

**Board of Managers of the 129 Lafayette St.  
Condominium v 129 Lafayette St. LLC**

2011 NY Slip Op 33053(U)

November 16, 2011

Sup Ct, NY County

Docket Number: 109791/10

Judge: Louis B. York

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

**LOUIS B. YORK**  
J.S.C.

PRESENT: \_\_\_\_\_  
*Justice*

PART 2

Index Number : 103032/2008  
BOARD OF MANAGERS  
vs.  
129 LAFAYETTE STREET LLC  
SEQUENCE NUMBER : 003  
VACATE ORDER JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

# FILED

NOV 23 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

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

Dated: 11/16/11

Luy  
**LOUIS B. YORK**, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X  
**BOARD OF MANAGERS OF THE 129 LAFAYETTE  
STREET CONDOMINIUM,**

Index No. 109791/10

Plaintiff,

-against-

**129 LAFAYETTE STREET LLC,**

Defendant.

**FILED**

NOV 23 2011

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**LOUIS B. YORK, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

This is a combined decision addressing motion seq. # 002 and seq. # 003. The first motion, made by plaintiff Board of Managers of the 129 Lafayette Street Condominium (hereafter Board of Managers) by notice of motion dated August 4, 2011, seeks an order granting (1) leave to serve and Amended/Supplemental Summons on new defendants, (2) leave to amend the Complaint, (3) extension of the time to file a Note Of Issue. The second motion, made by Board of Manager by notice of motion dated August 15, 2011, seeks to vacate the order <sup>infra</sup> dismissing the action. For the reasons stated ~~supra~~, the motions are denied.

**FACTS**

Board of Managers commenced this action in April 2008 for claims including fraud, specific performance, and breach of contract arising from the offering plan for the condominium located at 129 Lafayette Street. Initially the defendants included the Sponsor of the offering plan, 129 Lafayette Street LLC, the individual principals of the Sponsor, William Fegan, James Mooney, and Adrian Stroie, and the sales agent for the Sponsor, Stribling Marketing Associates,

LLC. However, pursuant to the Court's order of July 2009, claims against all defendants except 129 Lafayette have been dismissed.

Following service of an answer by the remaining defendant, a Preliminary Conference was held on October 13, 2010. The resulting Preliminary Conference Order states, *inter alia*, that: (1) depositions are to be held on December 16, 2010, continuing during that week until completed and that no adjournments may be made without court approval; (2) Plaintiff will respond to demands within 3 weeks; (3) the end date for disclosure will be February 2, 2011 with the Note of Issue to be filed by February 9, 2011; and (4) adjournment of the depositions without court approval will result in sanctions or waiver of further depositions or both.

Approximately a month later, due to Board of Manager's failure to provide discovery responses as directed by the Preliminary Conference Order, a Compliance Conference via telephone was scheduled and took place on November 17, 2010. During the telephone conference, the parties were directed to re-serve all discovery demands and to appear before the court for a Compliance Conference. A Compliance Conference then took place on December 1, 2010 resulting in a Compliance Conference Order dated December 2, 2010. This order stated that parties were to respond to all discovery demands by January 14, 2011, that depositions would commence on February 1, 2011, and that the deadline for discovery was extended to February 21, 2011 with the Note of Issue to be filed on February 28, 2011.

Board of Managers did not comply with this order and no discovery took place. Following months of inactivity and the passage of the extended Note of Issue filing date, the Court scheduled a Status Conference with the parties on July 20, 2011. In the Status Conference Order issued by the Court following this meeting, the Court very clearly directed that as a result

of continued and repeated failures to adhere to the Court's discovery orders, that unless the Note of Issue was filed by August 5, 2011, the action would be dismissed pursuant to CPLR § 3126.

On August 4, 2011, rather than obeying the clear instructions of the Court to file the note of issue, the Board of Managers filed the first of the present motions requesting, *inter alia*, an extension of the time to file the note of issue. The Court subsequently filed an order dismissing the action based on Board of Manager's failure to comply with the conditional order.<sup>1</sup>

## **DISCUSSION**

### **A. Motion Requesting Extension of Time to File Note of Issue**

Board of Managers has failed to comply with any of the Court's discovery orders including, most recently, the Court's conditional order explicitly stating that the action would be dismissed if Board of Managers failed to file the Note of Issue by August 5, 2011. The fact that Board of Managers filed a motion to extend the time to file the note of issue on that date rather than comply with the order, especially given that Board of Managers did not request a stay of the conditional order, is insufficient to set aside the dismissal of the action (*see Abouzeid v Cadogan*, 291 AD2d 423, 424 [2d Dept 2002]). Furthermore, as Board of Managers has failed to present any excuse or explanation for repeatedly ignoring the Court's disclosure orders, the Court denies the request to extend the time to file the note of issue.

Pursuant to CPLR § 2004, "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." Board of Manager's reason for the request is that discovery has not yet been completed. However, as

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<sup>1</sup> The Court notes that the copy of the order dismissing the action, submitted by the Board of Managers in its second motion (seq #003), appears to have been dated July 20, 2011. However the dismissal occurred on August 11, 2011 following Board of Managers' failure to comply with the Conditional Order dated July 20, 2011.

plaintiff is well aware, the Court's July 20, 2011 conditional order was due to Board of Managers continued and willful failure to follow the discovery orders of the Court. As such, the fact that discovery has not be completed is neither surprising, nor sufficient grounds for this Court to further extend the deadline for the Note of Issue. The motion requesting an extension of the time to file the Note of Issue is denied.

#### **B. Motion to Vacate the Order of Dismissal**

The Court also denies the motion by Board of Managers to vacate the dismissal of the action pursuant to CPLR 5015(a). As the Court stated *supra*, Board of Managers is not entitled to modification of the Court's July 20, 2011 conditional order based on its request to extend the time to file the note of issue. Furthermore, it is well established that to vacate a default judgment under CPLR 5015(a)(1), the proponent must establish both a meritorious cause of action and a reasonable excuse for the default (*see Achampong v Weigelt*, 240 AD2d 247, 247 [1st Dept 1997]). Here, regardless of whether Board of Managers has a meritorious cause of action, it has failed to give any reasonable excuse for the default. Once again, rather than give any reasonable excuse for ignoring the Court's orders, plaintiff simply argues that discovery was not complete. As stated *supra*, this excuse is insufficient. Furthermore, the claim of newly discovered evidence by Board of Managers hardly excuses its patently unacceptable conduct up to this point.

While the Court realizes that dismissal of an action under CPLR 3126 is a drastic remedy, plaintiff's continued and unexplained pattern of ignoring the orders of this Court is completely unacceptable. As the Court of Appeals stated in *Kihl v Pfeffer*, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (94 NY2d 118, 123 [1999]). In addition, the First Department has more recently noted, "[t]he public policy favoring resolution of cases on their merits is not promoted

by permitting a party to a single such matter to impose an undue burden on judicial resources to the detriment of all other litigants" (*Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286-287 [1st Dept 2008]). Therefore, as Board of Managers has failed to give any reasonable excuse or even an explanation for its repeated failure to obey the orders of this Court, its motion to vacate the order dismissing this action is denied.

As the action has been dismissed, the Court denies as moot the portions of the motion requesting leave to amend the Complaint and leave to serve Amended/Supplemental Summons on new defendants.

Therefore, for the reasons stated infra, the motion seeking leave to serve and Amended/Supplemental Summons on new defendants, leave to amend the Complaint, and an extension of the time to file a Note of Issue, and the motion seeking to vacate the order dismissing the action are denied.

Based on the foregoing, it is

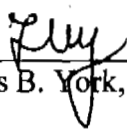
**ORDERED** that the motions by plaintiff Board of Managers of the 129 Lafayette Street Condominium are denied in their entirety.

Dated:  
11-16-11

**FILED**

ENTER: NOV 23 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
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Louis B. York, J.S.C.

**LOUIS B. YORK**  
J.S.C.