

**Stevens v Cutler**

2021 NY Slip Op 32465(U)

July 29, 2021

Supreme Court, New York County

Docket Number: Index No. 805037/2019

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM**

*Justice*

-----X

LISA STEVENS

Plaintiff,

- v -

BRADLEY J. CUTLER, D.D.S.,

Defendant.

-----X

INDEX NO. 805037/2019

MOTION DATE 06/15/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISS LACK OF PROSECUTION

In this action to recover damages for dental malpractice, the defendant, Bradley J. Cutler, D.D.S, moves pursuant to CLPR 3126, 3042, and 3216 to dismiss the complaint. The plaintiff's cross-moves to "deny" the defendant's motion to dismiss or, in the alternative, to afford her a period of 90 days to obtain new counsel and adjourn the return date of the defendant's motion for a period of 120 days to enable her new counsel to respond to the merits of defendant's motion. As part of the plaintiff's cross motion, the plaintiff's attorney moves pursuant to CLPR 321(b)(2) for leave to withdraw as her counsel. The branch of the defendant's motion seeking to dismiss the complaint pursuant to CPLR 3216 is denied, and the motion is otherwise held in abeyance until November 30, 2021. The cross motion is granted to the extent that the plaintiff's attorney is deemed to have been discharged as counsel, the plaintiff shall have until October 29, 2021 to obtain new counsel, and the return date of the defendant's motion is adjourned until November 30, 2021. The cross motion is otherwise denied.

In the first instance, the defendant has not shown that it has served the plaintiff, by registered or certified mail, with a demand in accordance with CPLR 3216(b) directing her to

resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of such demand, and notifying her that a default in complying with such demand within that 90-day period will serve as a basis for a motion dismissing the complaint for unreasonable neglect to proceed. A defendant "must serve" such a demand and notice before relief may be awarded pursuant to CPLR 3216 (*Dutchess Truck Repair, Inc. v Boyce*, 120 AD3d 543, 544-545 [2d Dept 2014]). "[C]ourts do not possess the power to dismiss an action for general delay where plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b)" (*Chase v Scavuzzo*, 87 NY2d 228, 233 [1995]; see *Bank of N.Y. v Harper*, 176 AD3d 907, 909 [2d Dept 2019]). Thus, the defendant's failure to establish that it served a demand pursuant CPLR 3216 deprives this court of the authority to dismiss the complaint based on the plaintiff's general delay in prosecuting this action.

CPLR 321(b)(2) provides that

"[a]n attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion *on such notice* to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, *as the court may direct*"

(emphasis added). Where a statute requires notice to be given in such manner as the court may direct, the underlying request for relief must be initiated by order to show cause, not by notice of motion (see *Smith v Smith*, 291 AD2d 828 [4th Dept 2002]; *Wong v Wong*, 213 AD2d 399, 400 [2d Dept 1995]; *Bynoe v Riverside Church in City of N.Y.*, 13 Misc 3d 628 [App Term, 1st Dept 2006]; *Aiello v Adar*, 193 Misc 2d 649, 654 [Sup Ct, Bronx County 2002]; *People of State of N.Y. v ELRAC, Inc.*, 192 Misc 2d 78, 82 [Sup Ct, N.Y. County 2002]; *Universal Elevator Co. v Jordan Elevator Co.*, 110 Misc 2d 670, 672 [Sup Ct, N.Y. County 1981] [explaining reasons for requiring order to show cause]; McKinney's Cons Laws of NY, Book 7B, CPLR C321:2 [2001]). The reason an order to show cause generally is required to initiate such a motion is that it provides the court with the opportunity to direct the timing and manner of service

of the motion papers so that a client actually obtains notice that his or her attorney is seeking to withdraw from further representing the client.

Here, the cross motion by the plaintiff's counsel seeking, among other things, leave to withdraw was initiated by notice of cross motion, and not by order to show cause. The plaintiff, however, submitted her own affidavit to the court expressly discharging Marc E. Lesser, Esq., as her counsel. Under these circumstances, the application for leave to withdraw as counsel is superfluous, as "[a] client has an absolute right to discharge an attorney at any time" (*Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]). Hence, that branch of the cross motion pursuant to which Lesser seeks leave to withdraw as counsel is granted only to the extent that the court recognizes that the plaintiff has formally discharged him as her attorney, and that branch of the cross motion is otherwise denied.

The branch of the cross motion purportedly seeking to "[d]eny[ ] Defendant's motion to dismiss" does not seek affirmative relief and, hence, is not the proper subject of a cross motion (see *Koegler v Amraly*, 2020 NY Slip Op 50858[U], 68 Misc 3d 1204[A] [Sup Ct, N.Y. County, Jul. 22, 2020]). Consequently, that branch of the cross motion must be denied.

Inasmuch as the court is recognizing that the plaintiff formally discharged her attorney, it concludes that an adjournment of the remaining branches of the defendant's motion is warranted to afford the plaintiff an opportunity to obtain new counsel and submit substantive opposition to the remaining branches of the defendant's motion, including the branch seeking dismissal pursuant to CPLR 3126. Consequently, those branches of the plaintiff's cross motion requesting time to retain a new attorney and an adjournment of the return date of the remaining branches of the defendant's motion are granted. The plaintiff shall have until October 29, 2021 to retain new counsel, should she be so advised, and the return date of the remaining branches of the defendant's motion is adjourned until November 30, 2021.

Accordingly, it is

ORDERED that the branch of the defendant's motion seeking to dismiss the complaint pursuant to CPLR 3216 is denied, and the motion is otherwise held in abeyance until November 30, 2021; and it is further,

ORDERED that the plaintiff's cross motion is granted to the extent that (a) the court recognizes that the plaintiff has discharged her attorney, Marc E. Lesser, Esq., and that he no longer has the obligation to represent the plaintiff in this action, (b) the plaintiff is directed to retain new counsel, should she be so advised, on or before October 29, 2021, and (c) the return date of the remaining branches of the defendant's motion is adjourned until November 30, 2021, and the cross motion is otherwise denied; and it is further,

ORDERED that, on or before August 13, 2021, Marc E. Lesser, Esq., shall serve a copy of this order with notice of entry upon the plaintiff by regular first-class mail at her last known address.

This constitutes the Decision and Order of the court.

7/29/2021  
DATE

  
JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE