

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

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_____AD3d_____

Argued - December 7, 2009

FRED T. SANTUCCI, J.P.
RUTH C. BALKIN
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2009-04937

DECISION & ORDER

Jonathan Gonzalez, respondent, Joseph S. Dulak, Jr., etc., plaintiff, v Nutech Auto Sales, appellant, et al., defendants-respondents.

(Index No. 3862/07)

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel), for appellant.

Tomkiel & Tomkiel, Yonkers, N.Y. (Matthew Tomkiel of counsel), for plaintiff Joseph S. Dulak, Jr.

In a consolidated action, inter alia, to recover damages for personal injuries, the defendant Nutech Auto Sales appeals from an order of the Supreme Court, Westchester County (Loehr, J.), entered May 4, 2009, which denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is modified, on the facts and in the exercise of discretion, by adding the words “without prejudice to renewal after completion of discovery” following the words “For the foregoing reasons, the motion is denied”; as so modified, the order is affirmed, without costs or disbursements.

On August 11, 2006, the defendant Donna Albarron allegedly purchased a car from the defendant Nutech Auto Sales (hereinafter Nutech). On the following day, the car was being driven by the defendant Steven M. Bucci when it was involved in an accident which allegedly caused the death of one of the passengers, Joseph S. Dulak III (hereinafter Dulak), the plaintiff Joseph S.

Dulak, Jr.'s, decedent, and injury to the other passenger, the plaintiff Jonathan Gonzalez. Dulak's estate and Gonzalez commenced separate actions against Nutech, Bucci, and Albarron; these actions were later consolidated. Nutech moved for summary judgment and submitted documents allegedly showing that ownership of the car had been transferred to Albarron the day before the accident. Based on this transfer, Nutech argued that it could not be liable in this case. The Supreme Court denied the motion as premature and on the merits. We modify.

Under the circumstances of this case, since the motion was premature as no discovery had yet taken place (*see* CPLR 3212[f]; *Harvey v Nealis*, 61 AD3d 935; *Valdivia v Consolidated Resistance Co. of Am., Inc.*, 54 AD3d 753), the Supreme Court erred in determining the motion on the merits.

SANTUCCI, J.P., BALKIN, ENG 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