

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

JAMES SIMONE,

Plaintiff,

-against-

GRACE LANES, LLC d/b/a JIB LANES,

Defendants.

Index No.: 711418/2015

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO CPLR § 3216****A. Preliminary Statement**

This Memorandum of Law is submitted in support of Defendants' motion to dismiss the Complaint pursuant to CPLR § 3216 for want of prosecution. This action has been pending for multiple years with no prosecution, and Plaintiff has failed to respond to Defendants' duly and properly served 90-day notice pursuant to CPLR § 3216. The Court should therefore dismiss this action for want of prosecution.

B. Background

The facts supporting Defendants' motion are set forth in the Attorney Affidavit of Stacey L. Pitcher, Esq. ("Pitcher Aff."), with exhibits, which are full incorporated into this Memorandum of Law by reference and are referred to hereinafter where relevant.

C. Argument

THE COURT SHOULD DISMISS THIS ACTION UNDER CPLR § 3216 FOR WANT OF PROSECUTION

Under CPLR 3216, a trial court has the power to dismiss an action “[w]here a party unreasonably neglects to proceed generally . . . or otherwise delays in the prosecution thereof.” CPLR §3216(a). There are a few procedural requirements that must be met before a trial court can properly exercise that power:

- (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 dismissal must have served a written demand by registered or certified mail requiring the party against whom dismissal is sought resume prosecution of the action and serve and file a note of issue within ninety days after receipt of such demand. This 90-day demand must also specify that failure to comply within the 90-day period will serve as a basis for a motion to dismiss for lack of prosecution. *Id.* at § 3216(b).

In this action, all three of the above conditions have been fulfilled. Issue was joined on January 7, 2016 when Defendants served their Answer. Pitcher Aff., Ex. B. Well over a year has passed since issue was joined. And, a Notice to Resume Prosecution containing all necessary provisions was duly and properly served upon Plaintiff on May 30, 2017. Pitcher Aff., Ex. C.

The 90 days would have elapsed on August 28, 2017. Pitcher Aff. at ¶ 11. However, On August 9, 2017, the Court, Hon. Salvatore J. Modica, issued an Order granting Plaintiff’s counsel’s motion to withdraw as counsel. Pitcher Aff. Ex. D. The Order stayed the action 60 days from the time of service of the Notice of Entry. Pitcher Aff. at ¶ 13. Plaintiff’s counsel served the Notice of Entry on August 11, 2017; which can be considered August 16, 2017,

allowing five days for mail. Pitcher Aff. at ¶ 14. Accordingly, the action was stayed until October 15, 2017. Pitcher Aff. at ¶ 15. At the time the case was stayed, there were seventeen days remaining of the 90 days. Pitcher Aff. at ¶ 16. Thus, the expiration of the 90 days was extended to November 1, 2017. Pitcher Aff. at ¶ 17.

More than 90 days has elapsed since that time, and Plaintiff has neither filed a Note of Issue nor made any progress in discovery or otherwise. In addition to meeting the three statutory conditions, defendants respectfully submit that this action has been pending for multiple years with almost no participation from Plaintiff. In fact, Defendant's written discovery was served on Plaintiff in March 2016 and, to date, no responses have been received. Pitcher Aff. at ¶¶ 6-7.

Under these circumstances, the Court is well within its discretion to dismiss this action pursuant to CPLR § 3216 for want of prosecution. *See, e.g. Tr. Co. of New Jersey v. Genser*, 271 A.D.2d 524, 525 (2nd Dep't 2000) (upholding Supreme Court's dismissal of the complaint based on failure to prosecute); *Watt v. New York City Transit Auth.*, 97 A.D.2d 466, 467 (2nd Dep't 1983) (plaintiffs' inordinate delay of more than three years after the complaint was allegedly mailed to the city, in contacting the city to request the answer, and in forwarding a copy of the original complaint, signified neglect in prosecuting the action); *Keating v. Smith*, 20 A.D.2d 141, 141 (2nd Dep't 1963) (granting a motion to dismiss for unreasonable neglect in the prosecution of the action); *Armstrong v. Star Co.*, 154 A.D. 320 (2nd Dep't 1912) (granted a motion to dismiss for failure to prosecute where there was a delay of over two years in bringing an action to trial after the joinder of issues).

D. Conclusion

For the foregoing reasons, Plaintiff's Complaint should be dismissed, with prejudice, pursuant to CPLR § 3216 and grant all other and further relief the Court deems just and proper.

Dated: December 8, 2017
New York, NY

GOLDBERG SEGALLA LLP



Stacey L. Pitcher, Esq.
Attorney for Defendants
Grace Lanes, LLC d/b/a JIB Lanes
711 3rd Avenue, Suite 1900
New York, New York 10017
Ph.: (646) 292- 8736
Fax: (646) 292-8701
dburns@goldbergsegalla.com

To: James Simone
122 Hana Road*
Edison, NJ 08817

AND

17 Park Ave*
Greenvale, NY 11548

*Sent to the two last known addresses that Defendants had for Plaintiff