

**Wynter v Our Lady of Mercy Med. Ctr.**

2015 NY Slip Op 31757(U)

August 3, 2015

Supreme Court, Bronx County

Docket Number: 23492/91

Judge: Douglas E. McKeon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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OTHILDA WYNTER, as Administrator of the  
Estate of CLIFTON WYNTER, and  
OTHILDA WYNTER,

Plaintiff(s)

- against -

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OUR LADY OF MERCY MEDICAL CENTER,  
NEW YORK CITY HEALTH AND HOSPITAL  
CORPORATION, STEPHEN WEITZ, M.D.,  
PATRICIA SCANLON, M.D.,  
EVELYN CAMPBELL, R.N.,  
JERRY BALENTINE, M.D.,  
BIG APPLE AGENCY, INC., and  
LORRAINE WILLIAMS, R.N.,

Defendant(s)

DECISION/ORDER

-----X

**HON. DOUGLAS E. MCKEON**

Plaintiff's motion to vacate the order of this Court dated July 24, 2013 which dismissed this action pursuant to CPLR § 5015(a)(1) is denied.

Even accepting counsel's argument that he did not receive notice of the missed conferences and thus failed to appear, the failure to appear is not excusable. Plaintiff's counsel had an obligation to investigate the status of this case and to make reasonable efforts to pursue the action. The Court notes that the defendants

appeared without being notified by the Court. Plaintiff's counsel should have checked the status of the case by contacting the Court, checking the status on line, or receiving automatic notifications through e-courts or e-law as the defendants herein did. Because this case has languished for over 23 years with an extensive history of failing to move the prosecution of this action forward the motion is denied.

While co-defendant's bankruptcy stay cannot be blamed on plaintiff's counsel, this matter languished for four years and was previously dismissed due to counsel's failure to prosecute in 2001. Furthermore, after being given a second chance to prosecute this action by the Appellate Division order in 2004 plaintiff's counsel failed to serve a complaint for two years and, after the bankruptcy stay was lifted in 2010, plaintiff's counsel did nothing to advance this case aside from appearing on the matter for a compliance conference once on October 26, 2010. Plaintiff has failed to comply with any of the discovery issues that were agreed upon at the October 26, 2010 conference including filing a Note of Issue. That request was made past the deadline to file the Note of Issue and plaintiff's counsel failed to file by the extended deadline and still had not filed a Note of Issue when this matter was dismissed by this Court two years later on July 24, 2013. Furthermore, while plaintiff's counsel states that he did not receive notification of the two conferences he missed, counsel admits that he received defendant's order with notice of entry that was served on August 13, 2013. Counsel did nothing to rectify the situation until filing this motion

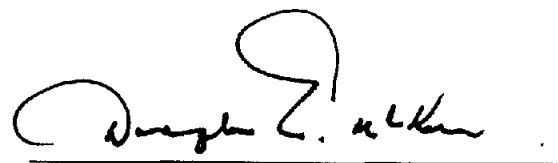
to vacate almost one year later on August 5, 2014. Denial of vacature is appropriate in cases such as this where the plaintiff has consistently neglected Court directives and where vacature would result in substantial prejudice to the defendants. See Tortarello v. Carlin 286 A.D.2d 628 (1<sup>st</sup> Dept. 2001). Here, the Court finds that plaintiff has an extensive history of delaying and neglecting this matter resulting in defendants being involved in this litigation for 23 years. In fact there is still outstanding discovery in this matter. Due to the inordinate delay in prosecuting this case defendants no longer have relevant records and clear memories of any of the facts herein. Plaintiff has been dead for over 15 years and it is highly unlikely that any medical providers or non-party witnesses can accurately testify to his care and treatment herein. Our Lady of Mercy Medical Center filed for bankruptcy in 2007 and has never reopened. It is unreasonable to expect the doctors herein to recall details of this long ago event.

Given the repeated nature of plaintiff's delays herein as well as the extreme prejudice to defendants were this action to be restored, the Court finds plaintiff's arguments to be unavailing. The Court finds that a reasonable excuse has not been proffered in seeking to vacate the dismissal herein. Plaintiff has made no effort to excuse the default of the October 26, 2010 order which directed a further deposition and to file a Note of Issue by May 1, 2011. While the Court may have failed to notify plaintiff of the May 20, 2013 and July 24, 2013 conferences the Court notes, as

already discussed, that the other parties made themselves aware of such conferences and appeared.

So ordered.

Dated: *August 3, 2015*

A handwritten signature in black ink, appearing to read "Douglas E. McKeon". The signature is written in a cursive style with a large, looping initial "D".

Douglas E. McKeon, J.S.C.