

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

D33459
G/kmb

_____AD3d_____

Submitted - December 14, 2011

PETER B. SKELOS, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2011-04010

DECISION & ORDER

Phillip Matthew, appellant, v City of New York,
et al., defendants, Consolidated Edison Company
of New York, respondent.

(Index No. 28007/07)

Monaco & Monaco, LLP, Brooklyn, N.Y. (Frank A. Delle Donne of counsel), for
appellant.

Richard W. Babinecz (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn], of
counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Queens County (Flug, J.), entered March 2, 2011, which denied his
motion pursuant to CPLR 3124 to compel the defendant Consolidated Edison Company of New
York to comply with discovery requests or, in the alternative, pursuant to CPLR 3126 to strike that
defendant's answer.

ORDERED that the order is affirmed, with costs.

A compliance conference order dated January 4, 2010, provided that the plaintiff's
failure to file a note of issue on or before July 16, 2010, would result in dismissal of the action
pursuant to CPLR 3216. While discovery was still outstanding, on July 16, 2010, the plaintiff filed
a conditional note of issue without first obtaining permission from the court pursuant to 22 NYCRR
202.21(d) (*see Huger v Cushman & Wakefield, Inc.*, 58 AD3d 682, 684; *cf. Lopez v Retail Prop.
Trust*, 84 AD3d 891). More than 5½ months after filing the conditional note of issue, the plaintiff

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moved pursuant to CPLR 3124 to compel the respondent to comply with discovery requests or, in the alternative, pursuant to CPLR 3126 to strike the respondent's answer. In support of his motion, the plaintiff failed to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue that would warrant additional pretrial discovery (*see* 22 NYCRR 202.21[d]; *Wigand v Modlin*, 82 AD3d 1213; *Tirado v Miller*, 75 AD3d 153, 161; *Silverberg v Guzman*, 61 AD3d 955; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 140). Accordingly, the Supreme Court properly denied the plaintiff's motion.

SKELOS, J.P., ANGIOLILLO, BELEN, LOTT and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court