

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

D26283  
G/kmg

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Submitted - January 12, 2010

JOSEPH COVELLO, J.P.  
FRED T. SANTUCCI  
HOWARD MILLER  
RANDALL T. ENG, JJ.

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2005-05453

DECISION & ORDER

Christopher Rocha-Silva, etc., appellant,  
v St. John's Hospital, et al., respondents.

(Index No. 5582/97)

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Mark Kressner, Bronx, N.Y. (Mitchell L. Perry of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success, N.Y. (Christopher Simone and Deirdre E. Tracey of counsel), for respondent St. John's Hospital.

Martin Clearwater & Bell LLP, New York, N.Y. (Ellen B. Fishman, John L.A. Lyddane, and Olimpio A. Russo of counsel), for respondent Solaima Soukkary.

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Rosengarten, J.), entered May 19, 2005, as denied his motion, in effect, to vacate the dismissal of the action pursuant to CPLR 3216.

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

In a compliance conference order dated October 21, 1999, the Supreme Court directed the plaintiff to file a note of issue on or before April 21, 2000, and warned that the action would be dismissed if the plaintiff failed to comply. Counsel for the plaintiff signed the order. This order had the same effect as a 90-day notice pursuant to CPLR 3216 (*see Shcherbina v Queens Nassau Nursing Home, Inc.*, 66 AD3d 869; *Anjum v Karagoz*, 48 AD3d 605). The plaintiff failed to comply with this order either by filing a timely note of issue or by moving to extend the period for doing so, and the action was properly dismissed pursuant to CPLR 3216 (*see Hoffman v Kessler*, 28 AD3d 718; *Mahler v Torres*, 25 AD3d 669).

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A case dismissed pursuant to CPLR 3216 may be restored only if the plaintiff can demonstrate both a reasonable excuse for the default and a meritorious cause of action (*see Mahler v Torres*, 25 AD3d at 670; *Giannoccoli v One Central Park W. Assoc.*, 15 AD3d 348, 349). Here, the plaintiff failed to make that showing. Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiff's motion, in effect, to vacate the dismissal.

COVELLO, J.P., SANTUCCI, MILLER and ENG, JJ., concur.

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2005-05453

DECISION & ORDER ON MOTION

Christopher Rocha-Silva, etc., appellants,  
v St. John's Hospital, et al., respondents.

(Index No. 5582/97)

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Motion by the respondent St. John's Hospital to dismiss an appeal from an order of the Supreme Court, Queens County, entered May 19, 2005, insofar as it is against it on the ground that the appellant failed to file a proof of claim in Bankruptcy Court. By decision and order on motion of this Court dated November 19, 2008, the motion was held in abeyance, and was referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the motion is denied.

COVELLO, J.P., SANTUCCI, MILLER and ENG, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court