

Esposito v Estate of Casale

2023 NY Slip Op 30759(U)

March 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 409/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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 ANTHONY ESPOSITO, CASTLE U.S.A. CORP.,
 VINCENT ESPOSITO & JULY4EVER CO., LTD.,
 Plaintiffs,

Decision and order

- against -

Index No. 409/18

ESTATE OF LOUIS CASALE, LOUIS JOHN CASALE
 AS ADMINISTRATOR OF THE ESTATE OF LOUIS
 CASALE, LOUIS JOHN CASALE, individually,
 ROSEMARIE CASALE, JOHN SAGARIA & FIREWORKS
 EXTRAVAGANZA INC.,

Defendants,

March 15, 2023

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 PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5 & #6

The Casale defendants have moved seeking to dismiss the plaintiff's case for the failure of plaintiff to prosecute the action. The defendant John Sagaria has cross-moved seeking, essentially, the plaintiff's ejectment from the premises located at 382 Rock Cut Road in Walden, New York. The plaintiff opposes the motions arguing there was never any intent to abandon the action and the defendant is not entitled to ejectment. Papers were submitted by all parties and arguments held. After hearing all the arguments this court now makes the following determination.

The complaint alleges that on June 5, 2000 the plaintiff Anthony Esposito and Louis Casale entered into a shareholder agreement wherein each member was a fifty percent owner of a corporation known as Castle USA Corp. Castle purchased property located at 382 Rock Cut Road in Walden New York and gave a ninety nine year lease to Vincent Esposito. Vincent entered into a further lease with defendants Sagaria and FIE which expired on

December 31, 2017. Louis Casale passed away on November 3, 2012 and the plaintiff sought to purchase Casale's shares from his son Louis Casale Jr., the administrator of his father's estate. It was later revealed that additional shares of stock were issued to Vincent Esposito, Rosemarie Casale and Louis Casale Sr. prior to his death. Some of those shares were then transferred to John Sagaria and FIE who are now acting as owners of Castle. This lawsuit has been commenced seeking a determination no such additional shares were allowable and that consequently Sagaria and FIE have no claims of ownership of Castle.

On June 30, 2022 the defendants served the plaintiff with a ninety-day notice urging the prosecution of the action. A motion seeking to dismiss the action for the failure to prosecute has now been filed.

Conclusions of Law

It is well settled that when a plaintiff is served with a ninety day notice pursuant to §3216 then the plaintiff must comply with the notice or move to vacate the notice or seek an extension of time within ninety days (Walters v. Hoboken Wood Flooring Corp., 6 AD3d 696, 775 NYS2d 158 [2d Dept., 2004]). Where a plaintiff fails to comply with such ninety day notice then the plaintiff must demonstrate a reasonable excuse for such failure to respond to such notice as well as a meritorious cause of action (Gaydos v. Muhlbauer, 10 AD3d 408, 781 NYS2d 144 [2d

Dept., 2004])).

The plaintiff has failed to adequately offer any reasonable excuse for the failure to respond to the ninety day notice served June 30, 2022. The plaintiff has presented excuses based upon the health of the parties due to COVID-19, the delay caused by COVID-19 generally and health issues of counsel. However, all those matters took place well before the ninety-day notice was served. The plaintiffs assert that "there was never a thought of abandoning the prosecution of the action. Unfortunately, along with Covid, it was a series of unanticipated and unfortunate events that led to the delay in the prosecution" (see, Affirmation in Opposition, ¶8 [NYSCEF Doc. No. 227]). Nevertheless, there is no evidence presented that any COVID-19 related delays or other unforeseen events reasonably contributed to the three month delay from when the ninety-day notice was served to the filing of this motion.

Thus, while there may have been personal matters that counsel and the parties were required to attend there has been an insufficient presentation of any reasonable excuse for the failure to prosecute the action. The inability to prosecute the action in the past, even if reasonable, has no bearing on the current posture of the case and surely fails to adequately respond to the ninety-day notice. In addition, there has been no demonstration that the causes of action have any merit.

Turning to the motion seeking ejectment the defendant asserts that the continued presence of Anthonty Esposito residing in an inhabitable building near the fireworks of Sangaria may harm Sagaria's business.

However, pursuant to CPLR §507 any action that affects the title to real property must be filed in the county where the property is located. Section 183 of the Civil Practice Act ("CPA"), the predecessor of CPLR §507 specifically noted that such actions include "(1) ejectment; (2) partition; (3) dower; (4) mortgage foreclosure; (5) to determine a claim to real property; (6) waste; (7) nuisance; (8) to compel a conveyance; and (9) every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real" (id).

Further, the practice commentaries to CPLR §507 explain that "CPLR 507 dropped the specific listings and adopted a simplified version of the language in Civ.Prac.Act § 183(9). The drafters of the CPLR indicated they intended "no change in meaning" (N.Y.Sen.Fin.Comm. et al., Fifth Prelim.Rep., Legis.Doc.No.15, p.76 (1961)), also noting that the new catchall language was broad enough to include all of the actions previously listed in § 183 (N.Y.Adv.Comm. on Prac. & Proc., First Prelim.Rep., Legis.Doc.No.6(b), p.22 (1957))" (see, Practice Commentaries to


CPLR §507). Therefore, the ejectment claim, which clearly affects title of real property cannot be pursued in Kings County since the property is not located in Kings County.

Consequently, based on the foregoing the motion seeking to dismiss the action for the failure to prosecute is granted. The motion seeking ejectment is denied.

So ordered.

ENTER:

DATED: March 15, 2023
Brooklyn NY



Hon. Leon Ruchelsman
JSC