

**Children's Magical Garden, Inc. v Norfolk St. Dev.,
LLC**

2024 NY Slip Op 31737(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 152094/2014

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

CHILDREN'S MAGICAL GARDEN, INC.,

Plaintiff,

- v -

NORFOLK STREET DEVELOPMENT, LLC, S&H EQUITIES
(NY), INC., SERGE HOYDA, and 157, LLC,

Defendants.

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INDEX NO. 152094/2014

MOTION DATE 04/03/2024

MOTION SEQ. NO. 017

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 017) 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807

were read on this motion to/for DISCONTINUE.

ORDER

Upon the foregoing documents, it is

ORDERED that the joint motion of plaintiff Children's Magical Garden, Inc., and defendant 157, LLC, to discontinue the action of plaintiff against defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., Serge Hoyda, and 157, LLC, and the second (breach of deed/contract), the third (contribution/indemnification), and the fourth (breach of implied covenant of good faith and fair dealing) cross-claims of defendant 157, LLC against defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., and Serge Hoyda is granted, and the action of plaintiff Children's Magical Garden, Inc. against defendants Norfolk Street Development, LLC, S&H Equities (NY), Inc., Serge

Hoyda, and 157, LLC, and the second (breach of deed/contract), the third (contribution/indemnification), and the fourth (breach of implied covenant of good faith and fair dealing) cross-claims of defendant 157, LLC against defendants Norfolk Development, LLC, S& H Equities (NY), Inc., and Serge Hoyda are discontinued, with prejudice, and without costs, on condition that, within fifteen (15) days of service of this Order with notice of entry, plaintiff Children's Magical Garden, Inc. and defendant 157, LLC, deliver, to which each consented, personally or by regular first class mail to this court a hardcopy of the agreement between such parties that settled plaintiff's action against defendant 157, LLC (Settlement Agreement) in camera review; and it is further

ORDERED that the sole remaining cross claim of cross claimant 157, LLC asserting fraud-active concealment against cross claim defendants Norfolk Street Development, LLC, S& H Equities (NY), Inc., and Serge Hoyda (NYSCEF Document Number 234), is hereby severed and shall continue; and it is further

ORDERED that after the foregoing in camera review of the Settlement Agreement, counsel prosecuting and defending the severed cross claim (fraud-active concealment) shall appear via Microsoft Teams on July 10, 2024, 2:30 PM, for a status conference to confer, in light of the foregoing discontinuance, about the disposition of motion sequence numbers 013 and 014, and about the

necessity or lack thereof of any supplemental papers and/or further oral argument on motion sequence numbers 015 and 016.

DECISION

With respect to costs as a condition of voluntary discontinuance, controlling case law holds:

“While a voluntary discontinuance, of course, should not be unconditionally allowed if frivolously sought to delay the litigation or harass or cause the opposition unnecessary expense, the record does not support defendant’s suggestion that plaintiff [so acted]”.

Eugenia VI Venture Holdings, Ltd v Maplewood Equity Partners, LP, 38 AD3d 264, 265 (1st Dept 2007).

Likewise, here, defendants seeking costs against the movants have not demonstrated that plaintiff frivolously sought to cause such defendants unnecessary expenses when plaintiff settled its title dispute with defendant Norfolk Street Development, LLC, twelve years after commencing an adverse possession action against such defendant and its grantor defendants. Nor do defendants demonstrate that defendant cross claimant 157, LLC, acted frivolously with respect to its discontinued cross claims.

In addition, this court does not find that the discontinuance of the plaintiff’s action against the defendants, or the discontinuance of three of four cross-claims of defendant 157, LLC, against co-defendants on such cross claims,

prejudices, in any way, co-defendants in their defense of cross claim plaintiff's sole remaining cross claim alleging fraudulent concealment against them. See Haughey v Kindschuh, 176 AD3d 85 (2nd Dept 2019).

Debra A. James

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5/17/2024

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE