

**Maynard v Park Slope Plaza, LLC**

2008 NY Slip Op 32579(U)

August 27, 2008

Supreme Court, Kings County

Docket Number: 0005034/2008

Judge: Laura Lee Jacobson

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At an IAS Term, Part 21 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 27<sup>th</sup> day of August, 2008

P R E S E N T:

HON. LAURA LEE JACOBSON,

Judge.

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RONALDO MAYNARD AND RICARDO MAYNARD,

Plaintiffs,

- against -

Index No. 5034/08

PARK SLOPE PLAZA, LLC, et al.,

Defendants.

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The following papers numbered 1 to 8 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 5
Opposing Affidavits (Affirmations)_____	_____
Reply Affidavits (Affirmations)_____	6 - 8
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, plaintiffs Ronaldo Maynard and Ricardo Maynard move for an order: (1) permanently staying defendant 583 6<sup>th</sup> LLC (the LLC) from transferring, selling, assigning, converting, alienating, excavating, building, erecting, or destroying plaintiffs' interest, rights and title in the real property known as 583 6<sup>th</sup> Avenue, 595 6<sup>th</sup> Avenue and 597 6<sup>th</sup> Avenue, in Brooklyn; (2) staying the LLC from transferring, selling,

assigning, converting, alienating, excavating, erecting, building or destroying plaintiffs' interest, rights and title in the real property known as 583-593 6<sup>th</sup> Avenue, 595 6<sup>th</sup> Avenue and 597 6<sup>th</sup> Avenue pending disposition of the action; (3) amending the summons and complaint to add additional parties and additional causes of action. Defendant LLC cross moves for an order directing plaintiffs to remove the automobile and motorcycle that they presently park at 583-593 6<sup>th</sup> Avenue and ordering them to cease and desist from trespassing on the property and interfering with the construction of a 24 family multiple dwelling.

### ***Facts and Procedural Background***

The instant action involves several parcels of property, i.e., 583-593 6<sup>th</sup> Avenue, a parking lot, and 595 and 597 6<sup>th</sup> Avenue, a three-family dwelling, which plaintiffs conveyed to Park Slope Plaza, LLC (Park Slope) on July 1, 2004. Briefly stated, plaintiffs allege that the title to 595 and 597 6<sup>th</sup> Avenue was conveyed to Park Slope, when plaintiffs intended to convey and Park Slope intended to purchase only the air/development rights to the properties. Plaintiffs further contend that they are entitled to retain a life estate in several parking spaces in the lot located on 583-593 6<sup>th</sup> Avenue.

The dispute now before the court began in October 2003, when Spiro Geroulanos, as the managing member of the LLC, entered into a contract, in his individual name, to purchase 583-593 6<sup>th</sup> Avenue from plaintiffs for \$2,900,000. Pursuant to a rider annexed to that contract, "[t]he buyer as part consideration to have the seller enter into this contract will provide Buyer a life estate in 3 parking spaces. The three life estates in the parking spaces

shall remain in force during the life of the oldest surviving seller.”

On June 21, 2004, upon receipt of \$25,000, plaintiffs entered into an “Option to Purchase Property” with Cross State Development Inc. (Cross State), a non-party, for the sale of the same property for \$3,000,000 (the Option). As is relevant herein, the Option provided:

“[T]he buyer as part of the contract price of 3,000,000.00 (three million dollars), will pay the seller an additional 100,000.00 (one hundred thousand dollars), or four parking spaces which may be separate condominium units that are to be set aside in any construction on the property, if any, for the ‘AIR RIGHTS, and DEVELOPMENT RIGHTS’ described as Block 1054, Lots 8 & 9 - 597 and 595 Fifth Avenue,<sup>1</sup> Brooklyn, NY, 11217.”

The Option was signed by defendant Scott S. Gale, plaintiffs’ attorney, and by defendant Itzhak Katan, as the President of Cross State. Plaintiffs also entered into an undated contract with Katan for the purchase. Pursuant to a rider annexed thereto, “[b]uyer agrees to grant seller three parking spaces. Seller shall have a Life estate as [to] said parking spaces.” On June 29, 2004, plaintiffs executed what they refer to as a “Time of the Essence Agreement” pursuant to which the parties agreed to close no later than 5:00 p.m. on July 1, 2004 and plaintiffs agreed to sell the air rights for \$100,000, with the attorney for the purchaser preparing the necessary documents; the agreement was not signed by the purchaser.

