

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

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_____AD3d_____

Argued - October 27, 2006

ROBERT W. SCHMIDT, J.P.
WILLIAM F. MASTRO
STEVEN W. FISHER
MARK C. DILLON, JJ.

2006-02155

DECISION & ORDER

Kisnet Brooks, appellant-respondent, v
Maintenance Service Resources, Inc., defendant
third-party plaintiff-respondent-appellant;
Allied Exterminating, third-party defendant-
respondent-appellant.

(Index No. 49128/97)

Rayo and Fontanelli, P.C., Brooklyn, N.Y. (Mark J. Rayo, Louis A. Badolato, and
Brian Isaac of counsel), for appellant-respondent.

Charles J. Siegel, New York, N.Y. (Peter E. Vairo of counsel), for defendant third-
party plaintiff-respondent-appellant.

Leahey & Johnson, P.C., New York, N.Y. (Peter James Johnson, Peter James
Johnson, Jr., James P. Tenney, and Joanne Filiberti of counsel), for third-party
defendant-respondent-appellant.

In an action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated February 10, 2006, as granted those branches of the separate motions of the defendant third-party plaintiff and the third-party defendant which were for leave to renew their prior separate motions, inter alia, pursuant to CPLR 4404(a) to set aside a jury verdict awarding damages to the plaintiff, which motions had been determined, in part, in an amended order of the same court dated January 24, 2005, and granted a new trial on the issue of damages, and the defendant third-party plaintiff and the third-party defendant separately cross-appeal, as limited by their respective briefs, from so much of the same order as

October 23, 2007

Page 1.

BROOKS v MAINTENANCE SERVICE RESOURCES, INC.

denied those branches of their separate motions which were to dismiss the complaint as a sanction for the plaintiff's allegedly fraudulent representations at the trial.

ORDERED that the appeal and cross-appeals are dismissed as academic, without costs or disbursements, in light of our determination of an appeal and cross appeal from an interlocutory judgment of the Supreme Court, Kings County, dated June 28, 2005 (*see Brooks v Maintenance Serv. Resources, Inc.*, _____AD3d_____) [Appellate Division Docket No. 2005-06455, decided herewith]).

SCHMIDT, J.P., MASTRO and DILLON, JJ., concur.

FISHER, J., dissents and votes to affirm the order insofar as appealed and cross-appealed from, with the following memorandum:

In light of my dissent from this Court's determination of an appeal and cross appeal from an interlocutory judgment of the Supreme Court, Kings County, dated June 28, 2005 (*see Brooks v Maintenance Serv. Resources, Inc.*, _____AD3d_____) [Appellate Division Docket No. 2005-06455, decided herewith]), I would not dismiss the appeal and cross appeals as academic. Rather, I would hold that the Supreme Court providently exercised its discretion in granting the defendant third-party plaintiff and the third-party defendant leave to renew their respective motions pursuant to CPLR 4404(a) (*see CPLR 2221[e][3]*) and, upon renewal, providently granted, in the interests of justice, those branches of the motions which were to set aside the jury verdict awarding damages and for a new trial on the issue of damages (*see Matter of De Lano*, 34 AD2d 1031, 1032, *affd* 28 NY2d 587; *McCarthy v Port of N.Y. Auth.*, 21 AD2d 125). Moreover, contrary to the contentions of the defendant third-party plaintiff and the third-party defendant, the Supreme Court providently exercised its discretion in declining to dismiss the complaint as a sanction (*cf. CPLR 3216[3]*; *Sisca v City of Yonkers N.Y.*, 24 AD3d 531, 532).

ENTER:



James Edward Pelzer
Clerk of the Court