

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

D25314
H/kmg

_____AD3d_____

Argued - October 19, 2009

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2009-04306

DECISION & ORDER

Ping Ji, etc., et al., appellants, v Mohammed Malik,
respondent.

(Index No. 13286/06)

Daniel Cobrinik, New York, N.Y., for appellants.

Horing, Welikson & Rosen, P.C., Williston Park, N.Y. (Niles C. Welikson and Randi
B. Gilbert of counsel), for respondent.

In an action to recover on a promissory note, the plaintiffs appeal from a judgment of the Supreme Court, Queens County (Kitzes, J.), entered March 16, 2009, which after a nonjury trial and upon the granting of the defendant's oral application, in effect, pursuant to CPLR 4401 for judgment as a matter of law, made at the close of the plaintiffs' case, is in favor of the defendant and against them, 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, Queens County, for a new trial.

Contrary to the defendant's contention, the plaintiffs established a prima facie case by submitting proof of the existence of a promissory note and the defendant's default thereon (*see* UCC 3-307[2]; *Levien v Allen*, 52 AD3d 578; *Lorenz Diversified Corp. v Falk*, 44 AD3d 910; *Central Islip Co-op. G.L.F. Serv. v Tsantes*, 17 AD2d 852; *Abrahamson v Steele*, 176 App Div 865). Accordingly, the Supreme Court erred in granting the defendant's oral application, in effect, pursuant to CPLR 4401 for judgment as a matter of law, and a new trial is warranted (*see Central Islip Co-op G.L.F. Serv. v Tsantes*, 17 AD2d at 852).

December 8, 2009

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The defendant's remaining contentions are either without merit, improperly raised for the first time on appeal, or rendered academic by our determination.

DILLON, J.P., DICKERSON, BELEN and ROMAN, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court