

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

D19640
O/prt

_____AD3d_____

Submitted - May 14, 2008

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
JOSEPH COVELLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-11218

DECISION & ORDER

Jose Edmundo Barbosa, appellant,
v Dominick A. Capolarello, et al.,
respondents.

(Index No. 21281/06)

Everett J. Patterson, P.C., Brooklyn, N.Y., for appellant.

In an action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Kings County (Bayne, J.), dated November 2, 2007, as granted that branch of the defendants' motion which was to compel him to appear for an orthopedic evaluation by the defendants' medical expert.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

Although the defendants waived their right to a physical examination of the plaintiff by an orthopedist by their failure to designate a physician to conduct the examination by the date set forth in the compliance conference order, the circumstances of this case warranted relieving the defendants of their waiver, particularly in the absence of any prejudice to the plaintiff (*see Poltorak v Blyakham*, 225 AD2d 600; *Williams v Long Is. Coll. Hosp.*, 147 AD2d 558; *Kanterman v Palmiotti*, 122 AD2d 116). Accordingly, the Supreme Court providently exercised its discretion in

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directing the plaintiff to appear for a physical examination by the defendants' orthopedist.

SKELOS, J.P., SANTUCCI, COVELLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court