

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

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CARGO MARINE UNDERWRITERS	No. 8227/05
AGENCY, INC.,	
	Motion
Plaintiff,	Date February 13, 2008
-against-	
	Motion
INFINITY INTERNATIONAL GROUP	Cal. No. 5
CORP. AND RICHARD SORIA,	
	Motion
Defendants.	Seq. No. 4
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PAPERS  
NUMBERED

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Plaintiff commenced this action seeking to recover damages alleged to have been sustained due to the defendants' appropriating confidential information and soliciting business in competition with plaintiff.

Defendants move for an order pursuant to CPLR 3216 granting judgment dismissing the complaint for failure to prosecute.

Plaintiff cross-moves for an order pursuant to CPLR § 2004 vacating the plaintiff's default in filing the note of issue and ordering a preliminary conference.

The defendants assert that by order entered February 3, 2006 (Polizzi, J.), the court denied plaintiff's motion to preclude and directed that examinations before trial be held on March 2, 2006 and continue day to day and to be completed on March 8, 2006. Plaintiff was also directed to file a note of issue on or before March 17, 2006. The parties stipulated to rescheduling

the depositions to April 3, 2006 with the filing of the note of issue to be on or before April 30, 2006. Pursuant to an order entered February 27, 2006 (Polizzi, J.), plaintiff was directed to file a note of issue on or before April 30, 2006.

Defendants' counsel further asserts that, by letter dated March 23, 2006, he informed counsel that he would be conducting plaintiff's deposition at his office on April 3, 2006. On March 30, 2006, he was informed that plaintiff was not ready to proceed on April 3, 2006. Plaintiff has not appeared for deposition and did not file a note of issue as ordered. Plaintiff's default has continued for over sixteen (16) months and plaintiff's complaint should be dismissed.

Plaintiff asserts that no preliminary conference has been held. The order entered on February 10, 2006 was never served upon plaintiff's prior counsel. The defendants have never provided any of the documentary evidence requested thereby defeating plaintiff's ability to conduct a deposition and to file a note of issue. Since the note of issue was not filed, the case was marked dismissed by the clerk of the court as was the procedure at the time. Defendants' motion is premature as the case has not been restored to the calendar. Plaintiff now requests that the action be restored to the calendar, that a preliminary conference be held and an extension of time to file the note of issue be granted.

Plaintiff also asserts that the original dismissal of the case was not more than one year since the joinder of issue and defendants failed to send any demands to continue discovery. The requirements of CPLR 3216 have not been met as one year had not elapsed since the joinder of issue and no ninety day letter or demand had been made prior to the court's dismissal of the case. This matter should have had a preliminary conference prior to the court's ordering a date to file the note of issue. There is no evidence that plaintiff failed to respond to any discovery requested by defendants that was wilful, contumacious or in bad faith. It would be more expeditious to order discovery completed instead of starting the action anew.

In reply, defendants assert that plaintiff took no action in support of its claims between April 2006 and the filing of its cross-motion. Plaintiff had filed three prior motions and no appeals were taken from any of them.

Plaintiff is now asking this court to reverse the prior orders which is patently improper.

In reply, plaintiff asserts that defendants failed to address the fact that plaintiff's cross-motion to restore the case to the calendar is a condition precedent to any motion, let alone defendants' motion for default. Defendants also do not address the fact that there was no preliminary conference and no order with respect thereto. Judge Polizzi's order was not a ninety day order or a substitution for a ninety day order.

#### Decision of the Court

The motion by defendants is denied.

The cross-motion by plaintiff is granted to the extent that this matter is restored to active status. The matter is being set down for a Preliminary Conference at which time the note of issue due date may be set.

Defendants have moved for dismissal pursuant to CPLR 3216 which provides, in pertinent part, that: "(a)Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b)No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with: (1)Issue must have been joined in the action; (2)One year must have elapsed since the joinder of issue; (3)The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed."

None of the parties have submitted copies of the pleadings herein. While a review of the court's records shows that the summons and complaint herein were filed on April 13, 2005, no evidence has been submitted to show when issue was joined. Based upon the papers submitted, this court cannot determine if the requirements of subdivisions (a)(1) and (b)(2) of CPLR 3216 have been met or when they were met. Further, there is no showing that a ninety day demand was served upon plaintiff so as to comply with subdivision (b)(3). Therefore, defendants are not entitled to a dismissal based upon CPLR 3216.

Accordingly, the motion by defendants is denied. The cross-motion by plaintiff is granted to the extent that this matter is restored to active status. The matter is set down for a Preliminary Conference in this Courthouse, located at 88-11 Sutphin Boulevard, Jamaica, New York, in Courtroom 314 on June 11, 2008 at 9:30 a.m. at which time the note of issue due date may be set.

Dated: May 19, 2008

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**HON. DAVID ELLIOT**