

**Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.**

2012 NY Slip Op 30386(U)

February 16, 2012

Supreme Court, New York County

Docket Number: 112959/05

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 112959/2005  
TISHMAN CONSTRUCTION  
vs  
GREAT AMERICAN INSURANCE  
Sequence Number : 010  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided in accordance with the annexed decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED

FEB 21 2012

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

FILED

FEB 21 2012

Dated: 2/16/12

OK

NEW YORK

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Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
TISHMAN CONSTRUCTION CORP. OF NEW YORK,  
CARNEGIE HALL CORPORATION and NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA,

Plaintiffs,

Index No. 112959/05

-against-

**DECISION/ORDER**

GREAT AMERICAN INSURANCE COMPANY and  
SCHIAVONE CONSTRUCTION COMPANY,

Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>  1  </u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>          </u>
Answering Affidavits.....	<u>  2  </u>
Replying Affidavits.....	<u>  3  </u>
Exhibits.....	<u>  4  </u>

**FILED**

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Plaintiffs commenced this action for insurance indemnification against defendant Great American Insurance Company ("Great American") arising out of a personal injury lawsuit brought by two employees of defendant Schiavone Construction Corp. ("Schiavone") against plaintiffs. Great American was the issuer of an excess/umbrella policy to Schiavone. Great American has now brought the present motion to dismiss the action for failure to prosecute pursuant to CPLR § 3216. For the reasons stated below, defendant's motion to dismiss is granted.

\* 3]

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Plaintiffs commenced this action in September 2005. Great American answered the complaint in December 2005 and served plaintiffs with discovery demands on November 10, 2010. On November 15, 2010, the court held a compliance conference and issued an order requiring plaintiffs to respond to the discovery demands by January 31, 2011 and to file a Note of Issue by May 31, 2011. Plaintiffs did not comply with this order and did not move to vacate or modify the order.

On July 8, 2011, Great American's counsel served plaintiffs' counsel by regular mail with a "ninety day" demand pursuant to CPLR § 3216 for resumption of prosecution (the "demand"). While it is undisputed that plaintiffs received this demand, they did not file a note of issue or otherwise respond to defendant's demand within ninety days of receipt of the demand. In addition to the ninety day demand, on August 8, 2011, Great American also filed a motion to compel discovery. However, this motion was withdrawn by letter dated October 12, 2011.

CPLR § 3216 provides that a defendant may serve plaintiff with a demand to resume prosecution and to file a note of issue within ninety days if issue has been joined and more than one year has elapsed since the joinder of issue. If the plaintiff fails to serve and file a note of issue within ninety days of receiving the demand, the court may grant defendant's motion to dismiss the complaint for want of prosecution unless the plaintiff "shows justifiable excuse for the delay and a good and meritorious cause of action." CPLR § 3216(e); (*see also Baczkowski v. D.A. Collins Construction Company*, 89 N.Y.2d 499 (1997)). When opposing a motion to dismiss on the ground that the note of issue was not filed within ninety days of an appropriate demand, the party opposing the motion must establish a meritorious cause of action "by an affidavit from someone with personal knowledge of the facts." *See Public Serv. Mut. Ins. Co. v*

\* 4]  
Zucker, 225 A.D.2d 308 (1<sup>st</sup> Dept 1996).

Great American is entitled to a dismissal of the action pursuant to CPLR § 3216 based on plaintiffs' failure to serve and file a note of issue as they have failed to establish that they have a meritorious cause of action by submitting an affidavit from someone with personal knowledge of the facts constituting the claim. To the contrary, they have not attempted to argue they have a meritorious cause of action.

Plaintiffs' argument that they can oppose the motion to dismiss without an affidavit of merit is without basis. In *Matter of Simmons v McSimmons, Inc.*, 261 A.D.2d 547 (2d Dept 1997), the case upon which plaintiffs rely, the court found that a motion to dismiss could be denied without requiring an affidavit of merit where the moving party contributed to the delay. However, in the present case, plaintiffs have failed to demonstrate that Great American contributed to the delay in the completion of discovery. Indeed, it is plaintiffs who failed to comply with the court's order that they respond to Great American's discovery demands by January 31, 2011 and to file the note of issue by May 31, 2011 as well as failing to respond to Great American's demand in any way during the ninety-day period. As plaintiffs have failed to demonstrate that they have a meritorious cause of action, the court need not address whether they had a justifiable excuse for their delay.

Plaintiffs' argument that the demand was not properly served because it was served by regular mail is without merit. The Court of Appeals has held that "the failure to serve a CPLR 3216 demand by registered or certified mail is a procedural irregularity and, absent a showing of prejudice to a substantial right of a plaintiff, courts should not deny, as jurisdictionally defective, a defendant's motion to dismiss for neglect to prosecute." *Balancio v American Opt. Corp.*, 66

\* 5] -  
N.Y.2d 750, 751 (1985). In the present case, as plaintiffs have failed to demonstrate that they were prejudiced by the service by regular mailing the court will not deny Great American's motion as jurisdictionally defective.

Further, plaintiffs' argument that the wording of Great American's ninety-day demand is deficient is without merit. The demand served by Great American sufficiently demands that plaintiffs file a note of issue within ninety days of receipt of the demand by stating that "failure to serve a Note of Issue with a Certificate of Readiness (90) ninety days after service of this Notice will result in a default by the plaintiffs, which default will serve as a basis for Motion to Dismiss this action for unreasonably neglecting to proceed."

Based on the foregoing, Great American's motion to dismiss this action pursuant to CPLR § 3216 for want of prosecution is granted. This constitutes the decision and order of the court.

Dated: 2/16/12

Enter:                     CK                    

FEB 21 2012

J.S.C.

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**FILED**