

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

D31024  
C/kmb

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Argued - March 15, 2011

REINALDO E. RIVERA, J.P.  
CHERYL E. CHAMBERS  
L. PRISCILLA HALL  
PLUMMER E. LOTT, JJ.

2010-01331  
2010-06069

DECISION & ORDER

Steven McDermott, etc., appellant, v Leigh A.  
Bahnatka, et al., respondents.

(Index No. 7821/07)

Duffy & Duffy, Uniondale, N.Y. (Brian C. Lockhart and James N. Licalzi of counsel),  
for appellant.

Thomas K. Moore (James P. Toomey, New York, N.Y. [Evy L. Kazansky], of  
counsel), for respondent Leigh A. Bahnatka.

Burke, Scolamiero, Mortati, & Hurd, LLP, Albany, N.Y. (Thomas J. Reilly of  
counsel), for respondents Banta Properties, Inc., doing business as Pizzeria Uno, and  
Banta Management Services.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York, N.Y. (Gregory S. Katz, Jennifer  
Oxman, and Nicholas P. Hurzeler of counsel), for respondent Crossroads Pub, Inc.

In an action to recover damages for wrongful death, the plaintiff appeals (1) from an  
order of the Supreme Court, Dutchess County (Pagones, J.), dated December 21, 2009, which  
granted the defendants' separate motions pursuant to CPLR 3126 to dismiss the complaint insofar  
as asserted against them, and (2), as limited by his brief, from so much of an order of the same court  
dated May 20, 2010, as denied that branch of his motion which was for leave to renew his opposition  
to the prior motions.

ORDERED that the order dated December 21, 2009, is reversed, on the facts and in

April 26, 2011

Page 1.

McDERMOTT v BAHNATKA

the exercise of discretion, without costs or disbursements, and the defendants' separate motions pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against each of them are denied; and it is further,

ORDERED that the appeal from the order dated May 20, 2010, is dismissed as academic, without costs or disbursements, in light of our determination of the appeal from the order dated December 21, 2009.

The Supreme Court improvidently exercised its discretion in granting the motions to dismiss the complaint pursuant to CPLR 3126. The drastic remedy of dismissal of a complaint is not warranted where there is no clear showing that the plaintiff's failure to comply with discovery demands or orders was willful and contumacious (*see* CPLR 3126; *Mitchell v Grace Plaza of Great Neck, Inc.*, 79 AD3d 1108, 1109; *LOP Dev., LLC v ZHL Group, Inc.*, 78 AD3d 1020, 1020-1021; *Torres v Lowinger*, 12 AD3d 363, 364). Here, the record demonstrates that, although the plaintiff did not comply with the Supreme Court's deadline for completion of discovery, his conduct, while dilatory, did not rise to the level of being willful or contumacious. Document discovery was completed approximately 18 months after this action was commenced, and the plaintiff cancelled a deposition on only one occasion.

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

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court