

Courtois v Rosenblum

2023 NY Slip Op 34320(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 30605/10

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

NADEGE COURTOIS,

Plaintiff,

- against -

NEAL ROSENBLUM, M.D., ERAN BORNSTEIN, M.D. BROOKDALE UNIVERSITY HOSPITAL AND MEDICAL CENTER, PERINATAL DIAGNOSTIC CENTER, MICHAEL CABBAD, M.D., JOANNE ANDRADES, M.D., NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, INC., BROOKLYN HOSPITAL CENTER, MIC WOMEN'S HEALTH SERVICESS, YVES JEAN-GILLES, M.D., KANNAN MURALIKRISHNAN, M.D., ERROLL I. BYER, M.D., ERROLL I. BYER, JR., M.D., BROOKLYN PLAZA MEDICAL and "JOHN DOES", fictitious Names intended to represent certain unknown physicians who treated And/or examined plaintiff,

Defendants

11/6/23

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DECISION/ORDER

The following papers were read pursuant to CPLR 2219(a):

NYSCEF Numbered:

Notice of Motion/Affidavit/Exhibits ~~2/3/4~~ SEQ#010

Affidavit in opposition 31

Cross Motion (ms 11) 15/16

Cross Motion (ms 12) 24/25

Cross Motion (ms 13) 40/41

Cross Motion (ms 14) 47/48

Cross Motion (ms 15) 57/58/62

Plaintiff's Affidavits in Opposition 53/54/55/56/61

Plaintiff commenced an action for personal injuries allegedly resulting from defendants' medical malpractice. Plaintiff moves, in motion [mot.] sequence [seq.] number [no.] 10), for an order restoring the matter to the calendar pursuant to CPLR 3404. Defendant New York Presbyterian Hospital opposes plaintiff's motion and cross-moves in mot. seq. 11, for an order pursuant to CPLR 3404, dismissing the action. Defendant Public Health Solutions opposes plaintiff's motion and cross-moves in mot. seq. 12 for an order dismissing plaintiff's action pursuant to CPLR 3404. Defendants Perinatal Diagnostic Center, Joanne Andrades, M.D., and the Brooklyn Hospital Center oppose plaintiff's motion and cross-moves in mot. seq. 13 for an order dismissing plaintiff's action pursuant to CPLR 3404. Defendants Michael Cabbad, M.D., Yves Jean-Gilles, M.D. and Kannan Muralikrishnan, M.D., (the Cabbad defendants) oppose plaintiff's motion and cross-move in mot. seq. 14 for an order dismissing plaintiff's action with prejudice pursuant to CPLR 3126. Defendants Dr. Neal Rosenblum, M.D., Dr Eran Bornstein, M.D., and Brookdale University Hospital and Medical Center (the Rosenblum defendants) cross-move in mot. seq. 15 for an order dismissing plaintiff's action with prejudice pursuant to CPLR 3126 and NYCRR 202.27.

FACTUAL BACKGROUND

Plaintiff commenced this action against defendants on or about December 17, 2010, alleging in part that "defendants' malpractice resulted in the stillborn birth of her child, physical pain and suffering, emotional distress, depression, post-traumatic stress disorder, pathological grieving . . ." On May 23, 2013, a Central Compliance Part order was issued which detailed discovery deadlines and directed that the note of issue be filed by September

30, 2014. The pre-printed language on the order specifically stated, “or action may be dismissed” and “This Order does not constitute a CPLR 3216 Notice.” On September 23, 2014, the IAS judge extended the time to file note of issue to June 30, 2015. The parties again appeared in the Central Compliance Part on May 19, 2015, and an order was issued detailing outstanding discovery and extending the deadline for filing note of issue to December 31, 2015. Said order included pre-printed language stating “Unjustified failure of any party to comply with the terms of this Order will result in the striking of a pleading . . . This order does not constitute a CPLR 3216 notice.” On April 14, 2016, the parties signed a stipulation (So-Ordered by the court), directing plaintiff to file the note of issue by June 28, 2016, which the Rosenblum defendants claim had the same effect as a valid 90-day Notice pursuant to CPLR 3216.

On July 8, 2016, upon plaintiff’s failure to appear at a conference and failure to file the note of issue, the IAS judge marked the matter “disposed.” The case lay dormant until the Rizzuto Law Firm (substituted as counsel for plaintiff on May 17, 2021) moved to restore the case to active status. To date, the note of issue has not been filed and much discovery remains outstanding.

