

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1094

CA 10-00414

PRESENT: FAHEY, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

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JAMES F. FANTIGROSSI, JR. AND TERRY FANTIGROSSI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BRANNON HOMES, INC., DOING BUSINESS AS BRANNON  
HOMES AT CANDLEWOOD PARK, DEFENDANT-RESPONDENT.

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LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J.  
VERRILLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILIPPONE LAW OFFICES, ROCHESTER (ALEX F. PHILIPPONE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered August 31, 2009. The order, insofar as appealed from, granted in part the motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs entered into a contract with defendant for the purchase of residential property and the construction of a home and thereafter commenced this action seeking damages for, inter alia, breach of contract and fraud. Contrary to plaintiffs' contention, Supreme Court properly granted that part of defendant's motion for partial summary judgment dismissing the breach of contract cause of action insofar as it is based on the allegation that defendant was required by the contract to install nine-foot-wide garage doors but instead installed eight-foot-wide garage doors. Even assuming, arguendo, that nine-foot-wide garage doors were required by the contract, we conclude that plaintiffs are deemed to have waived the right to assert that defendant breached the parties' contract based on defendant's deviation from that contractual specification inasmuch as such a deviation would have been obvious during plaintiffs' pre-closing inspection of the home. Indeed, plaintiffs "could surely see the size of the garage [doors] when title was accepted, and they should be presumed to have intended to have . . . garage [doors] of that size" (*Ting-Wan Liang v Malawista*, 70 AD2d 415, 420). Also contrary to plaintiffs' contention, the court properly granted that part of defendant's motion for partial summary judgment dismissing the fraud cause of action because it "arises out of the same facts that serve as the basis of the breach of contract cause of

action and may not be independently asserted" (*Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 915).

Entered: October 1, 2010

Patricia L. Morgan  
Clerk of the Court