

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

D13689  
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Argued - January 4, 2007

STEPHEN G. CRANE, J.P.  
REINALDO E. RIVERA  
GLORIA GOLDSTEIN  
EDWARD D. CARNI, JJ.

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2006-00031  
2006-03112

DECISION & ORDER

34-35<sup>th</sup> Corp., appellant, v 1-10 Industry Associates,  
LLC, respondent.

(Index No. 17996/01)

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Smith, Buss & Jacobs, LLP, Yonkers, N.Y. (Jeffrey D. Buss and James R. Anderson  
of counsel), for appellant.

Flemming Zulack Williamson Zauderer, LLP, New York, N.Y. (Jonathan D. Lupkin,  
Dean R. Nicyper, and Judith P. Falk of counsel), for respondent.

In an action, inter alia, to recover damages for breach of a lease, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Schack, J.), dated November 1, 2005, which granted that branch of the defendant's motion which was to dismiss the action pursuant to CPLR 3126, and (2) an order of the same court dated January 31, 2006, which denied its motion, denominated as one for leave to renew, reargue, and restore, and to compel compliance with its notices of deposition, but which, in actuality, was one for leave to reargue the defendant's prior motion.

ORDERED that the appeal from the order dated January 31, 2006, is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated November 1, 2005, is reversed, on the law, without costs or disbursements, and that branch of the defendant's motion which was to dismiss the action pursuant to CPLR 3126 is denied.

January 30, 2007

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34-35<sup>TH</sup> CORP. v 1-10 INDUSTRY ASSOCIATES, LLC

Under the circumstances of this case, the defendant did not sustain its burden of demonstrating that any failure of the plaintiff to engage in disclosure was willful and contumacious.

CRANE, J.P., RIVERA, GOLDSTEIN and CARNI, JJ., concur.

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2006-00031  
2006-03112

DECISION & ORDER ON MOTION

34-35<sup>th</sup> Corp., appellant, v 1-10 Industry Associates,  
LLC, respondent.

(Index No. 17996/01)

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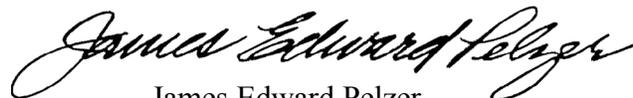
Motion by the respondent, on appeals from two orders of the Supreme Court, Kings County, dated November 1, 2005, and January 31, 2006, respectively, to dismiss the appeal from the order dated January 31, 2006, on the ground that no appeal lies from an order denying reargument, to strike all material from the record on appeal which relates to the order dated January 31, 2006, to strike the appellant's brief, and to direct the appellant to file a new brief which does not refer to the motion for leave to reargue and the order dated January 31, 2006, and to enlarge the time to serve and file a brief, and cross motion by the appellant to enlarge the record on appeal to include the motion papers relating to the motion for leave to reargue. By decision and order on motion of this court dated September 14, 2006, that branch of the motion which was to enlarge the respondent's time to serve and file a brief was granted and the remaining branches of the motion and the cross motion were held in abeyance, and were referred to the Justices hearing the appeals for determination upon the argument or submission of the appeals.

Upon the papers filed in support of the motion and the cross motion and the papers filed in opposition thereto, and upon the argument of the appeals, it is,

ORDERED that the branches of the motion which are to dismiss the appeal from the order dated January 31, 2006, to strike all material from the record on appeal which relates to the motion for leave to reargue and the order dated January 31, 2006, to strike the appellant's brief and to direct the appellant to file a new brief which does not refer to the motion for leave to reargue and the order dated January 31, 2006, and the cross motion are denied as academic, in light of our determination on the appeals.

CRANE, J.P., RIVERA, GOLDSTEIN and CARNI, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

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