

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

D13531
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_____AD3d_____

Submitted - December 6, 2006

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

2006-07545

DECISION & ORDER

Sonia Gonzalez, respondent, v Aleksey Leybovich,
et al., appellants.

(Index No.15822/04)

Jerrold N. Cohen, Mineola, N.Y., for appellants.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Kurtz, J.), dated June 29, 2006, which granted the plaintiff's motion to vacate the dismissal of the action pursuant to CPLR 3216, to restore the action to active status, and to extend her time to file a note of issue.

ORDERED that the order is affirmed, without costs or disbursements.

Contrary to the defendants' contention, the compliance conference order dated August 5, 2003, cannot be deemed a 90-day notice pursuant to CPLR 3216 since it gave the plaintiff only 77 days within which to file the note of issue (*see Wollman v Berliner*, 29 AD3d 786; *Delgado v New York City Hous. Auth.*, 21 AD3d 522; *Vasquez v Big Apple Constr. Corp.*, 306 AD2d 465). Since there was a failure of a CPLR 3216 statutory precondition to dismissal, the Supreme Court was not authorized to dismiss the action on its own motion (*see Schwartz v Nathanson*, 261 AD2d 527). Accordingly, the Supreme Court properly granted the plaintiff's motion, inter alia, to vacate the dismissal of the action and to restore the action to active status.

January 23, 2007

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The defendants' remaining contention is without merit (*see Fade v Pugliani*, 8 AD3d 612, 614-615).

MILLER, J.P., SPOLZINO, KRAUSMAN, 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