Senanayake v NYC Chiropractic & Physical Therapy, PLLC
2023 NY Slip Op 34033(U)
November 13, 2023
Supreme Court, New York County
Docket Number: Index No. 805462/2013
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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SANDAYA SENANAYAKE and HARLEY SENANAYAKE,

Plaintiffs,

- v -

NYC CHIROPRACTIC & PHYSICAL THERAPY, PLLC, RANDY STEPHEN, D.C., JOHN DOES, and JANE DOES,

Defendants.

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NYC CHIROPRACTIC & PHYSICAL THERAPY, PLLC, and RANDY STEPHEN, D.C.,

Third-Party Plaintiff,

-against-

SARI JASMAT RAMZAN,

Third-Party Defendant.

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INDEX NO. 805462/2013

MOTION DATE 08/08/2023

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 164, 165, 166, 167, 170, 171

were read on this motion to/for DISMISS.

In this action to recover damages for chiropractic malpractice, the defendants NYC Chiropractic & Physical Therapy, PLLC, and Randy Stephen, D.C. (together the NYC Chiropractic defendants), move pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them for the failure of the plaintiffs to prosecute the action, based on their failure to comply with a 90-day notice that the NYC Chiropractic defendants had served upon them. The plaintiffs oppose the motion. The motion is granted, and the complaint is dismissed insofar as asserted against the NYC Chiropractic defendants.

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 the NYC Chiropractic defendants when they served an answer on April 8, 2014. More than one year has passed since the joinder of issue. In addition, the court (Schlesinger, J.) issued a preliminary conference order on April 8, 2015, and more than six months have elapsed since that date. The same court thereafter conducted three status conferences that resulted in the issuance three status conference orders, while the justice to whom the action was first reassigned, Justice Madden, thereafter conducted three additional status conferences and issued three status conference orders between 2015 and 2017, as well as a preliminary conference order in connection with the third-party action that was commenced on October 9, 2017. Justice Madden thereafter so-ordered two further discovery stipulations on April 6, 2018, conducted three additional status conferences and

thereupon issued three additional status conference orders on August 6, 2018, November 21, 2018, and January 23, 2019, respectively, issued a motion decision order on March 29, 2019 that further extended several discovery deadlines, and a issued a case-scheduling order on April 10, 2019. Between August 21, 2019 and March 12, 2020, Justice Madden issued five additional status conference orders. Despite the fact that Justices Schlesinger and Madden had issued 20 discovery conferences between them, as of April 23, 2020, the plaintiffs failed to complete the discovery that had been directed by those justices or fully to comply with their orders. Although Justice Madden had scheduled an additional status conference for April 23, 2020, and extended the note of issue filing deadline until April 30, 2020, the courts were closed due to the COVID-19 pandemic between March 17, 2020 and June 10, 2020, and all filings were suspended until May 5, 2020. Consequently, Justice Madden never conducted that conference. The action thereafter was reassigned to this court.

On September 15, 2021, this court issued a status conference order, which was entered on September 27, 2021, noting that discovery was complete, and extended the note of issue filing deadline until October 15, 2021. The plaintiffs nonetheless failed to serve and file the note of issue by that date, and failed to seek leave of this court to extend their deadline for filing the note of issue at any time thereafter.

On March 30, 2022, the movants served the upon the plaintiffs' counsel, by certified mail, return receipt requested, a written demand directing them 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 plaintiffs that their failure to resume prosecution would serve as a basis for a motion to dismiss the complaint. Where 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 NYC Chiropractic defendants, however, have not submitted copies of the dated and postmarked green return receipt cards to establish the plaintiffs' counsel's actual date of receipt. Rather, they have

submitted an affidavit attesting to service of the 90-day notice upon the plaintiffs' attorney via certified mail, return receipt requested, and a copy of the certified mail receipt, as it appeared when dispatched. Where service of non-initiatory papers is made upon a party who is represented by counsel, as are the plaintiffs here, service may be effectuated by a mailing to counsel's address (*see* CPLR 2103[b]). Where such mailing is employed, and a period of time prescribed by law is measured by service of the papers, five days shall be added to the prescribed period of time to account for the delay between mailing and actual receipt (*see* CPLR 2103[b][2]). The court thus deems the plaintiffs' counsel to have received the 90-day notice on April 4, 2022. The plaintiffs thus had until the first business day after the lapse of 90 days after April 4, 2022 (*see* General Construction Law § 25-a), or until July 6, 2022, to file the note of issue or request an extension of time within which to do so. Between April 4, 2022 and May 14, 2023, when the NYC Chiropractic defendants made the instant motion (*see* CPLR 2211), the plaintiffs neither responded to the 90-day demand, filed a note of issue, nor resumed prosecution of the action. Nor did they request or move for an extension of time during that 13-month period within which to serve and file the note of issue. Rather, on June 3, 2023, and only in response to the motion itself, did the plaintiffs serve and file a the note of issue, albeit without court permission.

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 July 6, 2022 default date, the plaintiffs did not move to vacate the demand or seek to extend their time for filing the note of issue, and they did not make any such applications at any time thereafter.

Inasmuch as the plaintiffs failed timely to make a motion to vacate the 90-day notice, they became obligated, in opposition to the NYC Chiropractic defendants' motion pursuant to CPLR 3216, to establish both a justifiable excuse for the failure timely to file the note of issue and a potentially meritorious cause of action, as their 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"]; *cf. 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" (*Baczkowski 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 plaintiffs here nonetheless have failed to present any acceptable rationale for their long delay, totaling 14 months. Moreover, the plaintiffs have not submitted an affidavit of merit from a person with personal knowledge of the facts (*see Garcia v Roopnarine*, 18 AD3d 607, 607 [2d Dept 2005]), let alone an affirmation or affidavit of merit from a physician or chiropractor, which is necessary to establish the potential merit of a medical or chiropractic malpractice action (*see Mosberg v Elahi*, 80 NY2d at 942; *Smith v Montefiore Med. Ctr*., 60 AD3d 479, 479 [1st Dept 2009]).

Where, as here, the plaintiffs, subsequent to their receipt of the 90-day notice, did not contact the court, reach out to their adversaries to resolve any purported discovery disputes, or make a motion either to vacate the 90-day notice or a motion to extend their note of issue filing deadline prior to their July 6, 2022 default date, the court cannot excuse their long delay in resuming prosecution and their perfunctory and conclusory excuses for that delay (*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 filing of the note of issue long after the court-directed deadline was a nullity. "Litigation cannot be conducted efficiently if deadlines are not taken seriously, and . . . disregard of deadlines should not and will not be tolerated" (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C*., 5 NY3d 514,

521 [2005]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 124 [1999]).

Consequently, the NYC Chiropractic defendants' motion must be granted, and the complaint must be dismissed insofar as asserted against them.

With respect to the defendants denominated as "John Does" and "Jane Does," there is no showing of any efforts by the plaintiffs to identify these fictitious defendants. Since they were never identified, the plaintiffs are precluded from relying on CPLR 1024 to maintain this action against those parties (*see generally Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed as against them.

In light of the foregoing, it is,

ORDERED that the motion of the defendants NYC Chiropractic & Physical Therapy, PLLC, and Randy Stephen, D.C., to dismiss the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants NYC Chiropractic & Physical Therapy, PLLC, and Randy Stephen, D.C.; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendants NYC Chiropractic & Physical Therapy, PLLC, and Randy Stephen, D.C.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants NYC Chiropractic & Physical Therapy, PLLC, and Randy Stephen, D.C.; and it is further,

ORDERED that, on the court's own motion, the action is dismissed insofar as asserted against the defendants "John Does" and "Jane Does."

This constitutes the Decision and Order of the court.

11/13/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE