| **Beach 104 St. Realty Inc. v Kisslev-Mazel Realty LLC** |
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| 2009 NY Slip Op 32421(U) |
| October 8, 2009 |
| Supreme Court, Queens County |
| Docket Number: 25569/07 |
| Judge: Patricia P. Satterfield |
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Short Form Order

**NEW YORK SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19

Justice

----------x

BEACH 104 ST. REALTY INC.,

Plaintiff,

- against -

KISSLEV-MAZEL REALTY LLC., et al.,

Defendants.

----------x

Index No: 25569/07
Motion Date: 5/27/09
Motion Cal. No: 4 & 5
Motion Seq. No: 2 & 3

The following papers numbered 1 to18 read on this motion by plaintiff for an order granting plaintiff partial summary judgment as to defendants' liability on the first and second causes of action, pursuant to CPLR § 3212(e); and on this cross-motion by defendants for an order: (a) granting summary judgment in favor of defendants, pursuant to provisions of CPLR 3212; or in the alternative, (b) granting defendants' motion for leave to reargue the determination of this Court dated July 3, 2008, pursuant to CPLR 2221, and upon reconsideration dismissing plaintiff's complaint; or alternatively, (c) pursuant to NYCRR Rule 202.21(e), vacating the Note of Issue; and (d) imposing sanctions against plaintiff and its counsel, pursuant to provisions of NYCRR Rule 130-1.1.[1]

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[1]By Stipulation dated April 3, 2009, the parties agreed that defendants' motion be deemed to be both opposition and a cross-motion to plaintiff's motion for partial summary judgment.

Upon the foregoing papers, it hereby is ordered that the motion and cross-motion are determined as follows:

This is an action based upon fraud arising out of a real estate transaction between plaintiff Beach 104 St. Realty Inc. ("plaintiff") and defendants Meyer Chaim Greenbaum, Leah Greenbaum, Eliezer Greenbaum and Mendel Greenbaum ("individual defendants"), principals of defendant Kisslev Mazel Realty LLC. ("Kisslev"). By order of this Court dated July 3, 2008, defendants' motion to dismiss the complaint was denied. Plaintiff now moves for partial summary judgment on the first and second causes of action asserted in the complaint, and defendants now cross move for an order either granting them summary judgment; leave to reargue the July 3, 2008 decision of this Court and, upon reconsideration an order dismissing the complaint; or vacating the Note of Issue; and the imposition of sanctions against plaintiff.

**Relevant Facts**

In March 2004, plaintiff was introduced to defendants in connection with the purchase by plaintiff from defendant Kisslev of two parcels of real property located in Queens County, New York. The parcels are identified as Block 1610, Lots 10 and 20. The contract of sale required plaintiff to pay a purchase price of $3,412,500.00 for Block 1610, Lot 10 and $962,500.00 for Lot 20. Kisslev possessed the capacity to convey Lot 10 to plaintiff because of its status as assignee of the successful mortgage foreclosure sale bidder for Lot 10, an affiliated company named Kislev Mazel Corp., by assignment dated April 3, 2001. A closing was held on October 14, 2005 for both Lot 10 and 20. Kisslev assigned its foreclosure sale bidder status to plaintiff by assignment dated October 14, 2005. At the closing, a mortgage foreclosure sale referee tendered a referee's deed to Lot 10 to plaintiff, dated October 14, 2005. The consideration paid by plaintiff to Kisslev in order to effectuate the closing of Lot 10 was the contract price of $3,412,500.00. Further, at the closing, Kisslev tendered a bargain and sale deed to Lot 20 to plaintiff, dated October 14, 2005. The consideration paid by plaintiff to Kisslev in order to effectuate the closing of Lot 20 was the contract price of $962,500.00. Subsequent to the closing, plaintiff expended $2,460,000.00 for construction efforts.

It was only after the October 14, 2005 closing that plaintiff discovered for the first time that the properties it purchased were slated, as early as February 2, 2004, by the City of New York for condemnation, well before plaintiff's purchase of the land, and that defendants had been in contact with the City regarding such condemnation for months prior to entering into the contracts of sale of the properties, but concealed this information from plaintiff. Plaintiff asserts that it first learned about the condemnation plans when it received a notice of petition and petition dated January 4, 2007, and when plaintiff asked defendants about such circumstances, defendants denied any discussions or knowledge of any condemnation. Plaintiff alleges that if defendants had not concealed the truth and misrepresented their knowledge of the condemnation plan, it would not have entered into the contract to purchase the properties, and would not have gone into substantial debt toward its planned utilization of the property to create either two or three family homes or condominiums for sale.

The condemnation proceeding instituted by the City of New York by its filing of a Notice of Petition and Petition in the Supreme Court of the State of New York, Queens County, resulted in an order dated February 16, 2007 (Rios, J.), and entered March 23, 2007, that vested title to the property at issue in the City of New York. Plaintiff thereafter appeared and filed a Notice of Claim, dated April 2, 2007, to recover from the City of New York the lost value of its properties; the instant action was commenced in October 2007. Plaintiff, in its April 2, 2007 Notice of Claim served in the condemnation proceeding, alleged the following damages for which it sought compensation:

> (1) Direct damages for the taking of the property (land and improvements), including, but not limited to all economic benefits and monies that would have been realized by the land, improvements and the real estate project.
>
> (2) Damages equivalent to the full economic value of this real estate project, which project was near completion.

Plaintiff thereafter settled its case with the City of New York and by Final Decree dated December 9, 2008 (Rios, J.), plaintiff was awarded $10,900,000.00 in compensation for the taking of its property by eminent domain by the City of New York.[2]

In its action commenced against defendants, plaintiff seeks compensatory and punitive damages based upon fraud (first cause of action), breach of Covenant of Good Faith and Fair Dealing (second cause of action), fraudulently induced unilateral mistake (third cause of action), unjust enrichment (fourth cause of action), and public fraud (fifth cause of action). Plaintiff seeks partial summary judgment on its first and second claims sounding in fraud and breach of Covenant of Good Faith and Fair Dealing, respectively; defendant cross moves for, inter alia, dismissal of the complaint.

## Discussion

1. *Plaintiff's Motion*

Plaintiff moves for summary judgment on its fraud and breach of Covenant of Good Faith and Fair Dealings causes of action and frames the issue as being "whether having been aware that the properties were slated for condemnation, did defendants have a duty to disclose same to a buyer unaware (or likely unaware) of said fact in the course of the sale of the properties?" It argues that

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[2]Plaintiff alleges: "The condemnation proceeding has recently reached its negotiated conclusion with plaintiff receiving $10,900,000.00 in compensation for the Properties. However, inasmuch as the value of the Properties at the time of the condemnation was in excess of $13,000,000.00 (see appraisal report annexed herein as Exhibit "k"), plaintiff's damages exceed the condemnation award by millions of dollars to plaintiff's detriment."

the Court, in making that determination must consider whether the fact of condemnation would have impacted upon plaintiff's decision to enter into the transaction and whether defendants had superior knowledge concerning the condemnation which was not available to both parties. In opposition, defendants argue that the issues sought to be raised in this action have been subsumed by the $10,900,000.00 settlement reached in the condemnation proceeding between plaintiff and the City of New York that resulted in a settlement amount far in excess of the $7,500,000.00 land costs and construction costs.

It is well-established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

(a) Fraudulent Concealment

Here, plaintiff alleges that defendants fraudulently concealed the pending condemnation of the property that it was purchasing. "'To recover damages for fraud, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury' (Jablonski v. Rapalje, 14 A.D.3d 484, 487, 788 N.Y.S.2d 158)." Ozelkan v. Tyree Bros. Environmental Services, Inc., 29 A.D.3d 877, 878 (2nd Dept. 2006). Where, as here, a fraud claim is based on an omission or concealment of material fact, plaintiff must establish additionally that defendant had a duty to disclose material information and failed to do so. See, Barrett v. Freifeld, 64 A.D.3d 736 (2nd Dept. 2009); Sitar v. Sitar, 61 A.D.3d 739 (2nd Dept. 2009); Ozelkan v. Tyree Bros. Environmental Services, Inc., 29 A.D.3d 877, 878 (2nd Dept. 2006); E.B. v. Liberation Publications, Inc., 7 A.D.3d 566 (2nd Dept. 2004).

