

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

D25296
W/prt

_____AD3d_____

Argued - October 29, 2009

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2008-10430

DECISION & ORDER

Brenda Santiago, etc., respondent, v
Nyack Hospital, et al., appellants,
et al., defendants.

(Index No. 9405/06)

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York, N.Y. (Samantha E. Quinn of counsel), for appellant Nyack Hospital.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains, N.Y. (Montgomery L. Effinger of counsel), for appellant Peter Lawrence.

Benvenuto, Arciero & McAndrew (James W. Tuffin, Roslyn, N.Y. [Gabriel Mignella], of counsel), for appellant William Silver.

Birbrower, Beldock & Margolis, P.C. (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac and Jillian Rosen], of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice and wrongful death, the defendants Nyack Hospital, Peter Lawrence, and William Silver separately appeal, as limited by their respective briefs, from so much of an order of the Supreme Court, Rockland County (Garvey, J.), dated October 28, 2008, as denied their respective motions to dismiss the complaint insofar as asserted against each of them pursuant to, among other things, CPLR 3126 and 3211(a)(3).

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

December 8, 2009

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Given the strong public policy favoring resolution of cases on their merits (*see Negro v Saint Charles Hosp. & Rehabilitation Ctr.*, 44 AD3d 727, 728), under the circumstances here, the Supreme Court providently exercised its discretion in denying those branches of the appellants' respective motions which were to dismiss the complaint pursuant to CPLR 3126. The appellants failed to establish that any of the plaintiff's delays in complying with court-ordered discovery were willful and contumacious such that the drastic remedy of dismissing the complaint would be justified (*see Negro v Saint Charles Hosp. & Rehabilitation Ctr.*, 44 AD3d at 728; *Sisca v City of Yonkers, N.Y.*, 24 AD3d 531, 532; *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 737; *Lampel v Sergel*, 287 AD2d 548, 549).

Furthermore, under the circumstances, the Supreme Court properly denied those branches of the appellants' motions which were pursuant to CPLR 3211(a)(3) to dismiss the complaint insofar as asserted against each of them on the ground that the plaintiff, who was granted letters of limited administration with respect to the estate of the decedent, Carmen Alicea, lacked the capacity to maintain the instant action as the representative of that estate (*cf.* CPLR 205[a]; *Carrick v Central Gen. Hosp.*, 51 NY2d 242, 252).

The defendants' remaining contentions are without merit.

RIVERA, J.P., DICKERSON, HALL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court