Joseph v Hickey
2011 NY Slip Op 33913(U)
November 18, 2011
Sup Ct, Bronx County
Docket Number: 16325/05
Judge: Jr. Thompson
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DISMISSED
CPLR 3216
FAILURE TO
PROSECUTE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
HAIM JOSEPH,

Index No. 16325/05

Plaintiff,

-against-

DECISION/ORDER

JOYCE I. HICKEY, JAMES M. HICKEY and JANET HICKEY,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	_____
Answering Affidavit and Exhibits	_____
Replying Affidavit and Exhibits	_____
Affidavit	_____
Pleadings -- Exhibit	_____
Stipulation -- Referee's Report --Minutes	_____
Filed papers	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' motion for an Order pursuant to CPLR § 3216 dismissing Plaintiff's Complaint for failing to prosecute is GRANTED.

Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment on their First and Second counterclaims is DENIED.

Failure to Prosecute

Defendants contend that Plaintiff has failed to timely file and serve a Note of Issue, thus, his action should be dismissed for failure to prosecute.

> No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:
>
> (1) Issue must have been joined in the action;
>
> (2) One year must have elapsed since the joinder of issue;
>
> (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or

> certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety-day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

CPLR § 3216(b)(1)-(3). "Pursuant to CPLR § 3216(b)(3), the prescribed 90-day period for complying with the demand is measured from the *receipt* of such demand rather than the more commonly applicable date of service." Indemnity Insur. Co. v. Lamendola, 261 AD2d 580, 582. (emphasis added).

> In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

CPLR § 3216(e).

Issue was joined in this matter on or about August 4, 2008. The June 1, 2009, Compliance Conference Order required Plaintiff to file a Note of Issue on November 9, 2009, which he failed to do. Defendants sent a letter to Plaintiff on or about June 10, 2010, requesting that he file his Notice of Issue within ninety days or face a motion to dismiss. Plaintiff concedes that he received this letter. He contends, however, that he did "not know why this letter was sent to [him] and not to Attorney Segal, who was still his attorney of record." (J. Haim Aff at ¶ 21.) And that "any failure to file a Note of Issue should be excused in light of his former attorney's hospitalization and medical treatment." (Id. at ¶ 24.) Benjamin Segal, who was Plaintiff's Attorney of Record, states that "[i]n October 2009, I incurred a serious medical crisis and fell ill as a result of issue

with my heart. I received immediate, in-patient care at a hospital for three weeks, and then continued with medical treatment and physician care to date." (B. Segal Aff at ¶ 3.)

Although a counsel's illness and law office failure may be used as an excuse for failing to timely file a Notice of Issue, the Court finds that this excuse does not suffice under these circumstances. First, Defendants proffer evidence that Plaintiff himself notified Defendants' counsel on or about February 23, 2010, that he was "LOOKING for new attorney, since Mr. Segal is no longer able to handle this case." (Def Aff Reply at Ex. G.) And to "[p]lease address all correspondence to my address in the meantime." (Id.) Plaintiff lacked the assistance of counsel for four months prior to receiving Defendants' § 3216 Notice. Yet he did not change attorneys until January 25, 2011, six months after receiving the Notice. And made no effort move his case along until responding to Defendants' motion eight months after receiving the Notice.

Plaintiff's bare assertion that he did not file a Note of Issue after receiving Defendants' Notice because of his attorney's alleged health issues, coupled with a lack of explanation as to why it took him nearly a year to find new counsel, is an insufficient basis for this Court to find no intent on the part of the Plaintiff to abandon this matter or to show an excusable default. See Habib v. Miller, 233 A.D.2d 480; see also M.P.S. Marketing Services, Inc. v. Champion Int'l Corp., 176 A.D.2d 250, 251 (holding that "plaintiff[s'] ... delays with the substitution of counsel, do not justify the plaintiffs' failure to file a note of issue pursuant to the demand").

Additionally, although Mr. Segal states that he was aware that Plaintiff received Defendants' Notice, he fails to indicate when—or if—Mr. Joseph ever brought it to his attention. He also fails to state exactly what his condition was, how long it debilitated

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him or how it prevented him from filing a Note of Issue as required. See Michaels v Sunrise Bldg. & Remodeling, Inc., 65 A.D.3d 1021, 1023 (finding that despite plaintiff's contention that the failure to file a Note of Issue "was a result of a law office failure and their attorney's health problems," "plaintiffs provided no detailed explanation or any evidence to substantiate these excuses"). Thus, there is no basis for this Court to determine that Plaintiff's failure to file a Note of Issue was the result of neglect on the part of his attorney of record, engendered by his purported medical condition, rather than a willful intent to abandon this action. See Carte v. Segall, 134 A.D.2d 397.

Summary Judgment

Defendants are also moving for summary judgment on their First Counterclaim for adverse possession and their Second Counterclaims for a determination that the location of the fence at issue if the legal dividing boundary. Plaintiff opposes this application on the grounds that Defendants' successor-in-interest erected the fence at issue in 1967 with the consent and permission of the respective landowner.

A proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact. Raia Indus. v. Young, 124 A.D.2d 722. In the absence of such a showing, the motion must be denied. Id. To defeat a motion for summary judgment, the opposing party must present facts sufficient to require a trial on any issue of fact. CPLR § 3213(b). The Court finds that there is a triable issue of fact as to whether the grantors of the enclosed portion of land, Joyce I. Hickey, held that portion of land "adversely and in hostility" to the "true owner," Mr. F. Muhlfeld.

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"Adverse possession, even when held by a mistake or through inadvertence, may ripen into a prescriptive right after twenty years of such possession, the actual physical occupation and improvement being, in a proper case, sufficient evidence of the intention to hold adversely." Belotti v. Bickhardt, 228 N.Y. 296, 302 (citation omitted). "In order to establish title by adverse possession, it was incumbent upon the defendants to show that they and their grantors held the land adversely and in hostility to the true owner, claiming the entire title thereto." Doherty v. Matsell, 119 N.Y. 646, 647.

Plaintiff proffered a February 6, 2005, letter from Defendant JOYCE I. HICKEY wherein she stated "the history of the fence around [her] property," (Pl Aff Opp at Ex. D), which was that the fence had "been in existence in one type or another since 1967, the year after they purchased our home." (Id.) Plaintiff also proffered a June 13, 2005, letter from this Defendant, wherein in she stated that her "husband, with the permission and assistance of Mr. F. Muhlfeld, the previous property owner, installed the original enclosure in 1967." (Pl Aff Opp at Ex. D.) Defendants proffered the Affidavits of Defendant JAMES M. HICKEY, wherein he acknowledges this enclosure built in 1967 by his father, (J.M. Hickey Aff at ¶ 8), as well as his mother's June 13, 2005, letter (id.). He states, however, that the enclosure his mother was referring to was "a continuous row of privacy hedges ..., which ran along the width of the property at the end of the backyard of the property, near or on the property line shared with Mr. Muhlfeld's lot (Plaintiff's lot)," and "not the wooden stockade fence that [he] personally erected in the backyard of the property 19 years later," (id.). Defendant JANEY HICKEY parrots her brother's statements in her own Affidavit. (See J. Hickey Aff at ¶¶ 8, 9.)

On the other hand, Joyce Hickey does not mention a "privacy hedge" in her letters, nor does she mention that her son built a fence—any fence—in 1986. Indeed, it seems that her letters are referring to the wooden enclosure visible in Defendants' photographs. (Def Aff Supp at Ex. C.) Therefore, the Courts finds that there is a discrepancy as to which version of events should take precedence, a determination reserved for a jury See Gartech Elec. Contr. Corp. v. Coastal Elec. Constr. Corp., 66 A.D.3d 463, 464 (holding that "disputes as to proof are for the jury to resolve in assessing the credibility of the witnesses") (citations omitted).

The foregoing shall constitute the decision and order of this Court.

Dated: NOV 18 2011

J.S.C.

KENNETH L. THOMPSON, JR.