

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

CATHYANN CAPORALE,

Plaintiff,

TRIAL/IAS PART 26
NASSAU COUNTY

-against-

MOTIONS # 08, 09
INDEX #13586/98
MOTION SUBMITTED:
JULY 6, 2001

MICHAEL C. MESBAH, M.D.; IRA KEITH
BERLINER, M.D.; BERLINER & MESBAH, OB/
GYN, P.C.; WINTHROP UNIVERSITY HOSPITAL,
MICHAEL A. FERRAGAMO, JR., M.D.; ROBERT A.
EDELMAN, M.D. and UROLOGICAL SURGEONS OF
L.I., P.C.

Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2, 3, 4, 5, 6
Reply Affidavits.....7, 8

Plaintiff moves (motion sequence #8) for an order restoring this matter to the active calendar pursuant to CPLR 3404. Defendants oppose the motion. Defendants Ferragamo, Edelman and Urological Surgeons of L.I., P.C. cross-move (motion sequence #9) to dismiss the complaint pursuant to CPLR 3126 citing plaintiff's repeated failure to comply with previous court orders.

For the reasons that follow the motion is conditionally granted and the cross motion is denied.

Plaintiff commenced this medical malpractice action on May 14, 1998. She

alleges that the defendants committed malpractice in providing treatment for a malady known as congenital stress incontinence. Plaintiff claims that in the process of performing the initial medical procedure in October 1996, defendant Mesbah incorrectly placed a suture in the urethra and sutured the anterior portion of the bladder to the abdominal wall. After the procedure, plaintiff claims she suffered recurring infections, pain and loss of time from work . Thereafter, plaintiff consulted with defendant Edelman in an effort to diagnose and correct the problem. Dr. Edelman apparently discovered a protruding stitch attached to the upper bladder but allegedly failed to diagnose that the anterior bladder was sutured to the abdominal wall. A follow-up procedure was performed by a non-defendant doctor in April 1997 wherein the protruding stitch was removed from the upper bladder wall. Plaintiff allegedly continued to suffer pain and continued to see doctors and specialists in an effort to abate same. It was not until November 20, 1999 that the condition concerning the anterior bladder was discovered and surgically remedied.

Legal proceeding were ongoing at the same time that plaintiff was experiencing the above medical difficulties. Shortly after service of the summons and complaint, the defendants served various discovery demands and demands for bills of particulars. When the plaintiff failed to provide responses to these demands, the defendants moved to compel production of same. While these motions were pending, plaintiff's then-attorney moved separately to be relieved as counsel stating, *inter alia*, that the plaintiff's uncooperative and unresponsive attitude had materially impeded his ability to respond to the defendants' outstanding discovery demands and motions.

By orders dated February 5, 1999, Justice Geoffrey J. O'Connell relieved plaintiff's counsel and granted the defendants' motion to the extent that the plaintiff was directed to provide all outstanding discovery and bills of particulars within 30 days after retaining new counsel, or within 60 days of the February 5 order – whichever date occurred first. When the plaintiff failed to provide discovery as directed by the February

5 order, the defendants moved to strike the plaintiff's complaint pursuant to CPLR 3126 or compel the production of the requested materials. In opposition, plaintiff submitted the affidavit of an attorney she was seeking to retain. The attorney indicated that he had not had an opportunity to review plaintiff's file and requested an extension of time to do so. He eventually declined to accept the case.

By order dated August 12, 1999, Justice O'Connell afforded the plaintiff another opportunity to produce the discovery materials at issue. He ordered that these materials be supplied within thirty days of the date of the Court's order "or the complaint is stricken. CPLR § 3126." Anticipating that she might not be able to comply with this deadline, plaintiff sent a letter to Justice O'Connell dated August 20, 1999 assuring the court that she was diligently attempting to secure counsel despite her ongoing medical problems and treatment for same. She followed up with a letter dated September 13, 1999 wherein she requested an additional 90 days to secure new counsel and comply with the August 12 order. It does not appear that Justice O'Connell responded to the *pro se* plaintiff's letter application, which was copied to opposing counsel as required by the court. On September 21, 1999 the case was marked off Justice O'Connell's calendar. No judgment of dismissal ensued (*cf.*, *Dubinsky v Rykowski*, 266 AD2d 496; *Reilly v Syosset Hospital*, 225 AD2d 602).

Initially, the court notes that plaintiff's motion is incorrectly denominated a motion to restore the case to the calendar pursuant to CPLR 3404. Recently, the Second Department definitively stated that a pre-note of issue case cannot be marked off the calendar pursuant to CPLR 3404. Such a sanction is strictly reserved for cases that have reached the trial calendar. (*See, Lopez v Imperial Delivery Service, Inc.*, 282 AD2d 190). This case was in the earliest stages of discovery when plaintiff was faced with the dilemma of defending a motion to preclude as a *pro se* litigant attempting to retain new counsel. Ensuing difficulties led to the striking of her complaint pursuant to CPLR 3126 long before this case would have been ripe for trial. This is clearly a motion pursuant to

CPLR 5015(a)(1) to relieve the plaintiff from the prior dismissal based on an excusable default.

