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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH PART 62

Justice

HARLEM REAL ESTATE LLC and CITARELLA OPERATING LLC,

Plaintiffs,

- v -

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION and THE CITY OF NEW YORK,

Defendants.

INDEX NO. 111768/06

MOTION DATE 3/12/09

MOTION SEQ. NO. 003

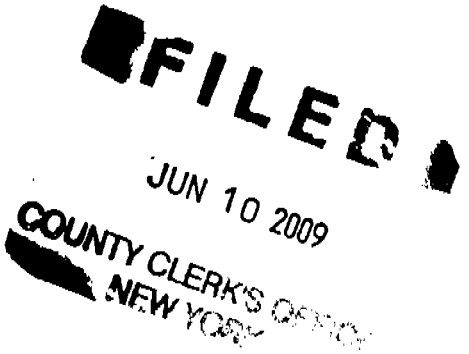
MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion — Affidavits – Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ORDERED that the motion is decided in accordance with the attached memorandum decision and order.



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: June 5, 2009

Hon. Karen S. Smith, *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

----------X

HARLEM REAL ESTATE LLC and CITARELLA OPERATING LLC,

Plaintiffs,

-against-

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION and THE CITY OF NEW YORK,

Defendants.

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Index No.: 111768/06
Motion Seq.: 003
Motion Date: 3/12/09

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

This motion by defendants New York City Economic Development Corporation and the City of New York for an order granting them summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' complaint and awarding judgment against plaintiffs on defendants' counterclaims, is granted, for the reasons stated more fully below.

By this action, plaintiffs Citarella Operating LLC ("Citarella"), a gourmet food market with several locations throughout the New York City metropolitan area, and Harlem Real Estate LLC ("HRE"), seek a declaratory judgment essentially declaring that HRE is not in default of the deed for a parcel of land they purchased from defendant New York City Economic Development Corporation ("EDC"). Defendants City of New York ("the City") and EDC assert numerous counterclaims essentially seeking to recover the deed for the subject property and eject plaintiffs from the property.

When plaintiffs commenced the action, they simultaneously moved for an order granting them "a *Yellowstone* type and/or injunctive relief," enjoining defendants from taking any action

directed at re-taking the property. Justice Marilyn Shafer denied plaintiffs' application by decision and order dated March 6, 2007. Plaintiff subsequently moved to dismiss defendants' counterclaims, which motion was also denied, by order of this Court dated September 29, 2007.

Facts

The relevant facts are contained in the parties' motion papers and are not in material dispute, unless noted below. In or about April 1999, the City and EDC, a local development corporation,[1] issued a request for proposals to develop real property owned by defendant City of New York, located at 461 West 125th Street and 426-458 West 126th Street, New York, New York (hereinafter "the Harlem Property"). Plaintiff Citarella, intending to acquire the Harlem Property, established Harlem Real Estate LLC (collectively "plaintiffs") and HRE's proposal to purchase the property for $850,000 was accepted. On May 3, 2001, EDC executed a Deed, which was recorded in the Office of the City Register on or about May 24, 2001, conveying the Harlem Property to HRE for development. The Deed imposed a condition subsequent, requiring HRE,

> within six (6) months from the date hereof [May 3, 2001], to commence rehabilitation of the buildings on the premises and, within two (2) years from the date hereof, to have completed such rehabilitation so as to allow [HRE] to obtain a certificate of occupancy for the use of such buildings for corporate offices, warehouses area, food preparation facility, light manufacturing operations, and a retail store. . . .

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[1] EDC is a local development corporation organized pursuant to Section 1411 of the New York State Not-For-Profit Corporation Law. According to its Answer, EDC was organized to, *inter alia*, provide assistance in relieving and reducing unemployment, promoting and providing for additional and maximum employment, and bettering and maintaining job opportunities for residents of the City of New York by encouraging industry to locate and remain in the City of New York.

The Deed further provided, in relevant part, that for a period of five (5) years, the Harlem Property,

> shall be used exclusively in connection with the business operations and corporate purposes of (i) Citarella Operating LLC and (ii) Harlem Enterprises LLC (collectively, the "User"), primarily in connection with User's corporate offices, warehouse area, food preparation operations or other food-related uses, and retail store and for no other purposes, except with the prior written approval of Grantor [EDC].

Failure to comply with either of the preceding provisions could, according to the Deed, lead to a notice of violation issued by EDC. If such a notice of violation is issued, the Deed further provided that HRE has 30 days to cure the violation as to the terms of Rehabilitation "by commencing or resuming the Rehabilitation required by this deed and diligently continuing such Rehabilitation until completion." After such a notice of violation is issued, the Deed provides that if HRE fails to "diligently continue such Rehabilitation to completion", EDC need not provide any additional notice to HRE before executing its rights under the Deed.

Pursuant to the express terms of the Deed, if HRE fails to comply with the above provisions, 1) EDC shall have the right to re-enter and take possession of the Harlem Property without paying any consideration to HRE; 2) the estate conveyed to HRE shall terminate and fee simple title to the Harlem Property and any improvements thereon shall re-vest in EDC; and, upon demand, 3) HRE must execute and deliver to EDC a deed conveying the Harlem Property to it.

According to the parties, between November 2002 and January 2004, Citarella was negotiating with the New York City Department of Small Business Services and EDC for a lease on additional property located in the Hunts Point area of the Bronx, New York, which would

serve as a food distribution center and warehouse space (hereinafter "Hunts Point"). Those parties entered into a lease agreement (hereinafter "Lease") for the Hunts Point property, which was fully executed on or about January 29, 2004, to take effect February 1, 2004. No provisions of the Lease made reference to the Deed or Harlem Property at issue in this action, and the Lease is not at issue here; however, plaintiffs do contend that the Lease changed HRE's obligations to the Harlem Property, a contention discussed in more detail below.

In March 2004,[2] the parties entered into a Modification of the Deed for the Harlem Property, which extended the time within which HRE had to complete the rehabilitation. The Modification stated that HRE had six (6) months from the time of the Modification to commence rehabilitation, to be completed within two (2) years, "so as to allow [HRE] to obtain a certificate of occupancy for the use of such buildings for corporate offices, warehouses area, food preparation facility, light manufacturing operations, and a retail store." In addition, the Modification included the following covenant:

> [HRE] . . . covenants to perform rehabilitation work to the buildings on the Premises so as to allow [it] to obtain a certificate of occupancy for the use of such buildings for corporate offices, warehouses area, food preparation facility, light manufacturing operations, and a retail store (the "Rehabilitation"). [HRE] . . . covenants to complete that portion of the Rehabilitation applicable to the retail store and obtain a certificate of occupancy for the retail store no later than July 31, 2004. [HRE] . . . covenants to commence the remaining Rehabilitation at the Premises not later than August 31, 2004, and to have completed all such remaining Rehabilitation at the Premises so as to allow [HRE] to obtain a certificate of occupancy for the use of such buildings for corporate offices, warehouses area, food preparation facility and light manufacturing operations not later than April 30, 2005.

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[2] The document begins, "This Modification of Deed, dates as of February __, 2004 . . . ." However, the Modification is witnessed by two individuals on March 23, 2004 and March 24, 2004, respectively. Accordingly, the Court will accept March 24, 2004 as the date of the Modification.

Finally, the Modification states, "All terms, provisions, covenants and restrictions of the Deed not modified herein shall remain in full force and effect and are reaffirmed in their entirety."

On or about July 25, 2006, EDC served upon HRE a notice of default for HRE's failure to, 1) obtain a certificate of occupancy for the retail store by July 31, 2004; 2) commence the remaining Rehabilitation work prior to August 31, 2004; 3) obtain certificates of occupancy for the use of the other space for corporate offices, warehouses area, food preparation facility and light manufacturing operations prior to April 30, 2005; and 4) use the Harlem Property for corporate offices, warehouses area, food preparation facility and light manufacturing operations for no less than five years.

After EDC served its notice of violation, entitled Notice of Default, upon HRE, plaintiffs commenced this action by order to show cause, seeking as a First Cause of Action, a declaratory judgment that, 1) plaintiffs are not in default of the Deed; 2) defendants breached implied covenants of good faith and fair dealing; 3) defendants should be equitably estopped from declaring default or taking further action, based on their unclean hands; 4) defendants have waived strict performance of the Deed; 5) compliance with the Rehabilitation as set forth in the Deed has been rendered impossible; 6) defendants' actions have frustrated or rendered impossible HRE's' ability to perform; 7) defendants have acted unreasonably, arbitrarily and/or capriciously; 8) defendants consented to, or should be deemed to have consented to, a change of use; and 9) defendants do not have a substantial interest in the enforcement of the deed restriction. As a Second Cause of Action, plaintiffs seek a mandatory injunction compelling defendants to accept and review alternative development plans for the Harlem Property. As a Third Cause of Action, plaintiffs seek an order extinguishing the deed restrictions pursuant to the

Real Property Actions and Proceedings Law. Finally, as a Fourth Cause of Action, plaintiffs seek an order enjoining defendants from taking further action on their Notice of Default.

Defendants answered the complaint and asserted several counterclaims. Defendants seek an order declaring that EDC has a right to re-enter and take possession of the Harlem Property and to terminate HRE's estate and interest in the Harlem Property and compelling HRE to convey the Harlem Property to EDC by executing and delivering a deed for same to EDC. In addition, based on HRE's alleged breach of the Deed, EDC seeks an order and judgment ejecting plaintiffs from the Harlem Property. Finally, EDC claims that it has suffered damages in excess of $2 million dollars and is entitled to recover same.

Defendants now move pursuant to CPLR § 3212 for an order granting it summary judgment dismissing plaintiffs' complaint and judgment in defendants' favor on their counterclaims.[3] Plaintiffs oppose the motion and contend that defendants have failed to meet their burden establishing their entitlement to judgment in their favor on plaintiffs' claims or on the counterclaims.[4]

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[3] In support of its motion, EDC submits the following documents: 1) the affidavit of Judith Barr, assistant vice president of real estate development at EDC, dated October 22, 2008; 2) a copy of the Deed between EDC and HRE, fully executed on May 3, 2001; 3) the Deed Modification, executed on March 24, 2004; 4) EDC's Notice of Default; 5) the Contract of Sale for the Harlem Property, dated May 14, 2000; 6) a letter from then-Manhattan Borough President C. Virginia Fields to Michael Carey, president of EDC, dated June 2, 2000; 7) EDC's Request for Proposals for development of the subject Harlem Property, dated April 1999; 8) the EBT testimony of plaintiffs by Joseph Gurrera, a member of HRE and president of Citarella, dated June 23, 2008; 9) an appraisal of the subject Harlem Property by Nico Valuation Services, Ltd. for defendants, dated December 1, 1999; 10) a letter Donald J. Lutt, Citarella's broker, to Tanya K. Tessa, executive vice president of EDC, dated November 20, 2002; 11) a letter to Gurrera from Stephen Hayes of EDC dated October 7, 2004; 12) a letter from Donald J. Lutt to Stephen Hayes dated March 10, 2005; 13) a letter from Roger Fortune, project manager at EDC, to Gurrera, dated October 12, 2005; 14) a letter from Gurrera to Fortune, dated November 15, 2005; 15) a letter from Gurrera to Fortune dated March 1, 2006; and 16) a Memorandum by Michael G. Carey to Deputy Mayor Randy Levine regarding the subject Harlem Property dated August 13, 1999.

[4] In opposition to the motion, plaintiffs submit, 1) the affidavit of Joseph Gurrera dated January 13, 2009; 2) a copy of the subject Deed; 3) a Certificate of Occupancy (#104524409F), effective date March 12, 2008, for "accessory storage", "loading platform", "retail store" and "office and accessory storage"; 4) an email from

