

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

D18843
X/prt

_____AD3d_____

Argued - March 3, 2008

PETER B. SKELOS, J.P.
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2007-08147

DECISION & ORDER

Carlos Zhinin, respondent, v
Stephen R. Vicari, et al., appellants.

(Index No. 2984/07)

Timothy W. Lewis, Town Attorney, Greenburgh, N.Y. (David R. Fried of counsel),
for appellants.

Michelstein & Associates, PLLC, New York, N.Y. (Richard A. Ashman and Peter
Ferraiuolo of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Westchester County (Liebowitz, J.), entered August 1, 2007, which denied their motion pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred.

ORDERED that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings consistent herewith.

In support of their motion to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(5), the defendants demonstrated that the Westchester County Clerk stamped the summons and complaint as filed on February 21, 2007, one day past the applicable statute of limitations. In opposition to the defendants' motion, however, the plaintiff submitted the affidavit of Robert Crandall, a licensed process server who delivered the summons and complaint to the Westchester County Clerk's Office. This affidavit raised a factual issue requiring a hearing, to wit, on the issue of whether the papers and filing fee were timely delivered to the County Clerk so as to have met the requirements of CPLR 304 (*see Peace v Yumin Zhang*, 15 AD3d 956). Under the circumstances, the matter must be remitted to the Supreme Court, Westchester County, for a hearing on the issue of

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when the papers and the filing fee were delivered to the County Clerk and for a new determination of the motion to dismiss thereafter.

SKELOS, J.P., ANGIOLILLO, LEVENTHAL and BELEN, 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