

Navarro v Insler
2011 NY Slip Op 34245(U)
December 24, 2011
Supreme Court, Bronx County
Docket Number: 21788/04
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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SAMUEL NAVARRO,

Plaintiff(s),

- against -

INDEX NO. 21788/04

HENRY INSLER, M.D., MICHAEL DUNCAN,
CONCOURSE MEDICAL COMPLEX, SIGNATURE
HEALTH CENTER, LLC, PLUS ENDOPOTHETIK,
AG, ENDOPLUS GmbH, PLUS ORTHOPEDICS,
and NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

DECISION/ORDER

Defendant(s)

-----X
HON. DOUGLAS E. MCKEON

Plaintiff's Order to Show Cause to vacate the Court's November 12, 2010 which granted the cross-motion by defendants Insler and New York City Health and Hospitals Corporation and dismissing plaintiff's claims against it on default is decided as follows.

Two motions had the same return date of September 28, 2010. Plaintiff's motion to strike was adjourned while co-defendants' motion for summary judgment was granted without opposition. The order dismissed Insler and Signature Health Center from the instant action. Plaintiff now seeks to vacate that order as well as have the Court strike the defendant's answers which relief was not addressed previously.

Initially, plaintiff's motion for an order striking the defendants' answers is denied. The Court finds that plaintiff has failed to demonstrate that the defendants in question engaged in any willful, or contumacious behavior in failing to produce individuals for depositions. As such, plaintiff's Order to Show Cause seeking to strike the answer of the defendants is denied and the earlier motion seeking the same relief is also denied.

Plaintiff argues that the underlying motion by defendants Insler and Signature Health Center to dismiss the complaint against them was granted by this Court erroneously, as it was submitted prematurely, resulting in the decision in favor of defendants on default. Therefore, plaintiff argues the decision should be vacated. Counsel for plaintiff claims that on the return date of the underlying motion he personally spoke with defense counsel and advised that opposition was not yet complete and that he would be seeking an adjournment. He claims that as one of the defendants also wanted to oppose the motion, they agreed to adjourn the motions.

In contrast, counsel for New York City Health and Hospitals Corporation states that on September 28, 2010 only the defendants appeared for the motions. At that time, counsel contacted Mr. DePietro, plaintiff's counsel, and was informed that he was on trial and would not appear. He asked for an adjournment. Despite never receiving opposition from Mr. DePietro, Mr. DePietro assured counsel that his opposition was complete and had been served. Mr. DePietro e-mailed counsel a

courtesy copy of his affirmation. As such, counsel requested that the motions be adjourned until March 1st. Counsel states that Mr. DePietro never mentioned that his opposition papers were incomplete, nor that he intended to seek a further adjournment. On March 1, 2011 all parties appeared before this Court. As plaintiff's opposition was never received, defendants presumed the motions would be marked as unopposed. However, plaintiff's counsel advised the Court that he had recently learned that an order was entered dismissing the action. After much discussion with this Court, HHC's motion was marked as fully submitted. Notwithstanding his repeated proclamations that timely papers were filed, it appears that plaintiff never actually served or filed opposition. As a result, the Court directed Mr. DePietro to bring an Order to Show Cause seeking permission to serve and file a late affirmation in opposition specifically detailing the reason for its delay.

The underlying facts of this case are as follows. Plaintiff alleges that the staff at Lincoln Hospital failed to render good and proper care and treatment to him from June 2nd through July 15, 2002. On July 9, 2002 the plaintiff was admitted to Lincoln Hospital for a right total knee replacement. He was discharged on July 15, 2002. On August 8th he returned to have his surgical sutures removed. After he left Lincoln Hospital on August 8, 2002 plaintiff never returned to Lincoln for further treatment. The surgery was performed by Dr. Henry Insler, M.D.

Plaintiff's Order to Show Cause for vacatur of this Court's November 12, 2010 decision which granted Insler's and NYCHHC's motion to dismiss plaintiff's claims

against it on default is denied. The Court finds that plaintiff failed to oppose the aforementioned motion to dismiss and that the motion was properly granted on default. The Court finds that Mr. DePietro has no justifiable excuse for his failure to oppose the aforementioned motion and that he never submitted any opposition to the defendant's motions although he had advised Janice Berry, Esq. Of Martin, Clearwater & Bell otherwise. When the motion was marked fully submitted on September 28, 2010 he claimed that he had served opposition papers prior to that date while he attempted, for the first time, to serve opposition papers on March 1, 2011, almost four months after the motion to amend/dismiss had already been granted. The Court finds that counsel has squandered serial opportunities to oppose the defendant's motions and that he was less than forthright in his dealings with defense counsel. The Court further finds that plaintiffs had not provided the court with a reasonable excuse for the default and his excuse does not suffice for a claim of law office failure. See Walker v. City of New York 46 A.D.3d. 278 (First Dept. 2007). Counsel's repeated failure to appear at conferences and oral argument and his failure to timely serve opposition for over nine months is a pattern of delay and disregard for counsel leading to the denial of the instant application to vacate.

In addition, the Court notes that had it vacated the judgment the cross-motions by defendants for an order dismissing the claims against them would be granted for failure to timely serve a Notice of Claim. Based on the dates of the alleged malpractice, a Notice of Claim should have been served, at the latest, 90 days from

the date of his last date of treatment at Lincoln Hospital or by November 6, 2002. Plaintiff failed to serve a Notice of Claim by that date. Instead, a document purporting to be a Notice of Claim was received over one year and ten months later. The plaintiff has never, to this date, sought a court order deeming this late notice of claim to be timely and the Court no longer has discretion to grant such an application because the applicable statute of limitations has run. As the plaintiff has failed to timely commence this action against NYCHHC and failed to comply with the statutory preconditions to suit against it the complaint would be dismissed as against NYCHHC.

Furthermore, it has recently been discovered that Dr. Insler was an employee of NYCHHC. To the extent Dr. Insler was an employee of HHC, the Notice of Claim is untimely as to him as well. Plaintiffs' arguments alleging deliberate conduct including concealment of Dr. Insler's relationship to Lincoln is rejected by this Court. There is no evidence of it aside from plaintiff's self-serving assertions. Plaintiff's failure to serve a timely Notice of Claim on HHC is not due to any actions or inactions on the part of defendant. Furthermore, the Court finds that it was an unfortunate result of plaintiff's failure to sue NYCHHC timely as well as his refusal to consolidate the case of Dr. Insler with NYCHHC that resulted in Dr. Insler's inability to prove his relationship with Lincoln until 2010. The Court finds unavailing plaintiff's claims of lack of knowledge of the defendants' relationship.

The Court rejects plaintiff's argument that continuous treatment applies to

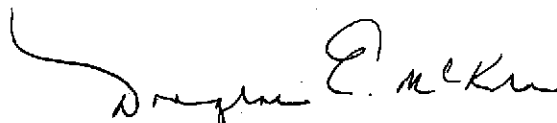
render the Notice of Claim timely. The medical record and testimony of plaintiff established that when Mr. Navarro was discharged on July 15, 2002 no further medical treatment was anticipated at Lincoln Hospital by plaintiff or hospital staff except for the removal of the sutures on August 8th. No other follow-up appointments were made nor was plaintiff instructed to return.

For all the aforementioned reasons, plaintiff's Order to Show Cause is denied.

So ordered.

Dated:

October 24, 2011

A handwritten signature in cursive script, appearing to read "Douglas E. McKeon".

Hon. Douglas E. McKeon, J.S.C.