

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

D31846
C/nl

_____AD3d_____

Submitted - June 8, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-08947

DECISION & ORDER

Kathryn M. Atterberry, appellant, v Serlin & Serlin,
etc., et al., respondents (and another title).

(Index No. 6136/08)

Neil H. Greenberg & Associates, P.C., Westbury, N.Y. (Justin M. Reilly of counsel),
for appellant.

Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. (Matthew K. Flanagan of
counsel), for respondents.

In an action to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Nassau County (Lally, J.), dated August 5, 2010, which denied her motion to vacate the dismissal of the action pursuant to CPLR 3216 and to extend her time to file a note of issue.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, and the plaintiff's motion to vacate the dismissal of the action pursuant to CPLR 3216 and to extend the time to file a note of issue is granted.

CPLR 3216 is an "extremely forgiving" statute (*Baczowski v Collins Constr. Co.*, 89 NY2d 499, 503), which "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (*Davis v Goodsell*, 6 AD3d 382, 383; see *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633; *Gibson v Fakheri*, 77 AD3d

619; *Ferrera v Esposit*, 66 AD3d 637, 638). Although the statute prohibits the Supreme Court from dismissing an action based on failure to prosecute whenever the plaintiff has shown a justifiable excuse for the delay and the existence of a potentially meritorious cause of action, “such a dual showing is not strictly necessary in order for the plaintiff to escape such a dismissal” (*Davis v Goodsell*, 6 AD3d at 384; see *Baczowski v Collins Constr. Co.*, 89 NY2d at 503-504; *Gibson v Fakheri*, 77 AD3d 619; *Ferrera v Esposit*, 66 AD3d at 638).

Here, the plaintiff attempted to file her note of issue 10 days beyond the deadline set by the Supreme Court’s certification order, and the defendants did not claim that they have been prejudiced by the minimal delay (see *Kadyimov v MacKinnon*, 82 AD3d 938). In addition, the delay in filing a note of issue was attributable to law office failure, and the plaintiff proffered both a reasonable excuse for her further two-month delay in making this motion and a potentially meritorious cause of action (see CPLR 2005; *Lauri v Freeport Union Free School Dist.*, 78 AD3d 1130; *Goldstein v Meadows Redevelopment Co Owners Corp. I*, 46 AD3d 509, 510; *Diaz v Yuan*, 28 AD3d 603). Furthermore, there is no evidence in the record of a pattern of persistent neglect and delay in prosecuting the action, or of any intent to abandon the action. Under these circumstances, the plaintiff’s motion to vacate the dismissal of the action pursuant to CPLR 3216 and to extend her time to file a note of issue should have been granted (see *Kadyimov v MacKinnon*, 82 AD3d 938; *Ferrera v Esposit*, 66 AD3d at 638; *Anonymous v Duane Reade, Inc.*, 49 AD3d 479; *Diaz v Yuan*, 28 AD3d 603).

MASTRO, J.P., FLORIO, LEVENTHAL, BELEN and COHEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court