

Master Elec., Inc. v Agassiz Realty Corp.

2007 NY Slip Op 32331(U)

July 18, 2007

Supreme Court, Queens County

Docket Number: 0008318/2000

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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MASTER ELECTRONICS, INC. d/b/a SABA
TV, INC. Plaintiffs,

Index
Number: 8318/00

- against -

Motion
Date: June 26, 2007

AGASSIZ REALTY CORP., URI ADNER,
SIDNEY GOLDEN, BASE CONSTRUCTION CORP.,
WEI ASSOCIATES, ROTANDI & SON
CONSTRUCTION CORP., JAMAICA WATER
COMPANY and THE CITY OF NEW YORK
Defendants.

Motion
Cal Numbers: 20 & 21
Motion Seq Nos 4 & 5

-----X

The following papers numbered 1 to 17 read on this motion by defendants Agassiz Realty Corp. and Sidney Golden, cross-motion by defendants Uri Adner, Rotandi & Son Construction Corp. and Base Construction Corp. and cross-motion by defendant City of New York, to dismiss the complaint for want of prosecution, pursuant to CPLR 3216, and motion by plaintiff's attorney, Wilkofsky, Friedman, Karel & Cummins, brought by order to show cause, to be relieved as counsel for plaintiff.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Notice of Cross-Motion-Affirmation-Exhibits.....	9-12
Order to Show Cause-Affirmation-Exhibits.....	13-15
Affirmation in Opposition to Order to Show Cause...	16-17

The motion and cross-motions to dismiss the complaint and the motion brought by order to show cause to be relieved as counsel are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions and cross-motions are decided as follows:

Motion by Agassiz Realty Corp. and Sidney Golden, cross-motion by Uri Adner, Rotandi & Son Construction Corp. and Base

Construction Corp. and cross-motion by the City of New York, to dismiss the complaint for want of prosecution, pursuant to CPLR 3216, are granted, there appearing no written opposition. Motion by Wilkofsky, Friedman, Karel & Cummins to be relieved as counsel for plaintiff is denied.

Plaintiff commenced the instant action by filing and serving a summons and complaint in 1998 under Index No. 106086/98 in New York County. Issue was joined by the moving and cross-moving defendants in 1998. The matter was transferred to Queens County in 2000 and assigned the above-captioned Index Number.

Pursuant to CPLR 3216(3), Agassiz and Golden served the pre-requisite 90-day demand to resume prosecution of the action upon plaintiff on December 26, 2006. Adner, Rotondi and Base served plaintiff with a 90-day demand on December 19, 2006 and the City served upon plaintiff a 90-day demand on January 29, 2007.

CPLR 3216(3) requires that the 90-day demand be served by registered or certified mail. The Court notes that the affidavits of service of the 90-day demands of Agassiz and Golden and of the City fail to indicate that service was accomplished by registered or certified mail. Only Adner, Rotondi and Base, in their cross-motion, annex proof of service of their 90-day demand by certified mail. However, notwithstanding that Agassiz, Golden and the City have failed to demonstrate that they complied with the service requirements of CPLR 3216(3), the use of ordinary mail instead of registered or certified mail is a mere procedural irregularity and is not grounds for denial of a motion to dismiss absent a showing of prejudice to a substantial right of plaintiff (see Balancio v. American Optical Corp., 66 NY 2d 750 [1985]). Plaintiff has not alleged, and the record on these motions and cross-motions does not show, that plaintiff was in any way prejudiced.

Although served with the demands in December 2006 and January 2007, plaintiff never sought an extension of time to file a note of issue. Plaintiff has not submitted any opposition to the motion and cross-motions. Instead, plaintiff's counsel has moved to be relieved as counsel for plaintiff. Plaintiff has offered neither an excuse for its neglect to prosecute the action nor an affidavit of merit.

Even were this Court to deem counsel's affirmation in support of his order to show cause seeking to be relieved as counsel an affirmation in opposition the motion and cross-motions to dismiss, there is no showing of a reasonable excuse for plaintiff's delay.

Plaintiff's counsel states that he has been attempting, since May 5, 2005, to no avail, to get plaintiff to furnish documentation to support its claim of property damage, such as invoices evidencing its purchase of the goods at issue and their value. He

contends that since plaintiff has failed to produce any documentation to support his inventory, it is not possible to go forward with the prosecution of the action and, therefore, counsel cannot file a note of issue and certify that the matter is ready for trial.

The only basis for plaintiff's failure to prosecute that is articulated on this record is its counsel's contention that plaintiff has failed to cooperate and has not furnished proof of its alleged damages. Such does not constitute a reasonable excuse for plaintiff's neglect or delay in proceeding. "Excuses for avoidable delay are insufficient which merely lay the delay at the door of plaintiff himself" (see Sortino v. Fisher, 20 AD 2d 25 [1st Dept 1963]). In addition, there is no affidavit of merit demonstrating that plaintiff has a viable cause of action (see id.). This action was commenced in 1998. Plaintiff has failed to proffer any reasonable excuse as to why, nine years later, he has yet to file a note of issue and fails to offer any reasonable excuse why it failed to comply with the 90-day demands.

Motion by plaintiff's attorney seeking to be relieved as counsel for plaintiff is denied. The basis of counsel's motion is that plaintiff has failed to furnish documentary proof in support of his claimed damages. This Court does not consider this explanation an adequate reason to allow counsel to withdraw, especially at this advanced stage in the proceedings.

Counsel has represented plaintiff in this action since 1998, discovery in this matter has been completed and a notice of trial and certificate of readiness has been filed. Counsel has had nine years to ascertain whether his client had the requisite proof to support his claim of damages. Counsel states in his affirmation that he has attempted to obtain additional documentation to support plaintiff's damages claim since May 5, 2005. He has failed to explain why he did not attempt to do so before 2005. After accepting this case and representing plaintiff herein for nine years, through the pleading and discovery stage and the filing of a note of issue and certificate of readiness, counsel now seeks to bail out after determining that he does not have enough to prove his case at trial.

Moreover, the 90-day demand to resume prosecution of this case was served upon plaintiff on December 19, 2006, approximately six months before counsel sought to be relieved.

Therefore, it would be prejudicial to the moving and cross-moving defendants and an improvident exercise of this Court's discretion to allow counsel to withdraw at this point and for the reasons stated. Under the circumstances, this Court will not condone counsel's belated effort to withdraw from the case (see Damore v. Helmsley Palace, Inc., 157 AD 2d 518 [1st Dept 1990]).

Accordingly, the motion and cross-motions to dismiss are granted and the complaint is dismissed as against Agassiz, Golden, Adner, Rotondi, Base and the City. The motion of Wilkofsky, Friedman, Karel & Cummins to withdraw as counsel for plaintiff is denied.

Dated: July 18, 2007

KEVIN J. KERRIGAN, J.S.C.