

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

D14151
O/cb

_____AD3d_____

Submitted - February 1, 2007

FRED T. SANTUCCI, J.P.
GLORIA GOLDSTEIN
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-00179

DECISION & ORDER

Smithtown Health Care Facility, respondent, v John
McCormack, appellant.

(Index No. 21231/02)

Scott Lockwood, Deer Park, N.Y., for appellant.

Long Tuminello Besso Seligman & Werner LLP, Bay Shore, N.Y. (Kevin R. Johnson
of counsel), for respondent.

In an action for an accounting, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), dated November 15, 2005, as denied his motion for summary judgment dismissing the complaint and granted that branch of the plaintiff's cross motion which was to dismiss the affirmative defense that he was not a proper party to the action.

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

The defendant's submissions in support of his motion for summary judgment failed to demonstrate his entitlement to judgment as a matter of law. Therefore, the motion was properly denied, regardless of the sufficiency of the papers submitted in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Santos v City of New York*, 15 AD3d 564; *Mariaca-Olmos v Mizrhy*, 226 AD2d 437).

Under the circumstances of this case, the court also properly granted that branch of the plaintiff's cross motion which was to dismiss the affirmative defense that the defendant was not

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a proper party to the action (*see generally St. Teresa's Nursing Home v Vuksanovich*, 268 AD2d 421; *Grace Plaza of Great Neck v Heitzler*, 2 AD3d 780).

SANTUCCI, J.P., GOLDSTEIN, CARNI and McCARTHY, 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