

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

D15492
X/gts

_____AD3d_____

Argued - May 15, 2007

HOWARD MILLER, J.P.
WILLIAM F. MASTRO
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2006-08234

DECISION & ORDER

A. L. Santagata, respondent, v Vinegar
Hill Group, LLC, et al., appellants.

(Index No. 35381/05)

Henry Lee M. Fong, New York, N.Y. (Andrew Chin of counsel), for appellants.

Barry Elisofon, Brooklyn, N.Y., for respondent.

In an action to recover damages for breach of contract, the defendants appeal from a judgment of the Supreme Court, Kings County (Ruchelsman, J.), dated July 14, 2006, which, upon an order of the same court dated July 5, 2006, searching the record and awarding summary judgment to the plaintiff, is in favor of the plaintiff and against them in the principal sum of \$240,940.

ORDERED that the judgment is reversed, on the law, with costs, and the order is vacated.

The Supreme Court erred in searching the record and awarding summary judgment to the plaintiff. The record reflects that the only motion before the court was the plaintiff's motion for a jury trial, which the defendants opposed. The Supreme Court characterized its action as "searching the record" pursuant to CPLR 3212(b). However, CPLR 3212(b) permits the court to search the record where there is a pending motion for summary judgment, and then to award judgment where it is warranted in favor of a non-moving party as to a cause of action that has been placed in issue by the papers (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430). Both of the cases the Supreme Court cited in support of its action in searching the record (*see Carnegie Hall Corp. v City Univ. of N.Y.*, 286 AD2d 214; *Dormena v Wallace*, 282 AD2d 425) involved pending

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motions for summary judgment. Since there was no such motion here, those cases are inapposite.

MILLER, J.P., MASTRO, DILLON and McCARTHY, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court