

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

D26858  
O/kmg

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

Submitted - March 24, 2010

REINALDO E. RIVERA, J.P.  
ANITA R. FLORIO  
HOWARD MILLER  
CHERYL E. CHAMBERS  
SHERI S. ROMAN, JJ.

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2009-07031

DECISION & ORDER

Rosalia Polizzi, et al., respondents, v Joseph Burke,  
appellant.

(Index No. 5131/06)

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Santangelo, Benvenuto & Slattery (James W. Tuffin, Manhasset, N.Y. [Gabriel Mignella], of counsel), for appellant.

Gordon & Gordon, Forest Hills, N.Y. (Jason Stern and Peter S. Gordon of counsel), for respondents.

In an action to recover damages for podiatric malpractice and lack of informed consent, etc., the defendant appeals from an amended order of the Supreme Court, Nassau County (Brandveen, J.), dated June 3, 2009, which granted the plaintiffs' motion to vacate the dismissal of the action pursuant to CPLR 3216 and to extend the time to file a note of issue.

ORDERED that the amended order is reversed, on the law, with costs, and the plaintiff's motion to vacate the dismissal of the action pursuant to CPLR 3216 and to extend the time to file a note of issue is denied.

The certification order dated October 4, 2007, directing the plaintiffs to file a note of issue within 90 days and warning that the action would be dismissed if the plaintiffs failed to comply, had the same effect as a 90-day notice pursuant to CPLR 3216 (*see Davis v Cardiovascular Consultants of Long Is. P.C.*, 65 AD3d 1076; *Felix v County of Nassau*, 52 AD3d 653; *Anjum v Karagoz*, 48 AD3d 605). The plaintiffs failed to comply with that order, either by filing a timely note

April 13, 2010

Page 1.

POLIZZI v BURKE

of issue or by moving to extend the period for doing so, and the action was properly dismissed pursuant to CPLR 3216 (*see Felix v County of Nassau*, 52 AD3d at 653-654; *Anjum v Karagoz*, 48 AD3d at 605). Since the plaintiffs failed to move to vacate the dismissal within one year, the motion was untimely and should have been denied (*see Vinikour v Jamaica Hosp.*, 2 AD3d 518, 519).

RIVERA, J.P., FLORIO, MILLER, CHAMBERS and ROMAN, 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