Morante v Studin
2014 NY Slip Op 34026(U)
December 4, 2014
Supreme Court, Nassau County
Docket Number: 19885/06
Judge: Antonio I. Brandveen

[* 1]

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

JOAN K. MORANTE and ALEX MORANTE,

Plaintiff,

- against -

JOEL R. STUDIN, M.D. and PREMIER MEDICAL, PC,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 19885/06

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The plaintiff moves this court for an order to restore this matter, previously marked off the court calendar, to the active calendar of the court. This is an action for medical malpractice.

The attorney for the plaintiff asserts that the prior order of this court dated May 24, 2010, which partially granted the motion by the plaintiff to sanction the defendant for failing to provide discovery, was incorrectly marked "Final" by the court. As a result of this "Final" marking this matter was marked off the court calendar by the clerk of the court. He states no Note of Issue had been filed and the action was not put on the trial

calendar and discovery was still ongoing at the time the case was marked off the calendar. He avers that he failed to take action to rectify this error because he was a new attorney, inexperienced and overwhelmed by his case load. He also states he was unable to address this issue because he was required to attend to the care of his elderly parents for the past several years.

Plaintiff argues, inter alia, that the mechanism for dismissal of a pre Note of Issue case that has been marked off the calendar is found in CPLR 3126 which requires the service of a 90 day notice to resume prosecution to serve as a basis for a motion to dismiss

In an affirmation in opposition by Daniel F. Dorman, Esq., attorney for the defendant, he argues, inter alia, that the reasons advanced by plaintiff's attorney for his delay for many years to restore this matter are irrelevant and improper. He further contends that a motion pursuant to CPLR 3216(a) which requires the service of a 90 day notice upon a party that neglects an action was not required here as that section presumes that an effort is undertaken to dismiss an active file whereas this case was marked disposed in May 2010. He argues further that to restore this matter was result in extreme prejudice to his client. He points out that Dr, Studin discarded his records concerning the plaintiff, necessary for the presentation of a defense, several years after he last treated the plaintiff in 2012 and more that 2 years after the case was marked disposed and the doctrine of laches compels the court to deny this application.

In *Cadichon v Facelle*, 18 N.Y.3d 230 (2011) the Court of Appeals held plaintiffs were entitled to vacatur of the dismissal of their medical malpractice action for neglect to prosecute where the record indicated that the action was ministerially dismissed, without notice to the parties and without entry of any final order of dismissal by the court. The court found that " where a case proceeds to the point where it is subject to dismissal, is should be the trial court, with notice to the parties, that should make the decision concerning the fate of the case, not the Clerk's Office"(Id. at 234).

In the recent case of *Arroyo v. Board of Educ. of City of New York* 110 A.D.3d 17, 19, 2013 N.Y. Slip Op. 05507 (2013) the Appellate Division of this Department also spoke directly to the issue raised here :

> At the outset, we note that we summarized the law applicable to the issue in this case in *Lopez v Imperial Delivery Serv.* (282 AD2d 190 [2001]), where we explained the interplay among three case management devices: CPLR 3404, 22 NYCRR 202.27, and CPLR 3216. In *Lopez,* we made clear that none of these devices applies to a pre-note-of-issue case where, as here, there has been no order dismissing the complaint pursuant to 22 NYCRR 202.27, and the defendant has never made a 90-day written demand on the plaintiff to serve and file a note of issue pursuant to CPLR 3216 (*see Varricchio v Sterling*, 86 AD3d 535, 536 [2011]; *Wasif v Khan*, 82 AD3d 1084 [2011]; *Mitskevitch v City of New York*, 78 AD3d 1137, 1138 [2010]; *Grant v County of Nassau*, 28 AD3d 714 [2006]; *Clark v Great Atl. & Pac. Tea Co., Inc.*, 23 AD3d 510, 511 [2005]; *Lopez v Imperial Delivery Serv.*, 282 AD2d at 199). In this case, the Board attempts to avoid the holding in *Lopez* by relying on the doctrine of laches as the basis for dismissing the complaint.
>
> Moreover, the doctrine of laches does not provide an alternate basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216 (b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable. Indeed, the Court of

Appeals concluded in *Airmont Homes* that dismissal for either gross laches or failure to prosecute was not available in the absence of compliance with CPLR 3216 (*see Airmont Homes v Town of Ramapo*, 69 NY2d at 902).

Accordingly, in the absence of a formal court order of dismissal and the requirements of CPLR 3126, the motion by the plaintiff to restore this action to active status is granted. All parties are directed to appear for a conference before this court on January 14, 2015 at 10:00 a.m.

So ordered.

Dated: **December 4, 2014**

ENTER:

J. S. C.

NON FINAL DISPOSITION

ENTERED

DEC 08 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE