Kleynerman v MJGC Home Care
2016 NY Slip Op 32799(U)
March 15, 2016
Supreme Court, Kings County
Docket Number: 4557/11
Judge: Larry D. Martin

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 15th day of March, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

RACHEL KLEYNERMAN, as ADMINISTRATOR of the ESTATE of ABRAM KLEYNERMAN, DECEASED, and RACHEL KLEYNERMAN, INDIVIDUALLY, and on BEHALF of THE HEIRS at LAW,

Plaintiff,

-VS-

INDEX No. 4557/11

MJGC HOME CARE, et al,

Defendants.

The following papers numbered 1 to 3 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	

Upon the foregoing papers, plaintiff Rachel Kleynerman ("plaintiff"), as Administrator of the Estate of Abram Kleynerman, deceased ("plaintiff's decedent"), and Rachel Kleynerman, Individually, and on behalf of the heirs at law moves for an order vacating this Court's January 15, 2013 order (the "2013 order"), restoring the instant action to active status and directing the parties to appear for a compliance conference.

A review of the Court's record indicates that, on or about March 28, 2011, plaintiff commenced the instant action seeking to recover compensatory damages allegedly sustained by plaintiff's decedent (the spouse of plaintiff) while in the care of defendants MJGC Home Care, Special Touch Home Care (collectively, "defendants"), "Jane Doe" and "John Doe." Plaintiff's decedent passed away on October 6, 2008 (Affirmation of plaintiff's counsel, exhibit C). In the complaint, plaintiff asserts causes of action sounding in negligence, loss of society and services and vicarious liability. Plaintiff further alleges in the complaint that she "is in the process of being

appointed administrator of [decedent's] estate" (complaint, ¶1). On or about April 28, 2011, defendants interposed an answer and a "Demand for Letters of Administration, Death Certificate and Autopsy Report." Plaintiff failed to produce these items. This Court's September 28, 2012 Preliminary Conference Order, among other things, directed plaintiff to provide letters of administration by April 10, 2012. By short form order dated April 10, 2012, defendants' motion to preclude and/or compel was granted to the extent of, among other things, directing plaintiff to provide letters of administration by May 11, 2012. Thereafter, by short form order dated January 15, 2013, on plaintiff's default, this Court granted defendants' motion to dismiss the complaint as asserted against them on the grounds of lack of standing and capacity to sue.

Subsequently, on or about February 19, 2013, a Petition for Limited Letters of Administration was filed with the Surrogate of Kings County (Affirmation of plaintiff's counsel). On or about November 18, 2014, Letters of Administration of the estate of plaintiff's decedent were issued to plaintiff by the Kings County Surrogate's Court (Affirmation of plaintiff's counsel, exhibit C). Plaintiff now moves for the relief requested herein on the grounds of "good cause."

As an initial matter, the Court finds that the action was properly dismissed because plaintiff lacked the capacity to sue at the time of its commencement and subsequent dismissal (*see Carrick v Central General Hospital*, 51 NY2d 242, 246 [1980]). While this timely commenced action was dismissed "with prejudice", it is well settled that a dismissal of an action due to a lack of capacity is not a dismissal on the merits (*see Yonkers Contracting Company v Port Authority Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]).

Here, plaintiff cites to no statutory or case law in support of the relief requested herein. Nevertheless, the Court will consider plaintiff's motion to vacate the 2013 order under the provisions of CPLR 5015 and 2221.

Pursuant to CPLR 5015 (a), a Court may vacate a default judgment for several reasons, including excusable neglect; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur

of a prior order (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). A motion to vacate a default judgment on the grounds of excusable neglect must be made within one year of service of a copy of written notice of its entry or within one year of its entry (CPLR 5015 [a][1]).

Based upon a review of the record submitted by the parties, it appears that plaintiff may be seeking relief on the grounds of excusable neglect (CPLR 5015 [a][1]) because the letters of administration were not obtained until one year and ten months after the issuance of the 2013 order. Defendants served plaintiff with a copy of the 2013 order with written notice of its entry on or about February 7, 2013 (Affirmation of plaintiff's counsel, exhibit B). Plaintiff did not move for the relief requested herein until February 27, 2015 (CPLR 2211), two years after the 2013 order and almost three months after the Letters of Administration were ultimately issued. Notably, plaintiff did not file a petition for the letters of administration until after the issuance of the 2013 order. Plaintiff does not proffer any reasons for the delay. In this regard, plaintiff's request to vacate the 2013 order is denied.

CPLR Rule 2221 specifically requires that the movant identify whether the motion is one for leave to reargue (CPLR 2221 [d]) or to renew (CPLR 2221 [e]), and the motion can be denied on plaintiff's failure to do so solely on that basis. Plaintiff has not cited to any specific subdivision nor identified any authority for the motion, but the Court is willing, in these limited circumstances, to entertain the motion under subdivision (e), as well as subdivision (a) to generally vacate an order, which will be analyzed under the common law.[1]

A motion to renew "shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). No changes in the law have been alleged. If the motion is not based on a change in the law, it must be based on "new facts not offered in the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2]–[3]). Plaintiff has not

[1] If this were a motion to reargue, it is untimely (CPLR 2221 [d] [3]).

identified any "new facts." The Court notes that plaintiff now submits the letters of administration. However, plaintiff has failed to proffer a reasonable justification for the failure to file a Petition for Limited Letters of Administration was filed with the Surrogate of Kings County until on or about February 19, 2013, after the January 15, 2013 dismissal of the instant action.

As defendant correctly points out, after the issuance of the 2013 order, plaintiff may have recommenced the instant action within the six month time-frame provided for under the provisions of CPLR 205 (a) (*see George v Mt. Sinai Hospital*, 47 NY2d 170 [1979]) if she had timely obtained letters of administration (Affirmation in Opposition, ¶ 15).

Accordingly, plaintiff's motion is denied.

The foregoing constitutes the decision and order of the Court.

ENTER,

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Motion Seq. #
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MAR 15 2016

HON. LARRY D. MARTIN
J.S.C.

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