

Osonitsch v Giarraffa
2013 NY Slip Op 33355(U)
May 6, 2013
Sup Ct, Queens County
Docket Number: 22028/10
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
Sherri Osonitsch,

Plaintiff,

-against-

Anthony Giarrappa, Clementina Giarrappa and
Klemchock Real Estate, LLC, as Escrow Agent,

Defendants.
-----X

Index No.: 22028/10
Motion Date: 3/1/13
Motion Cal. No.: 92
Motion Seq. No.: 1

The following papers numbered 1 to 18 read on this motion for an order pursuant to CPLR §3216 seeking an Order dismissing plaintiff’s Summons and Complaint on the merits for failure to prosecute her action.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits- Exhibits.....	5 - 9
Affirmation in Opposition.....	10 - 12
Affirmation in Reply.....	13 - 15
Reply Affirmation in Support of Cross-Motion.....	16 - 18

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants, Anthony Giarrappa and Clementina Giarrappa (“moving defendants” or “Giarrappas”) move pursuant to CPLR §3216 for an order dismissing plaintiff’s summons and complaint for failure to prosecute the action.

Plaintiff cross-moves for an order pursuant to CPLR 602 consolidating the within action

bearing Index Number 22028/2012 (“Action #1) with Index Number 15548/2012 (Action #2”) or in the alternative for an order directing that Action #1 and Action #2 be jointly tried in the Supreme Court, Queens County as there are common questions of law and facts in each action.

Facts

The within action arises from a real estate contract of sale dated July 19, 2008 wherein the plaintiff Sherri Osonitsch (“plaintiff”) agreed to purchase a home owned by the moving defendants. A deposit of \$14,000 was placed in escrow with the defendant Klemchock Real Estate, LLC. Closing of title never occurred.

Subsequently, plaintiff brought the within action for the return of her deposit. Plaintiff served the summons and complaint on August 13, 2010. The moving defendants interposed a verified answer on October 29, 2010.

The moving defendants contend that on November 11, 2011, they sent the plaintiff a letter urging her to prosecute the action after allegedly leaving 27 messages with plaintiff’s counsel. Plaintiff failed to respond.

Only July 16, 2012, the moving defendants mailed a 90 day notice to plaintiff.

Plaintiff’s attorney does not dispute the fact that the moving defendants repeatedly contacted his office in an effort to move this case along. Plaintiff’s attorney contends, in his affirmation, that his client has had to deal with various personal issues since the moving defendants filed their answer.

Defendant’s motion to dismiss for want of prosecution is granted and plaintiff’s cross-motion to consolidate is denied as more fully set forth below.

Discussion

Having been served with a 90-day notice pursuant to CPLR §3216, the plaintiff was required to either file a note of issue or move, before the default date, either to vacate the notice or extend the

90-day period. (See, *Brown v. World Fin. Props.*, 2003 N.Y. App. Div. LEXIS 6498 [2d Dept. 2003]; *King-Valls v. Mendel*, 756 N.Y.S.2d 875 [2d Dept. 2003]; *Blackwell v. Long Island College Hospital*, 756 N.Y.S.2d 769 [2d Dept. 2003]; *Baczkowski v. Collins Constr. Co.*, 89 N.Y.2d 499, 503 [1997].) Plaintiff failed to do so.

In opposition, plaintiff was required to demonstrate that there was a justifiable excuse for the delay and that she had a potentially meritorious cause of action. (CPLR §3216(e); *Jedraszak v. County of Westchester*, 102 A.D.3d 924 [2nd Dept 2013]; *Garcia v. North Shore Long Island Jewish Forest Hills Hosp.*, 98 A.D.3d 644 [2nd Dept 2012]; *Umeze v. Fidelis Care New York*, 17 N.Y.3d 751 [2011].) However, plaintiff failed to set forth a justifiable excuse for her delay as she failed to explain how her alleged personal and health problems prevented her attorney from prosecuting the within action. There is no indication that plaintiff was hospitalized for an extended period of time, if at all, nor is there any indication with respect to how plaintiff's alleged health problems prevented her and/or her attorney to proceed in the within action. Furthermore, the fact that her boyfriend was deported is also insufficient, standing alone, as an excuse for her failure to prosecute the within action.

Plaintiff also argues that by serving an answer to Action #2 she establishes a lack of intent to abandon the within action. However, this argument runs counter to plaintiff's contention that she was unable to prosecute Action #1. Plaintiff served an answer to Action #2 on September 5, 2012, within the 90 day period after the July 25, 2012 90 day notice. If plaintiff was physically, mentally or emotionally unable to respond to the 90 day notice then she should have been equally unable to serve a detailed answer to Action #2.

Accordingly, plaintiff fails to set forth a justifiable excuse for the delay in prosecuting the within action. (*Picot v. City of New York*, 50 A.D.3d 757 [2nd Dept 2008]; *Serby v. Long Island*

Jewish Medical Center, 34 A.D.3d 441 [2nd Dept 2006].)

Conclusion

For the reasons set forth above, the moving defendants' motion to dismiss plaintiff's cause of action is granted. Accordingly, plaintiff's cross-motion to consolidate is denied as moot.

Dated: May 6, 2013

Bernice D. Siegal, J. S. C.