

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

D13438
Y/cb

_____AD3d_____

Submitted - December 6, 2006

DAVID S. RITTER, J.P.
GLORIA GOLDSTEIN
ANITA R. FLORIO
JOSEPH COVELLO, JJ.

2006-05210

DECISION & ORDER

Perry Lubov, respondent, v Niles C. Welikson, et al.,
appellants.

(Index No. 15956/02)

Robert A. Ross, Huntington, N.Y., for appellants.

Charles S. Sherman, Garden City, N.Y., for respondent.

In an action, inter alia, to recover damages for breach of a shareholders' agreement, the defendants appeal from an order of the Supreme Court, Nassau County (Warshawsky, J.), dated May 8, 2006, which granted the plaintiff's motion to vacate an order of the same court dated January 19, 2006, dismissing the complaint for want of prosecution.

ORDERED that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in granting the plaintiff's motion to vacate the dismissal of this action for want of prosecution (*see* CPLR 3216; *Diaz v Yuan*, 28 AD3d 603; *Goldblum v Franklin Munson Fire Dist.*, 27 AD3d 694, 694-695; *Davis v Goodsell*, 6 AD3d 382, 383). The plaintiff established that due to an unresolved discovery dispute, he was unable to timely file a note of issue (*see Betty v City of New York*, 12 AD3d 472, 473). Moreover, given that the defendants contributed, at least in part, to the plaintiff's inability to file a note of issue in the proper form, the plaintiff was not required to present an affidavit of merit (*see Tu Ying Chen*

v Nash, 266 AD2d 279; *Matter of Simmons v McSimmons, Inc.*, 261 AD2d 547, 548).

RITTER, J.P., GOLDSTEIN, FLORIO and COVELLO, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court