

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

536

CA 12-02077

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

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ALBERT KILLIAN AND MELISSA KILLIAN,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

KEVIN HEIMAN, DEFENDANT-APPELLANT.

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BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 17, 2011. The order, insofar as appealed from, denied the motion of defendant to dismiss the amended complaint.

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

Memorandum: Defendant appeals from an order that, inter alia, denied his motion to dismiss the amended complaint with prejudice on the ground that one of the plaintiffs failed to appear at trial for a scheduled cross-examination. Defendant's contention that Supreme Court abused its discretion in denying that motion involves matters outside the record on appeal. We therefore are unable to determine the merits of defendant's contention, and defendant, "as the appellant, . . . must suffer the consequences" of submitting an incomplete record (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; see *Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: April 26, 2013

Frances E. Cafarell  
Clerk of the Court