

**Akkoc v 12-14 E. 37th Dev. Corp.**

2013 NY Slip Op 32655(U)

September 19, 2013

Supreme Court, New York County

Docket Number: 107610/2005

Judge: Lucy Billings

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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: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

Index Number : 107610/2005  
AKKOC, NURI M.  
VS.  
12-14 E. 37TH DEVELOPMENT  
SEQUENCE NUMBER : 010  
DISMISS

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

The following papers, numbered 1 to 3, were read on this motion to/for dismiss the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:  
*The court grants defendant's motion to dismiss the complaint to the limited extent set forth in the accompanying decision and otherwise denies defendant's motion.  
C.P.L.R. §§ 1021, 3126.*

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

## FILED

OCT 25 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/19/13

Lucy Billings, J.S.C.

LUCY BILLINGS  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46  
-----x

NURI M. AKKOC,

Index No. 107610/2005

Plaintiff

-against-

DECISION AND ORDER

12-14 E. 37TH DEVELOPMENT CORP.,

Defendant

-----x

12-14 E. 37TH DEVELOPMENT CORP.,

Third Party Plaintiff

-against-

**FILED**

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., F.J. SCIAME CONSTRUCTION  
CO., INC., and LUCKY DELI, INC.,

OCT 25 2013

Third Party Defendants

COUNTY CLERK'S OFFICE  
NEW YORK

-----x

LUCY BILLINGS, J.S.C.:

The remaining defendant, 12-14 E. 37th Development Corp., moves to dismiss the complaint pursuant to C.P.L.R. §§ 1021 and 3126(3). Defendant bases its motion on plaintiff's failure to respond to defendant's disclosure requests served in December 2011 and the failure by plaintiff's attorneys to attempt to contact their client to respond to the requests and thus learn of his death as of March 2011, to notify all other parties of his death, and to move to substitute the administratrix of his estate as plaintiff. Defendant, however, fails to show either that it ever served its disclosure requests on plaintiff's attorneys at

their current address as of when defendant first appeared in this action in 2010 or that the July 2012 preliminary conference or Preliminary Conference Order specifically referred to those requests, so as to prompt an inquiry by plaintiff's attorneys.

Although defendant's attorney insists that at an April 3013 status conference plaintiff's attorney orally agreed to respond to defendant's disclosure requests within 30 days, plaintiff's attorney denies any such agreement, as he had no knowledge of the requests at that point. Since the claimed agreement was neither in writing nor on the record, such an agreement would be unenforceable in any event. C.P.L.R. § 2104. Even had such a stipulation been binding under C.P.L.R. § 2104, it would have been of uncertain effect, as plaintiff's attorney at that point did know that he was without a client to represent.

Plaintiff's attorneys may have been justified in protecting their client's judgment by appealing in April 2011 the order vacating the default judgment and by moving in January 2012 to reargue defendant's motion to vacate the default judgment without attempting to consult their client. The attorneys were not justified, however, in appearing for a settlement conference in September 2012 without having attempted to consult their client. They do not show that they had consulted him before his death regarding a minimum amount that he would accept. Although defendant's offer at that conference was minimal, perhaps justifying rejection without an attempt to contact plaintiff, his attorneys did not know that the offer would be so low before the

appearance. As a result of their failures to attempt to contact plaintiff, his attorneys have wasted the parties' time at that appearance and the subsequent appearance for a compliance conference in September 2012. The record reveals no attempt by plaintiff's attorneys to contact their client even as the November 2012 deadline for depositions approached.

After plaintiff's attorneys in February 2013 learned of plaintiff's death, they attempted to obtain the parties' stipulation to substitute the administratrix of his estate as plaintiff, so that the status conferences scheduled in April and June 2013 might proceed productively. Defendant fails to show that it rejected these attempts until the June 2013 conference. Since then, however, plaintiff's attorneys have unnecessarily delayed in moving to substitute the administratrix of plaintiff's estate as plaintiff.

Consequently, the court grants defendant's motion to the extent of ordering dismissal of the complaint if plaintiff's attorneys further fail to move to substitute the administratrix of plaintiff's estate as plaintiff by September 30, 2013. C.P.L.R. § 1021. The court also imposes costs in the form of attorneys' fees awarded to defendant of \$1,000.00, to be paid to defendant by plaintiff's attorneys, for the two court appearances in September 2013. C.P.L.R. § 3126. If plaintiff's attorneys fail to pay defendant within 30 days after service of this order

with notice of entry, defendant may enter a judgment against them for that amount.

DATED: September 19, 2013

*Lucy Billings*

\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**  
OCT 25 2013  
COUNTY CLERK'S OFFICE  
NEW YORK