

**Leone v 175 Varick St., LLC**

2018 NY Slip Op 32297(U)

September 18, 2018

Supreme Court, New York County

Docket Number: 150714/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

-----X  
ANNA LEONE, INDEX NO. 150714/2017  
Plaintiff, MOTION DATE 09/18/2018  
- v - MOTION SEQ. NO. 003

175 VARICK STREET, LLC, AEW CAPITAL MANAGEMENT, LP,  
750 ZECKENDORF, LLC, EXTELL VARICK STREET, LLC, PVI WW  
175 PROPERTY, LLC, WEWORK COMPANIES, INC. THE  
GEORGIAN PRESS, INC.

**DECISION AND ORDER**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44,  
45, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65  
were read on this motion to/for EXTEND - TIME

Upon the foregoing documents, and as stated on the record at the September 18, 2018 oral argument, for the reasons stated on the record, and as stated below, it is ORDERED that the branch of the instant motion by defendant 175 Varick Street, LLC (“Varick”) that is made pursuant to CPLR 3012 (d) to excuse Varick’s failure to timely appear and respond to the complaint in this action and extend Varick’s time to appear and respond to the complaint to the date of this motion is granted. That branch of the instant motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint as to Varick is also granted. That branch of the instant motion pursuant to 22 NYCRR 130-1.1 (a) to award Varick attorney’s fees as a result of Plaintiff’s allegedly frivolous conduct is denied.

**BACKGROUND**

On April 19, 2018, this Court denied the motion of Plaintiff Anna Leone (“Leone”) pursuant to CPLR 3215 for an order directing the entry of a default judgment against movant Varick. (NYSCEF Doc No. 38.) As stated in the Court’s April 19, 2018 decision and order on Plaintiff’s motion, Leone commenced the instant action on January 23, 2017, by e-filing a summons and Complaint. The Complaint alleges that, on or about April 24, 2014, Defendants owned, managed, maintained, controlled, operated, supervised, and inspected premises located at 175 Varick Street, New York, New York (the “Premises”). The Complaint further alleges that Leone was lawfully within the Premises on April 24, 2014, when she was caused to be injured by a dangerous condition at the Premises due solely to the negligence of the defendants.

In an affidavit of merit dated February 22, 2018, that was submitted by Plaintiff on the prior motion, Leone states that “[t]his is an action to recover monetary compensation for serious injuries [she herself] sustained from an incident that occurred on April 24, 2014[,] at approximately 5:00 p.m.” Leone further states that “[she] was in the course of [her] employment

with AKQA when a defective window fell on [her] head.” Leone further states that “the defendants herein[] owned, leased, operated, and/or maintained the premises at which the foregoing incident occurred.”

Now, Varick moves pursuant to CPLR 3012 (d) for an extension of time to appear in this action and for the Court, in effect, to deem its motion to dismiss, filed on June 27, 2018, timely.

Movant argues, in sum and substance, that shortly after the action was commenced on January 23, 2017, on or about March 2017, counsel for Varick contacted counsel for Plaintiff to request that Varick be removed from the case. Movant has annexed as exhibit D to the instant motion an email, dated April 4, 2017, from Plaintiff’s counsel to Varick’s counsel pledging not to take further action against Varick based upon counsel’s representation that it did not own the property at the time of Plaintiff’s accident and indicating that Plaintiff would be providing Varick with a stipulation of discontinuance upon a review of certain documents sent to Plaintiff from Varick. Movant then argues that it followed up with Plaintiff on November 20, 2017, and was told, in an email annexed as exhibit E to this motion, that Plaintiff would not discontinue against Varick. Although Varick did not submit any opposition to Plaintiff’s motion for an order directing the entry of a default judgment against it, that prior motion was denied on April 19, 2018, as previously indicated.

Although the Court had previously found that Varick had no connection to the Premises on the date of Plaintiff’s alleged incident, April 24, 2014, movant has clarified in its papers that entity “175 Varick, LLC” is an entity unrelated to movant that became a leaseholder at the Premises on August 7, 2014. This was not clear to the Court in the moving papers submitted by Plaintiff on the prior motion.

Regardless, in the instant motion, Varick has submitted, as exhibit A, a certain Memorandum of Lease, dated May 26, 1999, indicating that Varick became a co-tenant at the Premises with XT-IT Fashions, Inc. as co-tenant and The Georgian Press, Inc. as landlord. Pursuant to an Assignment and Assumption of Lease Agreement submitted in the instant motion as exhibit B, Varick subsequently became the sole tenant under the lease. Varick then occupied the Premises as the sole tenant under the lease until May 20, 2005, when, pursuant to an Assignment and Assumption of Lease Agreement, Varick assigned its entire interest in the lease to Extell Varick LLC.

In sum and substance, movant argues that it had no interest in the Premises for nearly nine years prior to the accident (May 20, 2005, to April 24, 2014).

Plaintiff argues in its opposition papers that Varick has not provided a reasonable excuse for its delay in appearing in this action. Plaintiff argues that there has been a delay of more than one year in Varick’s appearance and that Varick never opposed its motion for an order directing the entry of a default judgment. Plaintiff further argues that it was made clear that Plaintiff would not discontinue as against Varick.

While Plaintiff argues that Defendant must provide a meritorious defense to this action, it should be noted that this is not the standard in the Appellate Division, First Department, which

uses a multifactor test as stated by the court in *Emigrant Bank v Rosabianca* (156 AD3d 468 [1st Dept 2017]), which Plaintiff did cite in its opposition papers. Those factors include the length of the delay, excuse offered, extent to which the delay was willful, possibility of prejudice to adverse parties, and potential merits of any defense.

The substance of the remainder of Plaintiff's opposition papers appears to be boilerplate applicable to a motion for summary judgment, which the Court will not consider insofar as much of it is inapplicable, although Plaintiff alleges that Varick has not demonstrated that it did not have actual or constructive notice of the dangerous condition which allegedly injured Plaintiff or that it did not manage or maintain the Premises.

In reply, Varick submits an affidavit by member Martin Meyer to address Plaintiff's arguments regarding notice and management raised in opposition. The affidavit states that Varick did not have actual or constructive notice as to the allegedly defective window and did not cause or create the defect. The affidavit further reiterates that Varick had no connection to the Premises since May 20, 2005, not that Varick merely was not the owner of the Premises, but had no connection at all.

Varick further argues that Plaintiff's time to appeal this Court's prior decision on the motion for an order directing the entry of a default judgment expired on July 1, 2018, and that Plaintiff did not appeal it. Varick further argues that the Court should disregard all references in Plaintiff's opposition papers to an inappropriate summary judgment standard. Varick then argues that Plaintiff has ignored its documentary proof that it had no connection to the Premises as of May 20, 2005. In addition, Varick reiterated the arguments in its moving papers.

At the September 18, 2018 oral argument on this motion, Varick reiterated the arguments in its papers. Plaintiff, in opposition, notably stated at the oral argument that Varick had a connection to the Premises seventeen days prior to the accident owing to that certain lease signed on August 7, 2014. That would have placed the accident as having occurred on August 24, 2014. As was pointed out to Plaintiff by Varick and the Court at the oral argument, Plaintiff alleged the subject accident occurred on April 24, 2018, not August 24, 2014. This appears to have been a misapprehension by Plaintiff as to when the accident was alleged to have occurred.

Further, Plaintiff indicated that the matter has been settled as to all other defendants.

### DISCUSSION

CPLR 3012 (d) provides, in relevant part, that "the court may extend the time to appear . . . upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

The Court, upon weighing the *Emigrant Bank* factors, will grant Varick's motion to extend its time to appear in the action and will extend the time to June 27, 2018, the date the instant motion was filed, nunc pro tunc. Specifically, the Court finds that Plaintiff's argument as to the lengthy delay of Varick in appearing in the action is disingenuous, as Plaintiff herself had stated to Varick that no action would be taken against it and had strongly suggested she would discontinue the matter as against Varick. As such, the Court finds that any delay in appearing

until now on the part of Varick was not willful and that Varick reasonably relied on Plaintiff's prior representations.

While it is perplexing that Varick did not submit opposition to Plaintiff's motion for an order directing the entry of a default judgment filed in February 2018, nevertheless, that motion was denied. Since then, there have been no discovery conferences in this matter, and Plaintiff did not request a preliminary conference until July 12, 2018, after Varick filed the instant motion.

Critically, Varick has demonstrated a meritorious defense to the action by means of exhibits A-C. As such, that branch of the instant motion seeking an extension of time to appear in the action is granted.

The Court having granted the motion for an extension of time to appear, the Court grants Varick's motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss. Specifically, based upon the documentary evidence submitted and a review of the complaint, the Court finds that Plaintiff does not have a cause of action against Varick, as Varick had no interest in the Premises since May 20, 2005. The complaint alleges that Varick "owned, managed, maintained, controlled, operated, supervised, and inspected" the Premises as of April 24, 2014, when Leone was "caused to be injured" due to "defendants' negligence by permitting a dangerous condition within said premises the defendant knew, or should have known, existed and continued to exist within said premises."

As the documentary evidence shows that Varick had no interest in the Premises since May 20, 2005, and the affidavit from its member indicates that it had no interest and neither had notice of nor created a dangerous condition at the Premises, the motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss is granted.

The Court denies Varick's application for attorney's fees pursuant to 22 NYCRR § 130-1.1. The Court finds based upon the motion submission that Varick has failed to show that Plaintiff's conduct was frivolous as defined in that rule.

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CONCLUSION

Accordingly, it is

ORDERED that the instant motion by defendant 175 Varick Street, LLC ("Varick") is granted in part and denied in part, to the extent that it is

ORDERED that the branch of the motion that is made pursuant to CPLR 3012 (d) to excuse Varick's failure to timely appear and respond to the complaint in this action and extend Varick's time to appear and respond to the complaint to the date of this motion is granted; and it is further

ORDERED that the branch of the motion that is made pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint as to Varick is also granted; and it is further

ORDERED that the branch of the motion pursuant to 22 NYCRR 130-1.1 (a) to award Varick attorney's fees as a result of Plaintiff's allegedly frivolous conduct is denied; and it is further

ORDERED that, within 30 days of the date of the decision and order on this motion, movant shall serve a copy of this order with notice of entry upon all parties and upon the clerk, who is directed to enter judgment accordingly as to the dismissal of the complaint as against movant; and it is further

ORDERED that, within 30 days of the date of the decision and order on this motion, movant shall obtain a copy of the transcript of the September 18, 2018 oral argument, deliver a hard copy to the Court, and upload a copy to NYSCEF; and it is further

ORDERED that, based upon Plaintiff's representation to the Court that the matter has been resolved as to all defendants other than movant, and based upon that the matter has been dismissed as against movant, the Court will mark the matter settled.

The foregoing constitutes the decision and order of the Court.

9/18/2018  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

*Robert D. Kalish*  
~~HON. ROBERT D. KALISH, J.S.C.~~  
HON. ROBERT D. KALISH, J.S.C.