

Nelly Charlotta, Inc. v Sorel

2007 NY Slip Op 30635(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0600181/2000

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART **IA** Part 16

Justice

Index Number : 600181/2000
NELLY CHARLOTTA, INC.
vs
SOREL, JEAN-CHARLES
Sequence Number : 003
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED
APR 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: APR 04 2007

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
NELLY CHARLOTTA, INC. and CHARLOTTA JANSSEN,

Plaintiffs,

-against-

Index No. 600181/00
Motion Seq. No. 003

JEAN-CHARLES SOREL, NADIR KHELEFI, and
NELLY STEVE, INC.,

Defendants.

-----X
SCHLESINGER, J.:

At issue here is plaintiffs' motion to restore the action to the calendar for all purposes and to enter a default judgment against defendant Nadir Khelefi. Defendant Jean-Charles Sorel and his corporation Nelly Steve, Inc. (the Sorel defendants) oppose the motion and cross-move to dismiss the action for failure to prosecute. In the alternative, counsel for the Sorel defendants seeks to be relieved from further representation. Defendant Khelefi has not appeared on the motion.

Background Facts

Plaintiff Nelly Charlotta, Inc. and its president and shareholder Charlotta Janssen commenced this action in early 2000 against Jean-Charles Sorel, the Vice President of the plaintiff corporation. Also named as defendants are Nadir Khelefi and Nelly Steve, Inc., a corporation allegedly formed by Sorel and Khelefi. Plaintiff Charlotta contends that she and Sorel incorporated in May 1998 to operate a restaurant in Brooklyn known as "Chez Oskar" and that Sorel hired Khelefi to manage the restaurant. She further contends that Sorel and Khelefi formed the defendant corporation the following year and opened another restaurant known as "Café Lafayette." Plaintiff claims that defendants embezzled money from the plaintiff corporation and engaged in other wrongful acts which caused plaintiffs to incur damages.

The Sorel defendants, represented by counsel, answered the complaint, but it appears that Khelefi did not. On July 25, 2000 plaintiffs and the Sorel defendants entered into a preliminary conference order before Judge Rick Braun, with a Note of Issue date of June 30, 2001 and a compliance conference date of July 25, 2000. Court records indicate that Judge Braun dismissed the case on December 19, 2000 "No Appearance Either Side."

Approximately ten months later, in October of 2001, plaintiffs moved to vacate the dismissal and restore the case to the calendar. The matter was reassigned at that time to this Court. The parties settled the motion by stipulation which provided that:

Defendants Sorel and Nelly Steve, Inc. hereby consent to the motion of Plaintiffs Nelly Charlotta, Inc. and Charlotta Janssen returnable on October 24, 2001 to vacate the dismissal of this case and to extend the time to place this case on the calendar to January 2, 2002.

Significantly, defendant Khelefi was not a party to the stipulation and did not consent at that time or at any time thereafter to restore the case to the calendar. Even more significantly, however, plaintiffs took no further action to restore the case to the calendar by the extended January 2, 2002 deadline or until this motion was made nearly five years later.

Plaintiff's Motion to Restore is Denied

As the plaintiff correctly notes, the standard for vacating a dismissal entered at a calendar call is clear in this Department:

The dismissal of an action pursuant to 22 NYCRR 202.27 based upon a plaintiff's failure to appear at a calendar call should be vacated where the plaintiff shows a reasonable excuse for the default and a meritorious cause of action.

Bodden v Penn-Attransco Corp., 20 AD3d 334 (1st Dep't 2005), quoting *Polir Constr., Inc. v. Etingin*, 297 AD2d 509 (1st Dep't 2002). Absent service of the dismissal order with notice

of entry, as herein, no time limit exists for making the motion, and neither a delay in moving, nor even prejudice caused by the delay, compels the Court to deny the motion. See, *American Continental Properties, Inc. v. Lynn*, 32 AD3d 700, 701 (1st Dep't 2006). Nevertheless, the motion can still be denied for lack of a reasonable excuse for the default or failure to set forth a meritorious cause of action. *Acevedo v. Navaro*, 22 AD3d 391, 392 (1st Dep't 2005), citing *Campos v. NYCHHC*, 307 AD2 785 (1st Dep't 2003).

This Court finds that, as in *American Continental* and *Campos*, cited above, plaintiffs' motion must be denied based on the failure to demonstrate a reasonable excuse for its failure to appear and proceed with the action. By their October 2001 stipulation, the parties agreed that the dismissal would be vacated if plaintiffs acted to restore the case to the calendar by January 2, 2002. It is undisputed that plaintiffs took no action within that period of time to restore the case. Therefore, Judge Braun's dismissal pursuant to 22 NYCRR 202.27 remained in effect. Even if one were to construe the stipulation as plaintiffs claim as an agreement to vacate Judge Braun's dismissal, plaintiffs would still be required to demonstrate a reasonable excuse for not proceeding to restore the action to the calendar by the stipulated deadline and for nearly five years thereafter.

Plaintiffs have simply failed to meet their burden to establish a reasonable excuse for the default. Wholly unpersuasive is plaintiffs' citation to cases of law office failure or difficulty with counsel, as all those cases are readily distinguishable. In her November 20, 2006 affidavit in support of the motion, plaintiff Charlotta Janssen sets forth her excuse for the default. Specifically, she states (at ¶23-24) that:

In or about November 2001, dissatisfied with my prior attorneys, I requested possession of the case file in order to find new counsel. Since then, I had not received any information from my attorneys, the Court, or Sorel's attorney's

regarding the status of the lawsuit. I have not since heard from Sorel's counsel or Sorel. I never intended to abandon this action. I was unable to find satisfactory counsel until my current counsel. My prior counsel never told me that the action was defaulted, or in any way dismissed or that there was a pending motion to restore the case.

What is most significant about this claim is the information that is omitted. While plaintiff states that she took possession of her file in or about November 2001 – after her counsel stipulated to restore the action by January 2, 2002 – she does not attest that she formally discharged her attorney on a date certain. On the contrary, Janssen implies in her next sentence that she was waiting to receive information from her attorneys after November 2001. Wholly without merit is the suggestion that the default is excusable because defense counsel or the court should have contacted plaintiff. It is the duty of a plaintiff, not of a defendant or the court, to take steps to prosecute an action.

Also conspicuously absent from plaintiff's alleged excuse are any details regarding plaintiff's alleged attempt to find new counsel, an attempt which was purportedly unsuccessful for five years. The conclusory claim, without a scintilla of supporting evidence, is unpersuasive.

Plaintiff's claim of a reasonable excuse is particularly unpersuasive in light of the litigation which defendant Khelefi commenced against Ms. Janssen and her corporation in Kings County Supreme Court in 2005 entitled *Nadir Khelefi v. Charlotta Janssen and Nelly Charlotta, Inc.*, Index No. 29294/05. Ms. Janssen is actively defending that action, apparently with the assistance of counsel. Indeed, this Court in connection with the instant motion received a copy of an affirmation from Khelefi's counsel submitted in the Kings County action in or about December of 2006, at or about the time the instant motion was

made. The affirmation refers to ongoing discovery disputes and extensive motion practice in the Kings County case. Interestingly, attached to the affirmation is an affidavit from Jean-Charles Sorel notarized in Brazil. In the affidavit, Sorel indicates that, as a French national, he was required to leave the United States when his period of authorized stay expired.¹ Sorel also explains in his affidavit that he transferred his interest in the plaintiff corporation to Khelefi pursuant to a Stock Transfer Agreement dated September 8, 2005. Plaintiffs in this action were apparently aware of this Agreement, as they appended a copy to their moving papers. Khelefi has also submitted an affidavit in the Kings County action, which is consistent with Sorel's affidavit.

Considering all these circumstances, plaintiffs have failed to establish that this action should be restored to this Court's calendar. The dismissal by Judge Braun shall remain in full force and effect, but without prejudice to the rights of Nelly Charlotta, Inc. and Charlotta Janssen to raise in the Kings County action any of the claims raised herein.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to restore the action to the calendar and for related relief is denied; and it is further

ORDERED that the cross-motion by the Sorel defendants is denied as moot.

This constitutes the decision and order of the Court.

Dated: April 4, 2007

APR 04 2007

FILED
 APR 11 2007
 NEW YORK
 COUNTY CLERK'S OFFICE



 J.S.C.
ALICE SCHLESINGER

¹Counsel for Sorel alleged in his cross-motion to withdraw that he could not locate Sorel and had not communicated with him for some time. Sorel's affidavit in the Kings County action appears to corroborate counsel's claims herein.