

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

D34596  
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Argued - February 21, 2012

REINALDO E. RIVERA, J.P.  
JOHN M. LEVENTHAL  
SHERI S. ROMAN  
JEFFREY A. COHEN, JJ.

2010-06064

DECISION & ORDER

Thomas Gannon, appellant, v Nicholas Juliano,  
defendant, Anthony Armenia, respondent.

(Index No. 14611/06)

Harry H. Kutner, Jr., Mineola, N.Y. (Kenneth L. Gartner of counsel), for appellant.

Gold, Stewart, Benes, LLP (Sweetbaum & Sweetbaum, Lake Success, N.Y.  
[Marshall D. Sweetbaum and Joel A. Sweetbaum], of counsel), for respondent.

In an action to recover damages for assault and battery, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Murphy, J.), entered May 4, 2010, as denied his renewed motion to vacate the dismissal of the action pursuant to CPLR 3216 and for leave to serve and file a late note of issue, and denied, as academic, the cross motion of the defendant Anthony Armenia for recusal.

ORDERED that the appeal from so much of the order entered May 4, 2010, as denied, as academic, the cross motion of the defendant Anthony Armenia for recusal is dismissed, as the plaintiff is not aggrieved by that portion of the order (*see* CPLR 5511); and it is further,

ORDERED that the order entered May 4, 2010, is reversed insofar as reviewed, on the facts and in the exercise of discretion, without costs or disbursements, and the plaintiff's renewed motion to vacate the dismissal of the action pursuant to CPLR 3216 and for leave to serve and file a late note of issue is granted.

To vacate the dismissal of the action, the plaintiff was required to demonstrate a justifiable excuse for his delay in filing a note of issue within 90 days of a certification order as

directed, and the existence of a potentially meritorious cause of action (*see* CPLR 3216[e]; *Baczowski v Collins Constr. Co.*, 89 NY2d 499, 503; *M.V.B. Collision, Inc. v Berman*, 86 AD3d 534, 534-535; *Fenner v County of Nassau*, 80 AD3d 555, 556; *Rodriguez v Five Towns Nissan*, 69 AD3d 833, 834). Here, the plaintiff did so. Accordingly, the Supreme Court should have granted the plaintiff's renewed motion to vacate the dismissal of the action pursuant to CPLR 3216 and for leave to serve and file a late note of issue.

RIVERA, J.P., LEVENTHAL, ROMAN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court