

**Fuchs v Dempsey**

2025 NY Slip Op 31452(U)

March 28, 2025

Supreme Court, New York County

Docket Number: Index No. 805127/2019

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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MINA FUCHS and HERMAN FUCHS,

Plaintiffs,

- v -

TANIA DEMPSEY, M.D., SHELLY MENOLASCINO, M.D.,  
and HASAN ASIF, M.D.,

Defendants.

-----X

**INDEX NO.** 805127/2019

**MOTION DATE** 12/23/2024  
01/02/2025  
01/31/2025

**MOTION SEQ. NO.** 003, 004, 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117, 118, 119, 120, 121, 122, 123, 124, 125

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 126, 127, 128

were read on this motion to/for DISMISS.

In this action, inter alia, to recover damages for medical malpractice based on alleged departures from good and accepted practice and lack of informed consent, the defendant Tania Dempsey, M.D., moves pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against her for the plaintiffs' failure to prosecute the action, based on their failure to comply with a 90-day notice that Dempsey had served upon them (SEQ 003). The defendant Shelly Menolascino, M.D., moves for the same relief as to her (SEQ 004), and the defendant Hasan Asif, M.D., moves for the same relief as to him (SEQ 005). The plaintiff does not oppose any of the motions. The motions are granted, and the complaint is dismissed in its entirety.

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, a defendant must have served a written demand upon the plaintiffs by registered or certified mail, directing the plaintiffs 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 plaintiffs 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.*). If the plaintiffs fail to serve and file a note of issue within 90 days, the court may grant a motion by the party seeking dismissal, unless the plaintiffs show justifiable excuse for the delay and a meritorious cause of action (see CPLR 3216[e]).

Here, issue was joined by Asif when he served an answer on May 15, 2019, issue was joined by Menolascino when she served an answer on June 3, 2019, and issue was joined by Dempsey when she served an answer on June 10, 2019. Consequently, more than one year has passed since the joinder of issue by all of the defendants before they made their respective motions. In any event, this court signed a preliminary conference order on February 23, 2022, and that order was entered on February 28, 2022. Hence, when the defendants made their respective motions, more than six months had elapsed since the issuance of that order. The motions thus are not premature.

There apparently has been no discovery exchanged since the entry of the preliminary conference order on February 28, 2022. Nor did the plaintiffs submit a proposed compliance conference order to the court by September 15, 2022, as required by the preliminary conference order and the court's Part Rules. On July 24, 2024, Asif and Menolascino each served, upon

the plaintiffs' counsel, by certified mail, return receipt requested, a written demand directing the plaintiffs to resume prosecution of the action and to file a note of issue within 90 days after receipt of such demand. The demands also notified the plaintiffs that their failure to resume prosecution would serve as a basis for a motion to dismiss the complaint. On July 25, 2024, Dempsey served a virtually identical demand upon the plaintiffs' counsel by certified mail, return receipt requested. 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 defendants, however, have not submitted copies of the dated and postmarked green return receipt cards to establish the plaintiffs' counsel's actual date of receipt. Rather, they have submitted affidavits attesting to service of the 90-day notice upon the plaintiffs' attorney via certified mail, return receipt requested. Where service of non-initiatory papers is made upon a party who is represented by counsel, as are the plaintiffs here, service may be effectuated by a mailing to counsel's address (see CPLR 2103[b]). 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][2]). The court thus deems the plaintiffs' counsel to have received Asif's and Menolascino's 90-day demands on July 29, 2024, and Dempsey's demand on July 30, 2024. The plaintiff thus had until October 28, 2024 (see General Construction Law §§ 20, 25-a) to file the note of issue or request an extension of time within which to do so, thus permitting discovery to continue. Between July 30, 2024 and November 25, 2024, when Dempsey made her motion (see CPLR 2211), between July 29, 2024 and December 3, 2024, when Menolascino made her motion, and between July 29, 2024 and January 7, 2025, when Asif made his motion, the plaintiffs neither responded to any of the three 90-day demands, filed a note of issue, nor resumed prosecution of the action. Nor did they request or move for an extension of time, during those periods of time, within which to serve and file the note of issue.

CPLR 3216(e) provides that

“[i]n the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.”

CPLR 2004 provides that

“[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.”

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b) (3), he or she must comply with the demand by filing a note of issue “or by moving, before the default date, either to vacate the demand or [pursuant to CPLR 2004] to extend the 90-day period” (*Angamarca v 47-51 Bridge St. Prop., LLC*, 167 AD3d 559, 559 [2d Dept 2018]; see *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d 760, 760-761 [2d Dept 2017]). After receiving the 90-day demands, and prior to the October 28, 2024 default date, the plaintiffs did not move to vacate the demands or seek to extend their time for filing the note of issue, and they did not make any such applications at any time thereafter.

Inasmuch as the plaintiffs failed timely to make a motion to vacate any of the 90-day demands, they became obligated, in opposition to the defendants’ respective motions pursuant to CPLR 3216, to establish both a justifiable excuse for their failure timely to file the note of issue and a potentially meritorious cause of action, as their failure to file the note of issue by the statutory deadline constituted a species of default (see *Baczowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *Grant v City of New York*, 17 AD3d 215, 216-217 [1st Dept 2005] [“an application to extend plaintiff’s time to file a note of issue within that 90-day period serves to prevent a default on the notice”]; cf. *Conway v Brooklyn Union Gas Co.*, 212 AD2d 497, 497-498 [2d Dept 1995] [an affidavit of merit is not required where the motion pursuant to CPLR 2004 was made prior to the expiration of the prescribed period to respond]). Dismissal pursuant to

CLR 3216 generally is warranted where a defendant timely and properly serves a 90-day demand, and a plaintiff fails to show, in opposition, that he or she 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”]).

It has been said, however, that CPLR 3216 is “extremely forgiving” (*Baczowski v Collins Constr. Co.*, 89 NY2d at 503), “in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff’s action based on the plaintiff’s unreasonable neglect to proceed” (*Davis v Goodsell*, 6 AD3d 382, 383 [2d Dept 2004]; see *Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633 [2003]; *Deutsche Bank Natl. Trust Co. v Inga*, 156 AD3d at 761). Although the court thus recognizes that it “retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even when a plaintiff fails to comply with the 90-day requirement and fails to demonstrate a justifiable excuse and a meritorious cause of action” (*Restaino v Capicotto*, 26 AD3d 771, 771 [4th Dept 2006]; *Davis v Goodsell*, 6 AD3d at 384; *Rust v Turgeon*, 295 AD2d 962, 962-963 [4th Dept 2022]), the plaintiffs, by failing to oppose the motion, have failed to present any acceptable rationale for their long delay in proceeding with discovery, totaling almost more than 2½ years, and did not submit an affidavit of merit from a person with personal knowledge of the facts (see *Garcia v Roopnarine*, 18 AD3d 607, 607 [2d Dept 2005]), let alone an affirmation or affidavit of merit from a physician, which is necessary to establish the potential merit of a medical malpractice action (see *Mosberg v Elahi*, 80 NY2d at 942; *Smith v Montefiore Med. Ctr.*, 60 AD3d 479, 479 [1st Dept 2009]).

Where, as here, the plaintiffs, subsequent to the receipt of the 90-day demands, did not contact the court, reach out to their adversaries to resolve any purported discovery disputes, or

make a motion either to vacate the 90-day notice or a motion to extend their note of issue filing deadline prior to the October 28, 2024 default date, the court cannot excuse their long delay in resuming prosecution of the action (see *Cato v City of New York*, 70 AD3d 471, 471-472 [1st Dept 2010]; *Schneider v Meltzer*, 266 AD2d 801, 802-803 [3d Dept 1999]).

Consequently, the defendants' respective motions must be granted, and the complaint must be dismissed in its entirety

In light of the foregoing, it is,

ORDERED that the motion of the defendant Tania Dempsey, M.D., is granted, and the complaint is dismissed insofar as asserted against her (SEQ 003); and it is further,

ORDERED that the motion of the defendant Shelly Menolascino, M.D., is granted, and the complaint is dismissed insofar as asserted against her (SEQ 004); and it is further,

ORDERED that the motion of the defendant Hasan Asif, M.D., is granted, and the complaint is dismissed insofar as asserted against him (SEQ 005); and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint as against all of the defendants.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

<u>3/28/2025</u>			
<b>DATE</b>			
MOTION 003:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
MOTION 004:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
MOTION 005:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE