

<b>Masonic Lodge "Silencio #16 De Don Pedro Martin," Inc. v Fraternidad Realty Corp.</b>
2022 NY Slip Op 31613(U)
May 16, 2022
Supreme Court, New York County
Docket Number: Index No. 655299/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART **56M**

*Justice*

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MASONIC LODGE "SILENCIO #16 DE DON PEDRO  
MARTIN," INC. INDEX NO. 655299/2017  
MOTION DATE 03/03/2022  
MOTION SEQ. NO. 006  
Plaintiff,

- v -

FRATERNIDAD REALTY CORP.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 63, 64, 65  
were read on this motion to/for DISMISS LACK OF PROSECUTION.

In this action for the repayment of two loans allegedly totaling \$65,000, the defendant moves pursuant to CPLR 3216 to dismiss the complaint for the failure of the plaintiff, Masonic Lodge "Silencio #16 de Don Pedro Martin," Inc. (hereinafter Martin Masonic Lodge), to prosecute the action, based on Martin Masonic Lodge's failure to comply with a 90-day notice that the defendant had served upon it. Martin Masonic Lodge does not oppose the motion. The motion is granted.

CPLR 3216(a) provides that

"[w]here 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, . . . 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.

To secure a dismissal pursuant to CPLR 3216, issue must have been joined and either one year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of any preliminary court conference order, whichever is later (see CPLR 3216[b]). In

addition, the defendant must have served a written demand upon the plaintiff by registered or certified mail, directing the plaintiff to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand (*see id.*). The demand also must give notice to the plaintiff that a default in complying with such demand within that 90-day period will serve as a basis for a motion dismissing the complaint as against that defendant for unreasonable neglect to proceed (*see id.*). In the event that the plaintiff fails to serve and file a note of issue within such 90-day period, the court may grant a motion by the party seeking dismissal, unless the plaintiff shows justifiable excuse for the delay and a good and meritorious cause of action (*see CPLR 3216[e]*).

Dismissal thus is warranted pursuant to CLR 3216 where a defendant timely and properly serves a 90-day notice, and a plaintiff fails to show, in opposition, that it did not intend to abandon prosecution of the action, that its history of extensive delay was justified, and that it had a meritorious claim (*see Thompson v Beth Israel Med. Ctr.*, 178 AD3d 468 [1st Dept 2019]; *see also Mosberg v Elahi*, 80 NY2d 941, 942 [1992] [plaintiff opposing a CPLR 3216 motion must demonstrate the existence of a "good and meritorious cause of action"]; *Garofalo v Mercy Hosp.*, 271 AD2d 642, 643 [2d Dept 2000] [opponent of CPLR 3216 motion must establish "a meritorious claim and excusable delay"]).

Here, issue was joined by the defendant when it served an answer on October 27, 2017. More than one year has passed since the joinder of issue. The court issued a preliminary conference order on July 24, 2018, and more than six months have elapsed since that date as well. In addition, the court has issued a compliance conference order and five status conference orders, but Martin Masonic Lodge failed to proceed with the discovery that had been directed by the court or fully to comply with those orders. On October 5, 2021, the defendant served Martin Masonic Lodge, by certified mail, return receipt requested, with a written demand directing it to resume prosecution and to file a note of issue within 90 days after receipt of such demand. The demand also notified Martin Masonic Lodge that its failure to resume prosecution

would serve as a basis for a motion to dismiss the complaint. The defendant re-served the demand by certified mail, return receipt requested, on October 14, 2021.

Where proof of the date of a plaintiff's receipt is included in the record, the 90-day period must be measured from a plaintiff's "receipt of such demand" (CPLR 3216[b]; *Public Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 310 [1st Dept 1996]). Although the defendant has not submitted a copy of the green return receipt cards with its motion, it has submitted postmarked certified mail receipts and an email message from Martin Masonic Lodge's attorney, dated November 3, 2021, confirming that he had received the CPLR 3216 notices that had been sent in October. If the court deems November 3, 2021 as the date of receipt, the statutory 90-day period lapsed on February 1, 2022. As of that date, Martin Masonic Lodge neither responded to the demand, filed a note of issue, nor resumed prosecution of the action. Nor had it requested or moved for an extension of time within which to serve and file the note of issue or conduct additional discovery. In fact, Martin Masonic Lodge has done none of those things at any time. The defendant made the instant motion on February 8, 2022. The motion is thus timely.

The defendant demonstrated that Martin Masonic Lodge, in declining to oppose the instant motion, failed to show that it did not intend to abandon prosecution of the action, that its history of extensive delay was justified, or that it has a meritorious claim. Hence, the motion must be granted, and the complaint must be dismissed. The dismissal is, however, not deemed to be a dismissal on the merits.

The court notes that, in a related action entitled *Respetable Logia Simbolica Silencio, Inc. v Masonic Lodge "Silencio #16 de Don Pedro Martin," Inc.*, commenced under Index No. 656099/2018 (hereinafter the related action), Martin Masonic Lodge and its principal, Jose Luis Carrion, were named as defendants. By order dated January 4, 2021, and entered in the related action, this court had stricken the answer of Martin Masonic Lodge and Carrion for their failure to comply with numerous discovery orders. By order dated July 13, 2021, and entered in the instant action, this court denied the defendant's motion pursuant to CPLR 3025(b) for leave

to serve an amended answer in this action adding the affirmative defense of collateral estoppel. In that order, this court concluded that that affirmative defense was unavailable, inasmuch as the striking of Martin Masonic Lodge's answer in the related action was the equivalent of holding it in default, which may not form the basis for collaterally estopping it in this action, and that there were no overlapping issues in the two actions in any event.

By decision and order dated May 5, 2022, however, the Appellate Division, First Department, reversed this court's July 13, 2021 order, and thereupon granted the defendant's motion for leave to amend its answer in this action, holding that only a default in answering a complaint or appearing in an action will obviate the applicability of collateral estoppel, and that a default by an answering defendant in the course of otherwise contested litigation would not (*see Masonic Lodge v Fraternidad Realty Corp.*, \_\_\_\_ AD3d \_\_\_\_, 2022 NY Slip Op 03051 [1st Dept, May 5, 2022]). The Appellate Division also concluded that, in their third cause of action, the plaintiffs in the related action did, in fact, seek a judgment declaring that the loans that underpin the instant action were not payable to Martin Masonic Lodge or Carrion and that, hence, there was an identity of issues in the two actions (*see id.*).

Inasmuch as the defendant's answer is now deemed amended to include the affirmative defense of collateral estoppel, the court concludes that, were the defendant to move to dismiss the complaint based upon that affirmative defense, this court would be constrained to grant the motion. By striking the answer in the related action, this court has decided the issue of who is the rightful payee of the subject loans against Martin Masonic Lodge and Carrion, the very issue in dispute in this action.

In its January 4, 2021 order striking Martin Masonic Lodge's answer in the related action, the court directed an inquest to assess damages and award other relief, to be held concurrently with the trial in the instant action. Because the court is dismissing the complaint in the instant action, it will issue a separate order in the related action scheduling that inquest for a date certain.

Accordingly, it is

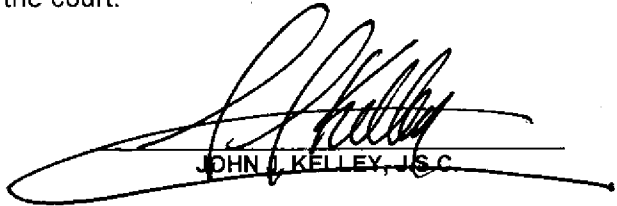
ORDERED that the motion of the defendant Fraternidad Realty Corp. to dismiss the complaint is granted, without opposition, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

5/16/2022

DATE

  
JOHN J. KELLEY, 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