

Pantaleon v St. Joseph of the Holy Family School

2013 NY Slip Op 32319(U)

September 25, 2013

Sup Ct, New York County

Docket Number: 101667/10

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C.
Justice

PART 48

Index Number : 101667/2010
PANTALEON, MILAGROS
vs.
SAINT JOSEPH OF HOLY
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

*Mtn decided in accordance w/ the accompanying
memorandum decision/order of the cmt.*

FILED

OCT 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/25/13

JEFFREY K. OING
J.S.C.

- 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
COUNTY OF NEW YORK: IAS PART 48

MILAGROS PANTALEON, individually and as
mother and natural guardian of EMILLYAH
JEFFERSON

Plaintiffs,

- against -

ST. JOSEPH OF THE HOLY FAMILY SCHOOL,

Defendant.

Index No.: 101667/10

Mtn Seq. No. 003

DECISION AND ORDER

FILED

JEFFREY K. OING, J.:

OCT 01 2013

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This personal injury action arises of a 2008 incident in which the 4 year old infant plaintiff Emillyah Jefferson (the "infant plaintiff") sustained injuries when she fell off the stairs of a slide at a Central Park playground due to the allegedly negligent supervision of defendant St. Joseph of the Holy Family School while on a school trip.

In motion sequence no. 002, defendant moved to dismiss this action for failure to prosecute. In that regard, the record demonstrates that the infant plaintiff repeatedly failed to appear for a court ordered independent medical examination ("IME"). In a decision and order, entered October 18, 2012, this Court granted the motion dismissing this action without prejudice. Plaintiffs now move for renewal of this Court's decision and order.

To begin, the motion is timely insofar as a renewal motion does not have time restrictions upon which it must be made (CPLR

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2221(e)). As indicated, the Court dismissed this action due to plaintiffs' failure to comply with four separate written Orders of this Court and one oral directive from Administrative Judge Sherry Klein-Heitler to produce the infant plaintiff for an IME.

In support of their motion, plaintiffs argue that the renewal motion should be granted for the following reasons: (1) at the time that plaintiffs' opposition to the dismissal motion was submitted, the whereabouts of the infant plaintiff's mother, Milagros Pantaleon, were unknown, and (2) within days following this Court's decision and order dismissing the instant case -- Pantaleon contacted her counsel's office to purportedly explain why she could not be found and why the infant plaintiff was never brought to any of the scheduled IME appointments (Cohen Affirm., ¶ 3; Pantaleon Aff., ¶ 6, attached to Cohen Aff., Ex. D). She explained that "personal troubles" forced her from her apartment for approximately two years (Pantaleon Aff., ¶ 4). She also stated that she did not "alert [her] attorneys to [her] move as [she] did not have a permanent living situation" and explained that her "cell phone was often disconnected or turned off" (Id., ¶ 4). Pantaleon claims that she only found out on or about October 12, 2012 that her counsel was looking for her when she "received notice from Emillyah's school that the lawyers at Goidel & Siegel, LLP needed to speak to [her]" (Id., ¶ 6).

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In opposition to the instant motion, defendant argues that plaintiffs fail to provide any detail explaining the circumstances that resulted in the loss of communication between counsel and Pantaleon. Nor does the record demonstrate any reasonable excuse or proof of meritorious claim to warrant reversal of this Court's Order dismissing the complaint. Additionally, defendant points to the fact that plaintiffs' counsel's affirmation in support of this motion fails to provide any information about the efforts made by counsel's firm to locate Pantaleon in the 22 months that lapsed from December 30, 2010, the date defendant first designated the infant plaintiff's IME, until this Court's dismissal of the complaint in October 2012.

The record indicates that plaintiffs' counsel did place a telephone call on an unspecified date to the infant plaintiff's school (Cohen Affirm., ¶6, fn 1). Plaintiffs also submit an affidavit from Simon Berezhansky, a paralegal in the office of Goidel & Siegel, LLP, who details the efforts he made to locate Pantaleon on July 12, 2012, the date in which this action came before Justice Heitler a second time (Cohen Affirm., Ex. C).

A motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior determination," and must set forth a "reasonable justification for the failure to present such facts on the prior motion" (CPLR

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2221[e)). Renewal may be properly granted when a witness, unavailable at the time of the original motion, becomes available (Szentmiklosy v County Neon Sign Corp., 276 AD2d 406, 406-07 [1st Dept 2000]).

Here, renewal is appropriate because Pantaleon could not be located at the time of the original motion to dismiss, which was based on the infant plaintiff's nonappearance at scheduled IMEs. The reason for the nonappearance of the infant plaintiff, who at that time was 8 years old, was due to the mother's absence. This explanation is reasonable. Indeed, to penalize the 8 year old infant plaintiff for her mother's failure to maintain contact with counsel would not be proper, particularly where the dismissal is not based on substantive grounds (Tishman Constr. Corp. v City of New York, 280 AD2d 374 [1st Dept 2001]).

This Court, however, is mindful of the mother's persistent past inability to comply with its numerous orders for the infant plaintiff to be produced for an IME, although albeit the failures may have been beyond her control. Accordingly, the motion to renew is granted on the condition that the infant plaintiff, Emillyah Jefferson, be produced for an IME within sixty (60) days after service of a copy of this order with Notice of Entry. In the event that plaintiff mother fails to comply with this directive, defendant's counsel shall submit a proposed order on notice dismissing this action with prejudice.

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Accordingly, it is

ORDERED that plaintiffs' motion for leave to renew is granted; and it is further

ORDERED that upon renewal, the Court vacates its prior Order, dated October 12, 2012, and denies defendant's motion to dismiss for lack of prosecution, and it is further

ORDERED that the infant plaintiff, Emillyah Jefferson, shall be produced for an IME within sixty (60) days after service of a copy of this order with notice of entry; and it is further

ORDERED that in the event that plaintiffs fail to comply with this directive defendant's counsel shall submit to Part 48 a proposed order on notice dismissing this action with prejudice; and it is further

ORDERED that upon service of a copy of this order with notice of entry upon the Clerk of Trial Support (Room 158), the Clerk is respectfully directed to restore this action to Part 48; and it is further

ORDERED that the parties appear for a status conference in Room 242, 60 Centre Street, on December 11, 2013, at 10 a.m.

This constitutes the decision and order of the Court.

Dated: 9/25/13

FILED
OCT 01 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. JEFFREY K. OING, J.S.C.