SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

CENTO PROPERTIES CO.,

Petitioner,

INDEX No. 024134/99

MOTION DATE: June 5, 2008
Motion Sequence # 002

-against-

THE BOARD OF ASSESSORS AND THE BOARD OF ASSESSMENT REVIEW OF THE COUNTY OF NASSAU,

Respondents.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation XX
Memorandum of Law..... X

PRELIMINARY STATEMENT

The Petitioner moves to reargue its prior motion to restore the proceeding to the Trial Calendar of the Court. The original motion was denied by Hon. Joseph A. DeMaro, since retired. The Petitioner argued that the Court overlooked matters of fact in rendering the Decision dated December 20, 2007.

CENTO PROPERTIES CO. **Index no. 024134/99**

PRELIMINARY STATEMENT

The Petitioner moves for an order restoring the proceedings to the ready trial calendar of the tax certiorari part of the Supreme Court. The motion was previously denied by Order dated December 20, 2007 (DeMaro, J.). Justice DeMaro has since retired and the matter is before this Court on a motion to reargue. The Petitioner asserts that the Court, in rendering the prior Decision and Order, overlooked matters of fact. The Respondents oppose the application on the grounds that the matters of fact which the Court is claimed to have overlooked are raised for the first time in the motion to reargue, and were not submitted for consideration by the Court on the original motion. In its Reply, the Petitioner contends that the Court misconstrued and misunderstood the efforts undertaken to resolve the matter and the contents of the agreement between the parties for removal and restoration of matters to the trial calendar.

BACKGROUND

Commencing in 1993, then- presiding Justice and Administrative Judge Leo F. McGinity sought to reduce the extraordinary backlog of tax certiorari matters on the active trial calendar. He established a 500-case monthly calendar, at which time the cases would receive an off-calendar marking, be transferred to a reserve calendar, and be recalled in six months, to determine the status of negotiations. Upon recall, they were marked either "settled" or "discontinued", irrespective of the reality that most were neither settled nor discontinued. The purpose was to enable the Respondents to obtain preliminary appraisals, adequate to serve as a basis for settlement negotiations, but not full trial appraisals complying with Uniform Rules for Trial Courts § 202.59. There are very many cases which have either never been negotiated, or were negotiated without success, and which Petitioners seek to restore to the ready trial calendar. This is one of them.

DISCUSSION

Motion to Reargue - Necessary Showing

Civil Practice Law and Rules § 2221 governs motions which address prior orders of the Court. It provides in part as follows:

Rule 2221. Motion affecting prior order

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and
2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

(b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.

(c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge.

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.
>
> (f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

The difference between motions for leave to reargue and leave to renew is that the former are based upon matters of law or fact, previously submitted, which the Court is claimed to have misapprehended or misunderstood; while the latter includes new facts not previously before the Court. The motion before the Court is labeled one for reargument. The original motion papers described the agreement between the parties whereby matters would be stricken from the calendar, but could be restored by letter within three years from the date of marking. They also detailed the efforts of the Petitioner to supply the Respondent with adequate information to enable them to make an informed decision as to the value of the subject for the tax years under review. The current application does not include new or additional facts not previously submitted to the Court; but rather, states that the import of those facts was misunderstood.

This Court agrees with that position, and adds, that included in a motion to reargue is a claimed misapprehension of the law in the prior determination. Such is the case in this matter. Calendar practice in the State of New York is governed by Civil Practice Law and Rules §§ 3404 and 3216, not by oral agreements between or among the parties, the substance of which are illusory, and the import of which are undetermined. Accordingly, the motion to reargue is **granted**; and this Court will now address the underlying motion.

Restoration of Cases for which a Note of Issue was filed.

Uniform Rules for Trial Courts § 202.59(d)(2) requires a Note of Issue for each property for each year under review in a tax certiorari proceeding. Real Property Tax Law § 718 sets time limits within which Notes of Issues for each subsequent year must be filed. For many years the County and Petitioners have executed a standardized stipulation which extends the time within which to file a Note of Issue until the time when the Petitioners are required to furnish a stipulation of consolidation of all open actions on the same property. Consequently, a Note of Issue is typically filed for the first year only, and the others are filed only in conjunction with trial preparation. That is the situation in this case.

