

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

D21364
W/prt

_____AD3d_____

Submitted - November 13, 2008

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
WILLIAM E. McCARTHY, JJ.

2007-04100

DECISION & ORDER

Zeld Associates, Inc., appellant, v
Joseph P. Marcario, defendant,
Marien R. Marcario, et al., respondents.

(Index No. 22419/06)

Joseph & Terracciano, LLP, Syosset, N.Y. (Seth A. Eschen and Janine T. Lynam of counsel), for appellant.

In an action, inter alia, for specific performance of a contract for the sale of real property, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Burke, J.), dated January 25, 2007, which granted the motion of the defendants Marien R. Marcario, Allen T. Swezey, and Julee E. Amsler pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is affirmed, without costs or disbursements.

Contrary to the plaintiff's contention, the Supreme Court properly granted that branch of the motion of the defendants Marien R. Marcario, Allen T. Swezey, and Julee E. Amsler (hereinafter collectively the defendants) which was pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against them. A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where documentary evidence utterly refutes the complaint's factual allegations, thereby conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Leon v Martinez*, 84 NY2d 83, 88). Here, the defendants, who agreed to sell the subject real property to the plaintiff, utterly refuted the complaint's factual allegations and conclusively established a defense as a matter of law by submitting certain documentary evidence establishing that they properly cancelled the contract for the sale of the

December 9, 2008

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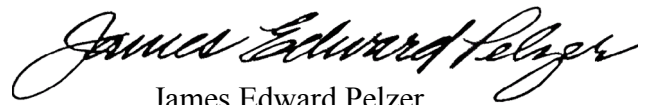
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property (*cf. Manzi Homes, Inc. v Mooney*, 29 AD3d 748, 749; *Oak Bee Corp. v Blankman & Co.*, 154 AD2d 3, 7-9).

The plaintiff's remaining contentions either are without merit or have been rendered academic in light of our determination.

RIVERA, J.P., DILLON, COVELLO and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court