

Martinez v Pogyo

2019 NY Slip Op 32759(U)

July 10, 2019

Supreme Court, Queens County

Docket Number: 14429/2015

Judge: Denis J. Butler

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FILED
 JUL 11 2019
 COUNTY CLERK
 QUEENS COUNTY

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
 Justice

-----x
 KEVIN C. MARTINEZ,

Index
 Number: 14429/2015

Plaintiff(s),

-against-

Motion Date:
July 2, 2019

CARLOS O. POGYO,

Seq. No.: 002

Defendant(s).

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The following papers were read on this motion by defendant for an order, pursuant to CPLR 3216, dismissing plaintiff's complaint, and notice of cross-motion by plaintiff for an order, pursuant to CPLR 602, consolidating the above-entitled action (Action 1) with the Supreme Court, Queens County, action bearing Index Number 714870/2018 (Action 2) for all purposes.

Papers
Numbered

Notice of Motion, Affirmation, Affidavit,	
Exhibits.....	1-17
Notice of Cross-Motion, Affirmation, Exhibits.....	18-21
Reply Affirmation, Affidavit.....	22-23

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

"Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits" (CPLR 3216 [a]). CPLR 3216 "is extremely forgiving of litigation delay," and the conditions precedent for dismissal under the statute are as

follows: "at least one year has elapsed since joinder of issue; defendant has served on plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff has failed to serve and file a note of issue within the 90-day period" (*Baczkowski v D.A. Collins Constr. Co.*, 89 NY2d 499, 503 [1997]). Though there can be no dismissal if the movant does not meet these prerequisites, courts retain discretion to deny a CPLR 3216 motion to dismiss even if the prerequisites are met (see *id.* at 504).

Here, a note of issue was filed on or about September 12, 2017. Plaintiff's counsel affirms that, prior to trial, plaintiff learned there was an additional allegedly negligent party to the subject motor vehicle accident. As a result, the note of issue was vacated in the Trial Scheduling Part on March 12, 2018.

Thereafter, on August 22, 2018, defendant served plaintiff with a 90-day notice. Counsel for the parties corresponded, and plaintiff's counsel agreed to extend the 90-day notice. Plaintiff's counsel failed to file the note of issue within the stipulated time but affirms it was due to him pursuing the second action against the allegedly negligent party. The court finds that plaintiff has demonstrated both a justifiable excuse for the delay and a potentially meritorious cause of action.

Accordingly, defendant's motion, pursuant to CPLR 3216, to dismiss plaintiff's complaint is denied.

Turning to the cross-motion for consolidation, plaintiff has demonstrated that the two cases arise from identical facts and circumstances, involve common questions of law and fact, and involve causes of action seeking to recover damages for personal injury sustained by the plaintiff in the subject motor vehicle accident (see CPLR 602).

Accordingly, the cross-motion for consolidation is granted and Actions 1 and 2 are hereby consolidated for all purposes under Index Number 14429/2015; and it is further

ORDERED, that the Clerk of the Court, upon being served with a certified copy of this order with notice of entry, is directed to transfer all papers filed under Index Number 714870/2018 to the file of Index Number 14429/2015; and it is further

ORDERED, that the caption of the consolidated action shall be as follows:

Supreme Court of the State of New York
County of Queens

-----x

KEVIN C. MARTINEZ,

Plaintiff(s),

Index
Number: 14429/2015

-against-

CARLOS O. POGYO and MILENA SHELMAKHER,
as Administratrix of the Goods, Chattels
and Credits of ALEX SHELL, deceased,

Defendant(s).

-----x

-----x

MILENA SHELMAKHER, as Administratrix of
the Goods, Chattels and Credits of ALEX
SHELL, deceased,

Third-Party Plaintiff(s),

-against-

CARLOS O. POGYO,

Third-Party Defendant(s).

-----x

; and it is further

ORDERED, that, due to outstanding discovery in light of the consolidation, and as filing the note of issue would be premature, defendant's 90-day notice is vacated; and it is further

ORDERED, that, upon completion of all discovery in the consolidated action, the parties shall so-stipulate and present the stipulation to the Clerk of the Trial Scheduling Part for an order permitting the filing of a new note of issue and restoring the matter for a pretrial conference or trial date; and it is further

ORDERED, that a copy of this order with notice of entry be served on all parties to the actions consolidated, and the Clerk of Queens County.

This constitutes the decision and order of the court.

Dated: July 10, 2019



Denis J. Butler, J.S.C.

FILED
JUL 11 2019
COUNTY CLERK
QUEENS COUNTY