

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

D18982  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - March 31, 2008

REINALDO E. RIVERA, J.P.  
PETER B. SKELOS  
FRED T. SANTUCCI  
ARIEL E. BELEN, JJ.

2008-00545

DECISION & ORDER

Velappan Veeraswamy, et al., appellants,  
v Novak Juhase & Stern, LLP, respondent.

(Index No. 14733/07)

Howard R. Birnbach, Great Neck, N.Y., for appellants.

Novak Juhase & Stern, LLP, Cedarhurst, N.Y. (G. Alexander Novak of counsel),  
respondent pro se.

In an action to recover a down payment made pursuant to a contract for the sale of real property, the plaintiffs appeal from an order of the Supreme Court, Queens County (Agate, J.), entered December 13, 2007, which denied their motion for summary judgment.

ORDERED that the order is affirmed, with costs.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Here, the plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law. Triable issues of fact exist, inter alia, as to whether the plaintiffs can be charged with an anticipatory breach or repudiation of the subject contract (*see IBM Credit Fin. Corp. v Mazda Motor Mfg. Corp.*, 92 NY2d 989, 993; *Morgan v McCaffrey*, 14 AD3d 670, 671), and whether they are entitled to the return of their down payment. Accordingly, the Supreme Court properly denied the plaintiffs’ motion for summary judgment.

April 29, 2008

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The parties' remaining contentions are without merit.

RIVERA, J.P., SKELOS, SANTUCCI and BELEN, 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