

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Rizzo v. Balish & Friedman

2017 NY Slip Op 6307 (App. Div. 2017) · No. 2016-05813 · Decided August 23, 2017

SUMMARY

The Appellate Division, Second Department, reversed an order denying the plaintiffs’ unopposed motion to vacate the note of issue and certificate of readiness in a dental malpractice and lack-of-informed-consent action. The court held that the certificate materially failed to comply with 22 NYCRR 202.21 because discovery remained outstanding and granted the motion to vacate.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	William F. Mastro, J.P.; Reinaldo E. Rivera, J.; Sandra L. Sgroi, J.; Joseph J. Maltese, J.
JURISDICTION	New York
DECIDED	August 23, 2017
DOCKET	2016-05813
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs in a dental malpractice and lack-of-informed-consent action appealed, as limited by their brief, from an order denying their unopposed motion to vacate the note of issue and certificate of readiness.
STANDARD OF REVIEW	Reviewed on the law and in the exercise of discretion.
PRECEDENTIAL VALUE	published New York Appellate Division decision
PARTIES	Camille Rizzo, et al. v. Drs. Balish & Friedman, DDS, et al.

TOPICS

- medical malpractice
- discovery dispute
- civil procedure

PRACTICE AREAS

- civil procedure
- medical malpractice

QUESTIONS PRESENTED

1. Whether a note of issue and certificate of readiness must be vacated when the certificate materially fails to comply with 22 NYCRR 202.21 by acknowledging that discovery remains outstanding and the case is not ready for trial.
2. Whether plaintiffs timely established grounds under 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness.

HOLDINGS

1. Because the certificate of readiness stated that discovery proceedings had not been completed, outstanding discovery requests remained, and the case was not ready for trial, it materially failed to comply with 22 NYCRR 202.21; therefore, the filing of the note of issue was a nullity.
2. The plaintiffs' motion to vacate should have been granted because it was made within 20 days after service of the note of issue, was supported by an affidavit showing that the case was not ready for trial, and established that substantial discovery remained outstanding.

KEY QUOTATIONS

“Since the certificate of readiness failed to materially comply with the requirements of 22 NYCRR 202.21, the filing of the note of issue was a nullity” (2017 NY Slip Op 06307, at *1)

FACTUAL BACKGROUND

The action sought damages for dental malpractice and lack of informed consent. The plaintiffs' certificate of readiness stated that discovery had not been completed, that outstanding discovery requests remained, and that the case was not ready for trial. Substantial discovery, including the full depositions of the parties, remained outstanding, and the defendants did not oppose plaintiffs' motion to vacate the note of issue and certificate of readiness.

PROCEDURAL HISTORY

The Supreme Court, Richmond County, issued a certification order directing plaintiffs to serve and file a note of issue and certificate of readiness within 48 hours or face dismissal. Plaintiffs filed the documents within the deadline, then moved within six days to vacate them because discovery remained incomplete. The Supreme Court denied the unopposed motion, and the Appellate Division reversed insofar as appealed from and granted the motion.

DISPOSITION

reversed

CASES CITED

- *Furrukh v Forest Hills Hosp.*, 107 AD3d 668, 669
- *Dutchess Truck Repair, Inc. v Boyce*, 120 AD3d 543, 545

- Garofalo v Mercy Hosp., 271 AD2d 642
- Singh v CBCS Constr. Corp., 137 AD3d 1250

OPINION

PER CURIAM.

Rizzo v Balish & Friedman (2017 NY Slip Op 06307) Rizzo v Balish & Friedman 2017 NY Slip Op 06307 Decided on August 23, 2017 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on August 23, 2017 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department WILLIAM F. MASTRO, J.P.

REINALDO E. RIVERA SANDRA L. SGROI JOSEPH J. MALTESE, JJ. 2016-05813 (Index No. 100065/14) [*1]Camille Rizzo, et al., appellants, Drs. vBalish & Friedman, DDS, et al., defendants. Lutfy & Santora, Staten Island, NY (James L. Lutfy of counsel), for appellants. Amabile & Erman, P.C., Staten Island, NY (Stephanie M. Berger of counsel), for defendants. DECISION & ORDER In an action to recover damages for dental malpractice and lack of informed consent, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (Dollard, J.), dated May 6, 2016, as denied their unopposed motion pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness.

ORDERED that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, without costs or disbursements, and the plaintiffs' motion pursuant to 22 NYCRR 202.21(e) to vacate the note of issue and certificate of readiness is granted.

In this dental malpractice action, the Supreme Court issued a certification order dated March 30, 2016, which directed the plaintiffs to serve and file a note of issue and certificate of readiness within 48 hours "or the case is dismissed."

The plaintiffs filed a note of issue and certificate of readiness within 48 hours, and within six days of the certification order, they moved to vacate the note of issue and certificate of readiness. The defendants did not oppose the motion.

The court denied the plaintiffs' motion. Pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21, a note of issue must be accompanied by a certificate of readiness, which must state that there are no outstanding requests for discovery and the case is ready for trial (see 22 NYCRR 202.21[a], [b]; Furrukh v Forest Hills Hosp., 107 AD3d 668, 669).

Here, the plaintiffs' certificate of readiness stated, among other things, that discovery proceedings had not been completed, that there were outstanding requests for discovery, and that the case was not ready for trial. Since the certificate of readiness failed to materially comply with the

requirements of 22 NYCRR 202.21, the filing of the note of issue was a nullity (see 22 NYCRR 202.21[b], [e]; *Dutchess Truck Repair, Inc. v Boyce*, 120 AD3d 543, 545; *Furrukh v Forest Hills Hosp.*, 107 AD3d at 669; cf. *Garofalo v Mercy Hosp.*, 271 AD2d 642).

Moreover, 22 NYCRR 202.21(e) provides, in pertinent part, that within 20 days after service of a note of issue and certificate of readiness, a court may grant a party's motion to vacate [*2]the note of issue "upon affidavit showing in what respects the case is not ready for trial" and if "the certificate of readiness fails to comply with the requirements of this section in some material respect."

Here, the plaintiffs timely moved to vacate the note of issue and supported the motion with an affidavit showing that the case was not ready for trial. Among other things, the plaintiffs demonstrated that substantial discovery remained outstanding, including the full depositions of the parties.

Under these circumstances, the plaintiffs' unopposed motion to vacate the note of issue should have been granted (see *Singh v CBCS Constr. Corp.*, 137 AD3d 1250). MASTRO, J.P., RIVERA, SGROI and MALTESE, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court