



**IN THE CONTEXT OF AN APPLICATION FOR A PRELIMINARY INJUNCTION SUPREME COURT SHOULD NOT HAVE GRANTED THE ULTIMATE RELIEF SOUGHT; THE CRITERIA FOR A PRELIMINARY INJUNCTION WERE NOT MET (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined Supreme Court should not have ordered the return of the down payment to the buyer (Berman) pursuant to the purchase contract in the context of granting a preliminary injunction. First, by granting the ultimate relief requested Supreme Court had effectively granted summary judgment before issue was joined. Second the criteria for a preliminary injunction were not met. The purchase contract allowed the termination of the agreement and the return of the down payment if three conditions were met. Berman alleged two of the conditions were met and the third was impossible:

Berman failed to demonstrate his entitlement to temporary injunctive relief pursuant to CPLR 6301, as he failed to establish any of the three required elements for such relief: (1) likelihood of ultimate success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of equities in his favor ... .

Berman failed to demonstrate irreparable injury, as the loss of a down payment is not an irreparable harm since the injured party could be made whole by a money judgment ... .

While Berman contends that it was impossible to obtain a Phase II Assessment within the required time, he failed to demonstrate a likelihood of success in establishing that it was impossible to obtain the report. ...

Finally, Berman failed to show that the balancing of equities was in his favor. [Berman v TRG Waterfront Lender, LLC, 2020 NY Slip Op 01902, Second Dept 3-18-20](#)