

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

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Argued - April 20, 2010

MARK C. DILLON, J.P.
HOWARD MILLER
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2006-05526

DECISION & ORDER

Geraldine Rini, etc., appellant, v Richard Blanck,
etc., defendants, Stephen Gulotta, respondent.

(Index No. 5063/91)

Flomenhaft & Cannata, LLP, New York, N.Y. (Benedene N. Cannata of counsel), for
appellant.

Bower Sanger & Lawrence, P.C., New York, N.Y. (Peter R. Bower of counsel), for
respondent.

In an action to recover damages for medical malpractice, etc., the plaintiff appeals
from a judgment of the Supreme Court, Queens County (Hart, J.), entered May 3, 2006, which, upon
the granting of the motion of the defendant Stephen Gulotta, in effect, to dismiss the complaint
insofar as asserted against him as a sanction for the plaintiff's failure to disclose certain information,
dismissed the complaint insofar as asserted against that defendant.

ORDERED that the judgment is reversed, on the law, on the facts, and in the exercise
of discretion, with costs, the motion of the defendant Stephen Gulotta, in effect, to dismiss the
complaint insofar as asserted against him as a sanction for the plaintiff's failure to disclose certain
information is denied, the complaint is reinstated insofar as asserted against the defendant Stephen
Gulotta, and the matter is remitted to the Supreme Court, Queens County, for further proceedings
before a different Justice.

A court may dismiss an action as a sanction if a plaintiff "refuses to obey an order for
disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed"

(CPLR 3126). However, the drastic remedy of dismissal is inappropriate absent a clear showing that the plaintiff's failure to comply with disclosure obligations was willful and contumacious (*see Kesar v Green Ridge Enters. Corp.*, 30 AD3d 471, 471; *Blake v Chawla*, 299 AD2d 437, 440; *Yona v Beth Isgel Med. Ctr.*, 285 AD2d 460, 461). Here, the record does not demonstrate that the plaintiff's failure to disclose certain information was willful and contumacious. Accordingly, the Supreme Court improvidently exercised its discretion in granting the motion of the defendant Stephen Gulotta, in effect, to dismiss the complaint insofar as asserted against him as a sanction for the plaintiff's failure to disclose certain information.

Under the circumstances of this case, we deem it appropriate to remit the matter to the Supreme Court, Queens County, for further proceedings before a different Justice.

DILLON, J.P., MILLER, DICKERSON and CHAMBERS, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court