

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

D14050  
G/gts

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

Argued - January 29, 2007

REINALDO E. RIVERA, J.P.  
PETER B. SKELOS  
MARK C. DILLON  
JOSEPH COVELLO, JJ.

---

2006-10306

DECISION & ORDER

Andrew Picart, respondent, v Brookhaven  
Country Day School, et al., appellants.

(Index No. 28933/04)

---

Steven F. Goldstein, LLP, Carle Place, N.Y. (Christopher R. Invidiata of counsel), for appellants.

Meltzer, Fishman, Madigan & Campbell, New York, N.Y. (Joseph P. Campbell of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Whelan, J.), dated October 3, 2006, which denied their motion, in effect, for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The defendants failed to satisfy their burden in the first instance of establishing, prima facie, their entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case, as the defendants did here (*see South v K-Mart Corp.*, 24 AD3d 748; *Xu v 688 Sixth Ave. Realty Co.*, 19 AD3d 687; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *O'Leary v Bravo Hylan, LLC*, 8 AD3d 542; *Mennerich v Esposito*, 4 AD3d 399, 400; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 388-389). Since the defendants failed to satisfy their initial burden

February 27, 2007

Page 1.

PICART v BROOKHAVEN COUNTRY DAY SCHOOL

of proof, it is unnecessary to analyze the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr., supra*). Accordingly, the Supreme Court properly denied the defendants' motion.

RIVERA, J.P., SKELOS, DILLON and COVELLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer  
Clerk of the Court