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COURT OF APPEALS

STATE OF NEW YORK

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PRINCES POINT LLC,

Appellant,

-against-

No. 92

MUSS DEVELOPMENT L.L.C.,

Respondent.

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20 Eagle Street  
Albany, New York  
September 5, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar is  
2 number 92, Princes Point v. Muss Development.

3 Good afternoon, sir.

4 MR. CIULLA: Good after - - - good afternoon,  
5 Your Honors. May it please the court, my name is John  
6 Ciulla of the Law Firm of Rosenberg Calica & Birney on  
7 behalf of the appellants - - - the appellant. I'd like to  
8 reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. CIULLA: In the order, the Appellate Division  
11 committed reversible error, in the first instance, by  
12 erroneously determining that merely by bringing this  
13 action, which included a rescission claim, that the  
14 appellant anticipatorily repudiated the party's real estate  
15 contract.

16 JUDGE GARCIA: Counsel, I have a factual question  
17 before you get into that. The last extension date, let's  
18 call it, is July 22nd, 2008, I think, right. If nobody  
19 does anything, action isn't brought but nobody does  
20 anything, neither party does anything, what happens under  
21 the terms of the contract?

22 MR. CIULLA: The contract would terminate.

23 JUDGE GARCIA: Without action by any party and  
24 then the deposit would be refunded?

25 MR. CIULLA: I believe so, Your Honor.

1 JUDGE GARCIA: And what about the money that's  
2 paid in to help in the effort to comply with whatever the  
3 environmental areas are?

4 MR. CIULLA: I believe that appellant would be  
5 entitled to receive the down payment as well as the  
6 compaction payments.

7 JUDGE WILSON: I assume you're relying on Section  
8 5.2 to say that the contract terminated if nobody did  
9 anything by the outside closing date?

10 MR. CIULLA: Well - - -

11 JUDGE WILSON: Well, let me ask - - -

12 MR. CIULLA: Yes.

13 JUDGE WILSON: Let me ask it this way.

14 MR. CIULLA: Well - - - okay.

15 JUDGE WILSON: Let me ask it this way.

16 MR. CIULLA: Sure.

17 JUDGE WILSON: I don't read Section 5.2 as saying  
18 anything about termination. It doesn't have the word  
19 termination in it at all. Section 5.3 does, and it gives a  
20 right of termination if, at any point after the outside  
21 closing date, one party gives the other party notice and  
22 then you have to provide 30 days' notice. Has anyone - - -  
23 is there anything in the record saying that either party  
24 sent notice of termination?

25 MR. CIULLA: No. There - - - there is no

1           indication of record that either party gave notice. But  
2           the way I would answer the question is this way, Your  
3           Honor. If the last outside closing date came and went,  
4           there was no closing, there was no conveyance, the  
5           respondents had an obligation to satisfy condition - - -  
6           express condition precedent of obtaining developmental  
7           approvals by that date. To the extent that they did not -  
8           - - and of course they did not and could not - - - I  
9           believe the contract would have terminated.

10                   JUDGE WILSON: Then - - - then what's the purpose  
11           of the language in Section 5.3 that says, "If the outside  
12           closing date has come and gone, the parties have the right  
13           to terminate with 30 days' notice"?

14                   MR. CIULLA: Well, I think that that section also  
15           provides that the parties have a right to extend it, and  
16           they did here. But there was a last outside closing date.  
17           And to answer Your Honor's question, I believe that if that  
18           closing date came and went and there wasn't a closing, that  
19           the contract would have terminated. And I believe that the  
20           respondents have taken that position in the litigation.

21                   JUDGE RIVERA: Well, what would otherwise be the  
22           purpose of a closing date, if not to have the closing on  
23           the property, of course.

24                   MR. CIULLA: Right.

25                   JUDGE RIVERA: But some end termination to this

1 contract.

2 MR. CIULLA: I'm sorry, Your Honor.

3 JUDGE RIVERA: Oh, I'm sorry. I'm - - - I'm not  
4 clear what - - - well, I'm just trying to appreciate what  
5 would be the point of a closing date? Obviously, it's to  
6 close on the real estate transaction.

7 MR. CIULLA: Right.

8 JUDGE RIVERA: I understand that. But otherwise  
9 to indicate the last day of the contract. I mean what - -  
10 -

11 MR. CIULLA: Well, it would indicate that at that  
12 point in time, the parties will - - - were required to  
13 perform their variations obligations under the contract.  
14 And in this particular situation, if that closing date had  
15 come and gone and the respondents had not satisfied the  
16 express condition precedent of obtaining all of the  
17 development approvals, then I believe the contract would  
18 have terminated.

19 JUDGE RIVERA: So the date comes and goes. Two  
20 months later, they get all the approvals they need, and  
21 they call up and say we're ready to close?

22 MR. CIULLA: As I understand the contract and the  
23 law, Your Honor, I - - - I believe that the contract would  
24 have - - - would have terminated by that date.

25 JUDGE WILSON: In Section 5.3(b), if - - - if a

1 party receives notice of termination after the outside  
2 closing date has occurred, gives the counterparty the right  
3 to waive the conditions that haven't been met and close  
4 anyway; is that right?

5 MR. CIULLA: That's - - - that's correct.

6 JUDGE FAHEY: Can I just ask you a little about  
7 what's - - - what's actually before us, your understanding  
8 of what's actually before us. The way I understand it,  
9 causes of action one and I think three are before us; is  
10 that correct? But the forbearance clause issue, cause of  
11 action two, is not before this court today.

12 MR. CIULLA: I believe - - -

13 JUDGE FAHEY: Is that right?

14 MR. CIULLA: - - - counterclaims one and three,  
15 Your Honor.

16 JUDGE FAHEY: Counterclaims, I'm sorry.

17 MR. CIULLA: Yes.

18 JUDGE FAHEY: And so two is not before us, so the  
19 forbearance clause issue, the arguments that were before us  
20 in - - - in the briefs and also the Appellate Division's  
21 reference to it really are not pertinent to the decision  
22 that we have to make today. Is that your understanding of  
23 it?

24 MR. CIULLA: That's correct. The - - - the only  
25 - - -

1 JUDGE FAHEY: Tell us why.

2 MR. CIULLA: The only issue before this court is  
3 whether or not the respondents are allowed to retain the  
4 down payment and the compaction payments.

5 JUDGE FAHEY: Right. Now take a step back. The  
6 case was pled as a - - - as I understand it, as rescission  
7 and reformation. Is - - - is that your understanding of  
8 it?

9 MR. CIULLA: Well, if I may just briefly go  
10 through the - - - the causes of action. There was a cause  
11 of action for a specific performance of the original  
12 contract - - -

13 JUDGE FAHEY: Right.

14 MR. CIULLA: - - - and an abatement of the  
15 purchase price; a rescission - - - a claim for rescission  
16 and/or affirmation of the amendment; and also included  
17 within the compl - - - the amended complaint was - - - was  
18 they sought - - - appellants sought relief to enjoin the  
19 termination of the contract pending the lawsuit.

20 JUDGE RIVERA: And you - - - I'm sorry.

21 JUDGE FAHEY: You don't need to - - - you don't  
22 need to go through them like that. I - - - we don't need  
23 that. What I - - - what - - - the reason I ask you for  
24 this question is because it seems to me many of the  
25 arguments that are addressed in the parties' brief and the

1 Appellate Division's decision as a reference to rescission  
2 really involved the question about whether or not this was  
3 an action for reformation.

4 MR. CIULLA: I - - - I believe that's correct,  
5 Your Honor. It was never an action about rescinding the  
6 entire contract.

7 CHIEF JUDGE DIFIORE: So talk us through the  
8 timing of this lawsuit.

9 MR. CIULLA: In - - - in way regard, Your Honor,  
10 if I - - - if I may.

11 CHIEF JUDGE DIFIORE: Well, it's a little curious  
12 to - - - to me, I'll speak for myself, that the lawsuit was  
13 brought at the eleventh hour.

14 MR. CIULLA: Well, I - - - I'm not passing the  
15 buck, so-to-speak. My firm didn't represent the appellant  
16 at that particular point in time. I - - - I frankly don't  
17 understand the thinking of bringing the lawsuit at that  
18 time except that it - - - it seemed pretty clear, looking  
19 at the record materials, that the respondents were not able  
20 to obtain the development approvals and close by the last  
21 outside closing date. And it appears that what the  
22 appellant was trying to do was to protect itself and  
23 vindicate its rights under the contract to try to move  
24 forward with the contract and proceed to a closing, but  
25 without some of the terms in the amendment or the amendment

1 altogether that they felt were procured by fraud.

2 JUDGE FAHEY: So - - - so is - - - okay. Is  
3 there any case law that you know of that equates  
4 commencement with rescission?

5 MR. CIULLA: No.

6 JUDGE FAHEY: No. So the theory, I suppose,  
7 would be that they were making an action for reformation.  
8 I'm assuming they were trying to get a closing, not not get  
9 a closing.

10 MR. CIULLA: Yes. There's - - -

11 JUDGE FAHEY: Yeah.

12 MR. CIULLA: If Your - - - if Your Honors look at  
13 the - - - the complaint and the record materials - - -

14 JUDGE RIVERA: Yes. But isn't there only one  
15 contract? It's the one that was amended and that's the one  
16 that you're trying to rescind?

17 MR. CIULLA: That - - - that's correct.

18 JUDGE RIVERA: So you're not - - - in that sense,  
19 you're not - - - you're not reforming that one, right. Or  
20 that's not what they were requesting.

21 MR. CIULLA: No.

22 JUDGE RIVERA: What they're requesting is we  
23 don't like this deal that we entered, and they - - - they  
24 give reasons, right. They claim there's fraud in the  
25 inducement, I didn't understand, whatever. I don't like

1           this deal. I like the prior deal.

2                   MR. CIULLA: They were seeking - - -

3                   JUDGE RIVERA: But - - - but the contract is this  
4 deal with the amendments.

5                   MR. CIULLA: Correct. But the law seems pretty  
6 clear to me that the - - - the refusal before them has to  
7 be unequivocal, unqualified, has to be absolute and  
8 definitive. If - - - if you have, as you have in this  
9 case, claims that seek to keep the contract alive.

10                   JUDGE RIVERA: But I guess that's what I'm  
11 saying. That's what I'm begging the question does this  
12 turn on whether or not we are in agreement with you that  
13 what you're trying to rescind is only the amendments  
14 versus, as the Department saw it, the Division saw it, that  
15 you were rescinding the contract because the only contract  
16 was this amended agreement?

17                   MR. CIULLA: No, Your Honor. Look, I think this  
18 is - - - this is a better case, if you will, because of the  
19 actual claims. But if it was just a straight-out  
20 rescission claim, I'm not sure that would make a  
21 difference, because as we argue in the briefs, the fact  
22 that a party to a contract is seeking an equitable remedy  
23 like rescission does not mean anything other than they're  
24 asking the court for that remedy. It doesn't mean that  
25 they're terminating the contract, they're canceling the

1 contract, or rescinding the contract themselves. But here,  
2 it's better - - -

3 JUDGE RIVERA: So simply stated, if - - - if you  
4 had lost and the court says you're bound by it, your  
5 position is then the clients would have complied?

6 MR. CIULLA: They would have complied.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Mr. Mollen.

9 MR. MOLLEN: Good afternoon. My name is Scott  
10 Mollen, Herrick, Feinstein, represent the respondents. I  
11 had the privilege of listening to Supreme Court Judge  
12 Stephen Breyer, and a different time, Judge Kaye, talk  
13 about the importance of common sense, the importance of  
14 being practical because when decisions are rendered that  
15 are not practical it doesn't generate respect from the  
16 public. Here's what happened. This is not an unusual fact  
17 pattern. A rising market in 2004, they sign a contract,  
18 buy it for 35 million. They're enthused. Although their  
19 papers say that the amendment was foisted on them, they  
20 always had the right in this contract because everyone  
21 understood this is a former waste site that had to be  
22 cleaned up.

23 JUDGE RIVERA: Okay. They may have whatever  
24 motives you suggest, but isn't the legal question whether  
25 or not filing the lawsuit is them saying we will not comply

1 with this contract ever, unequivocally, making that  
2 statement that they will not abide by their duties and  
3 obligations under the agreement?

4 MR. MOLLEN: Judge, I - - - I agree with you.  
5 And you - - - in the prior case, you talked about - - -

6 JUDGE RIVERA: That's a good thing. Yes.

7 MR. MOLLEN: I'm sorry?

8 JUDGE RIVERA: That's a good thing that you  
9 agree. Go ahead.

10 MR. MOLLEN: I - - - I hope so. In the prior  
11 case talked about ordinary meaning. That - - - that was  
12 important. You have a seller who saw they were accused of  
13 fraudulently inducing the other party into the contract.  
14 The request in the complaint, if one looks at the  
15 complaint, it was for rescission. Okay. Recession means  
16 terminate the contract.

17 JUDGE WILSON: In - - - in addition, "It was  
18 repeatedly for an injunction permanently restraining and  
19 prohibit the defendant sellers from terminating the  
20 agreement of sale."

21 MR. MOLLEN: You're - - - you're looking, I  
22 believe, at the addendum provision.

23 JUDGE WILSON: Yes.

24 MR. MOLLEN: I may be wrong.

25 JUDGE WILSON: Yes.

1 MR. MOLLEN: But - - - but if one looks at the  
2 facts in the pleading and one looks at the cause of action  
3 - - -

4 JUDGE WILSON: This is the relief requested.

5 MR. MOLLEN: I'm sorry?

6 JUDGE WILSON: This is the relief requested is -  
7 - - is for the - - - an injunction preventing the  
8 termination of the agreement.

9 MR. MOLLEN: I - - - I know what they said in  
10 their addendum. I also know that happens in a real estate  
11 transaction where you are trying to accomplish that, you  
12 move for a temporary restraining order to restrain the - -  
13 - to hold the expiration of the contract. You then ask for  
14 a preliminary injunction.

15 JUDGE FAHEY: But slow down. Every - - -

16 MR. CIULLA: No such motion was made.

17 JUDGE FAHEY: Slow down. Then every theory  
18 that's pled would amount to a legal conclusion under what  
19 you're arguing to the court. If you - - - if you - - -  
20 we'd have to take as a conclusion that the contract was  
21 rescinded, that the contract was reformed. Contrary  
22 pleadings, pleadings wouldn't make any sense. The theory  
23 that you're offering us, to go back to Judge Kaye, just  
24 common sense.

25 MR. MOLLEN: Sure.

1 JUDGE FAHEY: How can people do business in this  
2 situation.

3 MR. MOLLEN: Sure.

4 JUDGE FAHEY: The way you do business is you come  
5 in and you have five or six different arguments, some of  
6 them may work, some of them may not work in a legal  
7 setting. That seems to be what we have here.

8 MR. MOLLEN: Not - - - you don't have it for this  
9 reason.

10 JUDGE FAHEY: Okay.

11 MR. MOLLEN: Their argument - - - that's their  
12 argument - - -

13 JUDGE FAHEY: Right.

14 MR. MOLLEN: - - - that they alternatively pled.  
15 Here, the pleading - - - the - - - the cause of action is  
16 for - - - to terminate the contract or specific performance  
17 with an abatement. That's very important, with an  
18 abatement. That is a clear statement to a reasonable  
19 person. The seller took it that way.

20 JUDGE RIVERA: But isn't it clear from the  
21 complaint that they still wanted to purchase the property?

22 MR. MOLLEN: No. No.

23 JUDGE RIVERA: Just not under these terms - - -

24 MR. MOLLEN: Judge - - -

25 JUDGE RIVERA: - - - they entered into of March -

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MR. MOLLEN: Judge - - -

JUDGE RIVERA: - - - of whatever it was, 2006.

MR. MOLLEN: There's an old expression, if I can inject a little humor to make a point, watch the hands, not the lips. The conduct - - - the course of conduct here was to commence an action before the expiration date. Paragraph 10.2, I - - - is a key paragraph. 10.2 says that if you don't close - - -

JUDGE RIVERA: So if they wanted to terminate, couldn't they have done that in whatever, two days, forty-eight hours - - -

MR. MOLLEN: They - - -

JUDGE RIVERA: - - - whatever it was.

MR. CIULLA: They had the right. The interesting - - - the interesting - - -

JUDGE WILSON: Sorry. Can you - - - can you finish that and then if they don't close.

MR. MOLLEN: Before the expiration - - - if they don't close and the contract expires - - -

JUDGE WILSON: Before - - -

MR. MOLLEN: - - - the seller gets to keep the deposit.

JUDGE WILSON: No. It actually says before - - - on or before the last date required by this agreement. It

1 doesn't say the outside closing date. Is there a reason  
2 for that?

3 MR. MOLLEN: The last day required by the  
4 agreement. And - - - and - - -

5 JUDGE WILSON: But it doesn't say the outside  
6 closing date. Is there a reason for that?

7 MR. MOLLEN: I - - - I - - -

8 JUDGE WILSON: Let me ask it this way. If - - -  
9 just hypothetically, if the contract isn't terminated, does  
10 that affect who gets the deposit?

11 MR. MOLLEN: Well, I - - - under this contract,  
12 the terms of this contract provide either party had the  
13 right to terminate. They could have gotten their money  
14 back at - - - if they had terminated properly.

15 JUDGE WILSON: And I think there's nothing in the  
16 record, is that right, that either party terminated? Sent  
17 in a notice of termination?

18 MR. MOLLEN: That's correct. And there's a  
19 ruling at page 9, which has never been appealed, which is  
20 now the law of this case, that says that the contract  
21 expired by its terms. That's the ruling of the trial  
22 court. It is not before this court. So that is now the  
23 law of this case. So - - -

24 JUDGE RIVERA: Well, isn't - - - isn't by its  
25 terms the closing date if you have not extended it?

1 MR. MOLLEN: Correct.

2 JUDGE RIVERA: Isn't that this agreement?

3 MR. MOLLEN: Yes. It is - - - it is the closing  
4 date, and it was the July date. And in fact, in our brief,  
5 we cite to the malprac - - - their remedy - - - they  
6 claimed their lawyers never told them and sued their  
7 lawyers because they never told them by suing before the  
8 closing date that that could be an anticipatory breach.  
9 That's the action against their law firm.

10 JUDGE GARCIA: But really aren't - - - if you go  
11 to common sense, aren't really what they're trying to do is  
12 extend this contract? You're - - - you don't really want  
13 to sell them the property. They actually really want to  
14 buy it. So the roles are a little bit reversed here. So  
15 getting back to the Chief Judge's point, they bring this  
16 action on the eve of this thing expiring because they  
17 really don't want to cancel this contract, right. And then  
18 you, later, bring these counterclaims, which I think  
19 originally allege breach, not anticipatory repudiation,  
20 saying, oh, we were - - - you know, you breached the  
21 contract when you really never wanted to sell them this  
22 property anyway under these terms.

23 So to get into the common sense - - - because you  
24 were grudgingly extending that closing date, right. You're  
25 negotiating those extensions and it's very stringent

1 negotiations. This is the last one. So yes. They bring  
2 this to kind of stop the clock. And then yes. You bring a  
3 countersuit saying, oh, you breached the agreement. But  
4 was there really - - - if you're going to get under the  
5 common sense of this case, was there really ever any will  
6 on the part of the sellers here to sell this property to  
7 them under the terms of your contract?

8 MR. MOLLEN: Without question because under the  
9 contract, they had the right to - - - everybody knew this  
10 was a long-term permitting process. They understood that.  
11 That - - - the contract reeks of that. The correspondence  
12 reeks of that in the record. They had the right not only  
13 to terminate the contract, walk away at any time and get  
14 their deposit back, but what they had the right to also do  
15 is to close and take over the permitting process, and they  
16 could have done that, as well.

17 JUDGE STEIN: Would you - - -

18 MR. MOLLEN: But in - - - if I may - - -

19 JUDGE STEIN: Go ahead.

20 MR. MOLLEN: - - - just - - - just answer Judge's  
21 question, in 2008, the market was collapsing. Our client -  
22 - - you asked what our - - - did our client ever really  
23 want to close. Of course our client wanted to close. In  
24 2008 they would have closed, 2009, 2010, our client would  
25 have - - -

1 JUDGE GARCIA: Why didn't you extend the date?

2 MR. MOLLEN: - - - had 37 million reasons to  
3 close.

4 JUDGE GARCIA: Why didn't you extend the date  
5 further then?

6 MR. MOLLEN: Why? Because they - - - among other  
7 things, they were so anxious and so optimistic about the  
8 value of this property, they increased the price in the  
9 amendment by two million dollars, increased the price.  
10 They increased the deposit from 5 to 10 percent. They, in  
11 writing, acknowledged that the seller had complied with all  
12 of its obligations with respect to permitting, and they  
13 covenanted not to sue. All - - -

14 JUDGE GARCIA: And that's the first way the  
15 contract is saved I think in 2006, right? And there's,  
16 let's call it a bailout, coming in '08 when this is  
17 expiring so they bring this lawsuit instead of getting an  
18 amendment.

19 MR. MOLLEN: Yes.

20 JUDGE FAHEY: But it's the same principle  
21 operating, which is - - - and this is the market. The  
22 sellers think this isn't a great deal for us. We're not  
23 extending this anymore, and the buyers think we want this  
24 deal and we're going to lose it.

25 MR. MOLLEN: The comment, Judge, is you - - - in

1 your prior statement you used the term to - - - brought the  
2 suit to stop the clock. No. The - - - that's the whole  
3 key here. The clock was ticking. That's what the trial  
4 court found.

5 JUDGE GARCIA: Right.

6 MR. MOLLEN: If - - - in a typical real estate  
7 transaction, if you want to stop the clock, you - - - they  
8 - - - real estate people are pretty shrewd litigators. You  
9 go to court and ask for a TRO and a preliminary injunction.  
10 You told the closing date. But then if you do that, you -  
11 - - to make sure it's not frivolous and baseless, you have  
12 to post the bond.

13 JUDGE STEIN: But what's not being talked about -  
14 - -

15 MR. MOLLEN: And what they did here was they  
16 avoided the preliminary injunction, never posted a bond or  
17 a TRO because they didn't want to put up a dollar.

18 JUDGE STEIN: What's not being talked about here  
19 is the conditions precedent to the closing and whether - -  
20 - whether the sellers were ready, willing, and able to  
21 comply with those conditions. Can we talk about that for a  
22 moment?

23 MR. MOLLEN: Yes. There is not a single page in  
24 this record that shows that the seller was not able to  
25 deliver marketable title. In fact, the record shows the

1 seller was willing to go to closing. And by the way, page  
2 14 - - -

3 JUDGE STEIN: Well, then how - - - how does the  
4 seller get summary judgment - - -

5 MR. MOLLEN: Because - - -

6 JUDGE STEIN: - - - if there's nothing to show  
7 that?

8 MR. MOLLEN: Because there was an anticipatory  
9 breach and the case law makes it clear once there's an  
10 anticipatory breach, all obligations going forward cease.

11 JUDGE STEIN: Well - - -

12 MR. MOLLEN: So it - - -

13 JUDGE GARCIA: Well, is - - - haven't we at least  
14 implicitly said, if not explicitly, that there's a  
15 difference between actual performance, tendering  
16 performance, and demonstrating the ability to perform?

17 MR. MOLLEN: The cases that are being spoken  
18 about are cases that the other side relies on, are almost  
19 all distinguishable along those lines - - -

20 JUDGE FAHEY: The big case is the Pesa v. Yoma, I  
21 believe.

22 MR. MOLLEN: Yeah. Many of these cases are  
23 declaratory judgment actions or actions for damages. They  
24 are not liquidate - - -

25 JUDGE FAHEY: Well, but the theory - - - the

1 theory that Judge Stein put forward is the same theory as -  
2 - - as the theory in Pesa v. Yoma.

3 MR. MOLLEN: Right.

4 JUDGE FAHEY: The - - - the parties are reversed,  
5 one's a buyer and seller.

6 MR. MOLLEN: They - - - they said - - -

7 JUDGE FAHEY: But the theory - - - excuse me - -  
8 - is still the same.

9 MR. MOLLEN: Yeah. Pesa's highly  
10 distinguishable. In Pesa - - - in Pesa, among other  
11 reasons - - - first of all, they said there were issues of  
12 - - - of fact. There was an issue of whether there was, in  
13 fact, a repudiation because a lawyer gave an affidavit and  
14 then he seemed to modify it and retract it. That was one  
15 of the issues. Another issue was the buyer said the seller  
16 had not complied with their certificate of occupancy  
17 issues, and there was an issue whether they could have  
18 delivered. None of those facts involved a liquidated  
19 damage provision where the parties contractually agreed if  
20 the contract expires and you haven't closed, then you  
21 entitle the seller to keep the deposit and the compaction  
22 payments. We have a contract, 10.2 and the other  
23 provisions that relate to it, are - - - take - - - make it  
24 different, very different, than the cases they've gotten  
25 all over the country.

1 CHIEF JUDGE DIFIORE: Thank you, sir.

2 MR. MOLLEN: Thank you for your patience.

3 CHIEF JUDGE DIFIORE: Mr. Ciulla.

4 MR. CIULLA: It's clear under Pesa what Pesa did  
5 is it - - - this court reaffirmed a very longstanding set  
6 of principles that in order for a non-breaching non-  
7 repudiating party to recover damages, it must show that  
8 it's ready, willing, and able. That's a form of causation.  
9 Here not only did respondents fail to tender any evidence  
10 to show that they were ready, willing, and able, in fact  
11 the record is clear because of Mr. Seidenwar's affidavit,  
12 that they could not get the - - - all of the development  
13 approvals. He's - - -

14 JUDGE GARCIA: But let's say - - - counsel, let's  
15 say we agree with you and this isn't an anticipatory  
16 breach. Do they still have some type of breach claim they  
17 can bring? I mean we talked about stopping the clock. So  
18 now we're how many years after this. Can they come in and  
19 say we were ready, willing, and able and you breached on  
20 July 22nd, 2008. You didn't terminate. Do they have  
21 anything left if we agree with you that this - - - bringing  
22 this lawsuit is not an anticipatory breach?

23 MR. CIULLA: No, Your Honor. I don't believe so.  
24 It was - - -

25 JUDGE FAHEY: Well, wouldn't they have the - - -

1 the forbearance clause action still alive, and that would  
2 have to go back to the court. The court hasn't made a  
3 ruling on that. So you - - - the most you can leave here  
4 with is one and three. Two would still be alive, wouldn't  
5 be?

6 MR. CIULLA: I - - - well, let me say this, Your  
7 Honor. They would still be required to show that they're  
8 ready, willing, and able. Why should they be given - - -

9 JUDGE FAHEY: I understand that, but let's say  
10 they could.

11 MR. CIULLA: - - - a second chance to do that?

12 JUDGE FAHEY: Let's just, for argument's sake,  
13 say they could. Then there would be a measure of damages  
14 for that time period that the trial court would have to  
15 make a determination on.

16 MR. CIULLA: I - - - I don't agree, Your Honor.

17 JUDGE FAHEY: Okay.

18 MR. CIULLA: It's very clear to me that they had  
19 their chance to show that they were ready, willing, and  
20 able on this set of claims. They failed to do it. They  
21 should not be given a second bite of the apple, if you  
22 will, to do that.

23 JUDGE FAHEY: Thank you. Thank you.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Princess Point LLC v. Muss Development L.L.C., No. 92 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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