

Moore v Federated Dept. Stores & Macy's

2011 NY Slip Op 31745(U)

June 24, 2011

Sup Ct, NY County

Docket Number: 407020/07

Judge: Martin Shulman

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6/28/2011
* 1
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARTIN SHULMAN

J.S.C.

PART 1

Index Number : 407020/2007

MOORE, DWAYNE

vs

FEDERATED DEPARTMENT STORES

Sequence Number : 008

DISMISS

INDEX NO.

407020/07

MOTION DATE

MOTION SEQ. NO.

008

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits 1-4

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAGES NUMBERED

1
2
3

Cross-Motion: Yes No

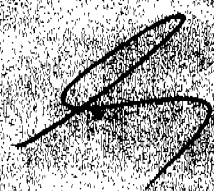
Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the attached decision and order.

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE



Dated: June 24, 2011

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDGE SETTLE ORDER/ JUDGE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
DWAYNE MOORE,

Plaintiff,

Index No: 407020/07

-against-

Decision and Order

FEDERATED DEPARTMENT STORES & MACY'S,

Defendants.

-----X
HON. MARTIN SHULMAN, J.S.C.:

Defendants move pursuant to CPLR 3216 to dismiss this employment discrimination action for want of prosecution. Exploiting a typographical error contained throughout the motion papers, plaintiff argues the motion is frivolous and requests, without cross-moving, that sanctions be imposed against defendants' counsel. Specifically, defendants' motion miscites CPLR 3216 (want of prosecution), citing instead to CPLR §3126 (penalties for refusal to comply with order or to disclose).

Notwithstanding the repeated typographical error in the motion papers, it is readily apparent that the motion was brought pursuant to CPLR 3216 rather than CPLR §3126. First, the notice of motion's heading contains the correct citation to CPLR 3216. Additionally, prior to bringing the instant motion and in accordance with CPLR 3216 (b)(3), defendants served plaintiff's counsel with a written demand requiring plaintiff to resume prosecution of the action and to serve and file the note of issue within 90 days (the "demand"). That demand clearly cites to CPLR 3216 and plaintiff does not deny receiving it. See Motion at Exh. 3.

CPLR 3216 provides in relevant part:

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(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

(e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

As defendants' motion notes, by prior decision and order dated July 14, 2010, this court *inter alia*: vacated plaintiff's previously filed note of issue because discovery was incomplete; directed that defendants' depositions be completed within 60 days; and directed plaintiff to file a new note of issue within 15 days thereof. Upon plaintiff's default in complying with the July 14, 2010 order, defendants' counsel served the demand.

Despite the fact that plaintiff's counsel knew or should have known that this motion was brought pursuant to CPLR 3216, plaintiff's opposition addresses only the motion's typographical error with no mention of the CPLR 3216 argument. The only conceivable reason for not filing the note of issue would be if discovery was incomplete and, in fact, plaintiff's counsel advised the court of defendants' alleged default in producing documentary discovery at a June 21, 2011 status conference.¹

However, this court's July 14, 2010 decision and order denied plaintiff's motions to strike defendants' answer and to compel defendants to comply with plaintiff's written discovery demands. As of that date, this court had determined that plaintiff was not entitled to further written discovery from defendants and the only outstanding discovery was defendants' depositions. It appears that defendants' depositions were never conducted or even scheduled. In any event, the last possible day for plaintiff to file the note of issue was September 29, 2010. From the foregoing, this court can discern no basis for plaintiff to establish a justifiable excuse for the delay in filing the note of issue. See CPLR 3216(e).

Plaintiff's failure to comply with the July 14, 2010 decision and order and to serve and file a note of issue in response to the demand constitute a neglect to prosecute this action and demonstrates a general pattern of delay in proceeding by plaintiff. The conditions precedent set forth in CPLR 3216 (b) having been satisfied and plaintiff having failed to serve and file a note of issue within the ninety-day period set forth in said subdivision, and the plaintiff having failed to offer a justifiable excuse for the delay

¹ This conference had been scheduled for control purposes in light of plaintiff's appeal of the July 14, 2010 decision and order.

or demonstrate the existence of a meritorious cause of action, defendants' motion to dismiss pursuant to CPLR 3216 must be granted. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

Dated: New York, New York
June 24, 2011



HON. MARTIN SHULMAN, J.S.C.

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