

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

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Submitted - November 17, 2010

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-01691

DECISION & ORDER

Lioudmila Mitskevitch, respondent, v City of New York, defendant, M.R.O.D. Realty Corp., appellant.

(Index No. 2902/07)

Molod Spitz & DeSantis, P.C., New York, N.Y. (Marcy Sonneborn and Alice Spitz of counsel), for appellant.

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

In an action to recover damages for personal injuries, the defendant M.R.O.D. Realty Corp. appeals from an order of the Supreme Court, Kings County (Velasquez, J.), dated January 6, 2010, which, inter alia, granted the plaintiff's motion to "restore" the action to the calendar.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly granted the plaintiff's motion to restore this action to the calendar. CPLR 3404 does not apply to this pre-note of issue case (*see Dergousova v Long*, 37 AD3d 645; *Lucious v Rutland Nursing Home of Kingsbrook Jewish Med. Ctr.*, 2 AD3d 412; *Lopez v Imperial Delivery Serv.*, 282 AD2d 190). Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there an order dismissing the complaint pursuant to 22 NYCRR 202.27 (*see Clark v Great Atl. & Pac. Tea Co., Inc.*, 23 AD3d 510; *Burdick v Marcus*, 17 AD3d 388; *123X Corp. v McKenzie*, 7 AD3d 769). Moreover, contrary to the appellant's contention, this action could not have properly been dismissed pursuant to CPLR 3126 based upon the plaintiff's failure to comply with court-ordered discovery, since there was no motion requesting this relief and the plaintiff was

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not afforded an opportunity to be heard on this issue (*see* CPLR 3124; 3126; *Xand Corp. v Reliable Sys. Alternatives Corp.*, 35 AD3d 849; *Postel v New York Univ. Hosp.*, 262 AD2d 40, 42).

SKELOS, J.P., SANTUCCI, ANGIOLILLO, HALL and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court