

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

D30458  
W/kmb

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

Submitted - February 10, 2011

MARK C. DILLON, J.P.  
ANITA R. FLORIO  
THOMAS A. DICKERSON  
JEFFREY A. COHEN, JJ.

---

2009-11274

DECISION & ORDER

Leigh Andrew Brand III, et al., appellants, v  
Ann-Marie Nordgren, respondent.

(Index No. 12623/07)

---

Daniels and Porco, LLP, Carmel, N.Y. (Robert S. Lusardi of counsel), for appellants.

Smith, Ranscht, Connors & Mutino, P.C., White Plains, N.Y. (Peter J. Mutino of counsel), for respondent.

In an action to recover damages for breach of a contract for the sale of real property and for the return of a portion of a down payment given pursuant to that contract, the plaintiffs appeal from an order of the Supreme Court, Westchester County (Scheinkman, J.), entered October 22, 2009, which granted the defendant's motion for summary judgment dismissing the complaint and on the counterclaim for retention of a portion of the down payment.

ORDERED that the order is affirmed, with costs.

The plaintiffs (hereinafter together the purchasers) and the defendant (hereinafter the seller) entered into a contract for the sale of certain real property, which, inter alia, required the purchasers to tender a down payment to the seller in the sum of \$86,000. The purchasers and the seller subsequently executed a side letter agreement, which recited that, with certain exceptions, \$20,000 of the \$86,000 down payment was nonrefundable. As is relevant to this appeal, one exception to the nonrefundability of this \$20,000 was that, if the purchasers received an appraisal of the subject real property that valued it at less the \$860,000 purchase price, the otherwise nonrefundable \$20,000 portion of the down payment would be returned to them. However, the side

March 15, 2011

BRAND v NORDGREN

Page 1.

letter agreement also recited that the purchasers waived their right to any refund of the \$20,000 portion of the down payment if, by a date certain, they failed to obtain such an appraisal, or failed to notify the seller or her attorney of their receipt of such an appraisal.

After the time for the purchasers to timely notify the seller or her attorney of the existence of the required appraisal had lapsed, the seller exercised her right to retain the \$20,000 portion of the down payment, and returned the remaining \$66,000 to the purchasers. The purchasers commenced this action for the return of the remaining portion of the down payment. The seller counterclaimed to retain the nonrefundable \$20,000 portion of the down payment. The Supreme Court granted the seller's motion for summary judgment dismissing the complaint and on her counterclaim for retention of the \$20,000 nonrefundable portion of the down payment. The purchasers appeal, and we affirm.

The Supreme Court properly granted the seller's motion for summary judgment dismissing the complaint and on her counterclaim for retention of a portion of the down payment under the contract. The seller established, *prima facie*, that the purchasers failed to obtain an appraisal of the subject real property evaluating it at less than the purchase price, and failed to notify her or her attorney of their receipt of such an appraisal prior to the expiration of the contingency period, as required by the side letter agreement. In opposition, the purchasers failed to raise a triable issue of fact. The purchasers, in their statement of uncontroverted facts, conceded that they did not obtain an appraisal of the property, completed by their lending institution, which appraised the value of the property at an amount less than the purchase price, and that they did not notify the seller, on or before the deadline, that they had received a completed appraisal valuing the property at an amount less than the purchase price (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557; *see also Vibar Constr., Inc. v Konetchy*, 78 AD3d 819; *Martin v Burns*, 77 AD3d 633).

Accordingly, the Supreme Court properly granted the seller's motion for summary judgment dismissing the complaint and on her counterclaim to retain the specified portion of the down payment.

The purchasers' remaining contentions, raised for the first time on appeal, are not properly before this Court.

DILLON, J.P., FLORIO, DICKERSON and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court