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Tanya Tesa of EDC to Jeffrey Manzer, Steve Lazarus, Thomas Sussewell and Lee Benedict; 5) the November 20, 2002 letter from Lutt to Tesa; 6) a letter from Jeffrey Manzer, Vice President at EDC, to Lutt dated April 15, 2003; 7) a lease agreement between the City of New York and Citarella Operating LLC, dated January 29, 2004, for a property called the Hunts Point Food Distribution Center, Bronx, New York (hereinafter "Hunts Point"); 8) Modification of the subject Deed; 9) a letter from Lutt to Hayes of EDC dated November 3, 2002; 10) a letter from Hayes to Gurrera dated October 7, 2004; 11) a letter from Mindy A. Birnbaum, director of legal affairs and business development at Citarella, to Council Member Stanley Michels dated May 17, 2000; 12) a portion of the New York City website highlighting Ken Konfong, assistant vice president of EDC, dated December 1, 2004; 13) an email from Tesa to Hayes dated December 29, 2003; 14) an email from Alyssa Cobb to numerous recipients, including Hayes, dated September 8, 2004; 15) the EBT testimony of Judith Barr, dated June 25, 2008; 16) an email from Susan Goldfinger to Hayes and Barbara Resnicow, vice president at EDC, dated November 10, 2004; 17) a fax from Gary Tarnoff to Hayes, dated February 4, 2005; 18) an email from Resnicow to Hayes dated February 23, 2005; 19) a Memorandum from Hayes to the Manhattan Community Board #9, Harlem Piers and Economic Development Committee, dated March 1, 2005; 20) a letter from Lutt to Hays dated March 10, 2005; 21) an email from Hayes to Edith Hsu-Chen, deputy director of the Manhattan Department of City Planning office, dated March 15, 2005; 22) a portion of the New York City website showing a press release announcing Hsu-Chen's appointment, dated September 12, 2008; 23) an article from The New York Times dated April 18, 2007; 24) an email from Hayes to Lutt dated April 11, 2005; 25) an email from Hayes to Roger Fortune and Alex Adams dated July 12, 2005; 26) an email from Hayes to Fortune dated July 12, 2005; 26) an email from Hayes to Fortune and Adams dated August 23, 2009; 27) an email from Adams to Kirsten Shaw dated September 8, 2005; 28) a letter from Hayes to Gurrera dated September 12, 2005; 29) a letter from Fortune to Gurrera dated October 12, 2005; 30) a letter from Fortune to Gurrera dated November 14, 2005; 31) a letter from Gurrera to Fortune dated November 15, 2005; 32) an email from Holly M. Leicht, assistant commissioner at the New York City Department of Housing Preservation and Development to Susan Goldfinger and Fortune dated January 9, 2006; 33) a letter from Gurrera to Fortune dated March 1, 2006; 34) defendants' Notice of Default dated July 25, 2006; 35) an email from Matt Wambua to Fortune dated June 26, 2006; 36) plaintiffs' Combined Demands dated June 15, 2007; 37) defendants' Response to Plaintiffs' Combined Demands dated January 11, 2008; 38) defendants' Privileged Document List, i.e. privilege log, dated April 8, 2008; and 39) a set of forms created by EDC and completed by Gurrera, dated September 23, 2008, relating to the receipt of "Business Incentive Rate ("BIR") Energy Assistance.

According to defendants, HRE has no cause of action against EDC or the City of New York. Additionally, defendants contend that HRE has defaulted on its obligations pursuant to the Deed and the Deed Modification, both of which are valid and enforceable under the law. As such, defendants claim they 1) are entitled to an order declaring that EDC is vested with fee title to the Harlem Property, 2) compelling HRE to execute and deliver a deed for the Harlem Property to EDC, and 3) directing the City Registrar to "take such action to reflect that [EDC] is vested with absolute and unencumbered title in fee" to the Harlem Property, and in addition granting a judgment in favor of EDC awarding it exclusive possession of the Harlem Property and ejecting HRE therefrom.[5]

Plaintiffs oppose the motion, 1) challenging the enforceability of the condition subsequent(s) contained in the Deed, specifically contending that the restrictions can and should be extinguished under the Real Property Actions and Procedure Law ("RPAPL"); 2) claiming that equitable remedies and/or defenses apply, given the fact that the Deed allowed EDC to change the approved use of the Harlem Property; and 3) contesting the contention by defendants that HRE failed to timely commence curing the default. Plaintiffs also argue that there is outstanding discovery to which they are entitled and which they need to properly oppose the motion.

Defendants here have succeeded in making a *prima facie* showing that they are entitled to judgment in their favor on several of their counterclaims and dismissing each of plaintiffs' causes of action against them, through the submission of admissible evidence. Plaintiffs have failed to

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[5] It should be noted that defendants do not, in their motion, seek any order respecting the damages to which they claim they are entitled in the Complaint. As such, the Court does not address this aspect of defendants' Complaint and makes no determination regarding same.

raise an issue of material fact which would necessitate trial or to point to any evidence in defendants' sole possession which would justify denial of the motion.

Plaintiffs' Complaint

Plaintiffs, in their Complaint, contend that they are entitled to, 1) a declaratory judgment on several grounds, 2) a mandatory injunction, 3) extinguishment of the conditions subsequent in the Deed, and 4) a permanent injunction, each of which will be addressed below. Preliminarily, it should be noted that, although plaintiffs name the City of New York in the caption, the only factual allegation against the City of New York is that it leased the Hunts Point property to plaintiffs. All other allegations are directed at EDC. Further, while plaintiffs refer to "defendants" collectively in each Cause of Action, they provide no additional factual allegations upon which any cause of action could be maintained against the City of New York as distinguished from EDC.

Default of the Deed and Conditions Subsequent

There is no genuine dispute that the Deed and the Deed Modification are valid and were properly executed and agreed upon by all parties subject to their terms.[6] The parties do

[6] While plaintiffs imply in portions of their papers that they were unaware of the condition of the buildings and the Harlem Property when they submitted their proposal for development of the Harlem Property to EDC, they stop short of alleging that the Deed and/or the Contract of Sale themselves are invalid. Regardless, any implication that plaintiffs were unfamiliar with the Harlem Property is clearly refuted by the evidence. The description of the Harlem Property in EDC's Request for Proposals ("RFP") states, "The existing buildings on the Site are in poor condition, but have some architectural merit." As defendants point out, the Contract of Sale also states that plaintiffs inspected the Harlem Property prior to sale and were aware of the "physical condition and state of repair thereof." Five months prior to the execution of the Contract of Sale, defendants sent plaintiffs an appraisal by Nico Valuation Services, Ltd. at the request of EDC, which described the state of the buildings and "highly recommend[ed] consultation with qualified construction experts." Finally, in his EBT, Gurrera testified that he was unaware of the condition of the property until six months to a year after plaintiffs purchased the property, stating, "I

substantially disagree, however, regarding whether HRE is in default of the terms set forth in the conditions subsequent, which default would give rise to defendants' right to re-enter and take possession and fee title in the Harlem Property pursuant to the terms of the Deed.

According to defendants, under the Modification, HRE was required to commence those portions of the agreed-upon renovation no later than August 31, 2004, to be completed by April 30, 2005, so that HRE could obtain certificates of occupancy for "corporate offices, warehouses area, food preparation facility and light manufacturing operations." Defendants allege that at the time the Notice of Default was issued on July 25, 2006, the only portion of the renovation that HRE had completed, for which a certificate of occupancy issued, was the retail area. According to EDC, by August 31, 2004 HRE had not commenced rehabilitation for purposes of corporate offices, warehouse space, food preparation or manufacturing operations, as required by the Deed and its subsequent Modification.

While HRE does not concede that it was in default at the time defendants issued the Notice of Default, it claims that any default was cured within 30 days pursuant to the terms of the Deed, which states that violations can be cured by "commencing or resuming the Rehabilitation . . . and diligently continuing such Rehabilitation until completion." According to HRE, it determined that developing the Harlem Property as originally agreed upon would be far more costly and less advantageous than HRE believed when it was purchased. As such, HRE began negotiating with defendants to modify the Deed further and began working toward a proposed

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took the building[s] as is . . . I made a mistake and I took the building as is." Although Gurrera claimed that a proper inspection could not be conducted prior to purchase because the Harlem Property was full of "rubble", the fact that EDC could commission an inspection undermines that contention. As previously stated, this issue is not before the Court, as plaintiffs did not raise this argument or make this allegation in their complaint.

alternate development plan which included residential housing. Plaintiffs submit numerous records and documents evidencing these negotiations with EDC employees at various levels of authority. Despite these negotiations, HRE claims it resumed rehabilitation of the Harlem Property, as provided under the February 2004 Modification, after the defendants issued their Notice of Default on July 25, 2006, which essentially constituted EDC's denial of HRE's proposed alternate development plan. According to HRE's opposition papers, on August 22, 2006 it filed an application for subdivision of the property, which it claims was a necessary step to obtaining a Certificate of Occupancy for the retail store only. This shows, they argue, that plaintiffs resumed rehabilitation within the 30 days following the Notice of Default. Subsequently, the application for subdivision was approved by the Department of Buildings on October 13, 2006. HRE further points out that it filed an "Alt 1 Application" to obtain a new Certificate of Occupancy for the retail store location on the newly zoned lots and other documentation related to this application between August 22, 2006 and February 15, 2007. Plaintiffs point to this and other documents to support their argument that HRE commenced curing the rehabilitation defect and continued diligently to do so, pursuant to the terms of the Deed. Therefore, they contend, defendants are not entitled to the relief they seek in their counterclaims.

The Court in *New York City Economic Development Corporation v Corn Exchange, LLC*, (2009 NY Slip Op 50409U [Sup. Ct. January 29, 2009] [Edmead, J.]), a case remarkably similar to the facts at issue here, discussed what kind of evidence would support a party's claim that any default had been cured pursuant to a Deed provision identical to that at issue here. There the party in default of the Deed, Corn Exchange, LLC, submitted an affidavit stating that shoring

and debris removal had been completed at the premises and that Corn Exchange, LLC had found "the right financial partner" for developing the site. In addition, Corn Exchange, LLC submitted the affidavit of an engineer and an architect, who both provided opinions about the property's development potential. What Corn Exchange, LLC did *not* submit was a specific plan or proposal for going forward with construction and development or any evidence that it had begun or completed any construction other than that necessary to remedy safety violations. In that case, Justice Edmead found that Corn Exchange's efforts could not be considered sufficient evidence that it "commenc[ed] or resum[ed] the Rehabilitation . . . and diligently continu[ed] such Rehabilitation until completion," pursuant to the Deed.

Here, to support their contention that HRE cured the default, plaintiffs can only point to their application for subdivision and the application for a new Certificate of Occupancy for the retail store, filed after the Notice of Default was served on HRE. These actions alone are insufficient to constitute "commencing or resuming the Rehabilitation . . . and diligently continuing such Rehabilitation until completion," and therefore plaintiffs cannot be considered to have cured the violations. Joseph Gurrera, president of Citarella and member of HRE, testified explicitly that after HRE was served with the Notice of Default, the company "stopped everything." He stated that HRE has not applied for any building permits or retained any contractors in an effort to move forward with development pursuant to the Deed. The EDC has rejected plaintiffs' proposal for mixed-use development, yet plaintiffs have not submitted a construction plan or calendar for developing the Harlem Property pursuant to the Deed and subsequent Deed Modification. Nor is there any evidence that plaintiffs have done any work on the Harlem Property since the law suit was commenced in 2006, as is required under the Deed.

"The Deed itself speaks of the cure in terms of commencing or resuming the construction 'until completion.' It does not recognize doing some work as a cure." (*New York City Economic Development Corporation v Corn Exchange, LLC*, 2009 NY Slip Op 50409U [Sup. Ct. January 29, 2009] [Edmead, J.]). The two applications filed by plaintiffs are not enough to raise an issue of fact in this regard, particularly where all of the necessary evidence to oppose this portion of defendants' motion for summary judgment are in plaintiffs' possession and control.

Implied Covenant of Good Faith and Fair Dealing

Good faith and fair dealing are required of all parties to an agreement. (*See Falk v Goodman*, 7 NY2d 87 [1959]; *A. Brod, Inc., et al. v Worldwide Dreams, L.L.C., et al.*, 2004 NY Slip Op 50733U [App Term, 1st Dept 2004]). "The covenant is breached 'when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under the agreement." (*A. Brod, Inc., et al. v Worldwide Dreams, L.L.C., et al.*, at *2 [internal citations omitted].) Neither party to an agreement "shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits" of the agreement. (*Dalton v Educational Testing Service*, 87 NY2d 384, 389 [1995]).

Plaintiffs allege that defendants violated the implied covenant of good faith and fair dealing in two distinct regards. First, according to plaintiffs, EDC's employees engaged in serious negotiations to attempt to change the use of the Harlem Property to include residential use, making it a mixed-use property. These negotiations included meetings and emails between the parties and there is evidence that EDC employees reached out to other non-EDC individuals

or entities in an effort to connect plaintiffs with a "development partner." It appears to be plaintiffs' claim that these efforts wrongly created the impression, upon which HRE relied, that EDC would allow a Modification to change the use of the Harlem Property and that, perhaps, HRE's non-compliance leading up to the proposed Modification would be excused. Second, plaintiffs argue that the Hunts Point Lease for a warehouse and food distribution center was intended to substitute for those same facilities at the subject Harlem Property as described in the Deed. Plaintiffs contend that defendants knew or should have known that if the Hunts Point Lease was entered into, it would change plaintiffs' use of the Harlem Property.

Based on the evidence submitted by the parties, the Court does not find that EDC violated the implied covenant of good faith and fair dealing. While EDC and its employees clearly encouraged HRE in their effort to find a development partner with which it could further develop the Harlem Property, it appears from the evidence that this was done only after plaintiffs informed EDC that they would be unable to complete the rehabilitation as originally envisioned and provided in the Modification of March 2004. In an October 7, 2004 letter to plaintiffs, Stephen Hayes, vice president of EDC, informed plaintiffs that the Department of City Planning was preparing to conduct a zoning study to allow for more residential construction in the area of the Harlem Property, but that there would be no zoning change for at least one to two years. In that same letter, Hayes told plaintiffs that, because of the importance of developing the Harlem Property and the lengthy delay already, EDC was requiring plaintiffs to submit a new plan and schedule "for the warehouse portion" of the Harlem Property no later than October 25, 2004. Contrary to defendants' implication in their motion papers, the context of the full letter makes clear that EDC would consider alternate plans for what was previously supposed to be the

"warehouse portion" of the Harlem Property. However, plaintiffs did not submit a new development plan and formal request for Modification of the Deed until March 1, 2006. According to Judith Barr of EDC, HRE's proposal was not satisfactory, redevelopment of the Harlem Property was already more than a year behind schedule, and the zoning regulations for the area still did not permit residential or mixed-use construction, which meant that any approved Modification would require either a variance approved by the Board of Standards and Appeals or a formal change in zoning, which would further delay the project. For these reasons, according to defendants, the belated proposal was not approved and instead defendants took steps to re-take the Harlem Property and find another developer for the location. Plaintiffs have failed to submit any evidence which could support their allegation that defendants' actions were intended to impair plaintiffs' rights under the Deed. Rather, plaintiffs were already in default by the time they submitted a proposed Modification.

In addition, plaintiffs have failed entirely to support their allegations that EDC knew and approved of their intention to *substitute* the Hunts Point facility for warehouse and food distribution areas in the Harlem Property, as stated in the Deed. The Lease was signed just prior to the Modification. The Lease makes no mention whatsoever of the Harlem Property. Further, the parties entered into a Deed Modification immediately after the Lease was executed, in which the parties reaffirmed each of the approved uses in the Deed. No part of the Modification changed the approved uses or referred to the Hunts Point facility. In addition, at least one of the emails plaintiffs attach in opposition to the defendants' motion explicitly indicates that the Hunts Point Lease and the subject Harlem Property were completely separate: "They [plaintiffs] will keep the whole Harlem site. . . . They have been told the appraised value of the Bronx site and

will be visiting the site to make an assessment as to whether they want to bid for it or not. **It was emphasized that the Bronx site bid is separate from the Harlem development**." (Email dated October 30, 2002 from Stephen Hayes to Robert Balder and Tanya Tesa, Exhibit E to plaintiffs' Affirmation in Opposition [emphasis added]). Even plaintiffs' own written communications with EDC regarding the Hunts Point location states that Citarella was "interest[ed] in relocating [its] warehouse and food production operation **from 18th Street in Manhattan** [hereinafter the "Chelsea Location"] to 600 Food Center Drive in Hunts Point." (Letter from Donald J. Lutt, broker for Citarella, to Tanya K. Tesa at EDC, November 20, 2002 [emphasis added].) This letter, written more than a year and a half after the Deed for the Harlem Property was executed, clearly states that the intention was to relocate Citarella's Chelsea Location. The evidence thus does not raise an issue of fact as to whether defendants took actions or conducted themselves in a manner intended to deprive plaintiffs of the benefits of the Deed.

Equitable Estoppel

Defendants contend that the issue of estoppel was decided by Justice Marilyn Shafer in her March 6, 2007 decision and order denying plaintiffs' motion for a preliminary injunction, in which she held that the doctrine of estoppel will not lie against municipalities, except in rare circumstances. While plaintiffs acknowledge the general and well-recognized principle that a municipality is not subject to estoppel to prevent it from exercising its lawful powers and rights, (*Matter of Parkview Associates v City of New York*, 71 NY2d 274 [1988]), they argue this case

falls within an exception to that rule.[7] Specifically, plaintiffs contend that they relied on defendants' representations - to plaintiffs and to other governmental agencies - that plaintiffs would be allowed to modify the Deed to include residential housing and that the Hunts Point Lease relieved plaintiffs of the warehouse portion of the Deed.

While it is true, as plaintiffs contend, that Justice Shafer's decision and order denying plaintiffs' application for a preliminary injunction does not automatically become the "law of the case,"[8] her reasoning in that decision and order applies just as soundly to the facts presented on this motion. The exception to the general rule that equitable estoppel does not lie against municipalities, applies only "in rare circumstances 'when failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right'." (*Harlem Real Estate v New York City Economic Development Corporation, et al.*, Sup Ct New York County, March 6, 2007, Shafer, J., Index No. 111768/06, Motion Sequence 001; *citing to Matter of Hauben v Goldin*, 74 AD2d 804, 805 [1st Dept 1980]). This exception has been very rarely applied and only in exceptionally unusual circumstances. (*Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]). Further, as Justice Shafer discussed, those who do business with a municipality's agents have an obligation to determine the scope of those agents' power "or else proceed at their own risk." (*Harlem Real Estate v New York City Economic Development Corporation, et al.*, Sup Ct New York County, March 6, 2007, Shafer, J., Index No. 111768/06, Motion Sequence 001; *quoting Henry Modell & Co., Inc. v City of New* York, 159 AD2d 354, 355 [1st Dept 1990]; *see*

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[7] Although plaintiffs base their argument for estoppel, in part, on the Real Property Actions and Proceedings Law, the Court discusses plaintiffs' rights pursuant to the RPAPL separately, below.

[8] *See, e.g.* Siegel, N.Y. Practice § 448 (4th Ed.) ("[T]he findings of a judge on a motion for a preliminary injunction will not conclude the trial judge . . . Findings on [a motion for temporary relief] do not bind the court when it later makes a final judgment.").

also, City of New York v Wilson & Co., 278 NY 86 [1938] ["statements of city officials do not estop the city"]).

In this case, there is no basis for plaintiffs' cause of action for equitable estoppel as they do not fall within the exception. The evidence submitted by the parties show that representatives of EDC encouraged plaintiffs to consider and submit alternative proposals for the Harlem Property once plaintiffs made it clear they did not intend to develop the Harlem Property as originally envisioned. At his deposition, Joseph Gurrera, president of Citarella and member of HRE, was asked whether EDC representatives were made aware of his intention to abandon plans to build a warehouse at the Harlem Property as a result of the Lease for the Hunts Point location. Gurrera stated that EDC representative Tanya Tesa was aware of that, but could not state that he informed her or how he knew she was aware, nor did plaintiffs submit any evidence indicating Tesa or any other EDC employee was aware of Gurrera's intentions in this regard. In addition, Gurrera specifically testified that no City employee or representative of EDC ever told him that his obligation to build a warehouse facility pursuant to the Deed and Deed Modification was obviated. Gurrera instead stated that it was "common sense" that it would make no "business sense" to have a leased warehouse and also to develop his own warehouse facilities in Harlem, but then admits that there was no agreement between representatives of the City or EDC and himself to change the use of the Harlem Property. Rather, the parties were in discussions and had met several times before EDC served plaintiffs with the Notice of Default. If Gurrera himself does not believe that EDC employees made representations or agreements to this effect, there is accordingly no need to discuss whether the City and/or EDC are bound by such representations or agreements.

Waiver

Plaintiffs seek, in the complaint, an order declaring that defendants have waived strict performance of the Deed. "[W]aiver is an intentional relinquishment of a known right and should not be presumed." (*New York City Economic Development Corporation v Corn Exchange, LLC*, (2009 NY Slip Op 50409U [Sup. Ct. January 29, 2009] [Edmead, J.], *quoting Inter-Power of New York, Inc. v Niagara Mohawk Power Corp.*, 213 AD2d 110 [3d Dept 1995]). Plaintiffs have submitted no evidence that EDC intended to give up its right to enforce the Deed provisions. In his letter to Gurrera on October 12, 2005, Roger Fortune specifically stated that HRE was in default of the conditions subsequent. As of March 1, 2006, HRE was still seeking a Deed modification to extend the time to comply and change the use, based on Gurrera's letter to Fortune. Nowhere in the papers submitted or in Gurrera's deposition is there evidence that EDC communicated its intention not to enforce its rights under the Deed. As such, this cause of action is dismissed.

Impossibility of Performance and Frustration of Purpose

Plaintiffs allege in their complaint that compliance with the terms of the Deed have been rendered impossible, and that the actions of defendants have "frustrated or rendered impossible" plaintiffs' ability to fulfill their obligations therein.

> Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. . . . While [the defense of impossibility has] been recognized in the common law, [it has] been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.

> Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.

(*Kel Kim Corporation, et al., v Central Markets, Inc., et al.*, 70 NY2d 900, 902 [1987] [internal citations omitted]).

This is not the case here, particularly where the subject matter of the agreement between the parties has not been destroyed. The only reason plaintiffs have provided for their inability to comply with the condition subsequent in the Deed and their desire to further modify it, is that they determined it would be exceedingly expensive to do so, something they did not anticipate at the time they purchased the property and executed the Deed. "'Financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy' is not such impossibility as to excuse a defendant from liability in damages for failure to perform the contract." (*Pettinelli Electric Co. v Board of Education*, 56 AD2d 520, 521 [1st Dept 1977], *quoting 407 East 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968], *aff'd*, 43 NY2d 760 [1977]). Plaintiffs cannot rely on defendants' denial of their proposed Modification to support this affirmative defense, as approval of any Modification was within the discretion of defendants and plaintiffs had no legal right to same.

Likewise, plaintiffs have not alleged facts sufficient to support an affirmative defense of frustration of purpose, which only applies where the frustration is "substantial." "It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." (*Rockland Dev. Assoc. v Richlou Auto Body*, 173 AD2d 690, 691 [2nd Dept 1991]; *Restatement [Second] of Contracts § 265, comment a*). As the Deed did not require defendants

to approve proposed Modifications and did not otherwise create a right to Modification of the Deed, but merely provided a mechanism by which a Modification could take place should the parties agree to one, defendants' rejection of plaintiffs' proposed Modification can not qualify as frustration of the agreement or the parties' rights under the Deed.

Unreasonable, Arbitrary and/or Capricious Acts

Plaintiffs seek a declaration that defendants have acted unreasonably, arbitrarily and/or capriciously. The Court presumes that plaintiffs are seeking relief pursuant to CPLR § 7803[3], which allows judicial review of the final determination of a government body or officer, to determine whether it was arbitrary and capricious and, thus, also presumes that the determination of which plaintiffs seek review is the denial of their request for a second Modification of the Deed.[9]

Assuming that the denial of plaintiffs' request for a further modification of the Deed is a "final determination" challengeable pursuant to CPLR § 7803[3] as being arbitrary and capricious, the proper standard of review is "whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (*Pell v Board of Education*, 34 NY2d 222, 231 [1974]). "Arbitrary action is without sound basis in

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[9] Plaintiffs have not addressed whether EDC, a local development corporation organized pursuant to Article 14 of the not-for-profit corporation law, is subject to CPLR § 7803[3], and this appears to be an issue of first impression, having been raised but not ever addressed by the Appellate Division in *Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Development Corporation, et al.*, (36 AD3d 234 [1st Dept 2006] ["Unaddressed in the parties' briefs . . . is the question of whether an article 78 proceeding may be properly brought against EDC."], *lv denied* 8 N.Y.3d 827 [2007]), because petitioner therein lacked standing. Nor have plaintiffs established that EDC's denial of plaintiffs' request to modify the Deed is a final agency determination, subject to review by this Court. As the parties have not briefed it and the issue is not dispositive in the instant case, the Court does not address it herein.

reason and is generally taken without regard to the facts." (*Id.*).

The Court cannot say that the decision by EDC to deny an additional modification of the Deed, based on 1) the extensive delay in developing the Harlem Property, 2) plaintiffs' delay in submitting a formal proposal for modification, and 3) the lack of specificity in the formal proposal plaintiffs eventually submitted, was without "sound basis in reason" or that it was "taken without regard to the facts." While plaintiffs argue that EDC should not have encouraged HRE to find a development partner, create plans for alternative development, and take other steps toward modified development of the Harlem Property, even if the Court were to agree, this is not dispositive. HRE and its principal, Gurrera, were experienced in the world of business, were represented by counsel, and could have negotiated the sale and development of the Harlem Property in a manner that protected their interests more completely. That is not what happened. Instead, HRE delayed development of the property and attempted to secure a modification of the agreement rather than develop the Harlem Property as originally agreed to by the parties. When HRE finally submitted plans for alternative development to EDC, they were insufficient and unsatisfactory, and were rejected. That EDC would choose to no longer entertain the ongoing attempts by HRE to modify the use - more than five years after the sale of the Harlem Property - and instead require compliance with the agreement or explore other development options, cannot be considered to be either arbitrary and capricious or without rational basis.

Order of Mandamus

Plaintiffs seek an order of mandamus compelling EDC to accept and review alternative development plans for the Harlem Property. It appears plaintiffs seek an order compelling EDC

to enter into a further Deed Modification to allow plaintiffs time to complete the newly submitted development plans. Plaintiffs, however, do not address whether they have obtained all the necessary zoning changes or a zoning variance to allow for mixed-use development.

An order of mandamus to compel performance of a duty enjoined by law may only lie where the right to relief is clear and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion." (*Hamptons Hospital & Medical Center, Inc. v Moore*, 52 NY2d 88, 96 [1981], *citing* Weinstein-Korn-Miller, CPLR Manual [rev ed], par 32.02, subd [b]).

Here, there is no clear right to the relief sought by plaintiffs and plaintiffs have cited to no legal authority compelling EDC to approve HRE's mixed-use proposal. Further, the decision whether to enter into a Deed Modification - modifying the terms of the agreement between the parties - is clearly an exercise of discretion not subject to an order of mandamus. That EDC may have had the authority to grant extensions of time, to modify the deed, or to approve a different use of the Harlem Property is wholly irrelevant, where the decision to take any such action was within the discretion of the EDC. As such, plaintiffs are not entitled to an order compelling EDC to accept and approve HRE's March 2006 modification request and development proposal.

Extinguishment of the Deed Restrictions

Plaintiffs' cause of action for an order extinguishing the use restrictions (i.e. conditions subsequent) in the Deed is duplicative of plaintiffs' cause of action for a judgment declaring that defendants do not have a substantial interest in the enforcement of the restrictions, and as such, they will be addressed together. Essentially, plaintiffs contend that the conditions subsequent are

not enforceable under the Real Property Actions and Procedure Law ("RPAPL") and should be extinguished because forfeitures of land are generally not looked upon favorably under the law. In support of this proposition, plaintiffs cite to RPAPL § 1951 *et seq.*, which governs certain restrictions on the use of real property. RPAPL § 1951 states, in relevant part:

> 1. No restriction on the use of land created . . . on or after September 1, 1958, by a . . . condition subsequent governed by section 1953 [below], shall be enforced . . . [if] it appears that the restriction is of **no actual and substantial benefit** to the persons seeking its enforcement . . . either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.
>
> 2. When relief against such a restriction is sought . . . if the court shall find that the restriction is of **no actual and substantial benefit to the persons seeking its enforcement** . . . either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment . . ., it may adjudge that the restriction is **not enforceable** by injunction [or pursuant to § 1953] and that it shall be completely **extinguished** upon payment . . . [of damages caused by extinguishment].
>
> (Emphasis added).

RPAPL § 1953 provides, in relevant part:

> 2. . . . [U]pon the happening of [a breach of the condition subsequent] the person or persons who would have such . . . right of entry except for this section, may maintain an action in the supreme court to compel a conveyance to him or them of the land. . . .
>
> 3. The relief provided in subdivision 2 shall be granted only to protect a **substantial interest in enforcement** of the restriction . . . [and is] subject to any defense that might be interposed in an action to enjoin a violation of the restriction . . . and the court may deny such relief or impose conditions upon the granting thereof, or grant alternative relief, upon like cause and in like manner as in an action for such injunction. If it appears that the relief provided in subdivision 2 would be inequitable, the court may [fashion equitable relief] upon such terms as justice may require to avoid a forfeiture of the value of improvements or other unjust

enrichment.

> 4. This section **shall not apply** where the . . . condition subsequent was created in a conveyance or devise . . . for **benevolent, charitable, educational, public or religious purposes** and restricts the use of land to such a purpose or to a particular application or means of carrying out such purpose . . . .

(Emphasis added).

Plaintiffs argue that, pursuant to RPAPL § 1951(1), defendants have no substantial interest in enforcing the condition subsequent, as the only substantial interest EDC can have is in promoting development of the Harlem Property in a manner approved by the community, which plaintiffs still intend to do through their mixed-use development plan. Plaintiffs also point out that jobs were created in the area of the Hunts Point facility and the City of New York has benefitted through tax revenue from that location of plaintiffs' operation. In addition, plaintiffs contend that conditions have changed, permitting the Court to deem the condition subsequent unenforceable. This proposition is based primarily on plaintiffs' allegation that Citarella entered into the Hunts Point lease for a warehouse and distribution center with the understanding that such lease would relieve it of the obligation to develop warehouse space on the Harlem Property, as specified in the condition subsequent. Finally, plaintiffs ask the Court to exercise its equitable powers delineated in RPAPL § 1953(3) to resolve the instant dispute.

Defendants argue, and this Court agrees, that the subject Deed and its restrictions are exempt from the provisions under which plaintiffs seek relief, by virtue of RPAPL § 1953(4), which explicitly excludes conditions subsequent "created in a conveyance or devise . . . for benevolent, charitable, educational, public or religious purposes and restricts the use of land to such a purpose or to a particular application or means of carrying out such purpose . . . ."

Further, while RPAPL § 1955 provides for a Supreme Court action to seek modification or extinguishment of conditions subsequent which are conveyed "for benevolent, charitable, educational, public or religious purposes," RPAPL § 1955(5) states that no such action is available, "where the conveyance creating the restriction was made by or [with] . . . the state of New York or any governmental unit, subdivision or agency of the . . . state of New York."

The Court in *New York City Economic Development Corporation v Corn Exchange, LLC* had an opportunity to discuss RPAPL § 1951, *et seq.*, as it related to a condition subsequent identical to that at issue here, when the defendant in that case moved to dismiss EDC's complaint against it as precluded by the RPAPL. (Index No. 405031/07, "Corrected" Motion Seq. 002 [Sup Ct New York County, August 19, 2008] [Edmead, J.]). In that case, EDC conveyed property to defendant Corn Exchange, LLC by deed, under which Corn Exchange was to rehabilitate an historic building and restore it to its original state, and establish a non-profit culinary institute for the community. The rehabilitation was to be completed and a certificate of occupancy to be obtained within 36 months of the date of the deed, and the uses specified in the deed to continue for not less than 5 years. The EDC commenced an action against Corn Exchange, seeking a declaratory judgment that Corn Exchange was in breach and further seeking an order of ejectment against it.

Corn Exchanged moved to dismiss EDC's action, and in its decision and order denying that motion, the court discussed the relationship between the deed in *Corn Exchange* and the provisions of the RPAPL discussed herein:

> [Real Property Law ("RPL")] § 347, enacted in 1958, is the predecessor statute to RPAPL § 1952. Prior to that time, the remedies of reverter or right of entry for failure to fulfill a condition relative to the use of land

> were automatic, usually pursuant to terms of a deed. RPL § 347 and its successor, [RPAPL] § 1953, were enacted as a means to extinguish non-substantial restrictions on the use of land. (NYLS' Governor's Bill Jacket, L1958 C864). After the effective date of RPL § 347 (September 1, 1958), conditions subsequent, the non-performance of which bring about forfeiture of the real property, could only be enforced as part of a court proceeding. The provisions give the court the right to deny reverter or a party's exercise of a right of entry unless the interest to be protected is substantial. Thus RPAPL § 1953 is really a restriction on the enforcement of a condition. Any exclusion from the scope of the statute, is really an exclusion *from the requirement that a court proceeding be brought to enforce a reverter or right of entry* on account of non-performance of a condition subsequent. Thus to the extent that the statute excludes a condition subsequent created in a conveyance that is for 'benevolent, charitable, educational, public or religious purposes,' it permits the automatic exercise of a right of entry that was otherwise permitted by the common law.

