

Rookhum v Choice Hotels Intl., Inc.

2016 NY Slip Op 30735(U)

April 19, 2016

Supreme Court, Queens County

Docket Number: 1641/07

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

BALKARAN ROOKHUM, SUNIL ROOKHUM, and
ANGELA ROOKHUM, as Administrators of
the Estate of AVINASH P. ROOKHUM and
ANGELA ROOKHUM, Individually,

Index No: 1641/07

Motion Date: 4/6/16

Motion Seq. No.: 8, 9

Plaintiff,

-against-

CHOICE HOTELS INTERNATIONAL, INC.
and AUM SIDHDHY VINAYAK, LLC d/b/a
AQUA MOTOR LODGE,

Defendants.

Motions Seq. #8 and #9 are combined for disposition.

The following papers numbered 1 to 14 read on this motion by defendant, AUM SIDHDHY VINAYAK, LLC d/b/a AQUA MOTOR LODGE (Aqua) to dismiss the complaint pursuant to CPLR 3216(b)(3) insofar as it is asserted against Aqua; and cross-motion by defendant, CHOICE HOTELS INTERNATIONAL, INC. (Choice Hotels), to dismiss the complaint insofar as it is asserted against it pursuant to CPLR 3216 and for summary judgment pursuant to CPLR 3212

	<u>PAPERS NUMBERED</u>
Seq.#8 Notice of Motion-Affidavits-Exhibits	1 - 3E
Notice of Cross-Motion-Affidavits-Exhibits..	4 - 7
Answering Affidavits-Exhibits.....	8 - 10
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Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows.

Initially it is noted that Aqua's motion should be denied for failure to submit proof of service of the motion (see CPLR 2103; 22 NYCRR § 202.5; Daulat v Helms Bros., Inc., 32 AD3d 410 [2006]). However, since the plaintiffs submitted opposition to the motion, and co-defendant cross-moved, the court will consider Aqua's motion on its merits.

On January 22, 2005 Avinash P. Rookhum was murdered in a hotel room he rented from Aqua Motor Lodge after being repeatedly stabbed. Two persons were arrested, charged and prosecuted in connection with his murder.

After appointment of co-administrators for the estate of the decedent, the plaintiffs commenced this action to recover for the wrongful death of Avinash P. Rookhum on January 18, 2007. The parties sought to obtain discovery regarding the criminal investigation from the Office of the District Attorney resulted in the action being stayed by a so Ordered stipulation dated June 6, 2007 in the Compliance Conference Part pending the completion of the criminal proceedings. The stay was lifted by Order dated July 26, 2012 and the action was again scheduled for a Compliance Conference to be held on September 11, 2012.

The Compliance Conference Order set a discovery schedule and directed plaintiff to file a Note of Issue on or before December 21, 2012. On December 7, 2012 defendant, Aqua, served a 90-day notice pursuant to CPLR 3216 demanding that plaintiffs serve and file a Note of Issue. On December 21, 2012 plaintiffs served and filed a Note of Issue.

In January, 2013, Aqua, and Choice Hotels, separately moved to dismiss the complaint pursuant to CPLR 3216 or, in the alternative to vacate the note of issue, compel plaintiffs to provide discovery and for an extension of time to move for summary judgment.

Although Aqua's motion was submitted without opposition and partially granted, it was vacated in the Order dated May 3, 2013 denying, with out prejudice, Choice Hotel's motion, when it was learned that plaintiffs' law firm had ceased to exist¹ and the plaintiffs were looking for new counsel. The Order, however

¹The sole active partner was disbarred as of October 16, 2011.

granted defendants, Aqua and Choice Hotels, leave to renew their respective motions within 30 days of service of the motion with notice of entry on the pro se plaintiffs or after plaintiffs obtained new counsel and notified defendants. Plaintiffs' new counsel served defendants with the Consent to Change Attorneys on June 3, 2013.

On July 29, 2013 all parties appeared in the Trial Scheduling Part and the Note of Issue was vacated due to outstanding discovery.

On November 29, 2013 Balkaran Rookhum, co-administrator and a defendant in his individual capacity died. As a result of his death, the court was divested of jurisdiction to act, and the proceedings were automatically stayed pending the substitution of the legal representative for the decedent pursuant to CPLR 1015(a) (see Aurora Bank FSB v Albright, 137 AD3d 1177 [2016]).

Letters of Administration naming ANGELA ROOKHUM and SUNIL ROOKHUM, as Co-Administrators of his estate were issued on April 13, 2015.

Now, more than 2 1/2 years after their earlier motions seeking dismissal pursuant to CPLR 3216 were denied, Aqua, moves and Choice Hotels cross-moves, to dismiss the complaint pursuant to CPLR 3216 based on the 90-day notice Aqua served on December 7, 2012. Defendants maintain that although its earlier motion for the same relief was denied and plaintiffs filed a Note of Issue, they are entitled to dismissal inasmuch as the notice was never vacated or dismissed by the court nor withdrawn by Aqua. Defendants further maintain that the plaintiffs' Note of Issue previously filed in response to their demand is a nullity as it contained false statements that discovery was complete.

After the defendants moved (Mot. Seq. #8 & Cross-motion) for dismissal, the plaintiffs moved (Mot. Seq. #9) for an Order restoring this action to active status, substituting ANGELA ROOKHUM and SUNIL ROOKHUM as Administrators of the Estate of BALKARAN ROOKHUM, deceased.

Although the defendants' motions are premature having been made while this action was stayed as a result of the death of Balkaran Rookhum, and before substitution of the representative of his estate, the court will address the merits of the motions to avoid any further delay.

Accordingly, this action is restored to active status.

ANGELA ROOKHUM and SUNIL ROOKHUM as Administrators of the Estate of BALKARAN ROOKHUM, is substituted as plaintiff in place of BALKARAN ROOKHUM, Individually and the caption is amended accordingly.

The defendant, Choice Hotels' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied. CPLR 3212(b) provides in pertinent part that,

"A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit...."

In support of its motion for summary judgment, Choice Hotels submitted only the affirmation of its attorney. The affirmation of an attorney which is not based upon personal knowledge of the facts is of no probative or evidentiary significance (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 384-385 [2005]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The defendant, Aqua's motion and the defendant, Choice Hotels' cross-motion to dismiss the complaint pursuant to CPLR 3216 are denied.

As a condition precedent to dismissal for failure to prosecute pursuant to CPLR 3216, the party seeking such relief must have served a 90-day notice demanding that the note of issue be filed (see Reyes v Ross, 289 AD2d 554, 555 [2001]; Seidman v Shames, 130 AD2d 568 [1987]; Fichera v City of New York, 79 AD2d 597, 598 [1980]). Since the defendant, Choice Hotels, did not submit proof that it served a 90-day notice it is not entitled to the relief requested as it cannot rely on a 90-day notice served by another defendant (see Yunga v Yonkers Contr. Co., Inc., 134 AD3d 1031, 1033 [2015]).

CPLR 3216 is, by its terms, "extremely forgiving" in that it never requires, but merely authorizes, the Supreme Court to dismiss an action based on the plaintiff's unreasonable neglect to proceed (CPLR 3216; Baczkowski v Collins Constr. Co., 89 NY2d 499, 503-505, [1997]). A plaintiff served with a 90-day notice pursuant to CPLR 3216, must either comply with the notice and file a note of issue or move, before the default date, to vacate the notice or for an extension of the 90 day period (see Di Simone v Good Samaritan Hosp., 100 NY2d 632 [2003]).

In general, if a plaintiff fails to comply with the demand, to avoid the sanction of dismissal, the plaintiff is required to demonstrate a justifiable excuse for the delay and the existence of a potentially meritorious cause of action (see Lee v. Rad, 132 AD3d 643 [2015]). However, such a dual showing is not strictly necessary in order for the plaintiff to escape dismissal under certain circumstances (see Baczkowski v Collins Constr. Co., 89 NY2d 499, 503-505 [1997]; Altman v Donnenfeld, 119 AD3d 828 [2014]) such as where the parties engage in further discovery proceedings or where the defendant, after serving the notice demands further discovery and when there is (see Altman v Donnenfeld, supra; Lee v Rad, supra).

In this case, the plaintiffs, in accordance with the Compliance Conference Order timely filed a Note of Issue. Contrary to defendants' contention, the Note of Issue filed in this case need not be deemed a "nullity, since the misstatement as to discovery was not made in bad faith (see Davis v Goodsell, 6 AD3d 382, 385 [2004]). The Note of Issue was filed in accordance with the court's directive. The policy in this court is to compel plaintiffs to file a Note of Issue despite there being extensive outstanding discovery and to deny a subsequent motion to vacate the Note of Issue, but setting a strict discovery schedule.

Nevertheless, even were the court to deem the Note of Issue a nullity, a plaintiff's failure to comply with a 90-day notice issued pursuant to CPLR 3216 may be excused "under a variety of circumstances," including, inter alia, where a defendant, after having served the notice, demands additional pretrial discovery from the plaintiff (see Davis v Goodsell, supra at 384). In this case, the parties engaged in discovery by, among other things, conducting a deposition of the plaintiff, Angela Rookhum on February 11, 2014 and Aqua serving a Demand for Discovery and Inspection dated February 25, 2014.

Moreover, the plaintiffs have provided a reasonable explanation for the extensive delays in this case which in part have been caused by the five year stay during the pendency of the criminal action to which the parties agreed and the death of Balkaran Rookhum after the note of issue was vacated. The plaintiffs also demonstrated a potentially meritorious action through the affidavit of Angela Rookhum, submitted in support of the plaintiffs' motion.

Accordingly, Aqua's motion to dismiss pursuant to CPLR 3216 is denied.

The amended caption of this action shall be as follows.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BALKARAN ROOKHUM, SUNIL ROOKHUM and
ANGELA ROOKHUM, as Administrators of
the Estate of AVINASH P. ROOKHUM,
deceased and ANGELA ROOKHUM and SUNIL
ROOKHUM as Administrators of the Estate
of BALKARAN ROOKHUM, SUNIL ROOKHUM
and ANGELA ROOKHUM, Individually,

Index No: 1641/07

Plaintiffs,

-against-

CHOICE HOTELS INTERNATIONAL, INC.,
and AUM SIDHDHY VINAYAK, LLC d/b/a
AQUA MOTOR LODGE,

Defendants.

All parties shall appear for a discovery conference on
May 18, 2016 at 10:00 a.m. in Part 2 courtroom 46 of the
courthouse located at 88-11 Sutphin Blvd., Jamaica, NY.

Only attorneys with full knowledge of the outstanding
discovery shall appear.

A copy of this Order is being mailed to the attorneys for
the parties.

Dated: April 19, 2016
D# 54

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J.S.C.