

Binenti v Lynn

2018 NY Slip Op 34328(U)

September 12, 2018

Supreme Court, Westchester County

Docket Number: Index No. 61539/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
THOMAS BINENTI and ELBA FIGUEROA,

Plaintiffs,

-against-

LAWRENCE LYNN, CADILLAC HOLDING LLC,
30-40 FLEETWOOD AVENUE CORP., and
GRAMATAN MANAGEMENT CORP.,

Defendants.

-----X
30-40 FLEETWOOD AVENUE CORP., and
GRAMATAN MANAGEMENT CORP.,

Third-Party Plaintiffs,

-against-

LAURA HANNA,

Third-Party Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on plaintiffs' motion, denominated as "Omnibus Motions in Limine for a Pre-Trial Evidentiary Hearing":

- Notice of Motion, Aff., Exhs. A, 1-14
- Affirmation in Opposition (Carey), Exhs. A-E
- Affirmation in Opposition (Berman), Exhs. A-D
- Affidavit in Reply
- NYSCEF record

Upon the foregoing papers, this motion is determined as follows:

This action arises from a 2013 leak that plaintiffs allege began in third-party defendant Laura Hanna's apartment in the building located at 30 Fleetwood Avenue, Mount Vernon, New York. Plaintiffs seek damages exceeding \$16 million, asserting that the leak required plaintiff Binenti to undergo a heart transplant and caused both plaintiffs to suffer mental health injuries. All defendants joined issue and executed a Preliminary Conference Stipulation so-ordered by this

DECISION AND ORDER

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Court (Lefkowitz, J.) on March 29, 2017. After the parties pursued discovery in numerous court appearances and extensive discovery motion practice, this Court (Lefkowitz, J.) so-ordered a trial readiness report (NYSCEF Doc. 191). On March 28, 2018, plaintiffs filed a Note of Issue and Certificate of Readiness attesting that (1) “[t]here are no outstanding requests for discovery”; (2) “there has been a reasonable opportunity to complete the foregoing [discovery] proceedings”; and (3) “[t]he case is ready for trial” (NYSCEF Doc. 247).

Plaintiffs now move, inter alia, for a “pre-trial evidentiary hearing,” an order permitting them to question the Building Superintendent, a Notary Public and the Building’s Porter, an order “forbidding any party to contact” these individuals, and a stay of the deadlines for summary judgment motion practice.

Analysis

First, plaintiffs’ motion violates Uniform Rule 202.7 and the Differentiated Case Management (“DCM”) Rules of this Court. Rule 202.7 directs that no discovery motion shall be made absent “an affirmation that [the movant or] counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion” (22 NYCRR [Uniform Rules of Trial Courts] § 202.7[a]). Likewise, the DCM Rules provide, in relevant part:

“Any party seeking to make a discovery motion shall do so in accordance with this protocol by requesting a pre-motion conference by e-mailing a ‘Request for Pre-Motion Conference (Compliance Part)’ via the NYSCEF system or by e-mailing the Compliance Part clerk and requesting an immediate conference. The parties will be expected to attend such conferences and attempt in good faith to resolve all discovery disputes. Nothing in these rules shall be construed to prevent or limit ... [the] making [of] any motion deemed appropriate to best represent a party’s interests. However, to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences shall be held in order to permit the Court the opportunity to resolve issues before motion practice ensues. In the event that motion practice is necessary, a briefing schedule will be established by the court-attorney referee.... All motions shall be made by Order to Show Cause...”

(DCM Rules, § II.C, at 7). The DCM pre-conference requirement for discovery motions mirrors the good-faith requirement of Rule 202.7.

Here, plaintiffs failed to proceed in good faith as Rule 202.7 requires, and failed to proceed by Order to Show Cause pursuant to a briefing schedule as the DCM Rules require. Plaintiffs offer no showing that they tried in good faith to resolve these disputes with defense counsel. As this motion violates Rule 202.7 and the DCM Rules, it is denied as procedurally defective.

The motion also lacks merit. Plaintiffs have had adequate opportunity to pursue discovery within the deadlines set forth in numerous prior court orders. Plaintiffs' attempt to stave off further discovery as questioning at a "pre-trial evidentiary hearing" is a transparent attempt to circumvent the court's directives. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeiffer*, 94 NY2d 118, 123 [1999]; *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

Moreover, plaintiffs have served and filed a Note of Issue attesting that there is no outstanding discovery, that plaintiffs had a reasonable opportunity to pursue discovery, and that this case is ready for trial. Their filing of the Note of Issue again waives the discovery remedies they now seek (see *Arons v Jutkowitz*, 9 NY3d 393 [2007]). A certificate of readiness certifies that all discovery is completed, waived, or is not required and the action is ready for trial (see *Tirado v Miller*, 75 AD3d 153 [2d Dept 2010]).

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d][e]. If a party seeks to vacate the note of issue within twenty days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with the requirements of that section in a material respect. However, if more than twenty days have elapsed since service of the note of issue, the moving party must demonstrate the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue and certificate of readiness in order for them to be vacated (22 NYCRR 202.21[d]).

In this action, plaintiffs filed the note of issue on March 28, 2018 and did not seek to vacate the note of issue or compel discovery until months after its filing. Accordingly, plaintiffs must demonstrate good cause exists to vacate the note of issue and demonstrate that "unusual or unanticipated circumstances" arose after the filing of the note of issue to warrant further discovery. Plaintiffs have not made that showing. Further, plaintiffs are not entitled to such discovery. CPLR 3101(a)(1) contemplates liberal discovery (see *Matter of Kapon*, 23 NY3d 32 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), but not limitless discovery.

Finally, the court must address plaintiffs' request for additional time for summary judgment motion practice and a stay of the action. In 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM Protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester County Supreme Court civil cases pursuant to the DCM Protocol. Pro-se litigants are not exempt from the requirements set forth in the DCM Protocol.

In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating

backlogs and delays. The Excellence Initiative relies on “Standards and Goals” as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge’s Excellence Initiative and delivering justice to all that enter our courts in a timely and efficient manner. The Excellence Initiative applies to all matters involving represented and self-represented parties.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

“As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored” (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004] [internal citations omitted]).

CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause. “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, ‘the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment’” (*Greenpoint Props, Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011], quoting *John P. Krupski & Bros., Inc. v Town Bd. of Southold*, 54 AD3d 899, 901 [2d Dept 2008]; see *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Pursuant to the DCM Protocol Part Rules with respect to post-note of issue summary judgment motions, “any motion for summary judgment by any party must be made within forty-five (45) days following the filing of the Note of Issue” (DCM Rule II.D, available at https://www.nycourts.gov/courts/9jd/diffCaseMgmt/DCM_protocol.pdf).¹ The trial readiness order issued by this court contains similar language. In addition, the Part Rules state in bold-face type:

“Counsel are cautioned that untimely motions cannot be made timely by denominating such as cross-motions. The failure of a party to serve and file a motion or cross-motion within the 45-day time period pursuant to this protocol and the Trial Readiness Order shall result in the denial of the untimely motion or cross-motion” (DCM Rule II.D [emphasis in original]).

While the DCM Protocol authorizes limited extensions of return dates on summary judgment motions, it invites no extension of the time for making such motions.

Based on the Part Rules set forth above, all summary judgment motions were due within 45 days of the filing of the note of issue. Here, both defendants’ motions were filed within 45

¹ The protocol was most recently updated on February 23, 2018; however, no changes were made to the sections in effect when plaintiffs filed the note of issue in the instant matter.

days after plaintiffs filed the Note of Issue on March 28, 2018. Accordingly, the defendants' initiatory papers were timely. Plaintiffs' request for a stay of proceedings and additional time is a clear example of the dilatory tactics that adversely impact the timely disposition of cases. Plaintiffs have also failed to establish good cause for an extension (*see generally Brill v City of New York*, 2 NY3d 648 [2004]; *see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657, 658 [2d Dept 2004]).

All other arguments raised and evidence submitted by the parties have been considered by the Court notwithstanding the specific absence of reference thereto.

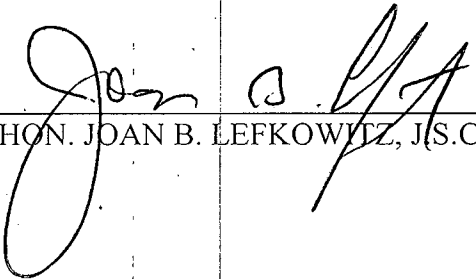
Accordingly it is hereby

ORDERED that plaintiffs' motion is denied in all respects; and it is further

ORDERED that within seven days hereof, counsel for the first-captioned defendant shall cause this Decision and Order, with Notice of Entry thereof, to be served on all defendants by NYSCEF and on plaintiffs by U.S. Mail, and upload to NYSCEF a suitable affirmation of such service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 12, 2018


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