

Ilemar Corp., Appellant, v. Henry Krochmal et al., Respondents

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

44 N.Y.2d 702; 376 N.E.2d 917; 405 N.Y.S.2d 444; 1978 N.Y. LEXIS 1913

February 13, 1978, Argued

March 29, 1978, Decided

PRIOR HISTORY: Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 18, 1977, which (1) reversed, on the law and the facts, a judgment of the Supreme Court in favor of plaintiff, entered in Suffolk County upon a decision of the court at a Trial Term (George F. X. McInerney, J.), and (2) dismissed the complaint. Plaintiff sought to recover down payments made by it under a contract for its purchase of realty owned by defendants, alleging, *inter alia*, that defendants were unable to convey a clear and marketable title to the property. (For prior appeal, see *48 AD2d 693*.)

Ilemar Corp. v Krochmal, 58 AD2d 853.

DISPOSITION: Order affirmed.

HEADNOTES

Vendor and Purchaser -- Claimed Failure to Provide Clear Title

In order to place the vendor of realty under a contract of sale in default for a claimed failure to provide clear title, the purchaser must first tender performance himself and demand good title, unless the title defect is not curable. In a case where the claimed defects were curable and, in fact, were subsequently cured, and the purchaser failed to tender performance, and, moreover, never advised the vendor of the defects it allegedly found objectionable, it never placed the vendor in default, and thus is not entitled to recover down payments made by it pursuant to the contract.

COUNSEL: *Ira L. Hyams* and *Howard J. Herman* for appellant.

Samuel Kirschenbaum and *Brian Michael Seltzer* for respondents.

JUDGES: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur in memorandum.

OPINION

[*703] [*917] [***445] **OPINION OF THE COURT**

Memorandum.

The order appealed from should be affirmed, with costs. In order to place the vendor of realty under a contract of sale in default for a claimed failure to provide clear title, the purchaser normally must first tender performance himself and demand good title (*Cohen v Krantz, 12 NY2d 242; Higgins v Eagleton, 155 NY 466*). Tender of performance by the purchaser is excused only if the title defect is not curable, for in such a case it would serve no purpose to require the purchaser to go through the futile motions of tendering performance. In this case, the claimed defects were curable, and, in fact, were subsequently cured. Moreover, not only did the purchaser itself fail to tender performance but, strangely, the vendor was never advised by the purchaser of the defects which it [*704] allegedly found objectionable. Accordingly, the purchaser never placed the vendor in default, and is thus not entitled to recover its down payments made pursuant to the contract as extended.