

Martinez v Kaw Nylo Nyack, LLC

2020 NY Slip Op 31027(U)

April 21, 2020

Supreme Court, New York County

Docket Number: 160946/2015

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 160946/2015

RODRIGO UGALDE MARTINEZ,

Plaintiff,

MOTION SEQ. NO. 008

- v -

KAW NYLO NYACK, LLC, WY MANAGEMENT LLC,
HAMPSHIRE HOTELS MANAGEMENT LLC, NYLO
NYACK, LLC, HHM NYACK, LLC, JAN DRYWALL CORP.,
WY BUILDERS, LLC,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 122, 123, 124, 125,
126, 127, 128, 129

were read on this motion to/for DISMISSAL PURSUANT TO CPLR 3216

In this personal injury action commenced by plaintiff Rodrigo Ugalde Martinez,
defendant JAN DRYWALL CORP. moves, pursuant to CPLR 3216, to dismiss the complaint
based on plaintiff's failure to prosecute the action. After a review of the motion papers and the
relevant statutes and case law the motion, which is unopposed, is denied with leave to renew
upon proper papers.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was injured on September 17, 2015 when he fell from a scaffold while
performing work at a construction site. Doc. 1. On October 26, 2015, plaintiff, then represented
by William Schwitzer & Associates, P.C., commenced the captioned action against defendants
KAW NYLO NYACK, LLC, WY MANAGEMENT LLC, HAMPSHIRE HOTELS

MANAGEMENT LLC, and NYLO NYACK, LLC. Doc. 1.

On December 1, 2016, plaintiff commenced a separate action (“the subsequent action”) in this Court under Index Number 160122/16, arising from the same accident, as against defendants JAN DRYWALL CORP. (“JAN”) and WY BUILDERS, LLC. Doc. 124. On April 10, 2017, JAN served its verified answer in the subsequent action. Doc. 125. Plaintiff thereafter moved to consolidate the two actions and, by order entered November 1, 2017, this Court (Bluth, J.) consolidated the actions under Index Number 160946/15. Doc. 126.

By order entered October 19, 2018, this Court granted a motion by The Law Office of Michael Lamonsoff to be relieved as counsel for plaintiff.¹ Doc. 115. In that order, this Court noted that plaintiff was incarcerated at the Metropolitan Detention Center (“MDC”), a federal prison located at 80 29th Street, Brooklyn, New York 11232. Doc. 115. This Court issued a 60-day stay to permit plaintiff to retain new counsel and scheduled a status conference for January 29, 2019. Doc. 115. Plaintiff was served with a copy of the order, with notice of entry, on October 17, 2018. Doc. 112.

When plaintiff failed to appear for the January 29, 2019 conference, this Court adjourned the conference until June 18, 2019 in order to provide plaintiff with additional time to retain new counsel. Doc. 122 at par. 8. However, plaintiff failed to appear for the June 18, 2019 conference as well.

On or about August 23, 2019, JAN purportedly served plaintiff with a “Demand for Resumption [of] Prosecution of Action and for Note of Issue”, otherwise known as a “90-day notice”, pursuant to CPLR 3216. Doc. 128. When plaintiff failed to respond to the 90-day notice, JAN filed the instant motion to dismiss.

¹ Neither the motion papers nor the NYSCEF filings reflect precisely when The Law Offices of Michael Lamonsoff succeeded William Schwitzer & Associates, P.C. as counsel for plaintiff.

LEGAL CONCLUSIONS:

The provision governing 90-day notices, which allows for the dismissal of a complaint due to a plaintiff's failure to prosecute an action, is CPLR 3216. CPLR 3216 (b)(3) provides, in pertinent part, that:

The court or party seeking [dismissal] . . . shall have served a written demand 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 such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

The affidavit of service reflects that JAN served plaintiff with the 90-day notice by regular mail, certified mail and "in [p]erson at the MDC. Doc. 128. Although the affidavit of service indicates that the 90-day notice was "mailed" on August 23, 2019, it does not specify whether it was sent by regular or certified mail (or both) on that day. Doc. 128. Nor does the affidavit of service specify when plaintiff was served "in [p]erson" with the 90-day notice. Additionally, JAN does not annex any proof of certified mailing to its motion. Also problematic is that this Court's search of the Federal Bureau of Prisons database revealed two individuals named Rodrigo Martinez, one who was released in 2009 and the other who was released in 2017.² Thus, it is uncertain whether plaintiff was still imprisoned as of the time of the alleged service of the 90-day notice.

Finally, there is no indication in NYSCEF that plaintiff was served with the instant motion. Although this is an efiled case, and the Court Rules allow for service of motions by

² The database did not reveal an inmate with the name Rodrigo Ugalde Martinez.

efiling (see 22 NYCRR 202.5-bb), it is uncertain whether plaintiff, who may have been incarcerated when the motion was filed, and who is no longer represented by counsel, ever received a copy of the instant motion.

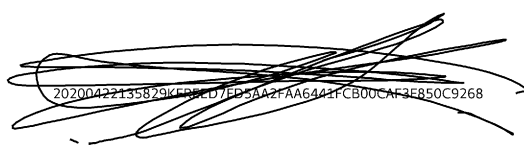
Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is denied with leave to renew upon proper papers within 30 days; and it is further

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

4/21/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE