Dr. Tak's Med. & Rehab., P.C. v Geico
2019 NY Slip Op 30309(U)
February 5, 2019
Supreme Court, Queens County
Docket Number: CV-708682-16/QU
Judge: John C.V. Katsanos

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS, SPECIAL TERM, PART 40

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DR. TAK'S MED. & REHAB., P.C.
a/a/o JUNGSUN KIM,

Plaintiff,

v. Index No. CV-708682-16/QU

GEICO,

Defendant.

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DECISION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PURSUANT TO
CPLR 3216 FOR WANT OF PROSECUTION

APPEARANCES

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HON. JOHN C.V. KATSANOS
Judge, Civil Court:

I. Background

Dr. Tak's Medical & Rehabilitation, P.C. (the "Plaintiff") as assignee of Jungsun Kim, commenced this action based on an automobile accident that occurred on November 13, 2015. Plaintiff served a summons and complaint on the defendant Geico (the "Defendant") on or about November 16, 2016. Defendant joined issue by service of its answer on or about December 16, 2016. No subsequent activity occurred in this case until January 17, 2018. On or about such date, Defendant served a 90-day notice upon Plaintiff's counsel demanding that Plaintiff serve and file a note of issue within the 90-day period prescribed by Rule 3216 of the New York State's Civil Practice Law and Rules (the "CPLR"). Plaintiff subsequently failed to file a note of issue.

On August 9, 2018, Defendant served a motion to dismiss Plaintiff's action for want of prosecution pursuant to CPLR 3216. Defendant asserts, *inter alia*, that considering Plaintiff's failure to respond to Defendant's 90-day notice and failure to move to vacate or extend the 90-day notice, barring any showing of justifiable excuse and meritorious cause of action, Plaintiff's complaint should be dismissed.

In accordance with the recitation of CPLR 2219 [a], the Court considered: (1) Defendant's motion to dismiss for want of prosecution, Defendant's counsel's affirmation and attached exhibits A and B; (2) Plaintiff's counsel's affirmation in opposition to said motion and attached exhibits A through C; and (3) Defendant's counsel's affirmation in reply to Plaintiff's affirmation in opposition and attached exhibits C and D.

Defendant's motion is granted as explained below.

II. Discussion

CPLR 3216 [b] [1]-[3] states, in pertinent part, that a court may consider dismissing an action for a plaintiff's neglect to prosecute when the following preconditions have been satisfied: (1) issue has been joined in the action; (2) one year has elapsed since the joinder of issue or six months have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later; and (3) the defendant served the plaintiff a written demand by registered or certified mail requiring the plaintiff to resume prosecution and to serve and file a note of issue within 90 days after receipt of such demand, and the defendant further stated that the plaintiff's failure to comply with such demand within said 90-day period will serve as a basis for the defendant to move for dismissal against the plaintiff for unreasonably neglecting to proceed.

If a plaintiff serves and files a note of issue within the 90-day period initiated by the defendant's written demand, "all past delay is absolved and the court is then without authority to dismiss the action" (*Baczkowski v D.A. Collins Constr. Co., Inc.*, 89 NY2d 499, 503 [1997], citing CPLR 3216 [c]). Conversely, "if a plaintiff fails to file a note of issue within the 90-day period, 'the court may take such initiative or grant such motion [to dismiss] unless the [defaulting] party shows justifiable excuse for the delay and a good and meritorious cause of action'" (*Id.*, quoting, in part, CPLR 3216 [e]). Therefore, "even when all of the statutory preconditions for dismissal are met, including plaintiff's failure to comply with the 90-day requirement," CPLR 3216 provides a plaintiff with "yet another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit" (*Id.*). If a plaintiff establishes a justifiable excuse and a meritorious cause of action, the action cannot be dismissed by the court (*See id.*).

In this case, the statutory preconditions for dismissal have been met (*See* CPLR 3216 [b] [1]-[3]). Plaintiff does not dispute that: (1) the issue had been joined on or about December 16, 2016; (2) over one year of inactivity in this matter had elapsed since the joinder of issue; (3) the Defendant timely served a 90-day notice on or about January 17, 2018 pursuant to CPLR 3216; and (4) prior to the expiration of the 90-day period initiated by the notice, Plaintiff failed to file a note of issue and did not move to vacate or extend the 90-day notice. Instead, Plaintiff opposes Defendant's motion by asserting that the delay in the prosecution of this matter is justified and that the cause of action is meritorious.

A. Lack of Justifiable Excuse

In determining whether a plaintiff has a justifiable excuse for its delay in prosecuting a case, a court may consider a "plaintiff's 'pattern of persistent neglect, [] history of extensive delay, [] intent to abandon prosecution and lack of any tenable excuse for such delay'" (*Deutsche Bank Nat'l Trust Co. v Inga*, 156 AD3d 760, 761 [2d Dept 2017], quoting *Schneider v Meltzer*, 266 AD2d 801, 802 [3d Dept 1999]; *see Saginor v Brook*, 92 AD3d 860, 861 [2d Dept 2012]).

Plaintiff's delay of this action took place during the over one-year period of inactivity prior to Plaintiff's receipt of the 90-day notice and during the period between the date Plaintiff received the 90-day notice and the date Defendant served the current motion. As a result of such delay, this action is now over two years old without any indication that discovery is complete or that parties are ready to proceed to trial. Plaintiff provides no justification for the period of inactivity prior to the receipt of the 90-day notice and only seeks to justify Plaintiff's failure to comply with the 90-day notice.

Specifically, Plaintiff submits an affirmation sworn to by Plaintiff's counsel alleging that Plaintiff's failure to comply with the procedure set forth in CPLR 3216 was due to Plaintiff's

counsel's detrimental reliance on prior experience in resolving motions to dismiss for failure to prosecute; the purported customary practices of all law offices other than counsel for Defendant; and a verbal agreement, which Defendant denies existed, providing Plaintiff with an unspecified amount of additional time to file notices of trial.

In his affirmation, Plaintiff's counsel describes a series of communications between himself and Defendant's counsel that allegedly took place after the Plaintiff received the 90-day notice on or about January 17, 2018. Plaintiff's counsel states that in late 2017 and early 2018, he received multiple motions to dismiss for want of prosecution and numerous 90-day notices from Defendant's counsel. Although Plaintiff's counsel does not specifically refer to the 90-day notice in the current matter, the motions and notices Plaintiff's counsel refers to apparently includes the 90-day notice in the current matter as well as motions and 90-day notices in unrelated matters.

According to Plaintiff's counsel, during the first, approximately, 65 days of the 90-day period initiated by the notice served in this matter, Plaintiff's counsel unsuccessfully attempted to resolve all of the outstanding motions and 90-day notices through multiple communications with Defendant's counsel and the last communication took place on or about March 23, 2018. Plaintiff's counsel further alleges that there was no communication between the parties over the next, approximately, 45 days, until he emailed Defendant's counsel on or about May 8, 2018. As of May 8, 2018, Plaintiff had allowed the 90-day period in the current matter to expire without fulfilling Plaintiff's obligation to file a note of issue and, prior to the expiration of the 90-day period, Plaintiff never entered into an agreement with Defendant's counsel regarding any of the outstanding motions or 90-day notices.

Plaintiff's counsel further states that on or about May 8, 2018 he set forth a proposal to Defendant's counsel that Plaintiff would file notices of trial for all outstanding motions and 90-

day notices within two weeks. On May 9, 2018, Plaintiff's counsel asserts that he spoke with Defendant's counsel, whom Plaintiff's counsel alleges provided him with a list of over 250 outstanding motions and 90-day notices in contemplation of Plaintiff's counsel's proposal. Defendant's counsel maintains that on or about May 9, 2018, a verbal agreement between the parties was reached that provided the Plaintiff with only two weeks to file notices of trial for all of the outstanding motions and 90-day notices. However, Plaintiff's counsel claims that he recalls both parties further agreed that filing notices of trial for over 250 cases in two weeks would not be prudent and Plaintiff's counsel misunderstood this acknowledgment to be an extension of the two-week period granted by Defendant's counsel. Plaintiff's counsel further mistakenly believed that the parties would agree to a time frame for filing the notices of trial on a later date.

Despite Plaintiff counsel's claimed belief that the time frame for filing the notices of trial was extended and unresolved, Plaintiff did not communicate with Defendant's counsel again until on or about August 8, 2018, which was approximately 92 days after the last communication, and Plaintiff failed to file a note of issue in the current matter as well as failed to, in the alternative, move to vacate or extend the 90-day notice.

Plaintiff's justifications are equivalent to settlement negotiations and law office failure. Settlement negotiations may be deemed a reasonable excuse for delay, but such an excuse only has effect within a brief interval after the last communication (*Matter of State of York v Town of Clifton*, 275 AD2d 523, 524-525 [3d Dept 2000], citing *Brady v Mastrianni, Abbuhl & Murphy, M.D.'s, P.C.*, 187 AD2d 858, 859 [3d Dept 1992] (noting, in turn, "settlement negotiations can only offer a justifiable excuse for delay for a brief interval after the last communication") (internal quotation marks and citations omitted)); *see also Olejak v Town of Schodack*, 295

AD2d 679, 680 [3d Dept 2002] ("Notwithstanding his confusion over whether discovery was complete, plaintiff failed to establish that he pressed forward as diligently as possible after being served with the 90-day demand [and] [p]laintiff's attempt to initiate settlement negotiations is also insufficient to justify his failure to comply with the 90-day demand") (internal quotation marks and citations omitted); *Moran v Pathmark Stores, Inc.*, 278 AD2d 208, 209 [2d Dept 2000]). Law office failure may also constitute a reasonable excuse under particular circumstances, however, conclusory and unsubstantiated claims of law office failure cannot excuse default (*See Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 594-595 [1st Dept 2005] ("Counsel's excuse that other casework obligations and family matters kept him from timely prosecuting the matter can only be seen as conclusory and unsubstantiated"); *Werbin v Locicero*, 287 AD2d 617, 618 [2d Dept 2001]; *Washington v Gorray*, 302 AD2d 454, 454 [2d Dept 2003]).

The justifications offered by Plaintiff include prolonged periods of inactivity that lacked any communication; a conclusory and unsubstantiated claim of a verbal agreement entered into after the 90-day period expired that effectively extended the time frame for filing all outstanding notices of trial indefinitely; and several fruitless attempts to reach a resolution that did not prompt the Plaintiff to, at a minimum, move to extend the 90-day notice in the current matter.

CPLR 3216 does not place a time limit on Defendant's ability to move to dismiss this action after the 90-day period expired and there is no evidence that during the alleged discussions between the parties on or about May 9, 2017, considering the statutory preconditions continued to be in effect, Defendant's counsel agreed to do anything more than temporarily abstain from filing a motion to dismiss pursuant to CPLR 3216. Additionally, even if there was an agreement between the parties to extend Plaintiff's deadline to file notices of trial for all outstanding motions and 90-day notices indefinitely, the Court can only presume that the 90-day

notice served in the current matter was included among the over 250 motions and notices that the parties allegedly discussed because Plaintiff fails to specifically state whether the current matter was included in the asserted agreement.

Based on the foregoing, the Court finds that Plaintiff failed to demonstrate the requisite justifiable excuse. As to the Court's discretion under CPLR 3216 in light of such finding, the Court of Appeals noted in *Baczkowski* "that under the plain language of CPLR 3216, a court retains some discretion to deny a motion to dismiss, even when plaintiff fails to comply with the 90–day requirement and proffers an inadequate excuse for the delay" (*Baczkowski v D.A. Collins Constr. Co., Inc.*, 89 NY2d 499, 504 [1997]). Accordingly, "[i]f plaintiff fails to demonstrate a justifiable excuse, the statute says the court 'may' dismiss the action—it does not say 'must' . . . —but this presupposes that plaintiff has tendered some excuse in response to the motion in an attempt to satisfy the statutory threshold" (*Id.*, citing CPLR 3216 [e]). The Court of Appeals in *Baczkowski* further emphasized the following regarding a court's discretion under CPLR 3216:

> Although a court may possess residual discretion to deny a motion to dismiss when plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly to honor the balance struck by the generous statutory protections already built into CPLR 3216. Even such exceptional exercises of discretion, moreover, would be reviewable within the Appellate Division's plenary discretionary authority. If plaintiff unjustifiably fails to comply with the 90–day requirement, knowing full well that the action can be saved simply by filing a note of issue but is subject to dismissal otherwise, the culpability for the resulting dismissal is squarely placed at the door of plaintiff or plaintiff's counsel. Were courts routinely to deny motions to dismiss even after plaintiff has ignored the 90–day period without an adequate excuse, the procedure established by CPLR 3216 would be rendered meaningless.
>
> Thus, when a plaintiff's excuse, though inadequate, is timely interposed, a court in its discretion might dismiss the action or, in an appropriate case, deny the motion and impose a monetary sanction on plaintiff or plaintiff's counsel instead (*see e.g. Lichter v State of New York,* 198 AD2d [at] 688 [in tripling the sanction imposed by the lower court, court notes "the sanction imposed should be substantial enough to serve as a deterrent to dilatory behavior in the future"]; *Neyra y Alba v Pelham Foods,* 46 AD2d 760 [1st Dept 1974]; *see also* 22

> NYCRR 130–1.1 [c] [2] [sanctionable frivolous conduct includes conduct "undertaken primarily to delay or prolong the resolution of the litigation"]).

(*Id.* at 504-505).

While the Court under *Baczkowski* may sparingly exercise its discretion to deny Defendant's motion to dismiss under CPLR 3216 when Plaintiff tenders even an inadequate excuse, the Court finds that the record reflects no basis for such an exceptional exercise of discretion.

B. Lack of Meritorious Cause of Action

To demonstrate the existence of a meritorious cause of action, Plaintiff must submit a verified complaint or an affidavit of merit from an individual having personal knowledge of the underlying facts (*See Salch v Paratore*, 60 NY2d 851, 852-853 [1983]; *Siegel v Commack Sch. Dist.*, 107 AD3d 687, 687 [2d Dept 2013]; *Haiskins v Jorge*, 147 AD2d 529, 530 [2d Dept 1989]). Conclusory allegations in a verified complaint or an affidavit of merit, allegations offered by a lay person that require an expert opinion, an unsupported conclusion that merit exists and an affidavit of merit made by an attorney who has no personal knowledge are insufficient to show a meritorious action (*See Koehler v Choi*, 49 AD3d 504, 505 [2d Dept 2008]; *Midolo v Horner*, 131 AD2d 825, 826 [2d Dept 1987]; *Keating v Smith*, 20 AD2d 141, 141-142 [2d Dept 1963]). Courts have noted that the existence of a meritorious cause of action must be demonstrated through materials submitted in the same evidentiary form as on a motion for summary judgement (*See DeLisa v Pettinato*, 189 AD2d 988, 988-989 [3d Dept 1993] ("The showing of merit required an affidavit by one with personal knowledge of the facts and required that materials be included in evidentiary form sufficient to defeat a summary judgment motion"); *Schuman v Raymond Corp.*, 174 AD2d 1040, 1041 [4th Dept 1991] ("Plaintiffs, in order to

demonstrate the existence of a meritorious cause of action, were obliged to submit materials in the same evidentiary form as on a motion for summary judgment")).

Even if in the alternative the Court assumed that Plaintiff provided a justifiable excuse and verified the complaint in this matter with the Plaintiff's affidavit, which was sworn to by the Plaintiff and submitted over one year after the summons and complaint in this matter was served, the Court finds that the submission of Plaintiff counsel's affirmation and the Plaintiff's affidavit are insufficient to demonstrate a meritorious cause of action. Plaintiff's counsel lacks personal knowledge of the underlying facts and Plaintiff's affidavit lacks factual allegations to demonstrate merit and merely refers to the complaint, which contains conclusory allegations (*See Koehler*, 49 AD3d at 504; *Midolo*, 131 AD2d at 825; *Keating*, 20 AD2d at 141).

III. Conclusion

Accordingly, the Court grants Defendant's motion to dismiss Plaintiff's complaint, but exercises its discretion to do so without prejudice.

This constitutes the decision and order of the Court.

Dated: February 5, 2019
Jamaica, New York

Hon. John C.V. Katsanos
Judge, Civil Court