

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

D32347
G/kmb

_____AD3d_____

Submitted - September 9, 2011

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2011-01800

DECISION & ORDER

Griffin's Landscaping Corporation (Corp.), respondent,
v Philip F. Bisesto, appellant.

(Index No. 686/09)

Handel & Carlini, LLP, Poughkeepsie, N.Y. (Anthony C. Carlini, Jr., of counsel), for
appellant.

Miles L. Markowitz, Millbrook, N.Y., for respondent.

In an action for specific performance of a contract for the sale of real property, the
defendant appeals from an order of the Supreme Court, Putnam County (Nicolai, J.), dated January
12, 2011, which, after a nonjury trial, directed him to convey the subject real property to the plaintiff.

ORDERED that on the Court's own motion, the notice of appeal is deemed an
application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is affirmed, with costs.

"As this case was tried to the court, without a jury, this Court's power to review the
evidence is as broad as that of the trial court, with appropriate regard given to the decision of the trial
judge who was in a position to assess the credibility of the witnesses" (*Bubba's Bagels of Wesley
Hills, Inc. v Bergstol*, 18 AD3d 411, 412; *see Northern Westchester Professional Park Assoc. v Town
of Bedford*, 60 NY2d 492, 499). Contrary to the defendant's contention, the terms of the parties'
agreement and the trial evidence regarding the parties' course of conduct thereunder amply
demonstrated that the parties mutually intended to credit the monthly payments made by the plaintiff

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toward the total purchase price of the subject real property, and to forego reliance upon the purchase money mortgage provision in their agreement (*see generally B. Reitman Blacktop, Inc. v Missirlian*, 52 AD3d 752, 753-754). Having acquiesced in this course of conduct for a period of approximately 10 years, during which time the plaintiff's payments exceeded the agreed purchase price of the property and the plaintiff paid all of the expenses associated with the property such that it would suffer "unconscionable injury" (*American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718) if specific performance was not granted, the defendant is estopped from now asserting that the contract is unenforceable (*see e.g. Piga v Rubin*, 300 AD2d 68,69; *Blechner v Pecoraro*, 164 AD2d 878, 880).

The defendant's remaining contentions are without merit.

MASTRO, J.P., BALKIN, CHAMBERS and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court