

Genna v Klempner

2023 NY Slip Op 31154(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 100530/2016

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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PAULA GENNA,

Plaintiff,

- v -

OLEG KLEMPNER, DDS, CENTRAL PARK SOUTH
DENTAL CARE, PLLC, OLEG KLEMPNER, BABAK
ROBERT GHALILI, DMD, BARAK ROBERT GHALILI, and
MIDTOWN DENTAL GROUP OF NYC, PLLC,

Defendants.

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INDEX NO. 100530/2016
MOTION DATE 01/19/2023
MOTION SEQ. NO. 015

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 015) 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 306

were read on this motion to/for DISMISS 3216/X-MOTION TO DENY MOTION.

In this action to recover damages for dental malpractice, the defendant Babak Robert Ghalili, also sued herein as Babak Robert Ghalili, DMD, moves pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against him for the failure of the pro se plaintiff to prosecute the action, based on her failure to comply with a 90-day notice that Ghalili had served upon her. The plaintiff, in papers erroneously denominated as a cross motion to deny Ghalili's motion, opposes Ghalili's motion. The motion is granted, and the complaint is dismissed insofar as asserted against the defendant Babak Robert Ghalili, also sued herein as Babak Robert Ghalili, DMD. The cross motion is denied.

CPLR 3216(a) provides that

"[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, . . . upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

To secure a dismissal pursuant to CPLR 3216, issue must have been joined, and either one year must have elapsed since the joinder of issue, or six months must have elapsed since the issuance of any preliminary court conference order, whichever is later (see CPLR 3216[b]). In addition, the defendant must have served a written demand upon the plaintiff by registered or certified mail, directing the plaintiff to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand (see *id.*). The demand also must give notice to the plaintiff that a default in complying with such demand within that 90-day period will serve as a basis for a motion dismissing the complaint as against that defendant for unreasonable neglect to proceed (see *id.*). In the event that the plaintiff fails to serve and file a note of issue within such 90-day period, the court may grant a motion by the party seeking dismissal, unless the plaintiff shows justifiable excuse for the delay and a good and meritorious cause of action (see CPLR 3216[e]).

Here, issue was joined by Ghalili when he served an answer on February 20, 2016. More than one year has passed since the joinder of issue. In addition, the court (Madden, J.) issued a preliminary conference order on February 15, 2017, and more than six months have elapsed since that date. The court notes that the same court thereafter conducted at least 20 status conferences and issued at least 11 status conference orders, but the plaintiff failed to complete the discovery that had been directed by the court or fully to comply with those orders. Although Justice Madden adjourned a status conference initially scheduled for July 9, 2020, a date shortly after the courts reopened subsequent to the COVID-19 pandemic closure, the plaintiff has yet to complete discovery she claims was outstanding, request *this* court to extend her deadline for filing the note of issue, or thereupon serve and file the note of issue.

On September 17, 2022, Ghalili served the upon plaintiff, by certified mail, return receipt requested, a written demand directing her to resume prosecution of the action and to file a note of issue within 90 days after receipt of such demand. The demand also notified the plaintiff that her failure to resume prosecution would serve as a basis for a motion to dismiss the complaint.

In email correspondence dated September 20, 2022, the plaintiff informed Ghalili's counsel that she had received the 90-day notice on September 19, 2022. Where, as here, proof of the date of a plaintiff's receipt is included in the record, the 90-day period must be measured from a plaintiff's "receipt of such demand" (CPLR 3216[b]; *Public Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 310 [1st Dept 1996]). The last date of the statutory 90-day period would normally have fallen on December 18, 2022, but since that date was a Sunday, the last date actually fell on the next business day, or on December 19, 2022 (see General Construction Law § 25-a[1]), and the plaintiff's default date was December 20, 2022. The defendant made the instant motion on December 22, 2022. The motion thus is timely.

In a status conference order dated January 7, 2020, the court (Madden, J.) directed the plaintiff to bring with her, at the next status conference, which was then scheduled for February 25, 2020,

"2 copies of flash drives with any recording of depositions/dental appointments with computer to show that recordings are retrievable from drives. Failure to provide the flash drives at [the] February 25, 2020 conference shall be result in π being precluded from introducing recordings at trial or in connection with summary judgment motions. The court will not accept transcripts in the place of recordings."

In a status conference order dated February 25, 2020, the same court fixed March 9, 2020 as the plaintiff's deadline for the service and filing of the note of issue, and ruled that the plaintiff was "precluded from using any recordings that have not been produced at today's conference, including in connection with any summary judgment motions or trial." In an order dated March 10, 2020, Justice Madden denied the plaintiff's letter request to extend her time to file the note of issue, which was made on various grounds, "including . . . the pendency of an appeal before the Appellate Division, . . . alleged inaccuracies in the transcript of plaintiff's deposition, and [the fact] that discovery is not complete." As Justice Madden explained,

"[c]ontrary to plaintiff's position, her appeal addressing the court's prior discovery rulings is not a basis for delaying the filing of the note of issue in this 2016 action, in which more than twenty discovery conferences have been held. Nor does plaintiff's contention that the deposition transcript is inaccurate warrant an

extension of her time to file [the] note of issue, particularly as plaintiff has filed an errata sheet and has exchanged audio recordings that she made of her own deposition. Finally, while plaintiff contends discovery is not complete, she does not indicate what discovery is outstanding, nor did she seek additional discovery at the status conference held on February 25, 2020, which required plaintiff to file her note of issue by March 9, 2020.”

In an order dated March 12, 2020, Justice Madden declined to sign the plaintiff’s proposed order to show cause, which she had submitted under Motion Sequence 013, and pursuant to which she sought to move to compel further discovery, extend her time for service and filing of the note of issue, and vacate the portion of the court’s January 7, 2020 status conference order addressed to her recordings. As the court reasoned, requests pertaining to discovery and the note of issue deadline already had been resolved in the March 10, 2020 order, and there was no basis to vacate the directives in the January 7, 2020 order.

As of the plaintiff’s December 20, 2022 default date, the plaintiff had neither responded to Ghalili’s demand, nor sought leave to extend her deadline for filing the note of issue and thereupon file it, nor resumed prosecution of the action. Other than the plaintiff’s unsolicited November 6, 2020 filing of the transcript of her former husband’s deposition and an errata sheet, no party filed any further documents in this action until December 22, 2022, or more than two years later, when Ghalili filed the papers in connection with the instant motion.

After Ghalili filed his motion papers in connection with this motion, but prior to the assignment of a motion sequence number, the plaintiff submitted a proposed order to show cause to this court under Motion Sequence 014, in which she sought to “move to deny” Ghalili’s pending motion. The court declined to sign the order show cause, on the ground that the motion that the plaintiff sought to make did not seek affirmative relief, but instead simply constituted opposition to Ghalili’s motion.

CPLR 3216(e) provides that

“[i]n the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless

the said party shows justifiable excuse for the delay and a good and meritorious cause of action.”

CPLR 2004 provides that

“[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.”

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3), he or she must comply with the demand by filing a note of issue “or by moving, before the default date, either to vacate the demand or [pursuant to CPLR 2004] to extend the 90-day period” (*Angamarca v 47-51 Bridge St. Prop., LLC*, 167 AD3d 559, 559 [2d Dept 2018]; see *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d 760, 760-761 [2d Dept 2017]). After receiving the 90-day notice, and prior to the December 20, 2022 default date, the plaintiff did not move to vacate the demand or seek to renew her prior applications to extend her time for filing the note of issue, and she did not make any such applications at any time thereafter.

Inasmuch as the plaintiff failed timely to make a motion to vacate the 90-day notice, she became obligated, in opposition to Ghalili’s motion, to establish both a justifiable excuse for the failure timely to file the note of issue and a potentially meritorious cause of action, as her failure to file the note of issue by the court-ordered deadline constitutes a species of default (see *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *Grant v City of New York*, 17 AD3d 215, 216-217 [1st Dept 2005] [“an application to extend plaintiff’s time to file a note of issue within that 90-day period serves to prevent a default on the notice”]; *Conway v Brooklyn Union Gas Co.*, 212 AD2d 497, 497-498 [2d Dept 1995] [an affidavit of merit is not required where the motion pursuant to CPLR 2004 was made prior to the expiration of the prescribed period to respond]). Dismissal pursuant to CLR 3216 generally is warranted where a defendant timely and properly serves a 90-day notice, and a plaintiff fails to show, in opposition, that he or she did not intend to abandon prosecution of the action, that his or her history of extensive delay was justified, and that he or she had a meritorious claim (see *Thompson v Beth Israel Med. Ctr.*,

178 AD3d 468 [1st Dept 2019]; *see also Mosberg v Elahi*, 80 NY2d 941, 942 [1992] [plaintiff opposing a CPLR 3216 motion must demonstrate the existence of a “good and meritorious cause of action”]; *Garofalo v Mercy Hosp.*, 271 AD2d 642, 643 [2d Dept 2000] [opponent of CPLR 3216 motion must establish “a meritorious claim and excusable delay”]).

