

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

D13268
C/hu

_____AD3d_____

Submitted - October 25, 2006

HOWARD MILLER, J.P.
GABRIEL M. KRAUSMAN
ROBERT A. SPOLZINO
STEVEN W. FISHER
MARK C. DILLON, JJ.

2005-10139

DECISION & ORDER

Barbara Walsh, et al., respondents, v Carl D.
Schmigelski, etc., et al., appellants, et al., defendant.

(Index No. 187/02)

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Brian E. Lee of counsel), for appellants.

Walsh Markus McDougal & Debellis, LLP, Garden City, N.Y. (Stephen P. Markus of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice and lack of informed consent, etc., the defendants Carl D. Schmigelski, Nassau Anesthesia Associates, P.C., and Virginia O'Connor appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Roberto, J.), dated September 27, 2005, as granted that branch of the plaintiffs' motion which was for leave to renew their prior motion to dismiss the complaint insofar as asserted against them, which had been granted in an order of the same court dated May 4, 2005, and, upon renewal, in effect, vacated that portion of the order dated May 4, 2005, granting the motion to dismiss, denied that motion, and reinstated the complaint insofar as asserted against them.

ORDERED that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, with costs, that branch of the plaintiffs' motion which was for leave to renew is denied, and that portion of the order dated May 4, 2005, which granted the appellants' motion to dismiss the complaint insofar as asserted against them is reinstated.

December 26, 2006

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Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' motion which was for leave to renew, since the plaintiffs failed to establish a reasonable excuse as to why the additional facts they offered were not submitted on the original motion (*see* CPLR 2221[e][2], CPLR 2221 [e][3]; *Dahlin v Paladino*, 14 AD3d 647, 647-648; *Gallagher v Daniella's Rest.*, 6 AD3d 659).

In light of the foregoing determination, we need not address the appellants' remaining contentions.

MILLER, J.P., KRAUSMAN, SPOLZINO, FISHER and DILLON, 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