

**Barres v Crank**

2019 NY Slip Op 31878(U)

May 3, 2019

Supreme Court, Bronx County

Docket Number: 306865/2009

Judge: Jr., Kenneth L. Thompson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IA 20 \_\_\_\_\_ X

TRASEY BARRES,

Index No: 306865/2009

Plaintiff,

-against-

**DECISION AND ORDER**

MARTINA M. CRANK and PHILIP L. CRANK, JR.,

**Present:**

Defendants

**HON. KENNETH L. THOMPSON, JR.**

\_\_\_\_\_ X

The following papers numbered 1 to 3 read on this **motion to renew and reargue**

No	On Calendar of <b>September 9, 2018</b>	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____ <b>1</b> _____
	Answering Affidavit and Exhibits-----	_____ <b>2</b> _____
	Replying Affidavit and Exhibits-----	_____ <b>3</b> _____
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move to stay this action on grounds that there are no filed documents authorizing plaintiff's change in attorneys, move pursuant to CPLR 2221 to renew and reargue the order to show cause, that resulted in an order of this Court dated March 16, 2018, vacating the dismissal of this action for plaintiff's default in appearing for trial, and to renew<sup>1</sup> a motion to change venue to Warren County that resulted in a decision and order dated May 16, 2014 rendered by Justice Schachner.

Defendants aver that at the February 21, 2017 appearance, "Kevin Barry, Esq, appearing of counsel to the firm, represented that Rosato & Lucciola had dissolved and questioned whether Mr. Rosato or Mr. Lucciola would represent

<sup>1</sup> Defendants cites to CPLR 2221(d) for the branch of this motion to renew the venue motion. However, CPLR 2221(d) is a motion to reargue, which in this case would need to be denied as untimely. Therefore, the Court construes this branch of the venue motion as one to renew.

plaintiff going forward.”<sup>2</sup> Defendants argue that plaintiff’s attorney lacked the authority to make the underlying order to show cause to vacate plaintiff’s default in appearing for trial. However, pursuant to a substitution of counsel document dated July 26, 2018, and executed by plaintiff, Gerard Lucciola, (Lucciola), and Joseph S. Rosato, The Lucciola Law Group, P.C., substituted as counsel for plaintiff in the stead of Rosato & Lucciola, P.C. Thus, there has been continuous representation of plaintiff by Lucciola, despite the change in law firms. “[P]laintiffs’ mistake of not filing the consent to change form is, under the circumstances, a mere formality and [defendant] has shown no prejudice by plaintiffs’ noncompliance with CPLR 321 (b).” *Bevilacqua v. Bloomberg, L.P.*, 70 A.D.3d 411, 412 [1<sup>st</sup> Dept 2010]).

Accordingly, that branch of defendants’ motion seeking a stay of this action is denied.

Defendants’ counsel expresses “puzzlement”<sup>3</sup> at Justice Soto’s unexplained unavailability to hear plaintiff’s underlying order to show cause to vacate the dismissal of plaintiff’s complaint and plaintiff’s default in appearing for trial. The transcript at exhibit L in the moving papers indicates that Justice Soto stated just prior to her dismissal of this action that she was exclusively doing trials in the Bronx as a volunteer.<sup>4</sup> When Justice Soto dismissed this action, Lucciola asked: “Are you going to entertain written papers on this to resurrect the case?” Justice Soto directed Lucciola to make the application in STP.<sup>5</sup> Lucciola made the application in STP before Justice Doris Gonzalez. The motion was referred out of

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<sup>2</sup> Moving affirmation, Michelle Kolodny, paragraph 3.

<sup>3</sup> Moving affirmation, Michelle Kolodny, paragraph 8.

<sup>4</sup> Transcript, May 5, 2016, page 16, line 1.

<sup>5</sup> Transcript, May 5, 2016 page 12.

STP and assigned to this Court on a random basis.

With respect to the branch of the motion seeking to reinstate the dismissal of the action, this action indisputably is potentially meritorious as illustrated by defendants' agreement to a high low of \$1,100,000 and \$100,000.

There is no dispute that the plaintiff's action potentially has merit, and public policy strongly favors resolving cases on the merits (*see Nickell v Pathmark Stores, Inc.*, 44 AD3d 631, 632 [2007]; *M.S. Hi-Tech, Inc. v Thompson*, 23 AD3d 442, 443 [2005]). The plaintiff should not be deprived of her day in court because of some difficulty in rescheduling a trial date that was convenient for all the parties (*see Burgess v Brooklyn Jewish Hosp.*, 272 AD2d 285 [2000]).

*Vera v. Soohoo*, 99 A.D.3d 990, 994–95 [2<sup>nd</sup> Dept 2012]).

Plaintiff's attorney Lucciola, could not proceed to trial on one date only, May 6, 2016. Lucciola indicated he was ready to begin to select the jury on Thursday, May 5, 2016, but needed to attend a CLE on Friday, May 6, 2016. Lucciola indicated he was ready to proceed with the remaining jury selection and trial the following Monday, May 9<sup>th</sup>. Defendant, Philip Crank apparently was available the week of May 9<sup>th</sup> for trial and was to be called to testify on plaintiff's case and therefore would have been available to testify even with a one day adjournment. Given plaintiff's mere one day adjournment request this Court will not vacate the decision and order of this Court dated March 16, 2018.

Accordingly, the branch of defendant's motion that seeks reargument and renewal of the motion underlying the decision and order of this court dated March 16, 2018 is denied.

That branch of defendants' motion that seeks to renew the decision and order of Justice Schachner dated May 16, 2014, denying a change in venue is denied. There is no additional evidence or a change in law upon which renewal could be granted.

CONCLUSION

Defendants' motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 5/3/2019

  
KENNETH L. THOMPSON JR. J.S.C.