

Lab, LLC v Travelers Prop. Cas. Co. of Am.

2023 NY Slip Op 32394(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 650827/2014

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

-----X
THE LAB, LLC,

Plaintiff,

- v -

TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA, AND NATHAN BUTWIN COMPANY, INC.

Defendant.
-----X

INDEX NO. 650827/2014

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISS

Plaintiff The Lab, LLC, brought an action against defendant Nathan Butwin Company, Inc., alleging that defendant failed to purchase and procure the appropriate business interruption insurance coverage. Plaintiff alleged that, as a result of defendant's purported negligence, it sustained uncovered losses as a result of Super Storm Sandy because its insurer declined its claim for business interruption coverage. In motion sequence number 002, defendant moves, pursuant to CPLR 3216, to dismiss the complaint for failure to prosecute this action.

BACKGROUND

The instant action was commenced with the filing of a summons and complaint on March 14, 2014 (NYSCEF Doc. No. 1). On May 21, 2014, defendant joined issue by service of an answer (NYSCEF Doc. No 2). On June 5, 2014, co-defendant Travelers Property Casualty Company of America joined issue by service of its answer (NYSCEF Doc. No. 3). On April 19, 2016, a preliminary conference order was so ordered by the Honorable Anil C. Singh (NYSCEF Doc. No. 11). On June 28, 2016, a compliance conference order was so ordered by the

Honorable Anil C. Singh which noted that the note of issue was to be filed by January 1, 2017 (NYSCEF Doc. No 13). The note of issue deadline was amended multiple times. Most recently, a so-ordered stipulation dated October 29, 2019 pushed the note of issue filing deadline until January 17, 2020. The note of issue was not filed by plaintiff's counsel on that date.

On March 13, 2020, approximately two months past the note of issue deadline so-ordered by the court on January 17, 2020, defendant electronically filed a demand for the filing of the note of issue pursuant to CPLR §3216, which demanded that a note of issue be filed within ninety days of the service of the demand (NYSCEF Doc. No. 36). Same was e-filed due to the Covid-19 pandemic. Plaintiff did not respond to that demand. Thereafter, on March 22, 2020, in light of the Covid-19 pandemic, all e-filings in non-essential matters were suspended. However, on May 4, 2020, an order was issued by the Chief Administrative Judge of the Courts allowing digital copies of notes of issue to be electronically filed in all pending matters.

As no note of issue had been filed, on February 11, 2021, defendant's counsel emailed plaintiff's counsel a letter seeking a response to its demand for the filing of the note of issue served on March 13, 2020. In response to that email, on February 12, 2021, plaintiff's counsel provided email correspondence stating, "I will respond to your notice shortly," indicating receipt of the demand for the filing of the note of issue. No note of issue was filed thereafter.

On May 5, 2022, defendant served plaintiff with an additional good faith letter seeking a response to its demand for the filing of the note of issue served on March 13, 2020 via U.S. Certified Mail to both addresses of plaintiff's counsel. On May 5, 2022, defendant served plaintiff with an additional good faith letter seeking a response to its demand for the filing of the note of issue served on March 13, 2020 via U.S. Certified Mail to both addresses of plaintiff's counsel. " The letter was delivered to plaintiff's counsel's office on July 21, 2022 (NYSCEF Doc.

No. 68). To date, plaintiff has not responded to either of defendant's demands. On February 23, 2023, defendant moved to dismiss pursuant to CPLR 3216 for failure to prosecute a claim. Defendant's motion is unopposed.

ANALYSIS

CPLR § 3216 discusses the requirements which must be met to dismiss a case for want of prosecution. Specifically, the statute provides as follows:

- (a) 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.
- (b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:
- (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;
 - (3) The court or 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.
(see CPLR 3216).

Dismissal of an action under CPLR § 3216 has been granted where a party abandons the litigation (see *Maloney v. Springfield Dev. Co.*, 20 AD2d 526, [1st Dep't 1963]; see also *Gleich v. Naiburg*, 212 AD2d 758, [2nd Dep't 1995]). "In order to defeat a CPLR 3216 motion to dismiss for failure to prosecute, a party must show 'justifiable excuse for the delay and a good

and meritorious cause of action.’ The affidavit of merit must contain evidentiary facts which establish a viable cause of action; it must be ‘as good as the kind of affidavit which could defeat a motion for summary judgment on the ground that there is no issue of fact’” (*Walker v. Town of Lockport*, 109 AD2d 1102, aff’d, 65 NY2d 840, [4th Dep’t 1985]). Here, plaintiff has not even opposed defendant’s CPLR 3216 motion, let alone produced any affidavit of merit containing evidentiary facts which could establish a viable cause of action.

In this action, issue was fully joined on May 21, 2014 and the preliminary conference held on April 9, 2016. On October 29, 2019, this court ordered that the note of issue be filed on January 17, 2020. As more than one year has passed since issue was fully joined, six months have elapsed since the issuance of the preliminary conference order and/or since this court ordered that plaintiff file the note of issue, the first and second requirements under CPLR § 3216 have been met.

On two separate occasions, March 13, 2020 and July 13, 2022, defendant served plaintiff a demand for the filing of a note of issue via electronic filing (the March 13, 2020 demand due to Covid-19) and certified mail (the July 13, 2022 demand), formally demanding that plaintiff resume prosecution of this action and serve and file a note of issue within 90 days of the date of the demand. Further, several good faith letters were also served requesting compliance with the demand. Plaintiff’s counsel indicated receipt of the good faith letter and demand for the filing of a note of issue on February 12, 2021, but continuously failed to file a note of issue. Plaintiff was expressly advised in each demand and subsequent good faith letter that failure to file the note of issue would serve as a basis for our motion to dismiss the complaint.

As stated above, defendant has properly served plaintiff with both Demands and each subsequent good faith letter and has placed plaintiff on notice that the failure to file the Note of

Issue will serve as the basis of the instant motion. Therefore, the third requirement has been met under CPLR § 3216.

Plaintiff has abandoned this litigation which was commenced almost eight years ago. Plaintiff has not filed a note of issue despite a court order directing him to do so by January 17, 2020. Allowing the case to remain on the docket not only serves as a waste of judicial resources, but also unfairly prejudices defendant, who was brought into this litigation by a party who appears no longer intent on pursuing its claims.

The court having determined that the conditions precedent set forth in CPLR 3216 (b) have been satisfied and the plaintiff having failed to serve and file a note of issue within the ninety-day period set forth in said subdivision, and the plaintiff having failed to offer a justifiable excuse for the delay or demonstrate the existence of a meritorious cause of action, or even to oppose defendant's CPLR § 3216 motion; it is now therefore

ORDERED that the defendant's motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

7/13/23
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: