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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 179 SSM 19
Ben Umeze, M.D.,
Respondent,
v.
Fidelis Care New York, et al.,
Appellants.

Submitted by Michael H. Bernstein, for appellants.
Submitted by Joseph N. Obiora, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed,
with costs, defendants' motion to dismiss the complaint pursuant
to CPLR 3216 granted unconditionally, and the certified question
answered in the negative.

Supreme Court abused its discretion by declining to

grant defendants' motion to dismiss without condition. Plaintiff failed to establish a (1) justifiable excuse for his failure to timely file a note of issue and (2) meritorious cause of action (see CPLR 3216 [e]; see also Baczkowski v Collins Constr. Co., 89 NY2d 499 [1997]).

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, with costs, defendants' motion to dismiss the complaint granted unconditionally, and certified question answered in the negative, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 9, 2011