

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

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_____AD3d_____

Submitted - September 11, 2006

HOWARD MILLER, J.P.
GLORIA GOLDSTEIN
WILLIAM F. MASTRO
MARK C. DILLON, JJ.

2005-06010

DECISION & ORDER

Town of Patterson, plaintiff, v Kenneth Hauser, et al.,
defendants third-party plaintiffs-respondents; Reilly
Construction, Inc., third-party defendant-appellant,
et al., third-party defendant.

(Index No. 172/05)

Hogan & Rossi, Brewster, N.Y. (David P. Burkart and Lita M. Ward of counsel), for
third-party defendant-appellant.

In an action, inter alia, to restrain the defendants from diverting surface water onto a town road, and a related third-party action to recover damages for breach of contract, the third-party defendant appeals from so much of an order of the Supreme Court, Putnam County (O'Rourke, J.), dated May 17, 2005, as denied that branch of its motion which was pursuant to CPLR 3211(a) to dismiss so much of the first cause of action of the third-party complaint as alleged that it "breached its contract with HAUSER in failing or neglecting to build, construct and provide to HAUSER a residence which was free from accumulation of ground and surface waters and which provided a means by which HAUSER could legally pump from his basement and its general locations such accumulating waters."

ORDERED that the order is affirmed insofar as appealed from, with costs.

We agree with the Supreme Court that, under the circumstances of this case, the release prepared by the appellant is ambiguous. The ambiguities contained therein cannot be resolved in the appellant's favor as a matter of law (*see Frost v Budget Car & Truck Rental*, 15 AD3d 963:

October 17, 2006

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Mejia v Trustees of Net Realty Holding Trust, 304 AD2d 627). Accordingly, the Supreme Court properly denied the subject branch of the appellant's motion.

MILLER, J.P., GOLDSTEIN, MASTRO and DILLON, 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