

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

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_____AD3d_____

Submitted - February 24, 2010

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2009-05217

DECISION & ORDER

Tracy Schmitt, etc., et al., appellants, v Nagalingam
Jeyalingam, etc., et al., respondents, et al., defendant.

(Index No. 2727/03)

Anthony R. Tirone, White Plains, N.Y. (Cynthia Dolan of counsel), for appellants.

Feldman, Kleidman & Coffey, LLP, Fishkill, N.Y. (Marsha S. Weiss of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice and wrongful death, etc., the plaintiffs appeal from an order of the Supreme Court, Orange County (Owen, J.), dated April 13, 2009, which denied their motion to restore the action to the trial calendar and to vacate an order of the same court dated May 30, 2008, granting the defendants' motion to dismiss the action upon their failure to proceed with the trial.

ORDERED that the order dated April 13, 2009, is affirmed, with costs.

Upon the plaintiffs' failure to proceed on the scheduled trial date, the Supreme Court granted the defendants' motion to dismiss the action. To vacate the order dismissing the action and to restore the action to the trial calendar, the plaintiffs were required to demonstrate both a reasonable excuse for their default and a meritorious cause of action (*see* CPLR 5015[a][1]; 22 NYCRR 202.27; *Santiago v Santana*, 54 AD3d 929, 930; *Frangione v Daniels*, 44 AD3d 708; *Brooks v Haidt*, 30 AD3d 365; *Kandel v Hoffman*, 309 AD2d 904, 905; *cf.* CPLR 3404). The plaintiffs failed to demonstrate a reasonable excuse for their repeated failure to proceed with the trial

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and to comply with orders directing them to serve post note of issue expert witness disclosure (*see* 22 NYCRR 202.21[d]) for more than two years (*see Santiago v Santana*, 54 AD3d at 930; *Kouziou v Dery*, 57 AD3d 949, 950; *Antoine v Bee*, 26 AD3d 306; *Kandel v Hoffman*, 309 AD2d 904, 905). Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiffs' motion to restore the action to the trial calendar and to vacate the order dismissing the action.

SKELOS, J.P., COVELLO, ENG, CHAMBERS and SGROI, 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