

**Aiken v Dawson**

2013 NY Slip Op 31612(U)

July 11, 2013

Sup Ct, New York County

Docket Number: 102302/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

MAI AIKEN,

Plaintiff,

-v-

JOAN O. DAWSON, PAUL DAWSON and TANDRA DAWSON,

Defendants.

INDEX No. 102302/11

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

MOTION SEQ. No. 001,002

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

**FILED**

JUL 22 2013

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to STRIKE.

**FILED**

PAPERS NUMBERED

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

Answering Affidavits- Exhibits 2, 5

Replying Affidavits 3

JUL 22 2013

**NEW YORK COUNTY CLERK'S OFFICE**

CROSS-MOTION: YES  NO

Motion sequence numbers 001 and 002 are consolidated for decision and are decided as follows:

In motion sequence number 001, defendants seek an order pursuant to CPLR § 3216(a) dismissing plaintiff's complaint, as plaintiff allegedly failed to timely respond to a duly served Ninety Day Notice. In sequence number 002, defendants seek an order pursuant to 22 NYCRR 202.21(e) striking the Note of Issue on the ground that the Certificate of Readiness is incorrect.

This action arises out of an alleged trip and fall occurring on October 19, 2010. Plaintiff claims to have fell due to an uneven sidewalk slab. Defendants are the owners

and managers of the adjacent building where plaintiff allegedly fell. Plaintiff commenced this action by filing a Summons and Complaint with the Clerk of this Court on or about February 24, 2011. Issue was joined by the defendants by service of a Verified Answer on March 30, 2011. Served with defendants Answer on March 30, 2011 were various discovery demands to include but not limited to demand for Bill of Particulars.

After not receiving a response to the various discovery demands, defendants, on or around November 19, 2012, filed a ninety day notice on plaintiff demanding pursuant to CPLR § 3216 that the prosecution of this matter resume and that the Note of Issue be served within 90 days after receipt of said demand. Again having not received a response from plaintiff, defendants filed the motion to strike the complaint on April 2, 2013.

Subsequent to the ninety day notice of November 19, 2012, (i) plaintiff filed her Note of Issue on May 8, 2013; (ii) plaintiff served her Verified Bill of Particulars on May 9, 2013; and (iii) plaintiff served her response to Combined Demands on May 15, 2013.

A plaintiff who receives a 90 day notice is required to either serve and file a timely Note of Issue or move, before expiration of the 90 day period, to vacate the notice or extend the 90 day period ( CPLR § 2004; Cope v. Barakaat, 89 A.D.3d 670, 671, 931 N.Y.S.2d 910 (2d Dept. 2011); Dominquez v. Jamaica Med. Ctr., 72 A.D.3d 876, 898 N.Y.S.2d 869 (2d Dept.2010). A plaintiff who fails to pursue either option may still avoid dismissal of the complaint by demonstrating both a justifiable excuse for the delay in responding to the 90 day notice and a meritorious cause of action ( CPLR § 3216(3); Palumbo v. Dell, 73 A.D.3d 723, 899 N.Y.S.2d 642 (2d Dept.2010); Picot v. City of New York, 50 A.D.3d 757, 855 N.Y.S.2d 237 (2d Dept. 2008).

Nevertheless, CPLR § 3216, however triggered, is “extremely forgiving” of litigation delay ( Baczowski v. Collins Constr. Co., 89 N.Y.2d 499, 503, 655 N.Y.S.2d 848, 678 N.E.2d 460 [1997] ), and there are a variety of circumstances in which the failure to comply with a CPLR § 3216 demand should in the exercise of proper discretion be excused ( Gibson v. Fakheri, 77 A.D.3d 619, 619–620, 908 N.Y.S.2d 356 (2d Dept. 2010); Zito v. Jastremski, 35 A.D.3d 458, 459, 825 N.Y.S.2d 255 (2d Dept 2006).

While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (see CPLR 3216 [e]; Di Simone v Good Samaritan Hosp., 100 NY2d 632, 633 [2003]), such a dual showing is not strictly necessary to avoid dismissal of the action (see Baczowski v. Collins Cosntr. Co., supra at 503-505).

This Court will exercise its discretion in excusing the plaintiff's failure to comply with the ninety day notice, since the discovery turned over to defendants, albeit late, indicate a meritorious claim at this early stage of the proceeding.

With respect to defendants' motion to strike the note of issue, a party may move to vacate the note of issue if the moving party shows that the case is not ready for trial, and it appears to the court that a material fact in the certificate of readiness is incorrect (see Uniform Rules for Trial Courts [22 NYCRR] § 202.21 [e] ). The general policy of this State, is to encourage “open and far-reaching pretrial discovery” ( Kavanagh v. Ogden Allied Maintenance Corp., 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197 [1998] [internal quotation marks omitted] ). To vacate the note of issue, discovery

requests must be legitimate and pending ( see Tilden Fin. Corp. v. Muffoletto, 161 A.D.2d 583, 555 N.Y.S.2d 161 [1990] ), not resolved or contrived. It is well settled that "a note of issue should be vacated when same is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed" ( Savino v. Lewittes, 160 A.D.2d 176, 177, 553 N.Y.S.2d 146). Here, plaintiff's representations in its certificate of readiness that the case is ready for trial, and that there are no outstanding requests for discovery are inaccurate. Depositions have not been held of the parties, nor have they been waived.

Accordingly it is

ORDERED that the motion to strike the complaint is denied; and it is further

ORDERED that the motion to strike the note of issue is granted; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of

entry on the Trial Support Office (Room 158); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 8/16, 2013, at 10:00 AM.

Dated: 7/11/13

Donna M. Mills  
J.S.C.  
DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
JUL 22 2013  
NEW YORK  
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