

Carroll v Nostra Realty Corporation

2007 NY Slip Op 34366(U)

February 21, 2007

Supreme Court, New York County

Docket Number: 0109293/2002

Judge: Carol R. Edmead

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: EDMEAD
Justice

PART 35

SAMANTHA CARROLL

- v -

NOSTRA REALTY CORP

INDEX NO. 109293/02

MOTION DATE 1/9/07

MOTION SEQ. NO. 7

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause by plaintiffs Debra Carroll, James Carroll, Samantha Carroll, and Zachary Carroll to vacate the Court's dismissal of the action on October 12, 2006 and to restore this action to the Court's calendar is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

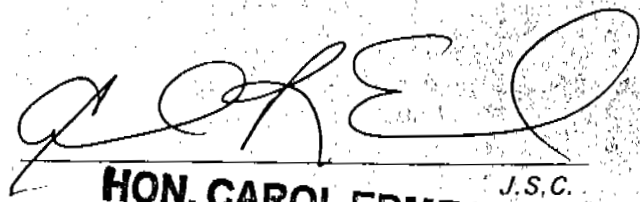
This constitutes the decision and order of the Court.

FILED

FEB 27 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: 2/21/07



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

TO BE FULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
SAMANTHA CARROLL, and ZACHARY CARROLL,
Infants under the age of fourteen years, by their Mother and
Natural Guardian, DEBRA CARROLL, and DEBRA
CARROLL and JAMES CARROLL, Individually,

Plaintiffs,

Index No. 109293-2002

-against-

DECISION/ORDER

NOSTRA REALTY CORPORATION,

Defendant.

-----X
NOSTRA REALTY CORPORATION, GREATER NEW
YORK INSURANCE COMPANY, CENTENNIAL
INSURANCE COMPANY,

Third-Party Plaintiffs,

-against-

FIREMAN'S INSURANCE COMPANY OF
WASHINGTON D.C.,

Third-Party Defendant.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this landlord-tenant/personal injury action, plaintiffs Debra and James Carroll, and their children Samantha and Zachary Carroll (collectively, "Tenants") move by order to show cause pursuant to CPLR 5015 (a)(1) to vacate the Court's dismissal of the action on October 12, 2006 and to restore this action to the Court's calendar.

Factual Background

This action arises from a dispute between the defendant, Nostra Realty Corporation, (the “Landlord”) and the Tenants over the living conditions at the residential premises of 845 West End Avenue, Apartment 5E, New York, New York (“the premises”). When the Tenants ceased paying rent, allegedly in response to the ongoing existence of hazardous conditions in the premises, the Landlord commenced a summary proceeding against the Tenants in the Civil Court of the City of New York (the “summary proceeding”). In defense of that action, the Tenants alleged that they were constructively evicted based on, *inter alia*, the presence of mold in the premises. The Tenants also counterclaimed for, *inter alia*, damages based on the Landlord’s breach of the warranty of habitability and an order requiring the Landlord to correct the dangerous conditions pursuant to various New York state and local codes and regulations.

Thereafter, in April of 2002, the Tenants commenced the instant action against the Landlord alleging that they sustained severe and permanent mental and physical injury as a result of the presence of toxic mold and asbestos in the premises (the “tort action”).

Upon motion, the summary proceeding and the tort action were consolidated in this Court and proceeded with discovery. After many delays during the discovery stage of this litigation, and at the direction of the Court, plaintiff filed the note of issue on March 28, 2006. Although discovery was outstanding, due to protracted nature of this litigation, the Court directed that plaintiff file the note of issue and that discovery proceed nonetheless.

The Landlord subsequently moved to strike the Tenant’s jury demand. Pending a decision on the merits of said motion, by interim order dated August 14, 2006, this Court directed the parties to “appear for trial in Part 40, Justice [Ira] Gammerman . . . on September 18,

2006, 9:30 a.m.” In the interim decision, this Court also instructed that “No adjournments shall be granted.” This Court subsequently denied the Landlord’s motion to strike the jury demand (Order, dated August 25, 2006).

