

Gall v Colon-Sylvain
2012 NY Slip Op 33930(U)
March 5, 2012
Supreme Court, Nassau County
Docket Number: 6536/07
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

-against-

FRANCES COLON-SYLVAIN, WELLS FARGO
N.A., JOSEPH GRANT, EMPIRE LAND
SERVICES CORP., ANTHONY MICHAEL
CAMISA, DAVID M. FISH and JJRG
ENTERPRISES INC.,

Defendants.

WELLS FARGO N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN,
JOSEPH GRANT and JJRG ENTERPRISES INC.,

Counterclaim-Defendants.

WELLS FARGO N.A.,

Third-Party Plaintiff,

-against-

JUDITH REARDON, ESQ.,

Third-Party Defendant.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 6536/07

MOTION DATE: Feb. 1, 2012
Motion Sequence # 015

The following papers read on this motion:

Notice of Motion.....	X
Affidavit in Opposition.....	XX
Affirmation in Support.....	X
Reply Affirmation.....	XX
Sur-Reply.....	X

Motion by defendant Wells Fargo to dismiss the complaint for failure to prosecute is denied.

This is an action for breach of fiduciary duty. Plaintiff Elemer Gall and defendant Joseph Grant formed a corporation, JJRG Services, Inc., to acquire distressed properties and renovate them for resale. In February 2005, Grant purchased a property located at 75 Oakdale Boulevard in Farmingdale, with \$240,000 contributed by Gall. Grant took out a mortgage on the property, the payment of which was to be his contribution to the venture, and then transferred title to JJRG. However, Grant defaulted on the mortgage, and on August 18, 2006 a judgment of foreclosure was entered.

On November 1, 2006, JJRG entered into a contract to sell the property to defendant Frances Colon-Sylvain, who was Grant's girlfriend. The contract was signed by Joseph Grant on behalf of the corporation. Colon-Sylvain, representing that the property would be her primary residence, obtained a purchase money mortgage from defendant Wells Fargo. The title was insured by defendant Empire Land Services Corp.

The closing occurred on December 26, 2006. While Grant acted for him by a power of attorney, Gall was nonetheless present at the closing. Defendant Anthony Camisa is an attorney who represented both Conlon-Sylvain and Wells Fargo in connection with the transaction. Defendant David Fish is the attorney who represented JJRG. At the closing, Gall received a check for \$52,620, representing his interest in the property. However, Gall did not cash the check, apparently because he thought that he was entitled to a greater share of the proceeds of the sale.

On April 16, 2007, Gall commenced the present action, asserting claims against Grant for breach of fiduciary duty, fraud, and conversion in connection with the real estate transaction. Additionally, plaintiff asserts a claim for fraud against defendant Wells Fargo. Wells Fargo counterclaimed against Gall for fraud based upon his participation in the loan transaction. Wells Fargo alleges that Colon-Sylvain had no intention of residing in the premises or paying the debt and agreed to be the nominal borrower only because Gall and Grant did not have adequate credit to qualify for the loan transaction.

In August 2007, Wells Fargo commenced an action against Colon-Sylvain and Gall

to foreclose the mortgage (Index No. 14073-07). On December 10, 2010, Wells Fargo served a third party complaint on Judith Reardon, the attorney who originally represented plaintiff in this action, seeking to impose a constructive trust on Gall's share of the loan proceeds, which had been distributed to Reardon.

Meanwhile, on February 22, 2011, Gall, still represented by Reardon, moved for summary judgment dismissing Wells Fargo's counterclaims against plaintiff and various other relief. In the order to show cause bringing on the motion, the court granted Reardon permission to withdraw as Gall's attorney on the grounds that her interests were "directly adverse" to those of her client. By order dated July 29, 2011, plaintiff's motion for summary judgment dismissing Wells Fargo's counterclaims was denied. Wells Fargo's third party claim against Reardon was eventually settled.

The matter was certified for trial on September 19, 2011. The certification order directed plaintiff to file a note of issue within 90 days, or by December 18, 2011. The certification order further provided that motions for summary judgment were to be filed within 60 days.

By notice of motion dated December 21, 2011, defendant Wells Fargo moves to dismiss the complaint for want of prosecution pursuant to CPLR 3216 on the ground that plaintiff failed to timely file a note of issue. Plaintiff, who is now pro se, filed a note of issue on January 25, 2012, in response to defendant's motion.

CPLR 3216(a) provides that where a party unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Nevertheless, CPLR 3216(b) provides that no dismissal shall be directed unless plaintiff has been served with a written demand to file a note of issue within 90 days.

A court may not dismiss an action for failure to prosecute unless there has been a general pattern of delay in proceeding with the litigation (*Cadichon v Facelle*, 18 NY3d 230 [2011]). Litigation cannot be conducted efficiently unless deadlines are taken seriously (Id). Nevertheless, dismissal of a claim involves judicial involvement and requires notice to the parties (Id).

Defendant does not allege that plaintiff was served with a 90 day demand, other than defendant's serving plaintiff with a copy of the certification order. In any event, the note of issue was only five weeks late. Defendant has not established a general pattern of delay, as

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most of the delay was caused by Wells Fargo's pursuit of its third party claim against Reardon. Defendant Wells Fargo's motion to dismiss the complaint for want of prosecution is denied. The parties' time to move for summary judgment is extended to 60 days from the date of this order.

So ordered.

Dated MAR 05 2012

Stephen A. Bucarelli
J.S.C.

ENTERED

MAR 08 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**