

DeNicola v DeNicola

2001 NY Slip Op 30068(U)

August 28, 2001

Supreme Court, New York County

Docket Number: 24296/94

Judge: Ariel Belen

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At an IAS Term, Part 10 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of August, 2001

P R E S E N T:

HON. ARIEL E. BELEN,

Justice.

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ANTHONY DeNICOLA and MICHAEL DeNICOLA,

Plaintiffs,

- against -

Index No. 24296/94

JOSEPH DeNICOLA, DOROTHY DeNICOLA, and the ESTATE OF JOHN DeNICOLA,

Defendants.

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The following papers number 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1, 2 _____
Opposing Affidavits (Affirmations) _____	_____ 3 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavits (Affirmations) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants Joseph and Dorothy DeNicola and the Estate of John DeNicola move for an order: (1) pursuant to CPLR 3404 dismissing the plaintiff's action as abandoned; (2) enjoining plaintiffs from commencing any further proceedings to

restore the case to calendar; and (3) imposing sanctions upon plaintiffs' attorneys for commencing a frivolous action. Plaintiff Anthony DeNicola (hereinafter "plaintiff") cross-moves for an order restoring this action to the calendar and substituting the Estate of John DeNicola as party plaintiff in place of John DeNicola.

In this action for, *inter alia*, the sale and partition of certain real property, a note of issue was filed on or about October 19, 1998. Thereafter, on June 17, 1999, that note of issue was vacated and the case was marked off the trial calendar when defendant failed to appear for a calendar call. On or about August 26, 1999, defendants moved to restore the case to the calendar. That motion was returnable on September 30, 1999, but the parties stipulated to adjourn it to October 28, 1999. The motion was marked off the calendar on September 30th when defendant failed to submit that stipulation at a calendar call.

On or about March 20, 2001, defendants made this motion pursuant to CPLR 3404 to dismiss the action as abandoned. Thereafter, on or about June 6, 2001, plaintiff cross-moved to restore the case to the trial calendar and to substitute the Estate of Michael DeNicola as plaintiff in place of Michael DeNicola, who died on May 12, 2000.

Defendants' motion to dismiss the case as abandoned is denied and plaintiffs' cross-motion to restore their action to the calendar is granted. CPLR 3404 provides that an action is deemed abandoned and automatically dismissed if plaintiff fails to move to restore it to the calendar within a year of the date it was stricken. Here, the case was struck from the calendar on October 1, 1999, and the motion to restore was not brought until June 6, 2001.

However, the proceedings were automatically stayed from May 12, 2000, the date of Michael DeNicola's death, until the date upon which a duly appointed representative is substituted by the court (CPLR 1015, 1021; see, *Novaro v Jomar Real Estate Corp.*, ___ AD2d ___, 725 NYS2d 543; *Harding v Noble Taxi Corp.*, 155 AD2d 265). On March 13, 2001, DeNicola's widow Carmela DeNicola was appointed as personal representative of the estate and on March 6, 2001, plaintiff sought an order pursuant to CPLR 1021 to substitute the estate for the deceased plaintiff.¹ Thus, since this action has been stayed since the date of Michael DeNicola's death, which occurred within the year following the default, plaintiff did not abandon his case and CPLR 3404 is not applicable to this action.

To obtain relief from an order on judgment marking the case off the calendar based on an excusable default for failure to appear for a calendar call, a party must provide a reasonable excuse for the failure to appear and demonstrate the merits of the cause of action or defense (see CPLR 5015 (a)(1); *Latha Restaurant Corp. v. Tower Ins. Co.*, ___ AD2d ___; 2001 WL 844763 *Mediavilla v Gurman*, 272 AD2d 146, 148).

Here, plaintiff's affidavit of merit sufficiently sets forth a meritorious cause of action. In that affidavit, plaintiff alleges that he had lived with his mother in a house owned by her and that his mother had refused to sign a deed transferring ownership in the house to defendants (his two brothers). However, claims plaintiff, after his mother died, defendant

¹ Since plaintiff's cross-motion for substitution was made within a reasonable time of Michael DeNicola's death and the appointment of a personal representative, the court grants that part of the motion which seeks to substitute the Estate of Michael DeNicola for Michael DiNicola (see, *Rosenfeld v Hotel Corp.*, 25 NY2d 25, 29; *Orellana v Malek*, 116 AD2d 557).

Joseph DeNicola and his wife, defendant Dorothy DeNicola produced a deed purporting to transfer ownership in the house to Joseph and his deceased brother, John, and shortly thereafter, plaintiff was served with eviction papers. According to plaintiff, he compared the signature on the deed to his mother's known signature and concluded it was a forgery. Those allegations sufficiently make out a cause of action pursuant to Articles 9 and 15 of the Real Property Law to compel the determination of both plaintiff and the estate of Michael DeNicola's claim to the disputed real property and for a partition sale of that property.²

Plaintiff also presents a reasonable excuse for his default. Plaintiff's attorney explains in an affidavit that an attorney who was no longer with the firm had been handling the case and it is unclear why he did not appear for the calendar call on the date that the case was marked off the calendar. However, the attorney explains that a motion to restore the case to the calendar was returnable on September 30, 1999; a stipulation was entered into by the attorneys for the plaintiffs and defendants to adjourn the motion to October 28, 1999. Plaintiff's attorney had employed the American Clerical Service to submit the stipulation at the September 30th calendar call, but in an affidavit, the managing clerk for that service explains that it was mistakenly not submitted. As a result, the motion was marked off the calendar on September 30th. This explanation of inadvertent law office failure as well as

2

On Nov 14, 1996, this court (Golden, J.), in a short-form order, denied defendants' motion for summary judgment, indicating that material facts are disputed, contradicting defendants' present claim that the cause of action is a "sham".

the failure of the clerical services provides a sufficient excuse for plaintiff's failure to appear for the calendar call (see, CPLR 2005; Sanchez v Javind Apt. Corp., 246 AD2d 353).³

The court has considered defendant's other contentions and finds them to be without merit.

Accordingly, defendant's motion: (1) pursuant to CPLR 3404 dismissing the plaintiff's action as abandoned; (2) enjoining plaintiffs from commencing any further proceedings to restore the case to calendar; and, (3) imposing sanctions upon plaintiffs' attorneys for commencing a frivolous action is denied in its entirety. Defendant's cross-motion to restore this case to the trial calendar and to substitute the estate of Michael DeNicola as plaintiff in place of the deceased Michael DeNicola is granted. The caption is hereby amended to read as follows:

ANTHONY DeNICOLA and the ESTATE OF MICHAEL
DeNICOLA,

Plaintiffs,

- against -

Index No. 24296/94

JOSEPH DeNICOLA, DOROTHY DeNICOLA,
and the ESTATE OF JOHN DeNICOLA,
Defendants.

³ In light of this evidence that plaintiff did not intend to abandon this action as well as the fact that plaintiff's attorney made this motion just three months after a personal representative was appointed and the lack of any evidence of prejudice to defendants, the court notes that, even had more than a year elapsed before the motion to restore was made, dismissal would not be warranted under CPLR 3404.

This constitutes the decision and order of the court.

ENTER,

Anil E. Bell
J. S. C.