

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

D30567
Y/prt

_____AD3d_____

Argued - March 2, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2009-08116

DECISION & ORDER

Lynn M. Wood, etc., respondent, v Capital One
Financial Corp., et al., appellants.

(Index No. 6106/07)

Wickham, Bressler, Gordon & Geasa, P.C., Melville, N.Y. (Eric J. Bressler of
counsel), for appellants.

Bracken & Margolin, LLP, Islandia, N.Y. (Linda U. Margolin of counsel), for
respondent.

In an action, inter alia, to recover damages for breach of contract, the defendants
appeal from an order of the Supreme Court, Suffolk County (Farneti, J.), entered July 17, 2009,
which granted that branch of the plaintiff's motion which was for summary judgment on the issue of
liability.

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

The plaintiff brought this action seeking damages, among other things, for breach of
contract in connection with a stock plan for which employees of North Fork Bank were eligible. The
defendants contended that the plaintiff was not an "employee" within the meaning of the stock plan
on the date her rights under the stock plan vested. Before discovery, the Supreme Court granted that
branch of the plaintiff's motion which was for summary judgment on the issue of liability.

The Supreme Court properly granted that branch of the plaintiff's motion which was
for summary judgment on the issue of liability. After the plaintiff established her prima facie

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entitlement to judgment as a matter of law on the issue of liability (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557), the defendants failed to raise a triable issue of fact in opposition (*see Farrell Bldg. Co., Inc. v Shinnecock Elec. Inc.*, 71 AD3d 821; *Suraleb, Inc. v International Trade Club, Inc.*, 13 AD3d 612, 613). Moreover, the defendants failed to establish that the motion should have been denied pending discovery. The defendants failed to demonstrate that further discovery would lead to additional relevant evidence (*see CPLR 3212[f]*; *Lambert v Bracco*, 18 AD3d 619, 620). The defendants' remaining contention, which relates to the third cause of action, is raised for the first time on appeal, and thus we decline to consider it (*see Wexelbaum v Jean*, 80 AD3d 756; *cf. Misicki v Caradonna*, 12 NY3d 511, 519; *Matter of State Farm Mut. Auto. Ins. Co. v Olsen*, 22 AD3d 673, 674).

SKELOS, J.P., BALKIN, ENG and AUSTIN, 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