

Majstorovic v Fairway Mkt.

2020 NY Slip Op 30602(U)

February 27, 2020

Supreme Court, New York County

Docket Number: 151644/2013

Judge: Nancy M. Bannon

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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. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

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INDEX NO. 151644/2013

ZLATIJA MAJSTOROVIC,

MOTION DATE 02/26/2020

Plaintiff,

MOTION SEQ. NO. 004

- v -

FAIRWAY MARKET, FAIRWAY BROADWAY LLC,
FAIRWAY BROADWAY LLC D/B/A FAIRWAY MARKET,
229 WEST 74TH STREET CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for

MISCELLANEOUS

In this personal injury action commenced in February of 2013, the plaintiff claims to have been injured when she tripped and fell in a Fairway supermarket on February 25, 2010. The plaintiff did not provide discovery for two years. Not even a Bill of Particulars or authorizations were served. By an order dated September 16, 2015, the court granted a motion by the defendant Fairway Broadway LLC to preclude the plaintiff from offering evidence at trial to the extent of directing her to provide all outstanding discovery, and a Bill of Particulars, within 45 days. The matter was thereafter stayed for a time as a result of bankruptcy and liquidation proceedings concerning the Fairway defendants.

A compliance conference order dated July 19, 2018, notes that the bankruptcy stay was recently lifted, but that only limited document discovery had been done to date. The court directed the plaintiff to respond to the defendants' latest demand dated April 26, 2018 and provide requested authorizations, and ordered depositions and an IME of the plaintiff. A compliance conference order dated January 24, 2019, states that the plaintiff did not provide

corrected authorizations or a supplemental Bill of Particulars as directed in a prior order, without excuse, and directed her to do so within five days. The Note of Issue deadline, after several prior extensions, was set as May 31, 2019, and marked "FINAL 3X – No adjournment or extension without motion practice."

Two weeks later, the plaintiff's counsel moved to be relieved, representing that the plaintiff was not cooperating with the discovery process, rendering counsel unable to schedule the plaintiff's deposition or IME, that she maintained conflicting views on how to proceed and was not communicating with counsel, making his continued representation impossible. By order dated April 15, 2019, the motion was granted, counsel was relieved and the matter was stayed 45 days for the plaintiff to retain new counsel. She did not.

Since the case had been dormant, the court scheduled a status/settlement conference for October 31, 2019. The defendants appeared by counsel. The plaintiff appeared, unrepresented. No settlement discussion took place.

On October 31, 2019, the court entered an order pursuant to CPLR 3216 directing that the plaintiff resume prosecution of the case within 90 days or the complaint would be dismissed. The order noted that no Note of Issue had been filed, and the deadline was May 31, 2019, six months prior. "When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a Note of Issue or by moving, before the default date, to either vacate or extend the 90-day period" Austin v Gould, 159 AD3d at 422 (1st Dept. 2018), *citing* Primiano v Ginsberg, 55 AD3d 709 (2nd Dept. 2008); Serby v Long Is. Jewish Med. Ctr., 34 AD3d 441 (2nd Dept. 2006) *lv denied* 8 NY3d 805 (2007); *see* HSBC Bank USA, N.A. v Williams, 177 AD3d 950 (2nd Dept. 2019). The plaintiff did not move to extend the Note of Issue deadline or the 90-day period. Rather, on January 29, 2020, the plaintiff moved, *pro se*, for leave to "proceed with the case *pro se*." No other relief was requested. Although this motion was made within 90 days, it was not the proper motion. Indeed, this motion was without purpose since any individual party may proceed unrepresented if they so choose. The plaintiff

proffered no excuse for her failure to timely provide discovery as demanded by the defendant and ordered by the court and for her pattern of delay in prosecuting this now seven-year old case. See Rosado v Ward Trucking Co., 186 AD2d 3 (1st Dept. 1992); Rubens v STO Industries, Inc., 160 AD2d 662 (1st Dept. 1990).

Defendants Fairway Market, Fairway Broadway LLC and Fairway Broadway LLC d/b/a Fairway Market opposed the plaintiff's motion and cross-moved to dismiss the complaint pursuant to CPLR 3216. Defendant 229 West 74th Street Corporation, the property owner, cross-moved for the same relief. The plaintiff has not opposed the cross-motions.

The cross-motions to dismiss the complaint are granted pursuant to CPLR 3216 for the reasons stated in the defendants' motion papers and herein.

Furthermore, as suggested in the defendants' papers, dismissal is warranted on the alternative ground of CPLR 3126, for the plaintiff's willful noncompliance with discovery orders. See Perez v City of New York, 95 AD3d 675 (1st Dept. 2012).

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

Accordingly, it is

ORDERED that the plaintiff's motion is denied as it does not request any relief that can be granted, and it is further,

ORDERED that the cross-motion of defendants Fairway Market, Fairway Broadway LLC and Fairway Broadway LLC d/b/a Fairway Market is granted, without opposition, and the complaint is dismissed as to those defendants pursuant to CPLR 3216 for want of prosecution, and it is further

ORDERED that the cross-motion of defendant 229 West 74th Street Corporation is granted, without opposition, and the complaint is dismissed as to that defendant pursuant to CPLR 3216 for want of prosecution, and it is further,

ORDERED that the Clerk shall enter judgment dismissing the complaint in its entirety.

This constitutes the Decision and Order of the court.

2/27/2020
DATE



NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: