

Nazzaro v D'Anna

2023 NY Slip Op 32551(U)

July 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 503400/2018

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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SIDORO NAZZARO, individually and as a
member of INTENTO SRL a foreign limited
liability company and INTENTO LLC,

Plaintiffs, Decision and order

- against -

Index No. 503400/2018

ANGELO D'ANNA and PIZZA CIAO PASTA INC.,
Defendants,

July 24, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The plaintiff has filed the instant motion seeking to restore the case to the court's calendar. The defendants oppose the motion and have cross-moved seeking a default. The motions have been opposed respectively. Papers were submitted by the parties and after review of all the arguments this court now makes the following determination.

This lawsuit was commenced on February 19, 2018 and concerns allegations of conversion of corporate assets, breach of contract, breach of fiduciary duty and tortious interference with existing business relations and other claims. A preliminary conference was entered into between the parties and a compliance conference that was scheduled for May 13, 2020 never occurred due to the courthouse closures in the wake of the COVID-19 pandemic. That conference has never been rescheduled and indeed the passage of time has rendered the case marked-off the calendar. The plaintiff has moved seeking to restore the case and the defendant has moved essentially for a default.

Conclusions of Law

It is well settled that before the filing of the note of issue the case can only be marked off if certain statutory prerequisites are followed (see, Mitskevitch v. City of New York, 78 AD3d 1137, 911 NYS2d 662 [2d Dept., 2010]). Those requirements include a ninety day notice pursuant to CPLR §3216 or an order dismissing the complaint pursuant to 22 NYCRR 202.27. Thus, in Santiago v. City of New York, 206 AD3d 948, 170 NYS3d 600 [2d Dept., 2022] the court held a case that is marked "disposed" should be restored where the note of issue has not yet been filed and none of the other statutory requirements have been satisfied (see, also, Express Shipping, Ltd., v. Gold, 63 AD3d 669, 880 NYS2d 183 [2d Dept., 2010]). Moreover, the plaintiff's request seeking this relief cannot be deemed late as to be denied due to laches (Picket v. Federated Department Stores Inc., 79 AD3d 1116, 914 NYS2d 646 [2d Dept., 2013]).

The defendant acknowledges that CPLR §3404 and Lopez v. Imperial Delivery Service Inc., 282 AD2d 190, 725 NYS2d 57 [2d Dept., 2001] do not apply to pre-note of issue cases yet the defendant curiously argues that in any event the factors enunciated in Lopez must be satisfied. The inconsistency of these arguments is apparent. A pre-note of issue case is treated differently than a case where the note of issue has been filed. Thus, by their very natures they are subject to differing standards and in fact in pre-

note of issue cases, other than what has already been enumerated, there are no standards. The case of Guillebeaux v. Parrott, 188 AD3d 1017, 132 NYS3d 691 [2d Dept., 2020] is instructive. In that case the trial court denied the plaintiff's request to restore the case to the active calendar on the grounds of laches. The Appellate Division reversed that determination and held the case should have been restored. The court explained that "CPLR 3404 does not apply to this pre-note of issue action...Further, there was neither a 90-day demand pursuant to CPLR 3216...nor an order dismissing the complaint pursuant 22 NYCRR 202.27...Moreover, "[t]he doctrine of laches does not provide [a] basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216(b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable"... "The procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b)"... "In the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff's motion to restore the action to active status should have been granted" (id).

Thus, clearly, there are no standards that must be evaluated when determining whether this case should be restored. This is particularly true where in this case the mark-off was due to


inaction as a result of courthouse shutdown and not any specific or identifiable failure of the plaintiff to appear at any scheduled court conference. Indeed, based on the facts presented there is no showing the plaintiff has "defaulted" in any way.

Therefore, based on the foregoing, the motion seeking to restore the case to the court calendar is granted. The motion seeking a default is denied.

So ordered.

ENTER:

DATED: July 24, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC