

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

D34056
G/kmb

_____AD3d_____

Argued - December 16, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2010-03996

DECISION & ORDER

Gregory Saginor, appellant, v Richard E. Brook,
et al., respondents, et al., defendant.

(Index No. 28097/04)

Levi Huebner & Associates, P.C., Brooklyn, N.Y., for appellant.

Richard E. Brook, Port Washington, N.Y., respondent pro se.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York, N.Y. (John P. Cookson
of counsel), for respondent Marc G. Schultz.

In an action, inter alia, to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Kings County (Spodek, J.), dated February 16, 2010, which, inter alia, denied, as untimely, his motion pursuant to CPLR 2004 to extend the time to serve and file a note of issue and granted the separate cross motions of the defendant Richard E. Brook and the defendant Marc G. Schultz to dismiss the complaint insofar as asserted against each of them pursuant to CPLR 3216.

ORDERED that the order is affirmed, with one bill of costs.

The defendants Richard E. Brook and Marc G. Schultz (hereinafter together the defendants) served 90-day demands upon the plaintiff pursuant to CPLR 3216. Schultz's 90-day demand was received on January 16, 2009. The parties dispute whether Brook's 90-day demand was received on January 7, or January 8, 2009.

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Upon receipt of the 90-day demands, the plaintiff was required to comply with them either by filing a timely note of issue or by moving, before the default date, to vacate the demands or to extend the 90-day period pursuant to CPLR 2004 (*see Sanchez v Serje*, 78 AD3d 1155, 1156). By motion dated April 6, 2009, the plaintiff timely sought an extension upon receipt of Schultz's 90-day demand and, contrary to the Supreme Court's determination, also timely sought an extension upon receipt of Brook's 90-day demand (*see Rivera v Glen Oaks Vil. Owners, Inc.*, 29 AD3d 560, 561-562). Nevertheless, the plaintiff's motion was properly denied and the defendants' cross motions to dismiss the complaint insofar as asserted against each of them pursuant to CPLR 3216 were properly granted in light of the lengthy delay in prosecuting this action, the absence of good cause for the inactivity in this case, and the prejudice to the defendants (*see Sanchez v Serje*, 78 AD3d at 1156; *Harrington v Toback*, 34 AD3d 640, 640-641).

The plaintiff's remaining contention is without merit.

DILLON, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court