

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

D17299
C/kmg

_____AD3d_____

Argued - October 15, 2007

ROBERT A. SPOLZINO, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
THOMAS A. DICKERSON, JJ.

2006-06806

DECISION & ORDER

New York City Economic Development Corporation,
appellant, v T.C. Foods Import and Export Co., Inc.,
et al., respondents (and a third-party action).

(Index No. 5856/00)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo, Alan H. Kleinman, Brad M. Snyder, and Elizabeth I. Freedman of counsel), for appellant.

Stephen H. Weiner, New York, N.Y., for respondents Marathon Outdoor, LLC, PNE Media, LLC, Titan Outdoor Holdings, LLC, and Outdoor Concepts, LLC, doing business as Titan Outdoor.

In an action, inter alia, to recover damages for breach of a restrictive covenant, the plaintiff appeals from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Weiss, J.), entered May 26, 2006, as after, inter alia, a nonjury trial on the issue of damages, granted the motion of the defendants Marathon Outdoor, LLC, PNE Media, LLC, and Titan Outdoor Holdings, LLC, and Outdoor Concepts, LLC, doing business as Titan Outdoor, to dismiss the complaint in its entirety, and denied the plaintiff's motion for leave to enter a default judgment against the defendant T.C. Foods Import and Export Co., Inc.

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.

December 18, 2007

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The measure of damages for breach of a restrictive covenant is the diminution in the value of the benefitted parcel by reason of the breach (*see Flynn v New York, Westchester & Boston Ry. Co.*, 218 NY 140; *Binghamton Plaza v Gilinsky*, 32 AD2d 994). Since the plaintiff did not adduce any evidence at trial as to such diminution, the Supreme Court properly granted the motion of the defendants Marathon Outdoors, LLC, PNE Media, LLC, and Titan Outdoor Holdings, LLC, and Outdoor Concepts, LLC, doing business as Titan Outdoor, to dismiss the complaint in its entirety.

The plaintiff's remaining contention is without merit.

SPOLZINO, J.P., KRAUSMAN, GOLDSTEIN and DICKERSON, 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