

28 A.D.3d 714

Supreme Court, Appellate Division,
Second Department, New York.

Peggy GRANT, appellant,

v.

COUNTY OF NASSAU, et al., respondents.

April 25, 2006.

Synopsis

Background: Plaintiff filed action to recover damages for medical malpractice. The Supreme Court, Nassau County, [McCarty, J.](#), granted defendants' motion to dismiss. Plaintiff appealed.


Holdings: The Supreme Court, Appellate Division, held that:

[1] failure to comply with statutory requirements for mandatory pretrial notice filings and certificate of merit could not alone justify dismissal, and

[2] statutory requirements for dismissal for want of prosecution had not been met.

Reversed.

West Headnotes (2)

[1] **Health**  Sanctions for failing to file affidavits; dismissal with or without prejudice

Health  Notice

Plaintiff's failure to comply with statutory requirements for mandatory pretrial notice filings and certificate of merit did not alone justify dismissal of medical malpractice action. [McKinney's CPLR 3012–a, 3406\(a\).](#)

3 Cases that cite this headnote

[2] **Pretrial Procedure**  Particular applications, delay or time limitation

Pretrial Procedure  Delay in filing note of issue or in noting action for trial

Medical malpractice action could not be dismissed for lack of activity, where no order of dismissal for failure to appear had been entered, action was pre-note of issue so that trial court could not have marked it off the calendar, and statutory requirements for dismissal for want of prosecution had not been met. [McKinney's CPLR 3216\(b\), 3404; N.Y.Ct.Rules, § 202.27\(b\).](#)

3 Cases that cite this headnote

Attorneys and Law Firms

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[Lorna B. Goodman](#), County Attorney, Mineola, N.Y. ([Karen Hutson](#) and [David B. Goldin](#) of counsel), for respondents.

HOWARD MILLER, J.P., [DAVID S. RITTER](#), [DANIEL F. LUCIANO](#), [ROBERT A. SPOLZINO](#), and [MARK C. DILLON](#), JJ.

Opinion

***714** In an action to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Nassau County ([McCarty, J.](#)), entered March 24, 2005, which granted the defendants' motion to dismiss the complaint for failure to comply with [CPLR 3012–a](#) and [CPLR 3406\(a\)](#).

ORDERED that the order is reversed, on the law, without costs or disbursements, the motion is denied, and the complaint is reinstated.

[1] The court was without the authority to dismiss this action based solely on the plaintiff's failure to comply with [CPLR 3012–a](#) and [CPLR 3406\(a\)](#) (*see* [Tewari v. Tsoutsouras](#), 75 N.Y.2d 1, 10, 550 N.Y.S.2d 572, 549 N.E.2d 1143; [Rice v. Vandenebossche](#), 185 A.D.2d 336, 586 N.Y.S.2d 303; [Jones v. Bodian](#), 172 A.D.2d 495, 568 N.Y.S.2d 697; [Casiano v. New York Hosp.-Cornell Med. Ctr.](#), 169 A.D.2d 806, 807, 565 N.Y.S.2d 174; *cf.* [Frons v. Uliss](#), 287 A.D.2d 537, 538, 731 N.Y.S.2d 644). Accordingly, the order must be reversed, and the complaint reinstated.

[2] The defendants allege that the court marked this action “purged no activity” on December 11, 2000. In her reply brief on appeal, the plaintiff acknowledges that some action was taken by the court on that date, but claims that the case was “simply removed” from the court’s calendar “due to a brief period of inactivity.” The record does not contain any written proof of the court’s alleged action on December 11, 2000. There is no order dismissing this action pursuant to 22 NYCRR 202.27(b). Since this action is pre-note of issue, the court could not have marked it off the calendar pursuant to CPLR 3404 (see *Lopez v. Imperial Delivery Serv.*, 282

A.D.2d 190, 196–197, 725 N.Y.S.2d 57). Furthermore, the court could not have dismissed the action on that date for want of prosecution because the criteria under CPLR 3216 were not met (see CPLR 3216[b]; *Baczowski v. Collins Constr. Co.*, 89 N.Y.2d 499, 502–503, 655 N.Y.S.2d 848, 678 N.E.2d 460; *Delgado v. *715 New York City Hous. Auth.*, 21 A.D.3d 522, 801 N.Y.S.2d 43).

All Citations

28 A.D.3d 714, 814 N.Y.S.2d 219, 2006 N.Y. Slip Op. 03048

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