

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

D26768
G/prt

_____AD3d_____

Argued - January 22, 2010

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

2008-04596

DECISION & ORDER

Aurora Industries, Inc., et al., respondents,
v Simon Halwani, appellant.

(Index No. 6450/05)

Boris Kogan, New York, N.Y. (Freda Khan of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York, N.Y. (Arnold E. DiJoseph III of counsel), for respondents.

In an action, inter alia, to recover damages for conversion, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Held, J.), dated April 7, 2008, as denied that branch of his motion which was summary judgment on the issue of liability on his counterclaims and granted that branch of the plaintiffs' cross motion which was for summary judgment dismissing his counterclaims.

ORDERED that the matter is remitted to the Supreme Court, Kings County, to hear and report in accordance herewith, and the appeal is held in abeyance in the interim.

The plaintiffs contend that the appeal should be dismissed since the defendant failed to compile an adequate record on appeal, omitting certain exhibits which were submitted in opposition to the defendant's motion and in support of the plaintiff's cross motion. The defendant contends that the Supreme Court rejected those exhibits. The original papers which were subpoenaed from the Supreme Court do not include those exhibits. However, the order appealed from does not indicate that the Supreme Court rejected any exhibits. Rather, the order states, "I have read the various submissions and exhibits submitted to this court by each side." Under these circumstances,

March 30, 2010

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we cannot determine whether the defendant has compiled an adequate record on appeal so as to permit review of the merits of the motion and cross motion (*see Fernald v Vinci*, 13 AD3d 333, 334; *Garnerville Holding Co. v IMC Mgt.*, 299 AD2d 450). Accordingly, we remit the matter to the Supreme Court, Kings County, to hear and report as to the exhibits it considered in determining the motion and cross motion, and the appeal is held in abeyance in the interim.

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, flowing style.

James Edward Pelzer
Clerk of the Court