

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**JAMES J. PASCUMA, JR., INC.,**

**TRIAL/IAS, PART 9  
NASSAU COUNTY**

**Plaintiff,**

**INDEX NO.: 033530/96**

**-against-**

**MOTION DATE: 4/2/07**

**GEORGE SANTANGELO,**

**MOTION SEQ. NO.: 005**

**Defendant.**

**The following papers having been read on the motion (numbered 1):**

**Notice of Motion.....1**

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is an action by plaintiff James J. Pascuma, Jr., Inc. to recover the principal sum of \$66,189.96 for services allegedly rendered by plaintiff to defendant, George Santangelo. Plaintiff claims that he provided services and materials as a thoroughbred horse trainer for horses owned by defendant. This action was originally filed in 1996. Plaintiff's counsel claims that for five years thereafter there was extensive discovery motions and numerous court conferences. Plaintiff's counsel also asserts that he believed that a Note of Issue had been filed but that, in any event, plaintiff's counsel was in the process of moving offices which caused disruption and contributed to the delay. Plaintiff failed to file a note of issue or seek an extension of time to do so and the Court's computer system shows the action purged pre note of issue on June 1, 2001. Review of the county clerk file reveals a certification order, dated April 11, 2000, which ordered plaintiff to serve and file a note of issue within 90 days and provides that "failure to comply within 90 days may serve as a basis for dismissal pursuant to CPLR 3216."

Almost six years since the court system dismissal, plaintiff moves for an Order restoring this action to the trial calendar by attempting to demonstrate a meritorious cause

of action, a reasonable excuse for the delay, a lack of intent to abandon the action, and a lack of prejudice to the defendant. Plaintiff also submits a proposed note of issue. Although plaintiff characterizes said dismissal as a dismissal pursuant to CPLR §3404, the Court notes that CPLR §3404 does not apply to pre-note issue actions. See **Dergousova v. Long**, 37 AD3d 645; **Lopez v. Imperial Delivery Service, Inc.**, 282 AD2d 190. Rather, the court system dismissed the action pursuant to CPLR §3216 for want of prosecution, with the certification order serving as a 90-day notice.

Pursuant to CPLR 3216(e), an action dismissed for failure to prosecute can be restored if a plaintiff can demonstrate a justifiable excuse and a good and meritorious cause of action. The Court finds that plaintiff's conclusory assertions of law office failure are insufficient to excuse an almost six year delay in filing the note of issue. Moreover, plaintiff's proof fails to establish a meritorious cause of action. See **Parkin v. Ederer**, 27 AD3d 633; **Rezene v. Williams**, 22 AD3d 656; **Fraga v. Smithaven Open MRI**, 6 AD3d 494.

Based on the foregoing,

ORDERED, that the motion by plaintiff JAMES J. PASCUMA, JR., INC. for an Order restoring this action is **denied**.

Plaintiff shall serve defendant with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Date: *May 31*, 2007

ENTER:

*[Signature]*  
J.S.C.

**ENTERED**

JUN 21 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**