

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

D14215
C/mv

_____AD3d_____

Submitted - February 7, 2007

STEPHEN G. CRANE, J.P.
FRED T. SANTUCCI
ANITA R. FLORIO
MARK C. DILLON
RUTH C. BALKIN, JJ.

2006-06675

DECISION & ORDER

Irene Heifetz, et al., respondents, v Miguel Godoy,
d/b/a MPG Construction, appellant.

(Index No. 24148/03)

McCabe, Collins, McGeough & Fowler, LLP, Carle Place, N.Y. (Thomas M. Quinn and Patrick M. Murphy of counsel), for appellant.

Goidel & Siegel, LLP, New York, N.Y. (Jonathan M. Goidel and Daniel Levy of counsel), for respondents.

In an action to recover damages for negligence and breach of contract, the defendant appeals from an order of the Supreme Court, Kings County (Kurtz, J.), dated June 1, 2006, which granted the plaintiffs' motion to restore the action to active status and to extend their time to file a note of issue, and denied its cross motion pursuant to CPLR 3216 to dismiss the action.

ORDERED that the order is affirmed, with costs.

Contrary to the defendant's contention, the compliance conference order dated September 14, 2004, could not be deemed a 90-day demand pursuant to CPLR 3216 since it gave the plaintiffs only 78 days within which to file the note of issue (*see Wollman v Berliner*, 29 AD3d 786; *Delgado v New York City Hous. Auth.*, 21 AD3d 522; *Vasquez v Big Apple Constr. Corp.*, 306 AD2d 465). Furthermore, the subsequent order dated January 13, 2005, which extended the plaintiffs' deadline for filing a note of issue, was also insufficient to constitute a 90-day demand since

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it did not provide the required 90-day notice and failed to advise the plaintiffs that the failure to comply with the demand would serve as the basis for a motion to dismiss the action (*see Wollman v Berliner, supra; Delgado v New York City Hous. Auth., supra; O'Connell v City Wide Auto Leasing*, 6 AD3d 682, 683). Accordingly, the Supreme Court properly granted the plaintiffs' motion to restore the action to the active calendar and to extend the time to file a note of issue and denied the defendant's cross motion pursuant to CPLR 3216 to dismiss the action.

CRANE, J.P., SANTUCCI, FLORIO, DILLON and BALKIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court