

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

D14226  
Y/hu

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

Argued - February 15, 2007

WILLIAM F. MASTRO, J.P.  
GABRIEL M. KRAUSMAN  
ANITA R. FLORIO  
RUTH C. BALKIN, JJ.

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2006-04882

DECISION & ORDER

American Telephone and Telegraph Company,  
respondent, v Schnabel Foundation Co., appellant.

(Index No. 11059/04)

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Burke, Lipton, Puleo, McCarthy & Gordon (Robin, Harris, King, Yuhas, Fodera & Richman, New York, N.Y. [Deborah F. Peters] of counsel), for appellant.

Boeggeman, George, Hodges & Corde, P.C., White Plains, N.Y. (Lisa M. Rolle and Daniel E. O'Neill of counsel), for respondent.

In an action to recover for damage to property, the defendant appeals from an order of the Supreme Court, Westchester County (La Cava, J.), entered April 6, 2006, which denied its motion to dismiss the action pursuant to CPLR 306-b and extended the plaintiff's time to serve it with process pursuant to that statute.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion to dismiss the action is granted.

The plaintiff exhibited an overall lack of diligence in prosecuting this action, failed to show proof of any attempt to serve the corporate defendant by service upon the Secretary of State until over a year after it had commenced this action in July 2004, failed to make any showing of merit, and failed to offer any excuse for the delay in serving the defendant other than a conclusory statement in its opposing counsel's affirmation alleging "clerical oversight due to law office failure." While the

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statute of limitations has now expired and the defendant did not show any prejudice, those factors were insufficient in the face of the plaintiff's failures, as set forth above, to warrant the denial of the defendant's motion in this instance (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106; *Ortiz v Malik*, 35 AD3d 560; *Meusa v BMW Fin. Servs.*, 32 AD3d 830; *Rihal v Kirchoff*, 291 AD2d 548).

MASTRO, J.P., KRAUSMAN, FLORIO and BALKIN, 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