

**Cary v Justus**

2014 NY Slip Op 33548(U)

October 29, 2014

Supreme Court, Ontario County

Docket Number: 104346

Judge: Matthew A. Rosenbaum

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONTARIO

-----  
GEORGE S. CARY,

Plaintiff

-vs-

Index No. 104346

ANNE W. JUSTUS, Individually and as  
Executrix of the Estate of George Justus;  
AMBER JOLLES, ESQ. (n/k/a Amber Trumbull)  
and ROBERT W. CROESSMANN, ESQ.,

Defendants  
-----

Special Term  
October 2, 2014

APPEARANCES

Andrew Lavooott Bluestone, Esq.  
Attorney for Plaintiff

WOODS OVIATT GILMAN LLP  
William G. Bauer, Esq.  
Attorneys for Defendants Croessmann and Joles

TREVETT CRISTO SALZER & ANDOLINA P.C.  
Melanie S. Wolk, Esq.  
Attorneys for Defendant Justus

## RESERVE DECISION

Rosenbaum, J.

Defendants, Amber Joles, Esq. (n/k/a Amber Trumbull) and Robert W. Croessmann, Esq., move by Order to Show Cause for an order dismissing Plaintiff's Complaint for failure to prosecute and failing to serve and file a Note of Issue pursuant to CPLR 3126. Plaintiff, George S. Cary, cross moves for an order pursuant to CPLR 3126 permitting Plaintiff to complete discovery, serve discovery demands, hold the Defendants' depositions, and extend the time in which to file a Note of Issue and Certificate of Readiness.

This action was commenced on March 9, 2010. Defendants Croessmann and Joles, through counsel, served a Notice of Appearance and Demand for a Complaint on July 13, 2010. Defendant Justus also served a Notice of Appearance on July 13, 2010. Plaintiff served the Complaint on August 22, 2010. Defendants Croessmann and Joles answered on August 23, 2010 and also served a Notice to Take Deposition of Plaintiff, Omnibus Discovery Demands, and a First Request for Production of Documents. Defendant Justus answered on September 24, 2010. On September 17, 2010, a letter was sent to Plaintiff's then-counsel, Christopher Ciaccio, requesting responses to the discovery demands. Responses to the Omnibus demands and a CD containing documents responsive to the First Request for Production of Documents was served on November 9, 2010. Plaintiff has not served any discovery demands.

No further action was taken in this case until October 31, 2012, when Defendants Croessmann and Joles served a 90-day Demand pursuant to CPLR §3126. Service of the demand was confirmed by Certified Mail, Return Receipt, by Plaintiff. In response to that notice, then-attorney Ciaccio served a Notice to Withdraw signed by Plaintiff acknowledging the service of the 90- day demand and delivery of the file to Plaintiff. Defendant Justus served a 90 day demand

on December 11, 2013. Plaintiff contends that then-attorney Ciaccio did not explain to him what could be done after service of a 90 day demand other than to file a Note of Issue.

On December 19, 2013, defense counsel received a letter from Plaintiff seeking additional time to seek counsel. Counsel for Croessmann and Joles refused to grant an extension. The 90 day demand period expired on January 31, 2014. Counsel for Justus received a letter on January 6, 2014 from Plaintiff seeking additional time to find counsel. Defendant Justus also denied the request for an extension.

Defendants Croessmann and Joles filed the instant motion to dismiss on May, 2014. Shortly thereafter, the Court received a letter from Plaintiff indicating that former attorney Ciaccio had required approximately \$30,000 for expert witnesses to review legal positions and supporting documentation but that Plaintiff had been unable to provide counsel with the funds. Plaintiff requested an additional 120 days on the Order to Show Cause and further indicated that he was in the process of finalizing a funding transaction that would allow him to retain Attorney Bluestone.

In this action, Plaintiff alleges contractual and legal malpractice claims, stating that the now deceased George Justus entered into various agreements and Plaintiff entered into various agreements with the intent of purchasing and operating hotels. It is alleged that Croessmann and Joles represented Plaintiff with regard to the purchase of the properties, formation of the LLC set up to own and operate the hotels, and as to LLCs formed with George Justus. Complaint, ¶6. It is further alleged that the representation also included the purchase of the properties, the formation of the LLCs set up to own and operate the hotels on the properties, and with regard to George Justus' interest in the LLCs and hotels formed with Plaintiff. *Id.* at ¶¶7-9.

George Justus died on August 4, 2006, and Plaintiff was thereafter

advised by Croessmann and Joles that Anne Justus succeeded to the management of the LLCs and had full decision making authority to manage the hotels owned by the LLCs. Id. at ¶12. Plaintiff alleges that Croessmann and Joles represented Anne Justus and Plaintiff, as well as the LLCs from the time of George Justus' death until June 7, 2007. Id. at ¶15. After George Justus died, Anne Justus disbursed money from the LLCs' accounts to various persons for payment of expenses incurred by the LLCs without Plaintiff's approval or authorization. Id. at ¶16. Plaintiff contends that many of those disbursements were disputed debts. Id. at ¶17. Moreover, Plaintiff alleges that on several occasions Croessmann and Joles disbursed themselves money belonging to the LLCs and held in the attorney trust account on the premise that they were owed the money as fees for work performed. Id. at ¶18.

After George's death, Anne Justus announced her intention to sell the properties and reduce or eliminate all financial obligations relative to the properties. Id. at ¶22. Plaintiff found financing to refinance the loans but Anne Justus opposed a refinance. Id. at ¶¶23-25.

CPLR Rule 3216 states:

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or 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. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) 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 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. . .

(e) 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 is, by its terms, ‘extremely forgiving’ in that it never requires, but merely authorizes, the Supreme Court to dismiss a Plaintiff’s action based on the Plaintiff’s unreasonable neglect to proceed.” Davis v. Goodsell, 6 A.D.3d 382, 383 (2d Dept. 2004). See also, Altman v. Donnenfeld, 119 A.D.3d 828 (3d Dept. 2014); Kadyimov v. MacKinnon, 82 A.D.3d 938 (2d Dept. 2011). It is not an abuse of discretion to deny a motion to dismiss pursuant to this section where opposition papers establish a justifiable excuse and merit to the action. See Woodward v. Chapman, 98 A.D.3d 1286 (4<sup>th</sup> Dept. 2012). Moreover, the Fourth Department has specifically noted that “even assuming, arguendo, that Plaintiff failed to establish a justifiable excuse for the delay and a meritorious cause of action, . . . ‘[a] court retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even [under those circumstances].’” Id. See also,

Amanda C.S. v. Stearns, 49 A.D.3d 1227 (4<sup>th</sup> Dept. 2008). If a court exercises its jurisdiction and denies the motion to dismiss, it can do so with the imposition of conditions as to, for example, the completion of pretrial discovery and the filing of a note of issue and certificate of readiness. Id. CPLR 3216 prohibits a court from ordering dismissal if a Plaintiff presents a justifiable excuse and a meritorious cause of action; however, “such a dual showing is not strictly necessary in order for the Plaintiff to escape such a dismissal.” Davis, 6 A.D.3d at 384. See also, Restaino v. Capicotto, 26 A.D.3d 771 (4<sup>th</sup> Dept. 2006) (“A court retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even when a Plaintiff fails to comply with the 90-day requirements and fail to demonstrate a justifiable excuse and a meritorious cause of action”), quoting Rust v. Turgeon, 295 A.D.2d 962, 963 (4<sup>th</sup> Dept. 2002).

Dismissal pursuant to CPLR 3216 can also be justified and ordered “based on patterns of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution, and lack of any tenable excuse for such delay.” Id., quoting Schneider v. Meltzer, 266 A.D.2d 801, 802 (3d Dept. 1999). For example, a perfunctory and conclusory assertion of justifiable delay will not be countenanced “in the context of the pattern of repeated, extended and unexplained delays in prosecuting the action over the course of a decade.” Cato v. City of New York, 70 A.D.3d 471 (1<sup>st</sup> Dept. 2010).

Here, Defendants argue that Plaintiff has failed to diligently prosecute this action for over three years and when served with a demand under CPLR 3216, likewise did nothing to respond for six months. Defendants argue that Plaintiff knew his attorney was withdrawing from representation in this action in October 2013 and that he was aware of the ninety day demand and its consequences. Despite this, Defendants state that Plaintiff failed to serve a note of issue and statement of readiness and that such failure mandates dismissal. It is alleged that the three year delay is prejudicial to Defendants.

Plaintiff submits an affidavit in opposition to the motion to dismiss. Plaintiff avers that (1) discovery is incomplete and he could not truthfully file a note of issue, (2) he did not know that he could file a motion to extend the time to file the note of issue, (3) his previous counsel withdrew from representation after he was successful in his run for Monroe County Court judgeship, and (4) he contacted attorneys in an effort to obtain representation and was turned down by all but his current counsel. Affidavit of George S. Cary, ¶3, 5, 9. Plaintiff further notes that he wrote to defense counsel and requested extensions of time to respond to the 90 day demand; both requests were denied. *Id.* at ¶¶13–16.

The circumstances presented warrant an exercise of discretion to allow this matter to proceed and deny the motion to dismiss for failure to prosecute. This matter commenced with previous counsel's initial request for \$30,000 to retain an expert at the commencement of the action and culminated in previous counsel's withdrawal from representation upon election to the bench. Indeed, during the three year interim, no action was taken in this case. Given Plaintiff's largely pro se efforts to reignite this action after service of the 90 day notice and withdrawal of his counsel, the record is devoid of any evidence of an intent to abandon this litigation. See DiNezza v. Credit Data of Hudson Valley, Inc., 166 A.D.2d 768 (3d Dept. 1990) (noting the "liberal and broad interpretation" afforded the papers submitted by a pro se litigant).

While, as noted supra, it is not strictly necessary for a litigant to demonstrate a justifiable excuse and meritorious claims, see Altman v. Donnenfeld, 119 A.D.3d 828 (2d Dept. 2014), the Court determines nevertheless that Plaintiff sufficiently satisfies those elements to be given the opportunity to proceed with his action. Plaintiff sets forth a reasonable basis for his delay in filing within the 90 day demand period: his previous counsel withdrew from representation upon election to the bench; he could not

truthfully state that discovery was complete; he was attempting to secure representation; and he contacted defense counsel and requests extensions of time in which to respond to the 90 day demand. A justifiable excuse has been accepted by the Fourth Department even where the showing “was not strong.” Wood v. Strong Memorial Hosp. of Univ. of Rochester, 262 A.D.2d 1054 (4<sup>th</sup> Dept. 1999).

Likewise, meritoriousness is demonstrated even where there is a showing of only “arguable merit.” McClure v. County of Monroe, 216 A.D.2d 874 (4<sup>th</sup> Dept. 1995). The Affidavit of George S. Cary submitted in opposition to the motion to dismiss is a sufficient affidavit of merit to withstand attack under CPLR 3216. See Baczkowski v. D.A. Collins Const. Co., Inc., 89 N.Y.2d 499, 503 (1997).

The motion to dismiss pursuant to CPLR 3216 is denied. A conference will be held with the Court to work out a discovery scheduling order.

Signed at Rochester, New York this 29<sup>th</sup> day of October, 2014.

-----  
Matthew A. Rosenbaum  
Supreme Court Justice