

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

D18646  
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Submitted - February 27, 2008

STEVEN W. FISHER, J.P.  
ANITA R. FLORIO  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON  
ARIEL E. BELEN, JJ.

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2007-05230  
2007-08663

DECISION & ORDER

Susan Rocco, plaintiff, v Family Foot Center,  
defendant, Stanley J. Zawada, defendant third-  
party plaintiff-respondent; Charles Lombardi,  
third-party defendant-appellant.

(Index No. 9666/04)

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Geisler & Gabriele, LLP, Garden City, N.Y. (Joseph Randazzo of counsel), for third-  
party defendant-appellant.

Stanley J. Zawada, Whitestone, N.Y., defendant third-party plaintiff-respondent pro  
se.

In an action to recover damages for podiatric malpractice, the third-party defendant  
appeals from (1) an order of the Supreme Court, Queens County (O'Donoghue, J.), entered May 2,  
2007, which granted the motion of the defendant third-party plaintiff pursuant to CPLR 3126 to strike  
his answer to the third-party complaint for failure to comply with a prior discovery order, and (2) an  
order of the same court entered August 20, 2007, which denied his motion, denominated as one for  
leave to renew and reargue, but which was, in actuality, one for leave to reargue.

ORDERED that the appeal from the order entered August 20, 2007, is dismissed,  
without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

March 25, 2008

ROCCO v FAMILY FOOT CENTER

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ORDERED that the order entered May 2, 2007, is reversed, on the law and in the exercise of discretion, with costs, and the defendant third-party plaintiff's motion pursuant to CPLR 3126 to strike the answer to the third-party complaint is denied.

The determination whether to strike a pleading for a failure to comply with court-ordered discovery lies within the sound discretion of the trial court (*see* CPLR 3126[3]; *Byrne v City of New York*, 301 AD2d 489, 490; *Ciancolo v Trism Specialized Carriers*, 274 AD2d 369, 370; *Vancott v Great Atl. & Pac. Tea Co.*, 271 AD2d 438; *Brown v United Christian Evangelistic Assn.*, 270 AD2d 378, 379). However, the drastic remedy of striking a pleading is not appropriate where, as here, there is no clear showing that the alleged failure to comply with discovery demands was willful or contumacious (*see* CPLR 3126[3]; *Harris v City of New York*, 211 AD2d 663, 664). Here, counsel for the third-party defendant affirmed that a copy of medical records generated by the third-party defendant had been sent to the third-party plaintiff on January 18, 2007, and submitted a copy of the transmittal letter accompanying the records, which established that discovery was timely made under the terms of the stipulation. Accordingly, the Supreme Court improvidently exercised its discretion in granting the defendant third-party plaintiff's motion.

FISHER, J.P., FLORIO, ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court