SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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70-35 113TH STREET HOLDINGS, LLC,

Index No.: 701293/2021

Plaintiff,

-against-

AUBERGE GRAND CENTRAL LLC,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S ORDER TO SHOW CAUSE TO DISMISS

RHEEM BELL & FREEMAN LLP
Attorneys for Defendant
Auberge Grand Central LLC
20 W. 36th Street, 12th Floor
New York, New York 10018
T.: (212) 239-4001
F.: (212) 239-4125
E.: rfreeman@rbfllp.com

PRELIMINARY STATEMENT

Defendant Auberge Grand Central LLC ("Defendant" or "Auberge"), respectfully submits this memorandum of law in support of its Order to Show Cause, which seeks an Order: (i) dismissing plaintiff 70-35 113th Street Holdings LLC's ("Plaintiff" or "70-35 Holdings") complaint in its entirety, with prejudice, (ii) ordering the removal, expungement, vacation and dismissal of the notice of pendency filed by Plaintiff, (iii) barring Plaintiff, whether suing as 70-35 113th St Holdings LLC or 70-35 113th Street Holdings LLC, its agents and representatives, including but not limited to Sam Sprei, Chaim Miller and Chaim Babad, from filing another notice of pendency on the subject premises in any action or proceeding without prior court approval, (iv) awarding Defendant reasonable legal fees, costs and disbursements incurred in the preparation and hearing of the instant motion, (v) awarding sanctions and costs against Plaintiff and Plaintiff's counsel for filing a duplicative action already disposed on the merits, and (vi) granting Defendant such other and further relief as may be just and proper under the circumstances.

Defendant further submits the instant Order to Show Cause for an Order, pending the hearing and determination of the aforementioned application, restraining and enjoining Plaintiff, whether suing as 70-35 113th St Holdings LLC or 70-35 113th Street Holdings LLC, its agents and representatives, including but not limited to Sam Sprei, Chaim Miller and Chaim Babad, from filing a notice of pendency on the subject premises in any action or proceeding.

For the reasons set forth more fully herein and in the affidavit of Ilio Mavlyanov sworn before to on February 22, 2021, and the affirmations in support filed in conjunction with this application, it is respectfully submitted that Defendant's Order to Show Cause must be granted in its entirety.

STATEMENT OF FACTS AND PERTINENT PROCEDURAL HISTORY

While the instant proceeding was only filed on January 19, 2021, and the summons, complaint and notice of pendency were never served, this matter, and more specifically the facts and circumstances of

this proceeding, has a long procedural history coupled with findings of fact and conclusions of law on the same parties, facts, transaction and applicable law already rendered.

Statement of Facts

The summons and complaint in this instant action seeks, in pertinent part: (i) reformation of contract, (ii) foreclosure of vendee's lien, (iii) return of deposit and extension fees and (iv) monies had and received (hereinafter, the summons and complaint filed on behalf of Plaintiff will be referred to as the "Third Proceeding"). True and accurate copies of the summons and complaint in the Third Proceeding are collectively annexed to the Affirmation in Support of Richard E. Freeman III, Esq. dated February 21, 2021 ("Freeman Aff.") as **Exhibit A**.

The Third Proceeding, much like the two prior proceedings previously commenced on the same exact transaction, between the same parties and involving the same law and facts[1][2], stems from a foreclosure auction sale that occurred in a prior proceeding in the Supreme Court of the State of New York, Queens County, entitled, *Auberge Grand Central, LLC v. Parkway Acquisition I, LLC f/k/a Parkway Hospital Associates, et al*, - Index No.: 489/2011, which previously had been captioned *Medical Provider Financial Corporation III -against- Parkway Acquisition I, LLC f/k/a Parkway Hospital Associates* – Index No.: 489/2011 (hereinafter collectively "Foreclosure Proceeding").

Auberge purchased the existing debt on the property known as 70-35 113th Street, Queens, New York (the "Parkway Hospital Property" or "Premises") and was substituted in as the plaintiff in the already existing Foreclosure Action, in the place of the existing lender.

[1] On July 16, 2015, Plaintiff commenced an action entitled *70-35 113th St Holdings, LLC -against- Auberge Grand Central LLC and Parkway Hospital Associates* – Index No.: 707503/2015 ("First Proceeding"). That action, alleged, amongst other things, a breach of contract for the sale of the Premises and, further, seeking specific performance of the contract or, in the alternative, a money judgment against Auberge in the amount of at least $22,500,000.00. 70-35 113th St Holdings filed a notice of pendency against the Premises in conjunction with the First Proceeding.

[2] Shortly after 70-35 113th St Holdings filed the First Proceeding, *another action* was filed on behalf of 70-35 113th St Holdings. Specifically, the action entitled *Wing Fung Chau, individually and on behalf of 70-35 113th St Holdings LLC, against Auberge and Parkway Hospital Associates* - Index No.: 713438/2015 was filed in the Supreme Court of the State of New York, Queens County on December 30, 2015 ("Second Proceeding"), alleging identical facts and causes of action as in the First Proceeding. Wing Fung Chau, individually, and or behalf of 70-35 113th St Holdings also filed a notice of pendency against the Premises.

A foreclosure auction for the property was held on January 10, 2014. Plaintiff 70-35 113th Street Holdings, LLC became the successful bidder for the Parkway Hospital Property. The memorandum of sale dated January 10, 2014 appended to the terms of sale of the same date ("Terms of Sale") states that the successful bid for the Premises was the sum of $22 million. Pursuant to the Terms of Sale, a ten (10%) percent deposit in the amount of $2.2 million dollars was tendered at the January 10, 2014 foreclosure auction to the Referee, Joseph Risi, Esq[3] ("Referee Risi"), with $1.2 million dollars being paid by Samuel Sprei ("Sprei") with monies he obtained from Chaim Babad ("Babad") and $1 million dollars being paid by Wing Fung Chau ("Chau"). A true and accurate copy of the Terms of Sale and Memorandum of Sale, both dated January 10, 2014, are collectively annexed to the Freeman Aff. as **Exhibit H**.

By the Terms of Sale, Plaintiff was to pay the $22 million dollar purchase price for the Parkway Hospital Property and any other costs and expenses set forth therein, less the $2.2 million dollar deposit already tendered, to the Referee at closing, at which time the Referee's Deed for the Premises would be ready for delivery. (**Exhibit H**). Pursuant to the Terms of Sale, the closing was to be cash closing without financing contingencies. (**Exhibit H**). The closing was to take place or before February 10, 2014 at 10:00am, with such date and time agreed to be *time of essence* as to the purchaser, 70-35 113th St Holdings LLC, only. (**Exhibit H** at ¶ 3).

Plaintiff failed to close on the February 10, 2014 closing date and it requested an adjournment of said closing date to February 20, 2014, which was agreed to by Auberge and the Referee and memorialized in a Stipulation dated March 28, 2014. A true and accurate copy of the Stipulation between the Referee, 70-35 113th St Holdings LLC and Auberge Grand Central LLC dated March 28, 2014 is annexed to the Freeman Aff. as **Exhibit I** at p. 1.

[3] The Hon. Joseph Risi, J.S.C. is now a sitting Justice of the Supreme Court of the State of New York, County of Queens. He is referred to herein throughout as "Referee" and not by his judicial title only because that was the capacity in which he was involved in the underlying foreclosure proceeding that forms the basis of the instant action.

Thereafter, Plaintiff requested a *second adjournment* of the closing to March 5, 2014, which Auberge and the Referee agreed to. (**Exhibit I** at p.1).

Plaintiff then failed to close on the agreed upon March 5, 2014 closing date, and it requested a *third adjournment* of the closing date to April 17, 2014 in exchange for (i) permitting the Referee to release the $2.2 million dollar deposit to Auberge and (ii) depositing an additional deposit of $500,000 with the Referee. 70-35 113th Street Holdings LLC by Sam Sprei, its attorney, Yisroel Schwartz, Esq., Auberge's counsel Susan McWalters, Esq., and the Referee entered into a stipulation for that purpose. (**Exhibit I**). Pursuant to its terms, the closing was set as time of the essence to close as to purchaser only with a time of the essence closing date of April 17, 2014 at 5:00PM at the office of the Referee. (**Exhibit I**).

Thereafter, Plaintiff "requested a fourth adjournment of the closing date" and both Plaintiff and its counsel, along with Auberge's counsel and the Referee, signed a new stipulation to that effect. A true and accurate copy of the Stipulation between the Referee, Plaintiff and Auberge Grand Central LLC dated April 14, 2014 is annexed to the Freeman Aff. as **Exhibit J**; see **Exhibit J** p. 2). Pursuant to that stipulation, Plaintiff agreed to pay the sum of $300,000 as a non-refundable extension fee to extend the time to close title to May 5, 2014. (**Exhibit J**). The stipulation confirmed that Atlantis National Services, the title company for the contemplated for the potential transaction, was ready, willing and able to deliver clear title. (**Exhibit J**). That closing was agreed to be time of the essence as to Plaintiff, only. (**Exhibit J**).

Prior to the agreed upon May 5, 2014 closing date, 70-35 Holdings' attorney, Yisroel Schwartz, Esq., emailed Sprei, Auberge's counsel and the Referee on May 2, 2014 advising that 70-35 Holdings was asking that the parties agree to postpone the closing one additional time for up to two weeks in exchange for an additional $500,000 extension fee.

On the basis of that email, 70-35 Holdings, Yisroel Schwartz, Esq., Auberge's counsel and the Referee entered into a new stipulation, whereupon 70-35 Holdings requested a fifth adjournment of the closing and the parties agreed to extend 70-35 Holdings' time to close until May 29, 2014 in exchange

for 70-35 Holdings' payment of a non-refundable $500,000 extension fee, and an additional deposit of $1,000,000 towards the purchase price that was being paid directly, and immediately released, to Auberge. A true and accurate copy of the Stipulation between the Referee, 70-35 113th St Holdings LLC and Auberge Grand Central LLC dated May 5, 2014 is annexed to the Freeman Aff. as **Exhibit K**.

Moreover, by its terms, the May 2014 Stipulation modified the Terms of Sale and, specifically: (i) it memorialized the four (4) prior adjournment requests made by 70-35 113th St Holdings and the additional deposits and extension fees that had been agreed to by 70-35 113th St Holdings, Auberge and the Referee in relation to same; (ii) it memorialized that Auberge and 70-35 Holdings "obtained confirmation of clear title from Atlantis National Services through Old Republic National Title Insurance Company," acknowledged that "Atlantic National Services, as agent through Old Republic was ready, willing and able to provide a clear fee policy to [70-35 Holdings]" and agreed that 70-35 113th St Holdings would be obtaining a fee policy and mortgage policy, if necessary, from Old Republic at closing; (iii) it stipulated the terms for yet another extension of time for 70-35 113th St Holdings to close on May 29, 2014; (iv) it stated that 70-35 113th St Holdings, its successors and or assigns, "shall have no claim, and shall make no claim to certain deposits that were already released or paid to Auberge, or which would be released or paid to Auberge, pursuant to the May 2014 Stipulation other than in connection with Auberge's gross negligence or willful misconduct or the failure to convey title to the Successful Bidder at closing" and (v) it agreed that 70-35 113th St Holdings shall hold the Referee harmless and indemnify the Referee for any claims arising out of the release of the initial deposit of $2,200,000. (**Exhibit K**).

As in previous stipulations, because 70-35 Holdings requested the extension, the parties to the stipulation agreed that the May 29, 2014 closing was time of the essence as to Plaintiff, only, because Plaintiff 70-35 113th St Holdings LLC was the party asking for the adjournment. (**Exhibit K**). In particular, the May 2014 Stipulation stated that in consideration for 70-35 Holdings paying Auberge an additional deposit of One Million ($1,000,000) Dollars and an extension fee of Five Hundred Thousand ($500,000)

Dollars, Auberge and the Referee agreed to extend and adjourn the closing of title a *fifth time* from May 5, 2014 to May 29, 2014 at 10:00am, such date being time of the essence as to 70-35 113th St Holdings as purchaser, only. (**Exhibit K**).[4] The May 5, 2014 stipulation stated that "no further adjournments will be granted to Successful Bidder[5]." (**Exhibit K**). Again, the May 2014 Stipulation was signed by the then attorney for 70-35 Holdings Yisroel S. Schwartz, Esq., and also by Sprei on behalf of 70-35 Holdings, separately, in addition to Auberge's counsel Susan McWalters, Esq. and Referee Risi. (**Exhibit K**).

McWalters sent an email to Yisorel Schwartz, Esq. and the Referee the day before the time of the essence closing confirming that the closing was taking place the next day, May 29, 2014 at 10:00am at the office of the Referee and that such closing was time of the essence. A true and accurate copy of the May 28, 2014 email between Susan McWalters, Esq. to Yisroel Schwartz, Esq. and the Referee concerning the May 29, 2014 time of the essence closing is annexed to the Freeman Aff. as **Exhibit L**.

A deed was prepared for the Referee to convey to 70-35 Holdings in contemplation of the May 29, 2014 time of the essence closing and title was clear at that time. In addition to the email correspondence earlier in the day on May 28, 2014, McWalters sent Yisroel Schwartz a subsequent email providing a draft closing statement and a title bill indicating that, amongst other things, Plaintiff needed the sum of $19,341,629.51 in order to close at the time of the essence closing set forth the next day, which in addition to the $3,700,000 in deposits already paid by Plaintiff, was a total of $23,041,629.51. A true and accurate copy of the May 28, 2014 email between Susan McWalters, Esq. to Yisroel Schwartz, Esq. regarding the funds needed to close and closing statement for May 29, 2014 is annexed to the Freeman Aff. as **Exhibit M**. There were no communications from Yisorel Schwartz, Esq. or Plaintiff that they were not going to

[4] In aggregate, 70-35 113th St Holdings LLC agreed to pay the total of Three Million Seven Hundred Thousand ($3,700,000) Dollars in deposits towards the purchase price of the Parkway Hospital Property and Eight Hundred Thousand ($800,000) Dollars in extension fees to Auberge. As set forth more fully in the May 2014 Stipulation, Two Million Two Hundred Thousand ($2,200,000) Dollars in deposits was released to Auberge as of that time.

[5] Successful Bidder refers to 70-35 113th St Holdings LLC throughout the stipulation. (**Exhibit K**).

show up at the closing so the other parties believed in good faith that Plaintiff or a representative would be appearing at the Referee's office at the agreed time to close.

At the agreed upon time of the essence closing of May 29, 2014, Susan McWalters, Esq., the attorney for Auberge appeared at the office of the Referee at 10:00am and presented a Referee's Deed and Referee's Report of Sale pursuant to the express terms of the May 2014 Stipulation. (**Exhibit N**). Richard Sorrentino, a title closer on behalf of Atlantis National Services, also appeared at the Referee's office. (**Exhibit N**). At that time, Auberge, the Referee and the title closer were prepared to convey clear fee title to 70-35 113th St Holdings for the Parkway Hospital Property. (**Exhibit N**).

Neither Plaintiff nor its attorney appeared at the office of the Referee on May 29, 2014 at 10:00am at the time of the essence closing ready, able or willing to close. (**Exhibit N**). Further, as of 11:00am that day, neither Plaintiff, its attorney, nor anyone purporting to act on behalf of the successful bidder appeared to close title to the Premises. (**Exhibit N**). As a result, 70-35 113th St Holdings was held in default of the Terms of Sale dated January 10, 2014, as modified by the May 2014 Stipulation. (**Exhibit K**; **Exhibit N**).

As a result of 70-35 Holdings not appearing ready, able and willing to close at the May 29, 2014 time of the essence closing, Referee Risi sent a notice to 70-35 Holdings' counsel, Yisroel Schwartz, Esq. of Blaivas & Associates, P.C., on May 29, 2014, stating "at 11:00 am, neither the successful bidder, the successful bidder's attorney, or anyone purporting to act on behalf of the successful bidder appeared to Close Title to the premises" and along with a Memorandum memorializing 70-35 Holdings' default (with the May 29, 2014 letter from Referee Risi and Memorandum collectively referred to hereinafter as "Default Notice"). A true and accurate copy of the May 29, 2014 default notice from the Referee to 70-35 113th St Holdings LLC is annexed to the Freeman Aff as **Exhibit N**.

After the default, Plaintiff's attorney reached out to Auberge's attorney making various financing requests of Auberge to assist Plaintiff in trying to secure funding in an effort to convince Auberge and the Referee to vacate Plaintiff's default.

None of the requests for financing were ever acceptable to Auberge, and no agreement for financing between Auberge and 70-35 Holdings was ever reached. The May 29, 2014 default was never vacated, and at no point did 70-35 113th St Holdings LLC ever demonstrate that it was ready, willing and able to close. The Premises was subsequently reauctioned on August 8, 2014.

At the second foreclosure sale on August 8, 2014, Defendant become the successful bidder on the Property by bidding $1 million dollars, the highest sum at auction. As a result, Defendant eventually became the owner of the Property, by deed conveyed by Referee Risi.

After the second foreclosure auction, Defendant made a motion in the Foreclosure Proceeding seeking the release of the remainder of Plaintiff's deposit to Defendant as well as an award of additional fees to the Referee. As a result, the Hon. Timothy J. Dufficy, J.S.C. issued an Order in the pre-existing Foreclosure Proceeding dated September 6, 2016, entitled "Order Awarding Additional Referee's Fees and Release of Defaulted Bidder's Deposit to Auberge Grand Central, LLC" which ordered, in pertinent part, that the Referee "release and pay the balance of the defaulted bidder's[6] deposit to Auberge Grand Central, LLC, as assignee of plaintiff." ("Defaulted Bidder Order"). A true and accurate copy of the Defaulted Bidder Order dated September 6, 2016 is annexed to the Freeman Aff. as **Exhibit O**.

That Order directed that the Referee release and pay the balance of defaulted bidder Plaintiff's deposit to Defendant, thus confirming Plaintiff's default. Plaintiff did not seek to appeal that Order.

Procedural History

On July 16, 2015, Plaintiff commenced an action entitled *70-35 113th St Holdings, LLC -against- Auberge Grand Central LLC and Parkway Hospital Associates* – Index No.: 707503/2015 ("First Proceeding"). That action, alleged, amongst other things, a breach of contract for the sale of the Premises and, further, sought specific performance of the contract or, in the alternative, a money judgment against Auberge in the amount of at least $22,500,000.00. Simultaneously on July 16, 2015, Plaintiff filed a notice

[6] Notably, 70-35 113th St Holdings is referred to as the "defaulted bidder" therein.

of pendency against the Premises. A true and accurate copy of the summons, complaint and notice of pendency in the First Proceeding is collectively annexed to the Freeman Aff as **Exhibit A**.

Shortly after 70-35 113th St Holdings filed the First Proceeding, *another action* was filed on behalf of 70-35 113th St Holdings. Specifically, the action entitled *Wing Fung Chau, individually and on behalf of 70-35 113th St Holdings LLC, against Auberge and Parkway Hospital Associates* - Index No.: 713438/2015 was filed in the Supreme Court of the State of New York, Queens County on December 30, 2015 ("Second Proceeding"), alleging identical facts and causes of action as in the First Proceeding. A true and accurate copy of the summons, complaint and notice of pendency in the Second Proceeding is collectively annexed to the Freeman Aff. as **Exhibit G**. Auberge filed a motion for summary judgment in the Second Proceeding against 70-35 113th Street Holdings LLC, and by the Decision and Order of the Hon. Leslie J. Purificacion, J.S.C. dated July 21, 2017 that motion was granted in its entirety and 70-35 113th St Holdings' complaint for specific performance and an award of money damages was dismissed. A true and accurate copy of the Decision and Order of the Hon. Leslie J. Purificacion, J.S.C. is annexed to the Freeman Aff. as **Exhibit P**.

The First Proceeding ultimately proceeded to a bench trial before the Hon. Leonard Livote, J.S.C., which took place across ten (10) days between February 21, 2020 through and including March 10, 2010. A Decision and Order After Trial dismissing Plaintiff's complaint and Defendant's counterclaim was issued by the court on December 2, 2020 and entered on December 4, 2020. There was a subsequent adjudication set forth in the Judgment dated December 15, 2020 and an Order issued by the court removing the notice of pendency on the Premises on December 14, 2020, which essentially confirmed the Decision and Order After Trial. A true and accurate copy of the Decision and Order After Trial dated December 2, 2020, the Order removing the notice of pendency on the Premises dated December 14, 2020, and Judgment dated December 15, 2020, are annexed hereto as **Exhibits C**, **D** and **E**, respectively.

As set forth more fully in the court's Decision and Order After Trial, the court arrived at the following findings of fact and conclusions of law that:

i. Time was made of the essence in the original terms of sale which were incorporated by referenced into each subsequent stipulation concerning an adjournment. See **Exhibit C**, p. 5;

ii. Time of the essence was not unilaterally made but agreed upon by the parties to the terms of sale and stipulations. See **Exhibit C**, p. 6;

iii. Plaintiff stipulated and thus agreed with the Referee and Defendant that confirmation of clear title from Atlantis National Services through Old Republic National Title Insurance Company was received and was not a bar to closing. See **Exhibit C**, p. 6;

iv. The evidence adduced at trial "establishes that the plaintiff breached the contract when it did not appear on the May 29, 2014 time-of-the-essence closing date." See **Exhibit C**, p. 5;

v. Defendant did not act as if the subject agreement was still in full force and effect after Plaintiff's default and, as such amongst other reasons, Defendant was not estopped from asserting Plaintiff remained in default. See **Exhibit C**, p. 6;

vi. Plaintiff did not demonstrate that it was ever ready, willing, and able to close after it was held in default. See **Exhibit C**, p. 6;

vii. Plaintiff was advised that the Property would be reauctioned because its default was not vacated. See **Exhibit C**, p. 4;

viii. On August 8, 2014 a second foreclosure auction was held for the Property, and Defendant became the successful bidder on the Property for $1,000,000.[7] See **Exhibit C**, p. 4;

ix. Plaintiff failed to prove its breach of contract and specific performance claims. See **Exhibit C**, p. 6.

70-35 113th St Holdings LLC appealed the subsequent Judgment (**Exhibit E**) and Order (**Exhibit D**) that were entered as a result of the Decision and Order After Trial. A true and accurate copy of those notices of appeal are annexed to the Freeman Aff. as **Exhibit R**.

[7] It is further undisputed that Defendant became the owner of the Property after the second foreclosure sale by way of Referee's deed.

As part of the Appellate Division, Second Department's Decision and Order on Motion dated January 15, 2021 in response to 70-35 113th St Holdings LLC's aforementioned appeals and application for a stay of the enforcement of the Judgment and Order, the Appellate Division ruled as follows:

> Appeals from an order of the Supreme Court, Queens County, entered December 14, 2020, and a judgment of the same court entered December 15, 2020. Motion by the appellant to stay enforcement of the judgment and the order, reinstate a certain notice of pendency, and enjoin the transfer, conveyance, or encumbrance of the subject real property, pending hearing and determination of the appeals.
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> …
>
> *ORDERED that on the Court's own motion, the appeal from the order is dismissed, without costs or disbursements, on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice (see CPLR 5701), and leave to appeal has not been granted*; and it is further,
>
> ORDERED that the motion is denied. (*emphasis added*)

A true and accurate copy of the Decision and Order on Motion of the Appellate Division, Second Department dated January 15, 2021 is annexed to the Freeman Aff. as **Exhibit S**.

In what appears to be a clear response Plaintiff's appeal being dismissed by the Second Department, Plaintiff brought the instant action. It is abundantly clear that Plaintiff filed the Third Proceeding for the sole purpose of "supporting" the filing of a notice of pendency, when both Plaintiff and Plaintiff's counsel know full well that there has already been a hearing and determination on the issues, facts and law that concern Plaintiff's failure to close at the time of the essence law date set for the Premises, and Plaintiff's forfeiture of its contract deposits and extension fees as a result of same.

Even a cursory review of the complaint demonstrates that all of the claims asserted by Plaintiff are essentially recast causes of action that were interposed or could have been interposed in the First Proceeding, *to wit*, (i) reformation of the Terms of Sale and/or the Stipulations so that specific performance may be granted – something litigated at length at trial in the First Proceeding, (ii) foreclosure of a vendee's lien – a claim that would arise from the subject agreement and could have been asserted in the First Proceeding, (iii) return of deposit and extension fees – precisely what Plaintiff requested at trial in the

First Proceeding and (iv) monies had and received – which is a again duplicative of relief requested in First Proceeding. Notably, all of these causes of action involve a common nexus of law and facts as well as parties identical to the First Proceeding and Second Proceeding.

As set forth more fully herein, Plaintiff's Third Proceeding must be dismissed in its entirety.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, SHOULD BE GRANTED IN ITS ENTIRETY

Plaintiff asserts the following causes of action in its Complaint against Defendant: (i) reformation of contract, (ii) foreclosure of vendee's lien, (iii) return of deposit and extension fees and (iv) monies had and received. Not a single cause of action asserted therein should be permitted to stand.

A. Defendant's Motion to Dismiss Pursuant to CPLR § 3211(a)(5) Must Be Granted

It is clear that the instant action must be dismissed on multiple grounds. CPLR § 3211(a)(5) states that a "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that… "the cause of action may not be maintained because of arbitration and award, *collateral estoppel*, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, *statute of limitations*, or statute of frauds." See CPLR § 3211. (*emphasis added*).

i. Plaintiff Causes of Action are Barred by Statute of Limitations

On the outset, it is clear that all of Plaintiff's newfound causes of action are barred by the statute of limitations and must be dismissed in their entirety. Each and every one of Plaintiff's claims are – at best - subject to a six (6) year statute of limitations, which would have begun to accrue as of the May 29, 2014 date of Plaintiff's default in the transaction that forms the basis of this proceeding.

To be sure, Plaintiff's first cause of action for contract reformation is subject to a six (6) year statute of limitations. *Bloom v. St. Paul Travelers Companies, Inc.*, 57 A.D.3d 819, 821 (2nd Dept., 2008). CPLR § 213(2). Plaintiff's second cause of action for foreclosure of vendee's lien is also subject to a six year statute of limitations. *Leonor v. Ingenio Porvenir C. por A.*, 34 N.Y.S.2d 705 (Sup Ct 1942); CPLR

§ 213(2). To the extent there actually was a vendee's lien, which there was not, it would also arise from the underlying agreement and be akin to a breach of contract action. Plaintiff's third cause of action, stylized as a "return of deposition and extension fees," is really just advancing another breach of contract claim, which is subject to a six year statute of limitations under New York law. CPLR § 213(2). Lastly, a claim for monies had and received is also subject to a six year statute of limitations. *District Attorney of New York County v. Republic of the Philippines*, 307 F.Supp.3d 171 (SDNY 2018); CPLR § 213(2).

Inasmuch as all of the claims are subject to six (6) year statutes of limitation, all of the claims asserted herein would be barred as of May 30, 2020. Even if the Executive Orders[8] passed by Governor Cuomo during the COVID-19 pandemic are taken into effect to suspend the statute of limitations, that would result in the expiration of the six (6) year statute of limitations for all such claims if they were not filed *as of November 3, 2020*. See Executive Order 202.72. Given that the action was commenced on January 19, 2021, said claims are now barred and must be dismissed.

ii. Plaintiff is Barred by the Doctrine of Res Judicata

The well-worn definition of res judicata is that it prohibits re-litigation of a matter when an earlier action disposed of the same transaction or series of transactions, involving the same parties, when there was a full and fair opportunity for the parties to be heard in the prior forum. *Paramount Pictures Corp. v Allianz Risk Transfer AG,* 31 N.Y.3d 64, 73 N.Y.S.3d 472 (2018); *Wilson v Dantas,* 29 N.Y.3d 1051, 58 N.Y.S.3d 286 (2017); *O'Brien v City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981).

Res judicata dictates that, "a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" … "as to the parties in a litigation and those in privity with them." *UBS Sec. LLC v Highland Capital*

[8] Executive Order 202.72 states "Pursuant to Executive Order 202.67, the ***suspension*** for civil cases in Executive Order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding as prescribed by the procedural laws of the state, including but not limited to the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby no longer in effect as of November 4, 2020…" (*emphasis* and **bolding** added)

Mgt., L.P., 86 AD3d 469, 473-74 (1st Dept. 2011). "Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, *even if based upon different theories or if seeking a different remedy.*" (54 NY2d at 357). *UBS Sec. LLC v Highland Capital Mgt., L.P.,* 86 AD3d 469, 474 (1st Dept. 2011). (*emphasis added*).

Professor David Siegel in N.Y. Prac, 4th ed. § 442, explains that:

> the doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties. *Its main predicate is that the party against whom it is being invoked has already had a day in court, and, if it was not satisfactory, the proper course was to appeal the unsatisfactory result rather than ignore it and attempt its relitigation in a separate action*. (*emphasis added*).

There is no real question that Plaintiff pins the entirety of its impermissible Third Proceeding on its claim for reformation through its misapplication of CPLR § 3002(d). While that will be discussed in more depth as it will likely be the focus of any opposition that Plaintiff may interpose to this motion, it is abundantly clear that the remaining three (3) causes of action must be summarily dismissed.

Plaintiff's second cause of action for foreclosure of vendee's lien, to the extent such vendee's lien even arguably exists, which it does not, would stem directly from the agreements that form the basis of the First Proceeding. To the extent that Plaintiff embarked upon a wide-spanning ten (10) day bench trial on those agreements, it cannot now for the first time assert a new claim in relation to the Terms of Sale and Stipulations post-trial. Certainly, had Plaintiff actually believed it had a vendee's lien upon which it could foreclose on the Premises, it could have and should have raised that during the bench trial of this First Proceeding. The reality, of course, is that the court's determinations in that proceeding makes it abundantly clear that even if this cause of action had been raised or asserted the result in the First Proceeding would have been exactly the same.

The same goes for Plaintiff's third and fourth causes of action, to wit, (iii) the return of deposit and extension fees and (iv) monies had and received. In both instance, Plaintiff is seeking the return of the monies it paid on account and in relation to the underlying agreements with respect to its failed purchase

of the subject Premises – something it already asserted throughout the trial and in its first cause of action in the First Proceeding in the context of its breach of contract action.

For the reasons set forth at length herein, the second, third and fourth causes of action must be dismissed under the doctrine of res judicata inasmuch as Plaintiff already had a full and fair opportunity to litigate these claims, whether or not it chose to do so. Moreover, even if that were not the case, there were already factual determinations in the First Proceeding that serve to bar Plaintiff maintaining these claims herein. To be sure, the Decision and Order in the First Proceeding determined that the evidence adduced at trial "establishes that the plaintiff breached the contract when it did not appear on the May 29, 2014 time-of-the-essence closing date" (**Exhibit C**, p. 5) that Plaintiff did not demonstrate that it was ever ready, willing, and able to close after it was held in default and that Plaintiff failed to prove its breach of contract and specific performance claims (**Exhibit C**, p. 6).

Simply put, since Plaintiff breached the contract, was never ready, able and willing to close and failed to prove its specific performance and breach of contract claims – findings and determinations that could only be reversed on appeal and for which appeal was already dismissed – it is clear that Plaintiff may not now assert a cause of action to (ii) foreclose on a vendee's lien, (iii) return of deposit and extension fees and (iv) monies had and received as same are barred by the doctrine of res judicata. Certainly, if Plaintiff were able to demonstrate it had not breached the subject agreements, it would have done so over the ten (10) days the trial was conducted. As such, these causes of action must be dismissed.

CPLR § 3002(d) Does Not Permit Plaintiff to Maintain a Cause of Action for Reformation of Contract and, Accordingly, Such Claim Must be Dismissed

The thrust of the Third Proceeding revolves around Plaintiff's first cause of action for reformation of contract. In attempted support of that claim, Plaintiff relies on CPLR § 3002(d), which states "A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed." The case law concerning CPLR § 3002(d) and

its predecessor Civil Practice Act § 112-d[9], which is word for word identical to CPLR § 3002(d), makes it clear that the narrow intent of the statute does not permit Plaintiff to maintain a cause of action for reformation herein. That section of the CPLR was made to give a chance to litigants who may have been deprived of their day in court or faced injustice by reason of a "technical" rule of evidence. It was not made to allow litigants another chance at a case by just changing their cause of action.

The statute providing that a judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform agreement and to enforce it as reformed was intended to prevent the injustice which might result under the ancient doctrine of "election of remedies," which provided that one who has elected a remedy cannot thereafter seek to enforce an inconsistent remedy.

In *Schuylkill Fuel Corp. v. Nieberg Realty Corp,* Judge Cardozo held that "a judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated. *Schuylkill Fuel Corp. v. Nieberg Realty Corp.* 250 N. Y. 304 (1929).

In *Falkowski v. Metro. Life Ins. Co.*, the court went through a very thorough analysis of then Civil Practice Act § 112-d, to come to the conclusion that such statute was not made to allow litigants another chance at a case by just changing their cause of action and that the doctrine of res judicata would bar re-litigation on allegations that, *much like in the instant case at bar*, were already fully litigated in a prior proceeding. *Falkowski v Metro. Life Ins. Co*., 175 Misc 878, 881 (Sup Ct 1941).

An extended review of *Falkowski* is warranted in this instance. In *Falkowski*, the court found that it was clearly "not the intention of the Legislature, in enacting [Civil Practice Act] § 112-d, to abolish the doctrine of *res judicata*. The principle of *res judicata* is too deeply grounded in our law, and the reasons for the doctrine are too plain, to require citation of authority. Suffice it to say that it prevents a litigant once defeated on the merits from again raising the same issue in another court of original jurisdiction. It

[9] Civil Practice Act § 112-d, much like CPLR § 3002(d), states "Action on contract no bar to action to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed."

is ordinarily a just and effective means of terminating litigation. Obviously, there must be some brake on litigiousness." *Falkowski v Metro. Life Ins. Co*., 175 Misc 878, 881 (Sup Ct 1941).

Falkowski went on to state that "an analysis of the complaint in the instant case, and a comparison thereof with the pleadings in plaintiff's first action, lead to the conclusion that the same subject-matter was 'settled by litigation between the same parties * * * before a court of competent jurisdiction, and the estoppel of the judgment is mutual * * * the other party would be bound if the original decision had been to the contrary." *Falkowski v Metro. Life Ins. Co*., 175 Misc 878, 881 (Sup Ct 1941).

The *Falkowski* court found that the plaintiff had an adequate remedy in its prior action and went on to find "the allegations now newly pleaded were litigated fully in that action. The plaintiff was allowed full leeway on the trial to prove the new matter now set forth in the complaint against which defendant has moved. Having been unsuccessful in his first attempt to recover against defendant, plaintiff now seeks to employ a new *form* of action. But the *substance* of his attempt to recover remains the same. Surely, there is no justification in permitting him to multiply his lawsuits on this policy against this defendant by using the device of changing the form of action. It could not have been the intention of the Legislature to permit such a situation. It could not have been the aim of the Legislature to turn its back on the public policy which discourages a multiplicity of suits. The intention was to prevent, in a proper case, the operation of a technicality in a manner to work injustice. The facts of plaintiff's complaint in the case at bar were litigated and disposed of on the merits. The same issues as now presented were or 'might have been so litigated' in his first lawsuit. They are now *res judicata*." *Id at* 881-882.

Similarly herein, Plaintiff was given full leeway over the course of ten (10) days of trial to prove the causes of action now set forth in the complaint filed in the Third Proceeding, and the substance of the relief being sought by Plaintiff remains the same, *to wit*, either specific performance or an award of money damages in the amount of the deposit monies and extension fees paid in relation in the underlying transaction. During the trial in the First Proceeding, Plaintiff's representatives Sam Sprei and Chaim

Babad testified at considerable length about the underlying Terms of Sale and Stipulations regarding the contemplated sale of the Premises, and went to collectively testify for several days that Defendant had promised financing, that the time of the essence law dates were ignored, vacated or inapplicable, and that, in general, the parties had essentially entered into an understanding that ran contrary to the clear and unequivocal Terms of Sale and Stipulations, which warranted a finding that Defendant breached the subject agreements and that Plaintiff was allegedly entitled to specific performance or a money judgment in the amount of the deposit monies and extension fees it paid. This is precisely what Plaintiff is now trying to rehash and get a second bite at the proverbial apple by bringing the instant claim for reformation.

In that regard, Plaintiff's complaint (**Exhibit A**) in the instant action states:

> "AS AND FOR A FIRST CAUSE OF ACTION
> (Reformation of Contract)
>
> …
>
> 74. It was the clear, manifest intention of the parties to the Terms of Sale that: (i) with respect to the closing of the foreclosure sale, time was not of the essence; (ii) adjournments/postponements of the closing date were liberally available without consequence to any party; and (iii) Auberge would be providing some level of financing to assist plaintiff with the purchase of the Property.
>
> 75. Accordingly, the Court should reform the Terms of Sale to reflect the clear, manifest intent of the parties.
>
> 76. Upon reforming the Terms of Sale to reflect the clear, manifest intent of the parties, the Court should then award plaintiff specific performance, and direct a sale of the Property to plaintiff in accordance with the reformed Terms of Sale."

All of these topics and arguments were already litigated *ad nauseum* over the course of the ten (10) day trial in the First Proceeding. Moreover, it was clearly determined that time was made of the

essence in the original terms of sale which were incorporated by referenced into each subsequent stipulation concerning an adjournment (**Exhibit C**, p. 5) and that the evidence adduced at trial "establishes that the Plaintiff breached the contract when it did not appear on the May 29, 2014 time-of-the-essence closing date." (**Exhibit C**, p. 5). The simple reality is this - in the highly unlikely event the court would allow Plaintiff to maintain the causes of action they are now asserting in the Third Proceeding, there is nothing else that could be testified to by the parties herein that was not already covered throughout the course of the trial in the First Proceeding and, said bluntly, there is no reason whatsoever to subject the same parties to potentially *another ten (10) days of trial* on the same transaction, law and facts, which were already heard and for which a determination and adjudication has already been reached.

Under the doctrine of res judicata, the reformation action Plaintiff now attempts to bring would be barred for the clear reason that Plaintiff may not relitigate issues that were fully litigated in the prior action on the contract. Because issues relevant to the question of reformation were or otherwise could have been decided in the prior action, the principle of res judicata prevents the relitigation of any such issue.

Accordingly, it is respectfully submitted that Plaintiff's cause of action for reformation be dismissed in its entirety, and the notice of pendency that the Plaintiff asserts arises from said cause of action be cancelled and expunged.

iii. Plaintiff is Barred by the Doctrine of Collateral Estoppel

In the alternative, Plaintiff's claims are barred by the doctrine of collateral estoppel.

"[T]he doctrine of collateral estoppel, a narrow species of res judicata, precludes a party from relitigating in a subsequent action or proceeding *an issue clearly raised in a prior action or proceeding and decided against that party or those in privity*, whether or not the tribunals or causes of action are the same." *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984) (*emphasis added*). Collateral estoppel is "intended to reduce litigation and conserve the resources of the court and litigants and it is

based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." *Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 584, 492 N.Y.S.2d 584 (1985).

"The doctrine of collateral estoppel bars a party from raising *any issues* he or she has unsuccessfully litigated in a prior proceeding. The doctrine applies where an issued raised in a later action is identical to an issue (1) that was raised, necessarily decided and material in a prior action; and (2) as to which claimant had a full and fair opportunity to litigate in the earlier proceeding." *Perez v. State*, 33 Misc.3d 1221(A), 943 N.Y.S.2d 794 (Ct Cl 2010) (internal citations omitted). "Properly utilized, it [collateral estoppel] serves to conserve the resources of courts and litigants. Because the doctrine is based on general notions of fairness there are few immutable rules." *Boorman v. Deutsch*, 152 A.D.2d 48, 547 N.Y.S.2d 18 (1st Dept. 1989) (internal citations omitted). "The fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." *Id*. "The party to be precluded from relitigating the issue *bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination*." *Buechel v. Bain*, 97 N.Y.2d 295 (2011). (*emphasis added*).

Collateral estoppel is applicable here where the issues raised in the First Proceeding concerning whether 70-35 113th St Holdings defaulted in its obligations under the Terms of Sale and May 2014 Stipulation by failing to timely close on the Premises where raised, determined and adjudicated in the First Proceeding, and where it was already decided that neither of Plaintiff's specific performance claims or breach of contract claims were proven, and it was made clear that Plaintiff never established that it was ever ready, able or willing to close. Such determinations make clear that the determinations reached against Plaintiff in favor of Defendant in the First Proceeding require dismissal of Plaintiff's cause of action for reformation, to foreclose on a vendee's lien, for return of deposit and extension fees and for

monies had and received in their entirety, as a decision on those aforementioned issues is fatal to Plaintiff maintaining these causes of action and prevents a contrary determination in a subsequent litigation.

II. PLAINTIFF'S NOTICE OF PENDENCY MUST BE STRICKEN AND PLAINTIF MUST BE BARRED FROM RE-FILING SAME

Plaintiff's Notice of Pendency must be stricken for the reasons already espoused herein inasmuch as the Notice of Pendency cannot exist independently of the complaint, as well as a result of Plaintiff's failure to serve the summons and complaint within thirty (30) days as required under CPLR § 6512.

CPLR § 6512 states, in pertinent part, that:

> § 6512. Service of summons. *A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant*…. (*emphasis added*).

The applicable case law herein confirms that CPLR § 6512 must be strictly construed, and that Plaintiff's failure to serve Defendant within thirty (30) days of filing the summons and complaint mandates the cancellation of the subject lis pendens, and further bars Plaintiff's filing of a subsequent lis pendens.

It is well settled that a notice of pendency is an 'extraordinary privilege' which demands 'strict compliance' with applicable statutory requirements. *Clear Blue Water, LLC v. Winston*, 886 N.Y.S.2d 66 (Sup Ct 2009) (holding that plaintiff was in violation of CPLR § 6514(a) by failing to serve the summons with the 30 day time limit set forth in CPLR § 6512 requiring cancellation of the notice of pendency); see also *Connell v. Weiss*, 1985 WL 428 (SDNY 1985). In *Rabinowitz v, Larkfield Bldg. Corp*, much like the instant case at bar, the Plaintiff failed to serve the record owner of the subject property within thirty (30) days of filing the summons, complaint and notice of pendency as required by CPLR § 6512. *Rabinowitz v. Larkfield Bldg. Corp*, 231 A.D.2d 703 (2nd Dept 1996). Inasmuch as plaintiff failed to strictly comply with the procedures of CPLR article 65, the court determined that defendant was entitled to cancellation of the notice of pendency pursuant to CPLR § 6514(A). *Rabinowitz v. Larkfield Bldg. Corp*, 231 A.D.2d 703 (2nd Dept 1996). Moreover, once a party fails to timely serve the summons pursuant to CPLR § 6512,

it is well settled that a second notice of pendency cannot be filed..." *Weiner v. MKVII-Westchester, LLC*, 292 A.D.2d 597 (2nd Dept, 2002); *Mastronardi v. Countywide Const. Corp*, 2 A.D.3d 416 (2nd Dept, 2003).

There is no question that Plaintiff has not served Defendant with the summons in this proceeding, and in reality has not taken any actual steps to prosecute or otherwise advance this action, instead being content to file and "park" a notice of pendency on the Premises in an effort to obstruct Defendant's pending sale. Even in the unlikely event that Plaintiff did serve a copy of the summons on Defendant within the requisite thirty (30) days required by statute, said service would not be considered complete until the filing of the affidavit of service. Inasmuch as no affidavit of service was filed and thus service not effectuated, the notice of pendency must be cancelled.

Accordingly, even in the highly unlikely event that this court would permit the complaint in the Third Proceeding to stand, there can be no question that the notice of pendency filed by Plaintiff is subject to mandatory dismissal under CPLR § 6514(a) for failure to comply with the provisions of CPLR § 6512.

III. PLAINTIFF'S FRIVOLOUS, HARRASING AND MALICIOUS CONDUCT WARRANTS AN AWARD OF SANCTIONS AND ATTORNEYS FEES

It is respectfully submitted that given Plaintiff's frivolous and malicious conduct in filing the meritless suit herein, an award of sanctions and attorneys fees is appropriate.

NY Ct R 130-1.1 states, in pertinent part, that:

> **§ 130-1.1. Costs; Sanctions**
>
> **(a)** The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part…
>
> **(b)** The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both…
>
> **(c)** For purposes of this Part, conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> … In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party…
>
> NY Ct R 130-1.1

As such, sanctions may come in two forms: (1) as reimbursement to the aggrieved party of his actual expenses and reasonable attorney's fees; and (2) in addition to or in lieu of costs, as a discretionary financial assessment or penalty against a party or an attorney who engages in frivolous conduct, in a sum not to exceed $10,000. Most decisions awarding costs under Section 130.1-1 rely on the same two factors for support: (1) the financial burden imposed on the defendant by forcing him to defend against a spurious claim, and (2) the procedural and administrative burdens imposed upon the courts themselves in their inquiry into the merits of the complaint.

"22 NYCRR 130.1-1 allows [the court] to exercise [its] discretion to impose costs and sanctions on an errant party" and "…[s]anctions are retributive, in that they punish past conduct. They are also goal-oriented, in that they are useful in deterring future frivolous conduct, not only by the particular parties, but also by the Bar at large." *Levy v. Carol Management Cor.,* 260 A.D.2d 27 (1st Dept. 1999). *In Guttridge v. Schwenke*, plaintiff persisted in pursuing a claim for money due under a contract after the defendant presented documentary evidence that the claim had been paid. The court in *Guttridge* said: "Plaintiffs' counsel must share the blame for such frivolous conduct as it was also his responsibility in preparing and verifying the complaint, and in conducting this litigation, to make diligent inquiry into the

facts and to discontinue litigation when it became apparent it lacked any merit. The frivolous conduct by plaintiffs and their attorney has not only burdened defendant by forcing him to incur legal expenses in defense of needless litigation, it has burdened the court by having to intervene on defendant's behalf. An award of costs and sanctions is needed here not only to compensate defendant, but to deter abuse of the judicial system and to ensure the orderly administration of justice." *Guttridge v. Schwenke,* 155 Misc.2d 317 (Sup Ct. 1992).

In sum, having participated in a ten (10) day trial on the subject transaction, involving the same parties, facts and law, Plaintiff knows full well that it does not have a single meritorious cause of action that can sustain the instant complaint. Having lost its appeal, it is clear that the impetus for Plaintiff filing the instant action was to place a notice of pendency on the Premises in an effort to prevent its transfer and "kill" Defendant's pending sale. Such malicious behavior has needlessly cost Defendant tens of thousands of dollars in unnecessary attorneys fees and costs, and has squandered already limited judicial resources that have been strained as a result of COVID-19. Such actions mandate an award of sanctions and costs.

To be clear, Plaintiff 70-35 113th St Holdings LLC's manager, Sam Sprei, and one of its two owners, Chaim Miller, have a history of bringing frivolous and redundant cases designed to cause opposing parties to incur significant and entirely unnecessary legal expense, while at the same time waste valuable judicial resources much like the instant case at bar,[10] and as such know their actions are wrongful.

[10] In the matter entitled, *Chaim Miller a/k/a Harry Miller and 49 Dupont Loft LLC – against- Dupont Street Developers LLC* – 506312/2019, the Hon. Sylvia G. Ash, J.S.C. held in her Decision and Order dated May 31, 2019 that "This Court previously cancelled the notice of pendency filed by Plaintiffs against DSD's properties pursuant to this Court's decision dated February 20, 2019 in a related action. The instant action is the third action filed by Plaintiffs regarding the same subject matter, Accordingly, Plaintiffs are barred from filing any further notices of pendency against properties owned by DSD without first obtaining court approval." A true and accurate copy of that Decision and Order is annexed to the Freeman Aff. as **Exhibit T**. Notably, the memorandum of law that was submitted as a precursor to that Decision and Order makes it very clear that Sam Sprei was similarly engaging in frivolous conduct designed to tie up the subject real property in the aforementioned case. A true and accurate copy of that memorandum of law is annexed to the Freeman Aff. as **Exhibit U**. That memorandum states, "during the 2018 Action, Miller and his two confederates, Sam Sprei and Abraham Lesser, filed frivolous identical Involuntary Bankruptcy Petitions in the Eastern District Bankruptcy Court against both DSD and Anmuth, to end run prior State Court rulings and to tie up DSD's alleged property." See **Exhibit U** at p. 14. That memo states "on March 27, 2019, Chief Judge Craig issued a 55 page Decision, and a separate Order and Judgment sanctioning Miller, and his confederates Sprei and Lesser, for filing the Involuntary Bankruptcy Petitions against, inter alia, Anmuth, in egregious bad faith." See **Exhibit U** at p. 15.

Plaintiff's representatives are also no strangers to be sanctioned for frivolous filings and similar conduct,[11] demonstrating a clear pattern of abuse of process and misuse of the legal system.

Even in the unlikely event this court were to find that the actions herein are not sanctionable, CPLR § 6514(c) authorizes the Court, whenever a notice of pendency is cancelled under § 6514, to award the defendant [in addition to any costs of the action] "any costs and expenses occasioned by the filing and cancellation", which includes attorneys fees in defending the action. *Josefsson v. Keller*, 141 A.D.2d 700, 530 N.Y.S.2d 10, 11 (2d Dept 1998). In that regard, an award of costs, expenses and attorneys fees is warranted by the mere mandatory cancellation of the notice of pendency alone.

As such, it is respectfully submitted that an award of attorneys fees and sanctions is appropriate.

IV. A TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED

As is clear in the instant action – this being the "Third Proceeding" – as well as demonstrated in unrelated cases referenced above, Plaintiff and its representatives have demonstrated a pattern and willingness to file multiple suits and notices of pendency in relation to the same transactions, parties and property. While the existence of the current notice of pendency is already jeopardizing Defendant's sale of the Premises, in the event Plaintiff were to file a subsequent notice of pendency during the hearing and determination of this action and require further motions to dismiss and litigation on the matter, such additional filing would likely prove fatal to Defendant's sale and result in irreparable harm.

For the reasons already set forth herein, it is respectfully submitted that Defendant has demonstrated a likelihood of success on the merits, and that Defendant's potential loss of the Premises due to a failed transaction and subsequent foreclosure demonstrate a balancing of the equities in

[11] In Chief Judge Craig's March 27, 2019 Decision in the United States Bankruptcy Court, Eastern District of New York proceeding entitled *In re Anmuth Holdings LLC, Alleged Debtor* – Case No. 18-43216-CEC and companion proceeding entitled *In re Quest Funding LLC, Alleged Debtor* – Case No. 18-43272-CEC, the court found that Sprei's post-filing actions "reflect a pattern of harassment, overreaching, uncompromising combativeness, intimidation, even deceit and threats." A true and accurate copy of the Decision of Chief Judge Craig is annexed to the Freeman Aff. as **Exhibit V**. Moreover, the Decision barred Sprei and Miller from filing any petition in the Eastern District Bankruptcy Court against one the parties in that proceeding, or any entity in which that party has an interest in, without first obtaining leave of Court, for a period of two years and Sprei and Miller were to pay attorney's fees and costs in the amount of $121,411.47, in addition to punitive damages in the amount of $600,000.00. See **Exhibit V** at p. 55.

Defendant's favor. As such, Defendant's application for a temporary restraining order should be granted.

WHEREFORE, for the reasons set forth herein, it is respectfully requested that Defendants' motion be granted in its entirety, together with such other and further relief as this Court shall deem just and proper.

Dated: New York, New York
February 22, 2021

RHEEM BELL & FREEMAN LLP

/s/ Richard E. Freeman III

By: _____
Richard E. Freeman III
Attorneys for Defendant
Auberge Grand Central, LLC
20 West 36th Street, 12th Floor
New York, NY 10018
T.: (212) 239-4001
F.: (212) 239-4125
E.: rfreeman@rbfllp.com