

<b>Ladd v New York Corridors, Inc.</b>
2020 NY Slip Op 35246(U)
May 4, 2020
Supreme Court, Nassau County
Docket Number: Index No. 601813/2017
Judge: Helen Voutsinas
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS/TRIAL PART 25  
Present: Hon. Helen Voutsinas, J.S.C.**

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**MICHAEL LADD and WAI KIN LEE,**

**Plaintiffs,**

Index No.: 601813/2017  
Motion Sequence Nos.: 003, 004

-against-

**NEW YORK CORRIDORS, INC.,**

**Short Form Order**

**Defendant.**

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The following papers were read on these motions:

Defendant’s Notice of Motion (Mot Seq. 003), Good Faith Affirmation, Affirmation in Support, Exhibits . . . . .	1
Proposed Intervenor’s Motion (Mot Seq. 004), Affirmation and Affidavit in Support . . . . .	2
Defendant’s Affirmation in Opposition . . . . .	3
Proposed Intervenor’s Reply Affirmation . . . . .	4

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Upon the foregoing papers, the motion of defendant New York Corridors, Inc., for an Order pursuant to 22 NYCRR §202.27, dismissing the complaint based on plaintiff’s failure to appear for multiple Court conferences; pursuant to CPLR §3126, striking the complaint based on plaintiff’s failure to appear for defense medical examinations, pursuant to CPLR §3216, dismissing the complaint for want of prosecution and the motion of proposed intervenor New York State Insurance Fund (“NYSIF”) to intervene as a party plaintiff in this action to protect and pursue its workers’ compensation lien on the grounds that NYSIF’s statutory right to recover its lien is no longer being adequately represented by plaintiff, in the event plaintiff fails to proceed with this this action, are decided as hereinafter provided.

The within action was commenced in or about December 2015. Plaintiff alleges that he was injured in an accident that occurred on December 31, 2014, at plaintiff's place of employment, 420 East 64<sup>th</sup> Street, New York. Plaintiff claims that defendant failed to properly clean construction debris from a renovation project at the premises, and that plaintiff slipped on soot, dust and/or debris that collected on an interior stairwell, causing him to fall down a flight of stairs resulting in serious injuries to his back.

A Preliminary Conference was held on May 30, 2017, and the parties engaged in discovery. Following defendant's deposition, defendant designated three (3) physicians, an orthopedic surgeon, neurologist, and a urologist, to conduct separate medical examinations of plaintiff. A Certification Conference was held on November 5, 2018, and the case was certified as ready for trial, subject to completion of certain discovery, including defendant's medical examinations, as set forth in an accompanying stipulation.

The medical examinations were rescheduled several times, at plaintiff's request. In January, 2019, plaintiff's attorneys, Gersowitz, Libo & Korek, P.C., moved to be relieved as counsel, based on their inability to get plaintiff to attend the medical examinations. In support of the motion to be relieved, one of plaintiff's attorneys stated that multiple attempts had been made to secure plaintiff's attendance at the defense medical examinations but plaintiff was unable to comply. According to counsel, plaintiff, who now resides in Florida, advised him that it would be a hardship for him to come to New York and stay for the required two (2) days that would be needed for the three (3) medical exams, and that the difficulty arises from personal reasons which include plaintiff's responsibility of taking care of his special needs daughter.

The Court granted the motion of Gersowitz, Libo & Korek, P.C. to be relieved as plaintiff's attorneys, which was unopposed, by Order dated March 26, 2019 (J. Parga). In that same Order, the Court scheduled a Re-Certification Conference for June 4, 2019. Plaintiff failed to appear and the Re-

Certification Conference was adjourned to July 18, 2019. Plaintiff again failed to appear, and the Re-Certification Conference was adjourned to November 19, 2019. Plaintiff did not appear on that date either, and defendant thereafter filed this motion to dismiss.

Defendant argues that the complaint must be dismissed pursuant to 22 NYCRR §202.27[b] for plaintiff's failure to appear for the Re-Certification conference three (3) times. Defendant also argues that the complaint must be dismissed pursuant to CPLR §3216[a] for want of prosecution. As a third basis for dismissal, defendant states that plaintiff's complaint should be dismissed pursuant to CPLR §3126, for plaintiff's repeated failure to appear for his defense medical examinations.

Proposed intervenor NYSIF separately moves for an Order pursuant to §§1012 and 1013 permitting it to intervene as a party plaintiff in this action to protect and pursue its workers compensation lien on the grounds that NYSIF's statutory right to recover its lien is no longer being adequately represented by plaintiff, in the event plaintiff fails to proceed with the action.

NYSIF submits the affidavit of Daniel Becker, Esq., who states that he is the Third Party Division Head of the Legal Division of NYSIF. Mr. Becker avers that plaintiff was injured during the course of his employment with Royal York Condominium & Associates, which insured its liability to its employees under a policy of workers' compensation insurance issued to it by NYSIF, and that policy was in effect on the date of the accident. As a result of plaintiff's injuries, NYSIF has paid workers' compensation to or on behalf of plaintiff totaling \$114,253.45, and that, accordingly, NYSIF has a statutory lien on the proceeds of any recovery in this action in the amount of \$114,253.45. Mr. Becker further avers that NYSIF has not received repayment of any portion of its lien to date. Accordingly, NYSIF argues that if it is not permitted to intervene, the underlying personal injury action will likely be dismissed as a result of plaintiff's apparent abandonment and NYSIF's lien rights on the proceeds of any recovery from said action will forever be lost.

Defendant opposes NYSIF's motion, arguing that the motion is untimely, and intervention would be prejudicial to defendant and ultimately futile in light of plaintiff's apparent abandonment of the action.

NYSIF moves for leave to intervene under both CPLR §1012, which pertains to intervention as of right, and CPLR §1013, which pertains to permissive intervention. CPLR §1012 provides, in pertinent part, that:

**[a] Intervention as of right.** Upon timely motion, any person shall be permitted to intervene in any action . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment.

CPLR §1013 provides as follows:

**Intervention by permission.** Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

“[I]t has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR §1012[a], or as a matter of discretion under CPLR §1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings'” (Berkoski v. Board of Trustees of Inc. Vil. of Southampton, 67 AD3d at 843 [2d Dept 2009], quoting Perl v. Aspromonte Realty Corp., 143 AD2d 824, 825 [2d Dept 1988]; see also Roman Catholic Diocese of Brooklyn v. Christ the King Regional High School, 164 AD3d 1394, 1396 [2d Dept 2018]).

It is not disputed that, pursuant to Workers' Compensation Law §29[1], NYSIF, as the workers compensation insurer, has a statutory lien on the proceeds of any recovery in this personal injury action. It is also not disputed that, pursuant to Workers' Compensation Law §29[2], if the injured worker elects not to sue a third party, then the injured worker's cause of action is assigned by statute to the insurance

carrier. In this case, plaintiff, the injured worker, has commenced a negligence action against a third party, but has failed to proceed in its prosecution after his attorneys were relieved.

The Court finds that intervention pursuant to either CPLR §1012[a] or CPLR §1013 is warranted under the circumstances presented in order to allow NYSIF to protect its statutory lien. NYSIF has a real and substantial interest in this action because its statutory right to its workers' compensation lien will be inadequately represented by plaintiff, who is currently pro se and not prosecuting his action. At the very least, permissive intervention is appropriate, since there are common questions of law and fact involving the recovery of both plaintiff and the workers compensation insurer, which arise from the same underlying occurrence. In addition, there is no indication that any additional discovery is outstanding, other than the defense medical examinations of plaintiff, that would unduly delay or prejudice any party.

The Court finds defendant's argument that it would be prejudiced by NYSIF's intervention unavailing. Permitting NYSIF to intervene would not prejudice defendant's ability to obtain plaintiff's medical examinations, or otherwise defend the action. Indeed, as NYSIF's counsel essentially concedes, its rights rest on the success of plaintiff's claim. Accordingly, NYSIF would ultimately be required to prove all elements of plaintiff's cause of action as against defendant, and would necessarily be subject to the same defenses. If, for example, plaintiff does not appear for the defense medical examinations, the action will be subject to dismissal.

