

Agosto v City of New York

2023 NY Slip Op 31590(U)

May 10, 2023

Supreme Court, New York County

Docket Number: Index No. 160115/2020

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

CHARLES AGOSTO,

Plaintiff,

- v -

THE CITY OF NEW YORK, SERA SECURITY SERVICES,
LLC, MR. JOHN (FIRST NAME UNKNOWN) KENDAL,

Defendants.

-----X

INDEX NO. 160115/2020

MOTION DATE 02/27/2023,
04/10/2023

MOTION SEQ. NO. 003 004

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39,
40, 41, 42, 43, 44

were read on this motion to DISMISS - LACK OF PROSECUTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46, 47, 48, 49, 50,
51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion for DISMISSAL

In motion sequence 003, defendants Sera Security Services, LLC and Steven Kendell,
i/s/h/a, Mr. John Kendal (collectively, the "Sera Defendants") move to dismiss this action pursuant
to CPLR §3216. In motion sequence 004, defendant the City of New York (the "City") also moves
to dismiss pursuant to CPLR §3216. These motions are consolidated for disposition and granted
on default and for the reasons set forth below.

Plaintiff commenced this action by summons and complaint on November 3, 2020. The
Sera Defendants interposed an answer on April 23, 2021, which answer included various discovery
demands. The City interposed an answer on May 7, 2021, and simultaneously served the plaintiff
with various discovery demands (NYSCEF Doc. No. 49 [Answer and Combined Discovery
Demands]).

Plaintiff failed to respond to these discovery demands. As a result, the Sera Defendants moved, pursuant to CPLR §§3124 and 3126, to compel plaintiff to respond to these demands or, alternatively, preclude plaintiff from offering information and evidence at the time of trial. While the Sera Defendants' motion was sub judice, plaintiff's counsel moved to be relieved as counsel. The Court addressed both motions in a decision and order dated July 1, 2022, which granted plaintiff's counsel's motion to be relieved, stayed this action for sixty days to afford plaintiff time to retain new counsel, and denied the Sera Defendants' motion (NYSCEF Doc. No. 28 [Decision and Order]). The stay of this action ordered by the Court was lifted on August 30, 2022.

On September 13, 2022, the Sera Defendants served a 90-Day Notice on plaintiff by certified mail, return receipt requested, demanding that plaintiff resume prosecution of the action, respond to its outstanding discovery demands and file a Note of Issue within ninety days (NYSCEF Doc. No. 44 [Aff. of Service]). On September 15, 2022, the City also served a 90-Day Notice on plaintiff by certified mail, return receipt requested, demanding that plaintiff resume prosecution of this action, respond to its outstanding discovery demands, and file a Note of Issue within ninety days of service (NYSCEF Doc. No. 59 [Aff. of Service]).

DISCUSSION

CPLR §3216 provides that:

Where 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, on its own initiative or 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

(CPLR §3216([a])). However, dismissal under this statute is only warranted if the following conditions are satisfied:

- (1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later; [and]

(3) The ... party seeking such relief, 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 ,,,

(CPLR §3216[b]).

These requirements have been satisfied here. As issue was joined in April and May 2021, respectively, over one year has elapsed since joinder. Movants have further established that they served plaintiff with 90-Day Notices, as required by CPLR §3216, and that plaintiff failed to respond to their discovery demands, file a note of issue, or move to vacate the 90-Day Notices or to extend this ninety day period.

Accordingly, it is

ORDERED that the motion by the City of New York to dismiss the complaint as against it is granted; and it is further

ORDERED that the motion by defendants Sera Security Services, LLC and Steven Kendell, i/s/h/a Mr. John Kendal, to dismiss the complaint as against them is granted; and it is further

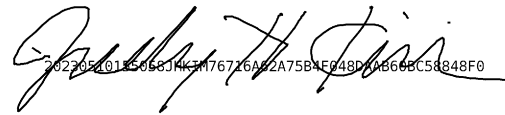
ORDERED that the complaint is hereby dismissed in its entirety; and it is further

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

ORDERED that counsel for the City of New York shall serve a copy of this decision and order with, notice of entry, upon plaintiff within fifteen days of this decision and order; and it is further

ORDERED that counsel for the City of New York shall serve a copy of this decision and order with notice of its entry upon the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this Court.



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5/10/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: