



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**RALPH THOMAS et ux v. MONTELCUCIA VILLAS, LLC  
CV-12-0156-PR**

**PARTIES:**

*Petitioners:* Ralph Thomas and Carolee Thomas

*Respondent:* Montelucia Villas, LLC

**FACTS:**

Montelucia Villas, LLC agreed to build, and Ralph and Carolee Thomas agreed to buy, a villa in the Montelucia resort community for \$3,295,000.00. The Agreement provided that the earnest money was payable in four deposits, which were nonrefundable unless Montelucia failed to satisfy an express condition to the Thomases' obligations. An additional provision, printed in bold capital letters, provided that "BUYER ACKNOWLEDGES THAT ESCROW WILL NOT CLOSE UNTIL THE TOWN OF PARADISE VALLEY HAS ISSUED AN OCCUPANCY CLEARANCE AND THE 'VILLAS INFRASTRUCTURE' AND 'VILLAS AMENITIES' HAVE BEEN COMPLETED."

The Agreement provided that the Thomases would be in default if they advised Montelucia they did not intend to "fully perform any provision of this Agreement." The Agreement also set forth the parties' acknowledgement that, if Montelucia elected to cancel the Agreement after being advised of the Thomases' nonperformance, it could retain the Thomases' deposits as "a reasonable estimate of Seller's damages," and that the deposits would "be forfeited to Seller as liquidated damages and not as a penalty."

The Agreement further provided that, if Montelucia failed to comply with the Agreement prior to the closing, the Thomases would be entitled to notify Montelucia of its default and Montelucia would have a period of days to remedy the default. If Montelucia had not remedied the default within the time provided, the Thomases could cancel the Agreement and receive a refund of their deposits. The Thomases expressly waived any other remedies at law or in equity.

After the Thomases paid the initial three deposits, Montelucia sent them a letter setting the date of the closing. Montelucia notified the Thomases that their villa was one of the first to be completed and that the entire neighborhood would be completed "over the next several months." It also advised that certain off-site improvements were "not finalized and will be completed over the next several weeks."

Ten days before the scheduled closing, the Thomases notified Montelucia that they were

canceling the Agreement and demanding a full refund of all their deposits. Their letter contended that the contract was illusory because several contractual pre-conditions were either ill-defined or within Montelucia's control, and that the benchmarks for completion of the home (construction of the Lincoln Drive access, internal road, pool area, and overflow parking) had not been met.

After Montelucia refused to return the earnest money, the Thomases sued. Montelucia counterclaimed that the Thomases were themselves in breach by refusing to close. The counterclaim requested specific performance of the contract or, in the alternative, liquidated or actual damages.

The superior court granted summary judgment to the Thomases based on a finding that Montelucia was in breach by failing to complete the resort's infrastructure, access, and amenities. The Thomases were awarded their deposits plus statutory interest, attorneys' fees, and costs.

On appeal, the Court of Appeals determined that the Thomases' cancellation of the contract constituted anticipatory repudiation, which it defined as a "breach of contract giving rise to a claim for damages and also excusing the necessity for the non-breaching party to tender performance." *United California Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 283 (App. 1983) (repudiating party not entitled to demand performance from the innocent party)(citing *Kammert Bros. Enters., Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301 (1967); 2 Restatement (Second) of Contracts § 277 (1981); 4 Corbin on Contracts § 977 (1951)).

The Court of Appeals further determined that, in general, a party seeking equitable relief such as specific performance must also show willingness and ability to perform. *See, e.g., Lee v. Nichols*, 81 Ariz. 106, 111-12 (1956); *United California Bank*, supra, at 283-284 ("To recover damages for anticipatory breach, the injured party need only show that he had the ability to perform his own obligations under the agreement. *Woliansky v. Miller*, 135 Ariz. 444 (App. 1983)"). However, since no claim by Montelucia for affirmative relief was presented, Montelucia was not bound by the general rule and was not required to prove that it was willing and able to perform under the contract. The non-breaching party need not prove it was able to perform unless it seeks damages, the Appeals Court held. It reversed the judgment of the superior court and ordered summary judgment for Montelucia.

## **ISSUES:**

1. Whether a party seeks "affirmative relief" when it uses the anticipatory-repudiation doctrine as a basis for retaining an earnest-money deposit.
2. Whether a party must satisfy the "ready, willing and able" element of an anticipatory-repudiation claim to retain an earnest-money deposit.

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