To prevail on a 5015(a)(1) motion, plaintiff must demonstrate a reasonable excuse for the default and a meritorious cause of action (*see, Liotti v Ruk*, 282 AD2d 717; *Weitzenberg v Nassau County Dep't of Recreation and Parks*, 282 AD2d 741). Plaintiff has satisfied this burden. As for a reasonable excuse, plaintiff has demonstrated that she was undergoing continuous treatment to correct the serious medical problems that allegedly arose from the defendants' malpractice during the same period of time that she was attempting to comply with Justice O'Connell's orders. According to her affidavit, plaintiff was seen by no fewer than eight doctors for examination, testing, and/or treatment from January through November 1999. These included gynecologists, urologists, and infectious disease specialists in at least two states. During this same period, plaintiff consulted with four different lawyers, all of whom declined the case. In light of these obstacles, plaintiff wrote to the court on two occasions *before* her default requesting more time to comply with the court's orders. The default became absolute despite these timely requests.

In addition to providing a reasonable excuse for her default, plaintiff has supplied the court with an expert affidavit from Bernard P. Ginsberg, M.D., a board certified physician licensed to practice in California and recognized by the New York State Department of Health as a specialist in obstetrics and gynecology. Dr. Ginsberg reviewed the medical records relative to plaintiff's care and treatment and opined, "with a reasonable degree of medical certainty," that the defendants committed malpractice either in the manner by which they performed the initial procedure or in failing to subsequently diagnose and correct the problem. As such, it appears that plaintiff has stated a meritorious cause of action.

The court is mindful of the fact that a motion to excuse a default pursuant to CPLR 5015(a)(1) should be made within one year of the service of a copy of the judgment or

order at issue. While the present motion was not made until nineteen months after Justice O'Connell's conditional preclusion order became effective, the delay is not an absolute bar to the present motion. The one year period set forth in CPLR 5015(a)(1) is not necessarily a statute of limitations and the court has the discretion to extend that period even after the expiration of one year where the interests of justice so dictate (*see, Melendez v City of New York*, 271 AD2d 416; *State v Kama*, 267 AD2d 225; *Allen v Preston*, 123 AD2d 303, 303-04). This is one of those rare cases.

It does not appear to this court that plaintiff's failure to provide the requested discovery was ever willful or contumacious. This court does not equate the breakdown in the professional relationship between plaintiff and her first counsel as evidence of plaintiff's disregard for this court and its orders. The delay that ensued after plaintiff's prior counsel was relieved can be explained by plaintiff's ongoing medical problems, her difficulty in securing new counsel, and her *pro se* status. Plaintiff never manifested an intent to abandon this case. Despite her medical difficulties, plaintiff made concerted efforts to secure representation both before and after the conditional dismissal took effect. She consulted with four attorneys prior to the dismissal, and at least one other attorney after the dismissal before present counsel agreed to accept her case in December 2000. Nor does there appear to be any real prejudice to the defendants by virtue of the delay. While some of the defendants suggest that crucial pre-operative medical records may no longer be available, this fact has yet to be established and can be the subject of motion practice at an appropriate time if such is the case.

In light of the strong policy in favor of resolving cases on the merits, the lack of malice on the part of plaintiff in fostering delay, the apparent merit to this action, the absence of any intent by plaintiff to abandon the case, and the lack of prejudice to the defendants, the court concludes that it is proper to conditionally restore the case to the calendar (*see, Halikiopoulos v New York Hospital Medical Center of Queens*, ___ AD2d ___, 725 NYS2d 895; *Liotti v Ruk*, 282 AD2d 717; *Cronin v Perry*, 269 AD2d 351;

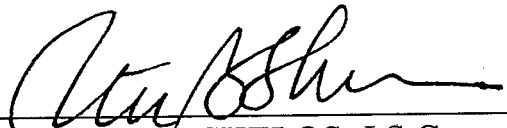
Busone v Bellevue Maternity Hospital, 266 AD2d 665).

ORDERED that plaintiff's motion to restore the case to the calendar is granted and the cross-motion to dismiss the complaint is denied upon the condition that plaintiff comply with all outstanding discovery demands, including any outstanding demands for bills of particulars, within forty-five (45) days of the date of this order. If plaintiff complies in this regard, counsel for the parties are to appear before the undersigned in Part 26 at 9:30 a.m. on October 30, 2001 for purposes of a conference.

ORDERED that in the event plaintiff fails to comply with the above condition within forty-five (45) days of the date of this order, then the motion is denied, the absolute dismissal pursuant to Justice O'Connell's order dated August 12, 1999 shall stand, and the cross motion is denied as moot.

This constitutes the decision and order of the court.

Dated: September 11, 2001


PETER B. SKELOS, J.S.C.

ENTERED

SEP 19 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**