

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

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_____AD3d_____

Argued - September 7, 2007

ROBERT W. SCHMIDT, J.P.
REINALDO E. RIVERA
GABRIEL M. KRAUSMAN
ANITA R. FLORIO, JJ.

2006-05045

DECISION & ORDER

Daniel W. Asher, appellant, v Lark J. Shlimbaum,
et al., respondents.

(Index No. 26766/05)

Greshin, Ziegler & Amicizia, LLP, Smithtown, N.Y. (Matthew H. Bligh of counsel),
for appellant.

Babchik & Young, LLP, White Plains, N.Y. (Jack Babchik, Matthew J. Rosen, and
Jordan Sklar of counsel), for respondents.

In an action to recover damages for legal malpractice, the plaintiff appeals from an
order of the Supreme Court, Suffolk County (Weber, J.), dated May 3, 2006, which granted the
defendants' motion to dismiss the complaint pursuant to CPLR 3211.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly granted the defendants' motion to dismiss the complaint
alleging legal malpractice. The plaintiff's underlying action was commenced to enforce an alleged
oral contract between himself and his sister and brother-in-law to convey certain real property from
them to him. By order dated September 30, 2004, the Supreme Court found that the plaintiff's
actions in connection with the acquisition and maintenance of the property were not unequivocally
referable to the alleged contract (*see* General Obligations Law § 5-703[4]), and therefore the alleged
contract was barred by the statute of frauds and was unenforceable (*see* General Obligations Law §
5-703[3]). This was sufficient to show that the plaintiff could not establish that he would have
succeeded in the underlying action but for the defendants' failure to plead other legal theories in

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connection with the underlying action (*see Leder v Spiegel*, 9 NY3d 836). Accordingly, the Supreme Court properly granted the defendants' motion to dismiss the complaint (*see L&S Motors, Inc., d/b/a Huntington Honda v Broadview Networks, Inc.*, 25 AD3d 767; *Dann v King Assoc., LLC*, 303 AD2d 539; *Roth v Goldman*, 254 AD2d 405).

SCHMIDT, J.P., RIVERA, KRAUSMAN and FLORIO, 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