

**Street Line, Inc. v Capital Logistics & Warehousing
Group, Inc.**

2020 NY Slip Op 30330(U)

January 24, 2020

Supreme Court, New York County

Docket Number: 656338/2018

Judge: Andrew Borrok

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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: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

STREET LINE, INC.

Plaintiff,

- v -

CAPITAL LOGISTICS & WAREHOUSING GROUP, INC.,

Defendant.

-----X

INDEX NO. 656338/2018
MOTION DATE 10/18/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for MISCELLANEOUS

Upon the foregoing documents and for the reasons set forth on the record (1/24/2020), Street Line, Inc. (the Plaintiff)'s motion to vacate the Notice of Discontinuance With Prejudice (NYSCEF Doc. No. 18, the Notice of Discontinuance), filed July 22, 2019, is granted.

The Relevant Facts and Circumstances

On December 19, 2018, the Plaintiff commenced this action against Capital Logistics & Warehousing Group, Inc. (the Defendant) for (1) conversion and (2) breach of contract. On March 4, 2019, the Defendant filed a motion to dismiss for lack of personal jurisdiction (NYSCEF Doc. No. 7). The parties subsequently filed two stipulations to extend the briefing schedule for the motion to dismiss (NYSCEF Doc. Nos. 12-13), dated March 14, 2019 and April 10, 2019 respectively.

Pursuant to a So-Ordered Stipulation of New York State Supreme Court Justice Nancy M Bannon (NYSEF Doc. No. 17), entered May 1, 2019, the parties agreed to hold the motion to dismiss and other proceedings in abeyance pending mediation in a related action. By email, dated July 11, 2019, Plaintiff's counsel advised Defendant's counsel that she "was discussing with client whether to withdraw complaint and refile in NJ district court" (NYSCEF Doc. No. 32). By email, dated July 22, 2019, Plaintiff's counsel stated to Defendant's counsel "[w]e will discontinue the NY matter and file in DNJ. Thanks." (*id.*). The Plaintiff then discontinued this action on July 22, 2019 pursuant to a Notice of Discontinuance inadvertently filed with prejudice (NYSCEF Doc. No. 18) i.e., as opposed to without prejudice so that the New Jersey matter could go forward. The Plaintiff now moves to vacate the Notice of Discontinuance with prejudice so that she can file a Notice of Discontinuance without prejudice.

Discussion

A notice of discontinuance must be timely filed pursuant to CPLR § 3217 (a) (1), which provides that:

- (a) Without an order. Any party asserting a claim may discontinue it without an order
 1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court;

Thus, the Plaintiff should have filed its Notice of Discontinuance before the Defendant filed its pre-answer motion to dismiss (*see BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d 507, 511 [1st Dept 2014] [stating that a motion to dismiss constitutes a "responsive pleading" within the meaning of CPLR § 3217 (a) (1)]). The record indicates that the Plaintiff's Notice of

Discontinuance was untimely filed on July 22, 2019, nearly four months after the Defendant filed its motion to dismiss on March 4, 2019. As a result, the Notice of Discontinuance may be vacated for failure to adhere to the deadlines set forth in CPLR § 3217 (a) (1) (*see Ostwald v Ostwald*, 2011 NY Slip Op 33808[U], *6 [Sup Ct, NY County 2011] [vacating a notice of discontinuance that was filed contrary to the timelines set forth in CPLR § 3217 (a) (1)]).

In addition, a court may correct a mistake, omission, defect or irregularity pursuant to CPLR § 2001:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

Here, the Plaintiff clearly committed a clerical error when it specified that the Notice of Discontinuance was filed with prejudice. This is evident from an email, dated July 22, 2019, from Plaintiff's counsel to Defendant's counsel wherein Plaintiff's counsel stated that the Plaintiff would "discontinue the NY matter and file in [the District of New Jersey]" (NYSCEF Doc. No. 23). Significantly, the email was sent on the same day that the Notice of Discontinuance was filed such that the Defendant had notice of the Plaintiff's intended course of action.

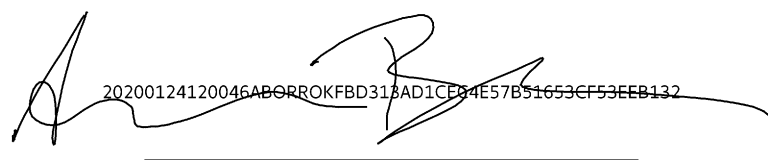
In her affidavit in support of this motion, Plaintiff's counsel also attested that she "inadvertently drafted the Discontinuance as being with prejudice, rather than without prejudice, as would have allowed the matter to be filed in the District of New Jersey. This was a pure mistake on my part,

as the intent was clearly to discontinue the herein matter without prejudice” (NYSCEF Doc. No. 21, ¶¶ 11-12). Under these circumstances, the Plaintiff’s mistake was purely clerical and favors correction (but see Deutsche Bank Natl. Trust Co. v Lee, 60 Misc 3d 171, 174-175 [Sup Ct, Westchester County 2018] [denying the plaintiff’s motion to vacate a discontinuance pursuant to CPLR § 2001 because the mistake alleged was that the voluntary discontinuance should not have been filed in the first instance and the plaintiff failed to submit any affidavit explaining the surrounding circumstances]). Accordingly, the Plaintiff’s motion to vacate the Notice of Discontinuance is also granted pursuant to CPLR § 2001.

Accordingly, it is

ORDERED that the Plaintiff’s motion to vacate the Notice of Discontinuance (NYSCEF Doc. No. 18) is granted; and it is further

ORDERED that the Plaintiff shall file a new Notice of Discontinuance by January 31, 2020.


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1/24/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: