

**Morant v Mount Sinai Beth Israel**

2021 NY Slip Op 32564(U)

December 2, 2021

Supreme Court, New York County

Docket Number: Index No. 805037/2016

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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JERRY MORANT and GABRIELLE MENNE,  
Plaintiffs,

**INDEX NO.** 805037/2016

**MOTION DATE** 08/16/2021

**MOTION SEQ. NO.** 004

- v -

MOUNT SINAI BETH ISRAEL, VLADIMIR B. SHUR, M.D.,  
and OCEAN ORTHOPEDIC NEUROSURGERY,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice, the defendants Mount Sinai Beth Israel and Vladimir B. Shur, M.D. (together the Mount Sinai defendants), together move pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them. The plaintiffs do not oppose the motion. The motion is granted, and the complaint is dismissed insofar as asserted against the Mount Sinai defendants.

The plaintiff commenced this action on January 25, 2016. Between September 26, 2017 and March 3, 2020, the court (Shulman, J.) issued nine case management orders. On May 3, 2020, the plaintiff's attorney died, and this action was automatically stayed by operation of CPLR 321(c). By order dated January 12, 2021, this court authorized the Mount Sinai defendants to serve a notice to appoint a new attorney upon the plaintiffs by FedEx delivery, and thereupon dissolve the stay in accordance with that statute. On January 27, 2021, the Mount Sinai defendants properly served the plaintiffs with both the January 12, 2021 order with notice of entry, and the notice to appoint a new attorney, the latter of which directed the plaintiffs to retain a new attorneys within 30 days or appear pro se.

After the plaintiffs failed to retain or appoint a new attorney to represent them, the Mount Sinai defendants, on March 26, 2021, served a notice upon the plaintiffs via FedEx demanding that they resume prosecution of the action and serve and file a note of issue within 90 days, and informing them that their failure to do so would serve as a basis for a motion to dismiss the complaint pursuant to CPLR 3216. Although the plaintiffs engaged in a search for a new attorney, and, on April 22, 2021, one attorney contacted counsel for the Mount Sinai defendants informing them that she was considering taking on the representation of the plaintiffs, the plaintiffs apparently did not retain that attorney, and the Mount Sinai defendants' counsel received no further communication from that attorney.

The applicable 90-day period set forth in CPLR 3216 for the resumption of prosecution of the action, plus one business day to account for the service of the motion papers by overnight delivery (see CPLR 2103[a][6]), expired on June 25, 2021. As of that date, the plaintiffs had neither resumed prosecution of the action nor filed the note of issue. On June 29, 2021, the Mount Sinai defendants made the instant motion to dismiss the complaint insofar as asserted against them.

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.”

A party moving to dismiss a complaint for want of prosecution must establish that issue was joined in the action, and that “[o]ne year . . . elapsed since the joinder of issue or six months . . .

elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later” (CPLR 3216[b][1], [2]). The movant must also show that it properly had served a written demand requiring the plaintiff both to resume prosecution of the action and to serve and file a note of issue within 90 day after receipt of such demand, and further stating that the plaintiff’s default in complying with such demand within that 90-day period will serve as a basis for a motion for dismissal for the plaintiff’s unreasonable neglect to proceed (CPLR 3216[b][3]).

On June 6, 2016, the Mount Sinai defendants joined issue. The court (Shulman, J.) issued a preliminary conference order on September 26, 2017. Hence, the Mount Sinai defendants were obligated to wait until March 26, 2018 to make the instant motion. Inasmuch as they made this motion on June 29, 2021, the motion is not premature.

Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3) in a timely and proper manner (*see Secreto v International Business Mach. Co.*, 194 Misc 2d 512, 513-514 [Sup Ct, Dutchess County 2003 [Dillon, J.] [service of 90-day notice by FedEx is permissible]), 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]). Where a plaintiff fails timely to make such as motion, he or she becomes obligated to establish, in opposition to the defendant’s motion to dismiss, both a justifiable excuse for the failure timely to file the note of issue and a potentially meritorious cause of action (*see Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]; *Grant v City of New York*, 17 AD3d 215, 216-217 [1st Dept 2005] [“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 the motion pursuant to CPLR 2004 was made prior to the expiration of the prescribed period to respond]).

It has been said that CPLR 3216 is “extremely forgiving” (*Baczowski 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).

Nonetheless, where, as here, the plaintiffs did not oppose the Mount Sinai defendants’ motion to dismiss and, hence, failed to demonstrate either a justifiable excuse for the failure timely to file the note of issue or a potentially meritorious cause of action, dismissal is warranted (see *Ramirez v Reyes*, 171 AD3d 1114, 1116 [2d Dept *Wilson v Nembhardt*, 180 AD2d 731, 733 [2d Dept 1992]).

The court notes that it is without authority, on its own motion, to dismiss the complaint insofar as asserted against Ocean Orthopedic Neurosurgery (OON) based upon the plaintiffs’ want of prosecution, as that defendant did not move for that relief pursuant to CPLR 3216(a) (see *Ramirez v Reyes*, 171 AD3d at 1116). Nonetheless, the court is obligated to dismiss the complaint against OON pursuant to CPLR 3215(c). That rule provides that

“[f]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a defendant’s] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action”

OON was in default on May 25, 2016, and the plaintiff failed to “take any proceedings for the entry of judgment” against it by May 25, 2017. “The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned” (*Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470, 471 [1st Dept 2020]; see *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]).

Accordingly, it is

ORDERED that the motion of the defendants Mount Sinai Beth Israel and Vladimir B. Shur, M.D., to dismiss the complaint insofar as asserted against them is granted, without opposition, and the complaint is dismissed insofar as asserted against those defendants; and it is further,

ORDERED that, on the court's own motion, the complaint is dismissed insofar as asserted against the defendant Ocean Orthopedic Neurosurgery; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

12/2/2021  
DATE

  
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JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: