

**Metro 765, Inc. v Eighth Ave. Sky, LLC**

2021 NY Slip Op 32609(U)

December 7, 2021

Supreme Court, New York County

Docket Number: Index No. 153063/2016

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 BANNON PART 42**

*Justice*

-----X

METRO 765, INC.,  
Plaintiff,

- v -

EIGHTH AVENUE SKY, LLC, AC HOSPITALITY INC.  
d/b/a THE NEW YORK INN,

Defendant.

-----X

EIGHTH AVENUE SKY, LLC  
Plaintiff,

-against-

CAPITOL SPECIALTY INSURANCE COMPANY a/k/a  
CAPSPECIALTY INSURANCE COMPANIES, ACCEPTANCE  
INDEMNITY INSURANCE COMPANY, AC HOSPITALITY INC.  
d/b/a THE NEW YORK INN, RAMESH BHATIA

Defendant.

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INDEX NO. 153063/2016  
MOTION DATE 12-7-21  
MOTION SEQ. NO. 009, 012

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595040/2018

The following e-filed documents, listed by NYSCEF document number (Motion 009) 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 343, 344, 345, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 431, 455, 470, 479, 485, 489

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 432, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 457, 471, 480, 486, 490

were read on this motion to/for LEAVE TO FILE.

In this breach of contract action arising from a commercial lease, the plaintiff, Metro 765, Inc., a tenant of the subject property at 765 Eighth Avenue in Manhattan, seeks damages in

excess of \$2,000,000 for damage caused to the subject premises and its restaurant business by ongoing water leaks and flooding, allegedly caused by the defendants, Eighth Avenue Sky, LLC and AC Hospitality, Inc. d/b/a The New York Inn, the property owner and second tenant, respectively. A third-party action was commenced by Eighth Avenue Sky LLC.

The court dismissed seven of the eleven causes of action of the complaint by an order dated May 2, 2017 (MOT SEQ 003). Discovery and further motion practice ensued. A compliance conference order dated September 12, 2019, states that depositions were not conducted due to the plaintiff's financial situation and its involvement in other litigations. The court directed the plaintiff to respond to interrogatories served over a year prior on or before October 25, 2019. A compliance conference order dated January 9, 2020, states that the plaintiff did not comply with the prior order.

On March 9, 2020, the plaintiff filed a petition for voluntary bankruptcy pursuant to Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. This action was thus automatically stayed through June 9, 2021, when the plaintiff filed a notice that the bankruptcy proceeding was closed.

A motion by counsel for the plaintiff to be relieved (MOT SEQ 013), which had been held in abeyance while the automatic stay was in effect, was granted by an order of this court dated July 13, 2021. Thereafter, no counsel appeared for the plaintiff.

A remote status conference was scheduled for September 30, 2021. The defendants appeared and the plaintiff failed to appear or contact the court. The order issued after that conference cautions that the "plaintiff's failure to appear subjects the complaint to dismissal. See 22 NYCRR 202.27. Complaint is also subject to dismissal for plaintiff's failure to provide discovery. See CPLR 3126".

In accordance with the status conference order, counsel for Eighth Avenue Sky, LLC, served a notice of deposition on the plaintiff. The plaintiff failed to appear for the deposition on November 30, 2021, and failed to contact counsel.

The court scheduled a further remote status conference for December 7, 2021. The plaintiff was again sent a notice and a link for the virtual conference. Also scheduled for December 7, 2021, was oral argument on the motion of Eighth Avenue Sky, LLC, to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7) (MOT SEQ 009) and the plaintiff's motion for leave to file a second amended complaint (MOT SEQ 012), both of which had been held in abeyance while the automatic stay was in effect. The plaintiff again failed to appear and failed to contact the court. Counsel for Eighth Avenue Sky, LLC and AC Hospitality Inc., and well as counsel for third-party defendant Capitol Specialty Insurance Company appeared at the conference. Counsel represented that the plaintiff had not contacted them or provided any discovery per the court's order.

Section 202.27 of the Uniform Rules for Trial Courts provides that “[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order . . . an order dismiss[ing] the action [or] grant[ing] judgment by default . . . [or] may make such order as appears just.” In light of the foregoing, the plaintiff's motion (MOT SEQ 012) is denied, and the amended complaint is dismissed pursuant to 22 NYCRR 202.27.

The amended complaint is also dismissed for failure to provide discovery. 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.” 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 (1<sup>st</sup> Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1<sup>st</sup> Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1<sup>st</sup> 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 (1<sup>st</sup> Dept. 2012); Perez v City of New York, 95 AD3d 675 (1<sup>st</sup> Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1<sup>st</sup> Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1<sup>st</sup> Dept. 2000).

Finally, the plaintiff’s failure to prosecute the action subjects the complaint to dismissal under CPLR 3216.

In light of the above, the motion of defendant/third-party plaintiff Eighth Avenue Sky, LLC, to dismiss the complaint (MOT SEQ 009) is denied as moot.

Accordingly, it is

ORDERED that the plaintiff’s motion for leave to file a second amended complaint (MOT SEQ 012) is denied pursuant to 22 NYCRR 202.27 upon the plaintiff’s failure to appear on December 7, 2021, and it is further

ORDERED that the amended complaint is dismissed pursuant to 22 NYCRR 202.27 and CPLR 3126, and it is further

ORDERED that the motion of defendant/third-party plaintiff Eighth Avenue Sky, LLC, to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7) (MOT SEQ 009) is denied as moot, and it is further

ORDERED that the parties in the third-party action shall appear for a status conference on January 28, 2022, at 12:00 p.m., unless a Stipulation of Discontinuance is filed prior to that date, with notification to the Part 42 Clerk, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

12/7/2021

DATE

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER