Falk v Morrison
2026 NY Slip Op 31706(U)
April 17, 2026
Supreme Court, New York County
Docket Number: Index No. 805162/2019
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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KATHERINE FALK,

Plaintiff,

- v -

JEFFREY A MORRISON, M.D., and THE MORRISON CENTER,

Defendants.

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INDEX NO. 805162/2019

MOTION DATE 08/21/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, the defendants move pursuant to CPLR 3216 to dismiss the complaint on the ground that the plaintiff has failed to prosecute the action. The plaintiff opposes the motion. The motion is denied.

CPLR 3216 provides, in relevant part, that:

> "(a) Where 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, on its own initiative or 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.
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> "(e) In 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."

In a status conference order dated June 28, 2022, and entered July 29, 2022, this court fixed January 20, 2023 as the deadline for the filing of a note of issue. That order also provided

that the "[c]ourt shall provide plaintiff with fill-in PDF status conference order form. Plaintiff shall consult with defendants, complete form, and submit it to court at SFC-Part56-Clerk@nycourts.gov, in accordance with schedule set forth below. If parties cannot agree on terms of status conference order, they shall request a status conference." The court set November 30, 2022 as the date on which the plaintiff was to submit the proposed order if there were any outstanding discovery matters that needed to be addressed before the note of issue was filed. The plaintiff did not submit a proposed order by that date, and did not file the note of issue by January 20, 2023. On September 14, 2023, the defendants served a demand upon the plaintiff's attorney by regular first-class mail, directing the plaintiff to resume prosecution of the action by serving and filing a note of issue within 90 days, and advising counsel that the failure to do so would constitute a basis for a motion to dismiss the complaint based on failure to prosecute the action.

In response to the demand, the plaintiff did not move to vacate it within 90 days, that is, by December 13, 2023, and did not serve and file a note of issue by that date. On June 4, 2024, the plaintiff demanded by email that the defendants produce all outstanding medical records in their possession. On June 5, 2024, the defendants made the instant motion.

To be able properly to make a motion to dismiss pursuant to CPLR 3216, a

> "party seeking such relief . . . shall have served a written demand *by registered or certified mail* requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed"

(emphasis added).

> "[A]bsent strict compliance with the conditions precedent to dismissal set forth in CPLR 3216(b)(3), '[n]o dismissal shall be directed' (CPLR 3216 [b]). Indeed, '[t]he conditions precedent to bringing a motion to dismiss for failure to prosecute under CPLR 3216 must be complied with strictly'"

(*Woloszuk v Logan-Young*, 237 AD3d 1497, 1499 [4th Dept 2025], quoting *Frank L. Ciminelli Constr. Co. v City of Buffalo*, 110 AD2d 1075, 1076 [4th Dept 1985]). "Among those conditions

precedent are the service of a 90-day demand to resume prosecution, by registered or certified mail, which specifically states that the failure to file the note of issue within 90 days will serve as a basis for a motion to dismiss for want of prosecution" (*id*.). Nonetheless, where, as here, a defendant serves the notice by regular mail, rather than by registered or certified mail, that "irregularity is not fatal" when the plaintiff "admittedly received the notice" (*Grant v City of New York*, 17 AD3d 215, 216 [1st Dept 2005]; *see Balancio v American Optical Corp*., 66 NY2d 750, 751 [1985] ["The failure to serve a CPLR 3216 demand by registered or certified mail is a procedural irregularity and, absent a showing of prejudice to a substantial right of a plaintiff, courts should not deny, as jurisdictionally defective, a defendant's motion to dismiss for neglect to prosecute"]). The plaintiff here clearly received the 90-day demand because, in addition to mailing, it was also uploaded to the New York State Court Electronic Filing system.

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3), that plaintiff 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]). The plaintiff did not move to vacate the demand or to extend her time for filing the note of issue. Inasmuch as the plaintiff failed timely to make such a motion, she became obligated, in opposition to the defendants' motion, to establish both a justifiable excuse for the failure timely to file the note of issue and a potentially meritorious cause of action, as her failure to file the note of issue by the court-ordered deadline constitutes a species of default (*see Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *Grant v City of New York*, 17 AD3d at 216-217 ["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"]; *Conway v Brooklyn Union Gas Co*., 212 AD2d 497, 497-498 [2d Dept 1995] [an affidavit of merit is not required where a motion to vacate the default pursuant CPLR 2001 was made prior to the expiration of the prescribed 90-day period]). It has

been said, however, that CPLR 3216 is "extremely forgiving" (*Baczkowski 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).

Here, the plaintiff's excuses for failing to prosecute this action included the failure of the defendants to produce a significant portion of her medical records that were necessary to proceed with depositions. Her attorney explained that

> "[d]uring discovery, our office made a request of the defendants for all of the records in their possession relating to the plaintiff's treatment, but they were not supplied until AFTER the plaintiff was deposed and minutes before the deposition of defendant Jeffrey Morrison. When they were received, the page count was approximately 1097 pages, appr[ox]imately 1000 pages that had not previously been disclosed. We adjourned the deposition in order to prepare more fully, but had insufficient time to have our expert re-review the matter before proceeding.
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> "After the deposition of Dr. Morrison we rather obviously needed to re-engage our expert's attention to the thousand pages she had NOT reviewed. In order to aid in that endeavor, we compared the 1097 page record with the 130 pages that had earlier been provided and obtained a chronology of the entire chart to forward to the expert. We also asked her to review both the plaintiff's and Dr. Morrison's deposition transcripts. This further review took many months because of the doctor's busy schedule and the sheer volume and disorganization of the records. [Dr. Morrison's treatment and record keeping were atypical and his treatment was unorthodox.]."

The plaintiff also submitted the expert affirmation of a physician licensed to practice medicine in New York, who asserted that she initially was provided with approximately 100 pages of records, which demonstrated "very incomplete care of various, serious conditions identified in the records - including diabetes mellitus, high blood pressure and mast cell activation syndrome." She attested that uncontrolled diabetes mellitus and hypertension are linked to increased risk of stroke and cardiovascular disease, while mast cell activation syndrome is a condition that increases inflammation in the system and, hence, is also considered to be a risk for stroke and cardiovascular disease. She further explained that there

are well-established guidelines for the treatment of diabetes mellitus and hypertension that "were not evidently followed in the course of care of this patient," while the defendant Jeffrey Morrison, M.D., did not advise the plaintiff of the risks of failing to follow those guidelines. As the plaintiff's expert described it, Morrison, who purports to practice "holistic medicine," never dealt with the results of testing in a way that improved the plaintiff's conditions in any substantial manner. In this respect, she opined that,

> "[t]ypically, clinical management of these conditions requires medication and counseling regarding lifestyle changes, but in this case the plaintiff/patient had documented history of multiple chemical sensitivities[1], which led her to seek the care of an alternative practitioner and avoid traditional medical therapies."

The expert opined that Morrison endeavored to treat the plaintiff's symptoms in an "inconsistent manner" by failing to adhere to these established guidelines, which increased her already known risks, and should be considered a "direct cause" of a stroke that the plaintiff ultimately sustained. In this respect, the plaintiff's expert concluded that the plaintiff's hemiplegia "was the direct result of and caused by the stroke, which in turn resulted from Dr. Morrison's inadequate and incomplete care of her condition," and that, consequently, Morrison's departures from accepted standards of care caused the plaintiff to endure a stroke and hemiplegia, with extensive sequelae, including confinement to a wheelchair.

Where the CPLR requires that a party submit an "affidavit of merit" in support of or in opposition to a motion, the requirements applicable to such an affidavit are "less exacting" than affidavits that must be employed on a motion for summary judgment, but "there must still be . . . an offer of evidence *similar* to that supporting a summary judgment motion" (*Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 404-405 [1st Dept 2006] [emphasis added]; *cf. Menkes v Mount Sinai Health Sys., Inc.*, _____AD3d_____, 2026 NY Slip Op 01736, *1 [1st Dept, Mar. 24,

[1] The court notes that, in at least one case, a defendant was awarded summary judgment by establishing that "multiple chemical sensitivity (MCS) is not a scientifically or medically recognized condition, [and] that a causal connection between MCS and chemical exposure has not been accepted in the scientific community" (*Abrams v Related, L.P.*, 137 AD3d 655, 656 [1st Dept 2016]), in response to which the plaintiff failed to raise a triable issue of fact.

2026] [in denying motion to vacate plaintiff's defaults and reinstate complaint after trial court dismissed it for her failure to appear at several discovery conferences, Appellate Division concluded that "plaintiff's expert submission fails to explain the standard of care from which defendants supposedly departed or how that departure caused plaintiff's injuries"]). This court concludes that the plaintiff's expert provided sufficient detail as to how Morrison departed from the standard of care in failing to follow established guidelines for the treatment of existing diabetes, opining that he failed to prescribe necessary medications to the plaintiff or advise her to make certain lifestyle changes. Moreover, the expert fully explained why and how those departures caused or contributed to the plaintiff's stroke.

"Under all the circumstances present here, it cannot be said that the plaintiff[ ] demonstrated an intent to abandon the action or a pattern of persistent neglect and delay in prosecuting the action" (*Amos v Southampton Hosp.*, 131 AD3d 906, 908 [2d Dept 2015]). The plaintiff established that the defendants delayed in producing all of the medical records that they had generated. She even requested that the defendants produce all of her records only one day before they made the instant motion.

Hence, denial of the motion is warranted.

Accordingly, it is,

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that, on or before May 22, 2026, the defendants shall produce all outstanding documents responsive to the plaintiff's demands; and it is further,

ORDERED that all additional discovery shall be completed on or before July 17, 2026, but that, if it appears that discovery will not be completed by that date, any party who purports to require additional discovery shall request a remote status conference with the court, at which conference the extension of the note of issue filing deadline set forth below may be considered; and it is further,

ORDERED that the plaintiff shall serve and file a note of issue and certificate of readiness on or before August 21, 2026.

This constitutes the Decision and Order of the court.

4/17/2026
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE