

NYSCEF DOC. NO. 44  
SHORT FORM ORDER

RECEIVED NYSCEF: 02/15/2019  
INDEX NO: 6766/16

**Supreme Court of the State of New York**  
**IAS Part 23 - County of Suffolk**

**AMENDED**

**PRESENT: Hon. Vincent J. Martorana**

**SILFEN-BERMAN PAPER CO., INC.**

**Plaintiff,**

**- against-**

**BENKERTS CLASSIC  
DELICATESSEN, INC. D/B/A  
BENKERT'S BAKERY, and BENKERTS  
CLASSIC DELICATESSEN, INC. D/B/A  
BENKERT'S DELI**

**Defendants.**

**ORIG. RETURN DATE: 11/8/18**

**ADJOURNED DATE: 11/8/18**

**MOTION SEQ. NO.: 002 - MG**

**PLTF'S/PET'S ATTY:**

**DARREN J. EPSTEIN, ESQ., P.C.  
254 South Main Street, Suite 406  
New City, New York 10956**

**DEFT'S/RESP'S ATTY:**

**ARNOLD A. ARPINO & ASSOCIATES, P.C.  
155 E. Main Street, Suite 190  
P.O. Box 830  
Smithtown, NY 11787**

Upon the following papers read on this motion to dismiss: Notice of Motion and supporting papers by defendant dated October 13, 2018; Notice of Cross-Motion and supporting papers by Plaintiff dated October 13, 2018; Affirmation/affidavit in opposition and supporting papers by Plaintiff dated October 13, 2018; Affirmation/affidavit in reply and supporting papers by defendant dated November 5, 2019; Other       ; (and after hearing counsel in support of and opposed to the motion) it is,

**ORDERED** that Defendant's motion seeking dismissal pursuant to CPLR §3216 is granted.

The within action was commenced in Supreme Court, Kings County on June 8, 2016 by filing of a summons and complaint seeking to recover payment for goods sold and delivered. Counsel for Defendants served a demand for change of venue. On or about July 11, 2016, the parties stipulated to transfer the case to Suffolk County Supreme Court and to extend Defendants' time to answer. Issue was joined by interposition of an answer by counsel on behalf of Defendants on or about July 25, 2016. More than a year has passed since issue was joined. There has been no preliminary conference in this matter. Plaintiff filed a motion on July 11, 2017 seeking to preclude, strike and dismiss and also seeking summary judgment. Such motion was withdrawn by stipulation on August 14, 2017. The only other activity in this case was the filing of a consent to change attorney on October 9, 2018 and October 12, 2018 and another consent to change attorney on October 22, 2017.

On June 20, 2018, Defendants' counsel's office served a ninety day demand upon Plaintiff's attorney via certified mail, return receipt requested. Such demand required the resumption of prosecution of the action and filing of a note of issue within ninety days and included notice that failure to comply would serve as a basis for a dismissal motion. Plaintiff failed to file a note of issue and the within motion was filed on October 13, 2018. The conditions precedent for bringing a motion under CPLR §3216 are that: (1) Issue must have been joined in the action; (2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of a preliminary conference order, whichever is later; and (3) The party seeking such relief shall have served a written demand by registered or certified mail requiring the adverse party to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand; the demand must also put such adverse party on notice that a default in complying with the demand will serve as a basis for a motion by the defendant for

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dismissal of the complaint based on the plaintiff's unreasonable neglect to proceed (CPLR §3216(b)). Defendant has met all of the preconditions of CPLR §3216(b).

Where a Plaintiff has been served with a ninety day demand pursuant to CPLR §3216, Plaintiff must either file the Note of Issue within the ninety day period or bring a motion seeking to either vacate the demand or extend the ninety-day period (*Cope v. Barakaat*, 89 AD3d 670, 671–72, 931 NYS2d 910, 911 [2d Dept. 2011]; *Deutsche Bank Nat'l Tr. Co. v. Inga*, 156 AD3d 760, 760–61, 67 NYS3d 264, 265–66 [2d Dept. 2017]; *Angamarca v. 47-51 Bridge St. Prop., LLC*, 167 AD3d 559, 90 NYS3d 70 [2d Dept. 2018]. Plaintiff did none of these things. Upon Plaintiff's failure to file the Note of Issue, it was incumbent upon Plaintiff to show a justifiable excuse for the delay and a good and meritorious cause of action (CPLR §3216(e); *Salerno v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Mem'l Ctr.*, 88 AD2d 637, 638, 450 NYS2d 227, 228 [2d Dept. 1982]; *Thornton by Thornton v. White*, 119 AD2d 744, 501 NYS2d 155, 156 [2d Dept. 1986]; *Picot v. City of New York*, 50 AD3d 757, 757–58, 855 NYS2d 237, 238–39 [2d Dept. 2008]).

Here, in opposition to Defendants' motion, counsel avers that she substituted in as counsel in October 2018 and that she attempted to contact Defendants' counsel to discuss settlement at that time. Counsel opines that her predecessor counsel zealously prosecuted the case and made attempts to settle in 2017. As proof of such zealous prosecution, Counsel offers that a motion was filed in July of 2017 and that the motion was withdrawn in August 2017. Nothing further is offered by Plaintiff's counsel. No justifiable excuse is presented for failing to file a Note of Issue, no affidavit of merit is provided and no other relief is requested.

Based upon the foregoing, Plaintiff's complaint is dismissed for failure to prosecute.

Dated: Riverhead, New York  
 February 14, 2019

  
 VINCENT J. MARTORANA, J.S.C.

CHECK ONE: XX FINAL DISPOSITION \_\_\_\_\_ NON-FINAL DISPOSITION