

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

PHILLIP S. LaGOW, an infant under the age of
fourteen (14) years, by his mother and natural
guardian DEBORAH LaGOW, and DEBORAH LaGOW,
Individually,

Plaintiff(s),

ORIGINAL RETURN DATE: 04/05/00

SUBMISSION DATE: 04/05/00

INDEX No.: 30358/96

XXX

INDEX No.: 20524/99

-against-

STEPHEN M. MURRAY, CHRISLAINE
MURRAY and ROBERT MURRAY,

MOTION SEQUENCE #3

Defendant(s).

The following papers read on this motion:

Notice of Motion..... 1

Motion by plaintiffs for a default judgment against defendants is denied without prejudice to renewal upon proper papers under index #20524/99.

By action bearing index #30358/96 plaintiffs sued these defendants for personal injuries allegedly sustained when infant plaintiff was attacked and bitten by defendants' dog. Two prior unopposed applications for a default judgment were unsuccessful.

Plaintiffs' first application by order dated June 10, 1997 [Phelan, J.] was denied without prejudice to renewal. In so holding the court wrote as follows:

"Plaintiffs have failed to provide an affidavit of facts constituting the claim (CPLR 3215(e)). To the extent CPLR 3215(e) permits reliance upon a verified complaint in satisfaction of this requirement, the court notes that said provision does not apply where, as here, the verification is made by counsel without personal knowledge (Joosten v. Gale, 129 AD2d 531, 534)."

Plaintiffs' second application was stricken from the court's calendar by order dated August 13, 1997 [Phelan, J.] as plaintiffs failed to comply with the service requirements of the Order to Show Cause used to bring said application.

This application is brought under a plenary action bearing index #20524/99 with nearly identical pleadings¹, presumably because of the more than one-year hiatus in activity under the first action (see CPLR 3215(c)).

However, no Request for Judicial Intervention was ever filed in the 1999 action. Despite same and in violation of 22 NYCRR 202.6(a), for no apparent reason one or more court clerks accepted the within motion by adding to plaintiff's motion index #30358/96 and processing the motion under the 1996 number. This was error.

The action bearing index #30358/96 is dismissed as abandoned (CPLR 3215(c)). The action bearing index #20524/99 is not properly before the court (22 NYCRR 202.6(a)).

Accordingly, the within motion is denied.

Finally, and perhaps most incredibly, this motion if considered on the merits would nevertheless be denied. As previously noted plaintiffs' first motion under index #30358/96 was denied without prejudice to renewal. In so holding the court detailed the deficiencies in plaintiffs' application. Despite same, the within application suffers from the very same deficiencies.

Upon any renewed application, counsel shall show cause why its failure to adhere to this court's prior legal ruling as found within the June 10, 1997 order, should not be deemed frivolous conduct (see 22 NYCRR 103-1.1(c)(1)).

Two originals of this Order are being executed and the County Clerk is directed to file one original of this order under index #30358/96 and the other original under index #20524/99.

This decision constitutes the order of the court.

Dated: 6-15-00

THOMAS P. PHELAN

J.S.C.
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¹ Review of the County Clerk's files in both actions reveals that the sole difference in the respective complaints stems from the replacement of Peter LaGow, the infant plaintiff's father, as the Guardian and derivative plaintiff in the 1996 action, with the infant plaintiff's mother, Deborah LaGow, in the 1999 action. While there has also been a change in counsel, the allegations within the complaints otherwise appear identical.