

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

D35742  
O/kmb

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Submitted - June 20, 2012

MARK C. DILLON, J.P.  
RUTH C. BALKIN  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

2011-10355

DECISION & ORDER

Salvatore Guerrera, respondent, v Robert J. Zysk,  
appellant.

(Index No. 39592/07)

Robert J. Zysk, Patchogue, N.Y., appellant pro se.

Jeffrey Levitt, Massapequa, N.Y., for respondent.

In an action, inter alia, to recover damages for legal malpractice, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Mayer, J.), dated September 1, 2011, as denied that branch of his motion which was pursuant to CPLR 3216, in effect, to dismiss the complaint for failure to prosecute.

ORDERED that the order is affirmed insofar as appealed from, with costs.

On May 5, 2010, the defendant served the plaintiff with a written demand pursuant to CPLR 3216 to serve and file a note of issue within 90 days after receipt of the demand. Shortly thereafter, the defendant served a notice of motion dated May 5, 2010, inter alia, pursuant to CPLR 3216, in effect, to dismiss the complaint for failure to prosecute. Since the defendant's motion was served before the expiration of the 90-day period, the Supreme Court properly denied that branch of the motion which was pursuant to CPLR 3216, in effect, to dismiss the complaint (*see Weber v Kessler*, 224 AD2d 520, 521; *Divjak v New York Hosp.-Cornell Med. Ctr.*, 219 AD2d 695; *Lyons v Butler*, 134 AD2d 576).

October 3, 2012

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The defendant's remaining contentions are without merit.

DILLON, J.P., BALKIN, BELEN and AUSTIN, JJ., concur.

ENTER:

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

Aprilanne Agostino  
Clerk of the Court