

Soghanalian v Fiske
2019 NY Slip Op 33411(U)
May 8, 2019
Supreme Court, Broome County
Docket Number: 2016-1321
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 14th day of December 2018.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

JOANN M. SOGHANALIAN,

Plaintiff,

-against-

DECISION AND ORDER

**Index No. 2016-1321
RJI No. 2016-1146-M**

**GREGORY FISKE & HEATHER FISKE, PAUL
JUMP & GEORGIA JUMP, CHRISTOPHER
KELLY & JOHANNA KELLY, WILLIAM
MIHOK & ELIZABETH MIHOK, BALJINDER
SINGH & PARMJEET KAUR, and CHAD
JABLONKA,**

Defendants.

APPEARANCES:

Ms. JoAnn M. Soghanalian
SRL Plaintiff
96 Ararat Drive
PO Box 1162
Vestal, NY 13851

Sarah Schulz, Esq.
Bennett, Schechter, Arcuri & Will, LLP
Attorneys for Defendants Gregory & Heather Fiske
701 Seneca Street, Suite 609
Buffalo, NY 14210

Michael A. Garzo, Jr., Esq.
Jackson Bergman
Attorneys for Defendants Paul & Georgia Jump
32 W. State Street
Binghamton, NY 13901

Brett Noonan, Esq.
Noonan Brown Law
Attorney for Christopher & Johanna Kelly
423 East Main Street
Endicott, NY 13760

Keith A. O'Hara, Esq.
Coughlin & Gerhart, LLP
Attorneys for Defendants William & Elizabeth Mihok
99 Corporate Drive
Binghamton, NY 13904

Peter Fee, Esq.
Law Office of Peter Fee
Attorney for Defendant Baljinder Singh
222 Front Street
Vestal, NY 13850

John Perticone, Esq.
Levene, Gouldin & Thompson, LLP
Attorneys for Defendant Chad Jablonka
450 Plaza Drive
Vestal, NY 13850

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on four motions to dismiss the action for failure to resume prosecution pursuant to CPLR 3216. The motions were made by the following four defendants or sets of defendants: Gregory and Heather Fiske; Chad Jablonka; Christopher and Johanna Kelly; and William and Elizabeth Mihok.¹ The plaintiff opposes the motions.

Brief Background

The plaintiff commenced this action by filing a summons and complaint with the Broome County Clerk's Office on June 15, 2016, followed by the service of an amended complaint. With the exception of Chad Jablonka,² the named defendants are all parents of teenagers who the plaintiff alleges unlawfully entered and damaged her home and stole items from it.

By letter dated January 10, 2018, the plaintiff's then counsel informed the Court that the plaintiff would be proceeding as a self-represented litigant.³ At a status conference on February 9, 2018, the plaintiff requested and was granted 30 days to retain substitute counsel.

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The defendants who have not moved to dismiss the action are Paul and Georgia Jump and Baljinder Singh and Paramjeet Kaur.

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Who was apparently over 18 years of age at the time of the incidents.

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He enclosed a letter from the plaintiff stating she would be proceeding as a self-represented litigant until she could obtain new counsel.

In a letter to the plaintiff and the defendants' counsel dated February 14, 2018, the Court confirmed that the plaintiff had until March 12, 2018 to retain counsel and after that date counsel were free to conduct further discovery, make motions, or file a trial note of issue as they deemed appropriate.

As the plaintiff never obtained counsel, she continues to appear as a self-represented litigant.

Arguments of the Parties

The four motions filed by the defendants are all based on their respective service of a Notice to Resume Prosecution (collectively referred to as Notices) on the plaintiff and the plaintiff's failure to respond to the Notices despite the passage of over 90 days. The defendants also point out that the plaintiff has previously caused delays in this action, such as by failing to respond to various discovery demands.

According to the affidavits of service filed by the respective defendants, service of the Notices was made as follows: counsel for the Fiske defendants served their Notice on the plaintiff via certified mail on March 21, 2018, which the plaintiff received on March 29, 2018 according to the certified mailing receipt; counsel for Mr. Jablonka served his Notice on the plaintiff via registered mail on April 25, 2018, which the plaintiff received on May 5, 2018 according to the USPS Tracking printout; counsel for the Kelly defendants served their Notice on the plaintiff via first class mail on June 29, 2018; and counsel for the Mihok defendants served their Notice on the plaintiff via first class mail on April 16, 2018.

In opposition to the motions, the plaintiff asserts that her complaint has "significant merit" and she has provided answers to the demand for interrogatories and participated in all

scheduled telephone conferences. She also asserts that the defendants' sons have admitted to unlawfully entering her home without permission and states that "large quantities of [her] personal property were removed from the residence" (see Soghanalian opposition of defendants' motion to dismiss at ¶ 7). She argues that she was prejudiced by her former counsel concealing his suspension from the practice of law. Finally, she alleges she mailed a Notice to Take Oral Deposition to counsel for the Fiske defendants on June 25, 2018⁴ and never received a response.

In reply, counsel for the Mihok defendants points out that the plaintiff's "affirmation" is not verified or notarized and thus should not be considered. She also points out that the plaintiff's former attorney's suspension has no bearing on her failure to respond to the Notice, as she was given until March 12, 2018 to retain substitute counsel and was self-represented at the time it was served. She argues that because the plaintiff has failed to submit an affidavit of merit or offer a reasonable excuse for failing to respond to the Notice, the defendants' motions must be granted.

Law

Pursuant to CPLR 3216, the Court may dismiss a party's pleadings where that party "unreasonably neglects to proceed . . . or unreasonably fails to serve and file a note of issue" provided certain conditions precedent have been complied with, including, in pertinent part: (1) issue has been joined; (2) one year has elapsed since the joinder of issue; and (3) the party seeking such relief has served a written demand by registered or certified mail requiring the

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The Court's letter dated February 14, 2018 states that all discovery was to be completed by June 29, 2018.

party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within 90 days (*see id.*).

To defeat a motion to dismiss the complaint for failure to prosecute pursuant to CPLR 3216, a plaintiff must establish a justifiable excuse for failing to file a note of issue within 90 days of the demand and a meritorious cause of action (*Burchard v. City of Elmira*, 52 AD3d 881 [3d Dept 2008]; *Austin v. County of Madison*, 169 AD2d 1015, 1016 [3d Dept 1991]). In evaluating the adequacy of a plaintiff's excuse, the Court must consider factors such as "the history of the case, the extent of the delay, evidence of intent to abandon the case, undue prejudice to [the] defendant, and the merits of the underlying claim" (*Burchard*, 52 AD3d at 881 [citations and internal quotation marks omitted]).

Analysis

The defendants have all established that issue has been joined, that one year has elapsed since the joinder of issue, and that the plaintiff was served with the Notices⁵ and failed to take any action in response to them despite the passage of over 90 days.

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While the Fiske defendants served their Notice via certified mail and Mr. Jablonka served his Notice via registered mail pursuant to the statute, the Kelly defendants and the Mihok defendants served their Notices via first class mail. However, the law is clear that the "failure to serve a CPLR 3216 demand by registered or certified mail is a procedural irregularity and, absent a showing of prejudice to a substantial right of a plaintiff, courts should not deny, as jurisdictionally defective, a defendant's motion to dismiss for neglect to prosecute" (*Balancio v. American Opt. Corp.*, 66 NY2d 750, 751 [1985]). In light of that and the fact that the plaintiff never denied receiving the Notices or established prejudice with respect to the method of mailing, the service by first class mail is an irregularity which will be overlooked (*see id.*; *see Athanasiou v. Esposito*, 212 AD2d 878, 879 [3d Dept 1995]).

There is, however, one Notice which contains a defect which must be addressed. The Notice served on behalf of the Mihok defendants provides:

“PLEASE TAKE NOTICE, that demand is hereby made upon the Plaintiff, Ken Finch, Jr., to serve and file a Note of Issue within 90 days after the service of this demand, and further that default in complying with this demand will serve as the basis for a motion by the undersigned for dismissal for want of prosecution, pursuant to Rule 3216 of the CPLR” (emphasis added).

While the caption is correct and the bottom of the Notice does indicate it was sent “TO: JOANN M. SOGHANALIAN, Plaintiff, P.O. Box 1162, Vestal, New York 13851,” the body of the Notice clearly indicates it was directed to an individual other than the plaintiff.

It is true that Courts “may disregard a defect or irregularity if a substantial right of a party is not prejudiced” (*TD Bank, N.A v. Leroy*, 121 AD3d 1256, 1260 [3d Dept 2014], citing CPLR § 2001). However, disregarding this apparent defect or irregularity would result in dismissal of the self-represented plaintiff’s action as against the Mihok defendants – a result that can certainly be categorized as substantial and resulting in prejudice (*see generally Klein v. Hooting, Inc.*, 267 AD2d 12, 13 [1st Dept 1999]). Therefore, the Notice served on behalf of the Mihok defendants was not effective as against the plaintiff and their motion to dismiss is denied on that basis.

As to the remaining moving defendants, the plaintiff must establish both a justifiable excuse for failing to file a note of issue within 90 days of receiving the Notice and a meritorious cause of action in order to successfully oppose the motions to dismiss.

A review of the plaintiff’s “affirmation” reveals that it is not verified or notarized (*see* CPLR 2106[a] [permitting attorneys, physicians, osteopaths, and dentists who are not parties to the action to submit a statement subscribed and affirmed to be true under penalties of perjury

in lieu of and with the same force and effect as an affidavit]). Since the plaintiff does not fall within a category where submission of an affirmation is permissible, her “affirmation” is not admissible.⁶

Even if the plaintiff’s “affirmation” were to be considered, it would not be sufficient to defeat the remaining motions as it does not establish a justifiable excuse for not responding to the Notices. Regardless of her former counsel’s suspension, the plaintiff was given until March 12, 2018 to retain counsel and was self-represented in late March, April, and June when the Notices were served.⁷ Likewise, her assertion that counsel for the Fiske defendants never responded to her June 2018 Notice to Take Deposition does not excuse her failure to request an extension of time in which to file the note of issue, move to vacate the Notice, or otherwise respond to the Notice despite the passage of over 90 days.

Conclusion

In light of the foregoing, the motion to dismiss of the Mihok defendants is denied and the remaining three motions to dismiss are granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date

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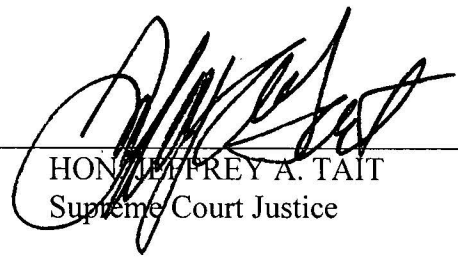
The Court recognizes and appreciates the difficulties faced by self-represented litigants. However, the law is clear that “a litigant appearing *pro se* acquires no greater right than any other litigant and such appearance may not be used to deprive [the] defendants of the same rights enjoyed by other defendants” (*Davis v. Mut. of Omaha Ins. Co.*, 167 AD2d 714, 716 [3d Dept 1990]; *see also HSBC Bank USA, Nat. Ass’n v. Pacyna*, 112 AD3d 1246, 1247 [3d Dept 2013]).

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And had been self-represented since January 2018.

below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: May 8, 2019
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
MAY 10 2019
BROOME COUNTY CLERK