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

D18459
O/prt

_____AD3d_____ Submitted - February 13, 2008

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2007-03234 DECISION & ORDER

Liliana Barbu, etc., et al., respondents,
v Napoleon Savescu, etc., et al., defendants,
Jay D. Tartell, etc., et al., appellants.

(Index No. 1799/00)

Belair & Evans, LLP, New York, N.Y. (James B. Reich of counsel), for appellants.

Stephen Civardi, P.C., Rockville Centre, N.Y. (Richard C. Obiol of counsel), for respondents.

In an action to recover damages for medical malpractice, wrongful death, and pain and suffering, etc., the defendants Jay D. Tartell, Craig J. Youner, and Advanced Radiological Imaging, P.C., appeal from an order of the Supreme Court, Queens County (Dollard, J.), dated February 23, 2007, which denied their motion pursuant to CPLR 3216 and 3404 to dismiss the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied that branch of the appellants' motion which was pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them. The plaintiffs filed a timely note of issue and there is no indication in the record that the note of issue was ever vacated. Relief pursuant to CPLR 3216 is no longer available based on a plaintiff's unreasonable neglect to proceed or delay in the prosecution of an action after the filing of the note of issue (*see Chase v Scavuzzo,* 87 NY2d 228, 231, 233; *Ballestero v Haf Edgecombe Assocs., L.P.,* 33 AD3d 952, 953;

Basetti v Nour, 287 AD2d 126, 128; *Lopez v Imperial Delivery Serv.,* 282 AD2d 190, 194).

Furthermore, the Supreme Court properly denied that branch of the appellants' motion which was pursuant to CPLR 3404 to dismiss the complaint insofar as asserted against them. There was no proof that the action was marked "off" the calendar as that term is used in CPLR 3404. The issuance of a stay of the action was not the equivalent of marking the case "off" the calendar (*see Ballestero v Haf Edgecombe Assocs., L.P.,* 33 AD3d at 953; *see generally Basetti v Nour,* 287 AD2d at 132-133).

FISHER, J.P., FLORIO, ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court