

Laspalakis v Weinfeld
2019 NY Slip Op 31864(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 805347/2016
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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Christine Laspalakis,

Index No.
805347/2016

Plaintiff,

- against -

**DECISION
and ORDER**

Steven Weinfeld, MD, and Mt. Sinai Medical
Center,

Defendants.

Mot. Seq. 3

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

Plaintiff Christine Laspalakis ("Plaintiff") moves for an Order vacating the Order of Hon. Eileen A. Rakower, J.S.C., dated August 27, 2018, and filed with Notice of Entry on September 7, 2018, granting Defendants' motion to dismiss the action based on Plaintiff's violation of Court Orders pursuant to CPLR § 5015(a)(1) and (3); and restoring the action to active status pursuant to CPLR § 3404. Defendants Steven Weinfeld, MD ("Dr. Weinfeld"), and The Mount Sinai Hospital s/h/a "Mt. Sinai Medical Center" (collectively, "Defendants") oppose.

Background/Factual Allegations

Plaintiff commenced this medical malpractice action by filing a Summons and Complaint on August 31, 2016. Defendants joined issue by service of Verified Answers on November 4, 2016.

On June 20, 2018, Defendants filed a Notice of Motion seeking an Order pursuant to CPLR §3126(3) dismissing the action due to Plaintiff's violation of Hon. Eileen A. Rakower's Order directing Plaintiff to produce outstanding discovery; or in the alternative, seeking an Order pursuant to CPLR §3124 compelling Plaintiff to provide the outstanding discovery by a date certain, and should Plaintiff fail to comply, automatically dismissing the action with a self-executing Order. Plaintiff did not oppose.

On August 27, 2018, the Court granted Defendants' motion to strike Plaintiff's pleadings, unless Plaintiff produced responses to all demanded discovery with 10 days from the date of the Order, and the parties were directed to appear for a compliance conference on September 11, 2018 at 9:30am.

Plaintiff contends that on October 12, 2018, Plaintiff's prior attorney Ira Podlofsky ("Podlofsky") was suspended from the practice for law for two years. Plaintiff contends that Podlofsky had not completed discovery, "including not replying to Defendants' (1) a Demand for a Bill of Particulars; (2) Notice To Produce Authorizations; (3) CPLR§4545 Demand; (4) Request for Identity of Witnesses and Notice to Produce; (5) Demand for Expert Witness Disclosure; (6) Demand for Party Statements; (7) Demand for Social Networking Information; (8) Demand for Photographs, Video and Audiotapes; (9) Demand for a Jury Trial; and (10) a Notice to Produce Medicare/Medicaid Lien Information". (Petitioner's Aff. in Support at 4). Plaintiff asserts that on or about October 31, 2018, the Law Offices of Arnold E. DiJoseph, P.C. was retained to represent Plaintiff.

Parties' Contentions

Plaintiff contends that she has demonstrated a reasonable excuse for her default. Plaintiff argues she did not provide outstanding discovery to Defendants as a result of Podlofsky's misconduct. Plaintiff contends Podlofsky mislead Plaintiff. Plaintiff argues that Podlofsky was not diligent in representing her. Plaintiff asserts that Podlofsky violated Sections 1.1, 1.3, 1.16, and 8.4 of the Rules of Professional Conduct. Plaintiff contends she had every intention of prosecuting the case and relied on Podlofsky to take appropriate action to do so.

Plaintiff asserts that she has a meritorious action, and submits David Mayer, M.D.'s ("Dr. Mayer") Affidavit of Merit. Plaintiff argues that Defendants will not be prejudiced by the vacatur. Moreover, Plaintiff argues that she has provided Defendants with all outstanding discovery, she has set forth a reasonable excuse, and has demonstrated that she has a meritorious case.

In opposition, Defendants contend that Plaintiff has failed to demonstrate that Defendants will not be prejudiced by the vacatur and that Plaintiff has a meritorious case. Defendants argue that Plaintiff "repeatedly ignored Court Orders" and Defendants attempted to obtain discovery since 2016. Defendants assert that the treatment rendered by Defendants was in 2014 and Defendants have not been able to obtain relevant records and interview crucial witnesses.

Furthermore, Defendants argue that Dr. Mayer's Affidavit of Merit is insufficient to show that Plaintiff has a meritorious case. Defendants assert that Dr. Mayer is a general surgeon/bariatric surgeon with no expertise in the field of orthopaedic surgery, and Dr. Mayer's opinions are not based on the post-operative medical records but rather based on assumptions and hearsay. Defendants contend that Dr. Mayer incorrectly states that Plaintiff saw Dr. Weinfeld on twenty occasions post-operative and was seen by Dr. Weinfeld's "colleagues". Defendants assert that according to Dr. Weinfeld's post-operative treatment notes, Plaintiff was seen by Dr. Weinfeld on six occasions and was not seen by Dr. Weinfeld's "colleagues". Defendants contend that Dr. Mayer also fails to correctly state the antibiotic treatment Dr. Weinfeld provided to Plaintiff and Dr. Mayer's opinions are conclusory and not based on facts. Additionally, Defendants contend that Dr. Mayer states in a "conclusory fashion" that Defendants must have been negligent if Plaintiff was diagnosed with an infection by an outside physician and had surgery, four months after stopping treatment with Dr. Weinfeld. Defendants assert that Dr. Mayer incorrectly states that Plaintiff underwent "revision" surgery, when instead Plaintiff underwent surgery to remove hardware after the bone had healed.

Legal 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). In order 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 A.D.2d 347, 348 [1st Dep't 1999]; *Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 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 A.D.2d 263 [1st Dept 1990]. "The determination whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy

favoring the resolution of cases on the merits.” *Chevalier v. 368 E. 148th Street Associates, LLC*, 80 A.D.3d 411 [1st Dept 2011] [citations omitted].

“While defendants argue that they are prejudiced ‘since memories fade over time,’ the mere passage of time does not establish prejudice . . . especially in a medical malpractice action where proof of the alleged malpractice will for the most part consist of medical records and the defendant's own testimony”. *Kaufman*, 36 A.D.3d 481, 484 [1st Dept 2007].

“In a medical malpractice action, an affidavit of merit by a medical expert is required.” *Barton v. Exec. Health Examiners*, 277 A.D.2d 27, 28 [1st Dept 2000]. “Nevertheless, the showing of merit required on a motion to restore is less than that required to defend a motion for summary judgment. *Kaufman v. Bauer*, 36 A.D.3d at 482. A meritorious cause of action is demonstrated when an expert affidavit of merit does not state new theories of liability or facts but merely states “a theory of medical malpractice that had been generally claimed in the bill of particulars”. *Abate v. Long*, 261 A.D.2d 252, 253 [1st Dept 1999].

Discussion

Here, Plaintiff has demonstrated a reasonable excuse. Defendants do not argue that Plaintiff fails to provide a reasonable excuse. Moreover, Defendants are not prejudiced because “proof of the alleged malpractice will for the most part consist of medical records and the defendant's own testimony”. *Kaufman*, 36 A.D.3d at 484. Additionally, Plaintiff has demonstrated a meritorious cause of action by submitting Dr. Mayer's Affidavit of Merit. Therefore, Plaintiff's cause of action should be decided upon the merits since Plaintiff provided a reasonable excuse and a meritorious cause of action.

Wherefore, it is hereby

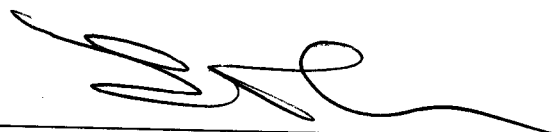
ORDERED that Plaintiff's motion to vacate the default judgment and restore the above referenced action is granted; and it is further

ORDERED that the parties are to appear for a compliance conference scheduled for July 30, 2019 at 9:30 AM in Part 6; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Trial Support Office (Room 158).

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

Dated: JUNE 26, 2019



Eileen A. Rakower, J.S.C.