It has been said, however, that CPLR 3216 is “extremely forgiving” (*Baczowski v Collins Constr. Co.*, 89 NY2d at 503), “in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed” (*Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]; *see Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633 [2003]; *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d at 761). Although the court thus recognizes that it “retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even when a plaintiff fails to comply with the 90-day requirement and fails to demonstrate a justifiable excuse and a meritorious cause of action” (*Restaino v Capicotto*, 26 AD3d 771, 771 [4th Dept 2006], *Davis v Goodsell*, 6 AD3d at 384; *Rust v Turgeon*, 295 AD2d 962, 962-963 [4th Dept 2022]), the plaintiff here nonetheless has failed to present any acceptable rationale for her repeated delays, totaling more than two years. Moreover, although the plaintiff now submits the certificates of merit that she had served in January 2016, when she commenced the action and was represented by counsel, those certificates, despite including printed language indicating that they were affirmed, are unsigned, and, hence, are not in admissible form (*see Pagano v Cohen*, 164 AD3d 516, 518 [2d Dept 2018]; *France v Packy*, 121 AD3d 836, 838 [2d Dept 2014]; *Zeigler v Ramadhan*, 5 AD3d 1080, 1082 [4th Dept 2004]; *Buonaiuto v Shulberg*, 254 AD2d 384, 385 [2d Dept 1998]; *Gamble v Triboro Servs., Inc.*, 14 Misc 3d 138[A], 2007 NY Slip Op 50282[U], *1, 2007 NY Misc LEXIS 422, *3 [App Term 1st Dept, Feb. 21, 2007]).

Where, as here, the plaintiff, subsequent to her receipt of the 90-day notice, did not contact the court, did not reach out to her adversary to resolve any discovery disputes, and did not make a motion prior to her December 20, 2022 default date either to vacate the 90-day

notice or to renew her prior applications to extend her note of issue filing deadline, the court cannot excuse her repeated pattern of delay and her perfunctory and conclusory excuses for delaying the prosecution of this action (see *Cato v City of New York*, 70 AD3d 471, 471-472 [1st Dept 2010]; *Schneider v Meltzer*, 266 AD2d 801, 802-803 [3d Dept 1999]). Moreover, the mere fact that discovery has yet to be completed is no excuse for her failure to prosecute (see *Koehler v Sei Young Choi*, 49 AD3d 504, 505 [2d Dept 2008]).

This court expresses no opinion as to whether Justice Madden improvidently exercised her discretion in denying the plaintiff's applications for leave to extend the note of issue filing deadline (see *361 Broadway Assocs. Holdings, LLC v Foundation Group I, Inc.*, 210 AD3d 548, 549 [1st Dept 2022]), but notes that it had the authority to consider a motion to renew those requests (see CPLR 2221[b], [e]; *Citimortgage, Inc. v Espinal*, 136 AD3d 857, 858 [2d Dept 2016]), and that the plaintiff did not avail herself of that opportunity prior to the submission of the instant motion.

The plaintiff's cross motion, which seeks "to deny" Ghalili's motion, does not seek affirmative relief, and must be denied on that ground (see *Stevens v Cutler*, 2021 NY Slip Op 32465[U], *3, 2021 NY Misc LEXIS 6082, *4 [Sup Ct, N.Y. County, Jul. 29, 2021] [Kelley, J.]; *Koegler v Amraly*, 68 Misc 3d 1204[A], 2020 NY Slip Op 50858[U], *1, 2020 NY Misc LEXIS 3518, *3-4 [Sup Ct, N.Y. County, Jul. 22, 2020]).

The plaintiff's remaining contentions are without merit.

Hence, Ghalili's motion to dismiss the complaint insofar as asserted against him must be granted. The dismissal shall not be deemed to be a dismissal on the merits. Since the court lacks authority to dismiss the complaint insofar as asserted against the remaining defendants, who did not serve the plaintiff with a 90-day notice (see *Hensle v 69/70 St. Assocs.*, 185 Misc 2d 712, 713 [App Term 1st Dept 2000]), it is appropriate to sever the action against Ghalili.

Accordingly, it is

ORDERED that the motion is granted, and the complaint is dismissed insofar as asserted against the defendants Babak Robert Ghalili, and Babak Robert Ghalili, DMD; and it is further,

ORDERED that the action is severed against the defendants Babak Robert Ghalili, and Babak Robert Ghalili, DMD; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Babak Robert Ghalili, and Babak Robert Ghalili, DMD.

This constitutes the Decision and Order of the court.

4/12/2023
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE