

King v City of New York
2019 NY Slip Op 30236(U)
January 31, 2019
Supreme Court, New York County
Docket Number: 152491/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM
Justice

-----X
MICHAEL KING,
Plaintiff,

INDEX NO. 152491/2015
MOTION DATE 01/22/2019
MOTION SEQ. NO. 003

- v -

CITY OF NEW YORK, MURINI HOLDINGS, LLC., CHRISTOPHER
TSAI,
Defendants.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISMISSAL DUE TO LACK OF PROSECUTION

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action, defendant Murini Holdings, LLC moves, pursuant to CPLR 3216, to dismiss the complaint due to the failure by plaintiff Michael King to prosecute the action. After a review of the motion papers and the relevant statutes and case law, the motion, which is unopposed, is granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Michael King commenced this personal injury action against defendants the City of New York (the City) and Murini Holdings, LLC (Murini) by filing of a summons and complaint on March 13, 2015. Doc. 1. The City and Murini thereafter joined issue by service of their answers.

Docs. 8 and 9.¹ Murini's answer was served on May 14, 2015. Doc. 8. Murini impleaded third party defendant Christopher Tsai (Tsai) on February 3, 2016. Doc. 5. Plaintiff then amended the complaint to name Tsai as a direct defendant and Tsai answered the amended complaint on or about March 8, 2016. Docs. 12, 16, 17.

On June 19, 2018, plaintiff's attorney moved, by order to show cause, to be relieved as counsel, citing "irreconcilable differences" with his client. Doc. 46 at par. 9. By order entered July 20, 2018, this Court granted counsel's motion. Doc. 54. In granting the motion, this Court stayed the action for 30 days, during which time plaintiff was to decide whether to obtain new counsel or appear pro se, and the parties were directed to appear for a compliance conference on November 27, 2018. Doc. 54.² The order was served on plaintiff by certified mail and regular mail. Docs. 55 and 57. To date, plaintiff has not retained new counsel.

On October 2, 2018, after the termination of the 30-day stay, counsel for Murini served plaintiff with a "90 Day Notice to Resume Prosecution" (the 90-day notice) by certified mail pursuant to CPLR 3216. Docs. 64 - 65. Murini now moves, pursuant to CPLR 3216, to dismiss the complaint in its entirety due to plaintiff's failure to prosecute the action, despite the 90-day notice. The motion was served on plaintiff by certified mail, return receipt requested, on December 18, 2018. Docs. 60, 66.

¹ By order dated December 21, 2016, the City was granted summary judgment dismissing all claims against it. Doc. 49.

²Due to plaintiff's failure to appear, the compliance conference scheduled for November 27, 2018 did not proceed. Doc. 61 at par. 8. Murini's counsel erroneously states that this conference was scheduled for November 22, 2018. Id.

LEGAL CONSIDERATIONS

Pursuant to CPLR 3216(b), a movant must satisfy three conditions in order for a court to dismiss a complaint for failure to prosecute: (1) issue must have been joined; (2) one year must have elapsed since issue has been joined in the action; and (3) the court or the party seeking the relief shall have served a 90-day notice 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 the demand. The 90-day notice must also state that a default in complying with the demand within the ninety-day notice period will serve as a basis for a motion for dismissal. CPLR 3216(e) provides that, if a party fails to serve and file a note of issue within ninety days of receiving the 90-day notice, the court may grant a motion to dismiss based on such failure unless the party "shows justifiable excuse for the delay and a good and meritorious cause of action."

As noted above, Murini and Tsai served their answers on May 14, 2015 and March 8, 2016, respectively, and, thus, more than one year has elapsed since they both joined issue. Plaintiff was thereafter served by certified mail with a 90-day notice demanding that he resume prosecution of the action and serve and file a note of issue within ninety days, and a warning that his failure to comply would serve as a basis for a motion for dismissal. To date, plaintiff has neither resumed prosecution of the action nor filed a note of issue. Additionally, since plaintiff has failed to oppose this motion, he has not provided any justifiable excuse for his delay or a meritorious cause of action. See CPLR 3216(e). Accordingly, Murini's motion to dismiss the complaint in its entirety is granted.

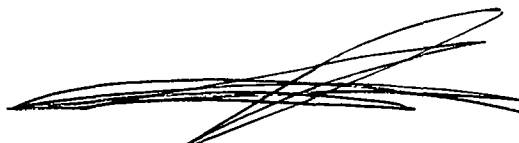
In light of the foregoing, it is hereby:

ORDERED that the motion by defendant Murini Holdings LLC seeking to dismiss the complaint in its entirety is granted without opposition, and the Clerk is directed to enter judgment in favor of defendants Murini Holdings LLC and Christopher Tsai dismissing this action in its entirety, together with costs and disbursements to said defendant, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, counsel for movant shall serve a copy of this order, with notice of entry, on all parties by certified mail, return receipt requested; and it is further

ORDERED that this constitutes the decision and order of the court.

1/31/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE