

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

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Submitted - December 2, 2009

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

2009-00379

DECISION & ORDER

Rashieda Maharaj, appellant, v Daniel LaRoche,
et al., respondents.

(Index No. 48819/99)

Adrian A. Ellis, LLC, Brooklyn, N.Y. (Ayisha Richards-McKay of counsel), for appellant.

Frank A. Racano, Mineola, N.Y., for respondent Daniel LaRoche.

In an action to recover damages for defamation and intentional infliction of emotional distress, the plaintiff appeals from an order of the Supreme Court, Kings County (Balter, J.), dated December 9, 2008, which denied her motion to restore the action to the calendar.

ORDERED that the order is reversed, on the law, with costs payable by the respondents, and the motion to restore the action to the calendar is granted.

The plaintiff moved to restore this action to the calendar after it was, in effect, dismissed pursuant to CPLR 3216 for failure to file a timely note of issue pursuant to a compliance order dated April 15, 2008. Notably, the compliance order specifically advised that it did not constitute a CPLR 3216 notice. Thus, the order could not be deemed a 90-day demand to file a note of issue, which is a precondition to dismissal under CPLR 3216 (*see* CPLR 3216[b][3]; *Ratway v*

Donnenfeld, 43 AD3d 465; *Heifetz v Godoy*, 38 AD3d 605; *Murray v Smith Corp.*, 296 AD2d 445, 447). Accordingly, the plaintiff's motion to restore the action to the calendar should have been granted.

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, flowing style.

James Edward Pelzer
Clerk of the Court