

<b>Cox v 249 Varet, LLC</b>
2026 NY Slip Op 31331(U)
March 27, 2026
Supreme Court, Kings County
Docket Number: Index No. 512734/2020
Judge: Kerry J. Ward
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At an IAS Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of March, 2026.

P R E S E N T:

HON. KERRY J. WARD, A.J.S.C.

CAMILLE COX,

DECISION/ORDER

*Plaintiff,*

Index No.: 512734/2020

-against-

Mot. Seq.: 5

249 VARET, LLC and LIBERTY ONE GROUP, LLC,

*Defendant(s).*

Plaintiff moves (mot. seq. 5) for the following relief: (1) an Order pursuant to CPLR § 5015(a) vacating this Court's Decision and Order dated April 7, 2025 (mot. seq. 3) (NYSCEF Doc. 99); and (2) an Order pursuant to CPLR § 2221(e) granting leave to renew Plaintiff's February 18, 2025 motion (mot. seq. 3) (NYSCEF Doc. 70) to vacate this Court's August 1, 2024 Order (mot. seq. 2) (NYSCEF Doc. 67), and upon renewal, restoring this case to the active calendar. Defendants oppose the motion in its entirety. Reply has been submitted.

### **Background and Procedural History**

This personal injury action, commenced in July of 2020, was marked dismissed in August of 2022 by the Final Conference Part ("FCP"). On March 4, 2024, Defendants moved to dismiss the action as abandoned (mot. seq. 2) (NYSCEF Doc. 34). The Court denied that motion as moot on August 1, 2024, noting that the case had already been marked dismissed in FCP.

On February 18, 2025, Plaintiff moved to vacate this Court's August 1, 2024 Order in order to obtain restoration of the action to the active calendar. This Court denied that application by Decision and Order dated April 7, 2025, on the grounds that it had been filed by counsel not of record.<sup>1</sup>

<sup>1</sup> On the return date of April 7, 2025, attorneys from both the Law Offices of Michael S. Lamonsoff and Ramos & Ramos appeared before the Court and each represented that they were counsel of record for Plaintiff. The

A subsequent application (mot. seq. 4) to vacate the disposal of the action was brought by Plaintiff and withdrawn. The instant motion (mot. seq. 5) seeks (1) to vacate the April 7, 2025 Order and (2) to renew Plaintiff's February 18, 2025 motion, asserting that the Law Offices of Michael S. Lamonssoff had maintained co-counsel status with Ramos & Ramos throughout the litigation.

Defendants oppose the relief, citing prejudice due to Plaintiff's prolonged inactivity, lack of discovery, the passage of time since the subject accident in 2019, and procedural missteps by Plaintiff's counsel.

### Law

Pursuant to CPLR § 5015(a), a motion to vacate lies within the sound discretion of the court and may be granted upon a showing of grounds such as excusable default, newly discovered evidence, fraud, or other sufficient reasons in the interest of justice (*see* CPLR 5015(a), *see also* 40 BP, LLC v Katatikarn, 147 AD3d 710 [2d Dept 2017]; *Shauna Black, appellant, v Abraham Taub, etc., et al., defendants, Steven Piriano, etc., respondent.*, 2026 NY Slip Op 01177 [2d Dept Mar. 4, 2026]). The court retains "inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice" (*Aurora Loan Servs., LLC v Dorfman*, 170 A.D.3d 786, 788, 96 N.Y.S.3d 152). However, "[a] court's inherent power to exercise control over its [orders and] judgments is not plenary, and should be resorted to only to relieve a party from [orders or] judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" (*Peterson v Credit Agricole Am. Services, Inc.*, 2026 NY Slip Op 01078 [2d Dept Feb. 25, 2026]).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221[e][2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]). "Although the requirement that a motion for renewal must be based on new facts is a flexible one, a motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Deutsche Bank Natl. Tr. Co. v Hasty*, 2026 NY Slip Op 01182 [2d Dept Mar. 4, 2026]).

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underlying motion (mot. seq. 3) had been filed by the Lamonssoff firm, although, as reflected in this Court's April 7, 2025 Order, no Notice of Appearance had been filed. The attorneys present in Court on April 7, 2025 did not acknowledge any co-counsel relationship, and indeed, counsel for Ramos and Ramos unequivocally represented that their firm was Plaintiff's sole counsel of record, with each unaware of the other's purported representation of the same client. This contributed to the Court's determination that the underlying motion had been filed by counsel not of record.

CPLR § 3216 strictly limits a court's authority to dismiss an action for failure to prosecute. Absent a service of a valid 90-day demand upon a plaintiff, dismissal for want of prosecution is improper and restoration of the action to the calendar is automatic. The Appellate Division, Second Department, has repeatedly applied this principle where a case has been dismissed or marked off prior to the filing of a note of issue, and there has been no 90-day demand served pursuant to CPLR § 3216. As the Second Department recently held in *Rosario v Scudieri*, "when a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic," and "under these circumstances, a motion to restore the action to the calendar should be granted without considering whether the plaintiff had a reasonable excuse for the delay or...engaged in dilatory conduct" (*Rosario v Scudieri*, 229 AD3d 573 [2d Dept 2024]; see also *Greenpoint Bank v Bavaro*, 239 AD3d 608, 609-10 [2d Dept 2025]). Similarly, in *Wells Fargo Bank, N.A. v Oziel*, the Second Department held that where there was no 90-day notice pursuant to CPLR § 3216 and no order directing dismissal of the complaint pursuant to 22 NYCRR 202.27, "restoring a case marked 'inactive' is automatic" (*Wells Fargo Bank, N.A. v Oziel*, 196 AD3d 618, 620 [2d Dept 2021]). In *Adams v Frankel*, the Court reiterated this point, finding that where the trial court dismissed the case and neither the defendants nor the court served a 90-day demand or entered an order of dismissal based on default, the restoration of the case was warranted (see *Adams v Frankel*, 235 AD3d 816 [2d Dept 2025]; see also *Tuala v Empire Builders & Restoration Corp.*, 245 AD3d 865 [2d Dept 2026]). The Second Department has made clear that CPLR § 3216's procedural safeguards are mandatory and that failure to follow them precludes dismissal for failure to prosecute, regardless of delay or perceived prejudice.

### Discussion

#### *Vacatur of this Court's April 7, 2025 Decision and Order (mot. seq. 3) Pursuant to CPLR § 5015(a)*

Plaintiff seeks vacatur of this Court's April 7, 2025 Order, which denied Plaintiff's motion sequence three to vacate FCP's disposal of the instant action as improper, primarily because the motion had been filed by counsel not of record at the time.

The Court finds no basis to disturb that ruling. Plaintiff has not identified any newly discovered evidence, mistake, fraud, or other enumerated ground under CPLR § 5015(a) that would warrant vacatur. Although Plaintiff now asserts that there was a co-counsel arrangement among various firms, including the Law Offices of Michael S. Lamonsoff PLLC, Santoro Carr PLLC, and Ramos & Ramos, this is in direct contradiction to the representation made by counsel in Court.

Even assuming *arguendo* that the Court were to revisit the determinations made in its April 7, 2025 Decision and Order, the Final Conference Part's dismissal of the action was proper.

Upon the proposed vacatur of this Court's April 7, 2025 Order, Plaintiff further requested, pursuant to motion sequence three, that the Court deny Defendants' motion sequence two to dismiss the action. That request, however, was deemed moot and remains moot, as the Court's August 1, 2024 Order had already denied Defendants' motion (seq. 2) to dismiss in light of FCP's prior disposition of the action. Moreover, the record before the Court does not reflect that Defendants' request for dismissal was antedated by service of a 90-day demand pursuant to CPLR § 3216, nor does it demonstrate that an order of dismissal was entered by the Court pursuant to 22 NYCRR 202.27. Accordingly, in addition to the mootness of the request, the procedural prerequisites for dismissal were not satisfied, and therefore, the motion was properly denied.

The Court would note that it did not reach the branch of Defendants' motion sequence two seeking default against Third-Party Defendants Carisma Construction Inc., Dynamic Electrical Contractors, New York Plumbing Works Inc., and WNW & Sons Plumbing and Heating, Inc., as the action had already been marked disposed at the time that motion was decided. If the action is restored, Defendants may renew that request.

Likewise, the April 7, 2025 Order properly denied Plaintiff's motion sequence three as it had been filed by counsel not of record. The confusion regarding the identity of counsel of record and the absence of clear coordination between the Law Offices of Michael S. Lamonsoff, PLLC and Ramos & Ramos resulted in significant procedural irregularities. Any later clarification of co-counsel arrangements, while now noted, does not undermine the validity of those prior rulings or furnish a basis for vacatur.

Ultimately, Plaintiff has failed to provide any evidence of fraud, mistake, inadvertence, surprise, or excusable neglect that would constitute a basis for vacatur of the order dated April 7, 2025, in the interest of justice (*see Peterson v Credit Agricole Am. Services, Inc.*, 2026 NY Slip Op 01078 [2d Dept Feb. 25, 2026]).

Accordingly, this branch of Plaintiff's motion is denied.

The Court now turns to whether restoration of the action is nevertheless warranted as a matter of law.

***Renewal of Plaintiff's February 18, 2025 Motion (mot. seq. 3) pursuant to CPLR § 2221(e), and Upon Renewal, Restoration of the Action***

Plaintiff also seeks leave to renew its February 18, 2025 motion to vacate this Court's August 1, 2024 Order pursuant to CPLR § 2221(e), arguing that clarification of counsel

relationships and procedural developments since the prior ruling now warrant a different outcome. Notwithstanding the procedural irregularities surrounding prior motion practice, the Court, in the exercise of its discretion, grants leave to renew Plaintiff's motion sequence three. Upon renewal, the Court finds that restoration of the instant action is required as a matter of law under the independent authority of CPLR § 3216 and controlling Appellate authority.

Although vacatur of the Court's April 7, 2025 Order is unwarranted, the request for dismissal occurred in the absence of the procedural safeguards required by CPLR § 3216, as Defendants did not serve the requisite 90-day demand upon Plaintiff prior to moving for dismissal, nor was a formal order of dismissal entered pursuant to 22 NYCRR 202.27. Under these circumstances, as established by Second Department precedent, restoration of the matter is automatic (*see Wells Fargo Bank, N.A. v Oziel*, 196 AD3d 618, 620 [2d Dept 2021]; *see also Greenpoint Bank v Bavaro*, 239 AD3d 608, 609–10 [2d Dept 2025]; *Rosario v Scudieri*, 229 AD3d 573 [2d Dept 2024]).

Therefore, upon renewal of motion sequence three, to the extent Plaintiff seeks restoration of the instant action, that relief is granted as a matter of law.

Accordingly, it is hereby

**ORDERED** that the branch of Plaintiff's motion (mot. seq. 5) seeking to vacate this Court's April 7, 2025 Decision and Order (mot. seq. 3) pursuant to CPLR § 5015(a) is DENIED; and it is further

**ORDERED** that the branch of Plaintiff's motion seeking leave to renew motion sequence three pursuant to CPLR § 2221(e) is GRANTED; and it is further


**ORDERED** that upon renewal, pursuant to controlling Appellate authority and CPLR § 3216, this action is hereby restored to the active calendar, and the Clerk is directed to mark this matter accordingly; and it is further

**ORDERED** that all other relief not expressly granted herein is hereby DENIED.

This hereby constitutes the Decision and Order of the Court.

Dated: 3/27/26

ENTER:

  
HON. KERRY J. WARD, A.J.S.C.  
Hon. Kerry J. Ward, A.J.S.C.