SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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LEONARD JONES,

Plaintiff,

-against-

MICHAEL WONG, M.D., WEN C. YANG, M.D., AND LENOX HILL HOSPITAL,

Defendants.

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Index No. 850260/2014

Decision and Order

Mot. Seq. 2

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

By Notice of Motion filed on November 1, 2019, Plaintiff moves pursuant to CPLR §§5015 and 2221 to vacate the Court's October 11, 2019 default order which granted summary judgment to Defendants and/or to renew the summary judgment motion. Defendants oppose.

Background

This medical malpractice action was commenced by the filing and service of a summons and complaint on or about August 15, 2014. Issue was joined by the service of Answers on or about September 17, 2014 and October 2, 2014. Discovery proceeded. Plaintiff's deposition was held on May 15, 2018 and Defendants' depositions were held on February 1, 2019 and June 27, 2019. Plaintiff filed the note of issue on June 5, 2019.

Defendants filed their summary judgment motion by Order to Show Cause on August 2, 2019, which was made returnable before the Court on October 11, 2019. Defendants' motion was supported by the expert affirmation of Howard Silberstein, M.D. Plaintiff was ordered to serve opposition papers on or before September 16, 2019 and Defendants were ordered to serve reply papers, if any, on or before October 2, 2019. Oral argument was scheduled on October 11, 2019.

On October 11, 2019, counsel for both parties appeared on the return date of the Order to Show Cause. Oral argument was heard on the record. The Court found that Defendants had made a prima face showing regarding their claims. The Court noted that Plaintiff did not submit opposition papers or an expert affirmation that rebutted Defendants' claims. Plaintiff's counsel requested an adjournment to submit their opposition. The Court stated that "[i]t's a little late right now to ask for time to try to get an affirmation in opposition." The Court noted that the motion was served on Plaintiff in early August. The Order was entered by the Clerk's Office on October 15, 2019, and Plaintiff was thereafter served with Notice of Entry by regular mail.

In the pending motion, Plaintiff's counsel states that on October 10, 2019, he called the Court to request permission to adjourn the motion by stipulation. Plaintiff's counsel states that the Court advised him that it would not accept a stipulation. Plaintiff's counsel states that on October 11, 2019, his office retained per diem counsel in order to request and obtain an adjournment of Defendants' motion so that Plaintiff's counsel could "continue working with its expert to finalize a physician's affirmation to use in conjunction with its opposition to the defendant's motion in this complex medical malpractice case." Defendants' counsel states that they did not receive any request for an extension prior to the date of oral argument.

Parties' Contentions

Plaintiff argues that the October 11, 2019 Order should be vacated because Plaintiff has a reasonable excuse for his default. Plaintiff argues that "the Court should find that plaintiff's (sic) has a reasonable excuse for its default in that plaintiff's counsel was simply requesting an adjournment of the motion so that it could finalize an affidavit from a physician in opposition to [the] motion for summary judgment in a complex medical malpractice action." Plaintiff's counsel argues that the "default was in no way willful or deliberate," and Plaintiff "had every intention of opposing the motion." Plaintiff's counsel states that he has now annexed a copy of opposition papers, including an affidavit from a board certified neurologist who opines that there were departures of care in the treatment provided to Plaintiff.

Plaintiff's counsel further argues that "his per diem attorney was ill-equipped to sufficiently explain the complexities of the physician's affirmation that was required to oppose the defendant's motion when he was so unexpectedly confronted with an outright refusal to consider an adjournment of a motion on for the first time

in the newly created Central Motion Part."[1] Plaintiff's counsel states that he "did not even learn of this situation until after the fact."

In addition to a reasonable excuse, Plaintiff states that he has a meritorious cause of action as demonstrated by the affirmation of his expert.

In the alternative, Plaintiff requests renewal of Defendants' motion for summary judgment based on the new facts not offered at the time of the default which are contained in Plaintiff's expert affirmation.

Defendants argue that Plaintiff's motion should be denied because it should have been brought by Order to Show Cause. Defendants further argue that Plaintiff has failed to demonstrate a reasonable excuse required under CPLR §5015. Defendants argue that Plaintiff's counsel has failed to specify any facts as to why he was unable to obtain an expert affirmation within the timelines set forth in the Court's order. Defendants further argue that Plaintiff's request for an extension of time to submit opposition papers was "too late." Defendants' counsel states that they did not receive any request for an extension prior to oral argument.

Defendants further argue that Plaintiff's default should not be excused because of the per diem counsel that Plaintiff's counsel retained on Plaintiff's behalf.

Legal Standards

Pursuant to CPLR § 5015, the court which rendered a decision 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 § 5015, the moving party must show that its default was "excusable" and demonstrate a "meritorious defense" to the underlying action. (*Pena v. Mittleman*, 179 AD2d 607, 609 [1st Dept 1992]; *Mutual Marine Office, Inc. v. Joy Const.*, 39 AD3d 417 [1st Dept 2007]).

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[1] In Plaintiff's reply papers, Plaintiff states "the language in the motion papers concerning the 'new motion part' were submitted in error."

CPLR § 2221 (e) (2) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination."

"As a matter of general policy, disposition of controversies on the merits is favored." (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dept 1964]).

Discussion

Plaintiff now submits an expert affirmation that is non conclusory and responsive to movant's expert affirmation. While the Court is loath to condone sloppy practices by lawyers, in light of the presentation of this affirmation and the public policy that controversies be resolved on the merits, the Court's Order dated October 11, 2019 which granted Defendants' motion for summary judgment is vacated.

Wherefore it is hereby

ORDERED that the Court's Order dated October 11, 2019 which granted Defendants' motion for summary judgment is vacated; and it is further

ORDERED that Plaintiff's expert affirmation shall be considered the opposition to Defendants' motion for summary judgment; and it is further

ORDERED that Defendants shall submit reply papers on or before March 4, 2020; and it is further

ORDERED that oral argument on Defendants' motion for summary judgment shall proceed on March 10, 2020, at 2:00 PM.

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

Dated: FEBRUARY 4, 2020

Eileen A. Rakower, J.S.C.