

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

D18190
G/mv

_____AD3d_____

Argued - February 4, 2008

ROBERT A. SPOLZINO, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2006-11906

DECISION & ORDER

William Yates, respondent,
v Roco Co., et al., appellants.

(Index No. 15990/05)

Russo, Keane & Toner, LLP, New York, N.Y. (Bradley S. Schoenfeld and Thomas F. Keane of counsel), for appellants.

Laurence M. Savedoff, PLLC, Bronx, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Ruchelsman, J.), dated November 20, 2006, as denied that branch of their motion which was to dismiss the complaint pursuant to CPLR 3211(a)(5) as barred by the doctrine of res judicata.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the motion to dismiss the complaint is granted.

In an identical prior action which the plaintiff commenced against the defendants, the Supreme Court dismissed the complaint based upon a preclusion order it had issued because of the plaintiff's repeated failures to appear for an independent medical examination. Although the order of the Supreme Court did not specifically recite that the dismissal was "on the merits," it should have been accorded res judicata effect in order to prevent the plaintiff from circumventing the preclusion decree (*see Strange v Montefiore Hosp. & Med. Center*, 59 NY2d 737, 738-739; *Kalinka v Saint Francis Hosp.*, 34 AD3d 742, 744).

February 26, 2008

Page 1.

YATES v ROCO CO.

The plaintiff's remaining contention is without merit.

SPOLZINO, J.P., ANGIOLILLO, BALKIN and LEVENTHAL, 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