

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

LARRY MILLER

Petitioner

--v--

22 ERICSSON OWNER, LLC, et al.

Respondents

MARC BERLEY, et al.

Nominal Respondents

Index No. 650203/2022

(Mot. Seq. 10)

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR ORDER OF DISCONTINUANCE**

A.Y. STRAUSS, LLC
Attorneys for Petitioner
535 Fifth Avenue, Fourth Floor,
New York, New York 10017

TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1

ARGUMENT..... 1

 Point I Petitioner’s Motion For An Order Of Discontinuance Should Be Granted...1

CONCLUSION.....3

TABLE OF AUTHORITIES

CASELAW

526 West 158th Street, HDFC v. Ramon,
70 Misc.3d 136(A), 137 N.Y.S.3d 617 (App. Term 1st Dep’t 2021)..... 3

Bank of Am., NA v. Douglas,
110 A.D.3d 452 (1st Dep’t 2013)..... 2

County of Westchester v. Welton Becket Assocs., 102 A.D.2d 34 (2d Dep’t 1984),
aff’d, 66 N.Y.2d 642 (1985)..... 1

Burnham Serv. Corp. v. National Council on Compensation Ins.,
288 A.D.2d 31 (1st Dep’t 2001).....1, 2

Shapiro, Inc. v. Milspemes Corp.,
20 A.D.2d 857 (1st Dep’t 1964)..... 1

STATUTES

CPLR 3217(b).....1,3

Petitioner Lary Miller (“Petitioner”) respectfully submits this memorandum of law in support of his motion, pursuant to CPLR 3217(b), for an order discontinuing this proceeding/action without prejudice upon entry of this Court’s decision on a motion to confirm the report of the Judicial Hearing Officer/Special Referee pursuant to this Court’s Order of Reference dated January 6, 2025, and directing that prior to entry of that decision, no other filings shall be made in this case except with respect to the Order of Reference, and awarding such and further relief as to this Court shall seem just and fair.

For the reasons set forth herein and in the accompanying Affirmation of Larry Miller (“Miller Aff.”), Petitioner’s motion should be granted.

ARGUMENT

Point I

PETITIONER’S MOTION FOR AN ORDER OF DISCONTINUANCE SHOULD BE GRANTED

CPLR 3217(b) provides that, upon an order of the court, an action may be voluntarily discontinued “upon terms and conditions, as the court deems proper.” In the absence of special circumstances, such as prejudice to the substantial rights of other parties to the action, a motion for a voluntary discontinuance should be granted. *See Burnham Serv. Corp. v. National Council on Compensation Ins.*, 288 A.D.2d 31, 32-33 (1st Dep’t 2001); *Shapiro, Inc. v. Milspemes Corp.*, 20 A.D.2d 857 (1st Dep’t 1964); *County of Westchester v. Welton Becket Assocs.*, 102 A.D.2d 34 (2d Dep’t 1984), *aff’d*, 66 N.Y.2d 642 (1985).

Here, even though this case has been pending for three years, it is still in its infancy. Not only has paper discovery not yet been completed and depositions not yet occurred,¹ but Petitioner’s

¹ See [NYSCEF Dkt. 245](#).

Amended Verified Petition – which was first interposed on September 3, 2024,² shortly before this case was stayed for the entire period running from October 23, 2024 through February 19, 2025³ – has not been answered or responded to.⁴ This case is thus still in the pleading stage, which vitiates any claim of prejudice to Respondents if the action is discontinued. *See Burnham Serv. Corp.*, 288 A.D.2d at 33 (“No special circumstances have been shown here, especially since the action is still in the pleading stage”); *Bank of Am., NA v. Douglas*, 110 A.D.3d 452, 452 (1st Dep’t 2013) (“No special circumstances have been shown here, especially since the action is still in the early stages of litigation”).

Furthermore, on February 18, 2025, Petitioner withdrew his motion for a temporary receiver.⁵ The only motion still pending in this case is Respondents’ motion for a protective order with respect to Petitioner’s subpoena to Marc Berley, Mot. Seq. 6, and that subpoena will be moot when this case is discontinued. Respondents have not interposed counterclaims against Petitioner, so the only claims in this case are Petitioner’s.

The only bar to immediately discontinuing this case is this Court’s Decision and Order dated January 6, 2025, [NYSCEF Dkt. 246](#), which includes an Order of Reference directing a Judicial Hearing Officer (“JHO”) or Special Referee to hear and report “on the issue of whether any amounts are due and owing to Morrison Cohen LLP, the amount due and owing to Morrison

² See [NYSCEF Dkt. 206](#).

³ See [NYSCEF Dkt. 213](#) (imposing temporary stay); [NYSCEF Dkt. 246](#) (imposing stay effective through February 19, 2025).

⁴ Prior to this Court’s decision and order granting Petitioner leave to interpose an Amended Verified Petition, Respondents filed a motion to dismiss it. That motion, filed *before* the Amended Verified Petition was even operative, is a nullity and was never refiled.

⁵ See [NYSCEF Dkt. 255](#).

Cohen LLP (if any) and the amount of any lien imposed (if any) for services rendered,” and sets the procedure for the hearing and confirmation of the JHO/Referee’s report *Id.* at 8-9.

In consideration of the Order of Reference, which concerns an issue tangential to this case, the Court should direct that this proceeding/action be discontinued upon entry of a decision on a motion to confirm the JHO/Referee’s Report, and prior to entry of that decision, no other filings shall be made except with respect to the Order of Reference. CPLR 3217(b) expressly empowers the Court to enter an Order of Discontinuance “upon terms and conditions, as the court deems proper,” which includes conditional orders of dismissal or the imposition of other appropriate terms. *See 526 West 158th Street, HDFC v. Ramon*, 70 Misc.3d 136(A), 137 N.Y.S.3d 617 (App. Term 1st Dep’t 2021) (permitting a landlord’s discontinuance of a holdover proceeding, but on condition that the landlord pay the attorneys’ fees incurred by the tenant.). The appropriate course of action here is to maintain this proceeding/action solely for the purpose of the JHO/Referee’s report and its confirmation, but not for any other purpose, and for this case to be wholly discontinued when the report is confirmed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Court grant their motion for an order of discontinuance upon the terms and conditions proposed.

Dated: New York, New York
February 21, 2025

Respectfully submitted,

A.Y. STRAUSS, LLC

By: /s/ David Salhanick

David Salhanick, Esq.

Attorneys for Petitioner

535 Fifth Avenue, Fourth Avenue

New York, New York 10017

973-435-5548

CERTIFICATION OF WORD COUNT

I, David S. Salhanick, do hereby certify pursuant to Uniform Civil Rule for the Supreme Court and County Court, 22 NYCRR § 202.8-b, that the above reply memorandum is 809 words, exclusive of the caption, table of contents, table of authorities, and signature block. I relied on the word count of the word processing system used to prepare this document.

Dated: February 21, 2025
New York, New York

/s/ David Salhanick
David S. Salhanick