

**Arnold v Blitz**

2023 NY Slip Op 31453(U)

April 28, 2023

Supreme Court, New York County

Docket Number: Index No. 805198/2016

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

GABRIELA ARNOLD and CHRISTIAN ARNOLD,

Plaintiffs,

- v -

NEAL BLITZ, DPM,

Defendant.

-----X

**INDEX NO.** 805198/2016

**MOTION DATE** 04/07/2023

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132 were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action to recover damages for podiatric malpractice, the plaintiffs move pursuant to CPLR 2221(d) for leave to reargue their opposition to the defendant’s motion to dismiss the complaint pursuant to CPLR 3216, which had been granted in an order dated March 2, 2023. The defendant opposes the motion. The motion is granted and, upon reargument, the March 2, 2023 is vacated, the defendant’s motion is denied, and the complaint is reinstated. The court declines to reinstate the note of issue. The plaintiff Gabriela Arnold shall submit to a continued deposition on May 25, 2023 at 10:00 a.m., the defendant, should he be so advised, shall serve any post-deposition demands referable to that continued deposition on or before June 27, 2023, the plaintiffs shall respond to any such demands on or before July 26, 2023, and the plaintiffs shall file a new note of issue and certificate of readiness on or before August 31 2023.

As this court explained in its March 2, 2023 order, it issued a status conference order on September 10, 2021, in which it directed the plaintiff Gabriela Arnold to submit to a continued deposition on or before November 10, 2021, fixed a deadline for service of post-deposition demands and responses, and set a note of issue filing deadline for March 31, 2022. On November 4, 2021, the defendant’s attorney contacted the plaintiffs’ attorney, inquiring as to

when Gabriela Arnold would be produced for a continued deposition. The defendant's attorney followed up with an almost identical email on February 3, 2022. The plaintiffs' attorney responded, suggesting that the parties might be able request the court further to extend the discovery and note of issue filing deadlines, but he neither scheduled the deposition nor contacted the court to request an additional conference or an extension of any deadline. March 31, 2022 passed, without the defendant conducting a further deposition of Gabriela Arnold and without the plaintiffs filing a note of issue. On April 26, 2022, the defendant's attorney again wrote the plaintiff's attorney, again requesting him to produce Gabriela Arnold for a continued deposition. The defendant did not conduct the continued deposition, and could not obtain an agreed upon date from the plaintiffs on when it might be conducted.

After receiving no further communications from the plaintiffs' attorney, the defendant's attorney, on June 8, 2022, served the plaintiffs' attorney by certified mail with a CPLR 3216 notice to resume prosecution by filing a note of issue within 90 days after the notice was served. The notice further informed the plaintiffs that their failure to file a note of issue within 90 days would form the predicate for a motion to dismiss the complaint for failure to prosecute. The plaintiffs' attorney received the notice on June 11, 2022. The plaintiff did not move to vacate the notice within the 90-day period following June 11, 2022, which expired on September 9, 2022. The defendant moved to dismiss the complaint on October 4, 2022 (see CPLR 2211) under Motion Sequence 003. In response to the motion, the plaintiffs, among other things, filed note of issue on October 6, 2022, albeit without authorization from the court.

In the March 2, 2023 order, the court granted the defendant's motion to dismiss the complaint pursuant to CPLR 3216, concluding that he established the conditions necessary to invoke that statute, and that the plaintiffs failed to oppose the motion. In fact, the plaintiffs did oppose the motion, but uploaded all of their responsive papers to the New York State Court Electronic Filing (NYSCEF) system under Motion Sequence 002 (see Docket Entry Nos. 93, 97, 98, 100, and 107), rather than Motion Sequence 003, despite the fact that Motion Sequence

002, seeking to compel discovery, had been resolved on December 12, 2018 pursuant to a stipulation.

As the Appellate Division, First Department, has explained,

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’”

(*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v Solowey*, 141 AD2d 813, 813 [2d Dept 1988]; see *Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 4492 [1st Dept 2016]). Here, the court overlooked the fact that the plaintiffs had actually submitted opposition to the defendant’s CPLR 3216 motion. Moreover, the plaintiffs’ mistake in uploading the opposition papers under the incorrect motion sequence number constitutes a type of default that is excusable as law office failure (see CPLR 2005; *Carrasquillo v 1211 6th Ave. Prop. Owner, LLC*, 2023 NY Slip Op 30374[U], \*4, 2023 NY Misc LEXIS 535, \*5 [Sup Ct, N.Y. County, Feb. 6, 2023]).

