

# Appeals Court Upholds Real Estate Dispute for Donerail

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Back in September 2011, Kelley Drye successfully represented Donerail Corporation N.V., the owner of 405 Park Avenue, against 405 Park LLC (a corporation formed by the real estate investors, Westbrook Partners, Westbrook Fund VII's investors, Laurence Gluck and Steven Witkoff), for their failure to close on the \$178.5 million purchase of the midtown property. The purchasers had made a \$38.5 million deposit, and were seeking to recover the deposit from Donerail. Donerail brought its own action seeking damages based on the purchasers' breach of contract and bad faith.

New York Supreme Court Judge Shirley Werner Kornreich agreed with Donerail's interpretation of the underlying contract and granted Donerail's motion for summary judgment in its entirety, dismissing with prejudice the purchasers' complaint to recover the deposit, and further granting Donerail's breach of contract claim, resulting in an affirmative award to Donerail of more than \$600,000.

Donerail president David E. Barry said, describing the victory: "The purchasers entered into a contract to buy 405 Park Avenue at the height of the real estate market, and when the market declined, they tried to renege on our contract. The Court confirmed what Donerail has maintained all along - that it was the purchasers who breached the contract by not closing, and that Donerail was entitled to retain the deposit and recover additional damages."

After two years of fighting at the state level, 405 Park continued to press its arguments to the First Department on appeal. The Appellate Court, in a decision written by Justice Rosalyn H. Richter, unanimously affirmed the decision by Judge Kornreich. The Appellate Court noted that Donerail had fully performed under the contract and was "ready, willing and able to perform" at the closing, whereas 405 Park had raised concerns that were "not reasonable" and appeared "pretextual, particularly in light of its expressed desire not to close."

Said partner **Michael C. Lynch**, "We were confident that the First Department would uphold Justice Kornreich's decision. 405 Park aggressively pursued these claims, but it was clear from the facts that they were always looking for a way to exit the agreement and force Donerail to refund the deposit. We were able to defend both on the facts and on the law and show both Justice Kornreich and the First Department that 405 Park never intended to close on this transaction. It is clear from the decisions that they agreed with us."

Donerail was represented by partners **William C. Heck** and **Michael C. Lynch**.