

De La Verriere v Elymar Rest. Corp.

2024 NY Slip Op 34419(U)

December 13, 2024

Supreme Court, New York County

Docket Number: Index No. 654354/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

JEANINE DE LA VERRIERE,

Plaintiff,

- v -

ELYMAR RESTAURANT CORPORATION, ELYANE
VASCHETTA, WILLIAM WELLES

Defendants.

-----X

INDEX NO. 654354/2022

MOTION DATE 12/12/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18 were read on this motion to/for DISMISS LACK OF PROSECUTION.

Defendants' motion to dismiss based on plaintiff's failure to prosecute is denied.

Background

In this putative class action, plaintiff contends that defendants failed to comply with Labor Law provisions concerning lawful wages paid to servers.

Defendants seek dismissal pursuant to CPLR 3216. They claim that they answered the complaint on December 28, 2022 and that plaintiff has refused to respond to any of its discovery demands since this action began. Defendants argue that they served plaintiff with a 90-day demand that plaintiff resume prosecution of this case on February 6, 2024 and that plaintiff did not file a timely note of issue as requested in the demand.

In opposition, plaintiff cites to various trial court rules and the rules of this part in support of her claim that dismissal under CPLR 3216 is inappropriate. She points out that this case has not yet even had a preliminary conference. Plaintiff also argues that she has produced all relevant documents in her possession in response to defendants' document demands.

In reply, defendants contend that plaintiff failed to cite a reasonable excuse for not filing a note of issue within 90 days of defendants' demand. They also insist that plaintiff has not provided a single document in response to defendants' discovery demands. Defendants maintain that there was no requirement that a conference be held prior to the service of their 90-day demand.

Discussion

“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. Unless the order specifies otherwise, the dismissal is not on the merits” (CPLR 3216[a]).

The Court denies the motion as the procedural timeline of this matter does not suggest that plaintiff “unreasonably” neglected to prosecute this case. The fact is that plaintiff filed an RJI on February 1, 2024 (NYSCEF Doc. No. 9) and defendants uploaded their 90-day demand under CPLR 3216 five days later on February 6, 2024 (NYSCEF Doc. No. 10). Unfortunately, plaintiff did not receive a conference date for many months. Simply put, the Court is unable to dismiss a case under these circumstances. It would make little sense to fault plaintiff for not filing a note of issue while she waited for the matter to be scheduled for a preliminary conference.

The Court must state the obvious—it simply took too long for this case to be assigned to a judge following the filing of the RJI. The relevant trial court rule states that a preliminary conference should be held within 45 days of the filing of the RJI (22 NYCRR 202.19[b][1]). This matter was not assigned to this part until October 2024 and this Court set a preliminary

conference for November 2024. Had the case been assigned earlier, the instant motion practice would likely not have been necessary and so the Court apologizes for the aforementioned delay.

To be sure, plaintiff seemingly has not done much to move her case. She waited a year and a half to file the RJI and although she claims that she has provided documents, she did not attach a copy of her responses.

Therefore, the Court finds that plaintiff must respond to defendants' discovery demands (and include any relevant documents) on or before January 7, 2025. The Court stresses that because so much time has passed since these demands were served, plaintiff can only raise objections based on privilege or that the requests are palpably improper (*Otto v Triangle Aviation Services, Inc.*, 258 AD2d 448, 448 [2d Dept 1999]). If plaintiff does not possess such documents, then she must provide a *Jackson* affidavit by January 7, 2025.

Summary

Although the Court recognizes defendants' apparent frustration with the slow pace at which this case has moved, this Court is unable to grant the instant motion. "The nature and degree of the penalty to be imposed on a motion to dismiss for want of prosecution is a matter of discretion with the court. CPLR 3216 is an extremely forgiving rule that never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (*Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532, 533 [1st Dept 2009] [internal quotations and citations omitted]).

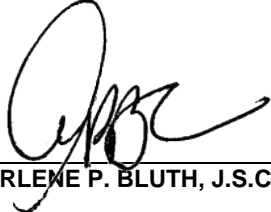
Here, plaintiff (eventually) did what she was supposed to do—file a request for a preliminary conference. That it took so long for it to be administratively assigned to this part is a valid justification for plaintiff not filing a note of issue as demanded by defendants. The Court

cannot find that plaintiff failed to prosecute a case because she was waiting for an assignment to a judge.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied.

See NYSCEF Doc. No. 13 concerning the next conference date and instructions concerning the next conference.

12/13/2024		
DATE		ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE