

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

D19707  
G/hu

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

Argued - May 12, 2008

HOWARD MILLER, J.P.  
MARK C. DILLON  
RUTH C. BALKIN  
CHERYL E. CHAMBERS, JJ.

2007-00182  
2007-04794

DECISION & ORDER

September's Food Systems, LLC, et al., appellants,  
v BRE/Wellesley Properties, LLC, respondent.

(Index No. 11594/06)

---

Katz & Klein, White Plains, N.Y. (Gerald M. Klein of counsel), for appellants.

Kantrowitz, Goldhamer & Graifman, P.C., Chestnut Ridge, N.Y. (Barry S. Kantrowitz and Reginald H. Rutishauser of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiffs appeal, as limited by their notice of appeal and brief, (1) from stated portions of an order of the Supreme Court, Westchester County (Murphy, J.), entered November 30, 2006, as modified by an order entered December 15, 2006, and (2) from so much of an order of the same court (Giacomo, J.), entered May 8, 2007, as denied that branch of their cross motion which was for partial summary judgment on the complaint.

ORDERED that the appeal from the order entered November 30, 2006, as modified by the order entered December 15, 2006, is dismissed as abandoned; and it is further,

ORDERED that the order entered May 8, 2007, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendant.

June 17, 2008

Page 1.

SEPTEMBER'S FOOD SYSTEMS, LLC v BRE/WELLESLEY PROPERTIES, LLC

The Supreme Court properly denied that branch of the plaintiffs' cross motion which was for partial summary judgment on the complaint. The plaintiffs failed to tender sufficient evidence to eliminate all material issues of fact and, accordingly, did not demonstrate their entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852; *Zuckerman v City of New York*, 49 NY2d 557, 562).

MILLER, J.P., DILLON, BALKIN and CHAMBERS, 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