

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

D16152
C/hu

_____AD3d_____

Submitted - June 13, 2007

ROBERT W. SCHMIDT, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
JOSEPH COVELLO
DANIEL D. ANGIOLILLO, JJ.

2006-10427

DECISION & ORDER

Donna Harrison, respondent, v Good Samaritan
Hospital Medical Center, appellant.

(Index No. 23863/03)

Matturro & Associates, Westbury, N.Y. (Anthony Matturro of counsel), for
appellant.

Meltzer, Fishman, Madigan & Campbell, New York, N.Y. (Edward J. Madigan of
counsel), for respondent.

In an action to recover damages for medical malpractice and lack of informed consent,
the defendant appeals from an order of the Supreme Court, Suffolk County (Molia, J.), dated
September 25, 2006, which granted the plaintiff's motion to vacate a judgment of the same court
entered July 26, 2006, upon an order of the same court dated June 12, 2006, granting the defendant's
unopposed motion to dismiss the action pursuant to CPLR 3216 for failure to prosecute, and restored
the action to the calendar.

ORDERED that the order is affirmed, with costs.

It is well settled that CPLR 3216 permits a court to dismiss an action for want of
prosecution only after the court or the defendant has served the plaintiff with a written notice
demanding that the plaintiff resume prosecution of the action and file a note of issue within 90 days
after receipt of the demand, and also stating that the failure to comply with the demand will serve as
the basis for a motion to dismiss the action. Since CPLR 3216 is a legislative creation and not part

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of a court's inherent power (*see Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902; *Cohn v Borchard Affiliations*, 25 NY2d 237, 248), the failure to serve a written notice that conforms to the provisions of CPLR 3216 is the failure of a condition precedent to dismissal of the action (*see Airmont Homes v Town of Ramapo, supra* at 902; *Ameropan Realty Corp. v Rangeley Lakes Corp.*, 222 AD2d 631, 632).

The defendant's demand dated November 11, 2004, for the resumption of the prosecution of the action cannot be deemed a notice pursuant to CPLR 3216 because it did not conform to the provisions of that statute. Since a proper notice was not served upon the plaintiff prior to the defendant's motion, the Supreme Court was not authorized to dismiss the action pursuant to CPLR 3216 (*see Kesar v Green Ridge Enters. Corp.*, 30 AD3d 471; *Murray v Smith Corp.*, 296 AD2d 445, 447; *Ameropan Realty Corp. v Rangeley Lakes Corp., supra* at 632). Accordingly, the Supreme Court properly granted the plaintiff's motion to vacate the judgment dismissing the action.

SCHMIDT, J.P., KRAUSMAN, GOLDSTEIN, COVELLO and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court