

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

D21453
O/hu

_____AD3d_____

Argued - November 20, 2008

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
RUTH C. BALKIN
WILLIAM E. McCARTHY, JJ.

2008-00098

DECISION & ORDER

Ana Iris Carpio Morales, etc., et al., respondents,
v 78 4th Avenue Corp., et al., appellants.

(Index No. 20410/07)

DiConza, LaRocca, DiCunto & Kaplin, LLP, Brooklyn, N.Y. (Richard A. Kaplin of counsel), for appellants.

Phillips Nizer, LLP, New York, N.Y. (Daniel M. Kolko and Peter W. Smith of counsel), for respondents.

In an action, inter alia, to set aside a deed conveying real property, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Dabiri, J.), dated November 14, 2007, as denied their cross motion pursuant to CPLR 3211(a)(1) to dismiss the complaint based on documentary evidence.

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

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see Leon v Martínez*, 84 NY2d 83, 88; *Kalmon Dolgin Affiliates of Long Is. v Robert Plan Corp.*, 248 AD2d 594). As the Supreme Court properly concluded, the documentary evidence submitted by the defendants in support of their cross motion to dismiss does not establish

December 16, 2008

Page 1.

MORALES v 78 4TH AVENUE CORP.

their defense as a matter of law or definitely dispose of the allegations in the complaint. Accordingly, the Supreme Court properly denied the defendants' cross motion to dismiss the complaint.

MASTRO, J.P., MILLER, BALKIN and McCARTHY, 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