

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

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_____AD3d_____

Submitted - January 30, 2008

REINALDO E. RIVERA, J.P.
ROBERT A. LIFSON
DAVID S. RITTER
EDWARD D. CARNI, JJ.

2007-01170
2007-05322

DECISION & ORDER

Anonymous, respondent, v Duane Reade, Inc.,
appellant.

(Index No. 7514/04)

Kasowitz, Benson, Torres & Friedman LLP, New York, N.Y. (Daniel P. Goldberg
and Kara F. Headley of counsel), for appellant.

Greenberg & Greenberg, LLP, New York, N.Y. (Simon Q. Ramone of counsel), for
respondent.

In an action, inter alia, to recover damages for breach of fiduciary duty and violation of 8 NYCRR 29.1, the defendant appeals, as limited by its brief, from (1) so much of an order of the Supreme Court, Kings County (Jacobson, J.), dated November 14, 2006, as denied its motion pursuant to CPLR 3126, among other things, to dismiss the complaint, and (2) so much of an order of the same court dated May 9, 2007, as denied its second motion pursuant to CPLR 3126 to dismiss the complaint and granted that branch of the plaintiff's cross motion which was for leave to extend the time to serve and file a note of issue.

ORDERED that the orders are affirmed insofar as appealed from, with one bill of costs.

The determination of whether to strike a pleading lies within the sound discretion of the trial court (*see* CPLR 3126[3]; *Ciancolo v Trism Specialized Carriers*, 274 AD2d 369, 370; *Vancott v Great Atl. & Pac. Tea Co.*, 271 AD2d 438; *Brown v United Christian Evangelistic Assn.*,

March 4, 2008

Page 1.

ANONYMOUS v DUANE READE, INC.

270 AD2d 378, 379). However, the drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or contumacious (*see* CPLR 3126[3]; *Harris v City of New York*, 211 AD2d 663, 664). Contrary to the defendant's contentions, it has failed to make a clear showing that the plaintiff's failure to be deposed was willful or contumacious.

Moreover, although the plaintiff admittedly failed to serve a note of issue by the court-ordered deadline, CPLR 3216 is "extremely forgiving" (*Baczowski 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, 383; *see Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633). Under the circumstances of this case, where the parties had barely commenced discovery proceedings, and where a motion and cross motion to compel discovery were pending at the deadline for the service and filing of the note of issue, the Supreme Court did not improvidently exercise its discretion in refusing to dismiss the action on the basis of the plaintiff's failure to meet that deadline (*see Davis v Goodsell*, 6 AD3d 382; *McCracken v Nitto Kohki USA*, 271 AD2d 510; *Matter of Simmons v McSimmons, Inc.*, 261 AD2d 547).

The defendant's remaining contentions are without merit.

RIVERA, J.P., LIFSON, RITTER and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court