

Calinescu v 167 LLC
2016 NY Slip Op 30639(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: 305717/2011
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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NICOLAE CALINESCU,
Plaintiff(s),

INDEX No. . 305717 / 2011

-against-

DECISION AND ORDER

167 LLC C/O CHESTNUT HOLDINGS OF
NEW YORK, INC., A/K/A 167 L.L.C.,
2-6 EAST 167 STREET,
Defendant(s),

-----X

HON. BETTY OWEN STINSON:

Motion by plaintiff *pro se* to vacate this court's order of June 18, 2014 which vacated his Note of Issue and order of May 20, 2015 that dismissed his case with prejudice for his failure to comply with previous court orders directing him to provide discovery to the defendants is denied.

By history this action was commenced by the *pro se* plaintiff on June 27, 2011 alleging various causes of action arising out of the apartment in which he lived at the time and from which he was evicted. Defendants interposed an Answer on July 26, 2011. The Verified Complaint with two exhibits is 71 pages long. The Verified Answer is five pages long and contains six Affirmative Defenses and one Counterclaim. In response to the Verified Answer the plaintiff filed a "Reply Affidavit" of eight pages which challenges the claims made by defendant in its Answer alleging defendant's dishonesty and the statements made in the Answer as absurd, ludicrous and false. Nothing was done in the case after the Reply Affidavit filed in October 2011

until plaintiff filed a motion for summary judgment on June 22, 2012. Justice John Barone denied the summary judgment motions of both plaintiff and defendant in a decision of December 21, 2012 and filed on December 31, 2012. Meanwhile, in August of 2012 the current counsel was substituted as counsel for defendant. Still no discovery was demanded by either party.

On June 27, 2013 plaintiff filed a Note of Issue and Certificate of Readiness indicating that a Bill of Particulars had been waived as well as “discovery proceedings known to be necessary completed were waived. It was also stated that there are no outstanding requests for discovery and that the case was ready for trial. On August 7, 2013 defendants filed a Notice of Motion seeking to strike plaintiffs Note of Issue. The affidavit of service of the Note of Issue indicates it was served on defendant’s counsel on June 24, 2013 by regular mail. Defendant’s Notice of Motion to strike plaintiff’s Note of Issue was served on August 1, 2013, more than 20 days, plus 5 days for mailing beyond the time it was noticed by plaintiff and was thus untimely. On August 29, 2013 an Order was entered by Justice Laura Douglas which granted defendant’s motion to vacate only to the extent of directing the parties to appear for a Preliminary Conference on October 18, 2013. The Order specifically stated that the Note of Issue was not stricken from the trial calendar.

Thereafter on October 18, 2013 a Preliminary Conference was scheduled to be held in courtroom 711. It is noted on the Preliminary Conference Order by Justice Douglas that the *pro se* plaintiff “appeared and left courtroom before completing P.C.”. A Preliminary Conference Order was completed and signed by Justice Douglas that not only specified what discovery should be completed, scheduled a compliance conference for December 11, 2013, and included a hand written statement by Justice Douglas that “All parties are bound by this order”. The pre-printed portion of the Preliminary Conference also provided that a) all statutory stays due to CPLR 3211,3212 and 3213 are vacated; b) Counsel will be required to justify, at the Compliance Conference, failure to adhere to the discovery schedule set forth herein, and c) In the event of non-compliance, costs or other sanctions may be imposed. Defendants cross-moved to dismiss

the plaintiff's complaint. The motion and cross-motion were denied by Justice Douglas in a decision of April 25, 2014, wherein she wrote as follows:

... Upon defendants' application to then vacate the Note of Issue, this court in the exercise of its discretion upon orders dated 8/28/13, and Preliminary Conference Order dated 10/18/13 directed and ordered the conduct of discovery proceedings, since same will promote the simplification and limitation of both factual and legal issues to promote the orderly and comprehensive presentation(*sic*) of the matter in the aid of the efficient use of judicial resources and to prevent prejudice to either side.

A "status conference" was scheduled for May 29, 2014, but the conference was not held until June 18, 2014 before the undersigned at which time it was noted that plaintiff had failed to provide any of the discovery that had been ordered by Justice Douglas. The *pro se* plaintiff insisted that he was not required to provide discovery as his Note of Issue had been filed and was not vacated by Justice Douglas. When this court indicated that there was the outstanding Order by Justice Douglas that provided otherwise he got up and left the courtroom. The court by written Order dated June 18, 2014 struck plaintiff's Note of Issue and directed plaintiff to provide the discovery called for in the Preliminary Conference Order within 90 days. The Compliance Conference was adjourned to September 24, 2014 and the order directed that plaintiff appear in Room 118M of the Bronx County Courthouse for his examination before trial on September 3, 2014. On July 10, 2014 Mr. Calinescu filed a Notice of Appeal from the June 20, 2014 Order. The appeal was unanimously dismissed as taken from a non-appealable paper as the court order did not resolve a motion made on notice but resulted from a compliance conference held pursuant to the DCM practice in Bronx County. *See 22NYCRR202.19*. Upon return from the Appellate Division the action was schedule for a further Compliance Conference on May 20, 2015. This court in its June 18, 2014 order struck plaintiff's Note of Issue. Mr.

