

John Anthony Group v Rong Gui Zheng

2007 NY Slip Op 33245(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0602742/2002

Judge: Debra A. James

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

JOHN ANTHONY GROUP,
Plaintiff,

- v -

RONG GUI ZHENG, XIAO RONG ZHAO, and
RENYI ZHENG a/k/a STEVE ZHENG,
Defendants.

Index No.: 602742/02
Motion Date: 06/26/07
Motion Seq. No.: 02
Motion Cal. No.: 47

The following papers, numbered 1 to 2 were read on this motion to dismiss.

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

PAPERS NUMBERED

1

2

FILED
OCT 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants' motion shall be denied and this matter shall be set down for a pre-trial conference.

The parties' papers submitted on this motion indicate some confusion about the history of this matter and the current status of the case. This may be understandable in light of the fact that the matter has not been actively litigated and there have been changes in counsel. Such facts, however, cannot and do not affect the disposition of the current application.

It is undisputed that on July 25, 2003, a default judgment

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

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

was filed and docketed in this court against the defendants based upon an Order of this court dated December 11, 2002, following an inquest scheduled therein which was held on June 16, 2003. In order to place this action on the calendar for inquest the plaintiff filed a note of issue on February 19, 2003, and obtained a calendar number 2003L-00849.

Defendants by motion returnable November 17, 2003, moved to vacate their default. By Order dated December 1, 2003 (Lcbedeff, J.), the court held the motion in abeyance pending a traverse hearing before a special referee. Apparently, the parties thereafter entered into a stipulation dated March 18, 2004, pursuant to which the parties stipulated to withdraw the motion to vacate the default judgment, restore the action to the calendar for a determination on the merits, keep the lien and judgment against the defendants in effect until a decision on the merits by the court. The stipulation further stated that the defendants would submit an answer and that discovery would be completed by June 2004. The defendants filed an answer in this action on April 16, 2004, and the plaintiff replied to the counterclaims in May 2004. There is no evidence this stipulation was ever so-ordered by this court or otherwise filed in this action.

Defendants now argue that having sent notice in compliance with CPLR 3216 and the plaintiff having failed to respond to such

notice, they are entitled to dismissal. Defendants are incorrect. "CPLR 3216 requires three conditions precedent before a case can be dismissed for want of prosecution: (1) issue has been joined; (2) one year has elapsed from the joinder of issue; and (3) the court or a party has served a written demand that the plaintiff file a note of issue within 90 days. . . . Accordingly, CPLR 3216 is clearly intended to apply to cases which have not yet reached the trial calendar." Lopez v Imperial Delivery Service, Inc., 282 AD2d 190, 194 (2d Dept 2001); accord Johnson v Sam Minskoff & Sons, Inc., 287 AD2d 233 (1st Dept 2001).

As stated above, this case was never removed from the trial calendar and the note of issue was never vacated and therefore dismissal cannot be had under CPLR 3216. Nor is CPLR 3404 applicable. Although dismissal under CPLR 3404 may be had without an order where a case is on the trial calendar, on the facts presented here it is inappropriate because the court's Order of December 1, 2003 (Lebedeff, J.), specifically held in abeyance defendants application to vacate the default. As a result, the failure of the parties to notify the court of their stipulation to proceed on the merits left this interim order open without judicial resolution. Therefore, there was no failure to answer a "calendar call" because the application to vacate the court's judgment was still pending so far as the court is concerned.

Because the parties agreed to proceed on the merits and have joined issue, the proper course is for the case to proceed on the trial calendar. That is, the parties have agreed to the restoration of this action to post-note of issue status on the trial calendar and to vacate the prior judgment once a merits determination issues. The court notes that the parties never agreed to remove this action from the trial calendar by vacating the note of issue and therefore the court shall, unless otherwise asserted by the parties, proceed to trial of this matter. The court will therefore set a pre-trial conference to fix a date for a bench trial in this action. Because the parties agreed in their stipulation to have the lien and judgment remain in effect until trial, the court shall not disturb the prior judgment.

Accordingly, it is

ORDERED that plaintiff's motion is DENIED; and it is further

ORDERED that the parties are directed to attend a pre-trial conference on October 30, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set an inquest date.

This is the decision and order of the court.

Dated: September 28, 2007

ENTER:

FILED
 OCT 10 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

Debra A. James J.S.C.
DEBRA A. JAMES
 J.S.C.