

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

D34140
N/prt

_____AD3d_____

Argued - January 19, 2012

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
LEONARD B. AUSTIN, JJ.

2011-03891
2011-05705

DECISION & ORDER

Country Service, Inc., et al., respondents, v
Feiden & Associates, P.C., et al., appellants.

(Index No. 14963/10)

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne, N.Y. (Lisa L. Shrewsberry
and Jennifer Lewkowski of counsel), for appellants.

Arnold S. Kronick, White Plains, N.Y., for respondents.

In an action to recover damages for legal malpractice, the defendants appeal from (1) an order of the Supreme Court, Rockland County (Kelly, J.), dated March 3, 2011, which granted the plaintiffs' motion, in effect, pursuant to CPLR 3012(d) to extend the time to serve the complaint, and denied their cross motion pursuant to CPLR 3012(b) to dismiss the action for failure to timely serve the complaint, and (2) an order of the same court dated April 26, 2011, which denied their motion pursuant to CPLR 3211(a)(7) to dismiss the complaint.

ORDERED that the order dated March 3, 2011, is reversed, on the law, the plaintiffs' motion, in effect, pursuant to CPLR 3012(d) to extend the time to serve the complaint is denied, and the defendants' cross motion pursuant to CPLR 3012(b) to dismiss the action for failure to timely serve the complaint is granted; and it is further,

ORDERED that appeal from the order dated April 26, 2011, is dismissed as academic in light of our determination on the appeal from the order dated March 3, 2011; and it is further,

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

To avoid dismissal for failing to timely serve the complaint after a demand had been made pursuant to CPLR 3012(b), and to be entitled to an extension of time to serve the complaint under CPLR 3012(d), the plaintiffs had to demonstrate both a reasonable excuse for the delay and a potentially meritorious cause of action (*see Tewari v Tsoutsouras*, 75 NY2d 1, 12; *Grace v Follini*, 80 AD3d 560; *Roccanova v Aussino [USA], Inc.*, 76 AD3d 522; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d 353, 357). Here, the plaintiffs failed to provide an affidavit of merit from a person possessing personal knowledge of the facts underlying the action (*see Tewari v Tsoutsouras*, 75 NY2d at 12; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d at 356). Accordingly, the Supreme Court should have denied the plaintiffs' motion, in effect, pursuant to CPLR 3012(d) to extend the time to serve the complaint, and should have granted the defendants' cross motion pursuant to CPLR 3012(b) to dismiss the action for failure to timely serve the complaint.

The parties' remaining contentions have been rendered academic in light of our determination.

RIVERA, J.P., DICKERSON, CHAMBERS and AUSTIN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court