

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

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CA 10-02125

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

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JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER  
TRUCKING, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CENTER POINT TRANSFER STATION, INC.,  
MATTHEW W. LOUGHRY AND KENNETH LOUGHRY,  
DEFENDANTS-APPELLANTS.

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E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 2, 2010 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the cross motion is denied without prejudice and as modified the order is affirmed without costs.

Memorandum: Supreme Court properly concluded that it was premature to grant defendants' cross motion for summary judgment dismissing the complaint at this stage of the litigation, in view of the limited discovery that has been conducted (see CPLR 3212 [f]; *Sportiello v City of New York*, 6 AD3d 421). We further conclude, however, that the court should have denied the cross motion without prejudice (see *Hall v Rite Aid Corp.*, 37 AD3d 1160). We therefore modify the order accordingly.

Entered: March 25, 2011

Patricia L. Morgan  
Clerk of the Court