Calinescu insisted that the court could not strike or vacate his Note of Issue and since it was properly filed discovery was closed and he was entitled to an immediate trial. A court reporter was called given the actions of Mr. Calinescu the last time he appeared before the court. Again, Mr. Calinescu voiced his opinion that the court was wrong, that he did not have to give a deposition before the case could be tried and that his Note of Issue could not be stricken, at which time he left the courtroom. The Uniform Rules for Trial Courts, Note of Issue and Certificate of Readiness(e) provides :

At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Because of his refusal to comply with at least three court Orders directing him to provide demanded discovery and has failed and refused to appear for a deposition, in addition to his leaving the courtroom on two mandatory appearance calendars I dismissed his case with prejudice on the record at the May 20, 2015 compliance conference date. The instant motion was filed in October 2015 returnable on November 13, 2015 and seeks to vacate this court's Orders of June 18, 2014 and May 20, 2015 citing 22NYCRR 202.21(e) and (d), and CPLR §2221(a). Rule 202.21(e) and (d) address the issue of vacating a note of issue. A party may move to vacate a note of issue within 20 days after it is served. In this case defendants did not timely move to vacate plaintiff's note of issue of June 27, 2013. However, the same rule provides that at any time the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect or fails to comply with the requirements of this section in some material respect. Plaintiff's Note of Issue is dated June 24, 2013 and indicates in the Certificate of Readiness that a Bill of Particulars was waived. At the Preliminary Conference ordered to be held by Justice Douglas on October 18, 2013, the plaintiff appeared but left the courtroom before completing the preliminary conference. The Order was completed by counsel for the defendant and Justice Douglas and indicates that a Bill of Particulars was to be served within 30 days. To date no Bill of Particulars has been served by plaintiff. The note of issue states that one of the claims made by plaintiff is for Negligent and

Intentional Infliction of Emotional Distress and even claims a “special Preference” on the ground that plaintiff sustained permanent personal trauma with long lasting psychological effects. The preliminary conference order required plaintiff to provide medical reports or authorizations for records to be served as well as hospital authorizations for any and all treating facilities, x-rays, diagnostic films, including mental health records. No records or authorizations have been furnished by the plaintiff.

Examinations before trial of all parties were to be held on December 4, 2013 in room 118 of the Bronx courthouse. No EBTs have been held to date. The Preliminary Conference Order further provides that discovery responses were to be provided prior to the EBTs or the EBTs will be adjourned. No responses to the Preliminary Conference Order were given and no EBTs have been held. The parties were to return for a compliance conference on December 11, 2013. Despite the court order plaintiff indicated in his note of issue that medical reports and an examination were not required and the discovery proceedings known to be necessary were completed and that there were no outstanding requests for discovery. While this may have been true on June 27, 2013 it was not true at the time of the compliance conference when it was held on June 18, 2014. Lastly, the plaintiff certified that there had been compliance with any orders issued pursuant to section 202.12 of the Rules of the Chief Administrator (22NYCRR202.12), the rule requiring preliminary conferences to be held. Based on the history of the case to that point, this court vacated plaintiff’s Note of Issue, directed compliance with the Preliminary Conference Order within ninety (90) days of the order, adjourned the compliance conference to September 24, 2014 and directed plaintiff to appear in room 118M of the Bronx courthouse for his examination before trial. There was no compliance by plaintiff with this Order. Plaintiff continues to insist that his Note of Issue was properly filed and he is not required to provide any discovery to the defendants despite the subsequent court orders.

Plaintiff’s consistent and adamant refusal to comply with the orders of the court and to participate in following the rules enacted for the orderly progression and preparation for trial is wilful and contumacious behavior that can not be accepted by the court. On May 20, 2015, when plaintiff appeared in court after his appeal from the court’s June 18, 2014 Order was dismissed he continued to insist that he could not be made to provide any discovery and again left the courtroom in the middle of his appearance at which time this court dismissed his case with prejudice on the record. The instant motion by plaintiff is to vacate both the Order of June 18, 2014 and May 20, 2015 are denied. Plaintiff has failed to establish that this court was without

authority to vacate his Note of Issue prematurely filed. The branch of plaintiff's motion based on CPLR2221(a) is denied as it does not specify whether is it for renewal or reargument, If for renewal it does not offer any new facts not offered on the prior motion that would change the prior determination or demonstrate that there has been a change in the law. The branch of the motion for reargument is untimely, and does not show what fact or law the court allegedly overlooked.

In sum, plaintiff's motion of November 13, 2015 seeking to vacate the court's Orders of June 18, 2014 and May 30, 2015 is denied.

Dated: March 8, 2016
Bronx, New York



BETTY OWEN STINSON, J.S.C.