

Dejesus v City of New York
2019 NY Slip Op 31085(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 151088/2012
Judge: Julio Rodriguez III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

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INDEX NO. 151088/2012

STEPHANIE DEJESUS INFANT BY HER MNG JULISSA
DEJESUS, JULISSA DEJESUS,

MOTION DATE 02/21/2019

Plaintiffs,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, POLICE OFFICER STEPHEN POLESOVKY,
POLICE OFFICER ERICK LARIOS,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54

were read on this motion to/for DISMISS

Plaintiffs commenced this action by filing of a summons and complaint on March 22, 2012, seeking damages allegedly sustained from an arrest and detention by the New York City Police Department (“NYPD”) on July 29, 2011, at approximately 12:00 p.m., at the corner of Wadsworth Avenue and 184th Street, New York, New York.

Defendants City of New York (“City”), NYPD, Police Officer Stephen Polesovsky, and Police Officer Erick Larios now move pursuant to CPLR 3216 to dismiss the complaint for plaintiffs’ failure to file a note of issue, timely seek an extension of time to file, or respond to defendants’ 90-day notice. Plaintiffs oppose the motion on the basis that new counsel has recently been retained by plaintiffs and that merits determinations are preferred; additionally, plaintiffs cross-move to extend the time to complete discovery, namely, depositions and (if necessary) an IME, and file the note of issue pursuant to CPLR 2004.¹ In reply, defendants argue that plaintiffs’ cross-motion is untimely and thus this action should be dismissed.

A case scheduling order was entered on December 4, 2012, with depositions scheduled to commence on January 25, 2013.

At a compliance conference held on February 21, 2013, the parties entered into a stipulation, so-ordered by Hon. Geoffrey D. Wright, under which plaintiffs were to provide authorizations to obtain the relevant NYPD file within 45 days and the relevant criminal court and district attorney’s files within 30 days, amongst other discovery, and depositions were scheduled during July and August of 2013.

¹ Although plaintiffs’ papers cross-move “pursuant to CPLR 2221 (a)”, the extensions requested in the substance of their papers are properly sought pursuant to CPLR 2004.

At a compliance conference held on August 15, 2013, the parties entered a stipulation, so-ordered by Hon. Geoffrey D. Wright, under which plaintiffs, again, were to provide authorizations to obtain the relevant NYPD, criminal court, and district attorney's files within 30 days of the conclusion of the criminal case, amongst other discovery, and depositions were scheduled during December of 2013.

At a compliance conference held on January 16, 2014, the parties entered a stipulation, so-ordered by Hon. Frank P. Nervo, under which plaintiffs, again, were to provide authorizations to obtain the relevant NYPD, criminal court, and district attorney's files within 30 days of the conclusion of the criminal case, amongst other discovery, and depositions were scheduled during July of 2014.

At a compliance conference held on September 18, 2014, the parties entered a stipulation, so-ordered by Hon. Frank P. Nervo, under which plaintiffs, again, were to provide authorizations to obtain the relevant NYPD, criminal court, and district attorney's files within 30 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during December of 2014.

At a compliance conference held on January 29, 2015, the parties entered a stipulation, so-ordered by Hon. Frank P. Nervo, under which plaintiffs were to provide copies of the certificate of disposition and, again, the relevant criminal court file within 30 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during March and April of 2015.

At a compliance conference held on May 7, 2015, the parties entered a stipulation, so-ordered by Hon. Frank P. Nervo, under which plaintiffs, again, were to provide copies of the certificate of disposition and the relevant criminal court file within 60 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during August of 2015.

At a compliance conference held on September 3, 2015, the parties entered a stipulation, so-ordered by Hon. James E. d'Auguste, under which plaintiffs were to respond to the initial case scheduling order section 4 (e) (for the relevant criminal court file) within 30 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during December of 2015.

At a compliance conference held on December 17, 2015, the parties entered a stipulation, so-ordered by Hon. James E. d'Auguste, under which plaintiffs, again, were to provide a copy of the relevant criminal court file within 60 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during March of 2016.

At a compliance conference held on April 7, 2016, the parties entered a stipulation, so-ordered by Hon. James E. d'Auguste, under which plaintiffs, again, were to provide a copy of the relevant criminal court file within 45 days of the so-ordered stipulation, amongst other discovery, and depositions were scheduled during June of 2016.

On July 1, 2016, plaintiffs' counsel filed an order to show cause to be relieved of counsel "due to the fact that the plaintiffs have refused to cooperate with our office, have refused to respond to phone calls and correspondences and most recently refused to appear for scheduled depositions" (*see* NYSCEF Doc No. 20, plaintiffs' counsel's aff. in support of order to show cause dated June 29, 2016). The application was granted on July 29, 2016, without opposition, and the action was stayed for 60 days for plaintiffs to find new counsel.

At the compliance conference scheduled for January 26, 2017, plaintiffs did not appear. The conference was adjourned to March 30, 2017; the adjournment order noted that "failure to appear may result in sanctions and/or dismissal".

At a compliance conference scheduled for March 30, 2017, plaintiffs once again did not appear. The conference was adjourned to July 6, 2017; the adjournment order noted that "failure to appear at the next compliance conference may result in sanctions and/or dismissal".

At a compliance conference scheduled for July 6, 2017, plaintiffs once again did not appear. The conference was adjourned to September 21, 2017; the adjournment order noted that "failure to appear at the next compliance conference may result in sanctions and/or dismissal".

At a compliance conference scheduled for January 11, 2018, plaintiffs once again did not appear. The conference was adjourned to March 15, 2018; the adjournment order noted that "failure to appear at the next compliance conference could result in court action pursuant to 22 NYCRR 202.27 including possible dismissal".

At a compliance conference scheduled for March 15, 2018, plaintiffs once again did not appear. The conference was adjourned to May 31, 2018; the adjournment order noted that "failure to appear at the next compliance conference could result in court action pursuant to 22 NYCRR 202.27 including possible dismissal".

At a compliance conference scheduled for May 31, 2018, plaintiffs once again did not appear. The conference was adjourned to October 4, 2018; the adjournment order noted that "failure to appear at the next compliance conference could result in court action pursuant to 22 NYCRR 202.27 including possible dismissal".

Defendants served plaintiffs with a 90-day notice pursuant to CPLR 3216 on April 19, 2018. Plaintiffs did not file a note of issue by July 18, 2018, or otherwise respond to defendants' 90-day notice during the designated period.

The instant motion was filed on August 9, 2018, after one case scheduling order calling for the production of, amongst other things, an authorization for or copy of the relevant criminal court file; nine compliance conference orders calling for same; and at least six compliance conferences that plaintiffs did not attend. Plaintiffs do not dispute defendants' statement of facts in this respect.

Pursuant to CPLR 3216 (e), if a party served with a 90-day notice "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” (see *Umeze v Fidelis Care New York*, 17 NY3d 751 [2011] [“Supreme Court abused its discretion by declining to grant defendants’ motion to dismiss” where plaintiff failed to meet CPLR 3216 (e) burden]; *Austin v Gould*, 159 AD3d 422 [1st Dept 2018]).

“When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a note of issue or by moving, before the default date, to either vacate the notice or extend the 90-day period” (*Primiano v Ginsberg*, 55 AD3d 709, 709 [2d Dept 2008]; *Serby v Long Is. Jewish Med. Ctr.*, 34 AD3d 441 [2d Dept 2006], *lv denied* 8 NY3d 805 [2007])” (*Austin*, 159 AD3d 422).

“If plaintiff unjustifiably fails to comply with the 90-day requirement, knowing full well that the action can be saved simply by filing a note of issue but is subject to dismissal otherwise, the culpability for the resulting dismissal is squarely placed at the door of plaintiff or plaintiff’s counsel. Were courts routinely to deny motions to dismiss even after plaintiff has ignored the 90-day period without an adequate excuse, the procedure established by CPLR 3216 would be rendered meaningless” (*Baczowski v D.A. Collins Const. Co., Inc.*, 89 NY2d 499 [1997]).

That there is a general preference for merit-based determinations of matters does not abrogate parties’ responsibilities to affirmatively litigate their actions. Plaintiffs were served with a 90-day notice pursuant to CPLR 3216 and failed to respond in the specified period. Moreover, plaintiffs failed to appear for numerous scheduled depositions and at least six scheduled compliance conferences prior to service of such notice. Finally, plaintiffs do not provide an excuse for the general pattern of delay in this matter in the form of failing to provide an authorization for or copy of the relevant criminal court file through at least nine discovery conferences and failing to appear for at least six discovery conferences, all spanning a period greater than five years. Nor do plaintiffs provide any excuse for the delay in addressing defendants’ 90-day notice. Rather, plaintiffs indicate that they “currently stand ready” to proceed.

Upon the foregoing documents, and all papers and exhibits submitted concerning the relief sought herein, this court finds that plaintiffs have failed to provide a justifiable excuse for the aforementioned delay and have failed to establish a meritorious cause of action in their opposition papers. Consequently, this court denies plaintiffs’ cross-motion to extend the period for discovery and the note of issue date; moreover, this court grants defendants’ motion to dismiss for failure to file a note of issue, timely seek an extension of time to file, or respond to defendants’ 90-day notice.

The court having determined that the conditions precedent set forth in CPLR 3216 (b) have been satisfied and the plaintiffs having failed to serve and file a note of issue within the 90-day period set forth in said subdivision, and the plaintiffs having failed to offer a justifiable excuse for the delay or demonstrate the existence of a meritorious cause of action; and further

The court having determined that the plaintiffs have failed to appear for at least six discovery compliance conferences, and the court having found that such conduct and the failure to serve and file a note of issue in response to the demand therefor constitute a neglect to prosecute

this action, which failures demonstrate a general pattern of delay in proceeding by plaintiffs, it is now therefore

ORDERED, that the motion of defendants City of New York, New York City Police Department, Police Officer Stephen Polesovsky, and Police Officer Erick Larios to dismiss the complaint is granted, and it is further,

ORDERED, that the cross-motion of plaintiffs to extend the discovery period and time to file a note of issue is denied, and it is further,

ORDERED, that defendants are to serve a copy of this Order with Notice of Entry upon all parties and the General Clerk's Office.

ORDERED that defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

April 11, 2019


HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE