SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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ZINA PARANSKY,

Plaintiff,

-against-

OLGA GALKINA, as Administrator for the Estate of MICHAEL GRUDSKIY, and CERUMIDY REALTY

Defendants.
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Index No.: 523679/2019
Motion Date: 6-12-23
Mot. Seq. No.: 2

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 34-74, the motion is decided as follows:

Defendant, Cerumidy Realty Inc. ("Cerumidy"), moves for an Order (1) pursuant to CPLR §3212 granting it summary judgment dismissing plaintiff's Complaint and all cross-claims, (2) pursuant to CPLR §3126 dismissing plaintiff Complaint due to plaintiff's failure to comply with a 90-day notice, (3) and for such other and further relief as this Court may deem just and proper.

The plaintiff commenced this action claim that she suffered personal injuries on February 25, 2018, at approximately 7:00p.m., as a result of a slip and/or trip and fall accident that took place on the public sidewalk. The plaintiff claims that "[t]he accident occurred on the sidewalk located between two premises known as 3089 and 3099 Brighton 6th Street, County of Kings, City and the State of New York." Defendant Cerumidy Realty is the owner of the property located a 3099 Brighton 6th Street and Estate of Michael Grudskiy is the owner of the property located at 3089 Brighton 6th Street. Cerumidy contends that since the alleged sidewalk defect was not located on its property and was not created by anyone associated with it, it cannot be found liable in his case. To demonstrate that the defect was not on its property, Cerumidy submitted the affidavit of Frank S. Ferrantello, a licensed Land Surveyor in the State of New York.

It is well established that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact (*see Alvarez Prospect Hosp.*, 68 N.Y.2d 320). Only when the movant has made such a showing does the burden shift to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center*, 646 N.Y.2d 851, 853 [1985]).

Here, Cerumidy did not, in the first instance, establish its prima facia entitlement to judgment as a matter of law. The affidavit of Mr. Ferrantello was based, in part, on his review of the deeds for the premises, tax maps, and City filed survey maps. None of these materials were annexed to his affidavit, nor was an evidentiary foundation laid for their admission. Since Mr. Ferrantello affidavit was based on his review of many documents which were not proffered in admissible form and not based on his personal knowledge, the Court cannot determine whether his conclusion, that the accident did not occur on Cerumidy's property, was based on his own personal knowledge or on hearsay (*see e.g. Bank of New York Mellon v. Gordon*, 171 A.D.3d 197, 206, 97 N.Y.S.3d 286, 294). "While a witness may read into the record from the contents of a document which has been admitted into evidence (*see HSBC Bank USA, N.A. v. Ozcan*, 154 A.D.3d 822, 826–827, 64 N.Y.S.3d 38), a witness's description of a document not admitted into evidence is hearsay (*U.S. Bank N.A. v. 22 S. Madison, LLC*, 170 A.D.3d 772, 774, 95 N.Y.S.3d 264; *see Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 97 N.Y.S.3d 286; *Great Am. Ins. Co. v. Auto Mkt. of Jamaica, N.Y.*, 133 A.D.3d at 632–633, 19 N.Y.S.3d 329; *People v. Barnes*, 177 A.D.2d 989, 578 N.Y.S.2d 9). Since Cerumidy did not demonstrate its prima facia entitlement to summary judgment, that branch of its motion for summary judgment dismissing all claims and cross-claims against it must be denied regardless of the sufficiency of plaintiff's opposition papers.

Turning to that branch of Cerumidy's motion to dismiss plaintiff's complaint due to plaintiff's failure to file a note of issue pursuant to its 90-day demand, Cerumidy submitted admissible proof demonstrating that the plaintiff failed to file a note of issue in response to its 90-day notice which was served on October 22, 2022. Where a 90–day demand to resume prosecution of an action pursuant to CPLR 3216(b)(3) has been properly served, a plaintiff may

avoid dismissal, as a matter of law, by either timely filing a note of issue or moving, before the default date, to vacate the notice or to extend the 90–day period (*see* CPLR 3216[c]; *Petersen v. Lysaght, Lysaght & Kramer, P.C.*, 47 A.D.3d 783, 783, 851 N.Y.S.2d 209; *C & S Realty, Inc. v. Soloff*, 22 A.D.3d 515, 515, 801 N.Y.S.2d 772; *Bokhari v. Home Depot U.S.A.*, 4 A.D.3d 381, 381, 771 N.Y.S.2d 395). Here, upon receipt of the Cerumidy did none of the above. Notwithstanding this, CPLR 3216 is "extremely forgiving" (*Baczkowski v. Collins Constr. Co.*, 89 N.Y.2d 499, 503, 655 N.Y.S.2d 848, 678 N.E.2d 460) in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (*Davis v. Goodsell*, 6 A.D.3d 382, 383, 774 N.Y.S.2d 568; *see* CPLR 3216[a], [e]; *Baczkowski v. Collins Constr. Co.*, 89 N.Y.2d at 504–505, 655 N.Y.S.2d 848, 678 N.E.2d 460; *Kadyimov v. Mackinnon*, 82 A.D.3d 938, 918 N.Y.S.2d 770).

While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (*see* CPLR 3216[e]; *Picot v. City of New York*, 50 A.D.3d 757, 758, 855 N.Y.S.2d 237), even where such a dual showing has not been made, dismissal is not mandatory and the Court retains great discretion in deciding whether dismissal is warranted (*see Baczkowski v. Collins Constr. Co.*, 89 N.Y.2d at 503–505, 655 N.Y.S.2d 848, 678 N.E.2d 460; *Gordon v. Ratner*, 97 A.D.3d 634, 635, 948 N.Y.S.2d 627; *Kadyimov v. MacKinnon*, 82 A.D.3d 938, 918 N.Y.S.2d 770; *Davis v. Goodsell*, 6 A.D.3d at 383–384, 774 N.Y.S.2d 568).

Shortly after the expiration of the 90-day period, however, the plaintiff served upon the Cerumidy Post Deposition Demands, requesting the last known address of the CCTV services facility, as well as copies of email attachments from the CCTV services facility, which were included in the subject video footage that the defendants had recently exchanged demonstrating an intent not to abandon the action. There is no evidence that the defendant was prejudiced by the minimal delay involved in this case or that there was a pattern of persistent neglect and delay in prosecuting the action, Under these circumstances, and it the exercise of its discretion, defendant's motion to dismiss pursuant to CPLR 3126 is denied (*see Gordon v. Ratner*, 97 A.D.3d at 635, 948 N.Y.S.2d 627; *Kadyimov v. MacKinnon*, 82 A.D.3d 938, 918 N.Y.S.2d 770; *Ferrera v. Esposit*, 66 A.D.3d 637, 638, 886 N.Y.S.2d 757; *Goldblum v. Franklin Munson Fire*

Dist., 27 A.D.3d 694, 695, 815 N.Y.S.2d 593; *Davis v. Goodsell*, 6 A.D.3d at 384, 774 N.Y.S.2d 568).

Accordingly, it is hereby

ORDRED that the motion is in all respects **DENIED.**

This constitutes the decision and order of the Court.

Dated: August 2, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020