SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PECKER IRON WORKS, LLC,

Plaintiff,

- v -

BEYS SPECIALTY, INC. and FEDERAL INSURANCE COMPANY,

Defendants.

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Index No. 651128/2016

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Defendants Beys Specialty, Inc. ("Beys") and Federal Insurance Company ("Federal") (collectively, "defendants") move pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint. Defendants argue that the instant action is barred under the doctrine of *res judicata* due to the dismissal of an essentially identical action filed by plaintiff Pecker Iron Works, LLC ("Pecker" or "plaintiff") in 2011. Defendants seek costs, attorneys' fees, and sanctions under Rule 130-1.2. Plaintiff opposes.

Pecker filed an action in the Supreme Court of the State of New York, County of New York, against Beys and Federal on February 4, 2011 (the "2011 Action"). By that action, Pecker sought to recover $187,174 in alleged extras under a construction subcontract. Pecker was represented in the 2011 Action by the law firm of Quinn McCabe, LLP ("Quinn McCabe"). Defendants served an answer on March 28, 2011. Following the completion of discovery, Pecker filed a Note of Issue on May 11, 2015.

In August 2015, Quinn McCabe moved to withdraw as attorneys for Pecker and sought an acknowledgment that it had a retaining lien to the papers and property of Pecker in its possession, as well as a charging lien in the amount of $47,529.45. The Order to Show Cause was signed by Justice Robert D. Kalish on September 9, 2015 and carried a return date of September 16, 2015. On the return date of the motion, there was no appearance by any representative on behalf of

Pecker and the Court granted Quinn McCabe's motion to be relieved as counsel for plaintiff. The September 16, 2015 Order further directed: "[T]he new attorney retained by plaintiff will file a notice of appearance ... within thirty days from the date the notice to retain new counsel is mailed." The action was stayed for thirty days in order to allow for appointment of a substitute attorney. The Order included a provision requiring the parties to appear for a trial conference on November 16, 2015. Quinn McCabe served a copy of the September 16, 2015 Order with Notice of Entry on September 17, 2015.

At the scheduled conference on November 16, 2015, there was no appearance by either a representative of Pecker or any attorney on its behalf. Defendants' counsel states that he appeared and "specifically requested that the 2011 Action be dismissed on the merits." Defendants' counsel further states:

> Accordingly, Justice Kalish issued an Order dismissing the 2011 Action. The Order provided that it was being made pursuant to 22 NYCRR 202.27 which permits dismissal where a plaintiff fails to appear for a trial conference. At the bottom of the form Order, there are two boxes denoted as "CASE DISPOSED" or "NON FINAL DISPOSITION" with an instruction to "check one". Justice Kalish checked the box "CASE DISPOSED" thereby indicating that this was a final determination on the merits.

Defendants' counsel avers that his office subsequently served Pecker with a copy of the November 16, 2015 Order together with Notice of Entry. Pecker did not move to vacate or appeal the Order.

Plaintiff commenced the instant action by the filing of a summons and complaint on March 4, 2016 (the "2016 Action"). Plaintiff is represented by Amos Weinberg, Esq. in the 2016 Action. Defendants' counsel avers that he wrote to Weinberg and requested that the 2016 Action be voluntarily discontinued based on the doctrine of *res judicata*. Defendants' counsel further advised Weinberg that "in the event motion practice was necessary to dismiss the case, attorneys' fees and sanctions would be sought." Defendants' counsel states that no response to the letter was received.

Defendants contend, and plaintiffs do not refute, that the complaints filed in the 2011 Action and the 2016 Action are essentially identical. The complaint in the 2011 Action includes six causes of action: lien foreclosure, State Finance Law section 137, breach of payment bond, breach of contract, account stated, and unjust enrichment. The complaint in the 2016 Action excludes the unjust enrichment

cause of action, combines the claims on the payment bond and State Finance Law into one single count, but otherwise asserts the same causes of action as the complaint in the 2011 Action. Both actions arise out of an alleged breach of the subcontract between Beys and Pecker on a project known as "Segment 5 - Pier 53 Firehouse" performed by Beys for Hudson River Park Trust. The amount of damages sought is also the same.

In the instant motion, defendants argue that the November 16, 2015 Order dismissing the 2011 Action constitutes a decision on the merits and thus bars plaintiff's pending complaint under the doctrine of *res judicata*. Defendants further argue that the tolling provision of CPLR 205(a) does not apply because there was a "final judgment on the merits" in the prior action. Finally, defendants argue that, even assuming that the November 16, 2015 Order did not constitute a "final judgment on the merits," plaintiff's failure to appear for two court conferences constitutes a "neglect to prosecute the action" and therefore CPLR 205(a) does not apply.

In opposition, plaintiff argues that it may bring a new action under CPLR 205(a) because the 2011 Action was not terminated "by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits." CPLR § 205(a). Plaintiff asserts that the 2011 Action was dismissed by the November 16, 2015 Order on the ground the plaintiff failed to appear for a scheduled conference. Plaintiff notes that the November 16, 2015 Order "did not state that the dismissal was with prejudice" and "did not recite anything that demonstrated a general pattern of delay in proceeding with the litigation on the part of plaintiff so as to disqualify plaintiff from bringing this action under CPLR 205." Plaintiff asserts that it timely commenced the instant action within six months of the order dismissing the 2011 Action.

CPLR 3211(a) provides, in relevant part, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... (5) the cause of action may not be maintained because of ... res judicata[.]" Under *res judicata*, "a valid final judgment bars future actions between the same parties on the same cause of action." *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 (1999). "As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Id.* (internal citations and quotations omitted).

CPLR 205(a) provides that when an action is dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits, the plaintiff may bring a new action within six months of the dismissal, even though the action would otherwise be barred by the statute of limitations. CPLR § 205(a); *see also United States Fid & Guar. Co. v. Smith Co.,* 46 N.Y.2d 498, 505 (1979) (CPLR 205(a) "serves the salutary purpose of preventing a Statute of Limitations from barring recovery where the action, at first timely commenced, had been dismissed due to a technical defect which can be remedied in a new action"); *Matter of Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 163 n.2 (2d Dept. 1996) (CPLR 205(a) is a "remedial" statute "designed to prevent claims from being irreversibly extinguished following technical-type dismissals").

"The proviso in CPLR 205(a) that the toll is inapplicable when the prior action was dismissed on the merits is essentially a corollary of the principle of res judicata that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Yonkers Contracting Co., Inc. v. Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 (1999) (internal quotations omitted). A dismissal "with prejudice" generally signifies that the court intended to dismiss the action "on the merits." *Id.*

In 2008, the Legislature amended CPLR 205(a) to add a requirement that "[w]here the dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."[1] CPLR § 205(a), as amended by

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[1] CPLR 205(a), as amended in 2008, provides:

> New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. *Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct*

L.2008, ch. 156, § 1; *see also* Siegel, N.Y. Prac. § 52 (5th ed.) (discussing the 2008 amendment to CPLR 205(a)).

Here, the 2011 Action was dismissed pursuant to 22 NYCRR 202.27 on the ground that plaintiff failed to appear for a scheduled conference on November 16, 2015. Section 202.27(b) provides, in pertinent part,

> Defaults. At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: * * * (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
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> N.Y. Comp. Codes R. & Regs. tit. 22, § 202.27(b).

The November 16, 2015 Order further noted that "[t]he court previously relieved plaintiff's attorney on September 16, 2015" and that "[t]he outgoing attorney served the order of the court on the plaintiff on September 17, 2015."

Accordingly, because the dismissal of the 2011 Action was not "on the merits," the doctrine of *res judicata* and the provision in CPLR 205(a) precluding a new action where the prior action was terminated by "a final judgment upon the merits" do not apply. *See, e.g.*, *Espinoza v. Concordia Intern. Forwarding Corp.*, 820 N.Y.S.2d 259, 260 (1st Dept. 2006) (holding that original action was not dismissed "on the merits" where plaintiff's counsel's failure to attend a compliance conference resulted in dismissal) ("[A] prior order that does not indicate an intention to dismiss the action on the merits is not a basis for the application of the doctrine of res judicata."); *see also Carmenate v. City of New York*, 872 N.Y.S.2d 120, 121 (1st Dept. 2009) (commencement of new action was proper under CPLR 205(a) where original action was timely commenced and dismissal was not on the merits but due to lack of a qualified administrator); *Carrick v. Central General Hospital*, 414 N.E.2d 632, 637–38 (1980) (prior dismissal of plaintiff's wrongful death cause of action was not a "final judgment upon the merits" within the

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> *constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.*
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> CPLR § 205(a) (emphasis added).

meaning of CPLR 205(a) notwithstanding that dismissal was based upon plaintiff's failure to establish one of the essential elements of her right to bring suit).

Defendants alternatively argue that "neglect to prosecute" was the basis for the dismissal of the 2011 Action, thus barring recommencement under CPLR 205(a). While the November 16, 2015 Order dismissing the 2011 Action noted that plaintiff had "failed to appear before [the] Court for a scheduled conference" and that plaintiff's attorney had withdrawn two months earlier, the Supreme Court did not "set forth on the record the specific conduct constituting the neglect" which would "demonstrate a general pattern of delay in proceeding with the litigation." CPLR 205(a). Absent such record indicating a general pattern of delay, this court cannot conclude that the prior action was dismissed for "neglect to prosecute" in light of the 2008 amendment to CPLR 205(a). *See Franchise Acquisitions Group Corp. v. Jefferson Val. Mall Ltd. Partnership*, 73 A.D.3d 1123, 1124 (2d Dept. 2010) (where dismissal of the prior action was upon the plaintiff's default pursuant to 22 NYCRR 202.27(b), the record did not support defendant's contention that the prior action was dismissed for failure to prosecute and dismissal did not constitute a determination on the merits); *cf. Marrero v. Crystal Nails*, 978 N.Y.S.2d 257, 263–64 (2d Dept. 2013) (holding that the 2008 amendment to CPLR 205(a) did not apply retroactively and finding that the prior action was dismissed for neglect to prosecute); *see also Stora v. City of New York*, 879 N.Y.S.2d 904 (Sup. Ct. 2009) (discussing the 2008 amendment to CPLR 205(a) and holding that plaintiff was entitled to the benefit of the six-month extension where Supreme Court dismissed the initial action without making any finding of a pattern of delay) ("[A]ny defendant concerned about a plaintiff obtaining the benefit of a section 205(a) extension after a dismissal on any grounds that could be deemed to be a neglect of prosecution would be wise to request at the time of dismissal that the court issue an adjudication on the issue of general delay."). Accordingly, since dismissal of the original action does not fall within one of the listed exceptions, plaintiff may avail itself of the saving provision of CPLR 205(a).

Wherefore, it is hereby,

ORDERED that defendants' motion to dismiss plaintiff's complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: NOVEMBER 9, 2016

EILEEN A. RAKOWER, J.S.C.

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