

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

D35571  
O/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - May 8, 2012

MARK C. DILLON, J.P.  
RANDALL T. ENG  
LEONARD B. AUSTIN  
SANDRA L. SGROI, JJ.

2011-05188  
2011-09019

DECISION & ORDER

Mark Gordon, et al., appellants, v Scott Ratner, etc.,  
et al., respondents.

(Index No. 7262/09)

Bruce G. Clark & Associates, P.C., Port Washington, N.Y. (Diane C. Cooper of counsel), for appellants.

Bower Monte & Greene, P.C., New York, N.Y. (Dylan Braverman and Anina Monte of counsel), for respondents Scott Ratner, Andrew Berke, J. Jane Cao, and Scott J. Sherman.

Charles E. Kutner, LLP, New York, N.Y. (Patrick Mevs of counsel), for respondent St. Francis Hospital.

In an action to recover damages for medical malpractice, the plaintiffs appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Sher, J.), entered March 25, 2011, as denied their motion to vacate the dismissal of the action pursuant to CPLR 3216, to restore the action to the pretrial calendar, and to set a new deadline for the filing of the note of issue, and (2) from an order of the same court entered August 5, 2011, which denied their motion, in effect, for leave to reargue the prior motion.

ORDERED that the order entered March 25, 2011, is reversed insofar as appealed from, on the facts and in the exercise of discretion, the plaintiffs' motion to vacate the dismissal of the action pursuant to CPLR 3216, to restore the action to the pretrial calendar, and to set a new deadline for the filing of the note of issue is granted, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings consistent herewith; and it is further,

July 11, 2012

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ORDERED that the appeal from the order entered August 5, 2011, is dismissed, as no appeal lies from an order denying a motion for leave to reargue and, in any event, the appeal from the order entered August 5, 2011, has been rendered academic in light of our determination on the appeal from the order entered March 25, 2011; and it is further,

ORDERED that the plaintiffs are awarded one bill of costs payable by the defendants appearing separately and filing separate briefs.

“CPLR 3216 is an ‘extremely forgiving’ statute (*Baczowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]), which ‘never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed’” (*Kadyimov v Mackinnon*, 82 AD3d 938, 938, quoting *Davis v Goodsell*, 6 AD3d 382, 383). Although the statute prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever a 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 a plaintiff to escape such a dismissal (*see Kadyimov v Mackinnon*, 82 AD3d at 938-939).

Under the circumstances of this case, including the minimal three-day delay in filing the note of issue, the excuse of law office failure which the Supreme Court properly accepted as reasonable, the fact that the defendants did not claim any prejudice, and the lack of evidence of a pattern of persistent neglect and delay in prosecuting the action or of any intent to abandon the action, the Supreme Court improvidently exercised its discretion in declining to excuse the plaintiffs’ failure to meet the deadline for filing the note of issue (*id.* at 939; *see Ferrera v Esposit*, 66 AD3d 637, 638; *Zito v Jastremski*, 35 AD3d 458; *Diaz v Yuan*, 28 AD3d 603; *cf. Sicoli v Sasson*, 76 AD3d 1002, 1003-1004; *Nowell v NYU Med. Ctr.*, 55 AD3d 573). Accordingly, the Supreme Court should have granted the plaintiffs’ motion to vacate the dismissal of the action pursuant to CPLR 3216, to restore the action to the pretrial calendar, and to set a new deadline for the filing of the note of issue.

DILLON, J.P., ENG, AUSTIN and SGROI, JJ., concur.

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2011-09019

DECISION & ORDER ON MOTION

Mark Gordon, et al., appellants, v Scott Ratner, etc.,  
et al., respondents.

(Index No. 7262/09)

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Motion by the defendants Scott Ratner, Andre Berke, J. Jane Cao, and Scott Sherman on appeals from two orders of the Supreme Court, Nassau County, entered March 25, 2011, and August 5, 2011, respectively, inter alia, to dismiss the appeal from the order entered August 5, 2011.

By decision and order on motion of this Court dated December 15, 2011, that branch of the motion which is to dismiss the appeal from the order entered August 5, 2011, was held in abeyance and was referred to the panel of Justices hearing the appeals for determination upon the argument or submission of the appeals.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeals, it is

ORDERED that the branch of the motion which is to dismiss the appeal from the order entered August 5, 2011, is denied as academic in light of our determination of the appeal from that order (*see Gordon v Ratner*, \_\_\_\_\_AD3d\_\_\_\_\_ [decided herewith]).

DILLON, J.P., ENG, AUSTIN and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court