

Clemons v Glickman
2012 NY Slip Op 33662(U)
December 24, 2012
Supreme Court, Bronx County
Docket Number: 0015267/1999
Judge: Douglas E. McKeon
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PART 19A

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed
 Settle Order
 Schedule Appearance

-----X
CLEMONS, LARRY

Index No. **0015267/1999**

-against-

Hon. **DOUGLAS MCKEON**,

-----X
GLICKSMAN, ROSLYNN M.D.

Justice.

The following papers numbered 1 to _____ Read on this motion, REARGUE/RENEW/RESETTLE/RECONSIDER
 Noticed on **September 20 2012** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

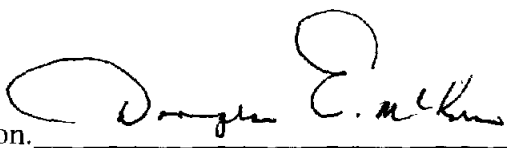
Upon the foregoing papers this

_____ motion is decided in accordance with the annexed
 decision and order of the Court.

So ordered.

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 12 / 24 / 12

Hon. 
DOUGLAS MCKEON, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
LARRY CLEMONS, as Administrator of the Estate
of JENNIFER CLEMONS, deceased,

Plaintiff(s),

- against -

INDEX NO: 15267/99

ROSLYNN GLICKSMAN, M.D., MONTEFIORE
MEDICAL GROUP, DAVID KAUFMAN, M.D.,
MICHAEL SWERDLOW, M.D., PATRICK LASALA,
M.D., and MONTEFIORE MEDICAL CENTER,

DECISION/ORDER

Defendant(s)

-----X

HON. DOUGLAS E. MCKEON

The July 9, 2012 order of the Court which dismissed plaintiff's complaint without opposition is vacated. The motion was to be adjourned without date for purposes of giving plaintiff's counsel time to locate his client and discuss with him the suspension of co-counsel and the status of the law firm of Shearer & Essner. Inadvertently, the motion was not held in abeyance but was decided without opposition. Now, upon reargument, defendants argue that the Court should adhere to its original decision dismissing this action as plaintiff has defaulted in complying with several Court orders without any reasonable excuse and because this case has no merit. The motion is decided as follows.

Movant argues that this matter should be restored to active status based

upon plaintiff's excusable default in submitting opposition to the original motion to dismiss.

This is a medical malpractice and wrongful death action which concerns treatment rendered between November 22, 1996 and April 29, 1997. The last time plaintiff took steps to prosecute this action was on April 27, 2006 when expert witness, Dr. Raul Rudelli, for whom plaintiff served an expert disclosure was deposed. Dr. Rudelli was the neuropathologist who performed the autopsy on decedent. At that deposition, Dr. Rudelli acknowledged that he could not comment on the standard of care applicable to the defendant as it concerned neurology neurosurgery or neuroradiology nor could he offer an opinion within a reasonable degree of medical certainty as to the precipitating etiology of the decedent's brain lesion. The case had been stayed pending the conclusion of Dr. Rudelli's deposition. Plaintiff took no steps to restore this case to the trial calendar for five years.

On January 12, 2011 defendants revised this case by contacting the Court requesting that the case be dismissed as abandoned. The Court scheduled a conference which was held on February 18, 2011. At the conference plaintiff's counsel was ordered to produce the client and the client's children for deposition and supply authorization for various records within 60 days. Although this order was not reduced to writing, plaintiff did not comply with the Court's order. On July 11, 2011 defendants moved to compel plaintiff to provide the outstanding discovery or face

dismissal. On September 13, 2011 Howard Essner, Esq. appeared on behalf of plaintiff for oral argument but did not serve any opposition papers. The Court gave plaintiff an adjournment until September 27, 2011 to submit opposition. In the opposition, plaintiff's counsel challenged the defendant's right to discovery. The Court granted defendant's motion to compel discovery by order dated December 29, 2011 and held that plaintiff's failure to appear for depositions or provide authorizations by February 27, 2012 may result in the dismissal of the complaint. Plaintiff failed to comply with this order and failed to provide the aforementioned discovery by February 27, 2012. Based on plaintiff's noncompliance with the aforementioned Court orders, defendants moved for a final dismissal of the complaint. By order of this Court dated July 9, 2012 the Court granted the application. As discussed, *supra*, the motion was granted although it was to be held in abeyance. Now, the motion is decided as follows.

This is a medical malpractice action in which it is claimed that the defendants failed to properly evaluate, diagnose and treat a progressive lesion in decedent's brain. Plaintiff was 33 years old at the time of her death and is survived by her husband, and two minor children. Mr. Essner argues that following the issuance of the December 29, 2011 order which indicated that a failure to appear for depositions and supply authorizations "may result in dismissal of the complaint", efforts were made by his former partner, David M. Shearer to comply. Plaintiff argues that this action has at all time been diligently prosecuted including taking depositions of other

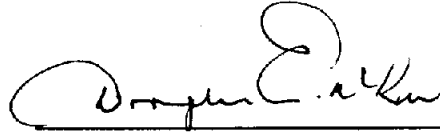
parties, participation in multiple court conferences and motion practice. Mr. Essner further advises the Court that on March 13, 2012 his former partner, Mr. Shearer was suspended from the practice of law for two and a half years and that all significant aspects of this matter had been handled by Mr. Shearer resulting in difficulties complying with the order. He states that as the law firm was in dissolution, he needed time to locate plaintiff, Mr. Clemons, advise him of his options, arrange for his ongoing representation and thereafter complete the depositions and provide the authorizations previously ordered. The Court has been advised that Mr. Clemons has been located since May 1, 2012 and Mr. Shearer's suspension discussed with him. Mr. Clemons has chosen to continue being represented by Essner & Koben, LLP and has advised that he and his sons will appear for depositions and provide any authorizations required.

At this time, defendant's motion to dismiss plaintiff's complaint is denied. Under the totality of the circumstances the Court finds that dismissal of the action would constitute a harsh and inequitable result for plaintiff. However, the Court also finds that counsel for plaintiff has consistently delayed moving this case along. As such, the Court directs plaintiff and his sons to appear for depositions within 60 days of the date of this order and to provide any necessary authorizations within 30 days of the date of this order. The failure to do so, absent compelling reasons which

would require advanced written notification to the Court, will result in the dismissal of this action.

So ordered.

Dated: *December 24, 2012*



Douglas E. McKeon, J.S.C.