

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

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_____AD3d_____

Submitted - April 7, 2009

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
RANDALL T. ENG, JJ.

2008-09000

DECISION & ORDER

Angel Nicole Redmond, etc., appellant,
v Jamaica Hospital Medical Center, defendant,
Kenneth Fretwell, etc., et al., respondents.

(Index No. 20270/03)

John T. Wisell, Kew Gardens, N.Y., for appellant.

Patrick F. Adams, PLLC, New York, N.Y. (Jeffrey S. Wolk of counsel), for
respondents.

In an action to recover damages for medical malpractice and wrongful death, the plaintiff appeals from an order of the Supreme Court, Queens County (O'Donoghue, J.), entered September 16, 2008, which denied her motion to vacate an order of the same court dated April 10, 2008, sua sponte, precluding her from conducting examinations before trial of the defendants Kenneth Fretwell and Jeffrey Chan pursuant to CPLR 3126.

ORDERED that the order entered September 16, 2008, is reversed, on the law and in the exercise of discretion, without costs or disbursements, and the motion to vacate the order dated April 10, 2008, is granted.

The record does not demonstrate that the plaintiff's counsel willfully and contumaciously obstructed the progress of disclosure with respect to the examinations before trial of the defendants Kenneth Fretwell and Jeffrey Chan (hereinafter the defendant doctors) (*see Maceno v Franklin Hosp. Med. Ctr.*, 14 AD3d 663, 664; *Santigate v Linsalata*, 304 AD2d 639, 641; *Gorokhova v Belulovich*, 267 AD2d 202, 203). Accordingly, the Supreme Court improvidently

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exercised its discretion in, sua sponte, imposing the sanction of preclusion with respect to the examination before trial of the defendant doctors (*see* CPLR 3126; *cf.*, *Mahopac Ophthalmology, P.C. v Tarasevich*, 21 AD3d 351, 352), and in denying the plaintiff's motion to vacate the order imposing that sanction.

DILLON, J.P., ANGIOLILLO, DICKERSON and ENG, 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