

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D12767  
E/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 17, 2006

THOMAS A. ADAMS, J.P.  
DAVID S. RITTER  
WILLIAM F. MASTRO  
ROBERT A. LIFSON, JJ.

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2005-06768

DECISION & ORDER

Lori Kalinka, etc., respondent, et al., plaintiff,  
v Saint Francis Hospital, et al., appellants, et al.,  
defendant.

(Index No. 1003/03)

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Steinberg & Symer, LLP, Poughkeepsie, N.Y. (Ellen Fischer Bopp of counsel), for appellants Saint Francis Hospital and Michael Susco.

Kris T. Jackstadt, Albany, N.Y. (Murry S. Brower of counsel), for appellant Courtney A. Martin.

Goldstein & Metzger, LLP, Poughkeepsie, N.Y. (Paul J. Goldstein and Mark Metzger of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the defendants St. Francis Hospital and Michael Susco appeal, as limited by their notice of appeal and brief, from so much of an order of the Supreme Court, Dutchess County (Sproat, J.), dated June 9, 2005, as denied those branches of their cross motion which were for summary judgment dismissing the complaint insofar as asserted against them by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata and for summary judgment dismissing the cross claims of the defendant T & C Seacrest Diner, Inc., d/b/a Rolling Rock Bistro, for indemnification insofar as asserted against them, and referred for a hearing that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them by the

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plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as time-barred, and the defendant Courtney A. Martin appeals from so much of the same order as denied that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata and referred for a hearing that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as time-barred.

ORDERED that the appeal from so much of the order as denied those branches of the motions which were for summary judgment dismissing the complaint insofar as asserted against the appellants by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as time barred is dismissed; and it is further,

ORDERED that the order is reversed insofar as reviewed, on the law, those branches of the cross motion which were for summary judgment dismissing the complaint insofar as asserted against the defendants St. Francis Hospital and Michael Susco by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata and for summary judgment dismissing the cross claims of the defendant T & C Seacrest Diner, Inc., d/b/a Rolling Rock Bistro, for indemnification insofar as asserted against the defendants St. Francis Hospital and Michael Susco are granted and that branch of the motion which was for summary judgment dismissing the complaint insofar as asserted against the defendant Courtney A. Martin by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata is granted.

ORDERED that one bill of costs is awarded to the appellants appearing separately and filing separate briefs.

The Supreme Court erred in denying those branches of the cross motion of the defendants St. Francis Hospital and Michael Susco and the motion of the defendant Courtney A. Martin which were for summary dismissing the complaint insofar as asserted against them by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka. By order dated August 23, 2000, the Supreme Court dismissed a prior action by George Kalinka as against those defendants for the same relief sought herein. The dismissal was upon the grant of an order of preclusion to each after the court determined that George Kalinka had willfully and contumaciously failed to comply with disclosure. Upon such facts, the dismissal of the prior action is properly given res judicata effect in this action (*see Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614; *Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737; *Barrett v Kasco Constr. Co.*, 56 NY2d 830; *Stray v Lutz*, 306 AD2d 836; *cf. Aguilar v Jacoby*, \_\_\_\_\_AD3d\_\_\_\_\_ [decided herewith]).

That branch of the cross motion of the defendants Saint Francis Hospital and Michael Susco which was for summary judgment dismissing cross claims of the defendant T & C Seacrest Diner, Inc., d/b/a Rolling Rock Bistro, for indemnification insofar as asserted against them, which was unopposed, should have been granted (*see Golub v Sutton*, 281 AD2d 589).

The appeal from so much of the order as directed a hearing to determine those branches of the motions which were for summary judgment dismissing the complaint insofar as asserted against the appellants by Lori Kalinka, as guardian of the person and property of George Kalinka, as time barred must be dismissed, as that portion of the order is not appealable as of right (*see* CPLR 570[a][2][v]; *Berliner v Berliner*, 294 AD2d 524), and, in any event, the issue has been rendered academic in light of our determination.

ADAMS, J.P., RITTER, MASTRO and LIFSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court