At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of January, 2016.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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470 MANHATTAN AVE LLC,

Plaintiff,

- against -

THOMAS BARONE, ECKFORD 1 REALTY CORP., ECKFORD 2 REALTY CORP. and INVESTMENT PROPERTY EXCHANGE SERVICES, INC.,

Defendant(s).

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DECISION AND ORDER

Index # 513947/2015

The following papers numbered 1 to 8 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	5-7
Other Affidavit (Affirmation)	8

After oral argument and upon the foregoing papers, Plaintiff's motion for a preliminary injunction is DENIED and Defendant's motion to vacate the *ex parte* temporary restraining order ("TRO") granted on November 16, 2015, is GRANTED to the extent granted herein.

Background

In its complaint, Plaintiff, 470 MANHATTAN AVE LLC, alleges that Defendants THOMAS BARONE, ECKFORD 1 REALTY CORP., and ECKFORD 2 REALTY CORP. (hereinafter collectively referred to as Defendants) induced it to purchase property located on 16-22 Eckford Street in Greenpoint, Brooklyn (hereinafter referred to as the "Property") under false representations.

Mr. Barone was the seller and owner of the Property. With the instant motion, Plaintiff seeks a preliminary injunction restraining Defendants from transferring or dissipating the $16 million that Plaintiff paid to purchase the Property. The funds are temporarily being held by Defendant, Investment Property Exchange Services, Inc. ("IPX"), who is holding said funds for Defendants' purchase of another property located in Pennsylvania as part of a so-called "like kind exchange" under Section 1031 of the Internal Revenue Code.

It is Plaintiff's position that a preliminary injunction is necessary to preserve Plaintiff's remedies because Eckford 1 and Eckford 2 Realty Corporations are single-purpose entities with no other assets except the $16 million in sale proceeds and Mr. Barone's assets would be insufficient to satisfy the potential judgment in this matter.

Plaintiff further contends that it is likely to prevail on its complaint alleging, among other things, fraudulent inducement and breach of contract. Plaintiff alleges the following: that between June 26 and July 15, 2015, during discussions about the sale of the Property, Defendants falsely represented that the Property's tenants were purely month-to-month commercial tenants leasing the premises for "studio and office" purposes with no continuing claim to reside in the Property; that the contract of sale which was signed on July 16, 2015, represented and warranted the same; that Defendants knew Plaintiff intended the Property to be demolished for the construction of a new development and would not have bought the Property if any of the tenants had a conceivable claim of a right to reside on the Property; and contrary to their false representations, Defendants knew the tenants could assert residential rights under New York's Loft Law based on the fact that Defendants themselves had installed kitchens, bathrooms and other fixtures in the leased spaces and had hired Loft Law counsel in April 2015 to advise them of the tenants' potential rights, all of which was concealed from Plaintiff. Plaintiff also claims that Defendants persuaded Plaintiff to forego inspection of the leased spaces prior to closing, set to occur on October 1, 2015, so that Defendants would not discover that the "commercial" leases were a sham.

Plaintiff further contends that, in late August 2015, Defendants learned the tenants had filed or were about to file their Loft Law application; that despite knowing the foregoing, at their meeting on August 25, 2015, Mr. Barone dissuaded Plaintiff from contacting the tenants to provide

termination notices, explaining that it would be better if the notice came from him given his longstanding relationship with the tenants; and that this "lie" was told to prevent Plaintiff from communicating with the tenants and discovering their claimed residential rights.

On September 9, 2015, the tenants filed their Loft Law application, which was not disclosed to Plaintiff. That same day, Plaintiff filed multiple demolition applications with the Department of Buildings, however, upon discovering the tenants' Loft Law application, Plaintiff states that it was forced to suspend development of the Property. Based on the foregoing, Plaintiff argues it has established its entitlement to a preliminary injunction. On November 16, 2015, Plaintiff moved *ex parte* for a TRO pending a determination of its instant motion for a preliminary injunction, which this Court granted.

In opposition and support of their motion to vacate the TRO, Defendants assert Plaintiff was fully aware that the tenants were residing on the premises in violation of their leases. Specifically, Defendants argue Plaintiff knew or should have known of the tenants' status since copies of the leases were provided to Plaintiff at the time of contract and that eight out of nine of the tenants listed were individuals. Further, that the lease rider referred to "apartments" and that despite these indications, Plaintiff failed to inspect the units or have the property appraised. Defendants also submit that, prior to closing, Mr. Barone directed his attorney to advise Plaintiff's real estate counsel, Howard Stein, that the tenants were in violation of their leases and potentially residing in the units. This disclosure was accompanied with an option for Plaintiff to cancel the contract and receive a refund of the deposit provided Plaintiff canceled within seven business days with time being of the essence. In support, Defendants attach an email dated August 5, 2015 from Harold Gruber, Esq., Defendants' attorney, to Mr. Stein communicating same. Defendants additionally assert that Plaintiff was informed, in-person, of the tenants' residential status at the signing of the contract amendment on or around August 25, 2015, to which Plaintiff's principal, Douglas S. Partrick, allegedly stated that he would have to "take them to court" and that he had a "fight on his hands."

Secondly, Defendants argue that the terms of the contract bars Plaintiff's claims. That Plaintiff represented and warrantied that "[b]efore entering into this contract, Purchaser has made such examinations of the Premises, the operation, income and expenses...relating to this transaction

as Purchaser deemed necessary," which Plaintiff failed to do. That Defendants never barred Plaintiff from inspecting the Property and Plaintiff's allegations concerning its conduct does not amount to concealment.

Finally, Defendants contend Plaintiff is a sophisticated investor and a part of Heatherwood, a real estate developer with a portfolio of investments throughout the New York metropolitan area. That therefore, Plaintiff should be held to the standard of a sophisticated investor and as such, the doctrine of *caveat emptor* bars Plaintiff's claim.

In the event the Court vacates the TRO, Defendant argues it is entitled to an award of damages and attorney's fees.

In reply, Plaintiff argues that the email disclosure fails to undo Defendants' fraud as the fraud was completed upon signature of the contract of sale, and moreover, that the email itself contains falsehoods since the leases and tenants were not commercial. Plaintiff argues Defendants concealed that they had leased space in the Property expressly for residential use though using sham commercial leases because the building had no certificate of occupancy. Plaintiff additionally states that, after the August 5, 2015 email, Plaintiff conducted its due diligence by inspecting the commercial leases tendered by Defendants and searching the public records of New York State Division of Housing and Community Renewal and the Loft Board but that could not reveal facts peculiarly within Mr. Barone's knowledge.

Discussion

"A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor" (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844 [2d Dept 2009]; *see Shasho v Pruco Life Ins. Co. of N.J.*, 67 AD3d 663, 665 [2d Dept 2009]). Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts (*Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 [2d Dept 2005]). Thus, while the existence of issues

of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief (*Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612 [2d Dept 2008]).

"The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court"(*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]).

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178[Ct App 2011]). However, in the context of real estate transactions, a claim of fraudulent misrepresentation or inducement must be analyzed within the doctrine of caveat emptor. "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" (*Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005]). "If however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of "active concealment," a seller may have a duty to disclose information concerning the property" (*Daly v Kochanowicz*, 67 AD3d 78, 91-92 [2d Dept 2009]). A plaintiff seeking to recover damages for active concealment must show that the defendant "thwarted" the plaintiff's efforts to fulfill his or her responsibilities imposed by the doctrine of caveat emptor (*see Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [Ct App 2009]). In addition, "[w]here the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was

induced to enter into the transaction by misrepresentations" (*Perez-Faringer v Heilman*, 95 AD3d 853, 854 [2d Dept 2012]).

Here, in consideration of the foregoing, the Court concludes that Plaintiff has not demonstrated its right to injunctive relief. First, the facts are sharply disputed with regards to one of the central issues - whether Defendants disclosed that the tenants were residing in the Property at or around the time of the contract and/or whether Plaintiff knew or should have known of the same.

Furthermore, assuming Defendants actively concealed the tenants' true status as "residential" tenants, Plaintiff's allegations do not clearly establish that Defendants "thwarted" Plaintiff's efforts to fulfill its responsibilities pursuant to the doctrine of *caveat emptor*. Plaintiff is a sophisticated party well-versed in the purchase of multi-million dollar properties. Given Plaintiff's view that the Property's vacancy was absolutely essential to the transaction, the Court finds Plaintiff's decision to rely on Mr. Barone's statements in lieu of inspecting the tenants' units to verify the "real quality" of Defendants' representation that the tenants and leases were "commercial" shows a lack of due diligence. Plaintiff does not dispute that Mr. Barone never barred it from inspecting the units. Plaintiff only asserts that Mr. Barone persuaded them not to, indicating that the tenants' "true" status was *not* peculiarly within Defendants' knowledge (*see UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [1st 2001]).

In addition, "irreparable harm" in the context of a preliminary injunction is one which is not compensable by money damages (*see Matter of Rice*, 105 AD3d 962, 963 [2d Dept 2013]). Here, Plaintiff has not established that an increased difficulty in enforcing a possible monetary judgment against Defendants necessarily constitutes irreparable harm.

Based on the foregoing, Plaintiff's motion for a preliminary injunction must be denied.

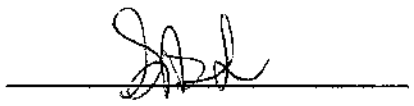
Accordingly, it is hereby

ORDERED that Plaintiff's motion for a preliminary injunction is DENIED; and it is further

ORDERED that Defendants' motion to vacate the TRO is GRANTED and the TRO in effect since November 16, 2015, is hereby lifted. Defendants' application for damages is denied.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.