

**Richards v Guerra**

2019 NY Slip Op 33265(U)

September 4, 2019

Supreme Court, Bronx County

Docket Number: 300050/2016

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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TARAMATIE RICHARDS and ORVILLE RICHARDS,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 300050/2016

CARLOS A. GUERRA,

Defendant.

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John R. Higgitt, J.

Upon defendant’s July 1, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff’s<sup>1</sup> August 21, 2019 affirmation in opposition and the exhibit submitted in support thereof; and due deliberation; defendant’s motion to review the June 28, 2019 order of a court attorney-referee, deemed one for leave to reargue the order because the order was not ultimately one of a Referee overseeing discovery pursuant to CPLR 3104(a), but of the court, is granted.

Pursuant to the December 24, 2018 decision and order of the undersigned, plaintiff was to provide an authorization for Montefiore Medical Center comporting with defendants’ October 22, 2018 letter within 10 days after service of a copy of the order with written notice of its entry, and appear for the supplemental deposition first ordered on November 8, 2017 within 30 days after defendants’ receipt of the authorization, to avoid being precluded from claiming exacerbation of injuries and a significant limitation injury under Insurance Law § 5102(d). The February 15, 2019 so-ordered stipulation of the parties extended plaintiff’s time to appear for deposition to March 25, 2019 (the December 24, 2018 order was not made known to the court at the February 15, 2019 appearance). The March 29, 2019 order of the court, acknowledging the

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<sup>1</sup> The action by plaintiff Orville Richards has been discontinued; the court refers to plaintiff Taramatie Richards as “plaintiff.”

unwitting extension of plaintiff's time of comply, deemed plaintiff precluded as per the December 24, 2018 order, in light of plaintiff's failure to comply with the December 24, 2018 and February 15, 2019 orders. When plaintiff thereafter moved to vacate her default, the court conditionally granted the motion on May 13, 2019, holding that plaintiff would not be so precluded if she appeared for and completed the supplemental deposition, and paid to defendant's counsel the sum of \$500.00, both within 30 days after the *date of entry* of the order (emphasis added). The May 13, 2019 order was entered on May 17, 2019. Defendant served a copy of the May 13, 2019 order with notice of its entry on May 22, 2019, and filed the order with notice of entry on June 26, 2019.<sup>2</sup>

At the following June 28, 2019 status conference, the court found that, given that order with notice of entry was entered on June 26, 2019, a further deposition of plaintiff occurring on July 24, 2019 would be timely.

Defendant asserts that the court misapprehended the date of entry of the May 13, 2019 order and the date of the service of the notice of entry of the May 13, 2019 in ordering the further deposition, and that plaintiff is now precluded from claiming an exacerbation injury. The court agrees. The May 13, 2019 order was entered on May 17, 2019 (*see* CPLR 2220[a]) and order with notice of entry was served on May 22, 2019 (*see* CPLR 2220[b]). It is only service of the order itself that is required to enforce the order (*see Raes Pharmacy, Inc. v Perales*, 181 AD2d 58 [1st Dept 1992]; *see also Lori v Malstrom*, 13 AD3d 243 [1st Dept 2004]; *cf. Ensley v Snapper, Inc.*, 62 AD3d 403 [1st Dept 2009] [notice of entry unnecessary where party to be bound was personally present at issuance of order]).

Plaintiff claims not to have received the May 13, 2019 order with notice of its entry, but

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<sup>2</sup> It is apparent that both parties are proceeding under the assumption that plaintiff's time to comply with the May 13, 2019 order was to be measured from the service of the order with written notice of its entry.

counsel's conclusory denial of receipt is insufficient, in light of defendant's sworn statement of appropriate service (*see Engel v Lichterman*, 95 AD2d 536 [2d Dept 1983]). It is also apparent that plaintiff did not avail herself of any means to track the entry of the May 13, 2019 order, which failure, in conjunction with her failure in complying with the November 8, 2017, May 2, 2018, December 24, 2018, February 15, 2019 and May 13, 2019 orders directing her appearance for a further deposition, are insufficient to overcome defendant's showing of entitlement to the relief sought (*cf. Matter of Rivera v N.Y.C. Dept. of Sanitation*, 142 AD3d 463 [1st Dept 2016]). Notably, plaintiff is not being deprived of a cause of action, nor are her pleadings affected, by the granting of the relief sought herein.

It is not lost on the court that plaintiff became "ready and willing" to appear for the further deposition only after realizing and taking advantage of an obvious error in calculating her time to comply. Furthermore, although plaintiff purported to endeavor to comply with the court's orders, her efforts were untimely and occurred after the court had already found that her failures to timely comply were willful and contumacious (*see Garcia v La Fortuna Rest., Inc.*, 118 AD3d 482 [1st Dept 2014]; *cf. Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]).

Accordingly, it is

ORDERED, that defendant's motion to review the June 28, 2019 order of a court attorney-referee, deemed one for leave to reargue the order because the order was not one of a Referee overseeing discovery pursuant to CPLR 3104(a), but of the court, is granted; and it is further

ORDERED, that upon such reargument, the June 28, 2019 order is vacated, and plaintiff is precluded from claiming an exacerbation injury; and it is further

ORDERED, that plaintiff shall file a note of issue and certificate of readiness for trial no later than October 4, 2019; and it is further


ORDERED, that the failure to timely file the note of issue and certificate of readiness for trial may result in the dismissal of the complaint; and it is further

ORDERED, that no appearance is necessary at the compliance conference calendar on October 25, 2019 and the Clerk of the Court shall delete such appearance.

The court is e-mailing a copy of this order to counsel.

This constitutes the decision and order of the court.

Dated: September 4, 2019

  
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John R. Higgitt, A.J.S.C.