

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

D32052
O/kmb

_____AD3d_____

Submitted - June 22, 2011

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2010-06978

DECISION & ORDER

Eduardo Delarosa, etc., respondent, v Besser
Company, et al., appellants, et al., defendants.

(Index No. 3711/09)

Meiselman, Denlea, Packman, Carton & Eberz, P.C., White Plains, N.Y. (Peter N. Freiberg of counsel), for appellants.

Davis, Saperstein & Salomon, P.C., New York, N.Y. (Michelle S. Russo, P.C., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Besser Company, Besser Lithibar, Besser International Sales Co., and Lithibar Matik, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Orange County (Slobod, J.), dated June 11, 2010, as denied that branch of their motion which was to dismiss the complaint pursuant to CPLR 3126.

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

The Supreme Court providently exercised its discretion in denying that branch of the appellants' motion which was to dismiss the complaint pursuant to CPLR 3126(3), since there was no clear showing that the plaintiff's failure to comply with the appellants' discovery demand was willful and contumacious (*see* CPLR 3126; *ACME ANC Corp. v Read*, 55 AD3d 854, 855; *Myung Sum Suh v Jung Ja Kim*, 51 AD3d 883; *Manko v Lenox Hill Hosp.*, 44 AD3d 1014; *Resnick v Schwarzkopf*, 41 AD3d 573). The plaintiff substantially, albeit tardily, complied with the discovery

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demand (*see Mironer v City of New York*, 79 AD3d 1106, 1108; *ACME ANC Corp. v Read*, 55 AD3d at 855; *Resnick v Schwarzkopf*, 41 AD3d 573).

RIVERA, J.P., ANGIOLILLO, ENG, CHAMBERS and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive style with a large, prominent initial "M".

Matthew G. Kiernan
Clerk of the Court