By agreement dated July 1, 2004, the Option was assigned to Park Slope. On that day, plaintiffs conveyed title to 583-593 6th Avenue to Park Slope pursuant to two deeds, i.e., one that conveyed the fee for 583-593 6<sup>th</sup> Avenue and the other that conveyed the

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<sup>1</sup> There is no argument that this agreement erroneously refers to property located on 5<sup>th</sup> Avenue, while the property at issue herein is actually located on 6<sup>th</sup> Avenue.

air/development rights for 595 and 597 6<sup>th</sup> Avenue. Plaintiffs also signed an agreement indemnifying Capital Land Title Company (Capital Land) and Chicago Title Insurance Company (Chicago Title) “against any loss or damages by reason of the outstanding contract of sale between ourselves and Spiro Geroulanos dated November 11, 2003.”

In August 2004, after learning of the sale, Geroulanos commenced an action against plaintiffs, Gale and Park Slope seeking a declaration that the conveyance to Park Slope was null and void, specific performance of his contract with plaintiffs and money damages (Kings Co Sup Ct, Index no. 27688/04). Plaintiffs and Gale filed a single answer dated November 12, 2004. By order dated February 17, 2006, the Honorable Joseph Silverman struck that answer for defendants’ failure to respond to interrogatories.

After selling the property to Park Slope, plaintiffs noticed that they were not receiving tax bills for 595 and 597 6<sup>th</sup> Avenue. Upon inquiry, they learned that the records in the Department of Finance and the Department of Buildings indicated that the owner of the property was Park Slope. When Gale failed to take action to correct the problem and restore title to them, plaintiffs commenced an action on October 29, 2007 against Park Slope; Katan; Gale; Gale & Associates; Forman & Associates, P.C. (Forman & Associates); Warren L. Forman (Forman); Capital Land; and Chicago Title (Kings Co Sup Ct, Index no. 40009/07) (the Companion Action). On October 30, 2007, two separate notices of pendency were filed, one against 595 and 597 6<sup>th</sup> Avenue and the other against 583-593 6<sup>th</sup> Avenue. When efforts to resolve the dispute by settlement failed, since defendants refused to grant plaintiffs a life

estate in any parking spaces, plaintiffs brought an order to show cause, dated December 20, 2007, seeking a permanent stay, summary judgment and related relief; Park Slope and Katan cross moved for an order dismissing the complaint. By decision dated May 5, 2008, this court denied plaintiffs' request for injunctive relief and for partial summary judgment; the City Register was directed to accept and file a corrected deed for 595 and 597 6<sup>th</sup> Avenue, which clearly indicates that plaintiffs are the owners of the fee interest in the property and that Park Slope's interest is limited to the air rights; granted a default judgment against defendants Forman & Associates, Forman, and Capital Land; and stayed Park Slope from selling, transferring or encumbering its interest in the subject property until the corrected deed was filed (the May 5, 2008 Decision).

On February 19, 2008, plaintiffs commenced the instant action against the same defendants, seeking to protect their interest in the parking spaces, premised upon fraud, breach of contract and negligence; plaintiffs also filed notices of pendency against 595 and 597 6<sup>th</sup> Avenue and 583-593 6<sup>th</sup> Avenue.

In the interim, Geroulanos entered into settlement negotiations with Park Slope and on March 25, 2008, Park Slope transferred title to 583-593 6<sup>th</sup> Avenue to him, along with the air/development rights to 595 and 597 6<sup>th</sup> Avenue, the same interests that Park Slope acquired from plaintiffs, for \$3,525,000; the transfer was effectuated by one deed. Upon learning of this sale, on April 2, 2008, plaintiff filed an amended complaint in the instant action adding the LLC, Lawyers Land Services Corp. (Lawyers Land), Ronald Covelli and

Morris Barenbaum as defendants and adding a tenth and eleventh cause of action.

By order to show cause dated April 4, 2008, plaintiffs made the motion now before the court. Therein, the Honorable Arthur M. Schack signed a temporary restraining order providing “that defendants shall not sell, transfer, convey, alter, convert, or excavate, erect, build or destroy the real property located at 583-593 6th Avenue, Brooklyn, NY, 595 6<sup>th</sup> Avenue and 597 6<sup>th</sup> Avenue, Brooklyn, NY pending the disposition of the within applications made by the plaintiffs.” On April 24, 2008, the LLC served the cross motion now before the court. On May 1, 2008, the LLC served a verified answer to the amended verified complaint. On May 2, 2008, defendants made an application to the Appellate Division, Second Department, to vacate the temporary restraining order. By decision rendered on May 5, 2008, the Honorable Robert A. Spolzino modified the stay. Capital Land, Lawyers Land and Covelli served their answer on May 8, 2008

### ***Plaintiffs’ Application to Amend the Complaint***

#### ***The Parties’ Contentions***

In seeking to amend their complaint to add the LLC, as the purchaser of the subject properties; Lawyers Land, as the title insurance company; Covelli, as the chairman of the title insurance company; and Barenbaum<sup>2</sup> as defendants, plaintiffs contend that leave of court is not required, since none of the defendants had answered the original complaint when the amended pleading was served.

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<sup>2</sup> Barenbaum’s involvement with the transaction is not made clear in the amended complaint.

### ***The Law***

CPLR 1003 provides, in pertinent part, that:

“Parties may be added at any stage of the action by leave of court . . . or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.”

Similarly, CPLR 3025(a) provides that “[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Pursuant to CPLR 3012(a), “[s]ervice of an answer or reply shall be made within twenty days after service of the pleading to which it responds.”

For purposes of applying the 20-day period during which a party may amend a pleading as-of-right in a case where there are multiple defendants, it has been held that the period begins to run on the date that the last pleading was served (*see generally Citibank v Suthers*, 68 AD2d 790, 795 [1979]; *Marcus v Maglione*, NYLJ, Oct. 5, 1998, p 29, col 6; *Dynaire v Germano*, NYLJ, Aug. 1, 1996, p 22, col 1).

### ***Discussion***

Herein, plaintiffs fail to annex affidavits of service that establish when each defendant was served with the original summons and complaint. A review of the affidavits of service filed with the court reveals, however, that on February 25, 2008, Gale was personally served; on February 25, 2008, a copy of the summons and complaint were served at the place of

business of Forman, with copies mailed on February 29, 2008; on February 27, 2008, a copy of the summons and complaint were served on the places of business of Katan and Chicago Title, with copies mailed to Katan on February 29, 2008; on March 5, 2008, a copy of the summons and complaint were served on the Secretary of State on behalf of Capital Land<sup>3</sup> and Forman & Associates, with copies mailed to each on the same day. The amended summons and complaint were filed with the court on April 2, 2008, before the first answer was served.

Since the last defendant to be served was served on March 5, 2008, plaintiffs could amend the summons and complaint as-of-right within 20 days thereafter, or until March 25, 2008.<sup>4</sup> Inasmuch as the amended summons and complaint was not filed until April 2, 2008, plaintiffs are incorrect in their assertion that they could amend the summons and complaint as-of-right, without leave of court.

The court notes, however, that the LLC responded to the amended summons and complaint on May 1, 2008; Capital Land, Lawyers Land and Covelli served their answer on May 8, 2008, asserting the affirmative defense of lack of personal jurisdiction. The defense

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<sup>3</sup> Although plaintiffs served Capital Land on May 13, 2008 by serving it at its place of business, the company had already been served by service on the Secretary of State, so that service was complete on March 5, 2008 (*see Cedeno v Wimbledon Bldg.*, 207 AD2d 297, 298 [1994] [service of process on a corporation is deemed complete when the Secretary of State is served, regardless of whether such process ultimately reaches the corporate defendant]). Accordingly, inasmuch as the court declines to permit a second service to extend the time in which a plaintiff can amend a summons and complaint as-of-right, the first date of service shall be found to be controlling herein.

<sup>4</sup> Although plaintiffs could have served an amended summons and complaint within 20 days after the last defendant served an answer, it did not wait until an answer was served to file their amended pleading.

of lack of personal jurisdiction may be raised either by motion or in the responsive pleading (*Bides v Abraham & Strauss Div. of Federated Dept. Store*, 33 AD2d 569, 569 [1969], citing CPLR 3211, subd. [e]).<sup>5</sup> Hence, since the LLC did not make a motion to dismiss and did not assert lack of personal jurisdiction as an affirmative defense in its answer, it must be deemed to have waived any such objection. In addition, the LLC served a cross motion seeking affirmative relief in response to plaintiffs' motion. The LLC will therefore be deemed to have consented to the jurisdiction of the court.

Further, pursuant to CPLR 3211(e):

“an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.”

Herein, although defendants Capital Land, Lawyers Land and Covelli served an answer in which they asserted the affirmative defense of lack of personal jurisdiction on May 8, 2008, they did not make a motion to dismiss on this ground within sixty days of serving their answer. Accordingly, they must also be deemed to have appeared herein and waived the defense of lack of personal jurisdiction pursuant to CPLR 3211(e) (*see generally Federici*

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<sup>5</sup> CPLR 3211(e) provides, in relevant part, that

“An objection based upon a ground specified in paragraph eight . . . of subdivision (a) [that the court has not jurisdiction of the person of the defendant] is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.”

*v Metropolis Night Club*, 48 AD3d 741, 742 [2008]; *Dimond v Verdon*, 5 AD3d 718, 719 [2004]; *Amerasia Bank v Saiko Enters.*, 263 AD2d 519, 520 [1999]).

The court reaches a different result with regard to Barenbaum. A review of the papers now before the court and the court file indicates that Barenbaum did not file an answer. Since this added defendant has not consented to service of the amended summons and complaint, and hence to the jurisdiction of the court over him, and since the amended summons and complaint are a nullity, having been improperly served without leave of court (*see generally* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3211:30), the court must determine if plaintiffs should be granted leave to amend the pleadings to add Barenbaum as a defendant. In this regard, it is well settled that "[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Morris v Queens Long Is. Med. Group*, 49 AD3d 394 [2008], quoting *Alan Assoc. v Lazzari*, 44 AD3d 95, 99 [2004]). Herein, since plaintiffs fail to identify the role that Barenbaum played in the subject transaction, and hence fail to particularize any claim against him in their moving papers or in the proposed amended pleading, plaintiffs fail to demonstrate that the proposed amendment has any merit.

Accordingly, that branch of plaintiffs' motion seeking leave to serve an amended summons and complaint is granted with regard to the LLC, Lawyers Land and Covelli and the amended summons and complaint are deemed served, nunc pro tunc. That branch of the

motion seeking leave to add Barenbaum as a defendant is denied.

### ***Injunctive Relief***

#### ***Plaintiffs' Contentions***

In support of their request for a restraining order, plaintiffs argue that said relief is necessary because defendants refuse to recognize their ownership interest in 595 and 597 6<sup>th</sup> Avenue and their life estate interest in the three parking spaces at issue herein. In addition, plaintiffs allege that they are unable to bring a nonpayment action against a tenant who resides at 597 6<sup>th</sup> Avenue because they are unable to prove ownership, and that they are unable to obtain financing to build an extension on the rear of their property for the same reason. Plaintiffs further argue that they are entitled to a life estate pursuant to their contract of sale and that Gale did not have authority to sign the Option on their behalf, nor did he have authority to waive any of their contractual rights to a life estate in the parking spaces.

#### ***The LLC's Contentions***

In opposition to plaintiffs' motion and in support of its cross motion, the LLC argues that plaintiffs are mistaken in their belief that they are no longer the owners of 595 and 597 6<sup>th</sup> Avenue. In this regard, the LLC avers that the deed conveying the properties clearly transferred only the air rights; the fact that the Department of Taxation and Finance and the City Register improperly changed their records to indicate that title to the fee was conveyed does not change this fact.

Further, the LLC contends that a review of the Option establishes that Park Slope

agreed to pay plaintiffs \$100,000 for the air/development rights to 595 and 597 6<sup>th</sup> Avenue, or to give them four parking spaces. It accordingly concludes that since a review of the closing documents, including the transfer tax forms, establishes that plaintiffs received \$3,100,000 at the closing, they received \$100,000 for the parking spaces. Hence, plaintiffs were fully compensated for the transfer of both title to 583-593 6<sup>th</sup> Avenue and the air rights to 595 and 597 6<sup>th</sup> Avenue, so that they must be deemed to have waived their alleged reservation of four parking spaces. In this regard, the deeds executed in favor of Park Slope make no mention of the reservation of a life interest in any parking spaces. Geroulanos further alleges that the LLC intends to develop the property as a 24 unit multiple dwelling; construction must be commenced and a foundation poured by June 2008, or the developer's tax abatement will be lost or jeopardized.

The LLC accordingly concludes that since plaintiffs have no right to any parking spaces at 583-593 6<sup>th</sup> Avenue, it should be granted an injunction prohibiting plaintiffs from parking any vehicles at the premises. The LLC further argues that although a preliminary injunction should not be granted, in the event that it is, plaintiffs should be required to post a bond in the amount of \$3,500,000.

### ***Standard for Granting Injunctive Relief***

“Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously” (*Matter of Related Props.*

*v Town Bd. of Town/Village of Harrison*, 22 AD3d 587 [2005], citing *Uniformed Firefighters Assn. v City of New York*, 79 NY2d 236, 241 [1992]; *Gagnon Bus Co. v Vallo Transp.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Hence, it is well settled that “[t]o be entitled to temporary injunctive relief, movant must show: (1) the likelihood of success on the merits; (2) irreparable injury absent granting the injunction; and (3) a balancing of the equities” (*Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]).

“The purpose of a preliminary injunction is to maintain the status quo pending determination of the action” (*Coinmach v Alley Pond Owners*, 25 AD3d 642, 643 [2006]; accord *Schweizer v Town of Smithtown*, 19 AD3d 682 [2005]). “The determination to grant or deny a preliminary injunction rests in the sound discretion of the court” (*Ginsburg v Ock-A-Bock Community Assn.*, 34 AD3d 637, 637 [2006]; accord *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2004]). The court must also recognize that “mandatory preliminary injunctions are not favored and should not be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed” (*SHS Baisley v Res Land*, 18 AD3d 727, 728 [2005], citing *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349 [2003]; *Rosa Hair Stylists v Jaber Food*, 218 AD2d 793 [1995]; *Xerox v Neises*, 31 AD2d 195 [1968]; 67 NY Jur 2d, Injunctions § 55).

Further, “[t]o sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts”

(*Matter of Related Props.*, 22 AD3d at 590, citing *Gagnon Bus Co.*, 13 AD3d 334; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty*, 255 AD2d 348 [1998]; accord *Ginsburg*, 34 AD3d at 637). Stated differently:

“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’ (*Milbrandt & Co. v Griffin*, 1 AD3d 327, 328; see *County of Westchester v United Water New Rochelle*, 32 AD3d 979, 980).”

(*Matter of Advanced Digital Sec. Solutions v Samsung Techwin Co.*, \_\_\_ AD3d \_\_\_, 2008 NY Slip Op 6371, 2 [2008]). Hence, “sharp factual issues, which obscure the likelihood of success, will bar the remedy” (*Dhamoon v 230 Park S. Apts.*, 48 AD3d 103, 114 [2007], citing *Eklund v Pinkey*, 31 AD3d 908, 909 [2006]; *Pearlgreen v Yau Chi Chu*, 8 AD3d 460, 461 [2004]; accord *Digestive Liver Disease v Patel*, 18 AD3d 423, 423 [2005]).

In order for a preliminary injunction to issue, it must also be shown that the irreparable injury to be sustained by the moving party is more burdensome to it than the harm caused to the party to be restrained through imposition of the injunction (*Nassau Roofing & Sheet Metal Co. v Facilities Dev.*, 70 AD2d 1021, 1022 [1979], citing *Edgeworth Food v Stephenson*, 53 AD2d 588 [1996]). Accordingly, where a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue, since an irreparable injury has been held to mean an injury for which monetary damages are insufficient (see e.g. *Dana Distribs. v Crown Imports*, 48 AD3d 613, 613 [2008], citing *Price Paper & Twine Co. v*

*Miller*, 182 AD2d 748, 750 [1992]; *accord Neos v Lacey*, 291 AD2d 434, 435 [2002]).

### ***Preliminary Issues***

Before addressing the merits of the demands, the court first rejects plaintiffs' contention that the decision rendered by Judge Spolzino provided that a stay would be in effect pending final disposition of the action. In this regard, Judge Spolzino amended the stay granted by Judge Schack to provide that:

“[T]he temporary restraining order is stricken and *pending a final determination of the pending motion for a preliminary injunction*, the defendants will not convey, lease or dispose of three parking spaces at the premises known as 583-593 6th Avenue, Brooklyn, New York, 595 6<sup>th</sup> Avenue, and 587 6<sup>th</sup> Avenue, Brooklyn, New York.”

(emphasis added). Hence, pursuant to its terms, the stay granted by Judge Spolzino continues only until this court resolves the pending motion, not until the action is resolved.

Further, the court declines to treat either the motion by plaintiffs or the cross motion by the LLC as a demand for permanent injunctive relief. In this regard, it is well settled that:

“A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits’ (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122; *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33; *see also, Jamie B. v Hernandez*, 274 AD2d 335, 336 [‘the function of a preliminary injunction is to provide a provisional remedy by maintaining the status quo pending a full hearing on the merits, rather than to determine the ultimate rights of the parties and mandate corrective action’]).”

(*Morris v Port Auth. of N.Y. & N.J.*, 290 AD2d 22, 26 [2002]). Hence, under the facts

presented here, granting either party a permanent injunction would improperly resolve the action on the merits.

The court also notes that the order to show cause brought by plaintiffs was signed on April 4, 2008, shortly after commencing the action and before any party served an answer. Similarly, the LLC served its cross motion on April 21, 2008, before its answer was served on May 1, 2008; significantly, the LLC does not assert a counterclaim for an injunction enjoining plaintiffs' alleged trespass therein. Accordingly, it would also be improper to treat either the motion or the cross motion as one seeking summary judgment on the merits, since issue had not been joined and the papers do not establish that either sought summary disposition of the action (*see generally Teri-Nichols Indus. Food Merchants v Elk Horn Holding*, 37 AD3d 198, 200 [2007] [the court improperly converted an application for preliminary relief into a motion for summary judgment without providing notice to the parties or an opportunity to lay bare their proof]; *Morris*, 290 AD2d at 26 [the court may not, on its own initiative, convert a motion for injunctive relief into a motion for summary judgment without giving adequate notice to the parties and providing an opportunity for the parties to lay bare their proof]). In this regard, it is also noted that in modifying the stay granted by Judge Schack, Judge Spolzino also characterized the motion and cross motion as seeking preliminary relief, since he continued a more limited stay "pending a final determination of the pending motion for a preliminary injunction."

***Plaintiffs' Request for an Injunction Regarding 595 and 597 6th Avenue***

In support of their contention that they are likely to succeed in establishing the merits with regard to this claim, plaintiffs argue that although they are the owners of the fee interest in 595 and 597 6th Avenue, they have been unable to restore their names as owners. More specifically, they assert that although Park Slope and the LLC had “the full and fair opportunity to file papers correcting and restoring fee ownership to the plaintiffs to the property,” they did not do so.

In opposition, the LCC avers, as did Park Slope in the Companion Action, that the deeds that transferred ownership to Park Slope did not convey the fee, but only the air/development rights. The LLC also contends that the May 5, 2008 Decision resolved this issue by ordering the:

“City Register, Kings County, to accept and file the corrected deed for 595 and 597 Sixth Avenue and to mark and correct its records so as to indicate that plaintiffs Ronaldo Maynard and Richard Maynard are the owners in fee of these properties and Park Slope’s ownership interests are limited to air rights is granted.”

(May 5, 2008 Decision at 12). Apparently, plaintiffs premise the instant demand for injunctive relief upon their belief that the May 5, 2008 Decision imposed a duty upon Park Slope to file a corrected deed.

Plaintiffs arguments are unpersuasive. In the first instance, in the May 5, 2008 Decision, plaintiffs were denied injunctive relief permanently staying defendants from transferring, selling, assigning, converting, alienating, or destroying plaintiffs’ interest, rights

and title in the property, with the court finding that:

“Here, plaintiffs have failed to demonstrate that they will likely succeed on the merits of their case. In this regard, the gravamen of plaintiffs’ claim against defendants is that they wrongfully deprived plaintiffs of their fee ownership interest in 595 and 597 Sixth Avenue. However, this claim is based solely upon City tax records which the parties concede are inaccurate. Moreover, the Bargain and Sale Deed on file for the subject property specifies that Park Slope’s ownership rights in the 595 and 597 Sixth Avenue only apply to that portion of the premises which lies above 150.2 feet. This calls into serious question plaintiffs’ claim that they have been deprived of their fee ownership interest in the property, which is the very basis for this action. Finally, Park Slope and Katan’s papers indicate that they do not claim any fee ownership interest in the property, but rather only own the air rights. Under the circumstances, it does not appear that plaintiffs will succeed on the merits in this action.”

(May 5, 2008 Decision at 7-8).

For the same reasons, and premised upon the LLC’s representation that it similarly does not own the fee to 595 and 597 6th Avenue, but only the air/development rights, the court again finds that plaintiffs fail to establish a likelihood that they will succeed on the merits on the same claim, as asserted against the LLC. In addition, as was also articulated in the May 5, 2008 Decision, plaintiffs fail to demonstrate that they will suffer an irreparable injury if injunctive relief is not granted, since the deeds conveying the property to both Park Slope and the LLC clearly limit the interest conveyed to the air rights, i.e., the deed to Park Slope conveyed:

“ALL that certain plot, piece, or parcel of land, with the buildings and improvements thereon erected, situate, lying and

being in the Borough of Brooklyn County of Kings, City and State of New York which lies above elevation 150.2 feet, said elevation referring to the Borough of Brooklyn Highway Department Datum which is 2.56 feet above Mean Sea Level Datum at Sandy Hook, New Jersey, as established in 1929 and bounded and described as . . . 597 Sixth Avenue, Brooklyn, New York [and] . . . 595 Sixth Avenue, Brooklyn, New York.”

Similarly, the deed from Park Slope to the LLC conveyed, with regard to 595 and 597 6<sup>th</sup> Avenue:

“ALL that certain plot, piece, or parcel of land, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York which lies above elevation 150.2 feet, said elevation referring to the Borough of Brooklyn Highway Department Datum which is 2.56 feet above Mean Sea Level Datum at Sandy Hook, New Jersey, as established in 1929 . . . ”

In so holding, the court rejects plaintiffs’ claim that the May 5, 2008 Decision obligated Park Slope to file a corrected deed to resolve the issue of ownership with the relevant City agencies. In the first instance, the Decision does not so provide. More significantly, plaintiffs requested an order directing the City Register to accept and file the corrected deed to reinstate plaintiffs’ fee ownership in 595 and 597 6<sup>th</sup> Avenue in the relief demanded in their motion in the companion action. Although the Decision did not preclude Park Slope from filing the corrected deed, since plaintiffs were the parties who sought and obtained the relief, it is disingenuous of them to now seek to impose a burden on Park Slope to effectuate such relief.

***Plaintiffs' Request for an Injunction Regarding 583-593 6th Avenue***

In support of their request for injunctive relief with regard to 583-593 6<sup>th</sup> Avenue, plaintiffs rely upon the language in the Option and in the contracts of sale granting them a life estate in three or four parking spaces. In opposition, the LLC argues that the language in those agreements is superceded by the language of the deeds pursuant to which plaintiffs conveyed the property, which do not reserve any interest in the properties. The LLC further argues that plaintiffs cannot establish that they will be irreparably harmed or that the balance of equities tip in their favor. The court agrees.

In the first instance, the law is well established that:

“An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, the right to purchase at a later date” (*Kaplan v Lippman*, 75 NY2d 320, 324, citing *Leonard v Ickovic*, 79 AD2d 603, *affd* 55 NY2d 727). Once an optionee gives notice of intent to exercise the option in accordance with the agreement, ‘the unilateral option agreement ripens into a fully enforceable bilateral contract’ (*id.*, at 325; *see also*, 1 Williston, Contracts § 5:16, at 721 [4th ed]).”

(*Jarecki v Shung Moo Louie*, 95 NY2d 665, 668-669 [2001]).

Herein, after signing the Option with Cross State, plaintiffs signed a contract of sale with Katan. Accordingly, having executed a contract of sale, the Option ceased to exist and can no longer be relied upon by plaintiffs to establish their right to a life estate in the parking spaces (*see generally Bero Contr. & Dev. v Vierhile*, 19 AD3d 1160, 1160-1161 [2005], *rearg denied* 21 AD3d 1442 [2005], *lv dismissed* 6 NY3d 772 [2006], *lv denied, motion denied* 9 NY3d 808 [2007] [provision in an option contract that provided that plaintiff would

construct homes on the property purchased was not enforceable where the parties thereafter signed a purchase agreement for the lots containing a merger clause and failed to incorporate the language of the original option contract that plaintiff would be the homebuilder]).

Similarly, having executed a deed conveying their interest in 595 and 597 6th Avenue to Park Slope, plaintiffs can no longer rely upon the terms of the contract of sale to support their claims of ownership:

“Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title [citation omitted]. However, this rule does not apply where there is a clear intent evidenced by the parties that a particular provision [of the contract of sale] shall survive the delivery of the deed, or where there exists a collateral undertaking’ (*Davis v Weg*, 104 AD2d 617, 619; see *Rothstein v Equity Ventures*, 299 AD2d 472, 475; *Dourountoudakis v Alesi*, 271 AD2d 640, 641; *527 Smith St. Brooklyn Corp. v Bayside Fuel Oil Depot Corp.*, 262 AD2d 278; *Goldsmith v Knapp*, 223 AD2d 671; *Noufrios v Murat*, 193 AD2d 791, 792; Powell on Real Property § 81.05[11][d]).”

(*Novelty: Crystal v PSA Institutional Partners*, 49 AD3d 113 [2008]; accord *Ka Foon Lo v Curis*, 29 AD3d 525 [2006] [because title to the property closed and the deed was delivered, the doctrine of merger extinguished any claim the buyer may have had regarding the contract of sale, so that the cause of action to recover for breach of contract could not be maintained and should have been dismissed]; *Simone v Homecheck Real Estate Servs.*, 42 AD3d 518 [2007] [because title to the property had closed and the deed was delivered, the doctrine of merger extinguished any claim the buyer may have had regarding the contract of sale).

In the alternative, plaintiffs are estopped from relying on the representations contained

in the contract of sale once a deed was executed.

“Estoppel by deed precludes a party to a deed and his or her privies from denying as against another party the force and effect of the deed ‘by any evidence of inferior solemnity.’ (*Pedro v Pedro*, 71 Misc296 [1911]; 5 Warren’s *Weed New York Real Property* [5th ed.] § 48.08). ‘Ordinarily [a grantor] cannot be heard to assert a right in disparagement of his own deed, a principle deeply imbedded in the common law . . . .’ (*Tubb v Rolling Ridge*, 28 Misc2d 532, 535 [1961]). A seller who, ‘assumed to convey a title, good as against subsequent purchasers and incumbrances, . . . [cannot] cut down the estate, so apparently conveyed, to a partial or modified grant . . . .’ (*The Mutual Life Ins. Co. v Corey*, 135 NY 326, 332 [1892]).”

(*DeRoche v John*, 14 Misc3d 1214A [2007]). Hence, a “deed must be held to convey all the interest in the lands which the grantor had unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant” (*Blackman v Striker*, 142 NY 555, 563-561 [1894], citing 1 RS 748, § 1), as, for example, by using words like “excepting and reserving” (*id.*; see also *City Club of Auburn v McGeer*, 198 NY 609 [1910]; *Las-Daub Realty v Fain*, 214 AppDiv 8, 12 [1925]; cf. *Metro Group Constr. v Town of Hempstead*, 24 AD3d 632 [2005] [plaintiff’s causes of action survived the closing of title where the agreement specifically provided that the construction provisions of the agreement “shall survive closing of title”]; *Jay Realty v Gross*, 204 AD2d 274, 276 [1994] [the rider to the parties’ contract of sale was not extinguished upon the closing of title where it contained a guarantee by the plaintiff against defects in the newly-constructed house for one year and further provided that the guarantee was to survive delivery of the deed]).

