

Alwaise v King

2019 NY Slip Op 34372(U)

October 21, 2019

Supreme Court, Dutchess County

Docket Number: Index No. 2017-50959

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. HAL B. GREENWALD

Justice.

SUPREME COURT: DUTCHESS COUNTY

SHANNON ALWAISE,

Plaintiff,

-against-

TYLER H. KING; OCCUPATIONS, INC.; ACCESS:
SUPPORTS FOR LIVING, INC.; DEMETRIOS
PAPADOPOULOS; COREY A. GRIMMET and A+
PERSISTENT AMBULETTE/CAR SERVICE CORP.,

Defendants.

DECISION AND ORDER
Index No. 2017-50959
Motion Seq. No. 3

The instant Decision and Order is intended to be a NOTICE TO APPOINT ANOTHER ATTORNEY pursuant to CPLR321(d).

PROCEDURAL HISTORY

This action concerns a multi-vehicle accident that took place on April 24, 2015 on State Route 9W approximately 0.1 mile north of South Entrance Road, Town of Stony Point, Rockland County. Plaintiff SHANNON ALWAISE (ALWAISE) was a passenger in a 2012 Ford motor vehicle bearing New York license plate number 16570LV. The Summons and Verified Complaint was filed on April 24, 2017 (NYSCEF Doc. No.1) Defendants interposed various Answers. (NYSCEF Doc. Nos. 5 & 13).

Thereafter, Defendant DEMETRIOS PAPADOPOULOS (PAPADOPOULOS) moved by Motion for Summary Judgment dated February 20, 2018 (NYSCEF Doc. No.17). seeking the matter dismissed be as against him. Defendants COREY GRIMMETT and A+ PERSISTENT AMBULETTE/CAR SERVICE filed a joint Motion for Summary Judgment (NYSCEF Doc. No. 30) seeking a dismissal as well. Plaintiff by her counsel consented to PAPADOPOULOS' Summary Judgment for dismissal. (NYSCEF Doc. No. 32). In a companion case in Orange County Supreme Court under index number 4376/2015, that Court by Decision and Order (Vazquez-Doles, J.) dated May 8, 2018 denied a similar application. (NYSCEF Doc. No. 39). Thereafter, by Decision and Order (McLoughlin, Edward T., AJSC) dated February 20, 2019 denied the GRIMMETT/A+ PERSISTENT Motion. (NYSCEF Doc. No. 43).

THE INSTANT MOTION

The Court (McLoughlin) directed the parties to attend a preliminary conference on March 21, 2019. (NYSCEF Doc. No. 44). Acting Supreme Court Justice, McLoughlin issued a Recusal Order dated 04-11-19. (NYSCEF Doc. No. 52), and the matter was assigned to this Court.

Defendants TYLER H. KING, OCCUPATIONS, INC., and ACCESS: SUPPORTS FOR LIVING, INC., (collectively KING DEFENDANTS), moved by Motion for dismissal of the Complaint for Plaintiff ALWAISE's "...failure to appear at court ordered...". (NYSCEF Doc. Nos. 56-66).

The Court file indicates that Plaintiff ALWAISE was represented by Michael Varble, Esq. of the law firm of Michael R. Varble & Associates, P.C. in this action. The Court takes judicial notice that Michael R. Varble, Esq.'s application to resign as attorney and counselor-at-law was granted and Ordered effective February 27, 2019. (see *Matter of Michael R. Varble, a Suspended Attorney*, 170 A.D.3d 41 (2019)).

On March 21, 2019, neither ALWAISE, nor any counsel purportedly representing her appeared for the scheduled Court conference. (NYSCEF Doc. No 57) and the matter was rescheduled for April 4, 2019. Again, neither ALWAISE, nor any counsel purportedly representing her appeared for the scheduled Court conference, and the matter was now rescheduled for May 21, 2019 before this Court. The matter was once again rescheduled for June 25, 2019 and again neither ALWAISE, nor any counsel purportedly representing her appeared for the scheduled Court conference, and the KING DEFENDANTS' counsel was directed to make the instant application to the Court.

DISCUSSION

A relevant Rule states:

22 NYCRR 202.27

Section 202.27. Defaults

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

- (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
- (c) If no party appears, the judge may make such order as appears just.

Accordingly, it is within the Court's purview to dismiss the instant action for Plaintiff ALWAISE' continued failure to appear at court conferences. See *Barnave v. United Ambulette, Inc.*, 885 N.Y.S.2d 645, (2d Dep't 2009), *47 Thamed Realty LLC v. Robinson*, 61 A.D.3d 923, (2009), *Franchise Acquisitions Group Corp. v. Jefferson Valley Mall L.P.*, 51 A.D.3d 717, (2008) A failure to appear at multiple conferences is *not* required --- a failure to appear at a single conference is sufficient to warrant dismissal. *Id.* In the instant matter plaintiff ALWAISE has continually failed to appear for *multiple* conferences. *Gliber v. Choi*, 62 A.D.3d 525, (2009).

However, the relevant statute, CPLR 321-(c) states:

(c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs. (Emphasis added)

Notwithstanding that the Court scheduled several conferences in March, April, May and June 2019, this action has not progressed over these past several months. That the aforesaid conferences were scheduled indicates however, that the action was in effect, proceeding, and not stayed. Therefore, the Court will provide Plaintiff ALWAISE with a final thirty (30) day period to either obtain new counsel of her choosing or represent herself *pro se* and comply with the attached 30-Day Notice Pursuant to CPLR 321. See *Torres v Emily Auto Service, Inc.*, 2015 WL 1278131 (N.Y. Sup) (Trial Order), Supreme Court, New York, No. 308492/2008 (2015)

By reason of the foregoing it is:

ORDERED that pursuant to CPLR 321(d) the matter herein and pending Motion to Dismiss is hereby stayed for a minimum of thirty (30) days through to and including December 2, 2019, and it is further

ORDERED that the attached 30-Day Notice Pursuant to CPLR 321 shall be served upon Plaintiff SHANNON ALWAISE pursuant to CPLR 308; and it is further

ORDERED that the Affidavit(s) or Affirmation (s) of service of the attached 30-Day Notice Pursuant to CPLR 321 shall be filed with the Court on or before December 5, 2019; and it is further

ORDERED that Defendants TYLER H. KING, OCCUPATIONS, INC and ACCESS: SUPPORTS FOR LIVING, INC., and, Plaintiff SHANNON ALWAISE shall appear before the Court, with or without counsel, at 10 Market Street, Poughkeepsie, NY 12601, 1st Floor Courtroom at **9:30am (morning) on December 5, 2019** for a conference in this matter; and it is further

ORDERED, that in the event that Plaintiff SHANNON ALWAISE and /or her new counsel FAIL TO APPEAR before the Court with or without counsel at 10 Market Street, 1st Floor Courtroom, Poughkeepsie, NY 12601 **at 9:30am (morning) on December 5, 2019** for a conference in this matter, the Motion for Dismissal, shall be granted with prejudice.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Date: October 21, 2019
Poughkeepsie, New York

ENTER:


HON. HAL B. GREENWALD, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.