

**Jemison v County of Nassau**

2012 NY Slip Op 33245(U)

February 2, 2012

Supreme Court, New York County

Docket Number: 9482/10

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

YOLANDA JEMISON,

Plaintiffs,

- against -

TRIAL/IAS PART 31  
NASSAU COUNTY

Index No.: 9482/10  
Motion Seq. Nos.: 01, 02  
Motion Dates: 12/21/11  
12/21/11

COUNTY OF NASSAU, NASSAU HEALTH CARE  
CORPORATION d/b/a NASSAU UNIVERSITY MEDICAL  
CENTER and HEMPSTEAD COMMUNITY HEALTH  
CENTER,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affidavit and Exhibits	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3216, for an order dismissing plaintiff's Verified Complaint for her failure to obey a court order. Plaintiff opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 2004, for an order extending plaintiff's time to file a Note of Issue from the due date of November 14, 2011, to the date of November 21, 2011, when the Note of Issue was actually filed.

The above entitled action stems from personal injuries sustained by plaintiff as a result of defendants' alleged medical malpractice. Specifically, this action arises from defendants'

alleged departures in the diagnosis and management of pre-term PROM and resulting septicemia and congestive heart failure. Plaintiff commenced the present action with the filing and service of a Summons and Verified Complaint on or about May 6, 2010. Issue was joined on or about June 14, 2010.

Defendants submit that, on August 16, 2011, all parties appeared before this Court for a Certification Conference. On said date, a Certification Order was entered into by counsel for both plaintiff and defendants. *See* Defendants' Affirmation in Support Exhibit E. The Certification Order stated, "[t]his matter is hereby certified for trial and plaintiff(s) is directed to file a note of issue within 90 days. If plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court (CPLR 3216)."

Defendants contend that, upon information and belief, plaintiff has failed to timely file and serve the Note of Issue and the time to file expired without her so doing. Defendants' counsel adds that, on or about November 18, 2011, he received correspondence from plaintiff's counsel which included a Note of Issue that had been signed by plaintiff's counsel on November 16, 2011. *See* Defendants' Affirmation in Support Exhibit F. Defendants' counsel notes that nowhere on the aforementioned Note of Issue was there any indication that said document was filed with the appropriate clerk of Court. Defendants argue that, "in order for the plaintiff to have complied with the Certification Order, that he (*sic*) would have to actually have filed a note of issue, and then served a validly filed note of issue upon counsel for the Defendants herein, on or before November 14<sup>th</sup>, 2011. As plaintiff has not done this, it is respectfully submitted that as per the Certification Order, that the matter is 'deemed dismissed.'"

In opposition to defendants' motion, plaintiff cross-moves (Seq. No. 02), pursuant to

CPLR § 2004, for an extension of time to file the Note of Issue from the due date of November 14, 2011, to the date of November 21, 2011, when the Note of Issue was actually filed. Plaintiff argues that “[a]lthough defendants’ motion is premised essentially on CPLR §3216, it is to be emphasized that a close reading of defendants’ papers and exhibits on the present motion reflects that defendants do not claim that plaintiff, in the language of CPLR §3216, has ‘unreasonably’ neglected to proceed or ‘unreasonably’ failed to serve and file a note of issue.” Plaintiff contends that there has not been a “general pattern of delay” in the instant matter. Plaintiff submits that the Note of Issue was served on November 16, 2011, and filed with the County Clerk of Nassau County on November 21, 2011, at 10:04 a.m. *See* Plaintiff’s Affidavit Exhibit 1. Plaintiff argues that the very brief delay in filing cannot by any definition be deemed to have risen to the level of *unreasonable* neglect or failure (emphasis added).

Plaintiff relies on the recent Court of Appeals decision, *Cadichon v. Facelle*, 18 N.Y.3d 230, 2011 WL 5827989 (2011), in support of her cross-motion. In the *Cadichon v. Facelle* matter, the Court held that “[a] case cannot be dismissed pursuant to CPLR 3216(a), however, unless a written demand is served upon the (*sic*) ‘the party against whom relief is sought’ in accordance with the statutory requirements, along with a statement 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 for unreasonably neglecting to proceed’ (CPLR 3216[b][3]).” It further states that “the July 7, 2008 amendment to CPLR 205(a), which as relevant here, states that where a dismissal is one for neglect to prosecute, ‘the judge shall set forth on the record the specific conduct constituting neglect, which conduct shall demonstrate a general patter of delay in proceeding with the

litigation, '....'"

Pursuant to CPLR § 3216(b)(3), "[n]o dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:.... (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring that 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 for unreasonably neglecting to proceed."

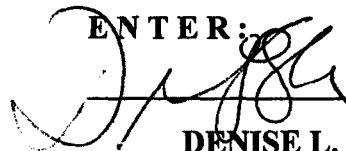
In the instant matter, there is no evidence that plaintiff "unreasonably" neglected to proceed or "unreasonably" failed to file the Note of Issue. Plaintiff filed the Note of Issue on November 21, 2011, which was just seven days past the deadline established in the Certification Order. The Court is unable to set forth on the record any specific conduct on the part of plaintiff that constitutes neglect, which conduct could demonstrate a general pattern of delay in proceeding with the litigation. Accordingly, the Court finds that defendants have not established grounds for dismissal pursuant to CPLR § 3216(a). Furthermore, based upon the above detailed ruling in *Cadichon v. Facelle*, the Court finds that defendants have not established grounds for dismissal pursuant to CPLR § 3216(b).

The Court additionally notes that justice prefers that issues be resolved on the merits. *See Ahmad v. Aniolowisk*, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2d Dept. 2006); *Eichen v. George B. Jr. Realty, Inc.*, 154 A.D.2d 428, 547 N.Y.S.2d 236 (2d Dept. 1989).

Based upon the above, defendants' motion (Seq. No. 01), pursuant to CPLR § 3216, for an order dismissing plaintiff's Verified Complaint for her failure to obey a court order is hereby **DENIED**.

Plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 2004, for an order extending plaintiff's time to file a Note of Issue from the due date of November 14, 2011, to the date of November 21, 2011, when the Note of Issue was actually filed is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:  
  
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
February 2, 2012

**ENTERED**  
FEB 06 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE