

Capolarello v Capolarello
2021 NY Slip Op 30001(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 154605/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **IAS MOTION 12**

Justice

-----X

MARIO CAPOLARELLO,

Plaintiff,

- v -

INDEX NO. 154605/2020

MOTION DATE _____

MOTION SEQ. NO. 001

DOMINICK CAPOLARELLO, MARC ALHONTE,

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6-13 were read on this motion to _____ extend time to answer _____.

In this action for relief relating to a dispute over a parent's estate, defendant Alhonte moves pursuant to CPLR 2004 and 3012 for orders extending his time to respond to the complaint, and upon granting the extension, dismissing the complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiff opposes.

I. PROCEDURAL HISTORY

On or about June 23, 2020, plaintiff commenced this action, and on or about July 16, 2020, personally served Alhonte with the summons and complaint and filed the affidavit of service on July 24, 2020. (NYSCEF 3). On August 12, 2020, plaintiff's counsel declined defense counsel's request for an extension of time to respond to the complaint, and on August 31, 2020, Alhonte filed this motion for an extension of time to respond and for dismissal of the complaint.

II. MOTION TO EXTEND TIME

A. Contentions

Defense counsel alleges that upon being retained by Alhonte on or about August 2, 2020,

he investigated estate documents, researched legal issues raised in the complaint, and considered the chances of an early resolution of the case. In voicemail messages on August 6 and 11, 2020, and by email dated August 11, 2020, he sought the consent of plaintiff's counsel to an extension of time to file a response. On August 12, 2020, plaintiff's counsel declined to agree to an extension. (NYSCEF 7).

Alhonte maintains that the motion to extend is made within reasonable time, that "plaintiff is not prejudiced by the minimal delay, that a courtesy adjournment to a first request is routinely granted, and that "any specific time limit for the commencement, filing, or service of any legal action, motion, or other process or proceeding" was tolled at the time a response was due. (*Id.*).

In opposition, plaintiff's counsel accuses defense counsel of deliberately refusing to respond timely and of failing to attach to his motion a proposed answer, relying on the allegations set forth in the complaint as proof of dilatory conduct. He also asserts entitlement to a default judgment and inquest and asks that a "condition precedent" to the late answer be imposed in the amount of \$2,500. (NYSCEF 10).

In reply, counsel observes that plaintiff's opposition to the motion has no merit, if at least for his failure to address the COVID toll, and that he need not attach his answer, having filed a preanswer motion to dismiss pursuant to CPLR 3211. (NYSCEF 13).

B. Analysis

Alhonte had 20 days, or until August 5, to respond to the complaint. The following day, he sought an extension from plaintiff and from August 6 to August 12, he awaited what he reasonably anticipated would be counsel's consent, but instead learned that counsel would not consent to an extension. Adding to the 19 days that had elapsed from August 12 to the filing of

the instant motion in lieu of an answer, yields a total delay of 25 days, six of which are attributable to counsel's delay in responding to Alhonte's request for an extension. Thus, Alhonte demonstrates that the delay was brief, not deliberate, and sufficiently excused. Plaintiff's reliance on the merits of his complaint as evidence that the delay was deliberate is misplaced.

Alhonte also demonstrates that there is no possibility of prejudice to plaintiff resulting from the delay, nor does plaintiff allege any, and the merits of the defense are clearly set forth in defendant's motion to dismiss. For these reasons, even without the tolling resulting from the COVID19 pandemic, Alhonte demonstrates his entitlement to the extension.

III. CONCLUSION

As the issues here are more properly addressed in the surrogate's court with its special expertise in trust and estate matters (NY Const. Art. § 19[a] ["supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties"]; see CPLR 325[e]; *Parker v The Am. Assn. of Univ. Women*, 185 AD3d 471 [1st Dept 2020]; *Benjamin v Morgan Guar. Trust Co. of New York*, 173 AD2d 373 [1st Dept 1991]), it is hereby

ORDERED, that defendant Marc Alhonte's motion for an extension of time to respond is granted, and his motion to dismiss is deemed timely filed and served; it is further

ORDERED, that the action is removed to Surrogate's Court, New York County; and it is further

ORDERED, that, within 30 days from the date of entry of this order, counsel for the

plaintiff or defendants shall serve a copy of this order with notice of entry upon the Clerk of this Court (60 Centre Street, Room 141B) and shall contact the staff of the Clerk to arrange for the effectuation of the transfer in an efficient manner; it is further

ORDERED, that the Clerk shall transfer this action and all documents filed therein to said Court; and it is further


ORDERED, that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address *www.nycourts.gov/supctmanh*); it is further

ORDERED that the Clerk of this Court and the Clerk of the above-referenced Surrogate's Court shall coordinate the transfer of the documents in the file in both cases so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to documents that may be in digital format; and it is further

ORDERED, that remainder of motion seq. no. 001 (defendant's motion to dismiss) and motion seq. no. 002 (plaintiff's motion for summary judgment) are denied as moot, based on the foregoing, without prejudice to their renewal in the above-referenced Surrogate's Court.

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1/4/2021
DATE



CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: