

**Furrukh v Forest Hills Hosp.**

2012 NY Slip Op 32569(U)

October 9, 2012

Supreme Court, Queens County

Docket Number: 28024/2008

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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NAWAZ FURRUKH and CHAUDHARY NAWAZ, Index No.: 28024/2008
Plaintiffs, Motion Date: 10/04/12
- against - Motion No.: 12
FOREST HILLS HOSPITAL, "JOHN DOES" AND Motion Seq.: 1
"JANE DOES,"
Defendants.

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The following papers numbered 1 to 16 were read on this motion by defendant, NORTH SHORE UNIVERSITY HOSPITAL AT FOREST HILLS s/h/a FOREST HILLS HOSPITAL, for an order pursuant to NYCRR § 202.21(e) and CPLR 3402, vacating the plaintiffs' note of issue and certificate of readiness, striking this action from the trial calendar and compelling the plaintiffs to comply with moving defendants' discovery demands; or in the alternative dismissing the plaintiffs' complaint pursuant to CPLR 3126(3) for failing to comply with defendants' demands for discovery and for failure to serve a certificate of merit pursuant to CPLR 3012-a(d); or dismissing the plaintiffs' complaint for failure to prosecute pursuant to CPLR 3216(a):

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....1 - 7
Plaintiff's Affirmation in Opposition.....8 - 12
Reply Affirmation-Exhibit.....13 - 16

This is an action for damages for personal injuries sustained by plaintiff, NAWAZ FURRUKH, as a result of negligence and medical malpractice committed by the physicians at Forest Hills Hospital. It is alleged that the treating physicians departed from accepted medical practices and procedures in June 2006 when the plaintiff was admitted and treated at Forest Hills

Hospital for pregnancy related issues, labor, delivery and post-partum care. The action was commenced by the plaintiff by the filing of a summons and complaint on November 18, 2008. Together with the complaint the plaintiffs' counsel served a "certificate" pursuant to CPLR 3012-a(a)(2) stating that plaintiffs' counsel could not obtain a copy of the plaintiff's hospital records or seek a consultation with a physician prior to the expiration of the applicable statute of limitations. Issue was joined by the service of Forest Hills Hospital's verified answer dated January 21, 2009. Together with its verified answer, defendant served combined demands for a bill of particulars and discovery and inspection dated January 15, 2009.

On February 20, 2009 the plaintiff's hospital records were sent to the plaintiff's attorney by counsel for the defendant hospital.

In support of the instant motion defendants' counsel states that the plaintiff, although possessing the plaintiff's hospital records for over 3 ½ years, has still not served a Certificate of Merit which is required, pursuant to CPLR 3012-a(d), to be served within 90 days of the receipt of the requested medical records. Counsel also states that the plaintiff has failed to serve a bill of particulars or responses to demands for discovery since the information was requested in January 2009 despite good faith letters sent by defendants' counsel on July 29, 2012 and September 23, 2010.

As the plaintiffs have not communicated with the defendants' counsel in over 3 years, defendants' counsel served a 90 day notice pursuant to CPLR 3216 requesting that the plaintiffs resume prosecution of the action. On August 6, 2012, prior to the expiration of the 90 day notice period, the plaintiffs filed a note of issue stating that a bill of particulars is not required, that physical examinations were not completed, that medical reports were not exchanged, that discovery was not yet complete and also stating that the case is not ready for trial. The note of issue also states that, "note of issue is being filed in pursuance of the demand by the defendants under CPLR 3216(b)(3)." The note of issue was the first document served by the plaintiffs since the filing of the summons and complaint.

Defendants' counsel submits that the note of issue should be stricken pursuant to 22 NYCRR § 202.21(e) as plaintiff states in the certificate of readiness that discovery is not complete and states that the case is not ready for trial. Counsel claims that since no discovery has taken place, since plaintiff has not yet served a certificate of merit or a bill of particulars, there is

no question that the case is not ready for trial and the note of issue and certificate of readiness should be vacated and the matter removed from the trial calendar.

Counsel also requests that the action be dismissed with prejudice for plaintiffs' failure to prosecute pursuant to CPLR 3216(e) because the note of issue served in response to the 90 day notice is null and void. Citing Blackwell v Long Island College Hospital, 303 AD2d 615 (2d Dept. 2000)], defendants' counsel contends that where the filing of the note of issue is determined by the court to be a nullity, the filing of that note of issue does not preclude the court from dismissing the action upon the expiration of the 90 day notice period even if the note of issue was filed prior to the expiration of the 90 days.

Defendants' counsel also asserts that the matter should be dismissed pursuant to CPLR 3126(3) as the plaintiffs have wilfully failed to comply with the defendants' discovery demands and has failed to file a certificate of merit within 90 days of receipt of the hospital records in violation of CPLR 3012-1(d) without moving for an extension of time to file the certificate of merit.

In the alternative counsel requests that the note of issue be vacated and the plaintiff be ordered to comply with all outstanding demands for discovery.

In opposition, plaintiffs' counsel, Satish K. Bhatia, Esq. states that he does not dispute the fact that he did not take any action in this case since the filing of the summons and complaint. He states that he did not take any steps "as another attorney was associated with our office until December 2010 and I was in a good faith impression that this complaint was filed by him and he was taking care of this case." He states that "on receipt of the notice of motion, I realized that this complaint was signed and filed by me and no step was taken." He also claims that the note of issue was filed prior to the expiration of the 90 day notice and thus he states there was no delay or neglect in prosecution of the action. Counsel states, however, that he has no objection to striking the note of issue and setting schedules for the completion of discovery.

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition and defendants' reply thereto, this court finds as follows:

That branch of the defendants' motion to dismiss the action pursuant to CPLR 3216 for want of prosecution is denied. The plaintiff served a note of issue and certificate of readiness prior to the expiration of 90 days from the filing of the defendants' demand to prosecute. The Courts have held that CPLR 3216 is, "by its terms, extremely forgiving 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" (see Hochberg v Maimonides Med. Ctr., 37 AD3d 660 [2d Dept. 2007]; Ferrara v N.Y. & Atl. Ry. Co., 25 AD3d 753 [2d Dept. 2006]; Davis v Goodsell, 6 AD3d 382 [2004]).

That branch of the defendants' motion to dismiss the complaint for failure to comply with CPLR 3012-a is denied as such sanction is not authorized (see Ferro v Lee, 48 AD3d 412 [2d Dept. 2008]; Russo v Pennings, 46 AD3d 795 [2d Dept. 2007]; Grant v County of Nassau, 28 AD3d 714 [2d Dept. 2006]).

That branch of the defendants' motion to dismiss the plaintiffs' complaint for failure to comply with outstanding discovery demands is denied. There has been no showing that the failure to comply with discovery demands is willful, contumacious or in bad faith (see Rini v Blanck, 74 AD3d 941 [2d Dept. 2010]; Lopes v Metropolitan Tr. Auth., 66 AD3d 744 [2d Dept. 2009]; Pascarelli v. City of New York, 16 AD3d 472 [2d Dept. 2005]).

However, this court finds that as there is a significant amount of discovery that remains in this matter, the note of issue should be stricken and discovery shall proceed expeditiously in this matter (see 22 NYCRR 202.21[e]; Hochberg v Maimonides Med. Ctr., 37 ASD3d 660 [2d Dept. 2007] Costenza v Skyline Towers 5, 8 AD3d 524 [2d Dept. 2004]; Lynch v Vollono, 6 AD3d 505 [2d Dept. 2004]; Drapaniotis v 36-08 33rd St. Corp., 288 AD2d 254 [2d Dept. 2001]; Garofalo v Mercy Hosp., 271 AD2d 654 [2d Dept. 2000]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the note of issue filed on August 26, 2012, is hereby vacated and it is further,

ORDERED, that the plaintiffs shall serve a verified bill of particulars and responses to all of defendants' outstanding discovery demands and shall also file a certificate of merit within 60 days of service of a copy of this order with notice of entry. If the plaintiff fails to fully respond to the outstanding demands and to serve the certificate of merit, then other

sanctions, including dismissal, may be imposed (see Rice v Vandenebossche, 185 AD2d 336 [2d Dept. 1992]; Casiano v New York Hospital-Cornell Med. Center, 169 AD2d 806 [2d Dept. 1990]).

Dated: October 9, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**