Only cases in which a Note of Issue has been filed require compliance with Civil Practice Law and Rules § 3404. In the Second Department, leave to restore is automatically granted if application is made within one year of the date of the marking. After one year, the matter is presumed abandoned, and is dismissed. But the presumption is rebuttable, and the Petitioner must make a four-pronged showing to justify reinstatement. (***Basetti v. Nour***, 287 A.D.2d 126, 133, 2nd Dept., 2001; See also, ***McClure v. Schindler El. Corp.***, 297 A.D.2d 335, 2nd Dept., 2002).

The party seeking restoration must show that there is a meritorious cause of action, that there was not intentional abandonment, that there is a reasonable excuse for the delay, and that the delay has not caused prejudice to the opposing party. But where the parties have stipulated to remove the case from the calendar, and particularly where it is done to accommodate the Defendant or Respondent, cases have held that the requirements of § 3404 with respect the foregoing showings are inapplicable. (***Denver v. American Home Products Corp., et al.***, 138 A.D.2d 670, 671, 2nd Dept., 1988; ***Nicolich v. Fitzgerald***, 259 A.D.2d 741, 2nd Dept., 1999).

But even applying the standards for restoration of § 3404, the Petitioner has established entitlement to restoration to the ready trial calendar. The submissions by counsel for the Petitioners are based on their actual knowledge of the circumstances under which the matter was stricken from the calendar, and the efforts to resolve it with the Respondents. Their actions belie any evidence of an intention to abandon the matter. The delay in seeking restoration was consistent with the very purpose for the removal, that is, to permit the Respondents to obtain appraisal reports upon which to negotiate with the Petitioner; and the reference to appraisals showing reductions evinces an adequate claim of a meritorious cause of action.

The motion to restore those matters for which a Note of Issue has been filed is **granted**.

Restoration of Pre-Note of Issue Matters.

In matters in which a Note of Issue has not been filed, and in which a party unreasonably neglects to proceed, or otherwise delays in the prosecution thereof, or who unreasonably fails to serve and file a Note of Issue, the Court may dismiss the party 's pleadings. Unless specifically provided to the contrary, the dismissal is not on the merits. But no such dismissal can take place unless the party seeking relief shall have served a written demand by registered or certified mail, calling upon the party against whom relief is sought, to serve and file a Note of Issue within ninety days of receipt of the demand. (Civil Practice Law and Rules § 3216). "In the absence of a 90-day notice pursuant to CPLR 3216, restoring a case marked 'inactive' is automatic". (***Andre v. Bonetto Realty Corp., et al.***, 32 A.D.3d 973, 975, 2nd Dept., 2006). (Internal citations omitted).

CONCLUSION

The motion to reargue is **granted**, and, upon reargument, the motion to restore all pending proceedings is also **granted**. To the extent that the motion involves a filed Note of Issue, the Petitioner has satisfied the burden of establishing a meritorious cause of action, that there was no intentional abandonment, that the delay was occasioned by a justifiable excuse, and that the Respondents have not been prejudiced. In addition, even if the Petitioner were to fail in satisfying the four-pronged test for vacating a default, the fact that the striking from the calendar was by agreement between the parties, and for the benefit of the Respondent, conformity is not necessary. (*see* ***Denver***, 138 A.D.2d at 671, ***Nicolich***, 259 A.D.2d 741).

There is no evidence, in either statutory law, Rules of Court, or Appellate case Law, of a claimed "3-Year Rule". While this may have been the time frame in which it was hoped that the Respondents would be able to gather themselves sufficiently to negotiate cases, and during which restoration could be had by simple letter, or a period beyond which the Respondents informally requested that the Petitioners seek restoration of unresolved matters, it certainly does not override Civil Practice Law and Rules §§ 3404 and 3216, the Uniform Rules for Trial Courts, or the Decisional Law cited herein.

With respect to those proceedings for which a Note of Issue has not been filed, the

motion is also **granted**. The Respondents have not shown any evidence of the service of a 90-day notice to the Petitioner calling upon them to file a note of issue, or that such notice has not been responded to by the Petitioners.

The parties are directed to exchange trial appraisal reports conforming to §202.59(g) of the Uniform Rules for Trial Courts, within sixty days of the receipt of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.

JUL 21 2008

Hon. Stephen A. Bucaria, J.S.C.