Gorski v 1155 Tenants Corp.
2022 NY Slip Op 31801(U)
June 1, 2022
Supreme Court, New York County
Docket Number: Index No. 155051/2017
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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MACIEJ GORSKI, Index No. 155051/2017

Plaintiff

- against - DECISION AND ORDER

1155 TENANTS CORP., R.D. RICE CONSTRUCTION, INC., and MAKITA U.S.A., INC.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves to restore this action, after an order dated January 3, 2018 (Kalish, J.), stayed the action when defendant R.D. Rice Construction, Inc., petitioned for bankruptcy. NYSCEF Doc. 16. After defendants 1155 Tenants Corp., Rice Construction, and Makita U.S.A., Inc., submitted their opposition to this motion, plaintiff submitted a reply that presented new grounds supporting his motion. Although the court does not ordinarily consider points raised for the first time in reply, Newport E. Inc. v. Sviba Floral Decorators, Inc., 202 A.D.3d 482, 484 (1st Dep't 2022); Glencore Ltd. v. Freepoint Commodities LLC, 198 A.D.3d 413, 414 (1st Dep't 2021), plaintiff replied to points raised by defendants, and the court provided defendants an opportunity to sur-reply, which they declined. Florentine G.O.

v. Benoit G., 198 A.D.3d 486, 486 (1st Dep't 2021). Since defendants waived further opposition, the court may consider plaintiff's reply as if it was included in his motion initially. Id.

II. PLAINTIFF'S MOTION TO RESTORE THIS ACTION

Plaintiff received notice on December 3, 2021, from a law firm uninvolved in this action, that Rice Construction's bankruptcy proceeding had concluded on December 27, 2018. Aff. of Lyaman F. Khashmati Ex. 5, at 2. On January 11, 2022, plaintiff moved to restore this action. Defendants 1155 Tenants and Rice Construction, citing Ware v. Porter, 227 A.D.2d 214, 215 (1st Dep't 1996), insist that plaintiff failed to move timely for restoration within a year after Rice Construction's bankruptcy proceeding concluded. All defendants further insist that plaintiff's delay caused prejudice to defendants. Plaintiff maintains that defendants' failure to demand that he resume prosecution within 90 days, pursuant to C.P.L.R. § 3216, allows him to restore this action automatically at any time. Plaintiff also points to defendants' failure to notify him that the bankruptcy proceeding was concluded as the reason for his delay in restoring this action.

Ware v. Porter, 227 A.D.2d at 215, considered the restoration of an action to the trial calendar under C.P.L.R. § 3404, after the action had been dismissed as abandoned. Unlike

that action, the court never dismissed this action, nor removed it from the trial calendar, since no note of issue has been filed. Thus C.P.L.R. § 3404 is inapposite to the determination of this motion. Thompkins v. Ortiz, 165 A.D.3d 428, 429 (1st Dep't 2018); Turner v. City of New York, 147 A.D.3d 597, 597 (1st Dep't 2017).

Nevertheless, plaintiff may not wield defendants' inaction against defendants to justify the inaction by plaintiff's own attorneys. If plaintiff's attorneys explained why plaintiff did not move for restoration for over three years since the bankruptcy proceeding concluded, law office failure might excuse the dilatory conduct, but plaintiff merely attempts to shift the blame to defendants, who owe no obligation to assist plaintiff in pursuing his claims. Plaintiff's attorneys easily could have monitored the bankruptcy proceeding, which was a matter of public record. Velez v. Seymour Moslin Assoc., Inc., 278 A.D.2d 164, 165 (1st Dep't 2000).

Nor may plaintiff justify his assumption that the bankruptcy proceeding continued after December 2018 and thus justify his delay based on his continued negotiations regarding recovery of Rice Construction's insurance. Negotiations toward that objective pertained whether or not the bankruptcy proceeding was ongoing, since plaintiff never filed a claim in that proceeding. He was and continues to be limited to recovery from Rice

Construction through its insurance.

Although plaintiff's prolonged delay is unjustified, defendants likewise demonstrated their disinterest in the prosecution of this action. After they knew Rice Construction's bankruptcy proceeding had ended, none of them served a notice to plaintiff under C.P.L.R. § 3216, which would have mitigated the prejudice they now claim. Sherman v. American Yard Prods., 306 A.D.2d at 138, 138 (1st Dep't 2003). Since they continued to act as if the action remained stayed, they also incurred minimal fees and expenses during this action's extended dormancy.

Yet defendants were aware of this action once plaintiff commenced it and were aware that the stay was temporary, so it did not impede their investigation of the complaint. Only after the bankruptcy proceeding ended in December 2018, and plaintiff then waited more than the year within which defendants insist he was required to move to restore the action, by 2020, were defendants justified in assuming plaintiff had abandoned the action. At that point, however, since plaintiff continued to negotiate regarding recovery of Rice Construction's insurance, Rice Construction and any other defendant aware of those negotiations still were unjustified in assuming plaintiff had abandoned the action.

Finally, defendants may remedy any prejudice from plaintiff's loss of the grinder that caused his injuries by

moving for spoliation penalties. Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 547 (2015); China Dev. Indus. Bank v. Morgan Stanley & Co. Inc., 183 A.D.3d 504, 505 (1st Dep't 2020); Rossi v. Doka USA, Ltd., 181 A.D.3d 523, 526 (1st Dep't 2020); Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, 171 A.D.3d 680, 680 (1st Dep't 2019). Any prejudice to defendants from loss of the grinder is the same whether it was lost before or after Rice Construction's bankruptcy proceeding ended.

III. CONCLUSION

Plaintiff is not to be penalized, however, because of his attorneys' lack of diligence, Velez v. Seymour Moslin Assoc., Inc., 278 A.D.2d at 165, particularly when defendants suffered no prejudice as a result. Therefore the court vacates the prior order staying this action as a "purely administrative marking," Onewest Bank FSB v. Arecy, 189 A.D.3d 1440, 1441 (2d Dep't 2020), since this action is pre-note of issue, and defendants did not serve a notice that plaintiff resume prosecution of this action pursuant to C.P.L.R. § 3216. Sherman v. American Yard Prods., 306 A.D.2d at 138; Cordero v. Singh, 295 A.D.2d 154, 154-55 (1st Dep't 2002); Boricua Coll. v. L&T Constr. Co., Inc., 294 A.D.2d 170, 172 (1st Dep't 2002); Guillebeaux v. Parrott, 188 A.D.3d 1017, 1017 (2d Dep't 2020). Plaintiff need not provide a reasonable excuse or demonstrate the merits of this action for it

to be restored. Group III Capital, Inc. v. Lang, 293 A.D.2d 339, 340 (1st Dep't 2002); Onewest Bank FSB v. Arecy, 189 A.D.3d at 1441. For these reasons, the court grants plaintiff's motion to restore this action. The parties shall attend a Compliance Conference on June 30, 2022, at 3:30 p.m.

Dated: June 1, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.