

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

D30195  
H/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 25, 2010

A. GAIL PRUDENTI, P.J.  
PETER B. SKELOS  
THOMAS A. DICKERSON  
JOHN M. LEVENTHAL, JJ.

---

2009-09223

DECISION & ORDER

Stephen Montano, et al., appellants, Eugene Spagnuolo,  
etc., et al., defendants, Stuart Styles, etc., respondent.

(Index No. 14852/03)

---

Peter E. Tangredi (Linda Trummer-Napolitano, White Plains, N.Y., of counsel), for appellants.

Vouté, Lohrfink, Magro & Collins, LLP, White Plains, N.Y. (Laura K. Silverstein of counsel), for respondent.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered August 25, 2009, which granted the motion of the defendant Stuart Styles, in effect, pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint insofar as asserted against that defendant. Justice Dickerson has been substituted for the late Justice Fisher. Presiding Justice Prudenti has been substituted for former Justice Santucci (*see* 22 NYCRR 670.01[c]).

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendant Stuart Styles, in effect, pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint insofar as asserted against him is denied.

After granting the motion of the defendant Stuart Styles (hereinafter the defendant), made during trial, for a new trial, in effect, pursuant to CPLR 4402, the Supreme Court granted the defendant's motion, in effect, pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint insofar as asserted against him. In addition to the fact that the Supreme Court had

previously granted the defendant's motion for a new trial, the motion, in effect, pursuant to CPLR 4401 was made before the close of the plaintiffs' evidence. Accordingly, that motion should not have been entertained (*see* CPLR 4401; *Canteen v City of White Plains*, 165 AD2d 856, 857; *Goldstein v C.W. Post Ctr. of Long Is. Univ.*, 122 AD2d 196, 197; *Balogh v H.R.B. Caterers*, 88 AD2d 136, 141; *Levy v Goldman*, 252 App Div 781).

In light of our determination, we need not reach the parties' remaining contentions.

PRUDENTI, P.J., SKELOS, DICKERSON and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court