"'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment' (citations omitted)." Matos v. Crimmins, 40 A.D.3d 1053 (2nd Dept. 2007), citing, Jablonski v. Rapalje, 14 A.D.3d 484, 485 (2nd Dept. 2005). See, also, Daly v. Kochanowicz, __ A.D.3d__, __ N.Y.S.2d__, 2009 WL 2516932 (2nd Dept. 2009). Although the "mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud" [id., 40 A.D.3d at 1054], "[c]oncealment, with intent to

defraud, of facts which one is duty-bound to disclose is of the same legal effect and significance as affirmative misrepresentations of fact (citations omitted)." Emord v. Emord, 193 A.D.2d 775 (2nd Dept.1993). "'To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor' [(Jablonski v. Rapalje, 14 A.D.3d at 485, 788 N.Y.S.2d 158)"( Rozen v. 7 Calf Creek, LLC, 52 A.D.3d 590 (2nd Dept. 2008); London v. Courduff,141 A.D.2d 803 (2nd Dept. 1988)] or demonstrate that "the party to be charged has superior knowledge or means of knowledge, such that the transaction without disclosure is rendered inherently unfair." Miele v. American Tobacco Co., 2 A.D.3d 799 (2nd Dept. 2003).

With respect to the first prong, plaintiff set forth no allegations of conduct on the part of defendants that would have thwarted plaintiff's efforts to fulfill its responsibilities pursuant to the doctrine of caveat emptor. See, Daly v. Kochanowicz, supra; Matos v. Crimmins, supra; Jablonski v. Rapalje, supra. Accordingly, to prevail, plaintiff must establish that defendants had a duty to disclose because the pending condemnation was a matter of which defendants had "superior knowledge or means of knowledge, such that the transaction without disclosure [was] rendered inherently unfair." Miele v. American Tobacco Co., supra.

As a general proposition, the duty to disclose does not arise where that information at issue is a matter of public record or involves a change in the status of the property that is beyond the defendant's control. See, F.A.S.A. Const. Corp. v. Degenshein, 47 A.D.3d 877 (2nd Dept. 2008)[decision of the Planning Board to invalidate the subdivision map, made after the closing on the sale of the property, was a matter completely beyond the defendants' control]; Lane v. McCallion, 166 A.D.2d 688 (2nd Dept. 1990)[rejecting the plaintiff's claim that the defendants engaged in active concealment of the Town's zoning ordinances or the ongoing proceedings at which the zoning amendments were under consideration]; see, also, Rozen v. 7 Calf Creek, LLC, 52 A.D.3d 590 (2nd Dept. 2008)[plaintiffs failed to raise a triable issue of fact as to whether or not defendants concealed the release and thwarted their efforts to discover it, since the release was readily ascertainable and obtainable from the public records]. Moreover, a "party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence (see East 15360 Corp. v. Provident Loan Socy. of N.Y., 177 A.D.2d 280, 575 N.Y.S.2d 856)." KNK Enterprises, Inc. v. Harriman Enterprises, Inc., 33 A.D.3d 872 (2nd Dept. 2006). "If the facts represented are not peculiarly within the representor's knowledge and the other party has the means available to him of knowing by the exercise of ordinary intelligence the truth or real quality of the subject of the representation he must make use of those means or he will not be heard to complain that he was induced to enter the transaction by misrepresentation." DiFilippo v. Hidden Ponds Associates, 146 A.D.2d 737 (2nd Dept. 1989).

Here, plaintiff contends that Courts do not, and should not, condone defendants' "knowing silence in regards to a basic factual assumption which any buyer like plaintiff would reasonably expect disclosure. Plaintiff was entitled to rely on defendants, concededly bargaining adversaries, to disclose such a fact as condemnation where defendants had special knowledge, not open to

plaintiff, and was aware that plaintiff was acting under a misapprehension as to facts which would be of importance to it." Plaintiff further contends that had defendants apprised it of the slated condemnation proceedings, it undoubtedly would have raised serious objections to "both the contract price and the purchase of the properties." It asserts that such proceedings were outside the purview of its knowledge and within defendants' superior knowledge "inasmuch as they had been in continuous and long standing contract with the City regarding such condemnation for months prior to entering into the contracts of sale of the properties." Plaintiff states that the aforementioned proceeding was not readily available information, and "even plaintiff's own title examiners could not find any hint of a condemnation process in the public records." It further states that "it is simply farcical for defendants to maintain that their private talks with the prospective condemnors was a matter which, absent their honest disclosure, was readily discoverable through independent means."

