

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

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CA 09-02528

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

PETER ALEKSANDROWICZ,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CANTELLA & COMPANY, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANTS.

WINGET, SPADAFORA & SCHWARTZBERG, LLP, NEW YORK CITY (HARRIS B. KATZ
OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICE OF GERARD A. STRAUSS, HAMBURG (GERARD A. STRAUSS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered March 12, 2009. The order denied the motion of defendant Cantella & Company, Inc. to dismiss the amended complaint.

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

Memorandum: We conclude with respect to the appeal by defendant Cantella & Company, Inc. (Cantella) that Supreme Court properly denied its motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (7). As the court properly held, the failure of Cantella to include a copy of the amended complaint with its motion papers is a fatal defect requiring denial of the motion (*see Soule v Lozada*, 232 AD2d 825). Further, although plaintiff and Cantella address the merits of plaintiff's causes of action in their briefs on appeal, we are unable to determine Cantella's motion in the interest of judicial economy because "neither [the original nor the amended] complaint was made part of the record" (*Jiggetts v Dowling*, 3 AD3d 326, 327, *lv denied* 3 NY3d 603; *cf. Soule*, 232 AD2d 825). We reject the contention of plaintiff on his cross appeal that the court abused its discretion in denying his application for costs and attorney's fees pursuant to 22 NYCRR 130-1.1 inasmuch as plaintiff failed to establish that Cantella's motion was "completely without merit in law" and thus that the motion was "frivolous" (22 NYCRR 130-1.1 [c] [1]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court