

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

D26041  
Y/kmg

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Submitted - December 16, 2009

REINALDO E. RIVERA, J.P.  
JOSEPH COVELLO  
DANIEL D. ANGIOLILLO  
JOHN M. LEVENTHAL  
SHERI S. ROMAN, JJ.

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2009-02773

DECISION & ORDER

Robert H. Rotering, appellant, v Perry Satz, et al.,  
respondents.

(Index No. 1743/08)

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Susan Chana Lask, New York, N.Y., for appellant.

Hiscock & Barclay, LLP, Albany, N.Y. (David B. Cabaniss of counsel), for  
respondents.

In an action to recover damages for legal malpractice, the plaintiff appeals from a judgment of the Supreme Court, Dutchess County (Pagones, J.), dated May 1, 2009, which, upon an order of the same court dated February 23, 2009, inter alia, granting the defendants' cross motion to compel acceptance of the answer and, sua sponte, directing that the complaint be dismissed pursuant to CPLR 306-b, dismissed the complaint.

ORDERED that the judgment is reversed, on the law, with costs, the complaint is reinstated, and the order dated February 23, 2009, is modified accordingly.

The Supreme Court, sua sponte, directed dismissal of the complaint on the basis, inter alia, that the plaintiff failed to file proof of service of the summons and complaint, citing CPLR 306-b. Pursuant to that statute, a court may only dismiss a complaint for failure to effect timely service of process "upon motion," not on its own initiative (*see* CPLR 306-b). The defendants never moved to dismiss the complaint (*see* CPLR 3211[a][8]; [e]). Thus, the Supreme Court erred in doing so sua sponte (*see Daniels v King Chicken & Stuff, Inc.*, 35 AD3d 345).

March 16, 2010

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The plaintiff's remaining contention is without merit.

RIVERA, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court