

134 A.D.3d 1002, 20 N.Y.S.3d 913  
(Mem), 2015 N.Y. Slip Op. 09413

\*\*1 Bart Paradiso, Appellant

v

St. John's Episcopal Hospital, Respondent.

Supreme Court, Appellate Division,  
Second Department, New York  
2015-02562, 700124/09  
December 23, 2015

CITE TITLE AS: Paradiso v  
St. John's Episcopal Hosp.

Preston & Wilkins, Levittown, NY (Gregory R. Preston  
of counsel), for appellant.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson,  
LLP, New York, NY (Samantha E. Quinn of counsel), for  
respondent.

In an action, inter alia, to recover damages for medical  
malpractice, the plaintiff appeals from an order of  
the Supreme Court, Queens County (O'Donoghue, J.),  
entered December 15, 2014, which granted the defendant's  
motion pursuant to [CPLR 3404](#) to dismiss the complaint.

Ordered that the order is reversed, on the law, with costs,  
\*1003 and the defendant's motion pursuant to [CPLR  
3404](#) to dismiss the complaint is denied.

The note of issue was vacated on April 29, 2013, and the  
plaintiff was not thereafter served with a 90-day demand  
pursuant to [CPLR 3216](#). In June 2014, the defendant  
moved pursuant to [CPLR 3404](#) to dismiss the complaint  
as abandoned. The plaintiff opposed the motion, asserting  
that [CPLR 3404](#) was inapplicable. The Supreme Court  
granted the defendant's motion. We reverse.

When the note of issue was vacated, the case reverted to  
its pre-note of issue status, and [CPLR 3404](#) did not apply  
to this case (*see Goodman v Lempa*, 124 AD3d 581 [2015];  
*Dokaj v Ruxton Tower Ltd. Partnership*, 55 AD3d 661  
[2008]; *Suburban Restoration Co., Inc. v Viglotti*, 54 AD3d  
750, 751 [2008]). Accordingly, the defendant's motion  
pursuant to [CPLR 3404](#) to dismiss the complaint should  
have been denied (*see Melendez v Plato Gen. Contr.*, 128  
AD3d 653, 654 [2015]).

Contrary to the defendant's contention raised for the  
first time on appeal, this action could not have properly  
been dismissed pursuant to [CPLR 3126](#) based upon the  
plaintiff's failure to comply with court-ordered discovery,  
since there was no motion requesting this relief and the  
plaintiff was not afforded an opportunity to be heard on  
this issue (*see Goodman v Lempa*, 124 AD3d 581 [2015];  
*Arroyo v Board of Educ. of City of N.Y.*, 110 AD3d 17,  
19 [2013]; *Mitskevitch v City of New York*, 78 AD3d  
1137, 1138 [2010]). Rivera, J.P., Dickerson, Maltese and  
LaSalle, JJ., concur.

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