Solomon Capital, LLC v Lion Biotechnologies, Inc.
2020 NY Slip Op 32154(U)
July 2, 2020
Supreme Court, New York County
Docket Number: 651881/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD, Justice — PART IAS MOTION 49EFM

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SOLOMON CAPITAL, LLC, SOLOMON CAPITAL 401(K) TRUST, SOLOMON SHARBAT and SHELHAV RAFF,

Plaintiffs,

-against-

LION BIOTECHNOLOGIES, INC., formerly known as Genesis Biopharma, Inc.,

Defendant.

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INDEX No.: 651881/2016

MOT. DATE: 2/24/2020

MOT. SEQ. No.: 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130
were read on this motion to/for DISMISSAL FOR LACK OF PROSECUTION

Defendant Lion Biotechnologies, Inc. ("Lion") moves for dismissal of plaintiffs' complaint for want of prosecution (Def. Br. at 1 [NYSCEF Doc. No. 122]). For the following reasons, defendant's motion is granted.

I. BACKGROUND

Plaintiffs are two individuals, Sharbat and Raff, and two entities, Solomon LLC and Solomon Capital 401(k) Trust (the "Trust"), of which Sharbat is the principal (Def. Aff., Ex. 1 ¶¶ 1–4 [NYSCEF Doc. No. 117] [hereinafter "Compl."]). Defendant Lion is a publicly traded biotechnology company focused on cancer treatment (Compl. ¶¶ 6, 9). Plaintiffs allege they have invested $223,908 in Lion in three different instances. In return for these investments, plaintiffs allege they were promised: (i) a promissory note in Lion in the amount of the investments, (ii) one-half a common share of each dollar invested (the "Share Award"), and (iii) the right to convert the note into shares on the same terms offered to other investors in the company's next financing (*id.* ¶¶ 21, 40, 47). Following a motion for summary judgment brought by defendant,

this court found in May 2020 that plaintiffs' recovery as to the Share Award would be limited to $47,420 (NYSCEF Doc. No. 136).

Defendant brings this motion as they allege plaintiffs have failed to prosecute this action following defendant's November 4, 2019 demand to resume prosecution and file a note of issue within 90 days (Def. Br. at 1). While plaintiffs eventually filed a note of issue on March 12, 2020 [NYSCEF Doc. No. 132], they failed to meet defendant's 90-day demand and this motion was filed on February 6, 2020.

II. ARGUMENTS

A. Defendant's Memorandum in Support

Defendant begins by arguing that when a party unreasonably fails to prosecute an action, the matter is subject to dismissal pursuant to CPLR 3216 provided three conditions are met: (i) the issue has been joined in the action, (ii) one year has passed since joinder of issue or six months have passed since the court issued a preliminary conference order, whichever is later, and (iii) the party seeking dismissal has served a written demand requiring the party opponent to resume prosecution and serve and file a note of issue within 90 days after receipt of the demand (CPLR § 3216 (b); *Jones v Maphey*, 50 NY2d 971, 972 [1980]). Defendant argues that when plaintiffs fail to file a note of issue within the 90-day period, they have a "double burden" in defending a motion to dismiss and must show "justifiable excuse for the delay and a good and meritorious cause of action" (CPLR § 3216(e); *see Sortino v Fisher*, 20 AD2d 25, 32 [1st Dept. 1963]; *Colon v Papatolis*, 95 AD3d 1160, 1160 [2d Dept. 2012]; *Rowley v Carl Zeiss, Inc.*, 270 AD2d 835, 835 [4th Dept 2000]).

Defendant argues the statutory preconditions are satisfied here as the issue has been joined, more than six months have passed since the court's preliminary conference order, and Lion served a written demand requiring plaintiffs to resume prosecution and serve a note of issue within 90 days which was not satisfied (Glazer Aff. ¶¶ 2–7, Exs. 1–5 [NYSCEF Doc. Nos. 116–121]). Defendant argues that plaintiffs cannot show a justifiable excuse for the delay and, because they have failed to file a note of issue on three separate occasions—after the original preliminary conference order, after a July 23, 2019 stipulation requiring filing in October, and after the 90-day demand—the requirements of CPLR 3216 have been satisfied and this action must be dismissed (*id.* ¶ 3; Def. Br. at 3–4).

B. Plaintiffs' Memorandum in Opposition

Plaintiffs begin by arguing that CPLR 3216 is "extremely forgiving of litigation delay," authorizing, but never requiring, the Supreme Court to dismiss a plaintiff's matter (*Baczkowski v D.A. Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *David v Goodsell*, 6 AD3d 382m 383 [2d Dept 2004]). Plaintiffs argue that defendant does not dispute that plaintiffs have meritorious causes of action (Pl. Br. at 2 [NYSCEF Doc. No. 129]). Plaintiffs further argue that they have a reasonable excuse for their delay—counsel of record in this matter, Eric Stern, was terminated from plaintiffs' firm, Sack & Sack, and it was learned that he had ignored this case—and the law firm has been working to get this matter back on track (*id.* at 3). Plaintiffs argue that law office failure may constitute a reasonable excuse, particularly where the failures were caused by former counsel and substitute counsel has been obtained (*Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 594 [1st Dept 2014]; *Pilor Constr. Inc. v Etingin*, 297 AD2d 509 [1st Dept 2005]; *Pagan v Estate of Anglero*, 22 AD3d 285 [1st Dept 2005]; *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633–34 [2003]; *see also Chelli v Kelly Group, P.C.*, 63 AD3d 632, 634 [1st Dept 2009] ["a client should not be deprived of his day in court by his attorney's neglect or inadvertent error, especially where the other party cannot show prejudice and his position has merit"]; *Darbeau v 136 W 3rd St., LLC*, 144 AD3d 420, 421 [1st Dept 2016]). Plaintiffs further argue that plaintiffs' law firm never received the certified November 4, 2019 demand for the note of issue as it was addressed to Eric Stern (Pl. Br. at 3). Finally, plaintiffs argue that the law firm timely filed an Opposition to Defendant's Motion for Summary Judgment on January 3, 2020, evincing an intent to continue prosecution of this matter (*id.* at 4).

C. Defendant's Reply

In reply, defendant argues that plaintiffs do not dispute that the conditions necessary for CLPR 3216 dismissal have been met (Def. Reply at 2 [NYSCEF Doc. No. 130]). Defendant argues that plaintiffs have failed to show a "justifiable excuse for the delay" as they fail to address their failure to file a note of issue prior to Mr. Stern's termination on December 10, 2019 or the fact that Mr. Harris of Proskauer Rose, also of counsel to plaintiffs, also received notice of defendant's demand (*id.* at 3). Defendant argues that even though plaintiffs conducted an "examination and investigation" to learn that Mr. Stern allowed court deadlines to lapse, they still failed to act on this deadline while simultaneously claiming to have been "diligently working to get this matter back on track" (*id.*; Pl. Br. at 3; *see also Di Simone v Good Samaritan Hosp.*,

100 NY2d 632, 634 [2003] ["upon transfer to the present attorney . . . pretrial matters have proceeded with the knowledge and participation of defense counsel"]). Defendant argues that plaintiffs have no excuse for their failure to file a note of issue after being served with this motion (*Pryce v Montefiore Med. Ctr.*, 114 AD3d 594, 594–95 [1st Dept 2014]; *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 505 [1997]).

Defendant argues that plaintiffs have demonstrated a pattern of dilatory behavior by violating two separate scheduling orders and failing to undertake basic trial preparation including taking depositions or designating experts (Def. Reply at 4; Pl. Br. at 2; *Polir Constr., Inc. v Etingin*, 297 AD2d 509, 511 [1st Dept 2002]). Defendant argues that plaintiffs have failed to show they have a good and meritorious cause of action as was their burden on this motion (Def. Reply at 4; *Rowley v Carl Zeiss, Inc.*, 270 AD2d 835, 835 [4th Dept 2000] ["to avoid dismissal, plaintiffs were required to demonstrate a justifiable excuse for the delay and a meritorious cause of action"]; *compare Pagan v Estate of Anglero*, 22 AD3d 285, 287 [1st Dept 2005]; *Chelli v Kelly Grp. P.C.*, 63 AD3d 632, 633 [1st Dept 2009]). Defendant further argues that its motion for partial summary judgment is not proof that plaintiffs have a meritorious case (Def. Reply at 5).

III. DISCUSSION

CPLR 3216 states that "where a party . . . unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion . . . may dismiss the party's pleadings on terms." A motion to dismiss for lack of prosecution cannot be made unless: (i) the issue has been joined in the action, (ii) one year has passed since joinder of issue or six months have passed since the preliminary conference order, whichever is later, and (iii) the party seeking relief has served a written demand requiring the party opponent to resume prosecution of the action and to serve and file a note of issue within ninety days of the demand. Here, defendant has successfully shown that the issue has been joined, the requisite amount of time has passed, and a demand for a note of issue has been made and was not answered within 90 days. As such, it is plaintiffs' burden pursuant to CPLR 3216 (e) to show that a justifiable excuse for the delay exists and the case has merit.

Plaintiffs' March 12, 2020 note of issue filing does not defeat this motion as plaintiffs who fail to meet the 90-day demand deadline remain subject to CPLR 3216 dismissal (*Scott v Columbia Memorial Hosp.*, 134 AD2d 792 [3d Dept 1987]). Instead, as the court in *Scott* notes,

failure to file within the allotted 90-day period obligates the court to examine the merits of an action (*Scott*, 134 AD2d at 794). While plaintiffs correctly note that law office failure or failures of prior counsel can be reasonable excuses under CPLR 3216 (e), such excuses are insufficient without a demonstration of a meritorious cause of action via affidavit from someone with personal knowledge (CPLR 3216 (e); *Public Service Mut. Ins. Co. v Zucker*, 225 AD2d 308, 309 [1st Dept 1996] ["we have held that failure to offer a proper affidavit of merit on [CPLR 3216 motions] may even deprive the court of discretion to overlook instances of law office failure which contributed to the delay"]; see *also Sortino v Fisher*, 20 AD2d 25, 31–32 [1st Dept 1963]; *Jaffe v Carol Management Corp.*, 268 AD2d 292, 292 [1st Dept 2000]). Plaintiffs fail to provide any such document, instead submitting an attorney affidavit which does not explain plaintiffs' failure to comply and cannot serve as an affidavit of merit (*Public Service*, 225 AD2d at 309; *Aquilino v Adirondack Transit Lines, Inc.*, 97 AD2d 929, 929 [3d Dept 1983]). Consequently, defendant's motion to dismiss for lack of prosecution is **GRANTED** and plaintiffs' complaint is dismissed.

It is hereby,

ORDERED that the motion to dismiss is GRANTED; and it is further

ORDERED that the case is hereby DISMISSED and the Clerk of the Court is directed to enter judgement against plaintiffs and in favor of defendant together with costs in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

7/2//2020
DATE

O. PETER SHERWOOD, J.S.C.

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