

**Padilla v L. Riso & Sons Co., Inc.**

2019 NY Slip Op 33329(U)

October 31, 2019

Supreme Court, Kings County

Docket Number: 509093/2019

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

Index No.: 509093/2019  
Motion Date: 10-7-17  
Mot. Cal. No.: 40

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ANA PADILLA, MIQUEL MARTEL, HUMBERTO  
CALERO and MADELINE PADILLA,

Plaintiffs,

-against-

**DECISION/ORDER**

L. RISO & SONS CO., INC.,

Defendant.

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The following papers numbered 1 to 3 were read on this motion:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Other.....	

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Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages to property allegedly caused by defendant's negligence, the defendant, L. RISO & SONS CO., INC., moves to dismiss the action as untimely pursuant to CPLR § 214 since it was not commenced within three years of the date of the occurrence. The plaintiff opposes the motion claiming that since the action was commenced within six months of the dismissal of the action, it was timely under CPLR 205(a)<sup>1</sup>.

<sup>1</sup>CPLR 205 provides:

(a) 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

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The occurrence giving rise to this action occurred on August 29, 2011. Plaintiff timely commenced an action against the defendant arising out of the occurrence in 2013. By notice of motion dated December 11, 2018, the defendant moved to dismiss the action pursuant to CPLR 3126 due to plaintiff's alleged failure to comply with a 90 day notice and to provide outstanding discovery. Defendant mailed the 90 day notice to plaintiff's counsel on October 17, 2017 demanding that the plaintiff "restore the case" (the action was apparently marked off calendar on October 14, 2016) and that all outstanding discovery be provided. The defendant re-sent the same notice by Certified Mail, R.R.R. on October 23, 2017. The 90 day notice did not demand, as CPLR 3126(b)(3) requires that the plaintiff "serve and file a note of issue within ninety days after receipt of [the] demand" nor did it state that plaintiff's default in complying with the demand would "serve as a basis for a motion by the [defendant]" for dismissal "for unreasonably neglecting to proceed."

Pursuant to the order of Justice King dated April 10, 2019, the motion was granted. In her order, Justice King did not state the basis for the dismissal, nor did she set forth any specific conduct constituting neglect demonstrating a general pattern of delay in proceeding with the

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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 constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

litigation as CPLR 205(a) now requires.<sup>2</sup>

On April 29, 2019, well within six months of the dismissal of the action, the plaintiff commenced this instant action which arises out of the same occurrence and alleges the same causes of action.

Defendant contends that even though Justice King did not state in her order why the action was dismissed, it is clear that the dismissal was based upon a failure to prosecute and CPLR 205(a) is therefore inapplicable. Plaintiffs contend that since Justice King's order is silent as to why the action was dismissed, plaintiffs were within their rights to recommence the action within the six month period provided for in CPLR 205(a) even though the action was commenced more than three years following the occurrence.

In *Sokoloff v. Schor*, No. 100056/16, 2019 WL 3938204 [2nd Dep't 2019], it was recently held that since CPLR 205(a) requires that in dismissing actions for neglect of prosecution, courts must describe the pattern of conduct constituting the neglect and that absent such language in an order dismissing the action, a plaintiff is free to commence a subsequent action against the same defendant concerning the same transactions or occurrences within the six-month grace period of CPLR 205(a) (*id.* at 6). The *Sokoloff* Court further held that a later order from a different court cannot properly be used for setting forth the specific conduct constituting the neglect that led to the dismissal in the prior action in satisfaction of the statutory requirements of CPLR 205(a) (*id.* at 5).

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<sup>2</sup>Certain amendments to CPLR 205(a) became effective on July 7, 2008. Pursuant to these amendments, where a court dismisses an action for neglect to prosecute under the statute, the Court must "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."

Since Justice King's order is silent as to why the prior action was dismissed, the commencement of this action on April 29, 2019, which was within six months of the dismissal of the action, was timely under CPLR 205(a). This Court is without authority to look behind Justice King's order for the purpose of determining the basis for the dismissal.

Accordingly, it is hereby

**ORDERED** that defendant's motion to dismiss is **DENIED**.

This constitutes the decision and order of the Court.

Dated: October 31, 2019



**PETER P. SWEENEY, J.S.C.**

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**HON. PETER P. SWEENEY, J.S.C.**