

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

D20196
X/kmg

_____AD3d_____

Argued - June 24, 2008

PETER B. SKELOS, J.P.
DAVID S. RITTER
ANITA R. FLORIO
EDWARD D. CARNI, JJ.

2007-09424

DECISION & ORDER

Steven G. Iscowitz, et al., appellants,
v County of Suffolk, et al., defendants,
Town of Babylon, respondent.

(Index No. 25155/02)

Richard P. Stone, New York, N.Y., for appellants.

Lewis Johs Avallone Aviles, LLP, Melville, N.Y. (Rebecca K. Vainder and Michael G. Kruzynski of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (R. Doyle, J.), dated July 16, 2007, as denied their cross motion pursuant to CPLR 3126 to strike the answer of the defendant Town of Babylon for failure to timely comply with discovery.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Contrary to the plaintiffs' contentions, the Supreme Court properly denied their cross motion pursuant to CPLR 3126 to strike the Town of Babylon's answer for its belated disclosure of certain information sought in discovery. The plaintiffs waived any objection to the adequacy and timeliness of the disclosure by filing a note of issue and certificate of readiness prior to moving pursuant to CPLR 3126 for the imposition of a discovery sanction (*see Melcher v City of New York*, 38 AD3d 376, 377; *Escourse v City of New York*, 27 AD3d 319, 320; *Simpson v City of New York*, 10 AD3d 601, 602; *Brown v Veterans Transp. Co.*, 170 AD2d 638; *Levy v Wexler*, 16 AD2d 688).

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In any event, the plaintiffs did not make a clear showing of willful and contumacious conduct on the part of the Town to warrant the drastic remedy of striking the answer (*see e.g. Nieves v City of New York*, 35 AD3d 557, 558; *Simpson v City of New York*, 10 AD3d at 602; *Ahroni v City of New York*, 175 AD2d 789, 790; *Forman v Jamesway Corp.*, 175 AD2d 514, 515-516), nor did they demonstrate that they would be substantially prejudiced by the late disclosure.

SKELOS, J.P., RITTER, FLORIO and CARNI, 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