(New York City Economic Development Corporation v Corn Exchange, LLC, Index No. 405031/07, "Corrected" Motion Seq. 002 at p 7 [Sup Ct New York County, August 19, 2008] [Edmead, J.][emphasis added]). Accordingly, contrary to plaintiffs' assertion that RPAPL § 1953 *et seq.* prohibits the condition subsequent found in the Deed or that it permits this court to extinguish, modify or refuse to enforce the conditions subsequent, §§ 1953(4) and 1955(5) obviously contemplate this type of restriction on the land and actually make it clear that defendants need not even commence an action in Supreme Court to exercise their right to fee title in the Harlem Property, upon a breach of the conditions subsequent. As the Deed and restrictions found therein are not subject to the provisions of RPAPL § 1953, defendants need not prove that they have a substantial interest in enforcement of same and plaintiffs are not entitled to an order extinguishing the restrictions.

Plaintiffs' Demand for Additional Discovery

Finally, the portion of plaintiffs' opposition which is based on alleged outstanding discovery is insufficient to defeat the instant motion. Pursuant to CPLR § 3212(f), plaintiffs must be able to identify "facts essential to justify opposition [which] may exist but cannot then be stated" because such facts are in the exclusive control of the opposing party. Plaintiffs here merely argue that there is additional relevant discovery to which it is entitled to prove their allegations, were the case to survive this motion, but point to no items or facts not in their control necessary to oppose this motion.

Plaintiffs first contend that Barr, at her EBT, did not have first hand knowledge of the relationship of the parties or events between them prior to February 2006, nor did she know why defendants did not issue a Notice of Default prior to July 2006 if defendants believed plaintiffs were in default. But, as discussed *supra*, the negotiations of the parties as they relate to plaintiffs' desired Modification in 2006 are irrelevant where the Modification was rejected. Further, such negotiations do not bind the defendants and the Deed required all Modifications to be in writing, making this requested discovery irrelevant to a determination of the parties' rights. In addition, plaintiffs argue that they are entitled to discovery regarding the issue of Columbia University's proposal to take over the Harlem Property, and to help address defendants' calculation of damages on their counterclaims. While the issue of damages will be addressed separately, it was fully within defendants' rights to explore other options for development of the Harlem Property once plaintiffs were in default of their obligations under the Deed. Even if the evidence showed that defendants were negotiating with plaintiffs and also discussing possible development by Columbia, or if the evidence showed that defendants only issued the Notice of

Default after being approached by Columbia, defendants were fully within their legal rights to explore other options for the Harlem Property should plaintiffs fail to cure the defaults and develop it as originally envisioned in the Deed and Modification.

Defendants' Counterclaims

Defendants have established their entitlement to judgment on their counterclaims against plaintiffs. Specifically, EDC seeks an order declaring that HRE has defaulted on the conditions subsequent in the Deed and, pursuant to the terms of the Deed, awarding EDC title to the Harlem Property. Further, EDC seeks an order compelling plaintiffs to convey the Harlem Property to it and to execute and deliver a Deed for the Harlem Property to EDC and also directing the City Registrar to take such action as necessary to reflect that EDC is vested with absolute and unencumbered title in fee.

To succeed on the counterclaims, EDC had the burden of establishing that HRE defaulted on its obligations as set forth in the conditions subsequent, that EDC served a Notice of Default on HRE, and that HRE failed to cure the default within 30 days thereafter. (*See New York City Economic Development Corporation v Corn Exchange, LLC*, 2009 NY Slip Op 50409U at *4 [Sup. Ct. January 29, 2009] [Edmead, J.]). For the reasons discussed above, defendants have met their burden and Plaintiffs have failed to raise an issue of fact requiring denial of the motion. To the extent plaintiffs have asserted affirmative defenses in their reply to defendants' counterclaims, they are duplicative of the affirmative relief sought in plaintiffs' complaint, not supported by the evidence and/or insufficient as a matter of law to defeat defendants' counterclaims for all the reasons already discussed herein.

The Court notes that although defendants assert a counter alleging they are entitled to nearly $2.5 million in damages as a result of plaintiffs' default, defendants do not seek judgment on this issue in their notice of motion, nor do they make any argument or submit any evidence pertaining to monetary damages in their motion papers. As such, the Court reserves judgment on this issue and will permit defendants 60 days from the date of entry hereof to file a Note of Issue requesting an inquest and assessment of damages only. Failure to do so will result in dismissal of this portion of the answer with counterclaims.

Accordingly, it is;

ORDERED that the portion of this motion by defendants City of New York and New York City Economic Development Corporation for an order pursuant to CPLR § 3212 dismissing plaintiffs' complaint, is granted; it is further

ORDERED that the portion of this motion by defendants City of New York and New York City Economic Development Corporation for an order pursuant to CPLR § 3212 granting defendants judgment on their counterclaims against plaintiffs, is granted in part as provided below:

1) New York City Economic Development Corporation is entitled to judgment vesting it with title in fee simple to the Property located at 461 West 125th Street and 426-458 West 126th Street, New York, New York;

2) New York City Economic Development Corporation is entitled to a deed conveying to it the real property located at 461 West 125th Street and 426-458 West 126th Street, New York, New York (Block 1966, Lot 95 on the Tax Map, according to the Deed), which plaintiffs are ordered to execute and deliver within

90 days of service of this decision and order with notice of entry;

3) New York City Economic Development Corporation is entitled to an order ejecting plaintiffs and their respective employees, agents and invitees from possession of the Property located at 461 West 125th Street and 426-458 West 126th Street, New York, New York;

ORDERED that the portion of defendants' answer with counterclaims alleging damages is hereby severed and those claims only shall continue as provided herein; it is further

ORDERED that within 60 days of entry hereof, defendants file a Note of Issue requesting an inquest and assessment of damages on the remaining cross-claim; it is further

ORDERED that failure to comply with the immediately preceding paragraph shall result in an automatic dismissal defendants' remaining cross-claim for damages; it is further

ORDERED that defendants serve a copy of this decision and order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street), the Clerk of the Trial Support Office (60 Centre Street) and the Clerk of the DCM Office (80 Centre Street) within 20 days of entry hereof.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

The foregoing constitutes the decision and order of this court.

Dated: June 5, 2009
New York, New York

ENTER:

Hon. Karen S. Smith, J.S.C.