

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

D20630
O/hu

_____AD3d_____

Argued - September 12, 2008

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
THOMAS A. DICKERSON, JJ.

2008-00969

DECISION & ORDER

Don Dokaj, et al., appellants, v Ruxton Tower
Limited Partnership, et al., respondents
(and a third-party action).

(Index No. 3298/94)

Zeccola & Selinger, LLC, Goshen, N.Y. (John S. Selinger of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York, N.Y. (Marcia Raicus and Joel M. Simon of counsel), for respondents Ruxton Tower Limited Partnership, Jeffrey B. Lewis, and Eric D. Rosenfeld.

Costello, Shea & Gaffney, LLP, New York, N.Y. (Frederick N. Gaffney and Sooyung T.A. Lee of counsel), for respondent Armor Kone Elevator, Inc., s/h/a Armor Kone Elevator Co., Inc.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Schulman, J.), entered September 27, 2005, which denied their motion for leave to file a note of issue.

Separate motions by the respondents to dismiss the appeal on the ground that the appeal was untimely taken. By decision and order on motion of this Court dated April 9, 2008, the motions were held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

October 14, 2008

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Upon the papers filed in support of the motions and the papers filed in opposition thereto, and upon the argument of the appeal, it is,

ORDERED that the motions are granted; and it is further,

ORDERED that the appeal is dismissed, without costs or disbursements (*see* CPLR 5513[a]).

Service by the appellants upon the respondents of certain motion papers, which included a copy of the order appealed from stamped with the date of its entry and an affirmation by an attorney in support of the motion referring to that order, was sufficient to trigger the 30-day period to take an appeal (*see* CPLR 5513[a]; *Matter of Xander Corp. v Haberman*, 41 AD3d 489, 490; *Meyer v Meyer*, 228 AD2d 955, 956). As the motion papers were served on January 6, 2006, and a notice of appeal from the order was filed no earlier than January 22, 2008, the appeal from that order was untimely taken and we grant the respondents' motions to dismiss the appeal (*see* CPLR 5513[a]; *Matter of Xander Corp. v Haberman*, 41 AD3d at 490).

SKELOS, J.P., COVELLO, BALKIN and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court