Defendants argue that plaintiff’s failure to comply with court orders, failure to file the note of issue and failure to appear at the conference before the IAS judge, resulting in a “disposed” marking signified the case was dismissed and as a result, closed their files. Defendants contend that if the case is restored, the lengthy passage of time will greatly prejudice their defense. In addition, the Cabbad defendants maintain that plaintiff’s motion pursuant to CPLR 3404 is “misguided” as this statute does not apply to pre note of issue

cases. The Rosenblum defendants argue that the April 14, 2016 So-Ordered Stipulation directing plaintiff to file the note of issue by June 28, 2016, was effectively a valid 90-day notice pursuant to CPLR 3216.

LAW

Although plaintiff erroneously moves to restore the action pursuant to CPLR 3404, this court addresses same as plaintiff moved for “further relief as to this court seems just and proper” (*see Tirado v Miller*, 75 AD3d 153 [2d Dept 2010}). It is well settled that CPLR 3404 [dismissal of abandoned cases] does not apply to pre-note of issue cases (*see Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 199 [2d Dept 2001]). The *Lopez* court clearly distinguished cases marked off the pre-note of issue calendar from cases dismissed pursuant to 22 NYCRR 202.27 [defaults], CPLR 3216 [want of prosecution] and sanctions based upon CPLR 3126 [penalties for refusal to comply with an order or to disclose]. The Court stated that “CPLR 3404 should be strictly reserved for cases that have reached the trial calendar,” and that CPLR 3126- [penalties for refusal to comply with order or to disclose], was available to impose sanctions for failure to strictly comply with dates for completion of discovery.

In the instant case, although defendants understood plaintiff violated multiple orders, defendants failed to serve a 90-day notice pursuant to CPLR 3216 which requires service of a written demand by registered or certified mail requiring a party to resume prosecution of the action. Failure to serve and file a note of issue within 90 days after receipt of the demand shall serve as a basis for a motion for dismissal for unreasonably neglecting to proceed. Contrary to the Rosenblum defendants’ claim, the 4/14/16 So-

Ordered Stipulation did not have the same effect as a valid 90-day notice pursuant to CPLR 3216. Additionally, relief pursuant to CPLR 3126 for penalties against plaintiff for repeated failure to comply with orders was available.

Furthermore, the IAS judge did not dismiss the action pursuant to NYCRR 202.27(b) which provides:

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: . . . (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or crossclaims.

Although plaintiff failed to appear at the conference and failed to file the note of issue, the judge marked the case “disposed” rather than dismissing same pursuant to NYCRR 202.27(b).

Prior to the dismissal of a case statutory prerequisites must be met (*see Mitskevitch v City of New York*, 78 AD3d 1137, 1138 [2d Dept 2010]). Here, there was neither a 90-day notice served pursuant to CPLR 3216, nor an order dismissing the complaint pursuant to NYCRR 202.27 (b). A case marked “disposed” must be restored to active status when the note of issue has not yet been filed and no other statutory requirements have been met (*see Santiago v City of New York*, 206 AD3d 948, 949-950 [2d Dept 2022]). Moreover, a disposal is not a dismissal without adherence to statutory requirements (*see Express Shipping, Ltd., v Gold*, 63 AD3d 669 [2d Dept 2010]). The court in *Express* noted that when a note of issue has not been filed, CPLR 3216 provides the procedure for dismissal. Consequently, in the instant case, the defendants’ argument that the disposed marking

meant the case was dismissed is erroneous as a note of issue was never filed, a CPLR 3216 90-day notice never served, and a dismissal pursuant to NYCRR 202.27 never ordered. Defendants failed to seek available recourse against plaintiff for noncompliance and CPLR 3404 and CPLR 3216 do not apply to pre-note of issue case without adhering to proper procedures (see *Arroyo v Board of Education of City of New York*, 110 AD3d 17, 21 [2d Dept 2013] [holding that “[m]arking a case off a motion or conference calendar does not dispose of it”]; *Varricchio v Sterling*, 86 AD3d 535, 536 [2d Dept 2011]; *Lopez*, 282 AD2d at 199 [noting that cases like the instant case are “while perhaps comatose, still alive”]).

To the extent not specifically addressed herein, the parties’ remaining contentions and arguments were considered and found to be without merit and/or moot. Accordingly, it is

ORDERED that plaintiff’s action is restored to active status. The parties shall appear in the Central Compliance Part on 12/19/23, for a Compliance Conference to schedule outstanding discovery and set forth a note of issue date.

This constitutes the decision and order of the Court.



Honorable Leon Ruchelsman
12/7/23