

Skabo v Okoronko
2019 NY Slip Op 33568(U)
December 4, 2019
Supreme Court, New York County
Docket Number: 805207/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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KEVIN SKABO and LINE SKABO,

Plaintiffs,
-against-

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IFEOMA OKORONKO, M.D., . DREW M.
DeMANN, D.C., N.P., MANHATTAN MEDICINE, P.C.
d/b/a MANHATTAN SPINE AND SPORTS MEDICINE,
EDWARD LIBFELD, M.D., WEST SIDE RADIOLOGY
ASSOCIATES, P.C. d/b/a UNION SQUARE
DIAGNOSTIC IMAGING WEST, HERSCHEL KOTKES,
M.D. and HERSCHEL KOTKES, M.D., P.C.,

Defendants.

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JOAN A. MADDEN, J.:

Defendant Drew DeMann (DeMann) moves, by order to show cause, for leave to file a summary judgment motion late, asserting that he has provided a good cause explanation for failing to file the motion by the deadline imposed by the court. Plaintiffs oppose the motion, which is granted for the reasons below.

This medial malpractice action was commenced on May 31, 2017, by filing the summons and verified complaint. By letter dated October 17, 2017, counsel for defendants Edward Libfeld, M.D. and West Side Radiology Associates, P.C. d/b/a Union Square Diagnostic Imaging West (together “the Libfeld defendants”) notified the court that due to the insolvency of their insurer, Fairway Physicians Insurance Company (“Fairway”), the Superior Court of the District of Columbia had imposed a stay on all actions against Fairway’s insureds including the Libfeld defendants. By order of this court dated February 13, 2018, the court stayed and severed the action against the Libfeld defendants.

The preliminary conference order entered into on February 8, 2019, required that all summary judgment motions be made within 90 days of filing the Note of Issue. As plaintiffs filed the Note of Issue on April 4, 2019, the deadline for filing summary judgment motions expired on July 3, 2019.

At the time the Note of Issue was filed, DeMann was represented by Robert D. Martin, Esq. of the Law Office of Michael Tromello. In support of his motion, DeMann submits the affirmation of Mr. Martin, in which he states that he was preparing to make a motion for summary judgment on behalf of DeMann when he sustained a life-threatening cardiac event which resulted in an unsuccessful angioplasty followed by quadruple bypass surgery, and that he was hospitalized for a total of twenty days, undergoing multiple procedures and incurring significant complications. When it became apparent that Mr. Martin would be out of the office for an extended period, many of his case files were transferred to DeMann's new counsel (hereinafter "the Milber firm"). According to the affirmation of Andrew Pisanelli, Esq. of the Milber firm, the firm received 29 cases from Mr. Martin, including this act. A consent to change attorney was signed by DeMann and filed on July 26, 2019. Mr. Martin states that he was not medically cleared to resume work until July 29, 2019, almost four weeks after the summary judgment deadline expired. According to Mr. Pisanelli, over the next approximately 30 days, the files in DeMann's case, along with 28 others, both electronic and paper, was moved from Mr. Martin's office in Melville, New York to his office in White Plains, New York.

In the meantime, summary judgment motions were timely filed by defendants Herschel Kotkes, M.D. and Herschel Kotkes, M.D., P.C. (motion sequence no. 001) and Ifeoma Okoronkwo, M.D. and Manhattan Medicine, P.C. (motion sequence no. 002). These motions

had not been fully submitted at the time this motion was made and were returnable in the motion support office on November 27, 2019.

On October 8, 2019, DeMann filed a proposed order to show cause for summary judgment, which was signed by the court on October 10, 2019, which is 97 days after the deadline for moving for summary judgment. DeMann argues that based on his prior counsel's serious illness good cause exists to extend his time to move for summary judgment.

Plaintiff opposes the motion, arguing that DeMann failed to show good cause for the delay, and that plaintiff will be prejudiced if the motion is permitted to be made late. He argues that before Martin fell ill, DeMann was represented by legal department of CNA Insurance Company, under the name Law Offices of Charles D. Siegel and then Law Offices of Tromello & Fishman, which employs numerous lawyers which could have taken over the action.

By letter efiled on October 10, 2019, counsel for plaintiffs wrote to the court requesting that a stay of this action as against the Libfeld defendants be lifted based on a September 6, 2019 order of the Superior Court of the District of Columbia lifting the stay imposed on the effected parties.

On the October 31, 2019 return date of DeMann's order to show cause, the court issued an order granting plaintiffs' request to vacate the court's February 13, 2019 order staying and severing the action against the Libfeld defendants.

A party may bring an untimely motion for summary judgment if it can show good cause for the delay. A showing of good cause under CPLR 3212(a) requires "a sufficient explanation for the untimeliness-rather than simply permitting meritorious non-prejudicial filings, no matter how tardy." Brill v. City of New York, 2 NY3d 648, 652 (2004). Illness of defense counsel has

been held to constitute good cause for a short delay in moving for summary judgment. See e.g. Popalardo v. Marino, 83 AD3d 1029, 1030 (2d Dept 2011); Friere-Crespo v. 345 Park Avenue, L.P., 122 AD3d 501, 502 (1st Dept 2014).

As the court indicated on the record at oral argument on October 31, 2019, the motion for an extension of time is granted and DeMann had until November 8, 2019 to file an order to show cause seeking summary judgment.¹ Despite the length of the delay in this case, an extension of DeMann's time to move for summary judgment is appropriate here as the court has granted plaintiffs' request to vacate its order staying and severing the claims against the Libfeld defendants, and as discovery has not been conducted with respect to these defendants. Under these particular circumstances, plaintiff will not be prejudiced by the DeMann's delay in seeking summary judgment.

Accordingly, it is

ORDERED that DeMann's motion for an extension of time of move for summary judgment is granted.

DATED: December 4, 2019


J.S.C.
HON. JOAN A. MADDEN
J.S.C.

¹While this motion was pending DeMann efiled an order to show cause on November 8, 2019.