

**West 97th St. Realty Corp. v Arenas**

2022 NY Slip Op 33798(U)

November 7, 2022

Supreme Court, New York County

Docket Number: Index No. 157201/2020

Judge: Mary V. Rosado

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.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

WEST 97TH STREET REALTY CORP.,

Plaintiff,

- v -

STACY ARENAS, JOHN ARENAS

Defendant.

INDEX NO. 157201/2020

MOTION DATE 06/27/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 were read on this motion to/for DISCONTINUE

Upon the foregoing documents, Plaintiff West 97th Street Realty Corp.'s ("Plaintiff") motion seeking to discontinue the instant action is granted.

Plaintiff initiated this action on September 8, 2020 (NYSCEF Doc. 1). Plaintiff sought ejectment, use and occupancy, and attorneys' fees against Defendants Stacy Arenas and John Arenas (collectively "Defendants") (id. at ¶¶ 12-23). Defendants answered and asserted various counterclaims (NYSCEF Doc. 3).

On June 20, 2022 Plaintiff filed the instant motion to discontinue pursuant to CPLR § 3217(b) (NYSCEF Doc. 13). Plaintiff asserts that it seeks a discontinuance as the relief primarily sought is now moot as Defendants have executed a lease renewal (NYSCEF Doc. 14). However, Plaintiff claims Defendants have been unwilling to agree to a discontinuance due to their counterclaim (id. at ¶ 7). Despite Defendants' refusal to discontinue this action, they have failed or refused to respond to Plaintiff's discovery demands, nor have they taken any action in respect to their counterclaim in over one year (id. at ¶ 8-9).

After Plaintiff filed this motion, Defendants filed a notice for discovery and inspection on August 19, 2022 (NYSCEF Doc. 24). Defendants assert that the delay in litigation was a result of Covid-19 and that there was a stay on this action until January 15, 2022, due to the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (NYSCEF Doc. 19). Defendants assert that they will be prejudiced by discontinuance since they will have to begin again at “square one” and will be required to purchase a new index number to initiate a second action. In reply, Plaintiff points out until the filing of this motion, there has been no activity in this case and that no discovery has yet taken place in this action.

The determination on whether to grant a motion for discontinuance is generally within the sound discretion of the Court (*Burnham Service Corp. v National Council on Compensation Ins.* 288 AD2d 31 [1st Dept 2001]). In making this determination, a Court must keep in mind that a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted (*Bank of Am., N.A. v Douglas*, 110 AD3d 452 [1st Dept 2013]). Where an action is still in the early stages of litigation or there has been no showing that a discontinuance is sought only to avoid an adverse determination, a motion to discontinue should be granted (*id.*; see also *Gonzalez v Kaye*, 58 AD3d 578 [1st Dept 2009]).

The Court finds that Plaintiff's motion seeking to discontinue the action should be granted. First, Plaintiff's action is now moot as a renewal lease has been executed. Second, there has been no discovery exchanged, let alone a preliminary conference, in over two years of this litigation. Therefore, the proceedings are still in a very premature phase of litigation, and discontinuing this action without prejudice will result in little to no prejudice to the Defendants.

Although the eviction proceeding may have been stayed until January 15, 2022 due to the Covid-19 Emergency Eviction and Foreclosure Prevention Act of 2020, Defendants offer no explanation as to why there has been no discovery demanded from January 15, 2022 until over eight months later on August 19, 2022. Moreover, although the portion of this action which sought ejectment may have been stayed, Plaintiff also made a claim for use and occupancy while Defendants counterclaimed for malicious prosecution, breach of the warranty of habitability, violation of rent stabilization laws, violation of the New York City Human Rights Law, defamation, breach of contract, fraudulent concealment, amongst other counterclaims. These claims and counterclaims fall outside the ambit of the stay on ejectment proceedings (*Casey v Whitehouse Estates Inc.*, 73 Misc.3d 562 [Sup. Ct., NY County 2021] [holding that extant Covid-19 relief statutes do not affect the authority of courts to grant money judgments for unpaid rent as against residential tenants]). The failure to prosecute or defend any of the claims or counterclaims over a two-year span warrant granting Plaintiff's motion for discontinuance.

Finally, while Defendants assert they may be prejudiced by having to purchase a new index number to re-assert their counterclaims, the Court notes that Defendants are currently represented by a legal service provider and ostensibly are not paying for the prosecution of their claims. In any event, being required to purchase an index number to prosecute claims does not rise to the level of prejudice to the substantial right of a litigant which would warrant denying the instant motion.

Therefore, as this action was commenced over two years ago, there has been no exchange of discovery by Defendants regarding any of their counterclaims, the action is still in its initial phase, and Defendants have failed to show how their substantial rights would be prejudiced by granting Plaintiff's motion for a discontinuance, the Court grants Plaintiff's motion seeking to discontinue this action.

Accordingly, it is hereby

ORDERED that Plaintiff West 97th Street Realty Corp.'s motion seeking to discontinue this action pursuant to CPLR § 3217(b) is granted and this matter shall be marked disposed; and it is further

ORDERED that all parties claims in this action are hereby discontinued without prejudice; and it is further

ORDERED that within thirty (30) days of entry of this decision and order, Plaintiff West 97th Street Realty Corp. shall serve a copy of this Order with notice of entry upon Defendants Stacy Arenas and John Arenas; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

11/7/2022  
DATE

*Mary V Rosado*  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE