SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24
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IRINA GIYAR, Individually and Derivatively on behalf of, the Bay Ridge Avenue Corporation,
Plaintiff,

-against-

861 LLC, THE BOARD OF MANAGERS OF THE BAY RIDGE CONDOMINIUM, MARIANNA PRESTIA, GIULIA PRESTIA, and ANTHONY SCOTTO, Individually and as members of the BOARD OF MANAGERS OF BAY RIDGE AVENUE CONDOMINUM,

Defendants.
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Mot. Seq. #s 3 and 4

Index # 500920/15

Decision and Order

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the Notice of Motion to Dismiss and Cross-Motion for Contempt submitted on April 29, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2[Exh. A-Z]
Affirmation and Affidavit in Opposition to Notice of Motion	3[Exh. A-V]; 4[Exh. AA-DD]
Affirmation in Support of Motion & In Opposition to Cross-Motion	6[Exh. AA-HH]
Memorandum of Law in Opposition to Motion	5

Plaintiff commenced this action against the defendants seeking a declaration of exclusive ownership interest of parking space 2 located at 861 Bay Ridge Avenue, Brooklyn, New York, with full and unobstructed use of the parking space and without any interference from the defendants; that she is not obligated to pay rent or fees to the defendants for the use or occupancy and enjoyment of the parking space; and that defendants, their agents, servants, employees and contractors may not interfere with or otherwise obstruct plaintiff's use of the parking space; for breach of contract and fiduciary duties; damages, an accounting of all financial affairs of the condominium and reasonable attorneys' fees.

Defendants move for an order pursuant to CPLR 3216 dismissing plaintiff's complaint; vacating the Temporary Restraining Order and directing plaintiff to vacate parking space 2 or be fined $500 per day from the date the order is served on plaintiff to the date plaintiff vacates the parking space; judgment in the amount of $14,000.00 in accordance with defendants' fourth counterclaim for use of the parking space from December 2014 through March 2024 and $125

per month until plaintiff vacates parking space 2; sanctions against plaintiff's counsel for filing a frivolous lawsuit with costs and disbursements. Plaintiff opposes the motion and cross-moves for contempt of court punishing defendants for willfully violating the terms of an Order of this Court, signed by the Hon. Karen B. Rothenberg on February 24, 2016; imposing sanctions pursuant to 22 NYCRR Part 130-1.1; enforcement of a settlement agreement reached between the parties; or in the alternative, granting plaintiff leave to conduct discovery in this action and permitting her to file a Note of Issue upon the conclusion of discovery. Plaintiff opposes the motion on the grounds that the defendants' ninety-day (90) notice is defective; there is a justifiable excuse for failure to file the Note of Issue and the matter has been settled by stipulation. Defendants oppose the plaintiff's cross-motion.

Brief Procedural History

Plaintiff commenced this action on or about January 26, 2015. Thereafter, on January 28, 2015, the plaintiff filed an Order to Show Cause for a temporary restraining order which was granted and remains in effect pursuant to the Hon. Karen B. Rothenberg's order dated October 8, 2015. On February 11, 2016, the parties entered into a stipulation agreeing that plaintiff would withdraw the Order to Show Cause for a preliminary injunction. (See, NYSCEF Doc. No. 11). On or about November 28, 2016, the parties stipulated to extend the plaintiff's time to file the Note of Issue, which as per the court's order of July 28, 2016, was to be filed on or before November 15, 2016. The date was extended to December 7, 2016. Plaintiff attempted to file a Note of Issue on March 9, 2017 (See, NYSCEF Doc. No. 26) however, it was returned for correction. Since then, no Note of Issue has been filed by plaintiff.

CPLR 3216

CPLR 3216 permits a court to dismiss a complaint for want of prosecution after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the demand and stating that failure to comply will serve as a basis for a motion to dismiss the action. *See, CPLR 3216*. If the party upon whom the demand is served fails to serve and file a note of issue within 90 days, "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." *See, Chen v. Shen*, 228 A.D.3d 798, 213 N.Y.S.3d 416 (2nd Dept., 2024). In the case at bar, the defendant served its written notice on or about November 24, 2023, demanding that the plaintiff serve and file a note of issue within 90 days. In opposition to defendants' motion, plaintiff argues that the notice is defective because it purports to be given on behalf of a party whom the attorney giving notice did not represent and did not contain the prescribed statutory language, and the plaintiff has a justifiable excuse and meritorious defense.

First, the court will address the issue of attorney representation. The defendants were initially represented by Lawrence F. DiGiovanna, Esq., of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferraro & Wolf, LLP., who on October 2, 2023, signed a Consent to Change Attorneys, whereby the Law Office of Anthony Thomas Scotto, became the substituted attorney

now representing the defendants, 861 LLC, Marianna Prestia, Giulia Prestia and Anthony Scotto. (See, NYSCEF Do. No. 27). Plaintiff argues that the substitution listed Anthony Scotto as the attorney for 861 LLC, Marianna Prestia, Giulia Prestia and Anthony Scotto, but not the Board, who was the only party with a potential interest in this litigation, who either was still represented by the previous counsel or unrepresented, and therefore, plaintiff did not address the demand pursuant to CPLR 3216 to file a Note of issue, since Mr. Scotto did not represent the only party that may have had a potential interest in the litigation—the Board of Managers of Bay Ridge Condominium. Plaintiff also argues that the notice was defective in that if did not have the prescribed statutory language. The court finds these two arguments unavailing. The plaintiff could have objected by returning the demand to defendants' counsel within fifteen days of its receipt, specifying the nature of the defect. (See, CPLR 2101[f]). *See,* CIC Intern., Ltd. v. Swiss Bank Corp., 121 A.D.2d 219, 503 N.Y.S.2d 30 (1st Dept., 1986) [stating that defendants' refusal to recognize attorney-in-fact as the attorney-of-record is irrelevant]. In addition, the plaintiff's attorney acknowledged receipt of the defendants' demand that the Note of Issue be filed, and emails were exchanged between the parties' attorneys without a rejection of the demand based on the alleged defects argued by plaintiff. The argument as to the prescribed statutory language not being verbatim, also fails. The demand needs to contain language warning that failure to file the note of issue within 90 days would serve as a basis for dismissal under CPLR 3216. *See,* Neary v. Tower Ins., 94 A.D.3d 723, 941 N.Y.S.2d 277 (2nd Dept., 2012), affirming the denial of dismissal pursuant to CPLR 3216 and granting restoration of the case to active status, where the "language warning that failure to file the note of issue by the deadline date of April 14, 2008, would serve a basis for dismissal under CPLR 3216. Here, the defendants' demand provides all the necessary language warning the plaintiff, in that it states as follows:

> Pursuant to CPLR §3216, demand is hereby made that a Note of Issue be filed within Ninety (90) days of your receipt of this letter. In the event the Plaintiff fails to timely file a Note of Issue as per this demand, the defendants will seek the dismissal of the action for unreasonably neglecting to proceed.

The court does not find the demand language to be defective on its face on the grounds that the demand it is not verbatim and exact as prescribed by the statute. The warning language is there.

CPLR 3216 requires three conditions precedent before a case can be dismissed for want of prosecution: (1) issue has been joined; (2) one year has elapsed from the joinder of issue; and (3) the court or a party has served a written demand that the plaintiff file a note of issue within 90 days. The court finds that the defendants have met the three conditions precedent.

Upon receipt of defendants' 90-day demand, served pursuant to CPLR 3216, the plaintiff was required to comply with it by filing a note of issue or move before the default date to vacate the demand or extend the 90-day period. *See,* Kushmakova v. Meadow Park Rehabilitation & Health Care Center, LLC, 56 A.D.3d 434, 867 N.Y.S.2d 154 (2nd Dept., 2008). To date, the plaintiff has not filed a note of issue, nor did the plaintiff move to vacate the demand or extend the 90-day period. None of the excuses proffered by plaintiff justify her lack of diligence and failure to

file a note of issue upon demand. Thus, even when all of the statutory preconditions are met, including plaintiff's failure to comply with the 90-day requirement, plaintiff has yet another opportunity to salvage the action by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit. *See, Michaels v. Sunrise Building and Remodeling, Inc.*, 65 A.D.3d 1021, 885 N.Y.S.2d 110 (2nd Dept., 2009). To avoid dismissal of the action, the plaintiff is required to show a justifiable excuse for the delay and a potentially meritorious cause of action, (See, CPLR 3216[e].

The plaintiff argues that a justifiable excuse exists because she believed the parties had settled the action based on numerous communications with the defendants and counsel for defendants. Upon receipt of the defendants' demand, plaintiff's counsel acknowledged receipt of defendants' demand and made an inquiry as to whether the defendants' counsel would agree to having the matter set down for a conference before the court, which was declined by defendants' attorney. (See, NYSCEF Doc. No. 44). The plaintiff's counsel did not mention nor inform defendants' counsel that the case had been settled based upon a stipulation signed on or about September 23, 2021. (See, NYSCEF Doc. No. 58). Plaintiff fails to demonstrate that she was actively engaged in the negotiations during the ensuing one-year period before the default date and defendants' motion to dismiss. The stipulation was signed in 2021, and the demand pursuant to CPLR 3216 was made in 2023. *See, Adbul v Lopez*, 111 A.D.3d 587, 974 N.Y.S.2d 120 (2nd Dept., 2013), where the court held that plaintiff's unsubstantiated assertion that she entered into an arbitration agreement was insufficient to excuse the delay. Also, *see, Moran v. Pathmark Stores*, 278 A.D.2d 208, 717 N.Y.S.2d 302 (2nd Dept., 2000). In addition, the signed agreement appears to represent settlement of plaintiff's arrears, which is indicated in the third "Whereas" paragraph of the one-page stipulation, as opposed to the parking space which is the crux of plaintiff's lawsuit.

Next, this court will address the potentially meritorious causes of action set forth in plaintiff's complaint and affidavit in opposition to defendants' motion to dismiss pursuant to CPLR 3216. In opposition to defendants' motion, plaintiff speaks specifically to her ownership of the condominium unit, which she argues includes Parking Space 2, and argues that she has been "injured by the fact that the offending defendant, 861 LLC has sold all units without her consent and in violation of the preliminary injunction order.

Plaintiff purchased the subject property in 1997 (See, plaintiff affidavit in opposition to motion and in support of cross-motion, Exh. AA]. Plaintiff alleges that she was defrauded with respect to Parking Space 2, which she argues was part and parcel of her purchase of Unit 2 at 861 Bay Ridge Avenue, and upon her realizing the fraud, she stopped paying rent to defendant 861 LLC. Defendants argue that plaintiff's cause of action for fraud is time barred because it is beyond the statute of limitations since the purchase of the Unit took place in 1997 and plaintiff did not commence this action until 2014, 17 years later.

The statute of limitations for fraud is six years from the commission of the fraud, or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later. *See, Loeuis v. Grushin*, 126 A.D.3d 761 (2nd Dept., 2015). Thus, a

cause of action based on fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence. *See*, Seidenfeld v. Zaltz, 80 N.Y.S.3d 311 (2nd Dept., 2018). Where it does not conclusively appear that a plaintiff had knowledge of the facts from which the fraud could reasonable be inferred, a complaint should not be dismissed. *See*, Sargiss v. Magarelli, 12 NY3d 527 (2009). Here, the plaintiff purchased a condo unit that she argues included parking space 2. In support of her argument, plaintiff annexes a copy of the deed for the unit, the plan of condominium home ownership declaration of the Bay Ridge Avenue Condominium, the Department of Buildings Certificate of Occupancy, and the Title Insurance for the condominium unit purchased by the plaintiff in 1997, to show proof that the condominium included parking space 2. However, the plaintiff entered into an agreement to lease parking space 2 (Exh. "N" to defendants' moving papers) from defendants in 1997, whereby she agreed pay rent at $50.00 per month for parking space 2 and did so for 17 years.

After careful consideration of the arguments, proofs submitted and the facts herein, the court finds that the plaintiff could with reasonable diligence, have discovered the fraud she alleges was perpetrated by the defendants. Since the plaintiff's action was commenced more than six years after the cause of action accrued, the court finds that the meritorious cause of action is time barred.

Adverse Possession

In further support of their motion to dismiss and in opposition to the plaintiff's cross-motion the defendants argue that they are entitled to judgment based on adverse possession. Plaintiff does not address defendants' argument relating to adverse possession. To establish a claim to property by adverse possession, a claimant must prove that the possession of the property was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period. Here, the plaintiff purchased a property in 1997 and from the beginning paid rent on a parking space that she believed she owned, to the defendants, who based upon the facts herein, would meet the requirements to establish a claim to the parking space by adverse possession.

Plaintiff's Cross-Motion for Contempt

Plaintiff cross-moves for an order punishing defendants for contempt of court for willfully violating the terms of this Court's order and So Ordered Stipulation by the Honorable Karen B. Rothenberg on February 24, 2016; imposing sanctions upon defendants for frivolous conduct pursuant to 22 NYCRR Part 130-1.1; enforcing a settlement among the parties, or in the alternative, granting plaintiff leave to conduct discovery and file a Note of Issue.

Based upon this court's granting of defendants' motion pursuant CPLR 3216, plaintiff's cross-motion for contempt, sanctions pursuant to 22 NYCRR Part 130-1.1, enforcing a settlement

between the parties, or in the alternative granting plaintiff leave to conduct discovery and file a Note of Issue is denied, and it is hereby

ORDERED that defendants' motion for an order dismissing plaintiff's complaint pursuant to CPLR 3216 is granted, and it further

ORDERED that the Temporary Restraining Order is vacated, and it is further

ORDERED that plaintiff is directed to vacate Parking Space 2 within on or before January 31, 2025, and it is further

ORDERED that upon plaintiff's failure to vacate on or before January 31, 2025, the plaintiff is directed to pay $125 per month for parking, and it is further

ORDERED, that judgment is entered in favor of defendants and against plaintiff in the amount of $14,000.00 in accordance with defendants' Fourth Counterclaim for parking in defendants' parking space from December 2014 through March 2024, and it is further

ORDERED, that plaintiff pay defendants $125 per month from April 2024 through and until plaintiff vacates on or before January 31, 2025, and each month she remains after the vacatur date for the parking space, and it is further

ORDERED, that defendants' request for sanctions against plaintiff for filing a frivolous lawsuit is **denied**.

ORDERED, that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
November 29, 2024

HON. LISA S. OTTLEY, J.S.C.

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