

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

D21404  
G/kmg

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Argued - November 6, 2008

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
STEVEN W. FISHER  
RANDALL T. ENG, JJ.

2007-02788  
2007-08116

DECISION & ORDER

Veronica Troche, appellant,  
v Gregory M. Lieberman, etc.,  
respondent, et al., defendants.

(Index No. 7490/04)

Schachter & Levine, LLP (Pollack, Pollack, Isaac & De Cicco, New York, N.Y.  
[Brian J. Isaac and Diane K. Toner], of counsel), for appellant.

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, Hauppauge, N.Y. (Scott G.  
Christesen of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals, as limited by her brief, (1) from so much of an order of the Supreme Court, Nassau County (Mahon, J.), dated February 14, 2007, as denied that branch of her motion which was to vacate the dismissal of the action pursuant to CPLR 3216 and to restore the action to the trial calendar, and (2) from so much of an order of the same court dated July 31, 2007, as, upon renewal, adhered to the original determination.

ORDERED that the appeal from so much of the order dated February 14, 2007, as denied that branch of the plaintiff's motion which was to vacate the dismissal of the action pursuant to CPLR 3216 and to restore the action to the trial calendar is dismissed, without costs or disbursements, as that portion of the order was superseded by so much of the order dated July 31, 2007, as was made upon renewal; and it is further,

ORDERED that the order dated July 31, 2007, is reversed insofar as appealed from,

December 9, 2008

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on the law, upon renewal, so much of the order dated February 14, 2007, as denied that branch of the plaintiff's motion which was to vacate the dismissal of the action pursuant to CPLR 3216 and to restore the action to the trial calendar is vacated, and that branch of the plaintiff's motion is granted; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff, payable by the defendant Gregory M. Lieberman.

CPLR 3216 permits a court to dismiss an action for neglect to prosecute only after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff file a note of issue within 90 days after receipt of the demand, and advising that the failure to comply with the demand will serve as a basis for a motion to dismiss the action (*see* CPLR 3216[b][3]; *Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d 996). “Since CPLR 3216 is a legislative creation and not part of a court's inherent power, 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” (*Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d at 997 [citations omitted]; *see Chase v Scavuzzo*, 87 NY2d 228, 233; *Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902).

On August 2, 2005, the Supreme Court issued a certification order which directed the plaintiff to file a note of issue "within 90 days of the date of this Order," and warned that “[t]he failure to file may be the basis of a motion pursuant to CPLR §3216.” Although such an order can constitute a valid 90-day demand pursuant to CPLR 3216 (*see Anjum v Karagoz*, 48 AD3d 605; *Bowman v Kusnick*, 35 AD3d 643), here, the order was not signed by counsel for the parties, who were not present in court on the date it was issued, and there is no evidence that it was ever served on the plaintiff, or that the plaintiff received it prior to the court's sua sponte dismissal of the action. Under these circumstances, the statutory preconditions to dismissal pursuant to CPLR 3216 were not satisfied (*see Ovchinnikov v Joyce Owners Corp.*, 43 AD3d 1124, 1126; *Basile v Chhabra*, 24 AD3d 149; *Jacobs v Cirnigliaro*, 259 AD2d 669, 670; *cf. Felix v County of Nassau*, 52 AD3d 653). Accordingly, the court should not have dismissed the action based upon the plaintiff's failure to comply with the certification order.

In light of our determination, we need not address the parties' remaining contentions.

MASTRO, J.P., RIVERA, FISHER and ENG, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court