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64 A.D.3d 588, 886 N.Y.S.2d 30, 2009 N.Y. Slip Op. 05770

(Cite as: 64 A.D.3d 588, 886 N.Y.S.2d 30)

Supreme Court, Appellate Division, Second Department, New York.

Kamil WILLIAMS, etc., et al., appellants,

v.

Margaret NAYLOR, etc., et al., respondents.

July 7, 2009.

Background: In action to recover damages for medical malpractice, the Supreme Court, Queens County, Hart, J., granted oral application of defendant, in effect, for summary judgment dismissing complaint insofar as asserted against him. Plaintiffs appealed.

Holding: The Supreme Court, Appellate Division, held that oral application for summary judgment was improperly granted.

Reversed and remitted.

West Headnotes

11 Appeal and Error 30 ↪ 223

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k223 k. Judgment. Most Cited Cases

Although claim that Supreme Court improperly granted defendant's oral application for summary judgment dismissing complaint in medical malpractice action insofar as asserted against him was raised for first time on appeal, Appellate Division would nevertheless reach issue as a matter of discretion, since it involved question of law that appeared on face of record and, if brought to attention of trial court, could not have been avoided.

12 Judgment 228 ↪ 183

228 Judgment

228V On Motion or Summary Proceeding

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228k183 k. In General. Most Cited Cases

Judgment 228 ↪ 184

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k184 k. Notice. Most Cited Cases

Defendant's oral application for summary judgment dismissing complaint in medical malpractice action insofar as asserted against him was improperly granted, as it was not supported by any motion papers, no formal motion was made on notice to the plaintiff, and the application was made after jury selection had been completed and more than 120 days after the note of issue had been filed, without any showing of good cause. McKinney's CPLR 3212(a).

****31** Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser of counsel), for appellants.

Farley & Glockner, LLP (Mauro Goldberg & Lilling LLP, Great Neck, N.Y. [Caryn L. Lilling and Katherine Herr Solomon], of counsel), for respondent Emeka Okeke.

MARK C. DILLON, J.P., HOWARD MILLER, JOHN M. LEVENTHAL, and CHERYL E. CHAMBERS, JJ.

***588** In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal from a judgment of the Supreme Court, Queens County (Hart, J.), entered March 3, 2008, which, upon granting the oral application of the defendant Emeka Okeke, in effect, for summary judgment dismissing the complaint insofar as asserted against him, is in favor of the defendant Emeka Okeke and against them dismissing the complaint insofar as asserted against him.

ORDERED that the judgment is reversed, on the law, with costs, the oral application of the defendant Emeka Okeke, in effect, for summary judgment dismissing the complaint insofar as asserted against him is denied, the complaint is reinstated against the defendant Emeka Okeke, and the matter is remitted to the Supreme Court, Queens County, before a different Justice for all further proceedings in this action.

[1] The plaintiffs raise legal arguments which appear on the face of the record and could not have been avoided had they been brought to the attention of the Supreme Court. Accordingly, the grounds for reversal urged by the plaintiffs may be considered by this Court even though they have been raised for the first time on appeal (*see Matter of 200 Cent. Ave., LLC v. Board of Assessors*, 56 A.D.3d 679, 680, 869 N.Y.S.2d 112; *Buywise Holding, LLC v. Harris*, 31 A.D.3d 681, 682, 821 N.Y.S.2d 213; ***589** *Matter of State Farm Mut. Auto. Ins. Co. v. Olsen*, 22 A.D.3d 673, 674, 802 N.Y.S.2d 725; *Beepat v. James*, 303 A.D.2d 345, 346, 755 N.Y.S.2d 649; *Weiner v. MKVII-Westchester*, 292 A.D.2d 597, 598, 739 N.Y.S.2d 432; *Block v. Magee*, 146 A.D.2d 730, 732, 537 N.Y.S.2d 215; 11 Carmody-Wait 2d § 72:133, at 347-348).

[2] The Supreme Court improperly granted the oral application of the defendant Emeka Okeke, which was, in effect, for summary judgment dismissing the complaint insofar as asserted against him. The oral application was not supported by any motion papers, no formal motion was made on notice to the plaintiff, and the application was made after jury selection had been completed and more than 120 days after the note of issue had been filed, without any showing of good cause (*see CPLR 3212(a)*; *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431; *Giannattasio v. Han Suk Kang*, 30 A.D.3d 375, 815 N.Y.S.2d 739; ****32** *Long v. Children's Vil., Inc.*, 24 A.D.3d 518, 805 N.Y.S.2d 286; *Minucci v. City of New York*, 303 A.D.2d 473, 756 N.Y.S.2d 432; *Hilton v. City of New Rochelle*, 298 A.D.2d 360, 751 N.Y.S.2d 392; *Diaz v. New York City Health & Hosps. Corp.*, 289 A.D.2d 365, 366, 734 N.Y.S.2d 882; *Martin Iron & Constr. Co. v. Grace Indus.*, 285 A.D.2d 494, 495, 729 N.Y.S.2d 146).

In light of our discretion to “take judicial notice of a record” in “the pending matter” (*Chateau Rive Corp. v. Enclave Dev. Assoc.*, 22 A.D.3d 445, 446, 802 N.Y.S.2d 366), we take judicial notice of the proceedings held on November 1, 2007, in this action. Under the circumstances of this case, upon remittitur to the Supreme Court, Queens County, all further proceedings in this action shall be conducted before another Justice (*see Ling Fei Sun v. City of New York*, 55 A.D.3d 795, 796, 869 N.Y.S.2d 546; *Doe v. Department of Educ. of City of N.Y.*, 54 A.D.3d 352, 354, 862 N.Y.S.2d 598).

In light of our determination, the parties' remaining contentions need not be addressed.

N.Y.A.D. 2 Dept., 2009.

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