

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M72195
E/sl

ROBERT A. SPOLZINO, J.P.
EDWARD D. CARNI
THOMAS A. DICKERSON
RANDALL T. ENG, JJ.

2007-04902

DECISION & ORDER ON MOTION

In the Matter of Lawrence Tumminello,
appellant, v Florence Bolten, respondent.

(Index No. 80317/06)

Motion by the respondent on an appeal from an order of the Supreme Court, Richmond County, dated March 13, 2007, (1) to direct the appellant to serve and file a supplemental record containing an order of the Supreme Court, Kings County, dated September 10, 2002, an affirmation of Robert E. Polistena, dated October 9, 2002, and an affidavit of Lawrence Tumminello, dated November 30, 2006, which are attached to the respondent's moving papers as Exhibits C, D, and E, (2) to strike pages 224 through 231 of the record on appeal, consisting of a sur-reply affirmation of Mary Margaret Looby, dated December 21, 2006, and attached exhibits, and to strike the references to the sur-reply affirmation from the appellant's brief in the second and third sentences of the first full paragraph on page 5 and the first two full sentences on page 10, (3) to enlarge the time to serve and file a brief, (4) and for an award of costs and an attorney's fee and to impose a sanction upon the appellant. By decision and order on motion dated April 21, 2008, the matter was remitted to the Supreme Court, Richmond County, to report on whether the court considered the sur-reply affirmation of Mary Margaret Looby, dated December 21, 2006, and attached exhibits, in determining the motion that resulted in the order dated March 13, 2007, and the respondent's motion was held in abeyance in the interim. The Supreme Court, Richmond County, has filed its report.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the report of the Supreme Court, Richmond County, it is

ORDERED that the branch of the motion which is to direct the appellant to serve and file a supplemental record containing the order dated September 10, 2002, the affirmation of Robert E. Polistena, dated October 9, 2002, and the affidavit of Lawrence Tumminello, dated November 30, 2006, which were attached to the respondent's moving papers as Exhibits C, D, and E, is granted and on or before July 24, 2008, the appellant shall serve and file a supplemental record containing those documents; and it is further,

June 26, 2008

MATTER OF TUMMINELLO v BOLTEN

Page 1.


ORDERED that the branch of the motion which is to strike pages 224 through 231 of the record on appeal, consisting of a sur-reply affirmation of Mary Margaret Looby, dated December 21, 2006, and attached exhibits, and to strike the references to the sur-reply affirmation from the appellant's brief in the second and third sentences of the first full paragraph on page 5 and the first two full sentences on page 10, is granted and on or before July 24, 2008, the appellant shall serve and file a replacement record and appellant's brief or delete or remove the stricken material from the copies of the record and the appellant's brief filed with the Clerk of the court; and it is further,

ORDERED that the branch of the motion which is to enlarge the respondent's time to serve and file a brief is granted, the respondent's time to serve and file a brief is enlarged until August 25, 2008, and the respondent's brief must be served and filed on or before that date; and it is further,

ORDERED that the branch of the motion which is for an award of costs and an attorney's fee and to impose a sanction upon the appellant is denied.

SPOLZINO, J.P., CARNI, DICKERSON and ENG, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court