

Silver Pointe Estate Condominiums v Zaretsky

2017 NY Slip Op 31939(U)

August 7, 2017

Supreme Court, Queens County

Docket Number: 708638/2015

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

The prior motion had an original return date of March 1, 2017. On the return date, an adjournment was granted to April 26, 2017. Opposition papers were to be served on or before April 12, 2017. Due to a death in the family, plaintiff's counsel did not timely serve opposition or the cross-motion as required by the Centralized Motion Part Rules. On April 25, 2017, the day prior to the return date, plaintiff's counsel e-filed a Notice of Cross-Motion and Opposition. On the return-date, the Cross-Motion and Opposition were rejected and the motion was submitted without opposition.

Plaintiff's counsel affirms that he did prepare opposition papers and a cross-motion and served defendant's counsel by mail on April 11, 2017. However, in light of the circumstances, he did not remember that this was an e-filed case. Based on the personal circumstances and the meritorious facts, counsel contends that the prior motion should be renewed.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]; see Coll v Padilla, 5 AD3d 716 [2d Dept. 2004]; Rizzotto v Allstate Ins. Co., 300 AD2d 562 [2d Dept. 2002]).

Here, and under the circumstances of this case only, this Court finds that counsel for plaintiff has presented a reasonable justification for the failure to properly serve opposition to the prior motion. In the consideration of the strong public policy of deciding matters on their merit, this Court will renew the prior motion as well as the cross-motion.

By way of relevant background, plaintiff is a condominium association charged with the operation of Silver Pointe Estate Condominiums (Silver Pointe). Defendant resides in a condominium unit at Silver Pointe. On June 5, 1995, plaintiff commenced an action against defendant in the New York City Civil Court, Queens County under index number 024517/1995. The action was a breach of contract action in which plaintiff sought to collect common charge arrears. Defendant filed an answer with counterclaims, alleging that in or around 1988, plaintiff enclosed Silver Pointe with a fence and guardhouse, but the fence did not enclose her unit. In a decision dated April 7, 1997, the Civil Court dismissed defendant's counterclaims, but agreed that plaintiff's placement of the fence deprived defendant of the full use and enjoyment of Silver Pointe's common elements. Therefore, the Civil Court

determined that plaintiff was not entitled to the full amount of common charges sought in the complaint. The Civil Court reduced the amount by 48% and awarded plaintiff monetary damages of \$11,315. The Civil Court further ordered that defendant was to continue to receive an abatement equal to 48% of the common charges allocated to her until plaintiff provided secured access to the condominium complex to defendant. Thereafter, plaintiff continued to bill defendant 52% of the common charges allocated to her until plaintiff commenced this action.

On or around February 1, 2017, defendant moved pursuant to CPLR 3216(b) to dismiss this action for want of prosecution. Pursuant to CPLR 3216(b), an action may be dismissed for want of prosecution if: (1) at least one year has elapsed since the joinder of issue; (2) the defendant serves the plaintiff a written demand for a note of issue, which is to be filed within 90 days; and (3) the plaintiff fails to serve and file such note of issue.

Here, defendant has satisfied all the necessary conditions. More than one year has elapsed since joinder of issue, a Demand to Resume Prosecution was served on October 14, 2016, and plaintiff has failed to file a Note of Issue.

"Where a party is served with a 90-day notice pursuant to CPLR 3216, it is incumbent upon that party to comply with the notice by filing a note of issue accompanied by a valid certificate of readiness or by moving, before the default date, either to vacate the notice or extend the 90-day period" (Chaudry v Ziomek, 21 AD3d 922, 924 [2d Dept. 2005]). Because plaintiff failed to properly respond to the 90-day notice within the allotted period of time, plaintiff is required to demonstrate both a justifiable excuse for the delay and the existence of a meritorious cause of action (see CPLR 3216; (Chaudry v Ziomek, 21 AD3d 922 [2d Dept. 2005]; Hayden v Jones, 244 AD2d 316 [2d Dept. 1997])).

In opposition, plaintiff's counsel contends that plaintiff did not prosecute this action because the parties were attempting to resolve the matter. However, the last conversation between counsel was on or around August 3, 2016, more than two months before plaintiff served the Demand to Resume Prosecution and File a Note of Issue. As such, plaintiff has failed to demonstrate a justifiable excuse for its inaction during the 90-day period.


As plaintiff failed to provide any excuse for its inaction during the 90-day period, the Court need not consider whether plaintiff has a meritorious cause of action (see Bhatti v Empire Realty Assoc., Inc., 101 AD3d 1066 [2d Dept. 2012]). As

plaintiff's action is dismissed for want of prosecution, that branch of its motion seeking summary judgment is denied as academic.

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that plaintiff's motion to renew is granted and upon renewal the decision dated May 9, 2017 and entered on May 15, 2017, granting defendant's motion to dismiss for want of prosecution, is adhered to in its entirety.

Dated: Aug 7, 2017
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

FILED
AUG 16 2017
COUNTY CLERK
QUEENS COUNTY