SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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TAHSEEN MERAJ and VAIDEHI MERAJ,

Plaintiffs, Decision and order

-against- Index No. 12325/2011

WALGREENS CO., W-8 BROOKLYN AVENUE U, LLC., WALGREENS EASTERN CO., INC. WORLD CLASS DEMOLITION, VICTOR A. GORDON, VICTOR A. GORDON P.E., S&S CONSTRUCTION GROUP, INC., MCALPINE CONSTRUCTION and UNICORP NATIONALDEVELOPMENT, INC., "JOHN" or "JANE" SAUTER, RA,"JOHN" or "JANE BONURA, RA, "JOHN" or JANE"HONEYFOR, PE, "JOHN" or "JANE" OLES, RA, "JOHN"or "JANE" PANACHT, PE.

Defendants October 17, 2023

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WALGREENS CO., W-8 BROOKLYN AVENUE U, LLC, WALGREENS EASTERN CO., INC. and UNICORP, NATIONAL DEVELOPMENT, INC.

Third-Party Plaintiffs,

-against-

REED-MACKINNON COMPANY, LLC,

Third-Party Defendant,

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #18, 19, 20

The plaintiffs have moved seeking to restore the case the calendar. The defendants and third party defendant have moved and cross-moved seeking to strike the plaintiff's complaint pursuant to CPLR §3126. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit was instituted by plaintiffs alleging the defendants damaged their property during excavation and renovation of the neighboring property (see, Tahseen Meraj v.

Walgreen's Co., 180 AD3d 891, 116 NYS3d 601 [2d Dept., 2020]). On February 13, 2020 the court issued an order which stated that the plaintiff must file the note of issue on or before July 17, 2020 and that the "note of issue will be decided then" (see, Order dated February 13, 2020). Indeed, on November 21, 2021 another order was issued wherein the note of issue was required to be filed by September 9, 2022. The plaintiffs assert they were never aware of that order and subsequently the case was marked disposed. The plaintiff now moves seeking to restore the case. As noted, the defendants move seeking to dismiss the complaint.

Conclusions of Law

It is well settled that before the filing of the note of issue the case can only be marked off if certain statutory prerequisites are followed (see, Mitskevitch v. City of New York, 78 AD3d 1137, 911 NYS2d 662 [2d Dept., 2010]). Those requirements include a ninety day notice pursuant to CPLR §3216 or an order dismissing the complaint pursuant to 22 NYCRR 202.27. Thus, in Santiago v. City of New York, 206 AD3d 948, 170 NYS3d 600 [2d Dept., 2022] the court held a case that is marked "disposed" should be restored where the note of issue has not yet been filed and none of the other statutory requirements have been satisfied (see, also, Express Shipping, Ltd., v. Gold, 63 AD3d 669, 880 NYS2d 183 [2d Dept., 2010]). Moreover, the plaintiff's

request seeking this relief cannot be deemed late as to be denied due to laches (Picket v. Federated Department Stores Inc., 79 AD3d 1116, 914 NYS2d 646 [2d Dept., 2013]). Moreover, a pre-note of issue case is treated differently than a case where the note of issue has been filed. Thus, by their very natures they are subject to differing standards and in fact in pre-note of issue cases, other than what has already been enumerated, there are no standards. The case of Guillebeaux v. Parrott, 188 AD3d 1017, 132 NYS3d 691 [2d Dept., 2020] is instructive. In that case the trial court denied the plaintiff's request to restore the case to the active calendar on the grounds of laches. The Appellate Division reversed that determination and held the case should have been restored. The court explained that "CPLR 3404 does not apply to this pre-note of issue action...Further, there was neither a 90-day demand pursuant to CPLR 3216...nor an order dismissing the complaint pursuant 22 NYCRR 202.27...Moreover, '[t]he doctrine of laches does not provide [a] basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216(b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable...The procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note

of issue pursuant to CPLR 3216(b)'...In the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff's motion to restore the action to active status should have been granted" (id).

Thus, clearly, there are no standards that must be evaluated when determining whether this case should be restored. The defendant's argue that the plaintiff engaged in wilful and contumacious conduct to the extent that no further discovery should be permitted. It is true that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). Moreover, the severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981

NYS2d 569 [2d Dept., 2014]).

In this case there is no basis to conclude the plaintiffs engaged in any wilful or contumacious conduct. First, there is no evidence to support the accusation the plaintiffs simply have not adequately pursued discovery. On the contrary, the evidence demonstrates the plaintiffs have consistently and deliberately pursued discovery, notwithstanding any understandable setbacks as a result of the COVID-19 pandemic. Consequently, the motions seeking to strike the complaint is denied.

Further, as noted, since there has been neither a ninety-day notice served nor an order pursuant to 22 NYCRR 202.27 the plaintiff's request to restore the matter is granted.

So ordered.

ENTER:

DATED: October 17, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC