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A Real Estate Purchaser's Unjustified Breach of Contract Precludes Recovery of the Down Payment

Daniel Clivner

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riety of issues of recent importance in New York law. In *Maxton Builders, Inc. v. Lo Galbo*, the Court of Appeals reaffirmed the common law rule in real estate transactions that allows a seller to retain a ten-percent down payment upon the purchaser's default. The court, however, limited its decision to those transactions involving ten-percent downpayments and left open the issue of recovery of a higher percentage deposit by a defaulting buyer.

In *Chinese Staff and Workers Association v. City of New York*, the Court of Appeals, construing article 8 of the ECL, held that the displacement of neighborhood businesses and residents constituted an environmental effect which must be considered in determining the necessity of an environmental impact statement. Moreover, the *Chinese Staff and Workers* court stated that when an agency fails to consider whether or not an environmental impact statement is necessary, the permit should be nullified and the agency should begin the process anew.

Finally, in *423 South Salina St., Inc. v. City of Syracuse*, an unanimous Court of Appeals held that the civil rights action brought by the plaintiff was barred for failure to serve notice of a claim as required under section 50-i of the GML.

The members of Volume 61 hope that the Court of Appeals decisions analyzed in *The Survey* will be of interest and value to the New York bench and bar.

DEVELOPMENTS IN THE LAW

A real estate purchaser's unjustified breach of contract precludes recovery of the down payment

Historically, a party in breach of contract could not recover

The Survey of New York Practice..... *The Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

- 1957 N.Y. Leg. Doc. No. 6(b) FIRST REP.
- 1958 N.Y. Leg. Doc. No. 13 SECOND REP.
- 1959 N.Y. Leg. Doc. No. 17 THIRD REP.
- 1960 N.Y. Leg. Doc. No. 120 FOURTH REP.
- 1961 Final Report of the Advisory Committee on Practice
and Procedure FINAL REP.

Also valuable are the two joint reports of the Senate Finance Assembly Ways and Means Committee:

- 1961 N.Y. Leg. Doc. No. 15 FIFTH REP.
- 1962 N.Y. Leg. Doc. No. 8 SIXTH REP.

any amount or value of part performance.¹ Many jurisdictions, however, have adopted a "modern rule" which permits the defaulting party to recover on a restitution theory if it can be proved that the part performance conferred exceeds the actual damages sustained.² Notwithstanding the general viability of the "modern rule," New York courts have consistently held that a purchaser who breaches a real estate contract cannot recover the down payment.³ The courts have so held, even where the seller subsequently

¹ See *Lawrence v. Miller*, 86 N.Y. 131, 140 (1881) ("To allow a recovery of this money would be to sustain an action by a party on his own breach of his own contract, which the law does not allow."); *Havens v. Patterson*, 43 N.Y. 218, 223 (1870) (law or equity does not permit party to recover money paid on executory contract when such party has refused to perform); see also *Corbin, The Right of Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931). Professor Corbin states: "[i]t has been thought by some that restitution should always be refused, for the good and sufficient reason that the plaintiff is one who is guilty of a breach of contract and should never be allowed to have advantage from his own wrong . . ." *Id.* at 1014.

This general rule has been applied to a wide variety of cases including contracts for the sale of goods, employment contracts, construction contracts, and installment land sales contracts. For a listing of real estate cases which apply this rule, see 62 N.Y. JUR. *Vendor and Purchaser* § 137 (1968 & Supp. 1987).

² See, e.g., *Britton v. Turner*, 6 N.H. 481 (1834). In *Britton*, the plaintiff had defaulted on a one year employment contract after working nearly ten months. *Id.* at 482. The New Hampshire court was the first American jurisdiction to abandon the common law rule, and permitted the plaintiff to recover the net benefit conferred, or the value of services performed, in excess of the damages caused by the breach. *Id.* at 493-94. In *Malmberg v. Baugh*, 62 Utah 331, 218 P. 975 (1923), the court granted restitution to a breaching buyer, reasoning that the alternative to restitution would leave the seller with all but one of the payments as well as the property. *Id.* at 345, 218 P. at 980. See also *Amvorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 106-07 (2d Cir. 1953) (predicting change in New York law which would allow restitution of payments in excess of injuries suffered); *Kitchin v. Mori*, 84 Nev. 181, 183, 437 P.2d 865, 866 (1968) (weight of authority now allows party in default to recover value of performance less damages).

New York has adopted Uniform Commercial Code ("U.C.C.") section 2-718, which delineates remedies for the defaulting buyer in contracts for the sale of goods. N.Y. U.C.C. § 2-718 (McKinney 1964). This section provides that in the absence of a liquidated damages clause, "the buyer is entitled to restitution of any amount by which the sum of his payments exceeds . . . twenty percent of the value of the total performance . . . or \$500, whichever is smaller." *Id.* The Appellate Division has held that shares in a cooperative apartment constitute goods within the purview of the U.C.C., and that the rights of the parties are subject to the limitations therein with respect to down payments on the apartment. See *Silverman v. Alcoa Plaza Assoc.*, 37 App. Div. 2d 166, 172, 323 N.Y.S.2d 39, 45 (1st Dep't 1971).

The Restatement (Second) of Contracts sections 373 and 374, drafted by Professor Corbin, adopts the "modern rule." See RESTATEMENT (SECOND) OF CONTRACTS §§ 373-74 (1979) [hereinafter RESTATEMENT (SECOND)]. But see *id.* § 374 comment c (right of real estate seller to retain 10% of contract price on buyer's default).

³ See, e.g., *Willard v. Mercer*, 58 N.Y.2d 840, 841, 446 N.E.2d 774, 774, 460 N.Y.S.2d 18, 18 (1983) (purchaser's failure to give seller adequate time to cure title defect precludes refund of down payment); *32 Beechwood Corp. v. Fisher*, 19 N.Y.2d 1008, 1009-10, 228 N.E.2d

resells the house to another buyer for a sum equal to or greater than the original contract price.⁴ Recently, in *Maxton Builders, Inc. v. Lo Galbo*,⁵ the New York Court of Appeals reaffirmed the long established practice in real estate transactions that allows a seller to retain a ten percent down payment upon the buyer's default.⁶

In *Maxton Builders*, the defendant buyers and plaintiff builder entered into a contract for the purchase of a one-family house.⁷ At the contract signing, the buyers delivered a check for ten percent of the purchase price to the seller as a down payment to be held in escrow.⁸ The contract of sale included a handwritten

823, 823-24, 281 N.Y.S.2d 843, 844 (1967) (per curiam) (defaulting purchaser of land may not recover down payment); *Dmochowski v. Rosati*, 96 App. Div. 2d 718, 718, 465 N.Y.S.2d 367, 367 (4th Dep't 1983) (buyer has no right to down payment where seller is ready, willing, and able to perform). The New York rule dates back to 1816, see *Ketchum v. Evertson*, 13 Johns. 356 (N.Y. Sup. Ct. 1816), and has been relied upon to hold that a seller may recover the down payment from a buyer who wrongfully stopped a down payment check. See *Palmer v. Golden*, 221 App. Div. 360, 361-62, 223 N.Y.S. 897, 897 (3d Dep't 1927) (mem.) See generally 62 N.Y. JUR. *Vendor and Purchaser* § 138 (1968) (collecting cases).

New York courts have utilized this rule predominantly in contracts involving a down payment of ten percent or less. See, e.g., *Fingerhut v. Kralyn Enter., Inc.*, 71 Misc. 2d 846, 847, 857, 337 N.Y.S.2d 394, 396, 405 (Sup. Ct. N.Y. County 1971) (\$225,000 deposit on \$3,075,000 purchase price), *aff'd*, 40 App. Div. 2d 595, 335 N.Y.S.2d 926 (1st Dep't 1972); *Knight v. Carter*, 1 Misc. 2d 351, 352-53, 146 N.Y.S.2d 129, 130-31 (Sup. Ct. Westchester County 1955) (\$500 deposit on \$28,750 purchase price). However, restitution has been denied in cases where the down payment was greater than ten percent. See, e.g., *Sewell v. Underhill*, 197 N.Y. 168, 169, 90 N.E. 430, 430 (1910) (25% deposit forfeited); cf. *Rudy v. Newman*, 54 N.M. 230, 234, 220 P.2d 489, 492 (1950) (31.2% deposit forfeited); *Seekins v. King*, 66 R.I. 105, 108, 17 A.2d 869, 870-71 (1941) (37.5% deposit forfeited). But see *Bean v. Walker*, 95 App. Div. 2d 70, 75, 464 N.Y.S.2d 895, 898 (4th Dep't 1983) (rule inapplicable when deposit approximated 50%). In addition, the rule has been applied even in the absence of a contractual provision for express damages. See *Evans v. Norris*, 69 App. Div. 2d 829, 829, 415 N.Y.S.2d 92, 92 (2d Dep't 1979) (mem.); *Fingerhut v. Kralyn Enter., Inc.*, 71 Misc. 2d 846, 857-58, 337 N.Y.S.2d 394, 406 (Sup. Ct. N.Y. County 1971), *aff'd*, 40 App. Div. 2d 595, 335 N.Y.S.2d 926 (1st Dep't 1972). See also 1A WARREN'S WEED, NEW YORK REAL PROPERTY, *Contracts* § 11.01 (4th ed. 1968) (even without forfeiture provision, right to retain deposits exists).

⁴ See *Evans v. Norris*, 69 App. Div. 2d 829, 829, 415 N.Y.S.2d 92 (2d Dep't 1979) (mem.); *Johnson v. Werner*, 63 App. Div. 2d 422, 424, 407 N.Y.S.2d 28, 30 (1st Dep't 1978); *Silverstein v. United Cerebral Palsy Ass'n*, 17 App. Div. 2d 160, 164-65, 232 N.Y.S.2d 968, 972-73 (1st Dep't 1962). See also 62 N.Y. JUR. *Vendor and Purchaser* §§ 161-62 (1968 & Supp. 1987) (surveying cases where vendor repossessed or resold land after buyer's breach).

⁵ 68 N.Y.2d 373, 502 N.E.2d 184, 509 N.Y.S.2d 507 (1986).

⁶ *Id.* at 378, 381-82, 502 N.E.2d at 188-89, 509 N.Y.S.2d at 511-12.

⁷ *Id.* at 376, 502 N.E.2d at 185, 509 N.Y.S.2d at 508.

⁸ *Id.* This exchange gives the purchasers of real estate equitable title. See *Havens v. Patterson*, 43 N.Y. 218, 221 (1870). However, the purchaser will forfeit the down payment in the event of the destruction of the real estate. See *Sewell v. Underhill*, 197 N.Y. 168, 172, 90

riders which provided that if the annual tax assessment was estimated to be in excess of \$3,500, the buyers would be entitled to return of their down payment upon written notice to the seller within three days of the contract signing.⁹ The day after the agreement was executed, the buyers discovered that the taxes were estimated to be greater than \$3,500, and stopped payment on their check.¹⁰ Shortly thereafter, the seller commenced an action to recover the down payment, contending that the buyers had breached the agreement by stopping payment on the check without properly notifying the seller of their intent to cancel the contract.¹¹ The plaintiff alleged damages in excess of the down payment, although he subsequently resold the house for the same price defendants had agreed to pay.¹² Special Term dismissed the defendants' motion for summary judgment, finding that the defendants breached the contract by failing to give timely notice of cancellation.¹³ Concluding that a question of fact existed as to whether awarding

N.E. 430, 432 (1910).

It is well settled that the owner of the real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner thereof.

New York Cent. & Hudson River R.R. Co. v. Cottle, 187 App. Div. 131, 144, 175 N.Y.S. 178, 186 (4th Dep't 1919), *aff'd*, 229 N.Y. 514, 129 N.E. 896 (1920). This equity interest, perhaps more than any other factor, accounts for the contrasting remedies between real estate contracts and other types of contracts. See Corbin, *supra* note 1, at 1016-18 (distinguishing land sale contracts from other contracts).

⁹ *Maxton Builders*, 68 N.Y.2d at 376, 502 N.E.2d at 185, 509 N.Y.S.2d at 508. Paragraph 3(a) of the rider to the contract provided that "[i]f real estate taxes are in excess of \$3,500 based on a full assessment of house sold for \$210,000.00, buyer shall have the right to cancel this contract upon written notice to the seller within three days of date and escrow funds to be returned." *Id.*

¹⁰ *Id.* The contract was signed on August 3, 1983, and the buyers' attorney advised the seller's attorney by telephone on August 5, 1983 that the purchasers desired to cancel pursuant to the rider provision. *Id.* A written notice of cancellation, requesting return of the escrow funds, was posted August 5, 1983, but did not arrive at the seller's attorney's office until August 9. *Id.* This lateness resulted in a breach of contract, as the rule is well-settled in New York that time is of the essence when a party exercises an option to terminate a contract. See *Sy Jack Realty Co. v. Pergament Syosset Corp.*, 27 N.Y.2d 449, 452, 267 N.E.2d 462, 463, 318 N.Y.S.2d 720, 721 (1971) (notice insufficient and ineffective if not received within specified time); *Kantrowitz v. Dairymen's League Coop. Ass'n*, 272 App. Div. 470, 471, 71 N.Y.S.2d 821, 822 (3d Dep't 1947) (mere mailing of notice insufficient), *aff'd*, 297 N.Y. 991, 80 N.E.2d 366 (1948). See generally 22 N.Y. Jur. 2d *Contracts* § 432 (1982) (time of essence in options to terminate contract).

¹¹ *Maxton Builders*, 68 N.Y.2d at 376, 502 N.E.2d at 185, 509 N.Y.S.2d at 508.

¹² *Id.* The alleged damages consisted of a \$12,000 brokerage fee for reselling the house, additional real estate taxes, insurance, and other carrying charges for the period between the breach and resale. *Id.* at 377, 502 N.E.2d at 185, 509 N.Y.S.2d at 508.

¹³ *Id.* at 377, 502 N.E.2d at 186, 509 N.Y.S.2d at 509.

plaintiff the deposit would constitute the imposition of a penalty, the court refused to grant summary judgment on the damages issue.¹⁴ The Appellate Division, Second Department, reversed and granted summary judgment to the plaintiff in the amount of the down payment.¹⁵ The court held that since the buyers repudiated the contract, they could not retain the down payment despite a subsequent resale of the premises for a sum equal to the contract price.¹⁶

In affirming the Appellate Division, Chief Judge Wachtler, writing for the Court of Appeals, acknowledged the harshness of the common law rule which denied a breaching party any recovery regardless of performance.¹⁷ The court also recognized an emerging judicial trend toward the adoption of a "modern rule" in most areas of contract law which permits a defaulting party to recover for part performance if such party can prove unjust enrichment.¹⁸ However, Chief Judge Wachtler declined to expand the modern rule to permit the recovery of down payments on breached real estate contracts.¹⁹ If a case involved a down payment approximating ten percent, the court reasoned that the modern rule would not provide a better alternative to the long-standing rule of *Lawrence*

¹⁴ *Id.* The court considered the sizable amount of the deposit, coupled with the plaintiff's success at reselling the premises for the same price, sufficient to create a question of fact as to whether the amount sought constituted a penalty. *Id.*

¹⁵ *Maxton Builders, Inc. v. Lo Galbo*, 113 App. Div. 2d 923, 493 N.Y.S.2d 825 (2d Dep't 1985).

¹⁶ *Id.* at 924, 493 N.Y.S.2d at 825.

¹⁷ *Maxton Builders*, 68 N.Y.2d at 379, 502 N.E.2d at 187, 509 N.Y.S.2d at 510. The court noted that "the common law [rule] would deny any relief to the defaulting party even when there had been substantial, or nearly complete performance." *Id.* Professor Corbin has argued that "the amount of the forfeiture increases as performance proceeds, so that the penalty grows larger as the breach grows smaller." Corbin, *supra* note 1, at 1029.

¹⁸ *Maxton Builders*, 68 N.Y.2d at 379-80, 502 N.E.2d at 187, 509 N.Y.S.2d at 510. *See, e.g., Vines v. Orchard Hills, Inc.*, 181 Conn. 501, 506-07, 435 A.2d 1022, 1027-28 (1980) (seller may not retain any more of down payment than will make him whole); *Perkins v. Spencer*, 121 Utah 468, 476-77, 243 P.2d 446, 451 (1952) (damages are those ordinarily recoverable in breach of contract cases). In *Freedman v. Rector of St. Matthias Parish*, 37 Cal. 2d 16, 230 P.2d 629 (1951), Justice Traynor held that the damage provisions of the California Civil Code and a public policy against forfeitures and penalties in the law provided a basis for relief to a defaulting buyer. *See id.* at 20, 230 P.2d at 631. *See also Perillo, Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 50 (1981) (common law rule criticized as improper measure of damages).

¹⁹ *Maxton Builders*, 68 N.Y.2d at 381-82, 502 N.E.2d at 188-89, 509 N.Y.S.2d at 511-12. Chief Judge Wachtler stated that although the harsh common law rule has been criticized and abandoned by a number of jurisdictions, the court should not depart from its prior holdings "unless impelled by 'the most cogent reasons.'" *Id.* at 381, 502 N.E.2d at 188, 509 N.Y.S.2d at 511 (citing *Baker v. Lorillard*, 4 N.Y. 257, 261 (1850)); *see infra* note 21.

v. Miller,²⁰ which allowed a seller to retain a down payment upon the purchaser's default.²¹ Chief Judge Wachtler concluded that since real estate transactions are classic examples of arm's length negotiations, the court should be reluctant to absolve a party of his contractual transgressions.²²

Though perpetuating the harsh common law rule, it is submitted that the Court of Appeals correctly affirmed judicial precedent by allowing the seller to retain the down payment upon a buyer's default. The court, however, noted that its holding does not address defaults involving down payments exceeding ten percent.²³ It is suggested that the retention of down payments of up to twenty percent by the seller is reasonable and should be permitted. However, it is submitted that courts should consider retention of a down payment in excess of twenty percent to be a forfeiture and return the excess deposit to the buyer.²⁴ A twenty percent thresh-

²⁰ 86 N.Y. 131 (1881). In *Lawrence*, the court specifically rejected the contention that a seller should only be entitled to his actual damage when a buyer breaches. *Id.* at 139-40.

²¹ *Maxton Builders*, 68 N.Y.2d at 381-82, 502 N.E.2d at 188-89, 509 N.Y.S.2d at 511-12. The court stated:

The rule permitting a party in default to seek restitution for part performance has much to commend it in its general applications. But as applied to real estate down payments approximating 10% it does not appear to offer a better or more workable rule than the long established "usage" in this State with respect to the seller's right to retain a down payment upon default.

Id. (footnote omitted).

²² *Id.* at 382, 502 N.E.2d at 189, 509 N.Y.S.2d at 512.

²³ *Id.* n.3. In a footnote, the court narrowed its holding: "It should be emphasized that we do not have before us any question concerning installment payments beyond a 10% down payment and thus we express no view concerning the parties' rights with respect to such payments following the vendee's default." *Id.*

Generally, where the payments made by the buyer totalled less than ten percent of the purchase price, even the most liberal courts have denied recovery to the breaching buyer. See Annotation, *Modern Status of Defaulting Vendee's Right to Recover Contractual Payments Withheld by Vendor as Forfeited*, 4 A.L.R.4th 993, at § 3(b) (1981).

²⁴ Most courts ruling on the issue of installment payments have allowed a defaulting buyer to recover his performance in excess of twenty percent when he could prove that the net benefit conferred upon the seller exceeded the seller's damages because installment contract cases may involve forfeitures of substantial percentages of the purchase price. See Corbin, *supra* note 1, at 1023-25. Cf. *Bean v. Walker*, 95 App. Div. 2d 70, 464 N.Y.S.2d 895 (4th Dep't 1983). In *Bean*, the court held that the plaintiff-seller could not retain the payments of the defaulting buyer, which totalled almost fifty percent of the purchase price, and regain possession of the land without a foreclosure proceeding. *Id.* at 74, 464 N.Y.S.2d at 893. It should be noted, however, that the court justified its departure from the general rule in New York, which allows retention by the seller, because of the special circumstances of the case: the defaulting buyer was in possession of the property. *Id.* at 75, 464 N.Y.S.2d at 893-99. It is suggested, however, that principles of forfeiture and penalty should protect the defaulting buyer seeking to recover a deposit in excess of twenty percent, regardless of

old figure has found support in other areas of the law and in proposed changes to the general rule of law in question.²⁵

Finally, in *Maxton Builders*, the court decided the case as if the defaulting buyer was seeking restitution of his down payment.²⁶ Consequently, the court did not require the plaintiff to prove actual damages incurred as a result of the defendant's breach.²⁷ Defaulting buyers may argue that when the seller seeks

possession.

²⁵ See Acts, Recommendation and Study Relating to Recovery for Benefits Conferred by Party in Default under Contract, [1942] N.Y. LAW REV. COMM'N REP. 179 (recommending enactment of section 244 of the Debtor and Creditor Law entitled "Restitution for Party in Default"). This legislation, which was not enacted, provided for restitution to the extent the down payment exceeded twenty percent of the purchase price. *Id.* at 183 (emphasis added).

New York courts have held that proprietary leases and shares in a residential co-op are subject to U.C.C. section 2-718, which allows restitution in sale of goods transactions where down payments made by the buyer exceed twenty percent of the purchase price. See *supra* note 2 (discussion of U.C.C. § 2-718).

If the contract contained a liquidated damages provision, a defaulting buyer may succeed in recovering at least part of his down payment, if the provision is construed to be a penalty and therefore unenforceable. See 22 AM. JUR. 2D *Damages* § 214 (1965 & Supp. 1986). In determining whether a provision is to be considered liquidated damages or a penalty, the general rule is that a stipulated sum is for liquidated damages only if the damages which might be anticipated are difficult to accurately estimate, and the amount stipulated is a reasonable estimate of the damages likely to be caused by the breach. *Id.* Professor Corbin has stated that provisions which call for retention of all previous installments based on nonpayment at a specified time should be held a penalty. See Corbin, *supra* note 1, at 1028. See also *Gerder Serv., Inc. v. Johnson*, 109 Misc. 2d 216, 216-18, 439 N.Y.S.2d 794, 795-97 (Sup. Ct. Erie County 1981) (installment contract enforceable only by foreclosure proceeding where substantial payments made). But see *Muskegon S.S. Corp. v. Fisk*, 200 App. Div. 621, 625, 193 N.Y.S. 463, 466 (1st Dep't 1922) (distinction between liquidated damages and penalties inapplicable where contract provides for down payment forfeiture), *aff'd*, 235 N.Y. 535, 139 N.E. 724 (1923).

However, the inclusion of a liquidated damages clause is not commonplace in real estate contracts. See M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 12.1(c), at 940 (4th ed. 1984) (not in seller's interest to include limited damages provision because majority of jurisdictions allow seller to retain entire amount of down payment when buyer defaults).

²⁶ See *Maxton Builders*, 68 N.Y.2d at 378, 502 N.E.2d at 186, 509 N.Y.S.2d at 509. It is submitted that the *Maxton* court equated a down payment check with the transfer of cash. This was the basis of an earlier decision, *Palmer v. Golden*, 127 Misc. 487, 216 N.Y.S. 509 (Sup. Ct. Saratoga County 1926), *aff'd mem.*, 221 App. Div. 360, 223 N.Y.S. 897 (3d Dep't 1927), where recovery was permitted by the seller when the buyer had wrongfully stopped payment on a down payment check. *Id.* The *Palmer* court concluded that when the down payment check was tendered to the seller, an enforceable contract was in place, and the money belonged to the seller. *Id.* at 488, 216 N.Y.S. at 510. Adopting this initial premise, *Maxton Builders* was decided as any typical case where the plaintiff buyer seeks restitution of his down payment. See *Maxton Builders*, 68 N.Y.2d at 378-82, 502 N.E.2d at 186-89, 509 N.Y.S.2d at 509-12.

²⁷ See *Maxton Builders*, 68 N.Y.2d at 378, 502 N.E.2d at 186, 509 N.Y.S.2d at 509. The court, in fact, noted that the defendants had failed to prove the net benefit conferred by

to recover a judgment against the buyer, such seller should be required to prove actual damages sustained as a result of the buyer's breach.²⁸ Conversely, if the defaulting buyer can prove that a net benefit was conferred on the seller, he should be permitted to sue the seller to recover that amount.²⁹

The Court of Appeals decision in *Maxton Builders* reaffirmed the common law rule denying recovery of a deposit to the defaulting buyer in real estate purchases. The court, however, by limiting its holding to the seller's right to retain deposits approximating ten percent, has left open the issue of recovery of a higher percentage deposit by a defaulting purchaser. It is submitted that deposits in excess of twenty percent should be returned to the buyer as unenforceable penalties, or alternatively, that the net benefit conferred upon the seller should be returned on restitution principles.

Daniel Clivner

ENVIRONMENTAL CONSERVATION LAW

ECL Article 8: Displacement of neighborhood residents and businesses is an environmental effect which must be considered when determining the necessity of an environmental impact statement; noncompliance results in nullification of permit previously granted

In 1975, the New York State Legislature enacted the State Environmental Quality Review Act ("SEQRA"), contained in Article 8 of the Environmental Conservation Law.¹ SEQRA's provi-

them on the plaintiff: "the defendants made no effort to show that the actual damages were less than the plaintiff alleged or that there was, in fact, a net benefit conferred." *Id.*

²⁸ *Cf. Leading Bldg. Corp. v. Segrete*, 60 App. Div. 2d 907, 907-08, 401 N.Y.S.2d 561, 562 (2d Dep't) (where seller claims damages in excess of down payment, actual damages must be proved), *appeal dismissed*, 44 N.Y.2d 901, 379 N.E.2d 223, 407 N.Y.S.2d 697 (1978). *See generally* 36 N.Y. JUR. 2D *Damages* § 9 (1984) (plaintiff must prove actual damages sustained).

²⁹ *Cf. Maxton Builders*, 68 N.Y.2d at 382, 502 N.E.2d at 189, 509 N.Y.S.2d at 512 (dicta suggesting proof of net benefit as prerequisite to recovery); *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 106-07 (2d Cir. 1953) (suggesting modern rule application in New York).

¹ N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984). SEQRA is modeled