

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

D32489
O/kmb

_____AD3d_____

Submitted - September 20, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2011-02640

DECISION & ORDER

Scott Needleman, et al., appellants, v
Chaim Tornheim, et al., defendants;
Quin Realty Corp., nonparty-respondent.

(Index No. 24255/09)

Bijal M. Jani, Pearl River, N.Y., for appellants.

Eric A. Schwartz, P.C., New York, N.Y., for nonparty-respondent.

In an action, inter alia, to recover damages for fraud, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Vaughan, J.), dated January 19, 2011, as granted that branch of the motion of the nonparty, Quin Realty Corp., which was to quash a subpoena duces tecum.

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

Contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of the motion of the nonparty, Quin Realty Corp., which was to quash the subject subpoena duces tecum, since the record fails to demonstrate that service of the subpoena was made on all parties to the action as required by statute (*see* CPLR 3120[3]; 2303; *Morano v Slattery Skanska, Inc.*, 18 Misc 3d 464, 472; *Matter of Roth*, 7 Misc 3d 1010[A], 2005 NY Slip Op 050521[U] [2005]; *Bldg Mgt. Co. v Schwartz*, 3 Misc 3d 351, 354-355). Additionally, the subpoena was facially defective and subject to being quashed because it neither contained nor was accompanied by an affirmation setting forth the language mandated by CPLR 3101(a)(4) (*see Kooper v Kooper*, 74 AD3d 6, 13; *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055, 1056; *Wolf v Wolf*, 300 AD2d 473; *Knitwork Prods. Corp. v Helfat*, 234 AD2d 345, 346). Although Quin Realty Corp. did not raise this

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latter issue at the Supreme Court, we may consider it because “it is an issue of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture” (*Parry v Murphy*, 79 AD3d 713, 715; see *Williams v Naylor*, 64 AD3d 588, 588-589; *Block v Magee*, 146 AD2d 730, 732-733).

The plaintiffs’ remaining contentions are without merit.

MASTRO, J.P., FLORIO, ENG and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court