

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

D17285
O/cb

_____AD3d_____

Argued - November 26, 2007

HOWARD MILLER, J.P.
STEPHEN G. CRANE
MARK C. DILLON
RUTH C. BALKIN, JJ.

2006-09612

DECISION & ORDER

Richard Herbst, respondent, v 1514 Eastern Parkway,
Ltd., appellant, et al., defendant.

(Index No. 45677/02)

Byers & Byers, New York, N.Y. (Stafford H. Byers and Eugene Byers of counsel),
for appellant.

Tenenbaum & Berger, LLP, Brooklyn, N.Y. (David M. Berger of counsel), for
respondent.

In an action for specific performance of a contract for the sale of real property, the
defendant 1514 Eastern Parkway, Ltd., appeals from a judgment of the Supreme Court, Kings County
(Held, J.), dated August 16, 2006, which, after a nonjury trial, is in favor of the plaintiff and against
it directing, inter alia, specific performance of the subject contract for the sale of real property.

ORDERED that the judgment is affirmed, with costs.

Where a case is tried without a jury, the power of the Appellate Division is as broad
as that of the trial court, and this court may render the judgment it finds warranted by the facts, taking
into account that in a close case the trial judge had the advantage of seeing the witnesses (*see*
Northern Westchester Professional Park Assoc. v Town of Bedford, 60 NY2d 492, 499; *Musick v*
330 Wythe Ave. Assoc. LLC, 41 AD3d 675, 675). Here, there was sufficient evidence demonstrating
that the appellant, on the basis of a mortgage contingency clause that ran solely to the benefit of the
purchaser, repudiated the subject contract in a manner constituting an anticipatory breach (*see*
Goldstein v Held, 37 AD3d 657, 658; *Coneys v Game*, 141 AD2d 795), and that the plaintiff, as

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assignee of the defendant Aaron Fromowitz, was ready, willing, and able to perform his obligations under the subject contract (*see Goldstein v Held*, 37 AD3d at 658).

The appellant's remaining contentions are without merit.

MILLER, J.P., CRANE, DILLON and BALKIN, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court