

**Arnold v Blitz**

2023 NY Slip Op 30628(U)

March 2, 2023

Supreme Court, New York County

Docket Number: Index No. 805198/2016

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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GABRIELA ARNOLD and CHRISTIAN ARNOLD

Plaintiffs,

- v -

NEAL BLITZ, DPM,

Defendant.

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INDEX NO. 805198/2016

MOTION DATE 11/03/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 99, 104

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 3216 to dismiss the complaint for the plaintiffs' failure to prosecute the action. The plaintiffs do not oppose the motion. The motion is granted, and the complaint is dismissed.

In the most recent status conference order issued in this action, dated September 10, 2021, this court directed the plaintiff Gabriela Arnold to submit to a continued deposition on or before November 10, 2021, fixed a deadline for service of post-deposition demands and responses, and set a note of issue filing deadline for March 31, 2022. On November 4, 2021, the defendant's attorney contacted the plaintiffs' attorney, inquiring as to when Gabriela Arnold would be produced for a continued deposition. The defendant's attorney followed up with an almost identical email on February 3, 2022. The plaintiffs' attorney responded, suggesting that the parties might be able request the court further to extend the discovery and note of issue filing deadlines, but he neither scheduled the deposition nor contacted the court to request an additional conference or an extension of any deadline. March 31, 2022 passed, without the defendant conducting a further deposition of Gabriela Arnold and without the plaintiffs filing a note of issue. On April 26, 2022, the defendant's attorney again wrote the plaintiff's attorney,

again requesting him to produce Gabriela Arnold for a continued deposition. After receiving no further communications from the plaintiffs' attorney, the defendant's attorney, on June 8, 2022, served the plaintiffs' attorney by certified mail with a CPLR 3216 notice to resume prosecution by filing a note of issue within 90 days after the notice was served. The notice further informed the plaintiffs that their failure to file a note of issue within 90 days would form the predicate for a motion to dismiss the complaint for failure to prosecute. The plaintiffs' attorney received the notice on June 11, 2022. The defendant made the instant motion to dismiss the complaint on October 4, 2022 (see CPLR 2211). Rather than opposing the motion, the plaintiffs simply filed a note of issue on October 6, 2022.

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]).

“Having received the 90-day notice, the plaintiff was required to file a note of issue or move, before the default date, to vacate the 90-day demand or to extend the 90-day period” (*Worldwide Ins. Brokerage, Ltd. v New City Mgt., LLC*, 172 AD3d 1282, 1282 [2d Dept 2019]). Dismissal thus is warranted pursuant to CPLR 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 September 23, 2016. More than one year has passed since the joinder of issue. In addition, the court (Madden, J.) issued a preliminary conference order on October 26, 2017, and more than six months have elapsed since that date. Moreover, the court has issued 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. Where, as here, 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]). Since the plaintiffs’ received the notice and demand on June 11, 2022, they had until September 9, 2022 to respond. Since the defendant made the instant motion on October 4, 2022, the motion is timely.

As of September 9, 2022, the plaintiffs had neither responded to the demand, filed a note of issue, nor resumed prosecution of the action. Nor had they requested or moved for an extension of time within which to serve and file the note of issue or permit additional discovery. The defendant demonstrated that the plaintiffs, in declining to oppose the instant motion, failed

to show that they did not intend to abandon prosecution of the action, that their history of extensive delay was justified, or that they have a meritorious claim. Although a court retains “residual discretion to deny a motion to dismiss when [the] plaintiff tenders even an unjustifiable excuse, this discretion should be exercised sparingly” (*Baczowski v Collins Constr. Co.*, 89 NY2d 499, 504 [1997]), under the circumstances presented here, in which the plaintiffs proffered no excuse whatsoever, dismissal is warranted (*see Worldwide Ins. Brokerage, Ltd. v New City Mgt., LLC*, 172 AD3d at 1282-1283). Nor did the plaintiffs save their action by filing a note of issue after the 90-day period set forth in the CPLR 3216 demand had lapsed (*see Nash v Schopfer*, 187 AD3d 1535, 1536 [4th Dept 2020]; *see also Aguilar v Knutson*, 296 AD2d 562, 562-563 [2d Dept 2002]). Hence, the defendant’s 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.

3/2/2023  
DATE



JOHN J. KELLEY, J.S.C.

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