

**Vera v New York El. & Elec. Corp.**

2014 NY Slip Op 33891(U)

December 10, 2014

Supreme Court, Kings County

Docket Number: 16651/08

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Central Compliance Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10<sup>th</sup> day of December, 2014.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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SALVADOR VERA and EDELINA VERA,

Plaintiffs,

- against -

NEW YORK ELEVATOR & ELECTRICAL CORPORATION,  
d/b/a NEW YORK ELEVATOR COMPANY,

Defendant.

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NEW YORK ELEVATOR & ELECTRICAL CORPORATION,  
d/b/a NEW YORK ELEVATOR COMPANY,

Third-Party Plaintiff,

- against -

COURTYARD BY MARRIOTT LAGUARDIA  
AIRPORT/NYC HOTEL,  
LGA HOTEL, LLC, and  
L.A.G. HOTEL ASSOCIATES, LIMITED PARTNERSHIP,

Third-Party Defendants.

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The following papers numbered 1 to 11 read herein:

Notice of Motion/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) Annexed \_\_\_\_\_  
Reply Affidavits (Affirmations) Annexed \_\_\_\_\_

Papers Numbered

1-2; 5-8 \_\_\_\_\_  
3; 9 \_\_\_\_\_  
4; 10 \_\_\_\_\_

DECISION AND ORDER

Index No. 16651/08

Mot. Seq. No. 10 and 12

Third-Party  
Index No. 7588/09

In this action to recover damages for personal injuries, defendant/third-party plaintiff New York Elevator & Electrical Corporation, d/b/a New York Elevator Company (defendant), moves (1) pursuant to CPLR 3104 (d), to review a JHO order, dated Oct. 9, 2013 (the JHO order), and, upon such review, vacating such order and, pursuant to CPLR 3216 (e), dismissing the complaint for lack of prosecution and failure to comply with the 90-day notice; or, in the alternative, (2) dismissing the complaint, pursuant to CPLR 3126 (3), for failure to prosecute, appear at a pretrial deposition to completion, submit to an IME, or provide any other discovery for more than one year (Seq. No. 12). Plaintiffs Salvador Vera and Edelina Vera cross-move for sanctions under 22 NYCRR 130-1.1 (Seq. No. 10).

#### *Chronology*

Plaintiff Salvador Vera (the injured plaintiff) and his wife, who asserted a derivative claim (collectively, plaintiffs), commenced this action on June 11, 2008. Defendant joined issue on July 15, 2008. Discovery proceeded for the ensuing three years. The injured plaintiff was deposed on May 19, 2011, and Jan. 20, 2012, but his deposition has not been completed to date.

By order, dated June 14, 2012, plaintiffs' counsel was relieved, and the action was stayed for 60 days to allow plaintiffs to retain new counsel. On June 22, 2012, the action was marked "disposed" on the pre-note of issue calendar. On Nov. 15, 2012, defendant served a copy of the June 14<sup>th</sup> order on the pro se plaintiffs.

On Jan. 22, 2013, defendant served a 90-day notice on plaintiffs, who were still pro se. The 90-day notice stated that (1) plaintiffs were required to serve and file a note of issue within 90 days after service of the notice, and (2) if plaintiffs failed to do so, defendant would move, pursuant to CPLR 3216, to dismiss their complaint for failure to prosecute. On Apr. 2, 2013, within the 90-day notice period, plaintiffs retained new counsel, which served defendant with a notice of appearance.

On May 9, 2013, following the expiration of the 90-day notice period, defendant moved to dismiss plaintiffs' complaint, pursuant to CPLR 3216 (3), on account of their prior failure to serve and file a note of issue. On May 30, 2013, plaintiffs' new counsel served defendant with a deposition notice. By letter, dated June 5, 2013, plaintiffs' new counsel offered to produce the injured plaintiff for his continued deposition on June 12 or 13, 2013. By notice, also dated June 5, 2013, plaintiffs' new counsel made the injured plaintiff available for an IME. Defendant declined, citing its outstanding motion to dismiss plaintiffs' complaint. On July 8, 2013, plaintiffs cross-moved for sanctions for defendant's refusal to withdraw its motion to dismiss. Both motions came to be heard on Oct. 9, 2013, before a JHO who, apparently unaware that defendant had already served a 90-day notice, did not address the merits of defendant's motion to dismiss but simply restored the action to active status. The JHO order explained that such restoration was appropriate "inasmuch as the [action] was marked off the Court's pre-note calendar absent either a 90 day order or 90 day order notice." The JHO order referred plaintiffs' cross motion for sanctions to another judge for disposition.

On Oct. 14, 2013, defendant timely moved for a review of the JHO order, pursuant to CPLR 3104 (d), and, upon such review, to dismiss the action either, pursuant to CPLR 3216 (e), or pursuant to CPLR 3126 (3). Thereafter, defendant's motion to review/dismiss, together with plaintiffs' cross motion for sanctions, were referred to, and consolidated for disposition before, the undersigned.

***CPLR 3104 (d) (Review of Order of Referee)***

Want of prosecution in a pre-note of issue case is generally governed by CPLR 3216, which requires service of a 90-day notice demanding the filing of a note of issue before a court may dismiss such a case on that basis. In most instances, where there was no prior service of a 90-day notice pursuant to CPLR 3216, restoration to active status of a pre-note of issue case that was marked "inactive" is automatic (*see Matter of Transtechnology Corp. v Assessor*, 71 AD3d 1034, 1037-1038 [2d Dept 2010]). Here, however, defendant had previously served its 90-day notice. Thus, it was error for the JHO to restore the action to active status without considering the effect of defendant's outstanding 90-day notice. Accordingly, the branch of defendant's motion for a review of the JHO order is granted, and, upon such review, the JHO order is vacated (*see Surgical Design Corp. v Correa*, 21 AD3d 409, 411 [2d Dept 2005]).

***CPLR 3216 (e) (Dismissal for Want of Prosecution)***

CPLR 3216 is "extremely forgiving of litigation delay" (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]). The statute "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed (CPLR 3216 [a], [e])" (*Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]).

“While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for his or her delay, and a meritorious cause of action[,] such a dual showing is not strictly necessary in order for the plaintiff to escape such a dismissal” (*id.* at 383-384 [internal citations omitted]).

Here, following receipt of defendant’s 90-day notice, plaintiffs did not file a note of issue within the 90-day notice period. However, defendant refused plaintiffs’ repeated requests to schedule an IME and to complete the deposition of the injured plaintiff. Further, there is no evidence that defendant was prejudiced by the minimal resulting delay (counting from the date of the expiration of the 90-day notice period), or that there was a pattern of persistent neglect and delay in prosecuting the action, or that plaintiffs evinced any intent to abandon the action. Under the circumstances, the Court exercises its discretion in excusing plaintiffs’ failure to meet the defendant-imposed deadline for filing the note of issue, and denies the branch of defendant’s motion which is to dismiss pursuant to CPLR 3216 (e) (*see Altman v Donnenfeld*, 119 AD3d 828, 828-829 [2d Dept 2014]).

***CPLR 3126 (3) (Dismissal for Failure to Comply with Order to Disclose)***

The Court next denies the remaining branch of defendant’s motion under CPLR 3126 (3) to dismiss plaintiffs’ complaint as a sanction for their failure to comply with discovery. Defendant’s failure to submit an affirmation of the parties’ good faith effort to resolve the disclosure dispute pursuant to 22 NYCRR 202.7 (a) (2)<sup>1</sup> in connection with this

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<sup>1</sup> 22 NYCRR 202.7 (a) (2) provides, in relevant part, that:

“[N]o motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.”

branch of its motion requires its denial (*see Perez v Stonehill*, 121 AD3d 960, 2014 NY Slip Op 07139, \*1 [2d Dept 2014]).

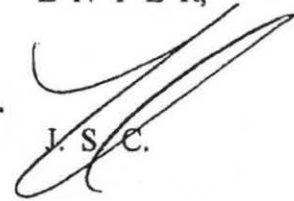
**22 NYCRR 130-1.1 (Sanctions)**

Plaintiffs' cross motion for sanctions is denied in the Court's discretion (*see Nowak v Walden*, 187 AD2d 418 [2d Dept 1992]). Defendant's challenge to the validity of the JHO order was not frivolous but was well-grounded in law, and was not interposed as a means of delaying the action or harassing plaintiffs (*see* 22 NYCRR 130-1.1 [c]).

The parties are reminded of their next scheduled appearance in the Central Compliance Part on Dec. 15, 2014, when a firm deadline for filing a note of issue in this six-year-old action will be set.

This constitutes a decision and order of the Court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL

**FILED**  
DEC 11 2014  
KINGS COUNTY CLERK'S OFFICE

