

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

D16169
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_____AD3d_____

Argued - June 5, 2007

HOWARD MILLER, J.P.
WILLIAM F. MASTRO
ROBERT A. LIFSON
EDWARD D. CARNI, JJ.

2007-00740

DECISION & ORDER

Robert J. Verolla, respondent, v Beechwood Carmen
Building Corp., appellant.

(Index No. 19566/05)

Bauman Katz & Grill LLP, New York, N.Y. (Daniel E. Katz and Yasmin R. Saeed
of counsel), for appellant.

In an action, inter alia, to rescind a contract for the sale of real property, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Tanenbaum, J.), entered December 11, 2006, as denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the defendant's motion for summary judgment dismissing the complaint is granted.

The defendant established its prima facie entitlement to judgment as a matter of law by submitting the terms of the parties' real estate sale contract and evidence unequivocally demonstrating that the plaintiff defaulted thereunder. Moreover, the plaintiff failed to raise a triable issue of fact in response, thus warranting the granting of the defendant's motion. Accordingly, pursuant to settled case law and the express terms of the contract, the defendant was entitled to retain the monies deposited with it by the plaintiff pursuant to the contract (*see Maxton Bldrs. v Lo Galbo*, 68 NY2d 373; *New Colony Homes, Inc. v Long Is. Prop. Group, LLC*, 21 AD3d 1072; *Micciche v Homes by Timbers, Inc.*, 18 AD3d 833; *Hegner v Reed*, 2 AD3d 683; *Ittleson v Barnett*, 304 AD2d 526; *Collar City Partnership I v Redemption Church of Christ of Apostolic Faith*, 235 AD2d 665).

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Contrary to the determination of the Supreme Court, the mere fact that the amount retained by the defendant constituted approximately 14% of the contract price failed to raise a triable issue as to whether the parties' arm's length agreement provided for an unenforceable penalty or was the product of overreaching (*see e.g. Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230; *Collar City Partnership I v Redemption Church of Christ of Apostolic Faith, supra*; *Vitolo v O'Connor*, 223 AD2d 762; *Badame v Bock Enters.*, 190 AD2d 1066).

MILLER, J.P., MASTRO, LIFSON and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court