

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU  
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....  
CHERYL GITLITZ and DARRIN GITLITZ,

Plaintiff,

- against -

Action #1  
Index No.11596/01  
Sequence #004, 005  
Part 40

HILLARY AGINS, PETER AGINS, JAMES DAVIS,  
MARIA BRENON, CHARLES EAMES and CLASSIC  
CASINO RENTALS, INC., Defendants.

1/6/2004

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Notice of Motion.....1  
Notice of Cross-Motion.....2  
Affirmation In Opposition.....3  
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The following decision is restricted to the plaintiffs and defendants in Action # 1 only. The defendants, Charles Eames and Classic Casino Rentals, Inc., move this Court for an order dismissing the Complaint of the plaintiffs, Cheryl Gitlitz and Darrin Gitlitz, pursuant to CPLR §3126, based upon the plaintiffs' failure to serve and file a Note of Issue within ninety days of the Court's order of March 31, 2003. The defendants, Hillary Agins and Peter Agins, cross-move against the plaintiffs for the same relief.

The underlying action is one to recover for personal injuries allegedly sustained by the plaintiffs as a result of a four vehicle, chain collision accident which occurred on August 6, 2000, at approximately 5:45 p.m. on the Loop Parkway in Nassau County, New York. The action was commenced by filing a Summons and Verified Complaint on July 26, 2001. Issue was joined by the service of timely answers by the above named defendants. Counsel for all parties attended a Certification Conference on March 31, 2003. This Court issued an order which, *inter alia*, directed the plaintiffs to serve and file a Note of Issue within ninety days. More than ninety days have elapsed since that order was issued. As of this date, no Note of Issue has been received by any of the defendants involved in the instant motions.

The defendants contend that the plaintiffs' failure to obey the Court's order constitutes a violation of CPLR §3216 and that pursuant to statute, the action must be dismissed. The plaintiffs oppose the motions on the ground that the cited statute requires, *inter alia*, prior service, by registered or certified mail, of a written demand upon the party against whom the relief is sought.

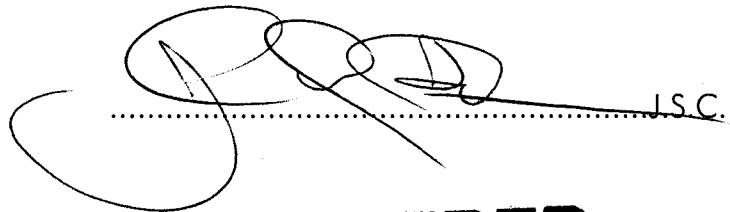
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The Certification Order of March 31, 2003, issued by this Court and signed by attorneys for the plaintiffs and relevant defendants, states in part, "The court *sua sponte* directs the plaintiff(s) to serve and file a note of issue within 90 days. Failure to comply within 90 days may serve as a basis for dismissal pursuant to CPLR §3216." The courts have held this to constitute a valid 90-day notice pursuant to CPLR §3216 (see, *Yi Pao Lu v Scaduto*, 303 AD2d 750 [2<sup>nd</sup> Dept., 2003; *Vento v Bargain Bilge West*, 292 AD2d 596 [2<sup>nd</sup> Dept., 2002; *Safina v Queens-Long Island Medical Group, P.C.*, 238 AD2d 395 [2<sup>nd</sup> Dept., 1997]). Such an order then obligates the plaintiffs to either comply with the notice, or request an extension of time within which to do so pursuant to CPLR § 2004, prior to the default date ( see, *Arenas v County of Nassau*, 232 AD2d 514 [2<sup>nd</sup> Dept.,1996]; *Carte v Segall*, 134 AD2d 397 [2<sup>nd</sup> Dept., 1987]). The plaintiffs did not exercise either of those options, however, the papers they submitted have outlined a meritorious cause of action.

Based upon the foregoing, the plaintiff's complaint against these defendants is dismissed, unless the plaintiff s file a note of issue within 45 days of the date of this order. If a note of issue is not filed, judgment dismissing the complaint shall be entered upon notice of entry on all parties by defendants.

Dated: February 25, 2004



**ENTERED**

FEB 27 2004

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**