

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

D14243
O/gts

_____AD3d_____

Argued - February 15, 2007

WILLIAM F. MASTRO, J.P.
ROBERT A. SPOLZINO
GABRIEL M. KRAUSMAN
RUTH C. BALKIN, JJ.

2006-04219
2006-05303

DECISION & ORDER

Johnnies Pelham Road Service, Inc., respondent,
v Richard S. Thomas, appellant.

(Index No. 2850/05)

McGovern, Connelly & Davidson, New Rochelle, N.Y. (Frank H. Connelly, Jr., of counsel), for appellant.

Littman Krooks, LLP, New York, N.Y. (Martha J. Brosius of counsel), for respondent.

In an action, inter alia, for specific performance of a right of first refusal contained in a lease, the defendant appeals from (1) a decision of the Supreme Court, Westchester County (Smith, J.), dated April 17, 2006, and (2) an order of the same court dated June 19, 2006, which, upon the decision, granted the plaintiff's motion for the release of a bond it had posted following the granting of a preliminary injunction and directed the Clerk of the County of Westchester to release to the plaintiff the sum of \$125,000, plus all accrued interest, minus the Westchester County statutory fees, to the plaintiff's attorney.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v Green Constr. Corp.*, 100 AD2d 509); and it is further,

ORDERED that on the court's own motion, the notice of appeal from an order dated May 2, 2006, is deemed a premature notice of appeal from the order dated June 19, 2006 (*see CPLR 5520[c]*); and it is further,

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ORDERED that the order dated June 19, 2006, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

We do not reach the defendant's contention that the Supreme Court lacked personal jurisdiction over him, as that issue was one that could have been litigated on the defendant's appeal from a prior order of the Supreme Court, Westchester County (Barone, J.), dated March 22, 2005, which appeal was dismissed by order of this court dated November 10, 2005, for failure to prosecute (*see Bray v Cox*, 38 NY2d 350, 355; *Horan v Ocean Ships*, 262 AD2d 531).

The defendant's remaining contention is without merit for reasons stated by Justice Smith in the Supreme Court.

MASTRO, J.P., SPOLZINO, KRAUSMAN and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court