

At IAS Part 22 of the Supreme Court of the State of New York, held in and for Bronx County, on the 1st day of December, 2021.

PRESENT: HON. THERESA M. CICCOTTO  
Justice of the Supreme Court

-----X  
TONI DOOLITTLE,

Plaintiff,

Index No. 22355/2017E

-against-

DECISION /ORDER

BRONX GARDENS LLC and 2016 REALTY, LLC,

Motion Sequence #4

Defendant.

----- X  
RECITATION, AS REQUIRED BY CPLR § 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLY AFFIDAVITS.....	.....4.....

UPON THE FOREGOING CITED PAPERS, THE COURT FINDS AS FOLLOWS:

Defendants move for an Order dismissing Plaintiff’s Complaint with prejudice for failure to prosecute the action pursuant to CPLR § 3216. Plaintiff *pro se* opposes.

**Background:**

Plaintiff commenced the instant action via the filing of a Summons and Complaint on March 27, 2017. The Complaint alleged that she allegedly sustained injuries while on the premises of 2016 Davidson Avenue, Bronx, New York. Defendants filed their Verified Answer with a Demand for

a Verified Bill of Particulars and combined discovery demands on July 5, 2017.

Defendants argue that “[d]iscovery has been a problem since the outset of this case” (Motion, p. 2, ¶5). They give a recitation of events which are supported by annexed exhibits. On September 15, 2017, and November 1, 2017, Defendants’ attorney sent letters to Plaintiff’s then counsel, The Felicetti Law Firm, reminding same that discovery was outstanding. A Preliminary Conference Order was issued on March 27, 2018, however, discovery remained outstanding. Consequently, Defendants filed a discovery motion on or about May 16, 2018. Justice Laura Douglas addressed the motion and included an Order directing service of outstanding discovery by July 20, 2018. Due to the continued failure to provide said discovery, Defendants filed another discovery motion on March 4, 2019. Justice Douglas rendered another Order resolving same on April 1, 2019. As of today, significant discovery remains outstanding and depositions have not been conducted.

On June 3, 2020, The Law Offices of Jason Tenenbaum, Esq. were substituted as attorneys of record for Plaintiff, replacing The Felicetti Law Firm. The parties engaged in settlement discussions and a settlement was reached on July 16, 2020 in the amount of \$9,000. Settlement papers were sent to Plaintiff’s counsel’s office but were never returned. On September 11, 2020, the Law Office of Jason Tenenbaum, moved via Order To Show Cause, to be relieved as Plaintiff’s counsel, citing a breakdown in communication. This Court granted said OSC on May 12, 2021 and gave Plaintiff sixty days from that date to retain counsel. Upon the sixty day expiration, Defendants served a 90 day notice on Plaintiff.

Plaintiff *pro se*, submits an Affidavit in Opposition. However, same does not address the merits of the instant motion. Plaintiff claims that the Court should deny the instant motion because “They filed this to [sic] soon came as regular mail [sic]” (*Aff. in Opp.*, p. 1, ¶2). She also claims that her home was broken into, that she was attacked ,and that she obtained a restraining order against

the person “for me and my kids” (*id.*). She also claims that it took her awhile to return home and when she arrived, she observed a big package. She assumed that said package was a copy of the case. Plaintiff also claims that she did not know that she had to go to court or respond. She also claims that she did not realize that weekends were included in the counting of days, that she is starting a “new job orientation on the 22<sup>nd</sup>” and is trying to get a lawyer.

In their Reply, Defendants argue that CPLR 2214(b) provides that: “answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time demands.” Defendants argue that their moving papers were served thirty days before the motion’s return date and Plaintiff’s opposition was due to be served no later than November 15, 2021. However, her opposition was not served until November 17, 2021, two days late.

Defendants argue that while Plaintiff alleges that she had not been home, and that when she returned home she did not realize what the package was, she fails to provide any dates when she returned home and noticed the package. As such, they argue that her excuse that she did not realize what the package was is an insufficient excuse. Moreover, they argue that even if the Court accepts Plaintiff’s Opposition, she fails to demonstrate a justifiable delay in prosecution and a meritorious cause of action.

They point out that it has been six months since the Order relieving her attorney as counsel and also four months after the court’s imposed sixty day time frame, yet Plaintiff has failed to procure counsel. Defendants further argue that they have been prejudiced by Plaintiff’s failure to prosecute this action.

**Conclusions of law:**

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 (*Palmenta v. Columbia Univ.*, 266 A.D.2d 90, 91 [1<sup>st</sup> Dept. 1999]; *Espinoza v. 373-381 Park Ave. S., LLC*, 68 A.D.3d 532, 532 [1<sup>st</sup> Dept. 2009]). CPLR§ 3216 “authorizes the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed” (*Davis v. Goodsell*, 6 A.D.3d 382, 383 [2d Dept. 2004]). Dismissal is prohibited wherein the plaintiff can show justifiable excuse for the delay and merit to the action (see CPLR§ 3216(e); *Di Simone v. Good Samaritan Hosp.*, 100 N.Y.2d 632 [2003]).

In the case at bar, the Court finds that Plaintiff’s opposition fails to indicate a valid reason why she has not yet retained counsel. Indeed, in addition to a written Order, this Court had advised her via a Teams virtual conference, that she had sixty days to procure counsel. The Court notes that absolutely nothing has been done to move this case forward. Indeed, Defendants have been unduly prejudiced in that they have been compelled to make motions, send correspondence and appear in court, to no avail.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that Defendants’ motion to dismiss is GRANTED; and it is further

ORDERED, that Defendants are directed to serve a copy of this Order with Notice of Entry upon Plaintiff via first class mail as well as certified mail, return receipt requested, within thirty (30) days of this Order.

This constitutes the decision and order of the Court.

DATED: December 1, 2021

ENTERED,



Hon. Theresa M. Cicotto

JSC