On September 18, 2006, counsel for all parties appeared in Part 40 before Justice Ira Gammerman as directed. At this time, Justice Gammerman was advised that discovery was still underway. Counsel for the Tenants, Fredric M. Gold (“Mr. Gold”), also advised Justice Gammerman that he was scheduled to go to trial in federal court on September 24, 2006 in the matter of *McCormack v LIRR*, and that he intended appear for jury duty on October 23, 2006.

According to Mr. Gold, he also advised Justice Gammerman that he was scheduled to go to trial in the Supreme Court, Westchester County, in the matter of *DeLuca v Iannuzzi* (“*DeLuca*”) on October 11, 2006 and in the matter of *Loung v The Long Island Railroad Company* on October 30, 2006. According to the Landlord, however, Mr. Gold never advised Justice Gammerman of his trial dates on these two additional cases. Instead, based on Mr. Gold’s representations concerning his September 24th trial and October 23rd jury duty commitment, the parties agreed to and selected October 12th as the adjourn date for the trial of this action, that being a date after the conclusion of the federal trial and before the commencement of Mr. Gold’s jury duty.

At Mr. Gold’s request, and over the objection of the Landlord, Justice Gammerman granted a final, short adjournment of the trial to October 12, 2006.

According to Mr. Gold, on October 11, 2006, Mr. Gold “was present in Supreme Court Westchester County and a jury slip was issued on the *DeLuca* case and [Mr. Gold] was sent down to the jury part, had a conference with JHO Rabin in which the case and jury selection procedures

were discussed . The case was put over for selection on October 16, 2006.” (Affidavit of Mr. Gold, 6).

On October 12, 2006, Mr. Gold’s partner, Jesse Sable, appeared in Part 40 before Justice Gammerman with an “Affirmation of Engagement” dated October 11, 2006, wherein Mr. Gold requested an adjournment of the trial and affirmed the following: “That on this date I am actually on trial in the Supreme Court of the State of New York, County of Westchester, in the matter of Christine DeLuca v Catherine Iannuzzi, bearing the Index# 13222/01. . . .”

Justice Gammerman rejected both Mr. Gold’s affirmation of engagement and the Tenants’ application for an adjournment, and dismissed the case.

According to Mr. Gold, he proceeded with the *DeLuca* jury selection and trial (*see infra at p. 10*).

Tenants’ Motion

In support of vacatur of the default entered against them, the Tenants argue that they have demonstrated both a reasonable excuse for the alleged default and a meritorious cause of action. The Tenants argue that their default was neither intentional nor willful. Specifically, the Tenants maintain that their inability to proceed to trial on October 12, 2006 was “due to Mr. Gold’s engagement” and that Mr. Gold’s engagement in another court was a reasonable excuse for the alleged default. The Tenants rely on the Uniform Rules for the New York State Trial Courts, section 125.1, which provides that “Engagement of counsel shall be a ground for adjournment of an action” According to Mr. Gold, he is the only attorney in his firm competent to represent the Tenants, as his partner, Mr. Sable, is 84 years old and retiring from the legal profession, and his associate, Ms. Mahlstage, is inexperienced to handle the matter. The Tenants further

maintain that their affidavits of merit and their bill of particulars sufficiently establish a meritorious cause of action for purposes of their motion.

In opposition, the Landlord argues that in addition to the factual misrepresentations made by Mr. Gold, Mr. Gold was not actually engaged as that term is defined by subdivision (b) of section 125 of the Uniform Rules, which reference is conspicuously absent from the Landlord's motion. According to the Landlord, when the parties appeared before Justice Gammerman for trial on September 18th, as ordered by the Court, the Tenants requested an adjournment because they had yet to retain or identify an expert witness in the personal injury aspect of the case. When Justice Gammerman granted the Tenants' request, the parties mutually selected the trial date of October 12th. At that time, Mr. Gold never advised Justice Gammerman that he was scheduled for another trial the same week as this action. Nor did Mr. Gold take any steps thereafter, between September 18th and October 12th, to adjourn the trial of this action.

Counsel for the Landlord contends that upon her receipt of Mr. Gold's affirmation of engagement, she contacted the clerk in Westchester County and was informed that Mr. Gold had appeared in the morning (of the 11th), but was directed to return the following Monday (October 16th) to pick a jury. On October 12th, when Mr. Gold's partner, Mr. Sable, appeared before Justice Gammerman, he simply stated that Mr. Gold was actually engaged on the *DeLuca* trial in Westchester, but did not advise the Court that Mr. Gold was scheduled to commence jury selection in said trial on October 16th. The Landlord contends that when Mr. Sable refused to pick a jury on October 12th, Justice Gammerman ordered a reporter, thereby giving Mr. Sable time to reconsider his intentional refusal to pick a jury, and time to telephone Mr. Gold to advise him of the Court's directive to proceed to trial. About 45 minutes later, when the court reporter

appeared, the Tenants' counsel again refused to select a jury.¹

It is pointed out that Mr. Gold fails to explain in his motion his failure to appear in Part 40 on the 12th, and that there was no impediment to his appearance on the 12th, at which time he could have disclosed his purported engagement.²

The Landlord contends that Mr. Gold's decision to send his partner was an attempt to deceive the court, and to prevent Justice Gammerman from directing him to pick a jury and consulting with the Westchester Supreme Court. The Landlord further contends that Mr. Gold's fraud is exacerbated by his claim that Mr. Sable could not pick a jury. To the contrary, Mr. Sable, an extremely experienced trial attorney, in fact tried a case to verdict only one month before the October 12th appearance. The Landlord argues that Mr. Gold should not be relieved of the consequence of his actions, and at the very least, the Court should impose sanctions and costs in the form of attorneys' fees and disbursements.

Furthermore, it is argued that the Tenants failed to establish a meritorious claim. According to the Landlord, the Tenants failed to submit any affidavits from a medical doctor proving any injuries, from any physician showing causation between mold and the Tenants' alleged symptoms, or from any plumber, engineer, or other expert showing liability on the part of the Landlord.

¹ Affirmation of Arthur Xanthos, Esq., ¶¶14-15.

² Counsel for the Landlord intimates that Mr. Gold was conducting meetings with physicians to prepare them for an upcoming trial (Affirmation of Arthur Xanthos, ¶12).

Analysis

An application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of justifiable excuse and legal merit to the claim or defense asserted (*Crespo v A.D.A. Mgt. et al.*, 292 AD2d 5 [1st Dept 2000]). It is within the sound discretion of the court to determine whether the proffered excuse and the statements of merit are sufficient (*Navarro v Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]).

Mr. Gold's failure to appear in Part 40 for trial on October 12th is unsupported by any reasonable excuse. Mr. Gold's contention that section 125.1 of The Rules of the Chief Administrator of the Courts excuses his nonappearance on the 12th is unfounded and wholly lacking in merit.

Section 125.1 of The Rules of the Chief Administrator of the Courts states the following:

Engagement of Counsel

(a) Engagement of counsel shall be a ground for adjournment of an action or proceeding in accordance with this rule.

(b) Engagement of counsel shall mean *actual engagement on trial* or in argument before any state or federal trial or appellate court, or in a proceeding conducted pursuant to rule 3405 of the CPLR and the rules promulgated thereunder. . . .

* * * * *

(e)(1) Each engagement shall be proved by affidavit or affirmation, filed with the court together with proof of service on all parties, setting forth: . . .

(v) the date and time the engagement *is to commence or did commence* and the date and time of its probable conclusion.

(2) In determining an application for adjournment on the ground of engagement elsewhere, the court shall consider the affidavit of engagement and may make such further inquiry as it deems necessary, including:

(ii) *whether or not the actions or proceedings involved were marked peremptorily for trial or were the subject of some other special marking;*

(iii) the number of times each of the actions or proceedings involved was previously adjourned and upon whose application;. . .

This Court finds that the affirmation of engagement herein fails to meet the requirements of section 125.1 of The Rules of the Chief Administrator of the Courts and fails to establish that Mr. Gold was “actually engaged” on October 12, 2006. The statement in Mr. Gold’s affirmation of engagement, that he was “actually on trial” was disingenuous and incorrect. Since Mr. Gold was scheduled to appear in the Westchester County Supreme Court for “trial” on October 11th, to his credit, his preparation of the letter (presumably on the 11th) and statement therein that he was “on trial” “on this date” was appropriate, as he reasonably could have expected to commence jury selection in the *DeLuca* case on October 11th. However, on the date Mr. Gold’s affirmation was submitted to the Court on October 12th, Mr. Gold was not actually engaged “on trial” as that term is generally understood in the legal community. The meaning of “on trial” is the time from which jury selection commences until disposition of the trial, neither of which was the case in the *DeLuca* matter on October 12th.

Although not governing authority, persuasive authority for this position is compelling. For example, it has been stated that “[o]n trial” means at the point of jury selection (*see Draves v Chua*, 168 Misc 2d 314, 642 NYS2d 1022 [Supreme Court, Erie County 1996] [*citing* CPL 1.20(11), and holding Article 31-Disclosure pre-trial rules as inapplicable, on grounds that “Jury selection . . . is not a pretrial stage, but rather is the commencement of the jury trial itself]).

In *Wright v Centurion Investigation, Inc.* (109 Misc 2d 624, 440 NYS2d 526 [Civil Court, Kings County 1981]), the Civil Court was presented with the issue of whether defendants who have filed a demand for a jury, after plaintiff had requested a nonjury trial, have the right to withdraw that demand without the consent of the plaintiff, and/or the court, at any time. The Court analyzed the procedures under the governing statute, CPLR 4102, and the powers of the

Court under CPLR 4102 [e] to relieve a party who has failed to demand a jury trial within the required time periods. The Court realized that such applications have been made prior to trial, and therefore, addressed the issue of “what constitutes trial.” In so doing, the Court found that

This case could reinforce the interpretation that there is no right to waive or demand a jury trial once trial has begun, which in the case of a jury trial does seem to be with the selection of the jury. In the case at bar the plaintiff failed to demand a jury. Some of the existing defendants demanded a trial by jury. The case was marked "select" on the calendar call, *and the parties were in the process of selecting* when all existing defendants requested a nonjury trial. *If a jury trial begins with the selection of a jury*, then the defendants herein need the permission of the plaintiff to withdraw their demand.

If trial begins when the jury is sworn in and the court commences its opening remarks, then the defendants can still withdraw their demand as of right during selection and plaintiff, of course, would need the permission of the court to file a demand *nunc pro tunc*.

Plaintiff has moved for such an order permitting the filing of a jury demand *nunc pro tunc*. In view of all of the above the court finds that the case at bar was actually on trial and therefore the defendants' request to withdraw the jury demand required the consent of the plaintiff, which consent was declined.

(Emphasis added).

Under any of the above scenarios, Mr. Gold was not *in the process of selecting* and *the jury was not sworn in*.

Further, an examination of the Criminal Procedure Law reveals that although the term “trial” has different definitions in different contexts, a “trial” can be deemed to commence upon jury selection. CPL § 1.20(11) defines trial as follows: “A jury trial commences with the selection of the jury and includes all further proceedings through the rendition of a verdict. A non-jury trial commences with the first opening address, if there be any, and, if not, when the first witness is sworn, and includes all further proceedings through the rendition of a verdict.” This differs from the definition of trial employed in CPL § 40.30, the double jeopardy provision, which states that a proceeding is at the trial stage when a jury has been impaneled and sworn or,

in the case of a trial by the court without a jury, a witness is sworn. (*In re Richard S.*, 195 Misc 2d 752, 761 NYS2d 779 [NY FamCt 2003]).

The above cited cases support the conclusion that in a civil action to be tried before a jury, an attorney is actually engaged “on trial” at the point he or she commences selecting the jury.

To present an affirmation to the Court on the 12th that Mr. Gold was “on trial,” when in fact, the matter was adjourned to the 16th for jury selection, was, at best, misleading, and at worse, outright false. The submissions herein indicate that on October 11th, the *DeLuca* case was adjourned to October 16th for jury selection; jury selection had *not* begun on October 11th. Further, the Court takes judicial notice of the Westchester County Supreme Court records on the *DeLuca* case, which indicate that on October 11th, the case was marked “CIT-J” (“called in for trial”). The next entry appearing after October 11th is an entry for October 16th, which is marked “JBD” (jury being drawn). There is no entry made for the date of October 12, 2006.

Yet, in a startling display of sophistry, the affirmation of engagement was presented to the Court on the 12th, not intimating, but stating that Mr. Gold was on trial, when in fact, the matter was adjourned. It strains credulity to imagine how Mr. Gold could have believed that the adjournment of the *DeLuca* trial on the 11th nevertheless constituted “being on trial” so as to excuse his appearance on the 12th. Thus, it was wholly disingenuous for Mr. Gold to supply the Court with the engagement letter on his behalf on the 12th as a basis of his nonappearance. Tellingly, the order to show cause by the Tenants fail to indicate the whereabouts of Mr. Gold on October 12th. Mr. Gold’s whereabouts on October 12th remain a mystery to the Court.

A further glaring omission is that while Mr. Gold underscored subdivision (a) to highlight that “Engagement of counsel shall be a ground for adjournment,” and proceeded to quote subdivisions (c) through (f), he utterly failed to recite subdivision (b), which provides the definition of “Engagement of counsel.” This omission demonstrates the continued pattern of intent to mislead the Court into adopting the Tenants’ position and granting relief in their favor.

Furthermore, upon a reading of Mr. Gold’s motion, it would appear that the October 12th date was set by the Court with disregard of Mr. Gold’s previously scheduled trial on the *DeLuca* matter on October 11th. Without the benefit of the transcript of the proceedings before Justice Gammerman, it would appear that all parties and the Court should have known that Mr. Gold could not appear on October 12th. However, Mr. Gold’s attempt to shift the blame of his nonappearance to Justice Gammerman for his “purported inflexibility” is unavailing. The transcript of the proceedings for October 12th, which supports the contentions made by counsel for the Landlord, clearly indicates that contrary to Mr. Gold’s contention, *all parties* in this action agreed to a trial date of October 12th, and Mr. Gold did *not* advise any party or the Court that the *DeLuca* trial had already been scheduled for October 11th. As Justice Gammerman stated on the record, when “everybody was here on the 18th” of September, Mr. Gold did not tell the Court that he was expected to appear for trial in the *DeLuca* case on the 11th, because “If you [sic] told me that, I wouldn’t have picked today. This is the date that everybody agreed to. . . .When I saw everybody on the 18th of September, this is the date that everybody said they were ready to pick the jury” (Transcript, p. 5). And, “obviously, if Mr. Gold felt that he had to be in Westchester on the 16th of October, he wouldn’t have agreed to the October 12th on this date.” (Transcript, p. 5) Thus, Mr. Gold’s claim that he advised Justice Gammerman that he was scheduled to go to trial

in the *DeLuca* case is incredible.

