

Barbu v Savescu

2007 NY Slip Op 30578(U)

February 23, 2007

Supreme Court, Queens County

Docket Number: 0001799/2000

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, JAMES P. DOLLARD IAS PART 13
Justice

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LILIANA BARBU, as Executrix
of the Goods, Chattels and Index No. 1799/00
Credits which were of
CONSTANTINE BARBU, Deceased, Motion Date: Sept. 24, 2006

Plaintiff, Cal. No. 2

-against-

NAPOLEON SAVESCU, M.D.,
BROADWAY IMAGING, P.C.,
JAY D. TARTELL, M.D.,
CRAIG J. YOUNGER, M.D.,
ADVANCED RADIOLOGICAL
IMAGING, P.C. and
JOHN E. FRANKLIN, JR., M.D.,

Defendants.

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The following papers numbered 1 to 3 read on this motion by defendants Dr.Tartell, Dr. Younger and Advanced Radiological Imaging, P.C., to dismiss the action pursuant to CPLR 3216(d) for lack of prosecution or in the alternative to direct the Clerk to dismiss pursuant to CPLR 3404.

	PAPERS <u>NUMBERED</u>
Notice of Motion-Affidavit-Exhibit.....	1
Answering Affidavits-Exhibits.....	2
Replying Affidavits.....	3

Upon the foregoing papers it is ordered that this motion is denied in all respects and the action is rescheduled for trial in the Trial Scheduling Part on April 26, 2007.

This matter appeared on the calendar for jury selection on January 22, 2004. On that date the action was marked "stayed" due to an application by plaintiff's then attorneys for leave to withdraw. The motion was submitted on April 13, 2004, Levine, J., and decided by Short Form Order dated April 22, 2004. The motion was granted and the stay continued for a period of sixty days from service of the order with Notice of Entry. A copy of the order with Notice of Entry and an affidavit of service was filed on May 20, 2004.

Accordingly the stay was automatically extinguished on July 19, 2004, and at that time the matter should have been rescheduled for trial. This is a mere ministerial act by the clerk of TSP which would not require a motion by any party. Due to an apparent lack of communication it has not been rescheduled for trial.

On August 12, 2005 the movant mailed a CPLR 3216 90-day Notice to the then pro se plaintiff to file a Note of Issue within that time. The instant motion followed. The plaintiff by new attorneys submitted opposition papers claiming procedural defects in the service of the 90 day Notice.

In their reply defendants claim the motion was to dismiss for post Note of Issue general delay in prosecution based on no activity by the plaintiff since the expiration of the stay.

There is case law to the effect that a "90 day Notice is not a condition precedent to dismissal once a Note of Issue is filed".

"A 90-day demand is not a condition precedent to dismissal once a note of issue is filed (see, Fuller v. Rolm Telecommunications Co. 255 A.D.2d 485, 486, 680 N.Y.S.2d 647; Tleige v. Troy Pediatrics, 237 A.D.2d 772, 774, 654 N.Y.S.2d 486; Hillegass v. Duffy, 148 A.D.2d 677, 679, 539 N.Y.S.2d 426; Travelers Indem. Co. v. Central Trust Co. of Rochester, 49 A.D.2d 1024, 1025, 374 N.Y.S.2d 483, appeal dismissed 38 N.Y.2d 895, 382 N.Y.S.2d 749, 346 N.E.2d 550" (State of New York v. Town of Clifton, 275 AD2d 723).

In that case the matter had been commenced in July, 1989, a Note of Issue had been filed in July 1993 and the matter stricken from the trial calendar in November, 1994. In May, 1998 the court informed the parties by letter that the proceeding would be abandoned unless they advised the court of the status within 20 days. Petitioner responded by letter stating that negotiations were ongoing and a Note of Issue would be filed if settlement was not reached in a few months. Negotiations ceased in June, 1998 but no Note of Issue was filed. The motion to dismiss was made in December 1998. The Court found, inter alia, that plaintiff failed to demonstrate a justifiable excuse for the delay. It is interesting to note that the oldest case referred to by the court, State v. Town of Clifton, was Travelers Indem Co. v. Central Trust Co. of Rochester which cited Trudel v. Lambe's Amhrest, Inc. (40 AD2d 625) for the proposition that the 45-day Notice requirement was inapplicable involved a CPLR 3404 dismissal for lack of prosecution (failure to restore a marked-off case within one year) and not a CPLR 3216 dismissal. Moreover, in the Travelers case the court attributed five out of six trial adjournments to the plaintiff. Hillegass v. Duffy, (148 AD2d 677) was a two-pronged decision based on both CPLR 3216(a) and CPLR 3404. There the post Note of Issue lack of prosecution was that the plaintiff took no steps to restore the action to the trial calendar for three years after it was marked off. In Tleige v. Troy Pediatrics, (237 AD2d 772), the case was permitted to remain on the calendar after the Note of Issue was filed but IME's and certain other disclosure was to take place shortly before the trial. Plaintiff failed to comply and also failed to provide a timely CPLR 3101(d) response and to appear for trial on a date which had been scheduled for seven months. The remaining case referenced in State v. Town of Clifton was Fuller v. Rolm Telecommunications Co., Inc. (255 AD2d 485) in which the Second Department acknowledged the proposition that a 90-day demand is not a condition precedent to dismissing an

action for neglect based solely on delays that occur after the action was placed on the calendar, but affirmed a denial of the motion to dismiss because it did not appear that the plaintiff unreasonably neglected to proceed generally in the action or was solely responsible for the delay. The decision of the court is silent as to any additional requirement that the plaintiff demonstrate a meritorious cause of action. In two recent cases, (Jastremski v. Zito, (35 AD3d 458) and Villano v. St. Charles's Rehabilitation Hospital (33 AD3d 992), the Appellate Division has noted that CPLR 3216 is "extremely forgiving" in that it "never requires, but merely authorizes the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed". In both of those cases the court said that a dual showing of a justifiable excuse for the delay and a meritorious cause of action is not strictly necessary to avoid dismissal of the action.

In the case at bar there does not appear to be any unreasonable or general delay on the part of the plaintiff. The order relieving counsel contained a limitation on the duration of the stay. The order required filing of proof of service with the office of the County Clerk which was done. There is nothing on the face of the order to indicate to a lay person that she had to do anything to have the court reschedule the trial date. Accordingly, the first branch of the motion is denied. The branch to dismiss pursuant to CPLR 3404 is also denied. The action was not marked off the calendar but rather was stayed. CPLR 3404 is not applicable.

Dated: February 23, 2007

J.S.C.