

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

D13316  
T/nl

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Submitted - November 27, 2006

STEPHEN G. CRANE, J.P.  
GABRIEL M. KRAUSMAN  
GLORIA GOLDSTEIN  
ROBERT A. SPOLZINO, JJ.

2006-00104

DECISION & ORDER

Adam Kaplan, etc., et al., respondents,  
v Village of Ossining, et al., appellants.

(Index No. 3957/00)

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Boeggeman, George, Hodges & Corde, P.C., (Cynthia Dolan of counsel), for  
appellants.

In an action, inter alia, to recover damages for personal injuries, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Nicolai, J.), entered November 18, 2005, as denied that branch of their motion which was for summary judgment dismissing the third cause of action and granted the plaintiffs' cross motion pursuant to CPLR 3217(b) to voluntarily discontinue that cause of action without prejudice.

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 motion which was for summary judgment dismissing the third cause of action is granted, and the cross motion to voluntarily discontinue the third cause of action without prejudice is denied.

The Supreme Court improvidently exercised its discretion in denying that branch of the defendants' motion which was for summary judgment dismissing the third cause of action (*see* CPLR 3212[e]) and granting the plaintiffs' cross motion to voluntarily discontinue that cause of action without prejudice (*see* CPLR 3217[b]). The record supports a finding that the plaintiffs were merely attempting to circumvent the effect of a preceding conditional order of preclusion (*see Venture I v Voutsinas*, 8 AD3d 475). "A plaintiff should not be permitted to discontinue an action without prejudice for the purpose of avoiding an adverse order of the court" (*Casey v Custom Crushing &*

December 26, 2006

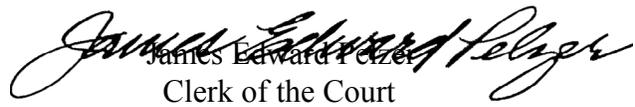
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*Materials*, 309 AD2d 726, 727; see *Schacter v Royal Ins. Co. of America*, 21 AD3d 1024, 1025; cf. *Mathias v Daily News, L.P.*, 301 AD2d 503, 504; *St. Pierre v Osterreich*, 123 AD2d 857).

CRANE, J.P., KRAUSMAN, GOLDSTEIN and SPOLZINO, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court