Martinez v City of New York
2016 NY Slip Op 32092(U)
September 20, 2016
Supreme Court, Queens County
Docket Number: 18409/09
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

ALTAGRACIA MARTINEZ,
Plaintiff,

-against-

THE CITY OF NEW YORK and BANK OF AMERICA, N.A.,
Defendants.

Index Number 18409/09

Motion Date June 15, 2016

Motion Seq. No. 3

Motion Cal. No. 108

The following papers numbered 1 to 13 read on this plaintiff to vacate the court's order dismissing the action on March 28, 2016, and to restore the matter to the active trial calendar.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Answering Affidavits - Exhibits	5 - 10
Reply Affidavits.....	11- 13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on April 11, 2008, when she was allegedly caused to trip and fall due to a sidewalk defect in front of 105-05 Martense Avenue, in the county of Queens, New York. This case was dismissed from the trial calendar on March 28, 2016, due to plaintiff's failure to appear for two pre-trial conferences in the Trial Assignment Part of Queens Supreme Court. Plaintiff moves to vacate the dismissal order and to restore the case to the active trial calendar, on the ground that counsel purportedly never received notice from the court or from defendant City of New York of either conference. The motion is separately opposed by defendant City of New York and Bank of America, N.A. ("BANA").

Facts

Plaintiff commenced the instant action on July 10, 2009, for acts which allegedly occurred on April 11, 2008. Issue was joined on May 19, 2010, when BANA served its Verified Answer to the complaint, and also asserted a cross claim against co-defendant. In May and June 2010, plaintiff and BANA also served discovery requests, including deposition notices. Approximately two and one-half years after the Verified Complaint was filed, the plaintiff filed a Request for Judicial Intervention (RJI), on January 30, 2012, and requested a Preliminary Conference.

A Preliminary Conference was held on February 14, 2012, at which plaintiff and defendants appeared. The Preliminary Conference Order set a schedule for all outstanding discovery, including depositions. In contravention of the Preliminary Conference Order, counsel for plaintiff never provided outstanding discovery nor was plaintiff produced for deposition.

On August 20, 2012, a Compliance Conference was held. The Compliance Conference Order set a new schedule to complete all outstanding discovery, including depositions. Counsel for plaintiff did not provide outstanding discovery, nor was plaintiff produced for deposition. On or about September 4, 2012, Bryan Cave, LLP, was substituted as counsel for BANA in the place of the Law Office of William J. Fitzpatrick. After receipt and review of the relevant litigation files transferred by BANA's prior counsel, Bryan Cave LLP determined that plaintiff's compliance with its outstanding discovery obligations was incomplete in contravention of both the Preliminary Conference Order and the Compliance Conference Order. In October 2012 and November 2012, BANA's counsel communicated with plaintiff's counsel with regards to the outstanding discovery. Counsel for plaintiff did not provide the documents requested nor produce plaintiff for deposition.

Notwithstanding the fact that he had not produced plaintiff for deposition, on January 24, 2013, counsel for plaintiff served a Note of Issue falsely certifying that discovery had been completed. Counsel for plaintiff also certified that "[t]here has been a reasonable opportunity to complete the foregoing proceedings", and that this "case is ready for trial." In conjunction with the Note of Issue, counsel for plaintiff also submitted an affirmation in which he also asserted (falsely):

- that "a preliminary conference was held on February 14, 2012. All directives contained in the Order have been complied with."

- That "all discovery materials including medical reports and medical

authorizations have been exchanged with the defendants on the same date as the Bill of Particulars and in Response to the Preliminary Conference Order;" and

- That "a compliance conference was held on August 20, 2012. All directives contained in the Order have been complied with except Examinations Before Trial of all parties and plaintiffs' [sic] Medical Examinations.

The record indicates that neither the Preliminary Conference Order nor the Compliance Conference Order were complied with as there still remained outstanding documents and plaintiff's deposition. Thus, BANA served a Motion to Vacate the Note of Issue on February 13, 2013. On the March 13, 2013 return date for the Motion to Vacate, plaintiff and BANA stipulated to a new discovery schedule.

A compliance conference was held on February 17, 2014. Neither plaintiff nor her attorney appeared. On February 24, 2014, plaintiff's Note of Issue, previously filed on January 24, 2013, was vacated, and the court marked the matter "disposed."

On March 28, 2014, plaintiff took BANA's deposition. Plaintiff was notified that the court had removed the case from its calendar because of plaintiff's failure to appear at the February 17, 2014 conference. In July 2014, plaintiff responded to BANA's outstanding discovery requests, but did nothing further for nine (9) months.

On January 23, 2015, BANA served plaintiff, by certified mail, with a Demand for Service and Filing of Note of Issue pursuant to CPLR 3216[b][3], with 90 days ("the 2015 Demand"), as the previously-filed Note of Issue had been vacated by the court. On April 20, 2015, the 88th day, plaintiff served a second Note of Issue and Compliance Affirmation. The Note of Issue did not include a Certificate of Readiness. The court did not accept the Note of Issue as the matter had been marked "disposed" in 2014, so on or about September 9, 2015, plaintiff served a Notice of Motion, to vacate the court's dismissal of February 24, 2015, and to restore the matter to the trial calendar. On the October 15, 2015 return date for the motion to vacate, at the court's urging, plaintiff, BANA and the City of New York stipulated that discovery was complete and that plaintiff was to file a Note of Issue no later than November 20, 2015, and that if that occurred, the matter would be restored to the Trial Scheduling Part calendar for February 22, 2016. Plaintiff did not file the Note of Issue on or before November 20, 2015, and did not appear at the conference on February 22, 2016. The record indicates that the Stipulation was signed by plaintiff's counsel.

On February 17, 2016, BANA served plaintiff, by certified mail, with a second

Demand for Service and Filing of Note of Issue pursuant to CPLR 3216[b][3] ("the 2016 Demand"). In response, plaintiff served a Note of Issue on February 22, 2016, Certificate of Readiness, Jury Demand and Compliance Affirmation. Plaintiff filed the Note of Issue, but did not appear at the February 22, 2016 Trial Scheduling Conference, which date had been set on October 15, 2015. Upon plaintiff's failure to appear at the February 22, 2016 conference, the court, as a courtesy to plaintiff, adjourned the Trial Scheduling Conference to March 28, 2016. On March 28, 2016, plaintiff failed to appear and the court dismissed the action.

On or about April 6, 2016, plaintiff filed the instant motion to vacate the dismissal, and to restore the action to the active trial calendar.

Discussion

Contrary to plaintiff's contention, the action was dismissed pursuant to 22 NYCRR 202.27 (b) for counsel's failure to appear at two scheduled conferences, namely on February 22, 2016 and March 28, 2016 (*see Chechen v Spencer*, 68 AD3d 801, 801-802 [2009]; *Saunders v Riverbay Corp.*, 17 AD3d 137, 138 [2005]). Consequently, in order to vacate the dismissal of the action, the plaintiff was required to demonstrate a reasonable excuse for her failure to appear and a potentially meritorious cause of action (*see Grippi v. Balkan Sewer & Water Main Serv.,* 66 AD3d 837, 838; *Psomatithis v Transoceanic Cable Ship Co., Inc.,* 39 AD3d 837, 838; *Hanscom v Goldman*, 109 AD3d 964, 965 [2013]; *see e.g. Brooks v Haidt*, 30 AD3d 365 [2006]). Plaintiff's counsel states that he was unaware of the March 28, 2016 conference because the letter from defendant City of New York, dated February 22, 2016, advising plaintiff of the adjournment, did not include counsel's proper suite address. Counsel does not address his failure to appear on February 22, 2016, the date plaintiff had previously stipulated to appear. Significantly, counsel's claim that the March 28, 2016 appearance did not appear on E-Courts, is belied by the record. Nonetheless, the excuse offered, an unexplained occurrence of law office failure, is not a reasonable one (*see Chechen v Spencer*, 68 AD3d at 802; *Matter of Denton v City of Mount Vernon*, 30 AD3d 600, 601 [2006]; *Montalvo v Nel Taxi Corp.*, 114 AD2d 494, 495 [1985]).

Furthermore, a pattern of willful default and neglect should not be excused (*see Bowman v Kusnick,* 35 AD3d 643, 644 [2006]; *Wynne v Wagner,* 262 AD2d 556 [1999]). The plaintiff repeatedly failed to adequately comply with the court's discovery orders, and plaintiff's attorney failed to appear for two scheduled compliance conferences. The plaintiff failed to explain this pattern of willful neglect (*see Bowman v Kusnick,* 35 AD3d at 644; *Wechsler v First Unum Life Ins. Co.,* 295 AD2d 340, 341-342 [2002]; *Wynne v Wagner,* 262 AD2d 556 [1999]).

Moreover, the affidavit of merit submitted in support of the plaintiffs' motion to vacate was devoid of any evidentiary facts or detail regarding the defendants' alleged acts of negligence (*see Brownfield v Ferris*, 49 AD3d 790, 791 [2008]; *Smith v City of New York,* 237 AD2d 344, 345 [1997]; *Reilly-Whiteman, Inc. v Cherry Hill Textiles,* 191 AD2d 486, 487 [1993]; *Lener v Club Med,* 168 AD2d 433, 435 [1990]). Thus, the affidavit of merit, is insufficient to demonstrate the existence of a potentially meritorious cause of action (*see Bustamante v Green Door Realty Corp.*, 69 AD3d 521 [2010]; *Brownfield v Ferris*, 49 AD3d 790, 791-792 [2008]).

Accordingly, the motion which is, in effect, to vacate the dismissal of the action pursuant to 22 NYCRR 202.27 and to restore the action to the calendar, is denied (*see Siculan v Koukos*, 74 AD3d 946, 947, 902 NYS2d 627 [2010]; *Brownfield v Ferris*, 49 AD3d at 792).

Dated: September 20, 2016

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Howard G. Lane, J.S.C.