

Merrick v HW Manhattan One LLC

2023 NY Slip Op 33484(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 160636/2021

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

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DANA MERRICK,

Plaintiff,

- v -

HW MANATTAN ONE LLC, EFIN MANAGEMENT CORP.,
REPUBLIC SCAFFOLD & HOIST CORP., SHENG SHENG
CONSTRUCTION, INC., THE CITY OF NEW YORK

Defendant.

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INDEX NO. 160636/2021
MOTION DATE 06/05/2023
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiff, Dana Merrick, commenced this action to recover for personal injuries allegedly sustained on July 26, 2021, when he was caused to trip and fall while walking on the public sidewalk adjacent to ongoing construction at 397 8th Avenue or 300 West 30th Street, New York, NY.

Defendants, HW Manhattan One, LLC (“HW”), Efin Management Corp. (“Efin”), and Sheng Sheng Construction, Inc. (“Sheng”) (collectively “defendants”), move for an order pursuant to CPLR § § 3211, 3212, 3126 and/or 3216, for summary judgment dismissing the plaintiff’s complaint in its entirety for unreasonable neglect in proceeding with this action and in violation of a court order. For the reasons set forth hereinbelow, defendants’ CPLR § 3216 motion is granted.

Procedural History:

Plaintiff commenced the action by filing a summons and verified complaint on November 24, 2021, naming HW, Efin, Sheng, Republic Scaffold & Hoist Corp. (“Republic”), and the City of New York (“the City”) as defendants. Issue was joined by all named-defendants through service of their verified answers with cross-claims. On June 29, 2022, plaintiff discontinued the action as against defendants the City and Republic only (NYSCEF Doc. No. 47). Subsequently, plaintiff’s former counsel moved for an order to be relieved as counsel, which was granted on November 16, 2022, and the action was stayed for 60 days to allow plaintiff to retain new counsel (NYSCEF Doc. No. 76). This order directed plaintiff to appoint new counsel or notify the court of his intention to proceed *pro se* within 60 days of the date of the mailing of the notice of entry (*Id.*).

CPLR § 3216:

CPLR § 3216 is extremely forgiving of litigation delay and a court may not dismiss an action for neglect to prosecute unless the statutory preconditions to dismissal are met (*Baczowski v D.A. Collins Const. Co., Inc.*, 89 NY2d 499, 503 [1997]) CPLR § 3216(b) requires compliance with the following conditions precedent: (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, (3) the party seeking the relief shall have served a written demand to resume prosecution of the action and to serve and file a note of issue within 90 days after such receipt and further stating that default in complying with the demand will serve as a basis for a motion for dismissal for unreasonably neglecting to proceed.

Defendants are in compliance with these prerequisite conditions. Issue was joined through service of a verified answer with cross-claims on March 14, 2022, and more than a year has passed since the joinder (NYSCEF Doc. No. 12). Prior to making its motion, on April 14, 2023, defendants served a 90-day notice upon plaintiff, demanding that plaintiff immediately resume prosecution of the action and file a note of issue within 90 days thereafter (NYSCEF Doc. No. 82). This notice included a clear indication that plaintiff's default in complying with the demand would serve as a basis for a motion to dismiss for neglecting to proceed (*Id.*).

Prior to the 90-day demand, plaintiff had the opportunity to demonstrate an inclination to proceed with litigating the action. In the time since November 2022, when plaintiff's prior counsel was relieved, plaintiff has failed to appoint new counsel or otherwise notify the court of his intent to appear in a *pro se* capacity. In the 90 days following service of the demand, plaintiff failed to file a note of issue or otherwise indicate any intention to proceed in prosecuting (*see Baczkowski v D.A. Collins Const. Co., Inc.*, 89 NY2d 499, 503-4 [1997] [following service of the 90-day demand, an indication to proceed could be moving to vacate the demand or seek an extension of time to file the note of issue]). Further, plaintiff has not submitted papers in opposition to the defendants' motion nor offered a reasonable excuse for the delay (*Id.*; [even if the statutory pre-conditions are met, including plaintiff's failure to comply with the 90-day requirement, the plaintiff has another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit]). Accordingly, defendants' motion is granted.

Accordingly, it is

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; and further

The court having determined that the plaintiff has failed to comply with the decision and order dated November 16, 2022, and the court having found that such conduct and the failure to serve and file a note of issue in response to the demand therefor constitute a neglect to prosecute this action, which failures demonstrate a general pattern of delay in proceeding by plaintiff, 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 defendants dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of the court.

<u>10/4/2023</u> DATE	<u>NICHOLAS W. MOYNE, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE