At a Part 70 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York on the 4th day of October 2018

PRESENT:
HON. WAVNY TOUSSAINT,
Justice

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MEGA CONTRACTING INC. and
MEGA CONTRACTING GROUP LLC,

Plaintiffs,

-against-

ADVENTURE MASONRY CORP. and
UTICA FIRST INSURANCE COMPANY,
Defendant.

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Index No:
503330/2014

DECISION

The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	1-2
Cross-Motion/Affidavit of Merit (Affirmations)	3-5
Reply Affidavit (Affirmations)	6

Upon the foregoing papers, defendant Adventure Masonry Corp. (hereinafter "Adventure") moves for an order, pursuant to CPLR § 3216, dismissing plaintiffs' Verified Complaint in its entirety. Plaintiffs Mega Contracting Inc., and Mega Contracting Group LLC (hereinafter "Mega") oppose the motion and cross-move to amend the Central Compliance Order to permit extension of the Note of Issue filing date.

On April 16, 2014, Mega commenced the instant action against defendants Utica First Insurance Company (hereinafter "Utica First") and Adventure to recover monetary

damages for property damage allegedly sustained at or near the premises located at 255 Fourth Avenue in the County of Kings, City and State of New York.

Mega served the summons and complaint on Adventure on April 24, 2014, alleging, among other claims, breach of contract and breach of insurance obligations. Thereafter, on May 20, 2014, Adventure answered Mega's complaint. On June 20, 2014, defendant Utica First filed a motion for Summary Judgment, seeking a declaration that it had no obligation to indemnify "Plaintiffs or either of them" or to otherwise reimburse any person or entity in connection with the claims alleged in the instant lawsuit. By a stipulation dated November 24, 2014, the attorneys for Mega and Utica First discontinued the subject action as to Utica First.

By Notice of Motion dated August 18, 2015, Adventure sought to preclude Mega for failure to provide a Bill of Particulars and, to compel discovery. On November 18, 2015, Adventure's motion to preclude was granted to the extent that the matter was set down for a preliminary conference. By Notice of Motion date September 8, 2015, Adventure sought an order tolling the 9% annual interest against it, as Mega had failed to respond to Adventure's outstanding discovery requests. On January 13, 2016, Adventure's motion to toll pre-judgment interest was denied. The parties appeared for a Preliminary Conference on January 13, 2016 and a discovery order was completed. On May 16, 2016, a Central Compliance Part Order directed Mega to, amongst other things, file a Note of Issue on or before October 14, 2016 or the action would be dismissed.

On October 28, 2016, 14 days after the Note of Issue deadline, Mega attempted to file a Note of Issue. It was rejected; and the case was also marked disposed. On December 26,

2017, Adventure served a demand on Mega to resume prosecution of the action and file a note of issue within 90 days pursuant to CPLR § 3216[b][3]. Mega did not file a note of issue within the 90-day period and took no other steps to indicate an intention to proceed with the action.

On April 9, 2018, after expiration of the ninety day period, Adventure moved to dismiss Mega's complaint pursuant to CPLR § 3216. The motion was returnable on May 8, 2018. Mega submitted no opposition to the motion. Instead, on the return date of May 8, 2018, Mega submitted a request for a three week adjournment to permit it to prepare its opposition. The matter was adjourned. On June 20, 2018, 43 days after the return date of Adventure's motion and 104 days after service of the 90-day demand, Mega filed a cross-motion seeking to amend the Central Compliance Part Order dated May 16, 2016, to extend the deadline for the filing of the Note of Issue and Certificate of Readiness and restore the case to the active calendar.

Adventure argues that Mega has failed to prosecute the instant matter, pointing out that the note of issue that plaintiff attempted to file on October 28, 2016 stated that discovery now known to be necessary "not" completed. Thus plaintiff had in fact not attempted to prosecute the lawsuit for approximately 525 days. Additionally, Adventure asserts that despite service of the 90-Day Demand, Mega completely and utterly failed to resume prosecution of this action, complete discovery, appear for a deposition, or serve and file the Note of Issue. Adventure further asserts that Mega's time to serve and file the Note of Issue, pursuant to the 90-Day Demand, expired on March 26, 2017. As Mega failed to file a Note of Issue with the Court and further failed to timely move to extend the time within which to file a Note of Issue, Adventure contends that it has satisfied the burden of CPLR

§ 3216 and Mega's action, as a matter of law, must be dismissed for failure/want of prosecution.

In its cross-motion, Mega argues that Adventure's motion should be denied in its entirety because: (a) Mega has a justifiable excuse for its failure to comply with the 90-day Demand; and (b) Mega has a meritorious cause of action. Mega further argues that Adventure's motion should be denied as Adventure has failed to provide discovery, hindering Mega's ability to comply with the 90-Day Demand. As such, when Mega attempted to comply with the May 16, 2016 Order and filed the Note of Issue and Certificate of Readiness on October 28, 2016, it correctly stated the discovery now known to be necessary was not completed, and the court subsequently rejected the Note of Issue and returned it for correction. Mega asserts it was unable to properly re-file the Note of Issue as it was impossible to change the filing date required by the May 16, 2016 Order. Mega claims that although attempts were made to contact the Court and resolve this issue, such efforts were unsuccessful and as a result, this action was marked disposed by the Court.

Mega also alleges that as of October 2, 2015, it has responded to all of Adventure's discovery demands, thus, the history of this case negates any inference by Adventure that Mega intended to abandon the action. In further support of its allegation that Adventure's own failure to provide Court-ordered discovery was one of the causes which led to Mega's failure in filing the Note of Issue, Mega submits an unanswered email sent by plaintiffs' counsel to defense counsel dated April 5, 2018, requesting that counsel send dates of availability to conduct Mega's deposition. Mega finally argues that Adventure's moving papers are devoid of any suggestion that it has suffered any prejudice, and in fact, Adventure will not suffer prejudice by the denial of its motion to dismiss or the granting of

Mega's cross-motion.

In support of its law office failure allegation, plaintiffs' counsel avers that he failed to diary Adventure's 90-day Demand and thus did not timely realize that an application should have been made sooner for an extension. Mega also submits an affidavit of merit, contending Adventure is liable for corrective work, mold remediation and consultant costs.

In reply, Adventure contends that Mega's opposition does not dispute, and therefore concedes, the fact that the 90-Day Demand was properly served and e-filed on December 26, 2017. Adventure argues that it has complied with all prerequisites and requirements of CPLR § 3216 as over one year has elapsed since joinder of issue; the 90-day Demand was served upon Mega via certified mail; the 90-day Demand demanded that Mega resume prosecution of this action by restoring the case to the active calendar; and stated that Mega's default in complying with the demand within the 90-day period would serve as a basis for a motion for dismissal of the action as against defendants for want of prosecution and unreasonably neglecting to proceed. Adventure also contends that Mega's argument that its motion should be denied due to its failure to provide discovery is without merit as Mega availed itself of none of its potential remedies. Adventure therefore asserts there is no reason Mega could not have appeared for a deposition as scheduled on multiple dates, and Mega's argument that it could not appear due to outstanding discovery owed by Adventure is not credible; thus, Mega's complaint must be dismissed as a matter of law.

Adventure also contends that the June 19, 2018 memorandum submitted by Mega does not provide any details as to the attempts that were made to contact someone at the Kings County Court, nor does it provide any detail or reason why nothing was done to

prosecute this action from the time the Note of Issue was rejected up until June 20, 2018. In addition, Mega's argument that the history of this case negates any inference that it intended to abandon this case is not true, as the facts of the case reveal that Mega did nothing for 600 days, and well after its time to act upon the 90-day Demand. In addition, Mega's argument of law office failure is of no merit as attorney neglect is not a justifiable excuse for failing to respond to the 90-day Demand. Lastly, Adventure argues, its moving papers detail numerous prejudicial attempts to obtain discovery from the plaintiffs.

Discussion

> CPLR 3216, as it now reads, is extremely forgiving of litigation delay. A court cannot dismiss an action for neglect to prosecute 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 (CPLR 3216[b]). So long as plaintiffs serves and files a note of issue within the 90-day period, all past delay is absolved and the court is then without authority to dismiss the action (CPLR 3216[c]). However, if plaintiff fails to file a note of issue within the 90-day period, 'the court may take such initiative or grant such motion [to dismiss] unless the [defaulting] party shows justifiable excuse for the delay and a good and meritorious cause of action' (CPLR 3216[e]). Thus, even when all of the statutory preconditions are met, including plaintiff's failure to comply with the 90-day requirement, plaintiff has yet another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse and an affidavit of merit. If plaintiff makes a sufficient showing, the court is prohibited from dismissing the action.

Baczkowski v D.A. Collins Const. Co., 89 NY2d 499, 503 [1997].

Defendant filed and served a 90-day Demand on December 26, 2017, making the deadline for plaintiffs to file their Notice of Issue March 26, 2018. The written 90-day Demand served by defendant conformed to the provisions of CPLR §3216(b) (*see* *Dominguez v Jamaica Med. Ctr.*, 72 AD3d 876 [2d Dept 2010]; *Ovchinnikov v Joyce Owners Corp.*, 43 AD3d 1124 [2d Dept 2007]). Having received a 90-day Demand, plaintiffs

were required either to serve and file a timely note of issue or to move pursuant to CPLR §2004, prior to the default date, to extend the time within which to serve and file a note of issue (*see* *Fenner v County of Nassau*, 80 AD3d 555 [2d Dept 2011]; *Sharpe v Osorio*, 21 AD3d 467, 468[2d Dept 2005]). Plaintiffs did neither. Thus, in order to avoid dismissal, plaintiffs were required to demonstrate a justifiable excuse for their failure to comply with the certification order and the existence of a potentially meritorious cause of action (*see* CPLR 3216[e]; *Baczkowski v D.A. Collins Constr. Co.*, 89 NY2d at 503; Stallone v. Richard, 95 A.D.3d 875, 876 [2d Dept 2012]; *Rodriguez v Five Towns Nissan*, 69 AD3d 833,834 [2d Dept 2010]; *Sharpe v Osorio*, 21 A.D.3d at 468).

"When considering the plaintiffs' excuses for failing to comply with the 90-day notice, the court has discretion 'to accept the ill physical or mental health of a litigant's attorney as an acceptable excuse for a default' (*Goldstein v Meadows Redevelopment Co Owners Corp. I*, 46 AD3d 509, 511 [2d Dept 2007]; *see* *Amato v. Commack Union Free School Dist.*, 32 AD.3d 807, 807-808 [2d Dept 2006]). Additionally, the court has discretion to accept law office failure as a justifiable excuse (*see* CPLR 2005). However, 'a conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse' (*Piton v Cribb*, 38 AD3d 741, 742 [2d Dept 2007]; *see* *Star Indus., Inc., v Innovative Beverages, Inc.*, 55 AD3d 903, 904 [2d Dept 2008]; *Petersen v Lysaght, Lysaght & Kramer, P.C.*, 47 AD3d 783, 784 [2d Dept 2008]). Rather, "'a claim of law office failure should be supported by a 'detailed and credible' explanation of the default at issue'" (*Lugauer v Forest City Ratner Co.*, 44 AD3d 829, 830 [2d Dept 2007]). *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d 1021, 1023 [2d Dept 2009].

Plaintiffs allege that their failure to file the Note of Issue within 90 days of the

Demand was due to the combination of "law office failure" within the meaning of CPLR § 2005, counsel's health problems and defendant's own failure to provide court-ordered discovery. However, the plaintiffs provide no detailed explanation or any evidence to substantiate these excuses. In addition, contrary to the plaintiffs' contention, the May 16, 2016 Order did not mandate that all discovery be complete prior to filing of the note of issue. Further, even if the defendant engaged in dilatory conduct in responding to discovery demands, such conduct did not constitute a reasonable excuse for plaintiffs' failure to respond to the 90-day Demand, as plaintiffs were not without remedies (see *Papadopoulas v R.B. Supply Corp.*, 152 AD2d 552, 553 [2d Dept 1989], see also *Huger v Cushman & Wakefield, Inc.*, 58 AD3d 682, 684 [2d Dept 2009]). Plaintiffs could have moved for permission to serve and file a conditional note of issue pursuant to 22 NYCRR 202.21(d), to compel disclosure pursuant to CPLR § 3124, to strike the defendant's answer pursuant to CPLR § 3126(3), or pursuant to CPLR § 2004; prior to the default date, to extend the time to serve and file the note of issue. *Id.* However, the plaintiffs failed to avail themselves of any of these options, and instead waited over 15 months after their default to seek to amend the May 16, 2016 Compliance Conference Order.

Attorney neglect is, as a matter of law, insufficient to defeat a CPLR § 3216 motion (*Bowman v Kusnick*, 35 AD3d 643 [2d Dept 2006]; *Gold v Bluvshtein*,18 AD2d 671 [2d Dept 1962]. Here, the conclusory and unsubtantiated claim of law office failure proffered by the plaintiffs does not rise to the level of a justifiable excuse (*see Bhatti v Empire Realty Assoc., Inc.*, 101 AD3d 1066, 1067 [2d Dept 2012]; *Stallone v Richar*, 95 Ad3d at 876).

Plaintiffs' argument that they were unable to properly re-file the Note of Issue as their attempts to contact the Court to change the filing date were unsuccessful, is not

supported by any proof. The memorandum submitted, which is dated about twenty months after the initial rejection of the untimely filing of the Note of Issue, lacks details as to the attempts made by counsel.

As plaintiffs failed to provide a reasonable excuse for the failure to prosecute, this Court need not address whether plaintiffs provided sufficient evidence to establish the existence of a meritorious cause of action (*see* CPLR § 3216 [e]; *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d at 1024); *Bhatti v Empire Realty Assoc., Inc.*, 101 AD3d 1066 [2d Dept 2012].

Accordingly, it is

ORDERED, that defendant Adventure Masonry Corp.'s motion to dismiss the complaint insofar as asserted against it pursuant to CPLR § 3216 is granted; and it is further

ORDERED, that plaintiffs' cross-motion to amend the Central Compliance Part Order dated May 16, 2016 pursuant to CPLR § 3004 by extending the deadline for the filing of the Note of Issue and Certificate of Readiness is denied; and it is further

ORDERED, that plaintiffs' cross-motion to restore the case to the active calendar is denied.

This constitutes the decision and order of the Court.

ENTER

J.S.C

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
FILED
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