

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

D25398  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - November 18, 2009

PETER B. SKELOS, J.P.  
ANITA R. FLORIO  
RUTH C. BALKIN  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2009-03010

DECISION & ORDER

Joseph Michael Swanson, etc., appellant,  
v Milton Eichler, etc., et al., defendants,  
Allen R. Frank, etc., respondent.

(Index No. 5817/01)

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Anthony C. Donofrio, Massapequa, N.Y., for appellant.

Santangelo & Slattery (James W. Tuffin, Roslyn, N.Y. [Gabriel Mignella], of counsel), for respondent.

In an action to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from an order of the Supreme Court, Nassau County (Mahon, J.), dated February 11, 2009, which denied his motion, in effect, to restore the action insofar as asserted against the defendant Allen R. Frank to the trial calendar.

ORDERED that the order is affirmed, with costs.

“A plaintiff seeking to restore a case to the trial calendar more than one year after it was stricken, and after it has been dismissed pursuant to CPLR 3404, must establish: (1) a meritorious cause of action, (2) a reasonable excuse for the delay in prosecution of the action, (3) a lack of intent to abandon the action, and (4) a lack of prejudice to the defendant” (*Borelli v Maye*, 293 AD2d 506, 506). Since the plaintiff failed to establish the last three of those factors, the Supreme

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Court properly denied the plaintiff's motion, in effect, to restore the action to the trial calendar (*see Magnone v Gemm Custom Brokers, Inc.*, 17 AD3d 412; *Schwartz v Mandelbaum & Gluck*, 266 AD2d 273; *cf Sheridan v Mid-Island Hosp., Inc.*, 9 AD3d 490).

SKELOS, J.P., FLORIO, BALKIN, BELEN and AUSTIN, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court