

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

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/new-york-supreme-court-of-the-state-of-new-york-appellate-division-second-judicial-department/2017/rizzo-v-balish-and-friedman-dor56oxc>