

Chapman v Stanley Commons Hous. Dev.

2020 NY Slip Op 32782(U)

August 17, 2020

Supreme Court, Kings County

Docket Number: 510332/16

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August 2020

HONORABLE FRANCOIS A. RIVERA

-----X

ANDREW M. CHAPMAN.

Plaintiff,

DECISION & ORDER

Index No. 510332/16

- against -

STANLEY COMMONS HOUSING DEVELOPMENT,
FUND CORPORATION AND STANLEY SENIOR, L.P.,
Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion of third party defendant Galaxy G.C. Group LLC (hereinafter Galaxy), filed on February 6, 2020, under motion sequence number five for an order pursuant to CPLR 3216 dismissing the complaint of Andre M. Chapman (hereinafter the plaintiff or Chapman) for failure to prosecute. The motion is unopposed.

- Notice of motion
- Affirmation in support
- Exhibits A-E

BACKGROUND

On June 17, 2016, plaintiff commenced an action for damages for personal injury against Stanley Commons Housing Development Fund Corporation and Stanley Senior, L.P. (hereinafter the defendants) by filing a summons and verified complaint with the

RECEIVED
08/25/2020

Kings County Clerk's office (hereinafter KCCO).

On August 26, 2016, the defendants filed a joint verified answer.

On April 19, 2017, the defendants filed a third-party summons and verified complaint against Galaxy for contractual indemnity, common law indemnity, contribution, breach of contract and failure to procure insurance.

On October 13, 2017, Galaxy filed a verified answer with cross claims to the defendants' third-party complaint. Galaxy's cross claims were for contractual indemnity, common law indemnity, contribution, and for insurance coverage asserted against the defendants.

On July 2, 2019, Galaxy served Chapman with a 90-day notice to resume prosecution of this matter and to file the note of issue within 90 days of receipt of said demand. The plaintiff did not oppose the motion and did not file a note of issue.

The plaintiff did not assert a claim against Galaxy.

LAW AND APPLICATION

CPLR 3216 provides in pertinent part as follows:

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

- (1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The court or party seeking such relief, as the case may be, 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 or her for unreasonably neglecting to proceed. Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

(c) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule serves and files a note of issue within such ninety day period, the same shall be deemed sufficient compliance with such demand and diligent prosecution of the action; and in such event, no such court initiative shall be taken and no such motion shall be made, and if taken or made, the court initiative or motion to dismiss shall be denied.

(d) After an action has been placed on the calendar by the service and filing of a note of issue, with or without any such demand, provided, however, if such demand has been served, within the said ninety day period, the action may not be dismissed by reason of any neglect, failure or delay in prosecution of the action prior to the said service and filing of such note of issue.

(e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

CPLR 3216 applies to a party who unreasonably neglects or otherwise delays in the prosecution against any party who may be liable to a separate judgment. On July 2,

2019, Galaxy served plaintiff with a 90-day notice to resume prosecution of this matter and to file the note of issue within 90 days of receipt of said demand. The plaintiff did not oppose the motion and did not file a note of issue.

However, the plaintiff has not plead a cause of action against Galaxy.

Consequently, under no circumstance can Galaxy be liable to a separate judgment in favor of the plaintiff. The procedural vehicle of CPLR 3216 for an accelerated judgment of dismissal for failure to prosecute is not available to Galaxy as a third party defendant as against the plaintiff.

CONCLUSION

The motion of third-party defendant Galaxy G.C. Group LLC for an order pursuant to CPLR 3216 dismissing the complaint of Andre M. Chapman for failure to prosecute is denied.

The foregoing constitutes the decision and order of this Court.

Enter:

Francis A. Roera
J.S.C.

2020 AUG 25 AM 9:43
KINGS COUNTY CLERK
FILED