

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

D33493
G/mv

_____AD3d_____

Submitted - December 14, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2011-05703

DECISION & ORDER

Larisa Tolmasova, respondent, v Ludimila Umarova,
et al., defendants, Roman V. Popik, appellant.

(Index No. 14697/03)

Roman V. Popik, New York, N.Y., appellant pro se.

Alexander Shiryak, Kew Gardens, N.Y., for respondent.

In an action, inter alia, to recover damages for legal malpractice, the defendant Roman V. Popik appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (F. Rivera, J.), dated June 3, 2011, as granted the plaintiff's motion to extend the time to serve and file a note of issue and, in effect, denied his cross application to dismiss the action pursuant to CPLR 3216.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as, in effect, denied the appellant's cross application to dismiss the action, is treated as an application for leave to appeal, and leave to appeal from that portion of the order is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

While the failure to comply with a court order directing the filing of a note of issue

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can, in the proper circumstances, provide the basis for the dismissal of a complaint pursuant to CPLR 3216, courts are prohibited from dismissing an action based on neglect to prosecute unless the statutory preconditions to dismissal set forth in CPLR 3216 are met (*see Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 502-503; *Murray v Smith Corp.*, 296 AD2d 445, 447; *Schwartz v Nathanson*, 261 AD2d 527, 528; *Schuering v Stella*, 243 AD2d 623, 624). Here, a compliance conference order dated October 29, 2009, which set a date for the filing of the note of issue, did not constitute a valid 90-day demand because there was no warning that failure to file the note of issue by March 31, 2010, would serve as a basis for dismissal pursuant to CPLR 3216 (*see Banik v Evy Realty, LLC*, 84 AD3d 994, 996; *Sanchez v Serje*, 78 AD3d 1155, 1156; *Ratway v Donnenfeld*, 43 AD3d 465). There was no other evidence in the record that a proper 90-day demand was served upon the plaintiff, permitting dismissal pursuant to CPLR 3216 (*see Clark v Great Atl. & Pac. Tea Co., Inc.*, 23 AD3d 510, 511; *Burdick v Marcus*, 17 AD3d 388; *123X Corp. v McKenzie*, 7 AD3d 769). Accordingly, the Supreme Court properly, in effect, denied the appellant's cross application to dismiss the action pursuant to CPLR 3216, and granted the plaintiff's motion to extend the time to serve and file a note of issue.

RIVERA, J.P., FLORIO, ENG, HALL and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court