

Colabella v Sayegh

2013 NY Slip Op 31634(U)

July 19, 2013

Sup Ct, New York County

Docket Number: 800201/11

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

COLABELLA, Noelle

INDEX NO. 800201/11

- v -

MOTION DATE 4-9-13

Sayegh

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to for summary judgment

Notice of Motion / Order to Show Cause - Affidavits - Exhibits _____

No(s) 1-6

Answering Affidavits - Exhibits _____

No(s) 7

Replying Affidavits _____

No(s) 7

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
& ORDER**

FILED

JUL 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/19/13

Joan B. Lobis, J.S.C.
JOAN B. LOBIS

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:.....MOTION IS GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
NOELLE COLABELLA and TONI ANN
COLABELLA, Individually and as Mother and Natural
Guardian of NOELLE COLABELLA,

Plaintiffs,

Index No. 800201/11

-against-

Decision and Order

RICKY J. SAYEGH, M.D., MIDLAND AVENUE
FAMILY PRACTICE, P.C., HOPE A. BERKELEY,
M.D., CARLO O. BAYRAKDARIAN, M.D.,
STEPHEN C. KLASS, M.D., LAWRENCE S. HONIG,
M.D., NEW YORK-PRESBYTERIAN/COLUMBIA
UNIVERSITY MEDICAL CENTER, THE
NEUROLOGICAL INSTITUTE OF NEW YORK,
COLUMBIA UNIVERSITY COLLEGE OF
PROFESSORS AND SURGEONS, TAUB INSTITUTE
FOR RESEARCH ON ALZHEIMER'S DISEASE AND
THE AGING BRAIN, and GERTRUDE H.
SERGIEVSKY CENTER,

FILED
JUL 23 2013
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Currently pending before this Court are four motions, sequence numbers 3 through 6, brought by defendants to dismiss this medical malpractice action. On June 28, 2012, Ricky J. Sayegh, M.D., (sequence number 3) moved for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules on the grounds that he did not depart from the standard of care in treating Noelle Colabella.¹ His motion was made returnable on August 9, 2012. In a separate motion, sequence number 4, Dr. Sayegh and his employer, Midland Avenue Family Practice, P.C.,

¹ The Court notes that Ms. Colabella was born on December 1, 1984, and was not an infant at the time the proceedings commenced. Without a court order of appointment, Toni Ann Colabella is not a proper guardian and should not be included in the caption in that capacity. To act as Noelle Colabella's guardian, Toni Ann Colabella must move for such relief by separate application.

move pursuant to 22 N.Y.C.R.R. § 202.27 to strike plaintiffs' Summons and Complaint and dismiss the action due to plaintiffs' failure to appear for a court-ordered conference on October 9, 2012. Defendants New York and Presbyterian Hospital, sued here as New York-Presbyterian/Columbia University Medical Center, The Neurological Institute of New York; the Trustees of Columbia University in the City of New York, sued here as Columbia University College of Professors and Surgeons; the Taub Institute for Research on Alzheimer's Disease and the Aging Brain; Gertrude H. Sergievsky Center; and Lawrence S. Honig, M.D., (sequence number 5); and Hope A. Berkeley, M.D., (sequence number 6) seek to dismiss the action for plaintiffs' failure to appear on October 9, 2012, and for plaintiffs' failure to provide outstanding discovery. 22 N.Y.C.R.R. § 202.27; C.P.L.R. § 3126. The motions to dismiss were made in late November and early December 2012. By so-ordered stipulation dated February 19, 2013, all motions were returnable April 9, 2013. The motions are consolidated for disposition.

This medical malpractice action was commenced on June 7, 2011, and involves Noelle Colabella's neurological care rendered by defendants. Ms. Colabella was diagnosed with NMDA Receptor Antibody Encephalitis, a condition that affects her immune system. Plaintiffs allege that the defendants were negligent by permitting her condition to deteriorate and that the defendants failed to obtain Ms. Colabella's informed consent. Plaintiffs also include a derivative claim on behalf of Toni Ann Colabella, Ms. Colabella's mother.

An initial preliminary conference was scheduled for June 12, 2012, but was adjourned to August 17, 2012. At that time, plaintiffs' attorney filed a motion to be relieved as their counsel.

By decision and order dated August 23, 2012, the Court granted the motion, stayed the matter for 60 days and directed the parties to appear for the adjourned preliminary conference on October 9, 2012. Defendants appeared for the conference on that date but plaintiffs did not. No further defaults occurred, and plaintiffs retained substitute counsel by early December 2012. After several more adjournments, the motions were submitted in April 2013. A preliminary conference has not yet been completed.

Turning first to the defendants' motions seeking to dismiss the action for plaintiffs' failure to appear on October 9, 2012, the defendants argue that plaintiffs have failed to provide a reasonable excuse for their default, have not shown merit to their action, and have failed to respond to discovery demands. In opposition, plaintiffs assert that the motions should be denied, as plaintiffs have not shown willful and contumacious behavior warranting a dismissal. Plaintiffs note that their prior attorney was released, and Toni Ann Colabella has been preoccupied with caring for daughter full-time since Noelle Colabella was diagnosed with the neurological disorder in February 2009. Toni Ann Colabella explains that she did not appreciate the significant of a non-appearance.

In an additional submission following a conference on February 19, 2013, the incoming plaintiffs' attorney offered an affidavit of merit from a physician, who reviewed the records and opines that the defendants' failure to aggressively treat Noelle Colabella was a deviation from the standard of care, and caused her permanent injuries. In reply, Dr. Sayegh argues that the plaintiffs' expert has not set out his or her credentials and that the expert has not stated an opinion with any particularity as to Dr. Sayegh's departures. In addition, Dr. Sayegh argues that since Noelle

Colabella's condition has no known cure, a delay in diagnosis would not have caused permanent damage. From the reply to the motion for summary judgment, it is apparent that Dr. Sayegh has considered the affidavit of merit from plaintiffs' expert as submitted for all purposes.

In considering the motions to dismiss for the one missed appearance, it is important to note that the law favors dispositions on the merits. Gibbs v. St. Barnabas Hosp., 61 A.D.3d 599 (1st Dep't 2009). One missed appearance in the context of this case is excusable. The affidavit of merit at this stage is sufficient to allow the case to continue. Additionally, the sanction of striking a complaint is not appropriate unless there has been a showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith. Gibbs, 61 A.D.3d at 599. Since no court orders have been entered that directed plaintiffs to provide discovery, their behavior cannot amount to willfulness or contumaciousness. The drastic remedy of preclusion or dismissal is not warranted at this time and the motions to dismiss are denied.

Turning now to Dr. Sayegh's summary judgment motion, Dr. Sayegh relies on his own statements that his treatment was correct, without the support of an expert affidavit. He details his treatment as Noelle Colabella's internist and states that he referred her to a neurologist. He indicates that his role in her treatment was to monitor her general health and argues that her treatment for NMDA Receptor Antibody Encephalitis was the province of a neurologist. Furthermore, he states that there is no known cure or treatment for this condition. Dr. Sayegh has established a prima facie case for summary judgment. While the affidavit of merit submitted by plaintiffs is sufficient to allow them to vacate their default on October 9, 2012, it is not sufficient to

defeat a motion for summary judgment. The motion for summary judgment is granted.

The Court notes that the summary judgment motion only addressed the medical malpractice claim. The complaint includes a cause of action for lack of informed consent against Dr. Sayegh. The merits of that claim have not been considered and the claim survives. Accordingly, it is

ORDERED that the motions to dismiss (motion sequence numbers 4, 5, and 6) are denied; it is further

ORDERED that the motion for summary judgment by Ricky J. Sayegh, M.D., (motion sequence number 3) is granted solely to the extent of dismissing the claim for medical malpractice; and it is further

ORDERED that the parties shall appear for a preliminary conference on Tuesday, August 20, 2013, at 2:30 p.m.

FILED

Dated: *July 19*, 2013

JUL 23 2013 ENTER:

**NEW YORK
COUNTY CLERK'S OFFICE**

JBL

JOAN B. LOBIS, J.S.C.