

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

D25549
G/prt

_____AD3d_____

Submitted - December 2, 2009

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
SHERI S. ROMAN, JJ.

2009-00424

DECISION & ORDER

David Gottfried, etc., appellant,
v Barry Maizel, respondent.

(Index No. 23740/07)

David Gottfried, New York, N.Y., appellant pro se.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., and Adonaid Casado Medina of counsel), for respondent.

In an action to recover damages for wrongful death, etc., the plaintiff appeals from so much of an order of the Supreme Court, Kings County (Held, J.), dated July 18, 2008, as denied, in part, his motion to compel discovery.

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

Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in only partially granting the plaintiff's motion to compel disclosure. The defendant could not be compelled to produce records, documents, or information that were not in his possession, or did not exist (*see Argo v Queens Surface Corp.*, 58 AD3d 656; *Maffai v County of Suffolk*, 36 AD3d 765; *Sagiv v Gamache*, 26 AD3d 368, 369), or that were privileged (*see Logue v Velez*, 92 NY2d 13). Contrary to the plaintiff's arguments, the Preliminary Conference Order dated

December 22, 2009

Page 1.

GOTTFRIED v MAIZEL

February 13, 2008, did not preclude the court from reviewing the propriety of his discovery demands or the adequacy of the defendant's response to those demands.

RIVERA, J.P., COVELLO, ANGIOLILLO, LEVENTHAL and ROMAN, 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