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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 121 SSM 5
William B. Clarke,
Respondent,
v.
Rafael Rodriguez,
Appellant.

Submitted by Thomas Weiss, for appellant.
Submitted by Gregory J. Brown, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed,
with costs.

There is support in the record for the affirmed finding
that the original contract was in the possession or control of

defendant. Upon due notice, defendant failed to produce the original. Accordingly, plaintiff sufficiently explained the unavailability of the original contract and, therefore, a photocopy was admissible as secondary evidence of its contents (see Schozer v William Penn Life Ins. Co. of N.Y., 84 NY2d 639, 643-644 [1994]). Moreover, as there is support for the undisturbed finding of Supreme Court that defendant frustrated plaintiff's efforts to perform the contract, plaintiff is entitled to the remedy of specific performance (see Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y., 28 NY2d 101, 106 [1971]).

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, with costs, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided March 29, 2011