

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

D25202
C/prt

_____AD3d_____

Submitted - September 23, 2009

PETER B. SKELOS, J.P.
JOSEPH COVELLO
FRED T. SANTUCCI
CHERYL E. CHAMBERS
LEONARD B. AUSTIN, JJ.

2008-11220

DECISION & ORDER

Naum Itskov, etc., et al., respondents, v
Menorah Home and Hospital for the Aged
and Infirm, appellant.

(Index No. 34227/05)

Bivona & Cohen, P.C., New York, N.Y. (Richard M. Fedrow and Patrick T. Steinbauer of counsel), for appellant.

William Pager, Brooklyn, N.Y., for respondents.

In an action to recover damages for medical malpractice, etc., the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated August 8, 2008, as denied its motion pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute.

ORDERED that the order is affirmed insofar as appealed from, with costs.

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 serve 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 (*see Rose v Aziz*, 60 AD3d 925, 926). Since CPLR 3216 is a legislative creation and not part of a court's inherent power (*see 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

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of a condition precedent to dismissal of the action (*see Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902; *Rose v Aziz*, 60 AD3d at 926; *Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d 996, 997; *Schuering v Stella*, 243 AD2d 623, 624).

Here, the defendant's notice dated November 5, 2007, demanding that the plaintiffs serve and file a note of issue cannot be deemed a notice pursuant to CPLR 3216 because it failed to notify the plaintiffs that they were "to resume prosecution of the action and to serve and file a note of issue within ninety days after *receipt* of such demand" (CPLR 3216[b][3] [emphasis added]; *cf. Johnson v Minskoff & Sons*, 287 AD2d 233, 238). Since no proper notice was received by the plaintiffs prior to the defendant's motion, the Supreme Court was not authorized to dismiss the complaint pursuant to CPLR 3216 (*see Rose v Aziz*, 60 AD3d at 926; *Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d at 997; *Schuering v Stella*, 243 AD2d at 624).

SKELOS, J.P., COVELLO, SANTUCCI, CHAMBERS and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court