

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

D18128  
X/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - January 22, 2008

A. GAIL PRUDENTI, P.J.  
ROBERT A. LIFSON  
JOSEPH COVELLO  
RUTH C. BALKIN, JJ.

2007-07096

DECISION & ORDER

Marcus & Company, LLP, appellant,  
v John Pescitelli, et al., respondents.

(Index No. 10698/05)

Kenneth J. Weinstein, Garden City, N.Y. (Michael J. Langer of counsel), for appellant.

Kestenbaum & Mark, Great Neck, N.Y. (Paula Schwartz Frome and Richard S. Kestenbaum of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Bucaria, J.), dated July 16, 2007, which denied that branch of its motion which was for leave to renew its opposition to the prior cross motion of the defendant John Pescitelli for summary judgment dismissing the complaint insofar as asserted against him, which, in effect, had been granted in an order of the same court dated June 28, 2006, and denied that branch of its motion which was for leave to amend the complaint pursuant to CPLR 3025.

ORDERED that the order is affirmed, with costs.

Under the circumstances of this case, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to renew its opposition to the prior cross motion of the defendant John Pescitelli for summary judgment dismissing the complaint insofar as asserted against him. The plaintiff failed to establish that there was a reasonable justification for not including the "new" facts in opposition to the prior cross motion (*see* CPLR 2221[e][2], [3]; *Clemente v Carl Bongiorno & Sons, Inc.*, 39 AD3d 688, 689; *Walsh v Schmigelski*,

February 19, 2008

Page 1.

MARCUS & COMPANY, LLP v PESCELLEI

35 AD3d 849; *Elder v Elder*, 21 AD3d 1055). In addition, the court providently exercised its discretion in denying that branch of the plaintiff's motion which was for leave to amend the complaint at this late stage of the proceedings, as the proposed amendment was "patently devoid of merit" (*Trataros Constr., Inc. v New York City Hous. Auth.*, 34 AD3d 451, 453; see *Lucido v Mancuso*, \_\_\_\_\_AD3d\_\_\_\_\_, 2008 NY Slip Op 00952 [2d Dept, Feb. 1, 2008]; *Polizzi v Profaci*, 5 AD3d 456, 458; *Ruddock v Boland Rentals*, 5 AD3d 368, 370; *McKiernan v McKiernan*, 207 AD2d 825).

PRUDENTI, P.J., LIFSON, COVELLO and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court