

**Board of Mgrs. of the Landings at Fresh Cr.  
Condominium v Latta**

2025 NY Slip Op 33513(U)

September 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 521093/2021

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8<sup>th</sup> day of September, 2025.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

-----X  
THE BOARD OF MANAGERS OF THE  
LANDINGS AT FRESH CREEK CONDIMINIUM,  
on Behalf of All Unit Owners,

Plaintiff,

Index No. 521093/2021

-against-

**ORDER**

DOUGLAS LATTA,

Defendant.

-----X  
The following e-filed papers read herein:

	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Exhibits.....	46 – 48
Notice of Cross-Motion/Affirmation in Opposition and in Support of Cross-Motion .....	50-51

Upon the foregoing papers, pro se defendant Douglas Latta moves (Motion Sequence [MS] # 4) for an order: 1) vacating the Notice of Discontinuance Without Prejudice (NOD) filed by plaintiff Board of Managers of the Landings at Fresh Creek Condominium, on behalf of all Unit Owners; 2) restoring this action to the active calendar; 3) dismissing this action with prejudice due to plaintiff’s improper discontinuance without proper leave of court and its “prejudicial conduct of obstructing administrative judicial process of the Court;” 4) removing any notices of pendency filed in this action; 5) ordering plaintiff to correct its business ledger to reflect a zero balance on defendant’s account; and 6) imposing sanctions on plaintiff and its counsel and referring counsel to the appropriate Disciplinary Committee for investigation of alleged ethical violations and misconduct.

Plaintiff cross-moves (MS # 5), pursuant to CPLR 3217 (b), for an order discontinuing this action without prejudice.

Plaintiff, the board of managers of a condominium complex in which defendant owns a unit, commenced this action on August 17, 2021 to recover unpaid common charges in the base amount of \$43,408.54, together with other continuing charges. On or about October 18, 2021, defendant moved to dismiss this action pursuant to CPLR 3211 (a) (1), (5) & (8). Defendant's motion was denied by order dated July 5, 2022 without prejudice to any defenses the defendant may raise in a subsequent answer. The court further directed plaintiff to serve and file an amended complaint which sets forth the time frame for which it sought unpaid common charges and assessments, and further directed defendant to interpose an answer within 30 days of receipt of the order, notice of entry and amended complaint. An amended complaint was thereafter filed on August 17, 2022. Plaintiff's affirmation of service (NYSCEF Doc No 31) states that defendant was served with the amended complaint, July 5, 2022 order and notice of entry by certified mail, return receipt requested, on August 17, 2022. No answer was thereafter interposed by defendant. While a document filed on July 18, 2023 (NYSCEF Doc No 41) is labeled in NYSCEF as "ANSWER," the document is not in the form of a responsive pleading but rather reply papers in response to plaintiff's papers filed in opposition to a purported motion by defendant to vacate the July 5, 2022 order on the basis of fraud.<sup>1</sup>

On February 5, 2025, plaintiff filed a NOD discontinuing this action without prejudice (NYSCEF Doc No 44). According to the affirmation of service, the NOD was served upon defendant by first class mail on February 6, 2025. Defendant subsequently brought the instant motion (MS # 4) to vacate the NOD and restore this action, and for further relief which includes vacating the July 5, 2022 order and dismissing this action with prejudice on grounds of "improper discontinuance without proper leave of this court and prejudicial conduct of obstructing administrative judicial process of the Court," cancelling any notices of pendency, ordering plaintiff to amend its business ledger to reflect a zero balance owed by defendant, imposing sanctions on plaintiff and its counsel and referring plaintiff's counsel to the appropriate Disciplinary Committee. In response to defendant's challenge to the NOD, plaintiff brought a cross motion for an order granting a discontinuance without prejudice pursuant to CPLR 3217 (b) as an alternative form of relief.

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<sup>1</sup> While plaintiff's affirmation in opposition (NYSCEF Doc No 32) includes as an exhibit a copy of the purported motion to vacate, the motion itself was not filed in NYSCEF and given a motion sequence number.

CPLR 3217 (a) (1) states that “[a]ny party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court” (CPLR 3217 [a] [1]). If CPLR 3217 (a) is inapplicable, CPLR 3217 (b) provides that “an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.” It has been held that where a defendant has a pending pre-answer motion to dismiss, a plaintiff cannot voluntarily discontinue the action under CPLR 3217 (a) (*see BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d 507 [1st Dept 2014]; *Rosenfeld v Renika Pty. Ltd.*, 84 AD3d 703 [1st Dept 2011]; *McMahan v McMahan*, 62 AD3d 619, 620 [1st Dept 2009]).


At the time the NOD was served on defendant in this matter, no responsive pleading had been interposed by defendant, nor was there a pending pre-answer motion to dismiss pursuant to CPLR 3211. Defendant’s prior motion to dismiss was denied by the July 5, 2022 order, and defendant was directed to serve an answer to plaintiff’s amended complaint within 30 days of service of the amended complaint, order and notice of entry, which defendant failed to do. Thus, plaintiff had the “absolute and unconditional right to discontinue [its] action without seeking permission through a court order, merely through the service of the notice upon defendant” (*Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997] [citations omitted]). Where “an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified” (*id.*; *see Brown v Cleveland Trust Co.*, 233 NY 399, 406 [1922]; *Loeb v Willis*, 100 NY 231, 235 [1885]; *Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1810 [4th Dept 2017]; *Stone Mountain Holdings, LLC v Spitzer*, 119 AD3d 548, 549 [2d Dept 2014]).

Accordingly, those parts of defendant’s motion for an order vacating the NOD and restoring this action is denied. As a result, those parts of defendant’s motion to vacate the July 5, 2022 order denying defendant’s dismissal motion, dismissing this action with prejudice and ordering plaintiff to correct its ledgers are denied as the discontinuance divested this court of jurisdiction to entertain such relief (*see CitiMortgage, Inc. v Pantoja*, 223 AD3d 610 [1st Dept 2024]). There being no active notices of pendency filed in this action, that part of the motion to cancel any notices is denied.

While discontinuance does not prevent the court from entertaining sanctions for a party's pre-discontinuance conduct (*see 13 East 124 LLC v J & M Realty Services Corp.*, 222 AD3d 446 [1st Dept 2023]), defendant has not established entitlement to the remaining items of relief in its motion, to wit, an award of sanctions and for referral of plaintiff's counsel to the Disciplinary Committee. Defendant's requests for sanctions and referral are based only on conclusory and unsubstantiated allegations that plaintiff's counsel has committed fraud upon the court by, among other things, filing an affidavit of service which counsel knew was false. However, while defendant challenges the veracity of the process server, there is no evidence presented beyond defendant's speculative and unsupported allegations that plaintiff's counsel had knowledge of any false statements in the affidavit of service. Defendant was served with plaintiff's opposition to his motion to dismiss, which included a copy of the process server's affidavit, but failed to rebut the presumption of proper service, as found by this court in the July 5, 2022 order. As a result, defendant's motion (MS # 4) is denied in all respects.

In light of this disposition, plaintiff's cross motion for an order discontinuing this action (MS # 5) pursuant to CPLR 3217 (b) is denied as academic. Nonetheless, even if plaintiff's motion pursuant to CPLR 3217 (b) were considered, plaintiff would still be entitled to discontinuance without prejudice. The determination of a motion pursuant to CPLR 3217 (b) for leave to discontinue an action without prejudice is within the sound discretion of the court (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *Aurora Loan Servs., LLC v Hunte*, 189 AD3d 1525, 1526 [2d Dept 2020]). "Generally such motions should be granted 'unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results'" (*Haughey v Kindschuh*, 176 AD3d 785, 786 [2d Dept 2019], quoting *Marinelli v Wimmer*, 139 AD3d 914, 915 [2d Dept 2016]). Here, there is no indication that substantial prejudice or other improper results would ensue from an order of discontinuance without prejudice, especially since the July 5, 2022 order would be nullified, effectively granting the principal relief sought by defendant in his motion to vacate.

The foregoing constitutes the decision and order of the court.

  
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Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**