Lugo v New York Weill Presbyt./Weill Cornell Med. Ctr.
2019 NY Slip Op 31786(U)
June 14, 2019
Supreme Court, New York County
Docket Number: 805462/2014
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1
----------x
BETTY LUGO,

Plaintiff, Index No. 805462/2014

-against- **Decision & Order**

NEW YORK WEILL PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, DAVID OTTERBURN, M.D.,

Defendants.
----------x

MARTIN SHULMAN, J.:

In this medical malpractice action, plaintiff moves to vacate this court's February 22, 2018 order (dismissal order) issued pursuant to 22 NYCRR §202.27(b) and to restore this action to the calendar. The dismissal order was issued based upon plaintiff's counsel's failure to appear for a scheduled court conference on February 6, 2018. Defendants oppose the motion.

In support of the motion to vacate the dismissal order, plaintiff's counsel mistakenly claims he arrived for the conference at approximately 10:45 a.m. after defense counsel had already left and the court marked the case off the calendar. In actuality, as gleaned from defendants' opposition and plaintiff's counsel's reply affirmation, plaintiff's counsel did not appear in court on that date. Rather, defense counsel called him at approximately 11:00 a.m. when he had not appeared for the 9:30 a.m. conference. Plaintiff's counsel states that he was in Kings County for a criminal court appearance and had inadvertently calendared the conference for the following week. He then attempted to contact the court and defense counsel.

In opposition, defense counsel states that she was willing to stipulate to restore the case to the calendar provided that outstanding discovery was provided. Although plaintiff's counsel served supplemental bills of particulars, defense counsel states that they remained insufficient and were identical as to both defendants. Accordingly, no stipulation to restore was executed and plaintiff brought this motion almost one year after being served with notice of entry of the dismissal order.

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).

Defendants argue that relief pursuant to CPLR 5015(a) is not warranted because plaintiff fails to establish both of the foregoing elements. Specifically, defendants claim that plaintiff's excuse of law office failure is insufficient and plaintiff fails to establish a meritorious cause of action since no affidavit of merit from a physician is included. Defendants also maintain that vacating the default judgment is unwarranted in light of plaintiff's continuing pattern of delay and neglect in prosecuting this action.

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. Plaintiff's subsequent attempts to rectify her discovery defaults in an attempt to have the action restored 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.

As to the second element, although no expert affirmation of merit is provided,[1] 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, except as to matters within the ordinary experience and knowledge of laypersons." Here, plaintiff's affidavit and her bill of particulars allege, inter alia, that surgical staples and/or clips were not removed prior to the conclusion of her bilateral breast reduction surgery. Arguably, a layperson likely knows or can reasonably infer that a foreign object remaining in the body after surgery will lead to complications.[2] Accordingly, plaintiff sufficiently establishes a potentially meritorious cause of action.

---

[1] Plaintiff instead submits an affidavit of merit from herself.

[2] In light of this conclusion, it is unnecessary for this court to address defense counsel's request to interpose a sur-reply in response to plaintiff's inclusion of a physician's affirmation in her reply papers.

Nonetheless, this court's vacatur of the dismissal order must be made "upon such terms as may be just". *See* CPLR 5015(a). Here, this action was commenced in 2014 and involves a 2012 surgery. No depositions have taken place and defendants claim that plaintiff's supplemental bills of particulars are insufficient. Additionally, although a party has one year to move to vacate a default under CPLR 5015(a)(1), here, another year has passed due to plaintiff waiting to bring this motion for almost a year from notice of entry of the dismissal order. Under these circumstances, and to alleviate any potential prejudice to defendants, the case's restoration is conditioned upon plaintiff's expeditious completion of discovery. Counsel for the parties shall appear at the next scheduled conference prepared to schedule firm deposition dates for all parties and to address any further outstanding discovery, including but not limited to the sufficiency of plaintiff's supplemental bills of particulars.

Accordingly, it is

ORDERED that plaintiff's motion is granted, the dismissal order is vacated and the action is restored to the calendar.

Counsel for the parties are directed to appear for a status conference on July 2, 2019 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: June 14, 2019

Martin Shulman, J.S.C.