

<b>Lemouchi v Massoud</b>
2021 NY Slip Op 33093(U)
November 17, 2021
Supreme Court, Queens County
Docket Number: Index No. 704189/15
Judge: Robert I. Caloras
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**Short Form Order  
NEW YORK SUPREME COURT - QUEENS COUNTY  
PRESENT: HON. ROBERT I. CALORAS**

**PART 36**

**Justice**

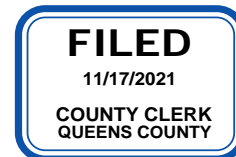
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**SOUFAINE LEMOUCHI,  
Plaintiff,**

**Index No. 704189/15  
Seq. No. 5**

**-against-**

**IBRAHIM MASSOUD, LILIANA MULLANEY,  
MARTIN MULLANEY, and KIHSHAH ARMSTRONG,  
Defendants.**



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The following papers numbered E75-E88, E89-E94, E97-E104, E105-E108 read on this motion by Defendant Armstrong for an order pursuant to CPLR § 3216 striking Plaintiff’s complaint and dismissing the action with prejudice as to Defendant Armstrong for unreasonably neglecting to proceed; and the cross motion by Defendants Liliana Mullaney and Martin Mullaney (hereinafter “Defendants Mullaney”) for an order pursuant to CPLR § 3216 and 3212 dismissing the action for lack of prosecution and granting judgment to the Defendants Mullaney.

	<b>PAPERS NUMBERED</b>
Notice of Motion-Affirmation-Exhibits.....	E75-E88
Notice of Cross Motion-Affirmation-Exhibits.....	E89-E94
Affirmation in Opposition-Exhibits.....	E97-E104
Affirmation in Reply.....	E105-E108

Upon the foregoing papers, it is ordered that the motion by Defendant Armstrong and cross motion by Defendants Mullaney are granted as follows:

Plaintiff commenced this action by filing a Summons and Complaint on April 27, 2015 alleging that vehicles driven by the aforementioned Defendants came into contact with the vehicle in which Plaintiff was a passenger on December 1, 2014, at the RFK Bridge at or near its intersection with Hoyt Avenue in Queens County.

Defendant Armstrong now moves for an order pursuant to CPLR § 3216 striking Plaintiff’s complaint and dismissing the action as to Defendant Armstrong for unreasonably neglecting to proceed. In support thereof, Defendant Armstrong submits, among other things, Defendant Armstrong’s counsel’s affirmation, CPLR 3216 Notice, and copies of discovery orders. According to the preliminary conference order dated January 4, 2016 and entered on January 14, 2016, most disclosure had to be completed by the parties by April 2016 with the Note of Issue to be filed by December 9, 2016. According to the compliance conference order dated July 7, 2016 and entered on July 18, 2016, parties were to respond to all outstanding discovery within 30 days and the Note of Issue was to be filed by December 16, 2016. An in-person conference on December 16, 2016 resulted in a stay of the action pending completion of discovery, as set forth in the so-ordered stipulation entered on January 5, 2017; a further in-person conference was conducted on March 8,

2017 and the stay of the action was continued, as set forth in the so-ordered stipulation entered on March 20, 2017; yet another in-person conference on June 6, 2017 resulted in a so-ordered stipulation, entered June 14, 2017, lifting the "stay," directing the parties to complete outstanding discovery by July 7, 2017 and directing that a Note of Issue be filed on or before July 28, 2017. On July 18, 2017, Plaintiff filed a Note of Issue. A Notice of Motion to strike the Note of Issue was filed by Defendant Armstrong on July 31, 2017, due to Plaintiff's failure to provide complete disclosure. The motion resulted in yet another discovery stipulation, so-ordered by Justice Pineda-Kirwan dated November 22, 2017 and entered on December 8, 2017, but the Note of Issue was not vacated.

The action appeared on the Trial Scheduling Part calendar on January 16, 2018, May 16, 2018, and again on September 12, 2018, before the Hon. Jeremy Weinstein. On that date, it was reported to the Court, that discovery had still not been completed. As a result, an Order dated September 12, 2018 was entered September 24, 2018, vacating the Note of Issue and directing "that upon completion of all outstanding discovery, the parties shall so-stipulate and a present said stipulation to the clerk of the Trial Scheduling Part for an order permitting the filing of a new Note of Issue and restoring this matter to the calendar for trial or a pre-trial conference." By Notice of Motion filed on November 13, 2019, Plaintiff sought an Order restoring the action to the trial calendar and granting leave to file a new Note of Issue. On December 12, 2019, the parties appeared before the Court to conference Plaintiff's motion. The Court adjourned the motion to February 6, 2020 and directed the parties to confer regarding the outstanding disclosure. On December 26, 2019, Plaintiff caused to be filed a Notice of Discharge of Attorney, advising he was "electing to proceed in this action pro se." On February 6, 2020, the parties again appeared before the Court on Plaintiff's motion for leave to file a new Note of Issue. Plaintiff appeared on that date, as did his former attorney of record. Plaintiff advised the Court that he wished to proceed pro se and his former counsel agreed to conduct the conference on the motion. As a result of same, Plaintiff's motion was withdrawn and yet another discovery stipulation was so-ordered and entered by the Court on February 27, 2020. Fully one year elapsed from the date this Court's so-ordered stipulation was entered and Defendant Armstrong argues that Plaintiff made absolutely no attempt to provide the outstanding disclosure delineated in the stipulation.

As a result, Defendant Armstrong served a notice pursuant to CPLR § 3216 upon Plaintiff and his former attorney of record by certified mail on February 26, 2021. Defendant argues that Plaintiff has failed to conduct discovery expeditiously and resume prosecution of this action after having been served with Defendant Armstrong's 90-day notice and therefore the complaint should be stricken and dismissed with prejudice. Plaintiff argues that he was pro se for a period of time and recently retained new counsel, who has submitted opposition. Plaintiff's counsel states that he attempted to file a Note of Issue on July 8, 2021, which was rejected by the Court on July 12, 2021 because the matter was disposed and required a court order to restore it to the calendar or a motion to restore. Plaintiff's counsel additionally argues that due to the COVID-19 pandemic, the Court has relaxed the Court rules. Plaintiff further argues that he never received the 90-day notice and demand from Defendant Armstrong. In support thereof, Plaintiff submits, among other things, Plaintiff's counsel's affirmation and Plaintiff's affidavit.

CPLR 3216 [b] [1]-[3] states, in pertinent part, that a court may consider dismissing an action for a plaintiff's neglect to prosecute when the following preconditions have been satisfied:

(1) issue has been joined in the action; (2) one year has elapsed since the joinder of issue or six months have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later; and (3) the defendant served the plaintiff a written demand by registered or certified mail requiring the plaintiff to resume prosecution and to serve and file a Note of Issue within 90 days after receipt of such demand, and the defendant further stated that the plaintiff's failure to comply with such demand within said 90-day period will serve as a basis for the defendant to move for dismissal against the plaintiff for unreasonably neglecting to proceed.

If a plaintiff serves and files a Note of Issue within the 90-day period initiated by the defendant's written demand, "all past delay is absolved and the court is then without authority to dismiss the action" (Baczowski v D.A. Collins Constr. Co., Inc., 89 NY2d 499, 503, citing CPLR 3216 [c]). Conversely, "if a plaintiff fails to file a Note of Issue within the 90-day period, 'the court may take such initiative or grant such motion [to dismiss] unless the [defaulting] party shows justifiable excuse for the delay and a good and meritorious cause of action'" (Id., quoting, in part, CPLR 3216 [e]). Therefore, "even when all of the statutory preconditions for dismissal are met, including plaintiff's failure to comply with the 90-day requirement," CPLR 3216 provides a plaintiff with "yet another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit" (Id.). If a plaintiff establishes a justifiable excuse and a meritorious cause of action, the action cannot be dismissed by the court (See id.).

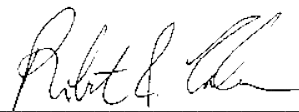
Here, the Court finds that the statutory preconditions for dismissal have been met (CPLR 3216 [b] [1] [3]). It is undisputed that issue had been joined on October 16, 2015, one year has elapsed since the joinder of issue and six months have elapsed since the preliminary conference order entered on January 14, 2016. Instead, Plaintiff opposes Defendant Armstrong's motion by asserting that Plaintiff did not receive the written notice and demand. Here, Defendant Armstrong established that they served the demand pursuant to CPLR § 3216(b)(3) by certified mail as per Defendant Armstrong's affidavit of service on Plaintiff, submitted as "Exhibit I, E86," and therefore Plaintiff has to establish either that a Note of Issue was filed or that the delay in the prosecution is justified and the cause of action is meritorious. The Court finds that the Plaintiff has failed to file a Note of Issue. The Court also finds Plaintiff has failed to demonstrate a requisite justifiable excuse. In determining whether a plaintiff has a justifiable excuse for its delay in prosecuting a case, a Court may consider a "plaintiff's 'pattern of persistent neglect, [] history of extensive delay, [] intent to abandon prosecution and lack of any tenable excuse for such delay'" (Deutsche Bank Nat'l Trust Co. v Inga, 156 AD3d 760, 761, quoting Schneider v Meltzer, 266 AD2d 801, 802; see Saginor v Brook, 92 AD3d 860, 861). Plaintiff's delay of this action took place during the one-year period of inactivity prior to Plaintiff's receipt of the 90-day notice and during the period between the date Plaintiff received the notice and the date Defendant Armstrong served the current motion. This action is over six years old without any indication that discovery is complete or that parties are ready to proceed to trial. Plaintiff provides no justification for the period of inactivity or for Plaintiff's failure to comply with the 90-day notice. Specifically, Plaintiff's counsel's affirmation states that Plaintiff's counsel attempted to file a Note of Issue on July 8, 2021, over a month after the 90-day notice duration, but the Note of Issue was rejected by the Court because the matter is considered

disposed and requires a Court order to restore it to the calendar. Plaintiff's counsel also states that Plaintiff was pro se from December 29, 2019 to July 8, 2021; however, the Court notes that Plaintiff appeared pro se at a previous Court conference and advised the Court that he wished to proceed pro se and entered into a discovery stipulation which he has not abided by. Based on the foregoing, the Court finds that Plaintiff failed to demonstrate the requisite justifiable excuse. Even if in the alternative the Court assumed that Plaintiff provided a justifiable excuse, the Court finds that the submission of Plaintiff counsel's affirmation and the Plaintiff's affidavit are insufficient to demonstrate a meritorious cause of action. Upon the foregoing, the Court finds that Plaintiff has failed to provide a justifiable excuse for the aforementioned delay and has failed to establish a meritorious cause of action in his opposition papers.

Defendants Mullaney cross move for an order pursuant to CPLR § 3216 and 3212 dismissing this action for lack of prosecution and granting judgment to Defendants Mullaney. In support thereof, Defendants Mullaney rely on the submissions of Defendant Armstrong as set forth above and submit, among other things, CPLR 3216 Notice and Defendants' Mullaney's counsel's affirmation. Counsel argues that Defendants Mullaney have had no contact with the Plaintiff in over a year and that they served Plaintiff with a notice pursuant to CPLR 3216, and Plaintiff has not filed and served a Note of Issue or resumed prosecution and therefore this action should be dismissed. In opposition, Plaintiff makes similar arguments as above. As to the cross motion, the Court similarly finds that Defendants Mullaney established that they served the demand pursuant to CPLR § 3216(b)(3) by certified mail as per Defendants Mullaney's affidavit of service on Plaintiff, submitted as "Exhibit B, E92" and Plaintiff did not respond or file a Note of Issue. Plaintiff argues that he did not receive the certified mail from Defendants Mullaney because Defendants Mullaney failed to affix an apartment number on the mailing. As set forth above, the Court finds that Plaintiff's submissions fail to establish any justification for failing to timely file a Note of Issue, offer a justifiable excuse and demonstrate a meritorious cause of action, or move for an extension.

Accordingly, the Court grants Defendant Armstrong's motion and Defendants Mullaney's cross-motion to dismiss Plaintiff's complaint.

Dated: November 17, 2021



ROBERT I. CALORAS, J.S.C.

