

**Felipe v New York City**

2024 NY Slip Op 33605(U)

September 13, 2024

Supreme Court, New York County

Docket Number: Index No. 151388/2021

Judge: Jeanine R. Johnson

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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. JEANINE R. JOHNSON PART 52-M

Justice

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INDEX NO. 151388/2021

ANA MERCEDES FELIPE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF CHAUNCEY MARINO GONZALES, DECEASED,

MOTION DATE 01/12/2024

MOTION SEQ. NO. 003

Plaintiff,

- v -

NEW YORK CITY, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, VOLUNTEERS OF AMERICA-GREATER NEW YORK, FJC SECURITY SERVICES, INC., JOHN DOES 1-10, JANE DOES 1-10, XYZ CORPORATION

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for DISMISS

Upon the foregoing documents and oral argument held on June 5, 2024, Defendant - Volunteers of America-Greater New York Inc.'s (hereinafter "VOA") and Defendants - City of New York and NYC Department of Homeless Services (collectively hereinafter "Def. NYC") combined motion to dismiss pursuant to CPLR § 3216 is denied.

LEGAL STANDARD

CPLR § 3216(a) states, "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."

CPLR § 3216(b) states, "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. Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”

CPLR § 3216(e) states, “in the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.”

“Where a party ignores a 90-day demand, the court may grant a motion to dismiss ‘on terms, unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.’” *Pub. Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 309 (1st Dept 1996). Courts have found law office failure to be an acceptable excuse. *See Miskiewicz v Hartley Rest. Corp.*, 58 NY2d 963 (1983); *Thompson v Shafer*, 57 AD2d 824 (1st Dept 1977) (“Plaintiff should not be required to suffer the consequences of his attorney’s conduct.”). However, “in defending a proper motion to dismiss for neglect it is essential that Plaintiff supply an affidavit of merit.” *Sortino v Fisher*, 20 AD2d 25, 31-32 (1st Dept 1963). The affidavit of merit must be by “someone with personal knowledge of the facts... [and] merely incorporating the complaint by reference, is insufficient.” *Pub. Serv. Mut. Ins. Co.* at 309. Even “where Plaintiff is the representative of a deceased person... there must still be merit shown by evidentiary facts.” *Sortino* at 32. But “an ample explanation for the delay requires less of a showing of merit... [and] prejudice to defendant is material but not essential.” *Id.*

## DISCUSSION

VOA asserts Plaintiff's complaint should be dismissed because she "failed to respond to... [the] written demand [served on October 11, 2023] in any way... [and] failed to show any justifiable excuse for the delay... [or show] a good and meritorious cause of action." (NYSCEF Doc. No. 47). VOA further asserts, "the administratrix of the decedent's estate... has no personal knowledge of the subject incident [and] as such, her affidavit does not and cannot affirm the merit of the case." (NYSCEF Doc. No. 71).

Def. NYC assert, Plaintiff failed to respond to the 90-day notice served... on October 26, 2023... [and] has failed to demonstrate a justifiable excuse and meritorious cause of action." (NYSCEF Doc. No. 59). Similar to VOA, Def. NYC also argue that the administratrix's, "affidavit in support is not made with personal knowledge and cannot demonstrate merit to her case." (NYSCEF Doc. No. 68).

Plaintiff contends the case has not been abandoned as evidenced by its response to Def. NYC's Demand for Authorization filed January 8, 2024, and further contends it's "still waiting for VOA to conduct depositions [and] the parties have not completed discovery... [thus it] cannot provide a Certificate of Readiness." (NYSCEF Doc. No. 62). Plaintiff outlines a series of personal and staffing issues that resulted in its delayed response as a justifiable excuse for the delay and submits the affidavit of merit by the decedent's mother to affirm the merits of the case. Lastly, Plaintiff highlights the "established public policy that action[s] should be considered on their merit... [and an adverse ruling] would work a grave injustice and severe hardship." *Id.*

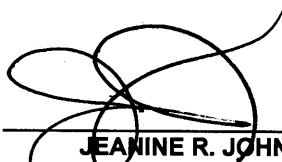
This Court finds that counsel for Plaintiff's delay is a justifiable excuse and Plaintiff's affidavit of merit sufficiently affirms a good and meritorious cause of action. The instant matter is distinguishable from *Pub. Serv. Mut. Ins. Co. v Zucker*, where the court held "counsel's affirmation, merely incorporating the complaint by reference, is insufficient." 225 AD2d 308, 309 (1st Dept 1996). Here, the affidavit of merit was supplied by the decedent's mother. Similarly to *Thompson v Shafer*, a First Department case which treats dismissal under CPLR § 3126 conservatively, this Court finds that 'Plaintiff had no intention to abandon this action, there is no undue prejudice to Defendants because of the delay of Plaintiff's counsel in prosecuting the action, and Plaintiff should not be required to suffer the consequences of her attorney's conduct.' 57 AD2d 824 (1st Dept 1977).

Accordingly, it is hereby,

ORDERED that Defendant – VOA’s motion to dismiss is denied; it is further  
ORDERED that Defendants - City of New York and NYC Department of Homeless  
Service’s motion to dismiss is denied.

This constitutes the Decision and Order of the Court.

9/13/2024  
DATE

  
JEANINE R. JOHNSON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
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