to dismiss the complaint of the plaintiff Kathleen H. Matthews based on unreasonable neglect to proceed pursuant to CPLR 3216(a). The plaintiff opposes the motion and cross moves for an Order "vacating the dismissal of the action."[1]

Brief Background

The plaintiff commenced this medical malpractice action by filing a summons and complaint with the Broome County Clerk's Office on November 25, 2013 seeking damages stemming from cataract surgery performed by Dr. Chaudhri on February 1, 2011.

Dr. Chaudhri previously moved to dismiss the action based on lack of personal jurisdiction. That motion was granted by Decision and Order dated May 15, 2015, leaving Ophthalmic Associates as the only remaining defendant.

Arguments of the Parties

In support of its motion, the defendant submits the affirmation of its attorney, Patricia M. Curtin, with exhibits and a memorandum of law. She states that the plaintiff has taken no action since attending her deposition on April 15, 2016, prompting service of a Notice to Resume Prosecution (Notice)[2] on the plaintiff's counsel via certified mail on or about March

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1 The action has not yet been dismissed as against this defendant. Perhaps the plaintiff is asking that the Court vacate or excuse its failure to respond to the 90-day Notice.

2 Also referred to as a 90-Day Notice.

28, 2018.[3] She states that the plaintiff has not served or filed a note of issue, requested an extension, moved to vacate the Notice, or otherwise responded to the Notice despite the passage of well over 90 days. In addition, she points out that the plaintiff has repeatedly failed to proceed in this action, including failing to respond to 2014 discovery demands for nearly two years – and only after the filing of a motion to compel in that regard.

In opposition, the plaintiff submits the affirmation of her attorney, Joseph S. Cote, III, who attributes the failure to respond to the Notice to law office failure. He asserts that substantial discovery has occurred, including the deposition of the plaintiff and service of bills of particulars. He asserts that the plaintiff is prepared to proceed to a trial and that denial of the motion to dismiss will not prejudice the defendant.

In response, the defendant submits the affirmation of its attorney, Michelle C. McCabe-Szczepanski, and a memorandum of law. She asserts that the plaintiff's description of law office failure is vague and conclusory and the plaintiff failed to establish a justifiable excuse or a meritorious cause of action. In particular, she states that the plaintiff did not provide an expert affidavit regarding merit, despite having filed a Certificate of Merit from her counsel upon commencement. She also asserts that this case has been plagued with protracted neglect on the part of the plaintiff since its inception and should be dismissed.

Law

Pursuant to CPLR 3216, the Court may dismiss a party's pleadings where that party "unreasonably neglects to proceed . . . or unreasonably fails to serve and file a note of issue"

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3 The return receipt was completed on April 2, 2018.

provided certain conditions precedent have been complied with, including, in pertinent part: (1) issue has been joined; (2) one year has elapsed since the joinder of issue; and (3) the party seeking such relief has 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 90 days (*see id.*).

To defeat a motion to dismiss the complaint for failure to prosecute pursuant to CPLR 3216, a plaintiff must establish a justifiable excuse for failing to file a note of issue within 90 days of the demand and a meritorious cause of action (*Burchard v. City of Elmira*, 52 AD3d 881 [3d Dept 2008]; *Austin v. County of Madison*, 169 AD2d 1015, 1016 [3d Dept 1991]). In evaluating the adequacy of a plaintiff's excuse, the Court must consider factors such as "the history of the case, the extent of the delay, evidence of intent to abandon the case, undue prejudice to [the] defendant, and the merits of the underlying claim" (*Burchard*, 52 AD3d at 881 [citations and internal quotation marks omitted]).

Analysis

It is true that there has been a history of delay in this case, culminating in the service of the 90-day Notice, the plaintiff's failure to timely respond to it, and the motion now before the Court. Nevertheless, this Court is not typically inclined to dismiss an action in these circumstances and instead prefers to have matters decided on the merits.

As noted above, a plaintiff must establish both a justifiable excuse for failing to file a note of issue within 90 days of receiving the notice and a meritorious cause of action in order to successfully oppose a motion to dismiss based on failure to prosecute.

With respect to the first prong, law office failure can constitute a justifiable excuse for failing to respond to the 90-day Notice (*see Pastore v. Golub Corp.*, 184 AD2d 827, 828 [3d Dept 1992], citing *Nichols v. Agents Serv. Corp.*, 133 AD2d 912, 914 [3d Dept 1987] [rejecting plaintiff's sole excuse of secretarial error and affirming dismissal of the action based on plaintiff's history of dilatory tactics and apparent lack of interest in case]).

However, the law is clear that to successfully oppose a motion to dismiss based on a 90-day Notice in a medical malpractice action such as this, "expert medical opinion evidence is required to demonstrate merit" (*see Fiore v. Galang*, 64 NY2d 999, 1001 [1985] [rejecting plaintiffs' argument that the verified complaint served as an affidavit of merits, noting that the malpractice claim involving failure to diagnose cancer and performance of an abdominal operation are not "matters with the ordinary experience of laypersons"]; *Herrington v. Saratoga Hosp.*, 202 AD2d 901 [3d Dept 1994] [reversing lower Court's denial of defendants' motion to dismiss medical malpractice complaint for failure to prosecute and dismissing complaint, where plaintiff submitted unsworn letter from medical doctor regarding plaintiff's condition but failed to file an affidavit of merit by a medical expert demonstrating malpractice]; *Tierney v. OB-GYN Assoc. of Ithaca*, 186 AD2d 926, 927 [3d Dept 1992] [affirming dismissal of medical malpractice action for failure to prosecute where plaintiffs failed to submit required expert medical opinion evidence]; *Brady v. Mastrianni, Abbuhl & Murphy, MDs, PC*, 187 AD2d 858, 860 [3d Dept 1992] [reversing lower Court's denial of defendants' motion to dismiss medical malpractice complaint for failure to prosecute and dismissing complaint, where plaintiff submitted an attorney's affidavit, plaintiff's affidavit, and a letter from a medical doctor which failed "to establish that plaintiffs' claim is meritorious"]).

This case law and the lack of any case law to the contrary or which provides an applicable exception leaves this Court with no option other than to dismiss the complaint in this action. As no expert medical opinion evidence has been submitted and the malpractice claims asserted do not involve "matters with the ordinary experience of laypersons," the complaint must be dismissed based on the case law cited above (*see Fiore*, 64 NY2d at 1001).

Conclusion

The defendant's motion to dismiss is granted and the plaintiff's cross motion is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: March 26, 2019
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
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BROOME COUNTY CLERK