

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

D26244
H/prt

_____AD3d_____

Submitted - January 22, 2010

FRED T. SANTUCCI, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2009-03738

DECISION & ORDER

Smithtown Health Care Facility, appellant,
v John McCormack, respondent.

(Index No. 21231/02)

Long, Tuminello, Besso, Seligman, Werner, Johnston & Sullivan, LLP, Bay Shore,
N.Y. (Kevin R. Johnston of counsel), for appellant.

Scott Lockwood, North Babylon, N.Y., for respondent.

In an action for an accounting, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Baisley, Jr., J.), dated March 4, 2009, which granted the defendant's motion, in effect, to preclude it from amending its complaint to add a cause of action to recover damages for fraud and/or fraudulent transfer of property.

ORDERED that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in limiting the plaintiff's proof at trial to the only cause of action which it pleaded in its complaint, to wit, an accounting, and in excluding any evidence relating to an alleged fraudulent transfer. The complaint failed to adequately plead or otherwise apprise the defendant of any claim based upon fraud and/or fraudulent transfer (*see* CPLR 3016[b]; *see also* Debtor and Creditor Law §§ 275, 276; *Michaelson v Scaduto*, 205 AD2d 507). Moreover, the plaintiff never moved for leave to amend its complaint and thus, to have, in effect, permitted such an amendment on the eve of trial would have unduly prejudiced the defendant (*see generally Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523; *Sewakarran v DeBellis*, 11 AD3d 445; *cf.*, *Weinstock v Handler*, 254 AD2d 165). Accordingly,

February 23, 2010

Page 1.

SMITHTOWN HEALTH CARE FACILITY v MCCORMACK

the defendant's motion was properly granted.

The plaintiff's remaining contentions are without merit.

SANTUCCI, J.P., DICKERSON, CHAMBERS and SGROI, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court