

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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CA 09-01643

PRESENT: SMITH, J.P., CARNI, PINE, AND GORSKI, JJ.

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IN THE MATTER OF THE ESTATE OF EUGENE JASON,  
DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LISA HERDMAN, NOW KNOWN AS LISA KRUE,  
DEFENDANT-RESPONDENT.

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FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered December 30, 2008 in a declaratory judgment action. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this declaratory judgment action by filing a summons and complaint. Simultaneously, plaintiff filed an order to show cause seeking the same declaratory relief. We deem the order to show cause as constituting a motion for summary judgment, and we conclude that Supreme Court properly denied the motion. " 'A motion for summary judgment may not be made before issue is joined . . . [,] and [the courts have] strictly adhered to [that requirement]' " (*Ward v Guardian Indus. Corp.*, 17 AD3d 1100, 1101, quoting *City of Rochester v Chiarella*, 65 NY2d 92, 101; see CPLR 3212 [a]; *Coolidge Equities Ltd. v Falls Ct. Props. Co.*, 45 AD3d 1289).

Entered: February 11, 2010

Patricia L. Morgan  
Clerk of the Court