Konigsberg Wolf & Co., P.C. v Absolute Fire Protection Co., Inc.
2018 NY Slip Op 31088(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 109022/2011
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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KONIGSBERG WOLF & CO., P.C.

Plaintiff,

-against-

ABSOLUTE FIRE PROTECTION COMPANY, INC.,

Defendant.

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Index No. 109022/2011

GEORGE J. SILVER, J.S.C.:

Upon the foregoing papers, it is ordered that this motion, made pursuant to CPLR § 3404, to restore this action to the calendar is denied for the reasons discussed herein.

Plaintiff Konigsberg Wolf & Co., P.C. ("plaintiff") is an accounting firm, which was allegedly reorganized as "KRM LLP" after a founding partner left the firm. Defendant Absolute Fire Protection Company, Inc. ("defendant") services and maintains emergency vehicles from its offices in New Jersey. In 2011, plaintiff filed a summons and complaint alleging that defendant owed plaintiff $32,593.25 for professional accounting services rendered. Defendant answered the complaint, and discovery went forward in 2013 and 2014. Then, in 2015, plaintiff's previous counsel was relieved from his representation of plaintiff. Said counsel subsequently served plaintiff with a court order dated October 9, 2015 directing plaintiff to obtain new counsel and have that counsel appear before the court. The order further stated that a failure to appear could result in the dismissal of the case. Plaintiff does not deny that it received the October 9, 2015 order, but rather states that its

practice was particularly hectic during this period of time, as KMR LLP was dealing with maintaining client relationships and doing the necessary work to keep clients originally associated with plaintiff. As a result, plaintiff states that its efforts to keep up with its new cases and older existing cases became untenable, causing an oversight of some of its responsibilities. Several months after the October 9, 2015 order, the court set a pre-trial conference in my mediation part on April 20, 2016. Between October 9, 2015 and April 2016, plaintiff states that it did not secure new counsel, and did not make an application to the court for an extension of time for it to seek new counsel. Because plaintiff failed to appear at the April 20, 2016 pre-trial conference, I struck plaintiff's case following an oral application for said relief by defendant.[1] Plaintiff states that after my decision was issued, plaintiff sent an associate down to the court to inquire about the status of the case. Plaintiff avers that it was only then that it first realized that a conference before me had been scheduled, and that the case had subsequently been stricken from the court's calendar due to its failure to appear. In February 2017, a formal consent to change attorney was filed with the court. Plaintiff argues that because it has a meritorious claim against defendant for a debt owed, and because its previous failure to appear was occasioned primarily by its inability to obtain new counsel during a particularly hectic period for the accounting firm, this matter should be restored, and should go forward on its merits. Plaintiff's present

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[1] Although defendant's application was to have this matter "dismissed with prejudice," by operation of law plaintiff's failure to appear for a pre-trial conference resulted in the matter being "struck from the calendar" as referenced under CPLR § 3404.

counsel affirms that plaintiff will keep up with this matter and appear at any future scheduled appearances should the action be restored.

In opposition, defendant states that plaintiff's failure to appear at a court-ordered conference after a note of issue had been filed properly resulted in this court's striking of the case from its calendar. Defendant further argues that plaintiff's failure to seek to restore this action for more than one year following this court's action precludes plaintiff from further prosecuting this matter and warrants denial of the present motion.

It is axiomatic and often reiterated that this state has a preference for litigation decided on its merits (*see Bassett v Bando Sangsa Co.*, 103 AD2d 728 [1st Dept 1984]). Since this action was dismissed on account of plaintiff's failure to appear for a pre-trial conference, the standard for restoring it essentially is the same as that for setting aside a default judgment (*Rodriguez v. Middle Atlantic Auto Leasing*, 122 AD2d 720 [1st Dept. 1986], *appeal dismissed* 69 NY2d 874 [1987]). Indeed, CPLR § 3404 provides that a case struck from the trial calendar and not restored within one year shall be deemed abandoned and shall be dismissed. Furthermore, for a case to be restored to the calendar, an order of restoration must be entered within the one-year period (*see Farmer v. L.B. Smith, Inc.*, 52 AD2d 1068 [4th Dept. 1976]; *Campbell v. Puntoro*, 36 AD2d 568, 569 [4th Dept. 1971]). Upon expiration of the one-year period, "a party seeking to have a case restored to the trial calendar must demonstrate a meritorious cause of action; [ii] a reasonable excuse for the delay; [iii] a lack of intent to abandon the action; and [iv] the absence of prejudice to the opposing party"

Kamara v Ambert, 89 AD3d 612, 613 [1st Dept. 2011]).

Here, the action was stricken from the calendar on April 20, 2016, and dismissed by operation of law in April 2017, one year after the court's order. Plaintiff sought to restore the action approximately fifteen months later, well beyond the one-year period from the date the action was struck by which a plaintiff could have restored the action as a matter of right (*see Basetti v. Nour*, 287 AD2d 126, 134-135 [2d Dept. 2001]; *see also Johnson v Rivera*, 10 AD3d 288, 288-289 [1st Dept. 2004]). Since plaintiff failed to move to restore the action within one year, the action was automatically dismissed by operation of law (*see Mills v Pisani*, 23 AD3d 1044 [4th Dept. 2005]; *Threatt v Seton Health* Sys., 277 AD2d 796 [3d Dept. 2000]). In his affirmation in support of this belated motion, plaintiff's counsel offers no specific explanation for the over two-year period between the date of that plaintiff's previous counsel was relieved and the date that the instant motion was filed during which plaintiff took no action to prosecute this matter. More to the point, plaintiff's counsel offered no specific, let alone reasonable, explanation for the protracted delay (fifteen months) in moving to restore this action (*see Christinao v. Solovieff Realty Co., LLC*, 62 AD3d 535 [1st Dept. 2009][CPLR § 3404 properly denied where plaintiff failed to adequately explain the "lack of activity between the time the case was struck from the calendar and their court-ordered motion to restore"]). The only explanation plaintiff's counsel appears to offer is that this case could not "find [its] way to the top" of other legal collection cases that plaintiff was attending to. Plaintiff's additional excuse that its chaotic reorganization and inability to

"keep up with the older existing cases" at the firm led to its delay in seeking new counsel is unpersuasive. To be sure, plaintiff's assertion in its affidavit that "we were somehow not on top of what was happening in court and somehow did not immediately hire new counsel" is not a recognized excuse for inaction. Indeed, the First Department has held that the excuse "[t]hat a case 'just fell through the cracks' is a particularly lame - that is to say, unreasonable - excuse" (*see Okun v. Tanners*, 47 AD3d 475 [1st Dept. 2008][denying a motion to restore pursuant to CPLR § 3404]). Moreover, while a claim of law office can at times provide a reasonable excuse for delay, it does not apply here because plaintiff does not dispute receipt of the court's October 9, 2015 order relieving plaintiff's prior counsel and directing plaintiff to obtain new counsel within 30 days (*cf., Bevona v. David Lipton/31 West 47th Street Co.*, 278 AD2d 104 [1st Dept. 2000]).

Even if plaintiff had established a reasonable excuse for its delay, plaintiff has not furnished evidence of a meritorious claim. Plaintiff's affiant is neither associated with nor employed by plaintiff. To be sure, plaintiff's affiant is the "Managing Partner of KMR, LLP," not "Konigsberg Wolf & Co., P.C." While plaintiff's affiant states that the company was "reorganized," and that "most of the firm's old clients remained with KMR," plaintiff has annexed no proof to its motion papers that the alleged debt owed to it was assigned to KMR or that KMR has standing to enforce the causes of action first asserted by plaintiff (Konigsberg Wolf & Co., P.C.)."[2] As such, plaintiff has failed to establish a prima facie

[2]This court also takes judicial notice of the fact that plaintiff is still on record as "active" with the New York Secretary of State under its original name. No change to its status is reflected.

showing that it has a meritorious claim in this action.

Finally, plaintiff has not proffered proof of a lack of intent to abandon the action or the absence of prejudice to defendant. Rather, plaintiff's motion is replete with reference to the fact that plaintiff was not attentive to this matter. Moreover, in the absence of proof of plaintiff's assignment of the debt to KMR, the note of issue would likely have to be vacated and discovery renewed in order to ascertain the manner in which plaintiff's records and time sheets would be available at trial, and who would be competent to testify at trial (*Rodriguez v. Middle Atl. Auto Leasing*, 122 AD2d 720, *supra*). It is hereby

ORDERED that plaintiff's motion to restore this action to the calendar is denied in its entirety.

This constitutes the Decision and Order of the Court

Dated: January 16, 2018

ENTER:

HON. GEORGE J. SILVER