

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

D19733
X/kmg

_____AD3d_____

Argued - May 22, 2008

STEVEN W. FISHER, J.P.
EDWARD D. CARNI
WILLIAM E. McCARTHY
ARIEL E. BELEN, JJ.

2007-02244
2007-10967

DECISION & ORDER

Stephen M. Somma, et al., respondents, v Maureen
Richardt, a/k/a Maureen Richardt-Gallagher, appellant.

(Index No. 03-26887)

Levine & Gordet, Brooklyn, N.Y. (Stephen Levine of counsel), for appellant.

Phillips, Weiner, Quinn, Artura & Cox, Lindenhurst, N.Y. (Richard F. Artura of
counsel), for respondents.

In an action to recover damages for breach of a contract for the sale of real property, the defendant appeals from (1) an order of the Supreme Court, Suffolk County (R. Doyle, J.), dated December 21, 2006, which, inter alia, denied her motion for summary judgment dismissing the complaint and for summary judgment on the counterclaim and, in effect, granted that branch of the plaintiffs' cross motion which was for summary judgment on the issue of liability on the complaint, and (2) an order of the same court dated October 25, 2007, which denied her motion, denominated as one for leave to renew, but which was, in actuality, for leave to reargue.

ORDERED that the appeal from the order dated October 25, 2007, is dismissed; and it is further,

ORDERED that the order dated December 21, 2006, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

June 24, 2008

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The appeal from the order dated October 25, 2007, must be dismissed. The defendant's motion, denominated as one for leave to renew its prior motion for summary judgment dismissing the complaint and its opposition to the plaintiffs' cross motion for summary judgment, was not based upon new facts (*see* CPLR 2221[e]; *Cordero v Mirecle Cab Corp.*, _____AD3d_____, 2008 NY Slip Op 04459 [2d Dept 2008]; *Trahan v Galea*, 48 AD3d 791). Accordingly, the motion, denominated as one for leave to renew, in actuality, was a motion for leave to reargue, the denial of which is not appealable (*see Cordero v Mirecle Cab Corp.*, _____AD3d_____, 2008 NY Slip Op 04459 [2d Dept 2008]; *Trahan v Galea*, 48 AD3d 791; *Pfeiffer v Jacobowitz*, 29 AD3d 661).

In April 2003 the parties entered into a contract whereby the defendant agreed to sell to the plaintiffs real property located in West Hills, New York, for the sum of \$520,000. The contract provided that the closing was to occur "on or about May 15, 2003." The plaintiffs paid a down payment in the sum of \$25,000 to the defendant. On July 7, 2003, the defendant allegedly cancelled a closing that was scheduled for July 8, 2003. Thereafter, by letter dated July 18, 2003, the plaintiffs informed the defendant that the closing was rescheduled for July 30, 2003, that time was of the essence, and that they would consider the defendant in default if the closing did not occur on that date. The defendant allegedly informed the plaintiffs on July 23, 2003, that she was not closing on July 30, 2003, and that she had no intention of selling her house to them. No closing ever took place.

Thereafter, the defendant sold the subject property to another individual on or about December 9, 2004, for the sum of \$575,000. After the defendant returned the down payment to the plaintiffs, the plaintiffs commenced this action against the defendant to recover damages for breach of contract. The defendant asserted a counterclaim alleging that the plaintiffs breached the contract. The defendant moved for summary judgment dismissing the complaint and for summary judgment on the counterclaim and the plaintiffs cross-moved for summary judgment on the complaint.

The plaintiffs demonstrated their prima facie entitlement to judgment as a matter of law on the issue of liability on the complaint (*see Alvarez v Prospect Hosp.*, 68 NY2d 320). While the original contract did not include a provision that time was of the essence, the letter dated July 18, 2003, sent by the plaintiffs to the defendant provided unequivocal notice that the closing date was July 30, 2003, where time was of the essence and that the defendant's failure to comply would be considered a default (*see Guippone v Gaias*, 13 AD3d 339; *Moray v DBAG, Inc.*, 305 AD2d 472). Accordingly, the defendant's statements to the plaintiffs that she did not intend to attend the closing amounted to an anticipatory breach of the contract (*see Yitzhaki v Sztaberek*, 38 AD3d 535), and the plaintiffs were not required to demonstrate that they were ready, willing, and able to close because the necessity for such a tender was obviated by the defendant's anticipatory breach (*see Moray v DBAG, Inc.*, 305 AD2d 472; *Ehrenpreis v Klein*, 260 AD2d 532).

In opposition, the defendant failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557). Accordingly, the Supreme Court properly, in effect, granted that branch of the plaintiffs' cross motion which was for summary judgment on the issue of liability on the complaint and denied the defendant's motion for summary judgment.

The defendant's remaining contentions are without merit.

FISHER, J.P., CARNI, McCARTHY and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court