

Elhanafy v City of New York

2022 NY Slip Op 32723(U)

August 11, 2022

Supreme Court, New York County

Docket Number: Index No. 158770/2014

Judge: Leslie Stroth

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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. LESLIE STROTH PART 52

Justice

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INDEX NO. 158770/2014

MANAL ELHANAFY, ELSAID ARIF,
Plaintiff,

MOTION DATE 05/04/2022

MOTION SEQ. NO. 004

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, CHINATOWN PARTNERSHIP
LOCAL DEVELOPMENT CORPORATION A/K/A
CHINATOWN B.I.D., TRIUMPH CONSTRUCTION CORP.,
S&M ENTERPRISES LLC A/K/A PERLBINDER HOLDINGS
LLC, WON & HAR REALTY CORPORATION

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 124, 125, 126, 127,
128, 129, 130, 131, 132, 133, 163, 164, 165, 166, 167

were read on this motion to/for

STRIKE PLEADINGS

Defendant Triumph Construction Corp. (Triumph) moves to dismiss this negligence action
for plaintiffs' alleged failure to prosecute, pursuant to CPLR 3216. The action arises out of an
alleged trip and fall accident occurring on March 28, 2014 at 242 and 244 Canal Street, New York,
New York, which allegedly caused injuries to plaintiff Manal Elhanafy (Ms. Elhanafy). Plaintiff
Elsaid Arif (Mr. Arif), Elhanafy's husband, joins in the action and claims loss of consortium.

Plaintiffs commenced this action by service of a summons and complaint on September 8,
2014. Triumph served its answer on November 5, 2015. Plaintiffs subsequently filed a
supplemental summons and verified amended complaint to include Won & Har Realty Corporation
as a defendant, to which Triumph served an amended answer on November 13, 2014. On August
31, 2016, the Court relieved plaintiffs' counsel, and the matter was stayed for 90 days. On May
26, 2017, plaintiffs' deposition was conducted, at which Ms. Elhanafy represented herself. On
August 15, 2017, plaintiffs appeared for an Independent Medical Examination (IME).

On January 3, 2022, over five years after plaintiffs' deposition and IME, Triumph served a 90-day notice upon plaintiffs demanding that plaintiff serve and file the note of issue within 90 days after service of such demand. (See Triumph's Exhibit E). Plaintiffs did not file the note of issue within 90 days of service of the demand, and Triumph brings the instant motion for plaintiff's failure to prosecute this matter.

Pursuant to CPLR 3216,

Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, *may* dismiss the party's pleading on terms. (Emphasis added).

The Court cannot dismiss an action pursuant to CPLR 3216 unless: "at least one year has elapsed since joinder of issue; defendant has served on plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff has failed to serve and file a note of issue within the 90-day period." *Baczowski v D.A. Collins Const. Co., Inc.*, 89 NY2d 499, 503 (1997). The Court of Appeals has held that, "CPLR 3216, as it now reads, is extremely forgiving of litigation delay." *Id.* Whether the Court should grant or deny a CPLR 3216 dismissal motion is left to its sound discretion. *Id.*

During the pendency of the instant motion, plaintiff Ms. Elhanafy retained new counsel. (See NYSCEF doc. 135, Notice of Appearance dated June 13, 2022). Plaintiff Ms. Elhanafy opposes the motion by her newly retained attorney, arguing that she was delayed in the prosecution of this action because her prior attorney withdrew his representation, leaving her to litigate this matter without the assistance of counsel since August 21, 2016. (See NYSCEF doc. 40). She has now retained counsel and is able to proceed. Moreover, as conceded by Triumph, Ms. Elhanafy appeared for a deposition, an IME, and numerous court conferences while representing herself.

Although Ms. Elhanafy recently retained new counsel, she has not demonstrated any other efforts to prosecute this matter since her IME August 15, 2017. Further, Ms. Elhanafy has not provided any excuse as to her five-year delay in retaining a new attorney, nor has she in any way established that she has not unreasonably neglected to proceed in this action. Therefore, the Court determines that plaintiff Ms. Elhanafy has not offered a justifiable excuse for her delay in proceeding and grants Triumph's motion as against her.

The Court notes that Mr. Arif has not retained counsel nor has he filed any opposition papers. Accordingly, Triumph's motion to dismiss for failure to prosecute is also granted as to Mr. Arif. The Court finds that the conditions set forth in CPLR 3216 (b) have been satisfied as against plaintiff Mr. Arif, who failed to serve and file a note of issue within the ninety-day period set forth in said subdivision and failed to offer a justifiable excuse for the delay or demonstrate the existence of a meritorious cause of action.

The Court determines that plaintiffs have failed to proceed generally in this action, and finds that their conduct, notably including the failure to serve and file a note of issue in response to the demand, therefore constitutes a neglect to prosecute this action, and demonstrates a general pattern of delay in proceeding by plaintiffs.

Therefore, it is ORDERED that the defendant Triumph's motion to dismiss this action is granted as against both plaintiffs, Manal Elhanafy and Elsaid Arif, and it is further

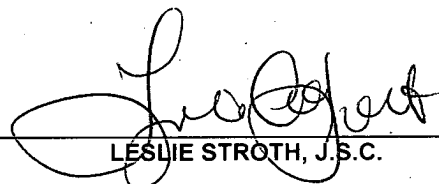
ORDERED that the part of the complaint brought by plaintiffs is dismissed in its entirety as against all defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

<u>8/11/2022</u> DATE			 LESLIE STROTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>