

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

812

CA 14-02149

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

AFFINITY ELMWOOD GATEWAY PROPERTIES, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

AJC PROPERTIES LLC, ET AL., DEFENDANTS,
EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN
GATHERS, ANGELINE C. GENOVESE, SANDRA
GIRAGE, ANDREW B. LANE AND LORENZ M.
WUSTNER, DEFENDANTS-APPELLANTS.

ARTHUR J. GIACALONE, EAST AURORA, FOR DEFENDANTS-APPELLANTS.

LIPPES, MATHIAS, WEXLER, FRIEDMAN, LLP, BUFFALO (BRENDAN H. LITTLE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 13, 2014. The order denied a motion by defendants Evelyn Bencinich, Susan M. Davis, Steven Gathers, Angeline C. Genovese, Sandra Girage, Lorenz M. Wustner, and Andrew B. Lane to settle the consolidated record on appeal.

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

Memorandum: Defendants-appellants (defendants) appeal from an order denying their motion to settle the consolidated record on appeal by excluding the 10-day trial transcript. We affirm. Contrary to defendants' contention, their appeal does not merely concern "exceptions to rulings on questions of law" such that no transcript is required (CPLR 5525 [b]). Rather, because "this appeal will necessarily involve questions of fact, an appeal without a transcript is not appropriate" (*Robinson & Carpenter v Gangl*, 31 AD2d 665, 666). "In the absence of a stipulation by the parties to the contrary, the court was required under CPLR 5525 to settle only a complete trial transcript" (*Rush v Insogna*, 170 AD2d 753, 753).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court