

**Margaret Tietz Nursing & Rehabilitation Ctr. v
Solomon**

2017 NY Slip Op 33104(U)

September 26, 2017

Supreme Court, Queens County

Docket Number: 4098/15

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

MARGARET TIETZ NURSING and
REHABILITATION CENTER,

Plaintiffs,

-against-

RACHEL SOLOMON and GABRIEL SOLOMON,

Defendants.

Index No.: 4098/15

Motion Date: 7/25/17

Motion Seq. No.: 3

Motion Date: 9/5/17

Motion Seq. No.: 4

Motions Seq. #3 and #4 are combined for disposition.

The following papers numbered 1 to 12 read on this motion (Seq.#3) by plaintiff for an Order pursuant to CPLR 3126 striking the defendants' answer for failure to respond fully to plaintiff's Notice of Discovery and Inspection dated June 16, 2015 and for failure to provide any responses to plaintiff's First Set of Interrogatories dated June 16, 2015; and motion (Seq.#4) by plaintiff for an extension of time to submit reply and opposition to defendant, Gabriel Solomon's cross-motion; and cross-motion by defendant, Gabriel Solomon, for summary judgment dismissing the complaint insofar as it is asserted against him; an order vacating the note of issue as discovery remains outstanding or in the alternative, an order dismissing the complaint for lack of personal jurisdiction; or dismiss the complaint insofar as it is asserted against him pursuant to CPLR 3215(c).

PAPERS
NUMBERED

Seq.#3 Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.	5 - 8
Replying Affidavits.....	
Seq.#4 Order to Show Cause-Affidavits-Exhibits ..	9 - 12

Upon the foregoing papers it is ordered that these motions are determined as follows.

The plaintiff's motion (Seq.#4) for an extension of time to submit opposition to the cross-motion is granted without opposition (see Calderone v Molloy College, 153 AD3d 491 [2017]).

The defendant's, Gabriel Solomon's', cross-motion to dismiss the complaint on the grounds of lack of personal jurisdiction is denied. The defendant waived this defense by having failed to move for such relief within 60 days of serving his answer (see CPLR 3211[e]). To extend the time to move the defendant must establish more than merely "good cause" or "in the interest of justice" (e.g., CPLR 306-b, 2004 and 3212[a]), but the stricter standard of "undue hardship" which requires proof that the motion could not have been made within the time limits provided by CPLR 3211(e) by the exercise of ordinary diligence (see, Abitol v Schiff, 180 Misc2d 949 [1999], aff'd as modified on other grounds, 276 AD2d 571 [2000]; see also Thompson v Cuadrado, 277 AD2d 151 [2000]). The defendant failed to demonstrate "undue hardship". Contrary to defendant's claim, the fact that the so Ordered stipulations issued in the compliance conference part stayed the action and stayed any further motions for discovery did not operate to stay the defendant, who allegedly did not previously appear, from moving to dismiss the complaint on the grounds of lack of personal jurisdiction.

The branch of the cross-motion pursuant to CPLR 3215(c) to dismiss the complaint insofar as it is asserted against Gabriel Solomon is also denied.

CPLR 3215(c) provides that: "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "To avoid dismissal of the complaint as abandoned pursuant to CPLR 3215(c), a plaintiff must offer a reasonable excuse for its delay and must demonstrate that the complaint is meritorious" (GMAC v Minewiser, 115 AD3d 707, 708 [2014]; quoting London v Iceland Inc., 306 AD2d 517, 517 [2003]). Here the plaintiff demonstrated that it did not abandon the action by its multiple court appearances, the prosecution of motions, entering into several stipulations and evidence that it was involved in settlement negotiations. Moreover, it has also demonstrated that it has potentially meritorious claims as against both defendants.

The defendant's motion for summary judgment is also denied. A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985];

Zukerman v City of New York, 49 NY2d 557, 562 [1980]). If the movant fails to make such a showing the motion must be denied regardless of the sufficiency of the opposing papers (Alvarez v Prospect Hosp., supra, at 324; Winegrad v New York Univ. Med. Ctr., supra, at 854).

This is an action to recover \$30,442.00 representing the cost of skilled nursing care, room and board provided to Rachel Solomon at the plaintiff's facility from November 5, 2013 through February 9, 2014. Plaintiff's claim as against Gabriel Solomon are essentially that assets of Rachel Solomon were transferred to the defendant, Gabriel Solomon, without fair consideration to defraud creditors including the plaintiff in violation Debtor Creditor Law §§ 270, 273 275, et seq.

Here the defendant's evidence failed to establish his entitlement to summary judgment by eliminating all issues of fact sufficient to warrant entry of judgment as a matter of law. "[A] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Disa Realty, Inc. v Rao, 25 NYS3d 677, 679 [2016] quoting LeBlanc v Skinner, 103 AD3d 202, 212 [2012] [internal quotation marks and citations omitted]). Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony are for the trier of fact (see LeBlanc v Skinner, supra at 211-212 [2012] quoting Gille v Long Beach City School Dist., 84 AD3d 1022, 1023 [2011]).

In addition, summary judgment in this case is premature inasmuch as the defendants have failed to provide responses to the plaintiff's discovery demands and failed to appear for depositions, as provided in the Preliminary Conference Order, the Compliance Conference Order and the three so Ordered Stipulations (CPLR 3212[f]). The information sought is solely in the defendants' knowledge and possession and their failure to provide the demanded items prevents the plaintiff from establishing its claims.

The branch of the defendants' cross-motion and the plaintiff's motion to strike the Note of Issue is granted. The action may be restored to the trial calendar in accordance with the rules of the Trial Scheduling Part.

The plaintiff's motion to strike the defendants' answer is denied with leave to renew if the defendants fail to provide full and meaningful responses to plaintiff's responses to plaintiff's Notice of Discovery and Inspection dated June 16, 2015

plaintiff's First Set of Interrogatories dated June 16, 2015 within 45 days of the date of entry of this Order.

In addition, the defendants shall appear for a deposition on or before December 8, 2017 at a time and place to be agreed upon by the attorneys for the parties.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: September 26, 2017
D# 56

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J.S.C.