

# NEW YORK APPELLATE DIGEST, LLC

An Organized Compilation of the Decision-Summaries Posted on the New York Appellate Digest Website Since January 2020 Addressing the Requirements for a Valid 90-Day Demand to File a Note of Issue and Related Dismissals, Including Dismissals for Failure to Prosecute. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header of Any Page to Return There. Right Click on the Citations to Keep Your Place in the Pamphlet.

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CPLR 3216; 90-Day  
Demand to File a Note  
of Issue and the  
Related Criteria for  
Dismissal—  
Researched May 26,  
2021

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**DISMISSAL NOT MANDATORY FOR FAILURE TO COMPLY WITH 90-DAY DEMAND.**

**ALTHOUGH PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A JUSTIFIABLE EXCUSE FOR FAILING TO COMPLY WITH THE 90-DAY DEMAND TO FILE A NOTE OF ISSUE PURSUANT TO CPLR 3216, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).**

The Third Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been dismissed pursuant to CPLR 3216, even though plaintiff’s excuse for failure to comply with the 90-day demand to file a note of issue was not justifiable:

Because there was no compliance with the 90-day demand, the party seeking to avoid dismissal had to demonstrate a “justifiable excuse for the delay and a good and meritorious cause of action” . . . . The opposition to defendant’s motion advanced only a conclusory and unsubstantiated claim of law office failure by plaintiff’s prior counsel as the justifiable excuse. Although the failure to detail and substantiate a claim of law office failure would justify dismissal of the complaint . . . , even when presented with an unjustifiable excuse, a court still retains some residual discretion to refuse dismissal of a complaint as a penalty under CPLR 3216 . . . .

... [S]ome of the delay in this case was not attributable to plaintiff. Taking into account that CPLR 3216 is “extremely forgiving of litigation delay” . . . , as well as the public policy of resolving disputes on the merits . . . , defendant’s motion, under the particular circumstances of this case, should have been denied to the extent that it sought dismissal of the complaint, and plaintiff’s cross motion should have been granted to the extent that it sought an extension of time to file the note of issue . . . . *Chase Home Fin., LLC v Shoumatoff*, 2021 NY Slip Op 01537, Third Dept 3-18-21

**ISSUE NOT JOINED, NO CPLR 3216 DISMISSAL.**

**THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 FOR FAILURE TO PROSECUTE; ISSUE HAD NOT BEEN JOINED AND OTHER CONDITIONS PRECEDENT TO DISMISSAL WERE NOT MET (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined plaintiff’s motion to vacate the conditional order dismissing the action for failure to prosecute pursuant to CPLR 3216 should not have been granted:

The conditional order constituted a defective 90-day notice pursuant to CPLR 3216. The court was without authority to issue a 90-day notice since issue was not joined in the action (see CPLR 3216[b][1] ... ). Moreover, the conditional order failed to state that the plaintiff’s failure to comply “will serve as a basis for a motion” by the court to dismiss the action for failure to prosecute ... . The purported dismissal was not properly effectuated since the court never directed the parties to show cause why the action should not be dismissed, and failed to issue a formal order of dismissal on notice to the parties as required by CPLR 3216 ... . Moreover, the conditional order was erroneous since it directed the plaintiff to move for an order of reference, even though the plaintiff had already moved for an order of reference. Accordingly, we grant the plaintiff’s motion to vacate the conditional order and restore the action to the active calendar. [U.S. Bank N.A. v Thompson, 2020 NY Slip Op 08098, Second Dept 12-30-20](#)

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**ISSUE NOT JOINED, NO CPLR 3216 DISMISSAL.**

**ISSUE WAS NEVER JOINED, THEREFORE THE ACTION COULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the action should not have been dismissed pursuant to CPLR 3216 for failure to prosecute because issue was never joined:

CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. ” A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met” ... . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] ...). Since at least one precondition set forth in CPLR 3216 was not met, the Supreme Court was without power to issue an order conditionally dismissing the action pursuant to that statute ... . [OneWest Bank, FSB v Singh, 2020 NY Slip Op 04957, Second Dept 9-16-20](#)

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**LACHES DOES NOT APPLY WHERE NO 90-DAY DEMAND MADE.**

**THE 2019 MOTION TO RESTORE THE ACTION TO ACTIVE STATUS AFTER THE NOTE OF ISSUE WAS VACATED IN 2012 SHOULD HAVE BEEN GRANTED; LACHES DOES NOT APPLY WHERE THERE HAS BEEN NO SERVICE OF A 90-DAY DEMAND PURSUANT TO CPLR 3216 (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined plaintiff’s motion to restore the traffic accident action to active status in 2019 after the note of issue had been vacated in 2012 should have been granted. The doctrine of laches does not apply where there has been not service of a 90-day demand pursuant to CPLR 3216:

CPLR 3404 does not apply to this pre-note of issue action ... . Further, there was neither a 90-day demand pursuant to CPLR 3216 ... , nor an order dismissing the complaint pursuant 22 NYCRR 202.27 ... .

Moreover, “[t]he doctrine of laches does not provide [a] basis to dismiss a complaint where there has been no service of a 90-day demand pursuant to CPLR 3216(b), and where the case management devices of CPLR 3404 and 22 NYCRR 202.27 are inapplicable” ... . “The procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where the plaintiff has not been served with a 90-day demand to serve and file a note of issue pursuant to CPLR 3216(b)” ... . In the absence of a 90-day demand pursuant to CPLR 3216, the plaintiff’s motion to restore

the action to active status should have been granted ... . [Guillebeaux v Parrott, 2020 NY Slip Op 06762, Second Dept 11-18-20](#)

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**MANDATORY CONTENTS OF THE DISMISSAL ORDER.**

**THE JUDGE WHO DISMISSED THE ACTION PURSUANT TO CPLR 205 (a) FOR FAILURE TO PROSECUTE DID NOT PLACE ON THE RECORD THE SPECIFIC CONDUCT CONSTITUTING NEGLIGENCE; THEREFORE THE ACTION WAS TIMELY FILED (FOURTH DEPT).**

The Fourth Department, reversing Supreme Court, determined the action should not have been dismissed because the tolling provisions of CPLR 205 (a) applied. The judge who dismissed the action did not place on the record specific conduct constituting neglect to prosecute demonstrating a general pattern of delay:

... [T]he tolling provisions of CPLR 205 (a) apply inasmuch as the 2012 action was not dismissed for neglect to prosecute. CPLR 205 (a) provides, in relevant part, that “[i]f an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action . . . , the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination,” even though the new action would otherwise be barred by the statute of limitations. “Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation” ... .

Here, it is undisputed that the 2012 action was timely commenced and that the instant action was commenced within six months of the termination of the 2012 action. ...

Here, the court did not outline a general pattern of delay by plaintiff in its order dismissing the 2012 complaint or in the attached decision ... . [Broadway Warehouse Co. v Buffalo Barn Bd., LLC, 2021 NY Slip Op 00963, Fourth Dept 2-11-21](#)

**MANDATORY CONTENTS OF THE DISMISSAL ORDER.**

**THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO PROSECUTE DID NOT DESCRIBE THE SPECIFIC CONDUCT CONSTITUTING NEGLIGENCE BY THE PLAINTIFF AS REQUIRED BY CPLR 3216; PLAINTIFF’S MOTION TO VACATE THE ORDER SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the plaintiff’s motion to vacate the order dismissing the complaint for failure to prosecute should have been granted because the conditions required by CPLR 3216 were not met:

A court may not dismiss a complaint for want of prosecution pursuant to CPLR 3216 on its own initiative unless certain conditions precedent have been complied with, including the requirement that “where a written demand to resume prosecution of the action is made by the court . . . ‘the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation’” . . . .

Here, the Supreme Court should have granted the plaintiff’s motion, among other things, to vacate the . . . order, as that order failed to set forth the specific conduct constituting neglect by the plaintiff . . . . [Wells Fargo Bank, N.A. v Brown, 2020 NY Slip Op 06576, Second Dept 11-12-20](#)

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**MANDATORY CONTENTS OF THE 90-DAY DEMAND AND THE DISMISSAL ORDER.**

**THE CERTIFICATION ORDER DIRECTING PLAINTIFF TO FILE A NOTE OF ISSUE WITHIN 90 DAYS WAS NOT A VALID 90-DAY NOTICE PURSUANT TO CPLR 3216; THE ACTION SHOULD NOT HAVE BEEN DISMISSED AND THE CROSS-MOTION TO EXTEND THE TIME FOR FILING A NOTE OF ISSUE SHOULD HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the action should not have been dismissed for failure to file a note of issue because a valid 90-day notice had not been issued or served. The certification order issued by Supreme Court directing plaintiff to file a note of issue within 90 days did not meet the criteria for a 90-day notice required by CPLR 3216:

... [T]he record shows that neither the Supreme Court nor any of the defendants served, pursuant to CPLR 3216, a 90-day demand to file a note of issue on the plaintiff. ... [A]lthough the court issued a certification order ... directing the plaintiff to file the note of issue within 90 days of the order, it did not constitute a valid 90-day demand because it did not contain any language warning that the plaintiff's failure to file the note of issue within 90 days would result in dismissal pursuant to CPLR 3216 ... . Additionally, the ... certification order did not set forth specific conduct by the plaintiff constituting neglect ... . Since the plaintiff was never served with a 90-day demand, the court should not have dismissed the complaint due to the plaintiff's failure to file the note of issue ... .

... [T]he Supreme Court could not rely upon CPLR 3126 as a basis upon which to dismiss the complaint as the plaintiff's failure to timely file the note of issue or to move to extend the time to file the note of issue did not constitute disobedience of an "order for disclosure" (CPLR 3126 ... ).

We also disagree with the Supreme Court's determination denying the plaintiff's cross motion, pursuant to CPLR 2004, to extend her time to file the note of issue. Discovery is complete and the defendants failed to establish that they were prejudiced by the plaintiff's failure to timely file the note of issue and her delay in moving for an extension of time to do so ... . [Tolkoff v Goldstein, 2020 NY Slip Op 04341, Second Dept 7-29-20](#)

**MANDATORY CONTENTS OF THE 90-DAY DEMAND AND THE DISMISSAL ORDER.**

**THE COURT’S ORDER DIRECTING PLAINTIFFS TO FILE A NOTE OF ISSUE DID NOT COMPLY WITH THE CRITERIA FOR A 90-DAY NOTICE PURSUANT TO CPLR 3216; THE COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined plaintiffs’ motion to restore the action to active status and to extend the time to serve and file a note of issue should have been granted. Supreme Court, after a compliance conference, directed plaintiffs to file a note of issue by August 4, 2016, which was 21 days from the date of the compliance conference order. The compliance order therefore did not meet the statutory criteria for a valid 90-day notice pursuant to CPLR 3216. Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216:

The compliance conference order dated July 14, 2016, did not constitute a valid 90-day demand pursuant to CPLR 3216 because it directed the plaintiffs to file a note of issue within 21 days, rather than 90 days, of the date of the order . . . . Furthermore, the compliance conference order failed to set forth any specific conduct constituting neglect by the plaintiffs in proceeding with the litigation (see CPLR 3216[b][3] . . .). In addition, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, sua sponte, directing dismissal of the complaint pursuant to CPLR 3216 . . . .

Since the statutory preconditions to dismissal were not met, the Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216 . . . .

Contrary to the respondents’ contention, this action could not have properly been dismissed pursuant to CPLR 3126, since there was no motion requesting this relief . . . . [Christiano v Heatherwood House at Holbrook II, LLC, 2020 NY Slip Op 03891, Second Dept 7-15-20](#)

**MANDATORY CONTENTS OF THE 90-DAY DEMAND.**

**THE 90-DAY NOTICE WAS DEFECTIVE; THEREFORE THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the action should not have dismissed pursuant to CPLR 3216 because the 90-day notice was defective:

On November 20, 2012, the Supreme Court issued a certification order which, *inter alia*, certified the matter for trial and directed the plaintiff to file a note of issue within 90 days. The order provided that “[i]f plaintiff does not file a note of issue within 90 days this action is deemed dismissed without further order of the Court. (CPLR 3216).” The plaintiff failed to file a note of issue, and the action was ministerially dismissed, without further notice to the parties. ...

An action cannot be dismissed pursuant to CPLR 3216(a) “unless a written demand is served upon ‘the party against whom such 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 [or her] for unreasonably neglecting to proceed’” ... . . .

The certification order, which purported to serve as a 90-day notice pursuant to CPLR 3216, was defective as it did not state that the plaintiff’s failure to comply with the demand would serve as a basis for the Supreme Court, on its own motion, to dismiss the action for failure to prosecute ... . Moreover, it is evident from the record that the action was ministerially dismissed without a motion or notice to the parties, and there was no order of the court dismissing the action ... . [HSBC Bank USA, N.A. v Arias, 2020 NY Slip Op 06108, Second Dept 10-28-20](#)

**MANDATORY CONTENTS OF THE 90-DAY DEMAND.**

**THE CONDITIONAL ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE DID NOT MEET THE CRITERIA OF CPLR 3216; THEREFORE THE MATTER SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the plaintiff’s motion to vacate the conditional order of dismissal should have been granted because the conditions in CPLR 3216 were not met by the order:

“CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with” ... . As relevant here, an action cannot be dismissed pursuant to CPLR 3216(a) unless a written demand is served upon the party against whom such 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 or her for unreasonably neglecting to proceed ... . “While a conditional order of dismissal may have the same effect as a valid 90-day notice pursuant to CPLR 3216” ... , the conditional order of dismissal here “was defective in that it failed to state that the plaintiff’s failure to comply with the notice “will serve as a basis for a motion” by the court to dismiss the action for failure to prosecute” ... . The Supreme Court should not have administratively dismissed the action without further notice to the parties and without benefit of further judicial review ... . [Deutsche Bank Natl. Trust Co. v Henry, 2020 NY Slip Op 07863, Second Dept 12-23-20](#)

**NO 90-DAY DEMAND, NO CPLR 3216 DISMISSAL.**

**THE BANK’S MOTION TO RESTORE THE 2009 FORECLOSURE ACTION WHICH HAD BEEN ADMINISTRATIVELY, BUT NOT FORMALLY, DISMISSED SHOULD HAVE BEEN GRANTED; THE BANK HAD PREVIOUSLY STATED ITS INTENTION TO DISCONTINUE THE 2009 FORECLOSURE BUT THE MOTION TO RESTORE WAS NOT PRECLUDED BY THE JUDICIAL ESTOPPEL DOCTRINE (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to restore a 2009 foreclosure action which had been administratively, but not formally, dismissed. The court noted that the bank’s prior statement of its intention to discontinue the 2009 action did not trigger the judicial estoppel doctrine:

While, in an effort to successfully prosecute the 2015 foreclosure action, the Bank represented that it would seek to discontinue the 2009 action, it is not judicially estopped from changing its position.” [A] party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed”” ... . The Bank did not obtain a favorable judgment in the 2015 foreclosure action.

The Supreme Court should have granted that branch of the Bank’s motion which was to restore the 2009 action to the active calendar. The 2009 action was never formally dismissed, as the marking-off procedures of CPLR 3404 do not apply to pre-note of issue actions such as this one ... . Since the 2009 action could not properly be marked off pursuant to CPLR 3404, the Bank was not required to move to restore within any specified time frame and was not obligated to demonstrate a reasonable excuse and a potentially meritorious claim ... . Further, there was neither a 90-day notice pursuant to CPLR 3216 ... , nor an order dismissing the complaint pursuant to 22 NYCRR 202.27 ... . Finally, [defendant] does not contend that the 2009 action was dismissed pursuant to CPLR 3215(c). [Deutsche Bank Natl. Trust Co. v Gambino, 2020 NY Slip Op 01476, Second Dept 3-4-20](#)

**NO 90-DAY DEMAND, NO CPLR 3216 DISMISSAL.**

**THERE CAN BE NO DISMISSAL PURSUANT TO CPLR 3216 WHERE THERE HAS BEEN NO DEMAND TO FILE A NOTE OF ISSUE. (THIRD DEPT)**

The Third Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The court held the action had never been dismissed pursuant to CPLR 3216 because no 90-day notice requiring the filing of a note of issue had been given. The foreclosure action was timely because the letter which defendants argued had accelerated the debt did not unambiguously state that the full mortgage debt had become due and payable immediately. However proof of the mailing of the the RPAPL 1304 notice was not sufficient:

The December 28, 2009 letter advised Mausler [defendant] that he was in default and that he could cure this default by making a payment “within thirty days from the date of this letter.” The letter further stated that “[i]f you do not cure this default within the specified time period, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately” ... . Additionally, the letter provided that if the amount due was not paid, “foreclosure proceedings may commence to acquire the [p]roperty by foreclosure and sale” ... . The Court of Appeals, however, recently explained that such language does not evince an intent by the noteholder to “seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event”... . Accordingly, contrary to defendants’ contention, the December 2009 letter did not constitute a valid acceleration of the debt so as to trigger the applicable statute of limitations. ...

Plaintiff relies on the affidavit from the loan servicing associate to demonstrate compliance with RPAPL 1304. The associate, however, “did not attest to familiarity with or provide any proof of the mailing procedures utilized by the party that allegedly mailed the RPAPL 1304 notice” ... . [Wilmington Trust, Natl. Assn. v Mausler, 2021 NY Slip Op 01296, Third Dept 3-4-21](#)