

Islam v New York City Health & Hosps. Corp.

2019 NY Slip Op 35091(U)

January 28, 2019

Supreme Court, Queens County

Docket Number: Index No. 707269/15

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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MD Aminul Islam, as Administrator of Index
MD Arafat Ali, deceased, Number: 707269/15

Plaintiff,
- against - Motion
Date: 1/25/21

New York City Health & Hospitals Corporation, Motion Seq. No.: 4

Defendant.

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The following papers numbered E42-50 on this motion by plaintiff to vacate the dismissal and restore the action to the trial calendar.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....E42-45
Affirmation in Opposition.....E46-48
Reply.....E49-50

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff to vacate the dismissal of this action and to restore the action to the trial calendar is denied.

This action was dismissed, no appearance plaintiff, pursuant to 22 NYCRR 202.27(b), for failure of plaintiff to appear for a control-date conference on March 21, 2019. Plaintiff's counsel now moves to vacate the dismissal and restore the action to the trial calendar. Counsel has failed to proffer a reasonable excuse for his default in appearing or a meritorious cause of action even had he presented a reasonable excuse.

This case appeared on this Court's pre-trial Medical Malpractice Health & Hospitals Corporation calendar on November 15, 2018. The record reflects that the case was, at that time, stricken from the trial calendar. Plaintiff's former counsel had appeared and indicated that he was planning to move by order to show cause to be relieved as counsel for plaintiff. Apparently, plaintiff was uncooperative with counsel and counsel indicated that the matter could not go forward. This Court struck the case from the trial calendar but adjourned the case to March 21, 2019 as a control date for a conference with whomever plaintiff had retained as his new attorney, if anyone. Plaintiff's prior attorney was relieved as

counsel for plaintiff pursuant to the order of this Court issued on January 9, 2019, and the action was stayed for 45 days after service of a copy of the order with notice of entry to afford plaintiff the opportunity to retain new counsel. A copy of the order with notice of entry was served upon plaintiff on January 22, 2019. Therefore, the stay expired on March 8, 2019. On the control date of March 21, 2019, neither plaintiff nor any attorney on his behalf appeared. A check of the Court record reflected no new attorney of record for plaintiff. This Court, accordingly, dismissed the action. Plaintiff's new, and present, counsel, John Ciafone, represents in his affirmation in support of the motion that he was in fact retained by plaintiff on January 3, 2019.

Mr. Ciafone offers as an excuse for his failure to appear for the control date conference on March 21, 2019 that he was not alerted by E-Courts or "in any other way" of the date of the conference. However, although Mr. Ciafone represents in his affirmation in support of the motion that he was retained by plaintiff on January 3, 2019, the record reflects that he did not record his representation of plaintiff in this case with E-Courts until April 22, 2019. Mr. Ciafone offers no explanation for his delay of over three months to file this notice of appearance. Moreover, he does not represent, and the record does not reflect, that he reached out to defendant's counsel at any time and in any manner, or to outgoing counsel, and he offers no explanation as to why he did not otherwise attempt, once he was retained, to determine the status of this case and any upcoming deadlines or appearance dates. The record demonstrates that Mr. Ciafone did nothing to attend to his client's case after he was retained until he filed his appearance with E-Courts three months later. Thereafter, he filed a note of issue on May 28, 2019, which was returned to him by the Clerk of the Court upon the ground that the matter is disposed and requires a court order to restore it to the calendar.

Mr. Ciafone thereafter filed a notice of motion on June 27, 2019 for an order restoring the case to the trial calendar. Counsel referenced in that motion this Court's order relieving prior counsel for plaintiff and staying the action for 45 days so that plaintiff could have the opportunity to retain new counsel. Mr. Ciafone thus moved solely to restore the matter to the calendar upon the basis that plaintiff has retained new counsel. Mr. Ciafone appeared on the return date of that motion, July 9, 2019, and was informed by the Court that motion was moot because the action was dismissed on March 21, 2019 and, thus, there was no case to restore to the trial calendar. Mr. Ciafone expressed his lack of awareness that the action had been dismissed. When he asked for guidance, he was informed that his only course of action would be to move to vacate the dismissal, which motion would have to set forth not only an excusable default, but a meritorious cause of action, which, since this is a medical malpractice action, would require a supporting affidavit or affirmation of a physician. This Court should not have had to provide such basic guidance to an attorney licensed to practice in the courts of this State. Mr. Ciafone,

accordingly, withdrew his motion.

On February 25, 2020, Mr. Ciafone moved to vacate the dismissal and restore the action to the trial calendar. Apparently, Mr. Ciafone did not comprehend the guidance that this Court had provided him, and did not support the motion with an affirmation of a physician. Mr. Ciafone merely represented, in a one-line statement in his affirmation in support of the motion, that he consulted with a physician, one David A. Mayer, M.D., and that Dr. Mayer will give expert testimony that defendants deviated from reasonable care in treating plaintiff, and annexed a screen shot of Dr. Mayer's web page. On the return date of that second motion, July 15, 2020, Mr. Ciafone voluntarily withdrew his motion upon being informed that a screen shot of a physician's web page does not constitute an affirmation of a physician establishing the meritorious nature of the action.

Mr. Ciafone now moves again to vacate the dismissal and restore the action to the trial calendar. And once again, the motion fails.

Mr. Ciafone does not set forth the section of the CPLR under which he is moving for the instant relief. He merely cites two cases in which dismissals were vacated pursuant to CPLR 5015(a)(1) upon a showing of both an excuse for the failure to appear and a meritorious cause of action, and in support of his perfunctory statement that law office failure has been accepted as a reasonable excuse to vacate a dismissal. Therefore, this Court deems the instant motion as seeking vacatur of the dismissal pursuant to CPLR 5015(a)(1), which requires a showing of both an excusable default and a meritorious cause of action.

As to the first of this two-prong requirement, that the party seeking to vacate demonstrate that his default is "excusable", it is well-established that in order that the default be deemed excusable it must be shown to the court's satisfaction that the excuse offered is reasonable (see Mid-Hudson Props., Inc. v. Klein, 167 A.D.3d 862, [2d Dept. 2018]).

As noted, Mr. Ciafone, without any elaboration, contends that cases have held that law office failure is a basis to vacate a default in appearance. In this regard, this Court is cognizant that, pursuant to CPLR 2005 (a section that Mr. Ciafone also does not reference), law office failure is a ground that may be considered as constituting a sufficient reasonable excuse so as to justify the exercise of the court's discretion to vacate a default in the interest of justice.

In this regard, it is the established rule in the Second Department that a claim of law office failure must be supported with a "detailed and credible explanation" that is reasonable (see Horio Realty Corp. v Hunts Point Flower Market, Inc., 181 A.D.3d 571 [2d Dept. 2020]; Singh v Sukhu, 180 A.D.3d 834, [2d Dept. 2020]; Wells Fargo Bank, N.A. v Harrigan, 179 A.D.3d 1142 [2d Dept. 2020];

Deutsche Bank National Trust Company v Mladen, 176 A.D.3d 1170 [2d Dept. 2019]). Mere neglect is insufficient to warrant vacatur (see U.S. Bank, N.A. v Essaghof, 178 A.D.3d 876 [2d Dept. 2019]) as is a bare allegation of law office failure (see HSBC Bank USA, National Association v Aquaviva, 177 A.D.3d 713 [2d Dept. 2019]).

The requirement of showing a detailed and credible explanation that is reasonable is not limited to motions to vacate default judgments for failure to appear and answer, but also is applicable to motions to vacate dismissals for failure to appear for scheduled conferences, motions or trials (see Diamond v Leone, 173 A.D.3d 686, [2d Dept. 2019]).

Mr. Ciafone's excuse for his failure to appear on March 21, 2019 that he was not notified of the conference date by E-Courts or otherwise, when it was because of his own neglect in failing to file his appearance with E-Courts and to otherwise take any initiative to determine the status of the case that he was not so informed, not only is incredible and unreasonable, but is borderline frivolous. Therefore, the motion must be denied for this reason alone.

As to the second requirement for vacatur under CPLR 5015(a)(1), the movant must proffer evidence of a meritorious cause of action or defense. This requirement is independent of the reasonable excuse requirement and is not specifically set forth in CPLR 5015(a)(1), but is based upon long-standing case law precedent recognizing that regardless of whether an excuse was reasonable, there would be no purpose to vacate a default or dismissal if there is no merit to the movant's claims or defenses (see Hon. Mark C. Dillon, 2019 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:6).

The "affidavit of expert" of David A. Mayer, M.D. submitted in support of the instant motion is not sworn or affirmed and offers no medical opinions as to departures and proximate causation based upon a reasonable degree of medical certainty but merely restates plaintiff's counsel's expert witness disclosure that sets forth in general, summary, terms what the expert physician will testify about at trial. Thus, this (for want of a better term to describe it) statement, is not probative and fails to set forth a meritorious cause of action for medical malpractice.

Accordingly, the motion is denied.

Dated: January 28, 2019



KEVIN J. KERRIGAN, J.S.C.

FILED & RECORDED
1/29/2021
2:16 PM
COUNTY CLERK
QUEENS COUNTY