As is also relevant to the instant dispute, the law presumes present conveyances by

deeds, not the transfer of a future interest:

“By statute, a grantor is presumed to convey its entire interest unless the contrary is expressly provided by or necessarily implied from the terms of the grant. (See, Real Property Law § 245; *Fowler v Coates*, 201 NY 257, 262-263; *Nicoll v New-York & Erie R. R. Co.*, 12 NY 121, 128, 129.) It is a public policy of the law to promote the certainty and transferability of land titles and this is reflected in the general legal rule of construction that present vesting of estates is preferred to delayed vesting. (See generally, Glasser, 1984 Practice Commentary, McKinney's Cons Laws of NY, Book 17B, EPTL 6-4.9, 1987 Pocket Part, at 37; 1A Warren's Weed, op cit., Conditions & Limitations § 4.03; 43 NY Jur 2d, Deeds, § 236; 56 NY Jur 2d, op. cit.; § 510.)”

(*Turiano v State*, 136 Misc2d 596, 601 [1987]). Herein, the deed for 583-593 6<sup>th</sup> Avenue did not incorporate plaintiffs' reservation of a life estate in the parking spaces. Accordingly, plaintiffs fail to demonstrate a likelihood that they can succeed on their claim for this reason as well.

Similarly, plaintiffs fail to demonstrate that it will suffer irreparable harm if they are not granted the relief that they seek. In this regard, the LLC argues that other parking is available in the area, so that plaintiffs can be adequately compensated by awarding the cost of obtaining alternative parking in the event that they succeed on the merits. Further, granting plaintiffs the relief that they seek would have the result of delaying the construction planned by the LLC. Accordingly, the court finds that the balance of equities do not tip in plaintiffs' favor.

### *The LLC's Application to Enjoin Plaintiffs' Trespass*

“Liability for civil trespass requires the factfinder to consider whether the person, without justification or permission, either intentionally entered upon another’s property, or, if entry was permitted, that the person refused ‘to leave after permission to remain ha[d] been withdrawn’” (*Long Island Gynecological Servs. v Murphy*, 298 AD2d 504 [2002], quoting *Rager v McCloskey*, 305 NY 75, 79 [1953]). Where the facts show that plaintiffs are likely to succeed on their causes of action for trespass, the grant of a preliminary injunction is proper (*see e.g. McMullan v HRH Constr.*, 38 AD3d 206 [2007]; *Patti v Cohen*, 227 AD2d 602, 603 [1996]; *Latrieste Restaurant & Cabaret v Village of Port Chester*, 212 AD2d 668, 669 [1995], *lv dismissed* 86 NY2d 837 [1995]; *see generally Seven Acre Wood St. Assocs. v Town of Bedford*, 302 AD2d 511, 512 [2003]). Where plaintiffs can be adequately compensated by money damages for any trespass to their property, however, they fail to show that they would suffer irreparable injury if the injunction were not granted, so that the award of such relief would be improper (*see Betesh v Jemal*, 209 AD2d 568, 569 [1994], citing *McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 174 [1986]).

### ***Discussion***

Herein, the above discussion denying plaintiffs injunctive relief on the ground that they fail to demonstrate a likelihood of success on the merits establishes that the LLC has demonstrated that it is likely to succeed on the merits of its trespass claim. As noted above, however, the LLC does not interpose a counter clam seeking to enjoin plaintiffs’ alleged

trespass on their property in its answer. Further, the LLC fails to establish that it will be irreparably harmed by plaintiffs' continued trespass. More specifically, the LLC's assertion that valuable tax abatements will be lost if construction does not begin immediately is without any evidentiary support. Further, the LLC has not demonstrated that it has obtained the municipal permits and approvals necessary for construction to begin. Finally, any costs that the LLC incurs in lost tax abatements, increased material costs, lost income, carrying charges, etc., can be compensated by an award of money damages. From this it follows that the LLC has not demonstrated that the balance of the equities tip in its favor.

Accordingly, the LLC's cross motion for injunctive relief is denied.

### ***Conclusion***

Plaintiffs' motion is granted only to the extent of granting them permission to serve an amended summons and complaint naming the LLC, Lawyers Land and Covelli as defendants and adding a tenth and eleventh cause of action as against them; the amended summons and complaint are deemed served nunc pro tunc. All other relief requested in the motion and cross motion is denied.

This constitutes the decision and order of the court.

ENTER,  
J. S. C.  
HON. LAURA JACOBSON