

Lee v Curtin
2018 NY Slip Op 31174(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 805108/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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CHRISTINE K. LEE and KENNETH LEE,

INDEX NO. 805108/12

Plaintiffs,

-against-

JOHN P. CURTIN, M.D., BEVERLY Y. WANG, M.D.,
LORRAINE PAN, M.D., DOROTA POPLOLEK, M.D.,
NEW YORK UNIVERSITY MEDICAL CENTER and
NEW YORK UNIVERSITY LANGONE MEDICAL
CENTER,

Defendants.

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JOAN A. MADDEN, J.:

In this action for medical malpractice, plaintiff Kenneth Lee (“plaintiff”), represented by counsel, moves pursuant to CPLR 5015(a)(1) to vacate the order of the Hon. Alice Schlesinger dated November 9, 2016, dismissing the action without prejudice for failure to prosecute, and to restore the action to this Court’s pre-note calendar. Defendants oppose.

Justice Schlesinger’s order states in its entirety as follows:

After a lengthy conversation somewhat of a personal nature, I believe Dr. Lee will not be successful in the near future in obtaining new counsel. In fact, he was considering discontinuing it. Rather than that I told him I would dismiss the action for failure to prosecute. I asked defense counsel to make such a verbal motion and she did. Her motion was to dismiss the action with prejudice. But I decline to do that as it is a decision not on the merits. So I am dismissing this action but without prejudice for failure to prosecute.

The order was order was e-filed and entered on November 10, 2016, and it was served with notice of entry on November 16, 2016. Plaintiff e-filed the instant Order to Show Cause on November 15, 2017, and it was signed on December 4, 2017. CPLR 5015(a) requires a motion

to vacate be made “within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party.” Defendants admit that the instant motion was made “on the eve of the deadline to do so.”

Given Justice Schlesinger’s explicit dismissal “for failure to prosecute,” the dismissal on those grounds of a pre-note case is governed by CPLR 3216. As the Court of Appeals has observed, CPLR 3216 “is extremely forgiving of litigation delay.” DiSimone v. Good Samaritan Hospital, 100 NY2d 632 (2003) (quoting Baczowski v. D.A. Collins Construction Co, Inc, 89 NY2d 499 [1997]). To vacate a dismissal pursuant to CPLR 3216, plaintiff must demonstrate both a reasonable or justifiable excuse for failing to prosecute the case, and a potentially meritorious cause of action. See Stroll v. Long Island Jewish Medical Center, 151 ADd3d 789 (2nd Dept 2017); Walker v. City of New York, 46 AD3d 278 (1st Dept 2007). Where as here the action involves claims for medical malpractice, an affidavit of merit from a medical expert is required to demonstrate a meritorious action. See DiSimone v. Good Samaritan Hospital, *supra*; Kaufman v. Bauer, 36 AD3d 481, 482 (1st Dept 2007). “Nevertheless, the showing of merit required on a motion to restore is less than that required to defend a motion for summary judgment.” *Id* at 482; see Polir Construction, Inc v. Etingin, 297 AD2d 509 (1st Dept 2002); Enax v. New York Telephone Co, 280 AD2d 294 (1st Dept 2001).

Plaintiff has made a sufficient showing of a justifiable excuse based on the reasons given by Justice Schlesinger for dismissing the action without prejudice for failure to prosecute, which clearly demonstrate that plaintiff did not intend to abandon the action. Justice Schlesinger expressly acknowledged plaintiff’s efforts to secure new counsel, but did not believe he would

succeed in doing so “in the near future.” She also persuaded plaintiff not to discontinue the action. As a result, she dismissed the action without prejudice for failure to prosecute in order to give plaintiff additional time to find a new attorney, and if he succeeded, he would then have the ability to move to vacate the dismissal and restore the action, and avoid any issue of untimeliness. Plaintiff has now retained counsel and is seeking to restore the action to active status.

Plaintiff has also made a sufficient showing as to a meritorious cause of action, based on the Affidavit of Merit from Dr. Richard L. Nemiroff, M.D. Dr. Nemiroff explains that plaintiff Ms. Lee was diagnosed with cervical cancer, and on February 8, 2010, defendant Dr. Curtain performed a “radical hysterectomy.” He explains that the “standard technique for performing a radical hysterectomy involves removal of 3 cm - 4 cm of the upper vagina in all aspect of the circumference of the cervix.”¹ Dr. Nemiroff states that a “pathology report indicates that the amount of vagina that was initially removed, along with the cervix, was at maximum 4mm anteriorly,” and “[a]lthough later in the surgery, 2.8 cm x 1.4 cm was removed, left unremoved was 1.6 cm of the lateral portion of the vagina.” He opines that it was “critical to remove a sufficient amount of the vagina, including the 1.6 cm that was not removed,” and that the “location of the reoccurrence of Ms. Lee’s cancer was in the right lateral corner” Dr. Nemiroff opines that “[i]n all probability, the surgical procedures performed on Ms. Lee on 02/08/2010 failed to remove all of the cancerous tissue,” as “[i]t would have been necessary to remove 3 cm -

¹Dr. Nemiroff also explains that “it is standard procedures to place clamps across the vagina and to cut below the clamps,” and opines that the “lateral corners of Ms. Lee’s vagina were not sufficiently removed, probably because the lateral corners of the vagina were clamped and suture-ligated.”

4 cm of the vagina , in order to ensure that all of the cancerous tissue was removed.” He states that Ms. Lee died on April 23, 2015, and opines that “[h]ad the surgery been performed properly, Ms. Lee would either not have had a reoccurrence of the cancer, or she would have had a significantly longer life before any such reoccurrence might have taken place.”

In opposition, defendants argue that they are prejudiced since “extensive discovery “ is outstanding, the alleged malpractice occurred eight years ago, New York Education Law requires medical records to be maintained for six years (seven years in New Jersey and Pennsylvania), and the IRS maintains records for three to six years at most. “[T]he mere passage of time does not establish prejudice.” Kaufman v. Bauer, supra at 484. However, given the age of this case, at the next scheduled status conference the Court will order expedited discovery to be completed in two months, and the parties shall be prepared to address all outstanding discovery at the conference. Any issue as to the prejudice to defendants due to the unavailability of medical or IRS records, shall be addressed by the trial court.

Defendants’ objections to Dr. Nemiroff’s affidavit are insufficient to warrant the denial of plaintiff’s motion. Plaintiff has submitted a Certificate of Conformity regarding Dr. Nemiroff’s out-of-state affidavit. Defendants cite no authority to support their assertion that a medical expert must be licensed in New York. Defendants object that Dr. Nemiroff fails to state that he has expertise in “gynecological cancers.” Dr. Nemiroff, however, specifically states that he is a clinical professor of medicine and surgery in the “field of obstetrics and gynecology,” he is licensed to practice medicine and surgery in Pennsylvania and New Jersey, and he has “treated patients with cervical cancer and [has] performed surgical procedures to excise cancerous tissue from patients, and to otherwise treat patients with this medical condition.” While defendants

further object that Dr. Nemiroff's opinion that the surgeon failed to remove all of the cancerous tissues, is "purely speculative" since he did not review the pathology slides, the affidavit is sufficient to demonstrate that plaintiff has a potentially meritorious action, as the "showing of merit required on a motion to restore is less than that required to defend a motion for summary judgment." Kaufman v. Bauer, *supra* at 482; see Polir Construction, Inc v. Etingin, *supra*; Enax v. New York Telephone Co, *supra*.

Thus, under the circumstances presented, and in light of the "strong public policy in favor of resolving cases on the merits," plaintiff's motion to restore is granted. and the order of dismissal is vacated and the action is restored to this Court's pre-note discovery calendar. Kaufman v. Bauer, *supra* at 482; accord Tsiormas v. Time Out Health & Fitness, 78 AD3d 619 (1st Dept 2010); Storchevoy v. Blinderman, 303 AD2d 672 (2nd Dept 2003).

Finally, since it is undisputed that plaintiff Christine K. Lee died during the pendency of this action, and that Kenneth K. Lee was appointed the administrator of her estate, the caption is amended to substitute plaintiff Christine K. Lee, as Kenneth K. Lee as the Administrator of the Estate of Christine K. Lee, Deceased.

Accordingly, it is

ORDERED that plaintiff's motion is granted and the order of Justice Schlesinger dated November 9, 2016 and entered November 10, 2016 is vacated, and the instant action is restored to this Court's pre-note calendar for a status conference on July 12, 2018 at 11:30 am; and it is further

ORDERED that the Clerk is directed to restore this action to this Court's pre-note calendar for a status conference on July 12, 2018 at 11: 30 am; and it is further

ORDERED that the caption is amended to substitute plaintiff Christine K. Lee, as Kenneth K. Lee as the Administrator of the Estate of Christine K. Lee, Deceased, and the caption as amended shall read as follows:

KENNETH K. LEE, as Administrator of the Estate of CHRISTINE K. LEE, Deceased, and KENNETH LEE, individually,

Plaintiffs,

-against-

JOHN P. CURTIN, M.D., BEVERLY Y. WANG, M.D., LORRAINE PAN, M.D., DOROTA POPLOLEK, M.D., NEW YORK UNIVERSITY MEDICAL CENTER and NEW YORK UNIVERSITY LANGONE MEDICAL CENTER,

Defendants

and it is further

ORDERED that plaintiff shall forthwith serve a copy of this order with notice of entry on the Clerk of Trial Support and the County Clerk so that their records can be altered to reflect the change in the caption substituting plaintiff Christine K. Lee, as Kenneth K. Lee, as the Administrator of the Estate of Christine K. Lee, Deceased; and it is further

ORDERED that the parties are directed to appear for a status conference on July 12, 2018 at 11:30 a.m., in Room 351, 60 Centre Street.

DATED: June 6, 2018

ENTER:



J.S.C.

HON. JOAN A. MADDEN
J.S.C.