

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

D33580
C/prt

_____AD3d_____

Argued - December 15, 2011

WILLIAM F. MASTRO, A.P.J.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2009-11417

DECISION & ORDER

Breslin Realty Development Corp., et al., appellants, v
J. Stanley Shaw, et al., defendants; Louis A. Russo, as
executor of the estate of Ronald Pecunies, proposed
intervenor-respondent.

(Index No. 4182/05)

Dollinger, Gonski & Grossman, Carle Place, N.Y. (Matthew Dollinger, Leslie A.
Foodim, Dennis M. Gonski, and Floyd G. Grossman of counsel), for appellants.

Jaspan Schlesinger LLP, Garden City, N.Y. (Steven R. Schlesinger and Joanne L.
Oweis of counsel), for proposed intervenor-respondent.

In an action to recover damages for legal malpractice, the plaintiffs appeal from so
much of an order of the Supreme Court, Nassau County (Warshawsky, J.), entered November 20,
2009, as granted the motion of Ronald Pecunies for leave to intervene in this action as a party
plaintiff to the extent of directing the plaintiffs' counsel to hold in escrow the sum of \$117,120,
purportedly representing the share of the proceeds of the settlement of this action claimed by Ronald
Pecunies, for 30 days.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and the motion for leave to intervene is denied in its entirety.

We agree with the plaintiffs' contention that the motion of Ronald Pecunies for leave
to intervene in this action as a party plaintiff should have been denied in its entirety. By the time
Pecunies filed the motion, the litigating parties had already entered into a stipulation of settlement
and this action was discontinued. Further, Pecunies was aware of this action from its inception, yet

January 24, 2012

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chose not to participate. Under these circumstances, there was no pending action in which to intervene, and the motion should have been denied in its entirety by the Supreme Court (*see* CPLR 1012, 1013; *Carnrike v Youngs*, 70 AD3d 1146; *Rectory Realty Assoc. v Town of Southampton*, 151 AD2d 737; *176 E. 123rd St. Corp. v Frangen*, 67 Misc 2d 281).

In any event, the relief granted by the Supreme Court, in the nature of establishing a temporary receivership, was improper because the settlement proceeds at issue here were not the subject of any action, and there was no clear evidentiary showing that the subject property was in imminent danger of irreparable loss or waste (*see* CPLR 6401[a]; *Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631, 632; *Singh v Brunswick Hosp. Ctr.*, 2 AD3d 433; *Matter of Armienti & Brooks*, 309 AD2d 659, 661; *Schachner v Sikowitz*, 94 AD2d 709).

In light of our determination, we need not address the plaintiffs' remaining contentions.

MASTRO, A.P.J., BALKIN, CHAMBERS and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court