

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

D21347  
G/hu

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

Submitted - November 13, 2008

REINALDO E. RIVERA, J.P.  
MARK C. DILLON  
JOSEPH COVELLO  
WILLIAM E. McCARTHY, JJ.

---

2007-09921

DECISION & ORDER

Salvatore Mirra, respondent, v Paul Patterson, et al.,  
appellants.

(Index No. 6725/07)

---

Regina Felton, Brooklyn, N.Y., for appellants.

In an action, inter alia, to recover damages for breach of an oral agreement, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated September 21, 2007, as denied that branch of their motion which was for summary judgment dismissing the complaint.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

The defendants established their prima facie entitlement to judgment as a matter of law by showing that the alleged oral agreement was unenforceable under the statute of frauds because it was not subscribed in writing by the defendant Paul Patterson and was not capable of being performed within one year (*see* General Obligations Law § 5-701[a][1]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366; *Stillman v Kalikow*, 22 AD3d 660, 662). In opposition, the plaintiff, by his affidavit, raised a triable issue of fact as to whether the statute of frauds barred the action, asserting, in effect, that “although the agreement was capable of an indefinite continuance, the agreement could have been fully performed within a year of the making thereof” (*Radnay v Charge & Ride*, 266 AD2d 194, 196; *see Cron v Hargro Fabrics*, 91 NY2d at 366; *Stillman v Kalikow*, 22 AD3d at 662; *Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405).

RIVERA, J.P., DILLON, COVELLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

December 9, 2008

MIRRA v PATTERSON