

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

D34371
N/prt

_____AD3d_____

Argued - February 10, 2012

RUTH C. BALKIN, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
ROBERT J. MILLER, JJ.

2011-03762

DECISION & ORDER

HSM Real Estate, Inc., respondent,
v Kasha Dragon, appellant.

(Index No. 18819/10)

Ingrid V. Wyllie, LLC, Brooklyn, N.Y., for appellant.

Robert M. Blakeman, Valley Stream, N.Y., for respondent.

In an action to retain a down payment given pursuant to a contract for the sale of real property, the defendant appeals from an order of the Supreme Court, Nassau County (Parga, J.), entered March 4, 2011, which, inter alia, granted the plaintiff's motion for summary judgment on the complaint.

ORDERED that the order is affirmed, with costs.

“Generally, a buyer who breaches a contract by applying for a mortgage loan greater than the one required under the express terms of the contract is not entitled to recover his down payment” (*Marx v Shustek*, 226 AD2d 351, 352; *cf. Gorgoglione v Gillenson*, 47 AD3d 472).

The plaintiff seller established, prima facie, that the defendant purchaser breached the parties' contract for the sale of real property by applying for a mortgage loan in the sum of \$455,000, an amount that exceeded the provision in the parties' contract requiring the defendant to secure a mortgage loan in the amount of \$400,000 (*see Humbert v Allen*, 89 AD3d 804, 807; *Post v Mengoni*, 198 AD2d 487; *Silva v Celella*, 153 AD2d 847). In opposition, the defendant failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Accordingly, the Supreme Court properly granted the plaintiff's motion for summary

judgment on the complaint.

The defendant's remaining contentions are without merit.

BALKIN, J.P., BELEN, HALL and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive style with a large initial "A".

Aprilanne Agostino
Clerk of the Court