

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

D26661
C/ct

_____AD3d_____

Submitted - March 10, 2010

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-07217

DECISION & ORDER

Anthony Verdi, et al., appellants-respondents, v
Victor T. Ho, et al., respondents-appellants.

(Index No. 6683/05)

Richard Frank, P.C., New York, N.Y. (Scott H. Seskin of counsel), for appellants-respondents.

Peltz & Walker, New York, N.Y. (L. Ruby Rey of counsel), for respondents-appellants.

In an action to recover damages for medical malpractice and lack of informed consent, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Jackson, J.), dated June 11, 2009, as, upon reargument, adhered to a prior determination in an order dated November 3, 2008, in effect, denying the plaintiff's application, in effect, for a continuance, and granting the defendants' application to dismiss the amended complaint, and the defendants cross-appeal from the same order.

ORDERED that the cross appeal is dismissed as abandoned (*see* 22 NYCRR 670.8 [a]); and it is further,

ORDERED that the order dated June 11, 2009, is reversed insofar as appealed from, on the law, and, upon reargument, the order dated November 3, 2008, is vacated, the plaintiff's application, in effect, for a continuance is granted, and the defendant's application to dismiss the amended complaint is denied; and it is further,

March 23, 2010

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ORDERED that one bill of costs is awarded to the appellants-respondents.

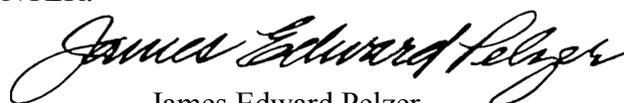
A week prior to the scheduled trial date of this action, the plaintiffs discovered that their medical expert had elected not to testify at trial. Accordingly, the plaintiffs' attorney, in effect, made an application for a continuance in order to obtain a new expert. In response, the defendants' counsel made an application to dismiss the amended complaint. By order dated November 3, 2008, the Supreme Court denied the plaintiffs' application and granted the defendants' application, dismissing the amended complaint with prejudice. Upon reargument, by order dated June 11, 2009, the Supreme Court, inter alia, adhered to so much of its original determination as granted the defendants' application to dismiss the amended complaint. We reverse the order dated June 11, 2009, insofar as appealed from.

“Although an application for a continuance is addressed to the sound discretion of the trial court, it is an improvident exercise of discretion to deny a continuance where the application is properly made, is not made for the purpose of delay, the evidence is material, and the need for a continuance did not result from the failure to exercise due diligence” (*Mura v Gordon*, 252 AD2d 485, 485; see *Notrica v North Hills Holding Co., LLC*, 43 AD3d 1119, 1120; *Romero v City of New York*, 260 AD2d 461). Balancing the appropriate factors, the Supreme Court improvidently exercised its discretion in, in effect, denying the plaintiffs' application, in effect, for a continuance and in granting the defendants' application to dismiss the amended complaint.

The cross appeal must be dismissed as abandoned, as the defendants do not seek reversal or modification of any portion of the order (see *Sirma v Beach*, 59 AD3d 611, 614; *Bibas v Bibas*, 58 AD3d 586, 587).

FISHER, J.P., COVELLO, BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court