

Sky Windows & Aluminum Prod. Ltd v 329 Pleasant Ave. Mazal Holdings, LLC

2021 NY Slip Op 32408(U)

November 22, 2021

Supreme Court, New York County

Docket Number: 156032/2018

Judge: William Perry

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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. WILLIAM PERRY PART **23**

Justice

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SKY WINDOWS AND ALUMINUM PRODUCT LTD,

Plaintiff,

INDEX NO. 156032/2018

MOTION DATE 06/15/2021

MOTION SEQ. NO. 001

- v -

329 PLEASANT AVENUE MAZAL HOLDINGS,
LLC, ATLANTIC SPECIALTY INSURANCE COMPANY, UMF
CONTRACTING CORP.

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action, Plaintiff Sky Windows and Aluminum Product alleges that Defendants 329 Pleasant Avenue Mazal Holdings LLC ("Mazal"), Atlantic Specialty Insurance Company (together, "Defendants"), and UMF Contracting Corp.¹ failed to pay it the full amount due for the supply and the installation of windows. In motion sequence 001, Plaintiff moves to vacate a 90-day notice filed by Defendants pursuant to CPLR 3216. The Defendants cross-move to dismiss the complaint for want of prosecution.

Background

Plaintiff alleges that it was employed by UMF to supply and install windows on the property located at 329 Pleasant Avenue, New York, NY, which was owned by Mazal at the time. (NYSCEF Doc No. 1, Complaint, at ¶¶ 8-9.) Plaintiff alleges that it performed this work from May 11, 2016 through May 19, 2017, with an agreed total price of \$395,000.00, but that UMF and

¹ To date, UMF has failed to appear.

Mazal only paid \$258,600.00 to Plaintiff. (*Id.* at ¶¶ 10, 13.) As a result, Plaintiff allegedly filed a notice of mechanic's lien in the amount of \$136,400.00, which Mazal moved to discharge in a separate proceeding under Index No. 158844/2017.²

Plaintiff subsequently commenced this action to foreclose on the mechanic's lien on June 27, 2018. Defendants answered on September 14, 2018 (NYSCEF Doc No. 6) and Plaintiff filed its reply to counterclaims on October 5, 2018. (NYSCEF Doc No. 8.)

Thereafter, on February 12, 2021, new counsel for Defendants filed a notice of appearance "as co-counsel" to Defendants' previously retained counsel. (NYSCEF Doc No. 12, Notice of Appearance.) The new counsel simultaneously filed the 90-day notice, pursuant to CPLR 3216, demanding that Plaintiff resume prosecution, comply with discovery obligations, and serve and filed a note of issue within 90 days, or Defendants would move to dismiss the complaint. (NYSCEF Doc No. 13, 90-day Notice.)

Plaintiff then filed a consent to change attorney and the notices of appearance for its own new counsel (NYSCEF Doc Nos. 15, 16, 17), a request for a preliminary conference (NYSCEF Doc Nos. 19, 20), and discovery demands and interrogatories. (NYSCEF Doc Nos. 21-24.)

Plaintiff then filed motion sequence 001 to vacate the 90-day demand, arguing that it "has a meritorious cause of action in this litigation and has not abandoned his [sic] causes of action. Furthermore, Defendants 3216 notice is entirely premature at this time." (NYSCEF Doc No. 26, Pl.'s Memo at ¶ 19.) Plaintiff also notes that its' recent flurry of filings "evidences a lack of intent to abandon the action." (*Id.* at ¶ 22.)

Defendants cross-moved to dismiss the complaint for want of prosecution, arguing that Plaintiff fails to offer a justifiable excuse for its two year, four-month delay in prosecuting the case

² This action was discontinued by stipulation dated February 7, 2018.

or complying with discovery and that Plaintiff fails to demonstrate a meritorious cause of action. (NYSCEF Doc No. 36, Cross-motion, at ¶ 20.)

In reply, Plaintiff argues that Defendants' new counsel was without authority to file the 90-day notice because Defendants failed to file a consent to change attorney. (NYSCEF Doc No. 44, Reply, at ¶¶ 6-10.) As such, Plaintiff argues that the 90-day notice was invalid and ineffective. (*Id.* at ¶ 9.) Additionally, Plaintiff argues that demonstrating a justifiable excuse for delay and a meritorious cause of action is only required in instances where a party moves for an extension of time to file the note of issue in response to a 90-day demand. (*Id.* at ¶ 35.)

Discussion

“CPLR 3216 is the general statutory authority for neglect-to-prosecute dismissals [and] is extremely forgiving of litigation delay.” (*Baczkowski v D.A. Collins Const. Co.*, 89 NY2d 499, 502–03 [1997]; *see also Ramon v Zangari*, 116 AD3d 753, 754 [2d Dept 2014] [the provision “never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed”].) The provision states that the court “on its own initiative or upon motion ... may dismiss” a party's pleadings if the following conditions have been complied with:

- (1) Issue must have been joined in the action;
 - (2) One year must have elapsed since the joinder of issue ... ; [and]
 - (3) The ... party seeking such relief ... shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed.
- (CPLR 3216[a], [b].)

Upon the proper filing of such a demand, the responding party is “required to file a note of issue or move before the conclusion of the 90-day period to either vacate the notice or extend the time for filing.” (*Vasquez v State*, 12 AD3d 917, 918 [3d Dept 2004].) If the responding party fails to either file or so move, it is found to be in default of the notice, and the court may dismiss the complaint “unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.” (CPLR 3216[e]; *Grant v City of New York*, 17 AD3d 215, 216-17 [1st Dept 2005] [reversing trial court decision dismissing the complaint for plaintiff’s failure to demonstrate justifiable excuse and meritorious cause of action where plaintiff timely responded to 90-day notice].)

Here, Plaintiff has “taken immediate and repeated steps to continue prosecution of this case after receiving the 90-day notice[.]” (*Crum v Benson, MD*, 2016 WL 1270475, at *1 [Sup Ct, NY County 2016] [granting motion to vacate 90-day notice where plaintiff resumed prosecution after receipt of such, demonstrating “no evidence of any intent by plaintiff to abandon the action”].) Defendants fail to specifically allege how they would be prejudiced by such vacatur aside from incurring “additional attorneys’ fees”. (Cross-motion at ¶ 22; *see also Holmes v Niakate*, 2021 WL 2388809, at *1 [Sup Ct, NY County, June 7, 2021].)

Additionally, there is no indication that Defendants made any good faith efforts to resolve the discovery defaults upon which the 90-day notice was predicated, and, as such, dismissal is not warranted pursuant to 22 NYCRR § 202.7[a], which requires “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.” (*Wu v Mount Sinai Medical Center*, 2015 WL 6437568, at *2 [Sup Ct, NY County 2015].)

Finally, regarding Plaintiff's contention that the 90-day notice filed by Defendants' "co-counsel" should be disregarded because Defendants have not filed a consent to change attorney form (Reply at ¶¶ 28-31), the court directs Defendants to comply with CPLR 321 by filing same. (*EIFS, Inc. v Morie Co., Inc.*, 298 AD2d 548, 550 [2d Dept 2002]; *STA Parking Corp. v Danielle Court Condominium*, 2017 WL 4167629, at *3-4 [Sup Ct, NY County 2017].) Plaintiff's motion is granted and the Defendants' cross-motion is denied. Thus, it is hereby

ORDERED that Plaintiff's motion sequence 001 to vacate the 90-day notice is granted; and it is further

ORDERED that Defendants 329 Pleasant Avenue Mazal Holdings LLC and Atlantic Specialty Insurance Company's cross-motion to dismiss the complaint is denied; and it is further

ORDERED that Defendants, within 30 days of the date of this order, shall file a consent to change counsel form conforming to the requirements of CPLR 321[b]; and it is further

ORDERED that the parties are directed to meet and confer and submit a proposed preliminary conference order to the court for signature via NYSCEF on or before November 19, 2021.

11/22/2021

DATE



WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE