

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

D24968  
C/prt

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

Argued - October 13, 2009

MARK C. DILLON, J.P.  
HOWARD MILLER  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON, JJ.

---

2008-11540  
2009-00852

DECISION & ORDER

Applied Behavior Analysis, Inc., appellant, v  
Greater New Jersey Annual Conference of  
United Methodist Church, respondent.

(Index No. 6678/07)

---

Welby, Brady & Greenblatt, LLP, White Plains, N.Y. (Alan D. Singer of counsel), for appellant.

Daniel E. Bertolino, P.C., Upper Nyack, N.Y. (Laurie A. Dorsainvil of counsel), for respondent.

In an action to recover a down payment for the purchase of real property, the plaintiff appeals from (1) an order of the Supreme Court, Rockland County (Garvey, J.), dated November 17, 2008, which denied its motion for summary judgment and granted the defendant's cross motion for summary judgment dismissing the complaint and on its counterclaim, and (2) a judgment of the same court dated December 8, 2008, which, upon the order, inter alia, is in favor of the defendant and against it in the principal sum of \$162,500.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

November 10, 2009

Page 1.

APPLIED BEHAVIOR ANALYSIS, INC. v GREATER NEW JERSEY ANNUAL  
CONFERENCE OF UNITED METHODIST CHURCH

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

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

The plaintiff entered into a contract with the defendant to purchase a building to be used as one of the locations of the plaintiff's school. In accordance with the contract, the plaintiff paid a \$162,500 down payment to the defendant's attorney, as escrowee. The plaintiff did not appear at a scheduled closing, and subsequently brought this action to recover its down payment.

The plaintiff moved for summary judgment, and the defendant cross-moved for summary judgment dismissing the complaint and its counterclaim. The Supreme Court correctly determined that the defendant demonstrated its prima facie entitlement to judgment as a matter of law (*see generally, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). In support of its cross motion, the defendant submitted evidence that because the plaintiff became concerned that repairs to the subject building would not be performed prior to the start of the upcoming school year, and that it would not have a site for its school, the plaintiff extended its lease at its former location and notified its lender that its lease "will, undoubtedly, put a significant strain on the budget." The lender determined that the plaintiff's additional obligation to pay rent under the extended lease was a change in financial condition and rescinded the loan commitment.

In opposition to the cross motion, the plaintiff failed to raise a triable issue of fact as to whether its financial condition leading to the rescission of the loan commitment was through no fault of its own and was not intended to bring about the failure of the real estate contract (*see generally Garber v Giordani*, 16 AD3d 454; *Kapur v Stiefel*, 264 AD2d 602, 603; *see also Sciales v Foulke*, 217 AD2d 693; *Creighton v Milbauer*, 191 AD2d 162, 164-165; *Lunning v 10 Blecker St. Owners Corp.*, 160 AD2d 178; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York*, 49 NY2d 557, 562).

For these reasons, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law, and the Supreme Court properly denied its motion for summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

DILLON, J.P., MILLER, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court