Analysis
As of: Dec 26, 2013

Samantha Carroll et al., Appellants, v Nostra Realty Corporation, Respondent. (And a Third-Party Action.)

4112N, 109293/02, 590007/06

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

54 A.D.3d 623; 864 N.Y.S.2d 10; 2008 N.Y. App. Div. LEXIS 6874; 2008 NY Slip Op 7041

September 23, 2008, Decided
September 23, 2008, Entered

SUBSEQUENT HISTORY: Appeal dismissed by *Carroll v. Nostra Realty Corp.*, 12 NY3d 792, 906 NE2d 1072, 2009 N.Y. LEXIS 641, 879 NYS2d 38 (N.Y., Apr. 2, 2009)

PRIOR HISTORY: *Carroll v. Nostra Realty Corp.*, 2007 N.Y. Misc. LEXIS 981 (2007)

CASE SUMMARY:

PROCEDURAL POSTURE: In an action asserting injuries from mold in their apartment, plaintiff tenants sought review of an order entered by the Supreme Court, New York County (New York), which denied the tenants' motion to vacate the trial court's dismissal of the action and restore the case to the calendar.

OVERVIEW: After delays in the discovery phase of the case, the trial court finally directed the tenants to file a note of issue and proceed to trial. The tenants and defendant corporation were directed to appear for trial on September 18, 2006, and were instructed that no adjournments would be granted. However, based on the schedule of the tenants' counsel, the trial was adjourned until October 12, 2006. Thereafter, the tenants' counsel was issued a jury slip in another matter and was instructed to return on October 16, 2006, for jury selection. On October 12, 2006, the partner of the tenants' counsel appeared before the trial court with an affirmation of engagement in which the tenants' counsel affirmed that he was actually on trial in the other matter; the affirmation was rejected as misleading, and the action was dismissed. On appeal, the court affirmed. The tenants failed to show a reasonable excuse under CPLR § 5015(a)(1) for failure to appear as their counsel was not actually engaged on trial or in any argument as defined by N.Y. Stands. & Admin. Policies, R. Chief Adm'r Cts. 125.1(b) on October 12 as jury selection did not begin until October 16 in the other matter.

OUTCOME: The court affirmed the trial court's order.

HEADNOTES

Judgments--Default Judgment--Vacatur.--Plaintiffs were not entitled to vacatur of dismissal since they failed to demonstrate reasonable excuse for failing to proceed on trial date; on trial date, plaintiffs' counsel was not actually engaged on another matter since he had not commenced selecting jury in other matter; even if counsel believed that he was actually engaged on another matter, he was required to appear and permit courts to determine which trial should proceed first; also, plaintiffs failed to demonstrate meritorious cause of action.

COUNSEL: [***1] Warner & Scheuerman, New York (Karl E. Scheuerman of counsel), for appellants.

Thomas D. Hughes, New York (David D. Hess of counsel), for respondent.

JUDGES: Concur--Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

OPINION

[*623] [**11] Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered February 27, 2007, which denied plaintiffs' motion to vacate the court's dismissal of the action and restore the case to the calendar, unanimously affirmed, without costs.

It is well established that in order to obtain relief from a judgment or order on the basis of an excusable default pursuant to CPLR 5015 (a) (1), the moving party must provide a reasonable excuse for the failure to appear and must further demonstrate that the case or defense has merit (*Goldman v Cotter,* 10 AD3d 289, 781 NYS2d 28 [2004]). Assessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court (*Mediavilla v Gurman,* 272 AD2d 146, 707 NYS2d 432 [2000]).

[**12] In this matter, the discovery phase of the case was delayed for a number of years. Eventually, the Supreme Court directed plaintiffs to file a note of issue and proceed to trial. In an order dated August 14, 2006, the parties were directed to appear for trial [***2] on September 18, 2006 and were instructed that "no adjournments shall be granted."

On September 18, 2006, counsel for all parties appeared [*624] before Justice Gammerman as directed. Over the objections of defendant's counsel, and at the request of plaintiffs' counsel, Frederic M. Gold, the trial was adjourned to October 12, 2006, based on Mr. Gold's schedule.

On October 11, 2006, Mr. Gold appeared on another matter in Westchester County, was issued a jury slip on that matter, and was instructed to return on October 16, 2006 for jury selection.

On October 12, 2006, Mr. Gold's partner, Jesse Sable, appeared in Part 40 before Justice Gammerman with an "Affirmation of Engagement," in which Mr. Gold affirmed that he was actually on trial in another matter. However, the court learned that Mr. Gold was not on trial on that date, and that the other matter had been scheduled for jury selection on October 16, 2006. The court then rejected the affirmation of engagement as misleading, and dismissed this action. On appeal, plaintiffs contend that they demonstrated a reasonable excuse because their counsel was actually engaged on trial on October 12, 2006.

Section 125.1 (b) of the Rules of the Chief Administrator [***3] of the Courts (22 NYCRR) states: "[e]ngagement of counsel shall mean actual engagement on trial or in argument before any state or federal trial or appellate court, or in a proceeding conducted pursuant to rule 3405 of the CPLR and the rules promulgated thereunder." On October 12, 2006, Mr. Gold was not actually engaged on trial or in argument before any court, and as the record reveals, was actually preparing witnesses on another matter. Accordingly, we reject plaintiffs' contention that they demonstrated a reasonable excuse for failing to proceed to trial in this action.

While there is no express definition of the term "on trial" in the applicable rules, it is commonly understood that a trial commences with the selection of a jury (*see Draves v Chua,* 168 Misc 2d 314, 315, 642 NYS2d 1022 [Sup Ct, Erie County 1996]; *Wright v Centurion Investigations, Inc.,* 109 Misc 2d 624, 440 NYS2d 526 [Civ Ct, Kings County 1981]; *see also* CPL 1.20 [11]). In any event, under no reasonable understanding of that term can an attorney who is directed to appear days later to select a jury be considered to be on trial on the day the direction is given. Contrary to plaintiffs' contention, an attorney is not actually engaged on trial when he is [***4] issued a jury slip. Accordingly, Mr. Gold was not

actually engaged on trial in another matter on October 12, 2006 since he had not commenced selecting a jury in that case.

At a minimum, even if Mr. Gold believed that he was actually engaged on another matter, he was required to appear on October 12, 2006 on this action, and, pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 125.1 (c), permit the courts to determine which trial should proceed first.

[*625] We also find that plaintiffs failed to demonstrate a meritorious cause of action. Specifically, the pleadings and affidavits submitted by plaintiffs were self-serving and conclusory. Further, plaintiffs failed to submit any sworn affirmations from physicians detailing their injuries and linking them to the alleged mold in their apartment.

[**13] We have considered plaintiffs' remaining contentions and find them unavailing. Concur--Lippman, P.J., Tom, Williams, McGuire and Freedman, JJ. [*See* 2007 NY Slip Op 34366(U).]