

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

D22513  
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Submitted - February 23, 2009

ROBERT A. SPOLZINO, J.P.  
DAVID S. RITTER  
ANITA R. FLORIO  
HOWARD MILLER, JJ.

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2008-04043

DECISION & ORDER

Walter Schwartz, appellant, v Michelle  
Farkas Miltz, respondent.

(Index No. 11127/04)

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Anthony L. Mascolo, Kew Gardens, N.Y., for appellant.

Weil & Kestenbaum, Bayside, N.Y. (Alan C. Kestenbaum of counsel), for respondent.

In an action for the partition and sale of real property, the plaintiff appeals from a judgment of the Supreme Court, Nassau County (Brandveen, J.), entered May 13, 2008, which, after a nonjury trial, is in favor of the defendant and against him, dismissing the complaint.

ORDERED that the judgment is reversed, on the law, with costs, the complaint is reinstated, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings consistent herewith.

In August 2004 the plaintiff commenced the instant action for the partition and sale of real property. On a prior appeal in this action, this Court, inter alia, affirmed the Supreme Court's denial of the defendant's cross motion for summary judgment dismissing the complaint (*see Schwartz v Miltz*, 37 AD3d 816).

Following a nonjury trial, the Supreme Court erred in determining that it could not consider whether an award of equitable relief to the plaintiff was appropriate (*see CPLR 3017*). Accordingly, the matter must be remitted to the Supreme Court, Nassau County, to consider the issue of equitable relief.

March 24, 2009

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SCHWARTZ v MILTZ

The plaintiff's remaining contentions are without merit.

SPOLZINO, J.P., RITTER, FLORIO and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer  
Clerk of the Court