

Sander v J.P. Morgan Chase Bank
2021 NY Slip Op 30499(U)
February 22, 2021
Supreme Court, New York County
Docket Number: 450857/2017
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 450857/2017

MARIE SANDER,

Plaintiff,

MOTION SEQ. NO. 002

- v -

J.P. MORGAN CHASE BANK and HAUPPAUGE
MANAGEMENT,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for

DISMISSAL

In this personal injury action commenced by plaintiff Marie Sander, defendant JPMorgan Chase Bank, N.A. i/s/h/a J.P. Morgan Chase Bank (“Chase”) moves, pursuant to CPLR 3216, to dismiss the complaint due to plaintiff’s failure to prosecute. After consideration of Chase’s contentions, as well as a review of the relevant statutes and case law, the motion, which is, in effect, unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on May 15, 2014 in which plaintiff slipped and fell on a wet floor at a Chase Bank located at 270 Broadway in Manhattan. Doc. 16. Plaintiff commenced the captioned action by filing a summons and verified complaint against defendants Chase and Hauppauge Management with the Clerk of the Supreme Court, Kings County on or

about June 23, 2014. Doc. 16.¹ Chase joined issue by its answer dated July 2, 2014. Doc. 17. Plaintiff thereafter amended the complaint and Chase answered the same on or about August 18, 2014. Doc. 19.

A preliminary conference was held in this matter on February 19, 2015. Doc. 22. At that conference, plaintiff was directed to appear for a deposition on May 4, 2015. *Id.* Plaintiff was also directed to provide Chase with certain document discovery by March 19, 2015. *Id.* At a compliance conference conducted on July 1, 2015, plaintiff was directed to appear for a deposition on September 21, 2015. *Id.*² To date, plaintiff has not been deposed and has not provided the document discovery owed. Doc. 15.

By order entered July 16, 2016, the venue of this action was transferred from Supreme Court, Kings County to Supreme Court, New York County. Doc. 23.

In May 2019, Wilson, Elser, Moskowitz, Edelman & Dicker LLP was substituted as counsel for Chase (Doc. 25) and, on October 28, 2019, the said firm served plaintiff's counsel with a notice, pursuant to CPLR 3216 (a "90-day notice"), demanding that the prosecution of this matter be resumed and that a note of issue be filed within 90 days of receipt of said demand. Doc. 26. The notice, served by certified mail, return receipt requested, warned that a default in complying with the demand within 90 days would serve as a basis for a motion to dismiss for neglecting to prosecute the action. *Id.*

On January 22, 2020, before the expiration of plaintiff's time to respond to the 90-day notice, plaintiff's counsel filed an order to show cause seeking to be relieved as counsel due to plaintiff's lack of cooperation and counsel's inability to contact plaintiff so that he could secure

¹ Plaintiff's claims against Hauppauge Management were discontinued in December 2014. Doc. 20.

² Plaintiff's counsel failed to appear for the compliance conference and Chase's attorney was directed to serve said counsel with a copy of the order. Doc. 22.

her cooperation in prosecuting the captioned action. Doc. 11. In an affirmation in support of the motion, plaintiff's counsel represented that his last communication with plaintiff was during the summer of 2017 and that, since that time, he had not spoken with plaintiff despite several attempts to contact her. Id. By order entered September 15, 2020, counsel's order to show cause was denied on the ground that it was "deemed abandoned". Doc. 13.

Defendant now moves, pursuant to CPLR 3216, to dismiss the action as abandoned based on plaintiff's failure to respond to the 90-day notice. Doc. 14.

Plaintiff's counsel does not technically oppose the motion, although he submits an affirmation, dated October 7, 2020 and entitled "Affirmation In Opposition to Defendant's Motion to Dismiss", purporting to oppose the same, in which he represents that he "was not notified, did not receive, did not find through e-courts or any mechanism (including US mail) indication of action on the [o]rder to [s]how [c]ause filed 22 January" and requests that this Court sign the said order to show cause. Doc. 29.

In reply, Chase argues that its unopposed motion must be granted given plaintiff's failure to comply with the 90-day notice.

LEGAL CONCLUSIONS

CPLR § 3216(b) requires three conditions to be met before the court may dismiss a complaint for failure to prosecute: (1) issue must have been joined; (2) one year must have elapsed since issue has been joined; and (3) the court or the party seeking the relief shall have served a 90-day notice by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of the demand. The 90-day notice must also warn that a default in complying

with the same will serve as a basis for a motion for dismissal. CPLR 3216(e) provides that, if a party fails to serve and file a note of issue within 90 days of receiving a 90-day notice, the court may grant a motion to dismiss based on such failure unless the party "shows justifiable excuse for the delay and a good and meritorious cause of action."

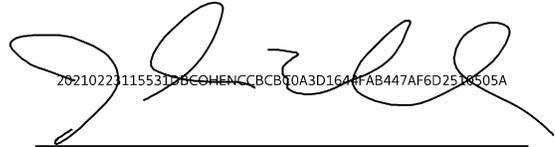
Chase joined issue in July 2014 and more than one year has clearly elapsed since that time. On October 28, 2019, plaintiff's counsel was served with a 90-day notice by certified mail, return receipt requested, demanding that plaintiff resume prosecution of the action and serve and file a note of issue within 90 days, and warning that her failure to comply would serve as a basis for a motion for dismissal. Since plaintiff has failed to resume prosecution of the action and to serve and file a note of issue, Chase's motion to dismiss the Complaint for lack of prosecution is granted. This Court further notes that plaintiff's repeated and unexplained failure to appear for a deposition and to provide document discovery also warrants dismissal of the complaint.

This Court rejects the contention by plaintiff's attorney that he was never advised that his application to be relieved as counsel was deemed abandoned. The order denying the application was efiled on September 15, 2020 and counsel thus knew, or should have known, of this outcome and could have taken appropriate steps to address it. Conspicuously absent from counsel's affirmation is any discussion whatsoever regarding whether he contacted this Court after filing the order to show cause on January 22, 2020 to ascertain whether it had been signed. Counsel's request that this Court sign the order to show cause filed in January 2020 is completely improper insofar as it is not made by notice of motion or order to show cause and, even if it had been made in such manner, this Court obviously would not be able to sign an order to show cause it has already denied. Finally, counsel completely disregards the fact that, as

attorney of record for plaintiff at the time the 90-day notice was served, it was incumbent upon him to respond to the same until such time as his motion to be relieved was granted.

Accordingly, it is hereby:

ORDERED that the motion by defendant JPMorgan Chase Bank, N.A. i/s/h/a J.P. Morgan Chase Bank to dismiss this action is granted without opposition and the Clerk is directed to enter judgment in favor of said defendant dismissing this action in its entirety, together with costs and disbursements to said defendant, as taxed by the Clerk upon presentation of a bill of costs.



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2/22/2021

DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE