

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

D13526  
G/cb

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

Submitted - December 6, 2006

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

---

2006-00915

DECISION & ORDER

Peter J. Gorski, et al., appellants, v St. John's  
Episcopal Hospital., et al., respondents.

(Index No. 3179/99)

---

Dell & Little, LLP, Uniondale, N.Y. (John S. McDonnell of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Brian Del Gatto and Tara E. Smith of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (LeVine, J.), dated December 6, 2005, which denied their motion to restore the action to the trial calendar.

ORDERED that the order is reversed, on the law, with costs, and the motion to restore the action to the trial calendar is granted.

By so-ordered stipulation dated June 5, 2002, the parties agreed to strike the note of issue and to restore the action to pre-note-of-issue status. Based on that so-ordered stipulation, the Supreme Court marked this action "stricken" on July 14, 2003. Since this action was in pre-note-of-issue status, the court's action on July 14, 2003, did not constitute a "marking off" pursuant to CPLR 3404 (*see Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 196-197; *see also Andre v Bonetto Realty Corp.*, 32 AD3d 973; *Reitman v St. Francis Hosp.*, 2 AD3d 429). Moreover, in the absence of a 90-day demand pursuant to CPLR 3216, restoration of this action is automatic (*see Andre v Bonetto*

January 23, 2007

GORSKI v ST. JOHN'S EPISCOPAL HOSPITAL

Page 1.

*Realty Corp., supra; Klevanskaya v Khanimova*, 21 AD3d 350). Accordingly, the court should have granted the plaintiffs' motion.

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.

James Edward Pelzer  
Clerk of the Court