

Marchetti v Kassir

2022 NY Slip Op 30637(U)

February 25, 2022

Supreme Court, New York County

Docket Number: Index No. 100367/2020

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

GAYLE MARCHETTI,

Plaintiff,

- v -

RAMTIN KASSIR,

Defendant.

-----X

INDEX NO. 100367/2020
MOTION DATE 02/01/2022
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for SECURITY FOR COSTS/PAYMENTS

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 8501, 8502, and 8503 to compel the plaintiff to give security for costs, as of right, and thereupon to grant a stay of all proceedings until the security is posted in an amount to be determined by the court. The plaintiff does not oppose the motion. The motion is granted to the extent that the plaintiff is directed to post security for costs in the sum of \$500 on or before March 30, 2022, and the action is stayed until that date.

CPLR 8501(a) mandates the court, "upon motion by the defendant," to "order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made" (emphasis added) (see Clement v Durban, 32 NY3d 337, 344-345 [2018]). The rule provides an exception where the plaintiff has been allowed to proceed as a poor person or is the petitioner in a habeas corpus proceeding (see id. at 344).

In the instant case, the pro se plaintiff indicated in her summons and complaint that she resides in Point Pleasant Beach, New Jersey, and thus is not a resident of the State of New York. Additionally, the plaintiff does not fall within any of the exceptions to CPLR 8501, as she

has not been granted permission to proceed as a poor person and this is not a habeas corpus proceeding in which she is a petitioner. Hence, it is appropriate for this court to order the plaintiff to give security for costs as of right (see *Garrett v Community Gen. Hosp.*, 288 AD2d 928, 929 [4th Dept 2001]).

CPLR 8503 provides that

“Security for costs shall be given by an undertaking in an amount of five hundred dollars in counties within the city of New York, and two hundred fifty dollars in all other counties, or such greater amount as shall be fixed by the court that the plaintiff shall pay all legal costs awarded to the defendant.”

The court, in its discretion, thus may determine that an amount greater than \$500 should be paid into the court by an out-of-state plaintiff, based on the facts and circumstances of the particular action (see *Beatty v Williams*, 227 AD2d 912, 912 [4th Dept 1996]; *Howell v Rothberg*, 197 AD2d 815 [3d Dept 1993]). Consequently, while the minimum security required is \$500 with respect to an action in which the venue is placed in a county within the City of New York, the court, in fixing the amount of the undertaking, may fix an increased amount in consideration of the amount of costs likely to be expended (see *Manente v Sorecon Corp.*, 22 AD2d 954 [2d Dept 1964] [security for costs was appropriately fixed at \$4,500 where disbursements were likely to reach that amount in light of appellate printing costs and other disbursements likely to be incurred in the case]; see also *Beatty v Williams*, 227 AD2d at 912 [requiring non-resident to post security for costs in the amount of \$5,000]; *Howell v Rothberg*, 197 AD2d 815 [3d Dept 1993][security for costs in the amount of \$2,000 was reasonable]).

Here, the defendant argues that the plaintiff should be compelled to post an undertaking in the sum of \$10,000.00, based both on his contention that he will be entitled to an award of costs pursuant to CPLR 8303-a(a) for defending a frivolous personal injury action, and upon his contention that he should be compensated for attorneys' fees that he has already incurred and is likely to incur. “Costs,” as defined in CPLR article 81, however, do not include an award of attorneys' fees. Rather, were the defendant to prevail in this action after a trial, he would be

entitled to costs in the sum of \$300 (see CPLR 8201[3]). Giving the defendant the benefit of doubt by assuming that he might move for summary judgment at the close of discovery, he would be entitled to costs on a motion, which the CPLR fixes at \$100 (see CPLR 8202). Although a party entitled to an award of costs is also entitled to tax his or her disbursements on both an action and a motion (see CPLR 8301[a], [b]), the statute requiring a nondomiciliary to post security for costs does not, by its terms, necessarily require the nondomiciliary to post security for disbursements, although, as noted above, several courts have considered taxable disbursements in arriving at an appropriate amount for the security. The court concludes, based on the future costs and disbursements that the defendant is likely to incur, that the undertaking should be fixed in the amount of \$500.

The court notes that, pursuant to CPLR 8502,

“[u]ntil security for costs is given pursuant to the order of the court, all proceedings other than to review or vacate such order shall be stayed. If the plaintiff shall not have given security for costs at the expiration of thirty days from the date of the order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor.”

Accordingly, it is

ORDERED that the defendant’s motion is granted to the extent that, on or before March 30, 2022,

- (a) the plaintiff shall give security for costs in the amount of \$500.00, by posting an undertaking, which undertaking may be in the form of a surety bond or a deposit of cash, money order, or bank check with the County Clerk of the County of New York, and such undertaking shall remain in effect until further order of this court;
- (b) pursuant to CPLR 8502, all proceedings in this case are stayed pending the posting of the undertaking, and if the plaintiff fails to post the undertaking, at the expiration of 30 days from the date of entry of this order, the court may dismiss the complaint upon motion by the defendant, and award costs in his favor; and

and the defendant’s motion is otherwise denied; and it is further,

ORDERED that the parties shall appear remotely for a status conference on April 14, 2022, at 11:00 a.m., and the court shall send an e-mail invitation to counsel for all parties to

participate in said conference via the Microsoft Teams application, at which conference a new note of issue filing deadline will be established.

This constitutes the Decision and Order of the court.

2/25/2022
DATE

JOHN J. KELLEY J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FIN. DISPOSITION

GRANTED

DE

CR

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE