

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

D21637
Y/prt

_____AD3d_____

Argued - December 8, 2008

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2007-10832

DECISION & ORDER

Joseph McCarthy, et al., respondents, v Steven W. Young, d/b/a Steven W. Young, G.C., et al., appellants, et al., defendant.

(Index No. 5501/03)

Sinnreich & Kosakoff, LLP, Central Islip, N.Y. (Annalee Cataldo-Barile and Timothy F. Hill of counsel), for appellants.

Donald Leo & Associates, P.C., Coram, N.Y. (John F. Clennan of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, the defendants Steven W. Young, d/b/a Steven W. Young, G.C., and Steven Young General Contractor, Inc., appeal from so much of an order of the Supreme Court, Suffolk County (R. Doyle, J.), dated September 15, 2006, as denied that branch of their motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against the defendant Steven W. Young, d/b/a Steven W. Young, G.C.

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

Accepting the allegations of the complaint as true, according the plaintiffs the benefit of every favorable inference, and determining only whether the facts alleged “fit within any cognizable legal theory” (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *see Leon v Martinez*, 84 NY2d 83, 87-88), the complaint sets forth a cognizable cause of action to recover damages for breach of contract against the defendant Steven W. Young, d/b/a Steven W. Young, G.C. The subject contract did not clearly state that it was entered into between the plaintiffs and the corporate defendant, Steven Young General Contractor, Inc. (*cf. Metropolitan Switch Bd. Co., Inc. v Amici*

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Assoc., Inc., 20 AD3d 455, 455-456).

“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff[s] will ultimately be able to prove [their] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP.*, 38 AD3d 34, 38). Accordingly, at this pre-discovery stage, the Supreme Court properly denied that branch of the motion which was to dismiss the complaint insofar as asserted against Steven W. Young, d/b/a Steven W. Young, G.C.

RIVERA, J.P., ANGIOLILLO, DICKERSON 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