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3), that plaintiff must comply with the demand by filing a note of issue “or by moving, before the default date, either to vacate the demand or [pursuant to CPLR 2004] to extend the 90-day period” (*Angamarca v 47-51 Bridge St. Prop., LLC*, 167 AD3d 559, 559 [2d Dept 2018]; see *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d 760, 760-761 [2d Dept 2017]). The plaintiffs expressly declined to move to vacate the demand or extend their time for filing the note of issue. Inasmuch as the plaintiffs failed timely to make such a motion, they became obligated, in opposition to the defendant’s motion, to establish both a justifiable excuse for the failure timely to file the note of issue and a potentially meritorious cause of action, as their failure to file the note of issue by the court-ordered deadline constitutes a species of default (see *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *Grant v City of New York*, 17 AD3d 215, 216-217 [1st Dept 2005] [“an application to extend plaintiff’s time to file a note of issue within that 90-

day period serves to prevent a default on the notice”]; *Conway v Brooklyn Union Gas Co.*, 212 AD2d 497, 497-498 [2d Dept 1995] [an affidavit of merit is not required where the motion pursuant to CPLR 2004 was made prior to the expiration of the prescribed period to respond]). It has been said, however, that CPLR 3216 is “extremely forgiving” (*Baczowski v Collins Constr. Co.*, 89 NY2d at 503), “in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed” (*Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]; see *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633 [2003]; *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d at 761).

Here, the plaintiffs’ initial excuse for failure to prosecute this action include their counsel’s assertion that, although the defendant’s attorney referred in his motion to a status conference that took place on September 21, 2021, counsel’s office did not participate in that conference, nor was provided with any notice that it was to take place. Counsel averred that, although he did speak with defense counsel and agreed to the produce plaintiffs for an updated deposition if they were willing, he never agreed to specific time period. Under this court’s rules, the court did not conduct an actual status conference. Rather, the court had directed the parties to submit a proposed status conference order if they could agree to its contents. The September 10, 2021 status conference order, which was entered on September 21, 2021, had been submitted by the defendant’s attorney, and indicated that the plaintiffs’ counsel had consented to producing Gabriela Arnold for a continued deposition, which was to be held within 60 days. Although March 31 2022 was fixed as the note of issue filing deadline in that order, the plaintiffs’ counsel alleged that he was effectively unaware that this directive had been made.

In support of the instant motion, the plaintiffs’ counsel alleged that he had attempted to file the note of issue back on January 15, 2020, and that it was rejected by the clerk’s office, but that he was unaware that it was indeed rejected. That filing appears as Docket Entry No. 59 on the NYSCEF system as a “deleted” document, but does not indicate a reason for its rejection. Counsel further contended that he never agreed to a “specific deadline” for the continued

deposition of Gabriela Arnold, and that the defendant's attorney "never provided dates and failed to respond to messages left her despite the fact that defense counsel claiming that additional discovery would be necessary to defend this lawsuit." As counsel explained it,

"Plaintiff is ready, willing and able to participate in a second deposition, if required to do so. I advised defense counsel of this fact even after I filed the second Note of Issue. . . . The response of defense counsel was to engage in further motion practice, specifically seeking an order striking the Note of Issue."

Under the circumstances presented here, the court concludes that these explanations are sufficient to establish a reasonable excuse as to why this one item of outstanding disclosure remained uncompleted, and that the plaintiffs did not timely file the note of issue due to law office failure. The court nonetheless cautions the plaintiffs' attorney that he must be aware of orders that have been uploaded to NYSCEF, and that he must be cognizant of the status of the action. Any further failure on his part to review and respond to orders that have been uploaded and automatically emailed to him will not be treated with the same leniency.

As to the merits of the plaintiffs' claim, in opposition to the defendant's CPLR 3216 motion, they had submitted the expert affidavit of podiatrist Paul Klein, D.P.M., who opined "that the care and treatment provided by defendant fell outside podiatric standards, specifically his surgeries of August 21, 2013 and November 20, 2013. His negligent acts resulted in plaintiff suffering permanent nerve damage requiring further treatment, including surgery." He further concluded that, as a consequence, the plaintiff was "left with a permanent disabling condition including irreparable nerve damage and disfigurement." Where the CPLR requires that a party submit an "affidavit of merit" in support of or in opposition to a motion, the requirements applicable to such an affidavit are "less exacting" than affidavits that must be employed on a motion for summary judgment, but "there must still be . . . an offer of evidence *similar* to that supporting a summary judgment motion" (*Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 404-405 [1st Dept 2006] [emphasis added]). The court concludes that Dr. Klein's expert

affirmation provides a showing of the merits of the plaintiffs' claim sufficient to support their opposition to the defendant's CPLR 3216 motion.

In an order dated March 13, 2023, this court denied, as academic, the defendant's motion to vacate the note of issue (SEQ 004), concluding that it was unnecessary to grant such relief because the complaint had been dismissed. Although the court is reinstating the complaint, it declines to reinstate the note of issue. Rather, the plaintiffs must file a new note of issue subsequent to the completion of the limited discovery that the court is directing herein.

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to reargue is granted, upon reargument, the order dated March 2, 2023 is vacated, the defendant's motion pursuant to CPLR 3216 to dismiss the complaint thereupon is denied, and the complaint is reinstated; and it is further,

ORDERED that the plaintiff Gabriela Arnold shall submit to a continued deposition on May 25, 2023 at 10:00 a.m.; and it is further,

ORDERED that the defendant, should he be so advised, shall serve any post-deposition demands referable to that continued deposition on or before June 27, 2023; and it is further,

ORDERED that the plaintiffs shall respond to any such demands on or before July 26, 2023; and it is further,

ORDERED that the plaintiffs shall file a new note of issue and certificate of readiness on or before August 31 2023.

This constitutes the Decision and Order of the court.

4/28/2023  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE