

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

782

CA 23-00306

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

ANNE MACKIEWICZ, AS EXECUTOR OF THE ESTATE OF
PAUL O. JESSEN, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

AUTUMN VIEW HEALTH CARE FACILITY, AUTUMN VIEW
HEALTH CARE FACILITY, LLC, THE MCGUIRE GROUP, INC.,
VESTRA SPVI, LLC, AND VESTRA SPV2, LLC,
DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, NEW YORK CITY (BRIAN D. GINSBERG OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BROWN CHIARI, LLP, BUFFALO (ANDREA N. CONJERTI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 14, 2022. The order, *inter alia*, denied the motion of defendants insofar as it sought to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: As limited by their brief, defendants appeal from an order that, *inter alia*, denied their motion insofar as it sought to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). We conclude that the appeal must be dismissed inasmuch as that order was materially amended by a subsequent order (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]), and we decline to exercise our discretion to treat the notice of appeal as one taken from the subsequent order (*see Matter of Justeen T.*, 17 AD3d 1148, 1148 [4th Dept 2005]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court