Accordingly, based upon a careful review and consideration of the papers submitted, proposed intervenor New York State Insurance Fund's motion for leave to intervene as a party plaintiff is **GRANTED**, and it is hereby

**ORDERED**, that the caption shall be amended to appear as follows:

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MICHAEL LADD, WAI KIN LEE and  
NEW YORK STATE INSURANCE FUND,  
  
Plaintiffs, Index No.: 601813/2017  
  
-against-  
  
NEW YORK CORRIDORS, INC.,  
  
Defendant.  
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and it is further

**ORDERED** that NYSIF shall serve the proposed verified intervenor complaint upon all parties in accordance with the CPLR within twenty (20) days of entry of this Order.

**Defendant New York Corridors, Inc.’s Motion to Dismiss**

In support of its motion to dismiss, defendant’s counsel submits an affirmation of good faith. However, the affirmation does not describe any “good faith effort” to resolve the outstanding medical examinations. Instead, in this affirmation, counsel refers to the affirmation of Michael A. Fruhling, Esq., one of the attorneys from the now relieved firm of Gersowitz, Libo & Korek, P.C., which had been submitted in support of that firm’s motion for leave to be relieved. In that affirmation, as discussed above, Mr. Fruhling stated that plaintiff, who now resides in Florida, advised him that it would be a hardship for him to come to New York and stay for the required two (2) days that would be needed for the three (3) medical exams noticed by defendant, with the difficulty arising from plaintiff’s responsibility of taking care of his special needs daughter. In the affirmation of good faith, defendant’s counsel argues that “[u]nder these circumstances, further good faith efforts by the undersigned would have been futile, and there is good cause why no additional efforts have been made.” The Court

disagrees, and finds that 22 NYCRR 202.7 required counsel to at least warn plaintiff that his failure to cooperate with the medical examinations would lead to a motion to dismiss the action.

In addition, defendant argues that the case should be dismissed pursuant to CPLR §3216 for failure to prosecute. Defendant states that the November 8, 2018 Certification Order contains a 90-day demand pursuant to CPLR §3216[b], and relies on plaintiff's failure to file a note of issue within ninety (90) days thereafter as a basis to dismiss for want of prosecution. However, as noted by defendant, the Court scheduled a Re-Certification Conference when it granted plaintiff's then counsel's motion to be relieved in its March 26, 2019 Order, effectively nullifying the November 8, 2018 Certification Order. Further, CPLR §3216[b][2] requires that:

“[t]he court or party seeking [dismissal for want of prosecution], 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.

Defendant has not served a written demand as required by the statute.

As to defendant's request for dismissal under 22 NYCRR 202.27, while the Court does recognize that plaintiff has failed to appear for the Re-Certification Conference which has been adjourned twice, the Court notes that the record is bereft of any information or proof showing that the pro se plaintiff was notified of the adjourned dates.

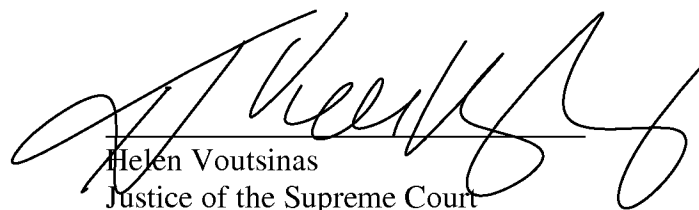
Accordingly, based upon a careful review and consideration of the papers submitted, defendant New York Corridors, Inc.'s motion to dismiss is **DENIED**, without prejudice.

The parties will be notified of a new recertification date once restrictions imposed by the Governor's orders are lifted.

Any other relief sought herein but not specifically ruled upon is **DENIED**.

This constitutes the Decision and Order of the Court.

Dated: May 4, 2020  
Mineola, NY



Helen Voutsinas  
Justice of the Supreme Court

**ENTERED**

May 07 2020

NASSAU COUNTY  
COUNTY CLERK'S OFFICE