

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 4, 2004

94747

CHRISTOPHER McENTEE et al.,
Appellants,

v

MEMORANDUM AND ORDER

ACE HOMES, INC.,
Respondent.

Calendar Date: January 14, 2004

Before: Crew III, J.P., Carpinello, Rose, Lahtinen and Kane, JJ.

Joseph M. Cairo, Waterford, for appellants.

Horigan, Horigan, Lombardo & Kelly P.C., Amsterdam (Derek L. Hayden of counsel), for respondent.

Lahtinen, J.

Appeal from an order of the Supreme Court (Nolan Jr., J.), entered May 7, 2003 in Saratoga County, which, inter alia, denied plaintiffs' motion for summary judgment.

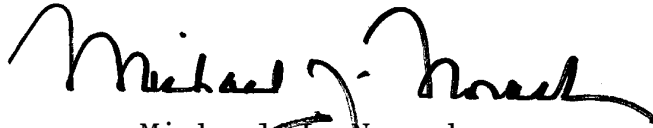
Plaintiffs cancelled a contract to purchase a modular home from defendant before the manufacturer had commenced work on the home. When defendant refused to return any part of their \$12,800 deposit, plaintiffs commenced this action and defendant counterclaimed for damages allegedly sustained as a result of the cancellation. Both parties eventually moved for summary judgment. Supreme Court found a threshold factual issue as to whether plaintiffs' cancellation was justified by unreasonable delays or was an anticipatory breach and, accordingly, did not reach the other issues asserted by the parties. Plaintiffs' appeal focuses on the issues not addressed by Supreme Court. We

agree with Supreme Court that there is a factual question on the threshold issue of whether there has been any breach and we discern no reason to address the other issues at this juncture.

Crew III, J.P., Carpinello, Rose and Kane, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:



Michael J. Novack
Clerk of the Court