

<b>Palmer v Long Is. Coll. Hosp.</b>
2015 NY Slip Op 31152(U)
July 7, 2015
Supreme Court, Kings County
Docket Number: 500399/2013
Judge: Laura Lee Jacobson
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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Borough of Brooklyn, City and State of New York, on the 7<sup>th</sup> day of May 2015.

PRESENT:  
HON. LAURA L. JACOBSON

Justice

\_\_\_\_\_  
WILLIAM PALMER,  
Plaintiff,

**DECISION/ORDER**

Cal. No.: 24

-against-

Index No.:500399/2013

LONG ISLAND COLLEGE HOSPITAL,  
Defendant.

**The following papers numbered 1 to 4 read on this motion**

**Papers Numbered**

Notice of Motion - Order to Show Cause-Cross-Motion  
and Affidavits (Affirmations) Annexed \_\_\_\_\_  
Answering Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Pleadings-Exhibits \_\_\_\_\_  
Stipulations - Minutes \_\_\_\_\_  
Filed Papers \_\_\_\_\_

1-2  
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3  
\_\_\_\_\_  
4  
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In this personal injury action, defendant Long Island College Hospital moves pursuant to CPLR §3216 for an order dismissing the complaint for want of prosecution on the merits and with prejudice; and directing the Clerk of the Court to enter judgment accordingly. Plaintiff commenced this action seeking damages for personal injuries allegedly sustained on February 4, 2010, when plaintiff fell while taking a shower at defendant's facility. This action was commenced by the filing of a Summons and Complaint on January 25, 2013. Issue was joined on July 31, 2013 by service of a

Verified Answer and Combined Discovery Demands. Prior to commencement of this action and after plaintiff's alleged injury, defendant petitioned the Court to approve the sale of its assets to the State University of New York Downstate Medical Center (hereinafter "SUNY Downstate"). Claims against defendant were not assumed by SUNY Downstate and were to be resolved by implementation of a Malpractice Trust to be used for valuing and paying claims against defendant. The plan was approved by a February 16, 2012 court order signed by Justice Carolyn Demarest. Pursuant to the order, claimants who do not opt out of the plan, shall have their claims resolved in accordance with the plan which provides for mediation and thereafter, if necessary, binding arbitration.

Defendant contends that when it did not receive responses to any of its discovery demands, it served a 90-day notice on plaintiff by certified mail on August 8, 2014. Defendant claims that in response, plaintiff's counsel sent a letter dated September 29, 2014 acknowledging receipt of the 90-day notice but asserting that because the case was under the Trust Plan, a note of issue could not be filed. Defendant contends that plaintiff requested that the 90-day notice be withdrawn. However, plaintiff had not submitted any response to defendant's discovery demands. By letter dated October 15, 2014, defendant advised plaintiff that it would withdraw the 90-day notice upon receipt of responses to their discovery demands. Defendant also advised plaintiff that the fact that this case is under the Trust Plan does not put a hold on litigation. Defendant asserts that more than 90 days has elapsed since service of the 90-day notice and plaintiff has still not responded to defendant's discovery demands. Consequently, defendant argues that plaintiff's complaint must be dismissed for failure to prosecute this action.

Plaintiff's counsel contends that he received a copy of Justice Demarest's February 16, 2012 order, from defendant's counsel Saretsky, Katz, Dranoff & Glass, LLP under cover letter dated February 27, 2014. The letter advised that plaintiff's claims were subject to the Court's order including the resolution proceedings. The letter also provided that "On behalf of CCC (Combined Coordinating Council, Inc.), instructions concerning those resolution proceedings will be provided to you by separate mailing from National Arbitration and Meditation, Inc." However, plaintiff's counsel claims that he did not receive forms from the Combined Coordinating Council Plan Administrator until November 18, 2014, which was after the 90-day notice had expired. Plaintiff's counsel claims that he did not provide the requested discovery because his office assumed that the CCC documents would outline necessary procedures to comply with discovery. According to plaintiff's counsel, he believed that discovery in the nature of a bill of particulars and examination before trial could not be conducted because Justice Demarest's order provides for discovery to the extent reasonably necessary for the conduct of mediation/arbitration. Plaintiff's counsel also contends that personal and family health matters also prevented him from promptly responding to the 90-day notice.

Plaintiff's counsel argues that these circumstances along with his uncertainty as to the manner of proceeding and the fact that he did not receive the CCC documents until weeks after he had been served with the 90-day notice, establish a justifiable excuse for the delay. Plaintiff's counsel contends that there is no evidence that plaintiff intended to abandon this action. Plaintiff's counsel alleges that he contacted the attorneys for defendant after he received the 90-day notice and expressed his opinion that the matter was to be resolved by mediation/arbitration and further, he contacted the attorneys for the Plan administrator and requested copies of the notification procedures under CCC and NAM. Additionally, plaintiff's counsel argues that defendant withdrew the 90-day notice by letter dated October 17, 2014. Plaintiff's counsel claims that although defendant may argue that the 90-day notice was conditionally withdrawn, defendant did not indicate the time period during which it was withdrawn or suspended. Plaintiff's counsel further asserts that defendant's counsel did not provide additional notice that they were reinstating the 90-day notice. Plaintiff's counsel argues that he has met his burden in demonstrating a justifiable excuse for the delay and that plaintiff has a meritorious claim demonstrated by plaintiff's affidavit of merit and verified complaint. Consequently, plaintiff requests that the Court, in its discretion, deny defendant's motion to dismiss.

In reply, defendant argues that plaintiff still has not responded to its discovery demands. Defendant asserts that it never withdrew its 90-day notice. Defendant contends that the October 17, 2014 letter states that defendant would withdraw the 90-day notice upon receipt of responses to their demands. Since plaintiff still has not provided any discovery, the 90-day notice is completely effective and valid. Defendant notes that although plaintiff had every opportunity to attach discovery responses to his opposition papers, he failed to do so. Defendant claims that plaintiff is unable to provide any justifiable excuse for the delay and he would be unable to establish a good and meritorious cause of action. Defendant argues that as such, the complaint must be dismissed for failure to prosecute pursuant to CPLR §3216.

"CPLR §3216 is extremely forgiving in that it never requires but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (*Goldblum v. Franklin Munson Fire District*, 27 AD3d 694 [2<sup>nd</sup> Dept. 2006]). "If a party fails to comply with a 90-day demand to serve and file a note of issue, but demonstrates a justifiable excuse for the delay and a good and meritorious cause of action (CPLR§3216 [e]), the trial court may not dismiss the action" (*Di Simone v. Good Samaritan Hospital*, 100 NY2d 632, 633 [2003]). However, "such a dual showing is not strictly necessary in order for plaintiff to escape such a dismissal" (*Davis v. Goodsell*, 6 AD3d 382, 384 [2<sup>nd</sup> Dept. 2004]). Here, plaintiff's counsel argues that he was uncertain as to the manner in which to proceed in this matter and that there was a delay in receiving instructions from the CCC. However, this does not explain the fact that more than eight

(8) months after service of the 90-day notice and more than four (4) months after filing of the instant motion, plaintiff still has not responded to defendant's discovery demands. Moreover, plaintiff's counsel created numerous delays in responding to the instant motion. However, plaintiff has provided evidence of a meritorious claim and there is no evidence that plaintiff intended to abandon this action.

Accordingly, defendants' motion to dismiss is granted unless plaintiff provides a response to defendants' discovery demands within thirty(30) days of service of a copy of this order with notice of entry; and it is further ORDERED that plaintiff's counsel pay defendant's counsel costs in the amount of \$100.00, within ten (10) days. Failure of the plaintiff to comply with these two conditions, will result in the granting of the motion to dismiss.

This constitutes the decision and order of the court.

ENTER  
\_\_\_\_\_  
J.S.C  
\_\_\_\_\_  
HON. LAURA JACOBSON

FILED  
COURT CLERK  
15 JUN 23 AM 8:58  
*[Handwritten initials]*