The Court further notes that Mr. Gold, who was rescheduled to pick a jury on October 16th in the *DeLuca* matter, could not select two juries in two different courts, as pointed out by Mr. Gold's partner and acknowledged by Justice Gammerman. However, consistent with section 125.1 (c), Justice Gammerman advised that if Mr. Gold "had come here today [October 12th] and told me his problems, I would have directed you [him] to pick a jury today, and I would have dealt with the Judge in Westchester to have that case follow this case. Yet, section 125.1 (c) provides that "Subject to the provisions of subdivision (f)³ of this section, where any attorney has conflicting engagements in the same court or different courts, the affected courts shall determine in which matters the parties shall proceed. . . ." Pursuant to the statute on which Mr. Gold relies, it is up to the courts, *not counsel*, to decide which of the two trial engagements shall be adjourned. Instead, "[Mr. Gold] elected not to do that [pick a jury]. He [Mr. Gold] elected to submit a misleading, I am being generous, a misleading affidavit." (Gammerman, J., Transcript, pp. 7-8).

As stated by the United States Supreme Court, "all individuals, whatever their position in government, are subject to . . . law: No man in this country is so high that he is above the law. No officer of the law may set that law of defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it" (*United States v Lee*, 106 US (16 Otto) 196, 220, 1 SCt 240, 261, 27 LEd 171 [1882]; *see also Butz v Economou*, 438 US 498, 506, 98 SCt 2910 [1978]).

³ Subdivision (f) involves situations where "a trial already has commenced . . .," and is thus, inapplicable to the issue at bar.

This is not a case where counsel was actually engaged in another Court proceeding and the Court refused to adjourn the trial (*cf. McCluskey v Ferriter*, 292 AD2d 244, 738 NYS2d 844 [1st Dept 2002]).

Indeed, counsel has made his procrustean bed in egregious misstatements to the Court, and must now lie in it.

The court is mindful that this harsh result penalizes the clients, the Carroll family. However, contrary to Mr. Gold's contention, it is not the Court that is denying the Carroll family their day in court; Mr. Gold accomplished this result when he decided to refuse to appear in Part 40 before Justice Gammerman as ordered. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123, 700 NYS2d 87, 722 NE2d 55 [1999]).

As the Tenants have not met their burden of establishing an excuse for the default, the issue of Tenants' potential meritorious defense need not be reached (*see Campos v New York City Health and Hosp. Corp.*, 307 AD2d 785, 763 NYS2d 292 [1st Dept 2003] [holding that plaintiff's failure to demonstrate reasonable excuse for her failure to appear at calendar call warranted denial of her motion to vacate the default]; *see also, Foster v Gherardi*, 201 AD2d 701, 608 NYS2d 2 [2d Dept 1994] [upholding refusal to grant plaintiff adjournment and dismissal of action based on counsel's failure to appear for trial on scheduled date where (1) attorneys were advised there would be no adjournment for any reasons, (2) counsel of record never advised court or adversary of any need for adjournment and instead failed to appear and sent outside attorney on his behalf to obtain adjournment, (3) that outside attorney orally

informed court that plaintiff's record attorney was engaged in another trial but offered no affidavit to that effect, and (4) was unable to furnish any information as to whereabouts of any of attorneys in plaintiff's attorney's law firm]).

Conclusion

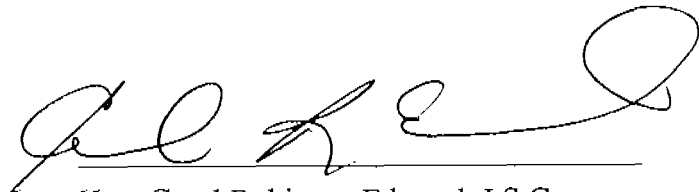
Accordingly, it is hereby

ORDERED that the order to show cause by plaintiffs Debra Carroll, James Carroll, Samantha Carroll, and Zachary Carroll to vacate the Court's dismissal of the action on October 12, 2006 and to restore this action to the Court's calendar is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 21, 2007



Hon. Carol Robinson Edmead, J.S.C.

FILED
FEB 27 2007
NEW YORK
COUNTY CLERK'S OFFICE