

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

D30442
W/ct

_____AD3d_____

Submitted - February 7, 2011

REINALDO E. RIVERA, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2010-05376

DECISION & ORDER

Rivka Benhamo, appellant, v Joseph Marinelli,
et al., respondents.

(Index No. 25689/09)

Michael and Swerdloff, LLC, Brooklyn, N.Y. (Leonard Swerdloff of counsel), for appellant.

Goldhaber Weber & Goldhaber, New York, N.Y. (Robert M. Goldhaber of counsel), for respondents.

In an action, inter alia, for specific performance of a contract for the sale of real property, the plaintiff appeals from an order of the Supreme Court, Kings County (Martin, J.), dated May 7, 2010, which, among other things, granted the defendants' motion for summary judgment dismissing the complaint and to vacate a notice of pendency filed in connection with the subject property.

ORDERED that the order is affirmed, with costs.

The defendants established their prima facie entitlement to judgment as a matter of law by tendering evidence in admissible form that the defendants Joseph Marinelli and Monique Marinelli (hereinafter together the sellers) were ready, willing, and able to perform their obligations pursuant to a contract for the sale of the subject real property on the law day, and that the plaintiff failed to appear and proceed with the closing (*see Stenda Realty, LLC v Kornman*, 67 AD3d 996, 998; *Pinhas v Comperchio*, 50 AD3d 1117). In opposition to the defendants' motion, the plaintiff failed to raise a triable issue of fact. The sellers had declared that time was of the essence, a condition to which the

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plaintiff, through her counsel, agreed. As a result, in order to obtain specific performance of the contract, the plaintiff was required to first tender performance and demand good title (*see Zeitoune v Cohen*, 66 AD3d 889, 891; *Nowak v Rametta*, 43 AD3d 1120, 1122; *Steinberg v Linzer*, 27 AD3d 450, 452; *Paglia v Pisanello*, 15 AD3d 373). Here, however, the plaintiff failed to do so, as she never substantiated her contention that she had the funds to purchase the property (*see Zeitoune v Cohen*, 66 AD3d at 892; *Madison Equities, LLC v MZ Mgt. Corp.*, 17 AD3d 639, 640; *see also Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1010).

As the defendants established that the plaintiff defaulted under the contract, and the plaintiff failed to rebut that showing or proffer any excuse for her defaults, the sellers' attorney was authorized to release the down payment from escrow to the sellers, who were thereafter entitled to retain the down payment as liquidated damages pursuant to the contract (*see Stenda Realty, LLC v Kornman*, 67 AD3d at 999; *Hegner v Reed*, 2 AD3d 683, 685).

The parties' remaining contentions either need not be reached in light of our determination, have been rendered academic, or are without merit.

RIVERA, J.P., BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court