

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

D14332  
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Argued - February 9, 2007

STEPHEN G. CRANE, J.P.  
ANITA R. FLORIO  
STEVEN W. FISHER  
THOMAS A. DICKERSON, JJ.

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2005-05818  
2005-09530

DECISION & ORDER

Jimmy Martinez, etc., appellant, v East 16<sup>th</sup>  
Associates, LLC, et al., defendants, Robert  
Kaszovitz, et al., respondents.

(Index No. 9534/02)

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Fitzgerald & Fitzgerald, P.C., Yonkers, N.Y. (John E. Fitzgerald, John M. Daly,  
Eugene S. R. Pagano, Alberto Casadevall, and John J. Leen of counsel), for appellant.

Curan, Ahlers, Fiden & Norris, LLP, New York, N.Y. (Matthew Zizzamia of  
counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, (1) from so much of an order of the Supreme Court, Kings County (Steinhardt, J.), dated May 17, 2005, as granted that branch of the motion of the defendants Robert Kaszovitz and Elaine Cohen which was for summary judgment dismissing the complaint insofar as asserted against them, and (2) from so much of an order of the same court dated September 12, 2005, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order dated May 17, 2005, is dismissed, as that order was superseded by the order dated September 12, 2005, made upon reargument; and it is further,

ORDERED that the order dated September 12, 2005, is reversed insofar as appealed

March 20, 2007

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from, on the law, upon reargument, so much of the order dated May 17, 2005, as granted that branch of the motion of the defendants Robert Kaszovitz and Elaine Cohen which was for summary judgment dismissing the complaint insofar as asserted against them is vacated, and that branch of the motion is denied; and it is further,

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

The respondents failed to satisfy their prima facie burden in support of their motion for summary judgment. Accordingly, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

CRANE, J.P., FLORIO, FISHER and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court