

**230-79 Equity, Inc. v Mancuso**

2010 NY Slip Op 30488(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 109996/2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 109996/2009  
**230-79 EQUITY, INC.**  
 vs.  
**MANCUSO, ROBERT**  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

*and/or*  
this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

MAR 11 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: MAR 08 2010

*J. Gische*  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
230-79 Equity, Inc.,

Plaintiff (s),

**DECISION/ ORDER**  
Index No.:  
Seq. No.:

**-against-**

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Robert Mancuso, Harriet Stein Mancuso,  
Bernard Stein, Bernice Stein, Alan  
Spigelman, Diane Spigelman,  
Edward M. Kreps, Sharon M. Kreps,  
Edmund Stevens, Jr. and Shari Ream  
Stevens, and Barry L. Solar as  
Trustees of the Edmund Stevens, Jr.  
Qualified Terminable Interest Trust for  
Shari Ream Stevens and  
GBL 78<sup>th</sup> Street LLC & 240-79  
Owners' Corp.,

Defendant (s).  
-----X

**FILED**  
MAR 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def GBL 78 <sup>th</sup> n/m (3211) w/BWS affirm . . . . .	1
Pltf's opp w/RC affirm, exh . . . . .	2
Def GBL 78 <sup>th</sup> reply w/BWS affirm . . . . .	3

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action for a declaratory judgment vis-a-vis a retaining wall which is in  
disrepair. Plaintiff 230-79 Equity, Inc. owns the building know as 230 East 79<sup>th</sup> Street,  
New York, New York, whereas defendants are owners of other real property which

border upon the decrepit retaining wall at issue. The parties to this action are exactly the same as those in another action before the Hon. Debra A. James (Index No. 101228-04) ("2004 action"). Judge James granted motions by the defendants for the dismissal of plaintiff's complaint for failure to prosecute (Decision, James J., 4/7/2009 and Order, James J., 6/9/2009). Judge James denied plaintiff's cross motion for an extension of time to file the note of issue.

Presently before the court is defendant, GBL 78<sup>th</sup> Street, LLC's ("GBL 78") motion for the pre-answer dismissal of this action based upon there being a prior action pending between the same parties for the same cause of action. Alternatively, GBL 78 argues that this action is time barred. Plaintiff opposes the motion.

### **Arguments**

In the 2004 action, the defendants brought separate motions to dismiss the complaint for failure to prosecute (CPLR 3216). Their motions were granted and Judge James ordered the counter-claimant (GBL 78<sup>th</sup>) to file its Note of Issue which it did. Although plaintiff cross moved for more time to file the note of issue, that cross motion was denied. The defendants have made motions for summary judgment on the remaining claims before Judge James; those motions are sub judice.

In the motion at bar, GBL argues that there is no reason to have two actions seeking the exact same relief and there is a potential for inconsistent rulings if both cases are allowed to proceed. GBL points out that there are motions for summary judgment before Judge James and the defendants would be prejudiced if their cross and counterclaims are not brought to a conclusion. GBL argues that this action is, in any event, time barred because it was brought after the cause of action accrued.

Plaintiff urges the court to let this new action proceed, but then refer it to Judge James. Plaintiff contends that full relief cannot be had in the action before Judge James because plaintiff is a necessary party.

### **Discussion**

At the outset, the court addresses defendant GBL's argument, that plaintiff's claims are time barred and this action should be dismissed for that reason. Where a motion to dismiss is based upon the affirmative defense that a claim is time barred, once the defendant establishes that defense, the burden then shifts to the plaintiff to set forth facts establishing that the case is not time barred (Assad v. City of New York, 238 AD2d 456 [2<sup>nd</sup> Dept 1997] *lv dismiss* 91 NY2d 848 [1997]). Plaintiff seeks a declaratory judgment regarding responsibility for repairs to a decrepit retaining wall. The City of New York issued a violation for the wall in plaintiff's name in November 2002.

The statute of limitation for a property damage action is three (3) years (CPLR 214 [4]) with certain exceptions (CPLR 214 [c]). Nonetheless, plaintiff argues the condition - and property damage - is ongoing and therefore, does not fall with CPLR 214 [4]. GBL does not provide any legal authority for its statutory limitations defense, or fully develop its argument on this point. Assuming without deciding that plaintiff's complaint survives because it is not time barred, there are other reasons for this case to be dismissed.

Plaintiff argues that "everybody" knew the complaint before Judge James would be dismissed, plaintiff would start this action and "[we] would be back to where we started from with all the parties." Plaintiff further contends that the "reality of the

situation is that both actions [should] be consolidated so that there [is] one determination ... and [no] conflicting determinations.”

A dismissal for want of prosecution is not a dismissal on the merits (CPLR 3216 [c]; Sports Legends, Inc. v. Carberry, 38 AD3d 470 [1<sup>st</sup> Dept 2007]). However, plaintiff has not brought a motion before Judge James to vacate the dismissal of its complaint, showing a reasonable excuse for its inattention to that case and merit to that action (Sports Legends, Inc. v. Carberry, supra). Given those circumstances, the commencement of this action is little more than an end-run of Judge James' decision and order dismissing plaintiff complaint for being inattentive to that case. Although plaintiff cross moved for an extension of time to file the note of it issue, that motion was denied by Judge James. Plaintiff has not appealed either decision/order and it is the law of the 2004 action. There is, therefore, no basis for this court to accept this new case because there would be two separate actions on parallel tracks. This is not a “companion case” as plaintiff suggests, but was commenced to circumvent Judge James' decision discussing the earlier, identical action. There is no reason provided by plaintiff why it did not or could not move for relief in the case for Judge James.

GBL has, on the other hand, established that the claims in the action at bar are identical to and indistinguishable from those before Judge James, notwithstanding the dismissal of plaintiff's complaint in that action. Therefore, GBL's motion pursuant to CPLR 3211 [a][4] is granted, this action is hereby dismissed without prejudice to plaintiff seeking any relief available in the action before Judge James ( Index No. 101228/2004).

**Conclusion**

It is hereby

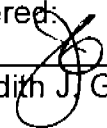
**ORDERED** that defendant GBL's motion to dismiss this action is granted; and it is further

**ORDERED** that the Clerk shall enter judgment against plaintiff 230-79 Equity, Inc. dismissing this action without prejudice to plaintiff seeking any relief available in the action before Judge James (Index No. 101228/2004); and its further

**ORDERED** that any relief that has not been expressly addressed is hereby denied.

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
March 8, 2010

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
MAR 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE