

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D12385  
Y/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - September 27, 2006

ANITA R. FLORIO, J.P.  
STEPHEN G. CRANE  
DANIEL F. LUCIANO  
ROBERT A. SPOLZINO  
JOSEPH COVELLO, JJ.

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2005-10290

DECISION & ORDER

Diane Villano, et al., respondents, v St. Charles  
Rehabilitation Hospital, et al., appellants, et al.,  
defendant.

(Index No. 22723/02)

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Bower Sanger & Lawrence, P.C., New York, N.Y. (Peter R. Bower of counsel), for  
appellant St. Charles Rehabilitation Hospital.

Martin Clearwater & Bell, LLP, New York, N.Y. (Claudia J. Charles and Anthony  
M. Sola of counsel), for appellants North Shore University Hospital, Michael Hall,  
Bruce Hirsch, and Bruce Farber.

Santangelo, Benvenuto & Slattery, Lake Success, N.Y. (James W. Tuffin of counsel),  
for appellant Hariton H. Kousourou.

Vitacco & Vitacco, Elmhurst, N.Y. (Guy R. Vitacco of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice and wrongful  
death, etc., the defendant St. Charles Rehabilitation Hospital, the defendants North Shore University  
Hospital, Michael Hall, Bruce Hirsch, and Bruce Farber, and the defendant Hariton H. Kousourou  
separately appeal from so much of an order of the Supreme Court, Suffolk County (Whelan, J.),  
dated September 15, 2005, as denied their respective motions pursuant to CPLR 3216 to dismiss the  
complaint insofar as asserted against them for failure to prosecute.

October 31, 2006

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ORDERED that the order is affirmed insofar as appealed from, with one bill of costs to the respondents, payable by the appellants appearing separately and filing separate briefs.

CPLR 3216 is “extremely forgiving” (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503) in that it “never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed” (*Davis v Goodsell*, 6 AD3d 382, 382; see CPLR 3216[a],[e]; *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633; *Baczkowski v Collins Constr. Co.*, *supra* at 504-505; *Tolmasova v Umarova*, 22 AD3d 570). While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff shows a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action (see CPLR 3216[e]; *Di Simone v Good Samaritan Hosp.*, *supra*), such a dual showing is not strictly necessary to avoid dismissal of the action (see *Baczkowski v Collins Constr. Co.*, *supra* at 503-505; *Davis v Goodsell*, *supra* at 383-384).

Here, the appellants began serving their 90-day notices less than two months after the parties entered into a preliminary conference order on September 23, 2004, wherein an extensive discovery schedule was set forth, and before the commencement of the parties’ depositions which were to begin with the plaintiffs’ depositions on March 9, 2005, and continuing with the defendants’ depositions until June 22, 2005. Accordingly, the Supreme Court providently exercised its discretion in denying the appellants’ motions pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them for failure to prosecute.

FLORIO, J.P., CRANE, LUCIANO, SPOLZINO and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court