

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

D22518
W/kmg

_____AD3d_____

Argued - February 13, 2009

WILLIAM F. MASTRO, J.P.
JOSEPH COVELLO
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2008-01847

DECISION & ORDER

McNamee Construction Corp., plaintiff,
v City of New Rochelle, defendant third-party
plaintiff-appellant, Desman Associates, etc., et al.,
defendants third-party defendants-respondents.

(Index No. 11742/04)

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Peter A. Meisels and Lalit K. Loomba of counsel), for defendant third-party plaintiff-appellant.

Gogick, Byrne & O'Neill, LLP, New York, N.Y. (John M. Rondello of counsel), for defendants third-party defendants-respondents.

In an action to recover damages for breach of a construction contract, the defendant third-party plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered January 23, 2008, as granted that branch of the motion of the defendants third-party defendants which was for summary judgment dismissing its claim for common-law indemnification on the ground of res judicata.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants third-party defendants which was for summary judgment dismissing the third-party claim for common-law indemnification on the ground of res judicata is denied.

Under the doctrine of res judicata, or claim preclusion, “a judgment on the merits by a court of competent jurisdiction is res judicata and ‘forecloses a party from relitigating a cause of action which was the subject matter of a former lawsuit or from raising issues or defenses that might

March 24, 2009

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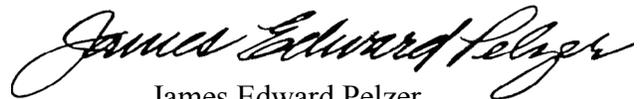
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have been litigated in the first suit” (*Sherman v Ansell*, 207 AD2d 537, 537, quoting *Chisholm-Ryder Co. v Sommer & Sommer*, 78 AD2d 143, 144; see *Town of New Windsor v New Windsor Volunteer Ambulance Corps, Inc.*, 16 AD3d 403, 404-405).

Here, the Supreme Court should not have awarded summary judgment to the defendants third-party defendants dismissing the third-party claim for common-law indemnification on the ground of res judicata. That claim is not res judicata insofar it pertains to new allegations in the amended complaint (see *Somma v Somma*, 19 AD3d 477, 478).

MASTRO, J.P., COVELLO, ENG and LEVENTHAL, 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