

Dyer v Kamara

2019 NY Slip Op 32517(U)

August 6, 2019

Supreme Court, Kings County

Docket Number: 503666/2015

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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PAMELA DYER,

Plaintiff,

-against-

ABDULAI KAMARA, RONNEY FELTON BELL and
JEANETTA BELL,

Defendants.
-----X

Decision and Order

Index No. 503666/2015

Cal. No. 10

Mot. Seq. 002

Submitted: July 30, 2019

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

Plaintiff's Notice of Motion to Restore dated June 18, 2019; Affirmation of Irwin D. Abraham, Esq., affirmed on June 18, 2019; Affidavit of Pamela Dyer, sworn to on March 12, 2019 (Exhibit A); Summons and Complaint (no verification page, Exhibit B); Default Judgment Order dated November 18, 2016; Attorney Affirmation of service of the motion, sworn to on June 18, 2019.....	1
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Hon. Richard J. Montelione, A.J.S.C.

The court in a prior order dated November 10, 2016, granted plaintiff's motion for default judgment and required plaintiff to file a Note of Issue within 30 days and to proceed to inquest on January 19, 2017. The plaintiff states that due to law office failure the Note of Issue was not timely filed, and the matter was marked "disposed by the Court on August 17, 2017." Plaintiff now moves the court to restore the matter to the calendar and to schedule an inquest.

The courts computerized records reflect the following:

Date	Status
7/30/2019	Default Judgment Motion Part Action: Fully Submitted
7/18/2019	Subsequent Motion Part

Date	Status
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Action: Adjourned

8/17/2017	Default Judgment Motion Part Action: Other Final Disp. Pre-Note
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5/18/2017	Default Judgment Conf. Part Action: Adjourned
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3/9/2017	Default Judgment Conf. Part Action: (not called) calendar
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1/19/2017	Default Judgment Conf. Part Action: adjourned
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Applicable Law/Legal Analysis

CPLR 3404. Dismissal of abandoned cases, reflects the following:

A case in the supreme court or a county court marked “off” or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

CPLR 3404, dismissal of abandoned cases which are marked off and where no motion to restore within a year are made, is inapplicable to pre-note of issue actions. (*See Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 725 NYS2d 57 [2nd Dept. 2001] and *see and cf also, Bank of NY v Arden*, 140 AD3d 1099 [2d Dept 2016], where court found in matter involving a mortgage foreclosure there was no necessity of bringing an unopposed pre-note motion to restore within a year of movant’s default).

CPLR 3216 which involves abandoned cases is also inapplicable because although a matter may be dismissed because a plaintiff “unreasonably fails to serve

and file a note of issue," there are several conditions precedent, including issue being joined, which are not met.

22 NYCRR 202.27, reflects the following:

Defaults

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

- (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or crossclaims.
- (c) If no party appears, the judge may make such order as appears just.

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Based on the foregoing, the court grants the plaintiff's application to restore the matter to the calendar and directs that the note of issue be filed by

9/6/19 and the matter shall then be placed on the inquest calendar of

10/29/19 where the matter will proceed to inquest and the failure of

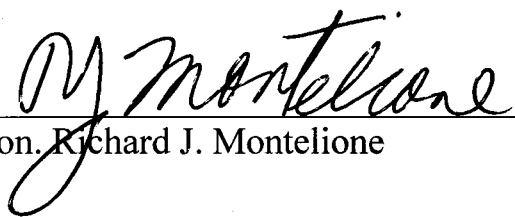
the plaintiff to file the note of issue or to appear for inquest shall result in the dismissal of this matter with prejudice pursuant to 22 NYCRR 202.27(c).

A copy of this order must be mailed to the defendants within ten days of this issuance of this order.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY

Date AUG 6 2019


Hon. Richard J. Montelione

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