

Michael Gross Diamonds Inc. v Vaknin
2020 NY Slip Op 33244(U)
October 2, 2020
Supreme Court, New York County
Docket Number: 651396/2014
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

MICHAEL GROSS DIAMONDS INC.,
Plaintiff,

- v -

YISHAI VAKNIN, SV&V CORPORATION, SV&V DIAMOND CORPORATION

Defendant.

-----X

INDEX NO. 651396/2014
MOTION DATE 9/24/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for RESTORE.

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff Michael Gross Diamonds, Inc. (motion seq. 002) is granted to the extent that this action is restored to active pre-note status; and it is further

ORDERED that, within 10 days from the entry of this order, plaintiff shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to restore this action to active pre-note status and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 10 days from the entry of this order, counsel for defendants shall file a notice of appearance in accordance with CPLR 321; and it further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Memorandum Decision

In this action for conversion, plaintiff Michael Gross Diamonds, Inc. moves for an order restoring this case to active status, scheduling a discovery conference, and fixing a date by which the corporate defendants shall appear by counsel (motion seq 002).

Background

Plaintiff and defendants SV&V Corporation and SV&V Diamond Corporation (together, the Corporate Defendants) are diamond and jewelry merchants based in New York, New York (NY St Cts Elec Filing [NYSCEF] Doc No. 32, affirmation of Michael Gross [Gross], ¶¶ 5-6). Defendant Yishai Vaknin (Vaknin) is the owner of the Corporate Defendants (NYSCEF Doc No. 43, Vaknin aff, ¶ 1).

Plaintiff alleges that it had consigned loose diamonds totaling \$1,099,230.46 on “memo” to defendants, but defendants have not paid plaintiff for them (NYSCEF Doc No. 32, ¶ 12). Plaintiff also seeks to recover \$140,000 for four diamonds that had been consigned previously by memo to defendants (*id.*, ¶ 18). Defendants paid plaintiff by check for the four diamonds, but the check was returned for insufficient funds (*id.*, ¶ 19; NYSCEF Doc No. 36, Gross affirmation, exhibit D at 1).

Plaintiff subsequently commenced this action on May 6, 2014, pleading two causes of action for conversion. After defendants timely interposed an answer, the parties appeared for a preliminary conference on June 24, 2014 (NYSCEF Doc No. 46, Vaknin aff, exhibit B at 1). Defendants’ attorneys then moved to be relieved as counsel. On June 24, 2015, the court (Ramos, J.) granted the motion without opposition (NYSCEF Doc No. 23). No further activity in this action took place until the court’s service on April 17, 2018 of a notice for a “prenote blockbuster conference” scheduled for May 11, 2018 (NYSCEF Doc No. 26). Plaintiff’s counsel

served a copy of the notice upon defendants, as well (NYSCEF Doc No. 27). On August 7, 2018, the court (Ramos, J.) “struck [the action] from the calendar for non-activity since December 22, 2015,” and granted plaintiff leave to “restore the action, on motion with notice” (NYSCEF Doc No. 28).

Plaintiff now moves to restore this matter to active status on the pre-note calendar. It seeks a discovery conference and an order fixing a date by which the Corporate Defendants’ counsel must file a notice of appearance. Plaintiff also notes that it intends to amend its complaint to assert additional claims against defendants in connection with a judgment rendered in a separate action.

Defendants, in opposition, contend that the present motion is untimely, citing Uniform Rules for New York City Civil Court (22 NYCRR) § 208.14 (c) in support. The rule provides that an action may be restored to the calendar upon a so-ordered stipulation signed by all parties, or by motion made on notice within one year after the action was stricken. Defendants herein maintain that plaintiff moved for relief more than one year after the action was stricken from the calendar. Defendants also claim that plaintiff has failed to prosecute this action, that it waited more than one year after the action was marked off the court’s pretrial calendar, and that this case has been dismissed under Uniform Rules for Trial Courts (22 NYCRR) § 202.27.

In response, plaintiff contends that CPLR 3216 and 3404 are inapplicable. Neither defendants nor the court served plaintiff with a notice under CPLR 3216 (b). In addition, no note of issue was ever filed. Furthermore, defendants referred to a “Notice of Administrative Dismissal” dated February 26, 2019 in their opposition. The notice, purportedly issued by the court, stated that the parties must complete a notice of intent to prosecute or file a stipulation to proceed by March 18, 2019 or else face administrative dismissal under Uniform Rules for Trial

Courts (22 NYCRR) § 202.27 (NYSCEF Doc No. 42, affirmation of Morris Fateha, ¶ 20).

Plaintiff, though, submits that it is unclear whether the notice applies to this action, since the matter had already been marked off the active calendar in August 2018.

Discussion

“A court’s need to control its prenote calendars and prevent delay must be addressed by application of statutory provisions other than CPLR 3404, such as CPLR 3216 or 22 NYCRR 202.27” (*Mitchelltown Apts. v GMAC Commercial Mtge. Corp.*, 293 AD2d 340, 341 [1st Dept 2002]). As applied herein, it is undisputed that defendants never served plaintiff with a notice to resume prosecution pursuant to CPLR 3216 (b) (*see Gendus v Sheraton/Atl. City W.*, 302 AD2d 427, 427 [2d Dept 2003]). Similarly, it does not appear that this action was ever dismissed pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27. Defendants failed to annex a copy of the Notice of Administrative Dismissal or a copy of the resulting administrative dismissal to their opposing papers. Absent a formal order, the action cannot have been dismissed (*see e.g. Cadichon v Facelle*, 18 NY3d 230, 236 [2011], *rearg denied* 18 NY3d 935 [2012] [concluding that an administrative dismissal, without notice to the parties and without entry of a formal dismissal order, does not constitute a dismissal for purposes of CPLR 3216]).

Furthermore, as noted above, when this action was marked off or deemed inactive, plaintiff was granted express leave to move to restore the action. In view of the court’s preference for resolving cases on the merits (*see Chowdhury v Phillips*, 306 AD2d 51, 53 [1st Dept 2003]), and in “the absence of any other ground for marking the case off the calendar,” plaintiff’s motion to restore is granted (*see Wachter v City of New York*, 300 AD2d 129, 130 [1st Dept 2002]). The court shall set this matter down for a conference.

Defendants' reliance on Uniform Rules for New York City Civ Ct (22 NYCRR) § 208.14 (c) is misplaced, as that rule applies only to actions pending in New York City Civil Court. Thus, *Kaufman v Bauer* (36 AD3d 481, 482-484 [1st Dept 2007]), cited by defendants in support, is unavailing, since that decision discussed whether a motion brought after the one-year time limitation set forth in Uniform Rules for New York City Civil Court (22 NYCRR) § 208.14 (c) should have been granted.

Defendants also cite to *Habib v Miller* (233 AD2d 480 [2d Dept 1996]) for the proposition that plaintiff must demonstrate the absence of an intent to abandon the matter and proffer a reasonable excuse for the delay in moving to restore the action. Defendants contend that given the lengthy period of inactivity, plaintiff has not demonstrated the absence of an intent to abandon the action. However, the action in *Habib* was dismissed under CPLR 3404 (*id.* at 481). CPLR 3404 provides, in relevant part, that “[a] case in the supreme court ... marked ‘off’ or struck from the calendar ... and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.” The statute applies in cases where a note of issue has been filed (*see Turner v City of New York*, 147 AD3d 597, 597 [1st Dept 2017]). In contrast, no note of issue was ever filed in the present action. As such, CPLR 3404 is inapplicable to this pre-note action (*id.* at 597, citing *Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011], *lv dismissed* 17 NY3d 923 [2011]; *Behren v Warren, Gorham & Lamont*, 301 AD2d 381, 382 [1st Dept 2003]).

Lastly, that branch of the motion for an order directing the Corporate Defendants' counsel to file a notice of appearance is granted. Although Vaknin avers that the Corporate Defendants are no longer active (NYSCEF Doc No. 43, ¶ 4), it appears that all defendants have retained counsel, as evidenced by the opposition to the present motion.

Conclusion

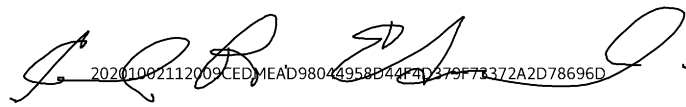
Accordingly, it is

ORDERED that the motion of plaintiff Michael Gross Diamonds, Inc. (motion seq. 002) is granted to the extent that this action is restored to active pre-note status; and it is further

ORDERED that, within 10 days from the entry of this order, plaintiff shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is hereby directed to restore this action to active pre-note status and make all required notations thereof in the records of the court; and it is further

ORDERED that, within 10 days from the entry of this order, counsel for defendants shall file a notice of appearance in accordance with CPLR 321; and it further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).


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10/2/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE