

**Carmo v St. Luke's Roosevelt Hosp. Ctr.**

2022 NY Slip Op 32396(U)

July 18, 2022

Supreme Court, New York County

Docket Number: Index No. 805040/2015

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** **56M**

*Justice*

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**INDEX NO.** 805040/2015

LUIS CARMO, as attorney-in-fact, on behalf of ALMERINDA CARMO,

**MOTION DATE** 05/16/2022

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

ST. LUKE'S ROOSEVELT HOSPITAL CENTER, sued herein as CONTINUUM HEALTH PARTNERS, INC., doing business as ST. LUKES ROOSEVELT HOSPITAL CENTER-ROOSEVELT DIVISION,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 3216 to dismiss the complaint for the failure of the plaintiff to prosecute the action, based on his failure to comply with a 90-day notice that the defendant had served upon him. The plaintiff does not oppose the motion. The motion is granted.

CPLR 3216(a) provides that

"[w]here 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 a separate judgment, or unreasonably fails to serve and file a note of issue, the court, . . . upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

To secure a dismissal pursuant to CPLR 3216, issue must have been joined and either one year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of any preliminary court conference order, whichever is later (see CPLR 3216[b]). In addition, the defendant must have served a written demand upon the plaintiff by registered or certified mail, directing the plaintiff to resume prosecution of the action and to serve and file a

note of issue within 90 days after receipt of such demand (*see id.*). The demand also must give notice to the plaintiff that a default in complying with such demand within that 90-day period will serve as a basis for a motion dismissing the complaint as against that defendant for unreasonable neglect to proceed (*see id.*). In the event that the plaintiff fails to serve and file a note of issue within such 90-day period, the court may grant a motion by the party seeking dismissal, unless the plaintiff shows justifiable excuse for the delay and a good and meritorious cause of action (*see CPLR 3216[e]*).

Dismissal thus is warranted pursuant to CLR 3216 where a defendant timely and properly serves a 90-day notice, and a plaintiff fails to show, in opposition, that it did not intend to abandon prosecution of the action, that his or her history of extensive delay was justified, and that he or she had a meritorious claim (*see Thompson v Beth Israel Med. Ctr.*, 178 AD3d 468 [1st Dept 2019]; *see also Mosberg v Elahi*, 80 NY2d 941, 942 [1992] [plaintiff opposing a CPLR 3216 motion must demonstrate the existence of a "good and meritorious cause of action"]; *Garofalo v Mercy Hosp.*, 271 AD2d 642, 643 [2d Dept 2000] [opponent of CPLR 3216 motion must establish "a meritorious claim and excusable delay"]).

Here, issue was joined by the defendant when it served an answer on February 20, 2015. More than one year has passed since the joinder of issue. In addition, the court (Madden, J.) issued a preliminary conference order on August 31, 2017, and more than six months have elapsed since that date. Moreover, the court has issued a compliance conference order and eight status conference orders, but the plaintiff failed to proceed with the discovery that had been directed by the court or fully to comply with those orders. One of the reasons for this failure is that the plaintiff's attorney had been relieved as his counsel by order dated June 14, 2019 (Madden, J.), and, by order dated February 14, 2020, the same court denied his motion for leave to reargue his opposition to his attorney's motion. Inasmuch as the plaintiff seeks to prosecute this action pursuant to a durable power of attorney given to him by his mother, who is the allegedly injured party, he is prohibited from prosecuting the action pro se,

but must be represented by an attorney at law (see *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 [1st Dept 2012]; *Whitehead v Town House Equities, Ltd.*, 8 AD3d 369, 370-371 [2d Dept 2004]; see also *Lanzuter Benevolent Assn. v Altman*, 160 AD3d 575, 576 [1st Dept 2018]; *Parkchester Preserv. Co., L.P. v Feldeine*, 31 Misc 3d 859, 864 [Civ Ct, Bronx County 2011]). Although this court adjourned a discovery status conference in this action on at least four occasions over a period of more than one year, the plaintiff has yet to retain or appear by counsel, thus preventing him from prosecuting the action. Moreover, although he has informed the court that his mother's physical condition prevents her from speaking or hearing, to this court's knowledge, the plaintiff has not sought the appointment of a guardian of her person pursuant to Mental Hygiene Law article 81.

On November 24, 2021, the defendant served the upon plaintiff, both by regular and certified mail, return receipt requested, a written demand directing him to resume prosecution of the action and to file a note of issue within 90 days after receipt of such demand. The demand also notified the plaintiff that his failure to resume prosecution would serve as a basis for a motion to dismiss the complaint.

Where proof of the date of a plaintiff's receipt is included in the record, the 90-day period must be measured from a plaintiff's "receipt of such demand" (CPLR 3216[b]; *Public Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 310 [1st Dept 1996]). The defendant, however, has not submitted copies of either postmarked white and green certified mail receipts or dated and postmarked green return receipt cards to establish the plaintiff's actual date of receipt. Rather, it has submitted an affidavit attesting to service of the 90-day notice upon the plaintiff and his mother via regular and certified mail, return receipt requested, and copies of the certified mail receipts and return receipt cards as they appeared when dispatched. Where service of non-initiatory papers is made upon a party who is not represented by counsel, as is the plaintiff here, it may be effectuated by a mailing to the party's last known address (see CPLR 2103[c], [b][1]).

Where such mailing is employed, and a period of time prescribed by law is measured by service

of the papers, five days shall be added to the prescribed period of time to account for the delay between mailing and actual receipt (see CPLR 2103[b][1]). The court thus deems the plaintiff to have received the 90-day notice on November 29, 2021. If the court deems that date as the date of receipt, the statutory 90-day period would normally have lapsed on February 27, 2022; since February 27, 2022 was a Sunday, the period actually lapsed on the next business day, or on February 28, 2022 (see General Construction Law § 25-a[1]). As of that date, the plaintiff neither responded to the demand, filed a note of issue, nor resumed prosecution of the action. Nor had he requested or moved for an extension of time within which to serve and file the note of issue or conduct additional discovery. In fact, the plaintiff has done none of those things at any time. The defendant made the instant motion on April 14, 2022. The motion is thus timely.

The defendant demonstrated that the plaintiff, in declining to oppose the instant motion, failed to show that he did not intend to abandon prosecution of the action, that his history of extensive delay was justified, or that he has a meritorious claim. Hence, the motion must be granted, and the complaint must be dismissed. The dismissal is, however, not deemed to be a dismissal on the merits.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted, without opposition, and the complaint is dismissed; and is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

7/18/2022  
DATE

  
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JOHN J. KELLEY, J.S.C.

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