

Kirk v Gupta

2018 NY Slip Op 31496(U)

July 3, 2018

Supreme Court, New York County

Docket Number: 805344/2013

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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RONALD KIRK, as Administrator of the Estate of
STEWART KIRK,

Plaintiff,

Index No. 805344/2013

-against-

Decision & Order

MANTU GUPTA, M.D. and COLUMBIA
PRESBYTERIAN MEDICAL CENTER,

Defendants.

-----X
MARTIN SHULMAN, J.:

In this action alleging medical malpractice and wrongful death, plaintiff, Ronald Kirk, as Administrator of the Estate of Stewart Kirk, Deceased (plaintiff or Kirk), moves pursuant to CPLR 5015(a)(1) to vacate this court's March 12, 2018 order (dismissal order) which was based upon plaintiff's failure to fully comply with defendant Mantu Gupta, M.D.'s (Dr. Gupta or defendant) discovery demands. Dr. Gupta, the sole remaining defendant in the action, opposes the motion.

By order dated July 18, 2017, this court dismissed this action pursuant to 22 NYCRR §202.27(b) based upon plaintiff's counsel's failure to appear for two court conferences on June 6, 2017 and July 18, 2017. Thereafter, plaintiff moved to vacate the default and defendant opposed the motion and cross-moved for relief pursuant to CPLR §3126 and/or 3124 based upon plaintiff's defaults in providing discovery. Plaintiff did not oppose the cross-motion.

By order dated October 27, 2017¹ this court granted Kirk's motion to vacate the July 18, 2017 dismissal order and restored the action to the calendar. This order also granted defendant's cross-motion to the extent of directing plaintiff, within 30 days of the electronic filing of the order, to fully comply with defendant's discovery demands. In the event of Kirk's failure to comply, the complaint was to be stricken.

Plaintiff served various responsive documents on November 30, 2017, which defendant deemed to be incomplete. Defense counsel then served a proposed dismissal order with notice of settlement, together with an affirmation detailing plaintiff's default (see NYSCEF Doc. No. 92). By notice of rejection filed on December 5, 2017, plaintiff's counsel rejected the notice of settlement and proposed order on the grounds of compliance (see NYSCEF Doc. No. 95).

At a December 12, 2017 conference, defense counsel advised the court that Kirk had not fully complied with the October 27, 2017 order. Over defendant's objection, this court extended additional time for plaintiff to comply prior to the next conference, which was scheduled for January 30, 2018. That conference was adjourned to February 6, 2018 on consent, after defense counsel waited for plaintiff's counsel to appear.

On February 6, 2018 defense counsel contacted the per diem attorney with whom she had spoken on January 30, 2018. Apparently, plaintiff's counsel did not calendar the conference date and a new date of February 27, 2018 was set.² On

¹ *Kirk v Gupta*, 2017 WL 4955945, 2017 NY Slip Op 32319(U).

² Upon contacting plaintiff's per diem counsel defense counsel was advised that she was in Queens but would come to Supreme Court, New York County to appear for

February 27, 2018, defense counsel waited for over an hour only to learn that plaintiff's counsel had no one to cover the appearance, which again had not been calendared. This court directed defense counsel to submit a letter on notice detailing the various defaults in anticipation of signing the proposed dismissal order based upon Kirk's discovery defaults.

Defense counsel submitted a letter on February 28, 2017, to which plaintiff failed to respond. On March 12, 2018, this court signed the dismissal order which plaintiff now seeks to vacate. Kirk now again moves to vacate yet another default.

Discussion

CPLR 5015(a)(1) provides in relevant part as follows:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of: 1. Excusable default . . .

To vacate a default judgment under CPLR 5015(a)(1),³ plaintiff must demonstrate a reasonable excuse for the default and a meritorious cause of action. *Navarro v Plus Endopothetik*, 105 AD3d 586 (1st Dept 2013). A determination of what constitutes a reasonable excuse for a default lies within the court's sound discretion. *Perellie v Crimson's Rest., Ltd.*, 108 AD2d 903, 904 (2d Dept 1985).

In support of this motion, plaintiff's counsel claims that defense counsel misrepresented that Kirk had not complied with the October 27, 2017 order. However,

the conference. Defense counsel was willing to wait, however, the court was no longer available due to a personal emergency.

³ Defense counsel notes that plaintiff appears to move pursuant to CPLR 5015(a)(3), which provides for vacatur of a judgment or order upon the ground of "fraud, misrepresentation, or other misconduct of an adverse party".

rather than making misrepresentations to the court, defense counsel in fact contended that plaintiff had not fully complied in that certain items were not provided, such as authorizations, or were defective. Plaintiff's instant motion does not address the items defendant contends remain outstanding. As such, relief cannot be granted under CPLR 5015(a)(3).

As to CPLR 5015(a)(1)'s requirements, this court already found in its October 27, 2017 order that the action arguably has merit despite the omission of an affidavit of merit. Nonetheless, on this round of motion practice plaintiff fails to offer any excuse for the default, insisting instead that he complied with the October 27, 2017 order. This is demonstrably incorrect, as evidenced by plaintiff's failure to address defendant's specific allegations of non-compliance.

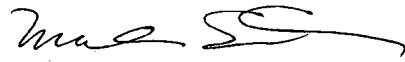
Previously, this court's October 27, 2017 order found that the then proffered excuse for defaulting was "somewhat weak", yet considered other factors, including "whether the default prejudiced the opposing party, whether it was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the strong public policy of resolving cases on their merits when possible (citations omitted)." *Toll Bros., Inc. v Dorsch*, 91 AD3d 755, 755-756 (2d Dept 2012).

While plaintiff's default at that time was deemed "inadvertent" and not prejudicial to Gupta, at this juncture the continued default in providing complete discovery, as well as the various failures to appear (or timely appear) for court conferences, has not been brief and has prejudiced defendant. True, plaintiff filed this motion the same day the

court issued the March 12, 2018 order,⁴ however, it is too little, too late. Accordingly, it is

ORDERED that plaintiff's motion is denied.

Dated: July 3, 2018



Martin Shulman, J.S.C.

⁴ The October 27, 2017 order noted that plaintiff filed that motion within three days of the July 18, 2017 dismissal order, thus evincing an intent not to abandon the action.