

Geron v Haber

2022 NY Slip Op 32428(U)

July 21, 2022

Supreme Court, New York County

Docket Number: Index No. 800432/2011

Judge: Sabrina Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

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YONN GERON, AS CHAPTER 7 BANKRUPTCY TRUSTEE
OF THE ESTATE OF IONA FREEMAN,

Plaintiff,

- v -

GREGORY HABER, DAVID ROBBINS, CHRISTOPHER
GOSTOUT, LENOX HILL HOSPITAL,

Defendant.

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INDEX NO. 800432/2011

MOTION DATE 07/08/2022,
07/08/2022,
07/08/2022

MOTION SEQ. NO. 018 019 020

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 018) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 144, 147

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The following e-filed documents, listed by NYSCEF document number (Motion 019) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 138, 139, 142, 143, 148, 149

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The following e-filed documents, listed by NYSCEF document number (Motion 020) 119, 120, 121, 122, 123, 124, 125, 126, 140, 141, 145, 146

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

The motions are consolidated herein for determination and granted to the extent of vacating the note of issue and otherwise denied.

Plaintiff commenced this action eleven years ago alleging medical malpractice on the part of defendants.

Jury selection was commenced on February 28, 2022 and completed on March 1, 2022. Six jurors and four alternate jurors were selected. On Wednesday, March 2, 2022, Plaintiff's counsel Bonita Zelman gave an opening statement that lasted close to two hours. At the conclusion, Ms. Zelman complained of dizziness and requested to take the afternoon off. Ms.

Zelman told the Court that she wanted to consult her own doctor in Long Island and would not consult a physician in Manhattan.

Later that afternoon, Ms. Zelman's paralegal told the Court that Ms. Zelman was hospitalized for testing and would be unable to proceed with trial the next day, Thursday March 3, 2022. A continuance was granted and the trial adjourned to Monday March 7.

On Friday afternoon, March 4, 2022, Dr. Ragone wrote to the court on behalf of Ms. Zelman and stated she would be incapable of proceeding with trial on Monday March 7, 2022, and that her ability to proceed after that date would depend upon her test results and clinical condition.

On Monday morning, March 7, 2022, Alan H. Figman, Esq., an attorney who has an office in the same suite as Ms. Zelman, appeared in Court to request a mistrial on her behalf. Mr. Figman represented to the Court that Ms. Zelman went directly from court to St. Francis Hospital on Long Island on Wednesday March 2 where she stayed overnight. Mr. Figman was told that Ms. Zelman had seen a doctor, went through a battery of neurological tests to determine if she had a TIA or a stroke, and that she was still experiencing unidentified neurological symptoms and could not proceed with trial.

Mr. Figman could not give the Court details as to when Ms. Zelman would be prepared to proceed. The Court reached out to Dr. Ragone but was first told he was with a patient and would call back, and then later told in fact he had not been in the office at all that day. The court had no choice but to declare a mistrial and disband the jury. The court additionally vacated the note of issue.

Under current calendar management rules, the trial courts have essentially four options when a case is called for trial and one or more of the parties fails to appear or for some reason is unable to proceed. The trial court has the discretion to (1) adjourn the trial to another date,(2)

mark the case “off” or strike it from the calendar pursuant to CPLR 3404, (3) vacate the note of issue pursuant to Uniform Rules for Trial Courts (22 NYCRR 202.21[e]), or (4) dismiss the complaint or strike the answer pursuant to Uniform Rules for Trial Courts (22 NYCRR 202.27).

Basetti v. Nour, 287 A.D.2d 126, 133 (2001).

In this action the court granted plaintiff’s application for a mistrial because plaintiff’s counsel alleged she was unable to proceed due to unidentified health reasons. The court also vacated the Note of Issue pursuant to 22 NYCRR 202.21[e].

In order to reinstate the note of issue plaintiff’s counsel was required to move for reinstatement in accordance with 22 NYCRR 202.21(f) which provides:

Reinstatement of note of issue. Motions to reinstate notes of issue vacated pursuant to this section shall be supported by a proper and sufficient certificate of readiness and by an affidavit by a person having first-hand knowledge showing that there is merit to the action, satisfactorily showing the reasons for the acts or omissions which led to the note of issue being vacated, stating meritorious reasons for its reinstatement and showing that the case is presently ready for trial.

N.Y. Comp. Codes R. & Regs. tit. 22, § 202.21.

Plaintiff’s counsel failed to comply with this requirement and instead just filed a new note of issue. It is for this reason that the motions to vacate the note of issue are granted.

Additionally, this Court still has no clear understanding of what, if any, physical ailment prevented counsel for plaintiff from moving forward with the trial after the continuance granted plaintiff initially, nor whether counsel for plaintiff is physically capable of trying this action at this time. Any motion to reinstate the note of issue should address these issues.

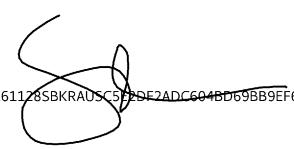
ORDERED that the motion to vacate the note of issue is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that, within 15 days from the entry of this order, movants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21(f); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



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7/21/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE