

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

D24715
O/kmg

_____AD3d_____

Submitted - September 23, 2009

REINALDO E. RIVERA, J.P.
HOWARD MILLER
RUTH C. BALKIN
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2008-11681

DECISION & ORDER

Shilya Shcherbina, etc., respondent, v Queens
Nassau Nursing Home, Inc., appellant.

(Index No. 17782/02)

Ptashnik & Associates, New York, N.Y. (James Gilroy of counsel), for appellant.

Shestack & Young, LLP, New York, N.Y. (Shibu J. Jacob of counsel), for
respondent.

In an action to recover damages for personal injuries, the defendant appeals from so much of an order of the Supreme Court, Kings County (Patterson, J.), dated October 28, 2008, as granted that branch of the plaintiff's motion which was, in effect, to vacate the dismissal of the action pursuant to CPLR 3216 and to restore the action to the active calendar.

ORDERED that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, and that branch of the plaintiff's motion which was, in effect, to vacate the dismissal of the action pursuant to CPLR 3216 and to restore the action to the active calendar is denied.

In a compliance conference order dated April 1, 2003, the Supreme Court directed the plaintiff to file a note of issue on or before July 1, 2003, and warned that the action would be dismissed if the plaintiff failed to comply. Counsel for the plaintiff signed the order. This order had the same effect as a 90-day notice pursuant to CPLR 3216 (*see Felix v County of Nassau*, 52 AD3d 653, 653; *Anjum v Karagoz*, 48 AD3d 605, 605; *Hoffman v Kessler*, 28 AD3d 718). The plaintiff

October 20, 2009

Page 1.

SHCHERBINA v QUEENS NASSAU NURSING HOME, INC.

failed to comply with this order either by filing a timely note of issue or by moving to extend the period for doing so, and the action was properly dismissed pursuant to CPLR 3216 (*see Felix v County of Nassau*, 52 AD3d 653, 653-654; *Anjum v Karagoz*, 48 AD3d 605, 605). Since the plaintiff waited three years to move to vacate the dismissal of the action, the motion was untimely and should have been denied (*see Vinikour v Jamaica Hosp.*, 2 AD3d 518, 519).

RIVERA, J.P., MILLER, BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court