

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

D23851  
G/kmg

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Argued - April 21, 2009

WILLIAM F. MASTRO, J.P.  
PETER B. SKELOS  
THOMAS A. DICKERSON  
PLUMMER E. LOTT, JJ.

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2008-04341

DECISION & ORDER

Joseph Bennett, etc., appellant, et al., plaintiff, v  
Michael Hucke, et al., defendants, Alan Kirk,  
et al., respondents.

(Index No. 10131/07)

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Gathman & Bennett, LLP, Huntington, N.Y. (John C. Bennett and Eric M. Cahalan of counsel), for appellant.

Mazzara & Small, P.C., Hauppauge, N.Y. (Timothy F. Mazzara of counsel), for respondents.

In an action to recover damages for personal injuries, etc. the plaintiff Joseph Bennett, as guardian of James Bennett, an incapacitated person, appeals from an order of the Supreme Court, Suffolk County (Tanenbaum, J.), dated March 18, 2008, which granted the motion of the defendants Alan Kirk, Alan H. Kirk, Inc., and Alan Kirk Custom Homes, Inc., pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, and the respondents' motion pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them is denied.

As the plaintiff correctly contends, the motion of the defendants Alan Kirk, Alan H. Kirk, Inc., and Alan Kirk Custom Homes, Inc. (hereinafter collectively the Kirk defendants), pursuant to CPLR 3211 to dismiss the complaint was not made within the time period in which those defendants were required to serve an answer (*see* CPLR 3211[e]). Accordingly, since no extension of time to make the motion was requested by the Kirk defendants or granted by the court (*see* CPLR

July 7, 2009

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2004), the motion should have been denied as untimely (*see Bowes v Healy*, 40 AD3d 566; *Diaz v DiGiulio*, 29 AD3d 623; *Continental Info. Sys. Corp. v Mutual Life Ins. Co. of N.Y.*, 77 AD2d 316, 318). The Kirk defendants may pursue any appropriate relief by way of a summary judgment motion in the normal course of the litigation (*see Diaz v DiGiulio*, 29 AD3d at 623).

In view of the foregoing, we need not reach the parties' remaining contentions.

MASTRO, J.P., SKELOS, DICKERSON and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court