

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

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Y/kmb

_____AD3d_____

Submitted - March 9, 2011

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-03835

DECISION & ORDER

Aneela Wasif, et al., appellants,
v Nawaz Khan, respondent.

(Index No. 22061/04)

Grover & Fensterstock, P.C., New York, N.Y. (Ernest T. Lawson of counsel), for appellants.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Schneier, J.), dated March 5, 2010, which granted the defendant's motion pursuant to CPLR 3216 to dismiss the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion pursuant to CPLR 3216 to dismiss the complaint is denied.

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. Since CPLR 3216 is a legislative creation and not part of a court's inherent power (*see Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902; *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 of a condition precedent to dismissal of the action (*see Airmont Homes v Town of Ramapo*, 69 NY2d at 902; *Rose v Aziz*, 60 AD3d 925, 926; *Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d 996, 997; *Schuering v Stella*, 243 AD2d 623, 624).

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The defendant's purported 90-day demand dated September 1, 2009, served upon the plaintiffs, was defective on its face, as it failed to demand that the plaintiffs serve and file a note of issue (*see* CPLR 3216[b]; *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d 1021, 1024). Furthermore, a so-ordered stipulation filed October 29, 2009, which extended the plaintiffs' time to file a note of issue to January 22, 2010, could not be deemed a 90-day demand since it failed to advise the plaintiffs that the failure to comply therewith would serve as the basis for a motion to dismiss the action (*see Heifetz v Godoy*, 38 AD3d 605; *O'Connell v City Wide Auto Leasing*, 6 AD3d 682, 683; *Akpinar v John Hancock Mut. Life Ins. Co.*, 302 AD2d 337). Since the plaintiffs were not served with a proper 90-day demand, the defendant's motion pursuant to CPLR 3216 to dismiss the complaint should have been denied (*see Rose v Aziz*, 60 AD3d at 926; *Harrison v Good Samaritan Hosp. Med. Ctr.*, 43 AD3d at 997).

SKELOS, J.P., COVELLO, ENG, CHAMBERS and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court