

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

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_____AD3d_____

Argued - November 17, 2008

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2008-06289

DECISION & ORDER

H.B. Singer, LLC, respondent, v Thor Realty, LLC,
appellant.

(Index No. 44554/07)

Matalon Shweky Elman, New York, N.Y. (Joseph Lee Matalon and Barbara R. Shweky of counsel), for appellant.

Friedman, Khafif & Sanchez, LLP, Brooklyn, N.Y. (Andrew M. Friedman of counsel), for respondent.

In an action to recover damages for breach of contract, fraud, and conversion, the defendant appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated May 8, 2008, which denied its motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action.

ORDERED that the order is affirmed, with costs.

Upon the closing of title and transfer of the deed to seven parcels of real property in Brooklyn, the sum of \$2,000,000 was placed in escrow with a title company to cover open liens and other obligations docketed against the parcels. Following the closing, the defendant purchaser directed the title company to pay the sum of \$170,000 from the escrowed funds to Good Ideas, Inc., the designee of Eli Dayan, a nonparty who had an agreement with the plaintiff seller for a one-percent consulting fee upon the closing of title for having brought the parties together. The plaintiff then commenced this action alleging breach of contract, fraud, and conversion on the ground that the defendant, in collusion with Dayan, and knowing that the plaintiff had defenses to any claims for

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payment that Dayan might have made, wrongfully directed the \$170,000 payment to Dayan's designee from the escrowed funds. The plaintiff asserted in the complaint that the disputed sum of \$170,000 should have been returned to it as part of the purchase price of the parcels. Contrary to the defendant's contention, the merger doctrine does not require dismissal of the action. The retention of the escrow funds was for the purpose of satisfying obligations still outstanding after the closing. Thus, there was a clear intent that the escrow agreement would survive the delivery of the deed (*cf. Crowley Mar. Assoc. v Nyconn Assoc.*, 292 AD2d 334), and therefore, the plaintiff's right to the disputed funds was not extinguished by merger upon the closing of title (*cf. 27 Smith St. Brooklyn Corp. v Bayside Fuel Oil Depot Corp.*, 262 AD2d 278).

The defendant's remaining contentions are without merit.

FISHER, J.P., ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court