

<b>Sabiaga v Cape Church Assoc., LLC</b>
2022 NY Slip Op 30369(U)
February 3, 2022
Supreme Court, New York County
Docket Number: Index No. 160747/2019
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

*Justice*

-----X

JOSE SABIAGA,

Plaintiff,

- v -

CAPE CHURCH ASSOCIATES, LLC, CONSIGLI &  
ASSOCIATES, LLC,

Defendant.

-----X

INDEX NO. 160747/2019

MOTION DATE 11/30/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for EXTEND - TIME.

Plaintiff moves, by order to show cause, to extend the NOI deadline date.

The application is unopposed.

First, as an initial matter, the Court directed plaintiff serve defendants with the instant application by certified overnight mail, and file proof of service prior to the return date (NYSCEF Doc. No. 63). The Court further advised “Failure to timely file proof of service shall result in denial of the application” (*id.*). Plaintiff’s counsel failed to file proof of service, and consequently, the instant application is denied.

Second, turning to the merits, by status conference order dated April 7, 2021, prior to the transfer of this matter to Part IV, the Court set the note of issue deadline as August 30, 2021 (NYSCEF Doc. No. 31). Thereafter, plaintiff changed counsel, and plaintiff's incoming counsel filed a motion seeking plaintiff's previous counsel's file (mot. seq. 002). Prior to argument on the motion, the attorney file was provided to incoming counsel. The Court, by Decision and Order, found that plaintiff's incoming counsel engaged in frivolous behavior, by failing to withdraw the moot motion and failing to appear at argument, wasting this Court's limited resources (NYSCEF Doc. No. 41). Notwithstanding, the Court, as a courtesy, did not impose sanctions at that time (*id.*). Thereafter, plaintiff failed to file a note of issue, as previously directed, by the August 30, 2021 deadline, and no party sought to extend such deadline. Consequently, the Court issued a resumption of prosecution demand directing plaintiff to complete discovery within 90-days under threat of dismissal (CPLR § 3216; see NYSCEF Doc. No. 49).

CPLR § 2004 provides the Court with authority to extend the note of issue deadline upon just terms and upon good cause. "It is within the discretion of the Supreme Court whether to grant such an extension of time" (*Oliver v. Town of Hempstead*, 68 AD3d 1079, 1080 [2d Dept 2009]). Where the Court has

issued a demand for resumption of prosecution (90-day demand), “a plaintiff must either timely file a note of issue or move for an extension of time to file the note of issue pursuant to CPLR § 2004 (*Oliver v. Town of Hempstead*, 68 AD3d 1079, 1080 [2d Dept 2009]).

Here, plaintiff’s counsel’s curt affirmation in support of this application comprises three substantive sentences, is entirely conclusory, and provides no basis to extend the note of issue (NYSCEF Doc. No. 56). The Court is constrained to note that although plaintiff’s counsel advises it was not substituted until November 24, 2021, pursuant to a notice of appearance, it filed the aforementioned motion seeking plaintiff’s client file nearly six months earlier, on June 8, 2021, under the auspice of representing plaintiff. No explanation is provided for the lengthy delay in filing a notice of appearance.

Accordingly, plaintiff has failed to provide any basis for further extension of the note of issue deadline, plaintiff’s counsel has continued to engage in frivolous unsupportable motion practice, and continued to waste this Court’s limited resources. Under these circumstances, the Court finds plaintiff has not established good cause for extending the note of issue.

Furthermore, the Court finds plaintiff's counsel has again wasted this Court's resources by filing a further unsupported motion and failing to comply with the Court's service directives. Put simply, for a second time, and following this Court's admonition, plaintiff's counsel has effectively brought a motion before the Court and abandoned same half-way through without withdrawing or resolving same, wasting this Court's resources. As previously cautioned by the Court in its motion sequence 002 Decision and Order, such behavior is sanctionable under 22 NYCRR § 130-1.2 (*see e.g. Benefield v. New York City Hous. Auth.*, 260 AD2d 167 [1st Dept 1999] "There is no requirement that the dictates of [22 NYCRR] § 130-1.2 be followed in any rigid fashion, the court's decision was sufficient to set forth the conduct on which the [sanctions] award was based, the reasons why it found this conduct to be frivolous and the amount to be appropriate").

Accordingly, it is

ORDERED that the motion is denied for failure to file proof of proper service, in accordance with the signed order to show cause; and it is further

ORDERED that the Court's temporary stay, as issued by the instant

order to show cause, is vacated, and plaintiff is directed to file a note of issue on or before March 4, 2022; and it is further

ORDERED that such note of issue shall not reserve any right to complete any outstanding discovery, and that the note of issue shall otherwise comply with the Part Rules, Court Rules and CPLR; and it is further

ORDERED that should plaintiff fail to timely file the note of issue, as above, the matter shall be dismissed on March 7, 2022.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/3/2022  
DATE

  
FRANK MERVO, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE