34 N.Y.2d 685, *; 312 N.E.2d 478;
356 N.Y.S.2d 294; 1974 N.Y. LEXIS 1648, **

**Carmanco Holding Corp., Respondent, v. Byre Associates, Appellant; Carmanco Holding Corp., Respondent, v. Elding Associates, Appellant**

**[NO NUMBER IN ORIGINAL]**

**Court of Appeals of New York**

***34 N.Y.2d 685; 312 N.E.2d 478; 356 N.Y.S.2d 294; 1974 N.Y. LEXIS 1648***

**March 21, 1974, Argued**
**May 1, 1974, Decided**

**PRIOR HISTORY:** [**1] *Carmanco Holding Corp. v. Byre Assoc., 41 A D 2d 1031*, affirmed.

*Carmanco Holding Corp. v. Elding Assoc., 41 A D 2d 1031*, affirmed.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 15, 1973, which, insofar as appealed from, unanimously affirmed (1) orders of the Supreme Court at Special Term (William Kapelman, J.), entered in New York County, denying motions by defendants to dismiss the complaints in the above-entitled actions and granting cross motions by plaintiff for summary judgment, and (2) the judgments entered thereon. In each action plaintiff sought to recover a sum paid by it, in excess of $ 7,500, under each of two contracts for the purchase of real property. On January 16, 1968 it had entered into separate contracts with each defendant and with Lancaster Associates, not a party to the present actions, to purchase three parcels of real property in the Borough of Manhattan. Each of the three contracts provided that plaintiff was to make a deposit of $ 7,500 at that time, make a second payment one year later, and, on closing of title, scheduled for [**2] March 19, 1969, make another cash payment and execute a purchase money mortgage; that plaintiff's liability under the contract was limited to the $ 7,500 deposit, to be retained by the seller as liquidated damages and that, in the event the seller was unable to convey title, its sole liability to plaintiff was to refund the amount paid on account of the purchase price, the cost of examining title, and any survey cost incurred by plaintiff. On January 15, 1969, the day before the second payment was due under each contract, plaintiff, defendants and Lancaster Associates entered into a single written agreement, which provided that each contract of January 16, 1968 was to be modified to provide that title closing was to take place on March 19, 1971; that the second payment made by plaintiff was to be credited toward the purchase price; that, at title closing, the balance of the purchase price was to be payable in cash or check on delivery of the deed; that plaintiff agreed to acquire title on the date of the closing; that, in the event title was unmarketable or the seller was unwilling or unable to convey title in accordance with the contract for any other reason, plaintiff would be entitled [**3] to a refund of all sums paid on account of the purchase price, and that, except as modified in said agreement, the parties confirmed and ratified each contract. On execution of this agreement, plaintiff made the second payments to defendants, but, by letter dated March 17, 1971, advised them that it had decided not to take title, and requested them to return the second payments, but they refused to do so. Special Term held that, while the modification agreement made changes as to the sums to be repaid if the sellers defaulted and as to the closing date, there was no provision therein which changed the liquidated damage clause in the event plaintiff elected not to take title, and that defendants were bound by their agreements and were required to return those sums paid by plaintiff in excess of the agreed liquidated damages. In the Court of Appeals defendants argued that the modification agreement imposed new obligations, on which plaintiff defaulted, entitling them to retain all sums paid on account; that the contracts of January 16, 1968 were essentially options and the modification agreement was an election by plaintiff to pick up those options, and that, in any event, the modification [**4] agreement changed a unilateral into a bilateral obligation, specifically obligating plaintiff to acquire title, entitling them, upon its default, to retain all sums paid on account.

**HEADNOTES**

**Vendor and purchaser -- contract for sale of real property -- after deciding not to take title to property which it had contracted to purchase from defendants, plaintiff sought to recover sums paid to them in excess of amount fixed in contracts as liquidated damages -- contentions by defendants that subsequent agreement which modified original contracts imposed new obligations on which plaintiff defaulted, entitling them to retain all sums paid by it, that contracts were essentially options and modification agreement was election by plaintiff to pick up those options, and that, in any event, modification agreement changed unilateral into bilateral obligation, specifically obligating**

**plaintiff to acquire title, entitling them, upon its default, to retain all sums paid -- order which affirmed judgments in favor of plaintiff affirmed.**

**COUNSEL:** *Joseph H. Gellman* and *Harold Gellman* for appellants.

*Samuel Kirschenbaum* for respondent.

**JUDGES:** Concur: Chief Judge Breitel and Judges Jasen, Gabrielli, [**5] Jones, Wachtler, Rabin and Stevens.

**OPINION**

[*687] Order affirmed, with costs; no opinion.