In opposition to the motion for partial summary judgment on the fraud claim, defendants contend the information regarding the condemnation proceeding was available through public records "via the internet on the Department of City Planning website." Defendants, in attempting to demonstrate the public availability of documents regarding the slated condemnation of the subject properties, proffer, inter alia, the December 22, 2004 City Planning Calendar; the January 5, 2005 City Planning Calendar; the City Planning Commissions application status documents outlining the project goals and status; and The "Rockaway WPCP" project milestones. Defendants state the following:

> A simple phone call to NYC District 14 Community Board inquiring about land use proceedings relating to the properties would have yielded the information. In short, the efforts of plaintiff to discover the relevant information required them to pick up a phone or make a few clicks of the mouse on an internet search engine and government website. [The] December 22, 2004 City Planning Calendar listing the intention of the City to consider the properties for condemnation [] is still available on the City Planning website at http:www.nyc.gov/html/dcp/html/luproc/dispo.shtml. The calendar that was posted on the City Planning website was available at the times the parties entered into the contract of sale.
>
> In addition, the City, as part of its case seeking to vest private property through the eminent domain procedure, must allege that it has met the public notice and hearing requirements outlined in the governing statutes. [] Plaintiff's claim that defendants had exclusive knowledge of the City's potential plans is essentially a collateral attack upon the adequacy of the public notice afforded by the City. In other words, if defendants had peculiar and exclusive knowledge of the potential municipal taking of the instant property, then the City failed to give public notice.

> [Plaintiff] cannot claim reliance on a misrepresentation or non disclosure of the condemnation when it could have discovered the truth with due diligence. [] A fact that is in the public domain (that the property was subject to eminent domain) and available for all to see is not a fact peculiarly in defendants knowledge and failure to disclose those facts (even if intentional) is not within the ambit of fraud.

The instant matter appears to be a case of first impression as none of the abundant caselaw reviewed by this Court has spoken to these set of facts. Indeed, many cases in the Second Department have found that the purported misrepresentations relied upon by the respective plaintiffs in those cases were not within the peculiar knowledge of the defendants. Compare, Ryan v. Pascale, 58 A.D.3d 711, 712 (2nd Dept. 2009) [the alleged misrepresentations upon which the plaintiffs purportedly relied did not concern matters within the peculiar knowledge of the appellants]; Rigney v. McCabe, 43 A.D.3d 896, 897 (2nd Dept. 2007)[misrepresentation allegedly relied upon by the plaintiff not a matter within the peculiar knowledge of the defendant; that the house was exposed to flooding could have been, and indeed was, discovered by the plaintiff through the exercise of due diligence]; Kay v. Pollak, 305 A.D.2d 637 (2nd Dept. 2003)["the actual amount of real estate taxes on the property was not a matter peculiarly within the knowledge of the [Pollaks]" and "could have been discovered by the plaintiff through the exercise of due diligence."]; Platzman v. Morris. 283 A.D.2d 561 (2nd Dept. 2001)[the existence of the second-floor kitchen and the fact of its illegality were not facts which were peculiarly within the sellers' knowledge]; Glazer v. LoPreste, 278 A.D.2d 198 (2nd Dept. 2000)[information that was allegedly withheld from home purchasers, that a sex offender lived in the neighborhood, was not peculiarly within the knowledge of the vendors or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction]; Cohen v. Cerier. 243 A.D.2d 670 (2nd Dept. 1997)[actual amount of real estate taxes on the property not a matter peculiarly within the knowledge of the defendant; could have been discovered by the plaintiff through the exercise of due diligence]; LaBarbera v. Marino, 192 A.D.2d 697 (2nd Dept. 1993)[the suitability of the parcel for building not peculiarly within the knowledge of the defendants].

This case, however, is more akin to the facts presented in Sentlowitz v. Cardinal Development, LLC, 63 A.D.3d 1137 (2nd Dept. 2009), an action that involved the sale of real property to the plaintiffs by the defendant Cardinal Development, LLC. There, the plaintiffs, asserting causes of action to recover damages for, inter alia, fraudulent concealment, alleged that the appellants concealed the fact that the subject property contained land designated as wetlands by the United States Army Corps of Engineers. The Appellate Division, Second Department held that the Supreme Court properly determined that the amended complaint stated a cognizable cause of action to recover damages for fraudulent concealment against the defendants. Likewise, in Tahini Investments, Ltd. v. Bobrowsky, 99 A.D.2d 489 (2nd Dept. 1984), a similar case, defendant represented to plaintiff that the 93-acre farm which plaintiff sought to purchase was principally used as a horse farm. Ten months after the closing, plaintiff's workers discovered two dozen rusted drums buried underground containing industrial waste, which was nontoxic but could be potentially

hazardous to livestock. The Appellate Division, Second Department, in finding triable issues of fact, stated the following [99 A.D.2d at 490]:

> The conflicting affidavits present triable issues of fact precluding the award of summary judgment (CPLR 3212, subd. [b]). Where a party to a contract conceals a material fact which he is in good faith bound to disclose, such silence may constitute an actionable misrepresentation (Rosenschein v. McNally, 17 A.D.2d 834, 233 N.Y.S.2d 254; Noved Realty Corp. v. A.A.P. Co., 250 App.Div. 1, 293 N.Y.S. 336). Furthermore, even where the parties have executed a specific disclaimer of reliance on a seller's representations, a purchaser may not be precluded from claiming reliance on any oral misrepresentations if the facts allegedly misrepresented are peculiarly within the seller's knowledge ( Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597; O'Keeffe v. Hicks, 74 A.D.2d 919, 426 N.Y.S.2d 315). The material issues of whether defendant knew of the existence of the dumping site and whether plaintiff could have ascertained the site's presence with reasonable diligence, present questions of fact which may not be resolved on motion papers.

On a motion for summary judgment, the court's function is to determine whether material factual issues exist, not to resolve such issues (citations omitted). A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility' (Scott v. Long Is. Power Auth., 294 A.D.2d 348, 741 N.Y.S.2d 708)." Tunison v. D.J. Stapleton, Inc., 43 A.D.3d 910 (2nd Dept. 2007). See, Baker v. D.J. Stapleton, Inc., 43 A.D.3d 839, 841 (2nd Dept.,2007); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957 ); French v. Cliff's Place, 125 A.D.2d 292 (2nd Dept. 1986); D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985).

"As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arms length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." UST Private Equity Investors Fund v. Salomon Smith Barney, 288 A.D.2d 87, 88 (1st Dept 2001). "To sustain a claim for fraud, sophisticated investors, as here, must have discharged their own affirmative duty to exercise ordinary intelligence and conduct an independent appraisal of the risks they are assuming." DDJ Management, LLC v. Rhone Group, LLC, 60 AD3d 421, 424, (1st Dept 2001). Whether, as contended by plaintiff, the pending condemnation of the property was within the peculiar knowledge of defendants that gave rise to a duty to disclose or, as contended by defendants, the pending condemnation was a matter of public record and thus verifiable, cannot be summarily determined by this Court. Consequently, that branch of plaintiff's motion for summary judgment on the first cause of action for fraudulent concealment is denied.

(b) Breach of the Covenant of Good Faith and Fair Dealings

Likewise denied is that branch of the motion seeking summary judgment on the second cause of action for breach of the Covenant of Good Faith and Fair Dealings. "'Every contract contains an implied covenant of good faith and fair dealing (see Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566). "This 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 their agreement' (Aventine Inv. Mgt. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513, 514, 697 N.Y.S.2d 128)." P.T. & L. Contracting Corp. v. Trataros Const., 29 A.D.3d 763, 764 (2nd Dept. 2006); Turkat v. Lalezarian Developers, Inc., 52 A.D.3d 595 (2nd Dept. 2008). "The implied covenant of good faith encompasses "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the agreement, and prohibits either party from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 1-10 Industry Associates, LLC v. Trim Corp. of America, 297 A.D.2d 630, 631 (2nd Dept. 2002); see, Richmond Shop Smart, Inc. v. Kenbar Development Center, LLC, 32 A.D.3d 423 (2nd Dept. 2006).

Summary judgment should be granted where there are no triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). Here, plaintiff has failed, in the first instance, to discharge its burden of demonstrating that there are no triable issues of fact to be determined in this case with regard to this cause of action. Indeed, other than making the application for summary judgment on the second cause of action, the record is devoid of any substantive evidence that would satisfy plaintiff's burden and warrant summary determination on the breach of the Covenant of Good Faith and Fair Dealings claim. Thus, under these circumstances, as plaintiff has failed to make a prima facie showing entitling it to summary judgment, it is not necessary for this Court to consider the sufficiency of defendants' opposition papers. See, generally, Roth v. Zelig, 64 A.D.3d 558 (2nd Dept. 2009); Saunders v. 551 Galaxy Realty Corp., 64 A.D.3d 564 (2nd Dept. 2009); Bruk v. Razag, Inc., 60 A.D.3d 715 (2nd Dept. 2009); Taylor v. Rochdale Village, Inc., 60 A.D.3d 930 (2nd Dept. 2009); Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2nd Dept. 2008); Pearson v. Parkside Ltd. Liability Co., 27 A.D.3d 539, 540 (2nd Dept. 2006); see, also, Gregg v. Key Food Supermarket, supra; Seabury v. County of Dutchess, 38 A.D.3d 752 (2nd Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2nd Dept. 2006). Therefore, that branch of plaintiff's motion for summary judgment on its second cause if action is also denied.

2. *Defendants' Motion*

Defendants, by papers entitled Notice of Motion which the parties agreed to deem opposition and a cross-motion pursuant to stipulation dated April 3, 2009, cross move for an order granting them summary judgment based upon "plaintiff's condemnation Notice of Claim that sought damages based on the same claims plaintiff asserted in this case and based on the stipulation of settlement plaintiff used to induce the Court to sign a decree resolving plaintiff's valuation claims and awarding plaintiff a final valuation condemnation decree." In the alternative, defendants seek leave to reargue

the July 3, 2008 decision of this Court which denied their underlying motion to dismiss the complaint, pursuant to CPLR §§ 3211(a)(1) and (7), and upon reconsideration, an order dismissing the complaint. Lastly, defendants alternatively seek an order vacating the Note of Issue and the imposition of sanctions against plaintiff.

(a) Summary Judgment

As previously noted, summary judgment should be granted where there is an absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Here, defendants argue that plaintiff sought damages in its condemnation Notice of Claim on the same claims in this action, and therefore, "judicial resolution of all of plaintiff's claims for damages (which plaintiff elected to conceal from this Court) arising out of the condemnation of the [premises] bars plaintiff from seeking to recover yet again, in this case, for those same damages." In a footnote to this contention, defendants state the following:

> The bar to plaintiff's claim is substantive. Note should be made that plaintiff's failure to furnish disclosure, pursuant to demands, and the concealment of relevant information in the concurrent condemnation valuation litigation from the Court and the parties, should act as a procedural bar to its claims to recover damages from defendants.

Defendants assert that "plaintiff's use and ratification of the contract purchase price to establish the value of the property and obtain a benefit (payment for its loss) in the condemnation valuation proceeding estops plaintiff from asserting that it was damaged in this case." In support of these contentions, defendants proffer two Appellate Division, Second Department cases, entitled Barrier Systems, Inc. v. A.F.C. Enterprises, Inc., 264 A.D.2d 432 (2nd Dept. 1999) and Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc., 88 A.D.2d 461 (2nd Dept. 1982), alleging that they stand for the proposition that "a party to a contract loses their right to assert fraud claims when, cognizant of the fraud, they accepted the benefits of the contract and thereby ratified it." Thus, defendants assert that as there are no triable issues of fact as to damages, they are entitled to judgment and dismissal of the complaint on that ground.

Defendants' reliance upon the aforementioned cases, however, is misplaced. In Barrier, the plaintiff commenced an action against defendant A.F.C. for its failure to make certain payments remaining on a modified lease. In opposition to plaintiff's motion for partial summary judgment, defendant A.F.C. alleged that the plaintiff had intentionally misrepresented the features and performance characteristics of certain equipment by employing "bait and switch" tactics to fraudulently induce it into using the equipment. The appellate Court, in reversing the trial court's denial of plaintiff's motion for partial summary judgment, stated, in pertinent part, the following [264 A.D.2d 432, 433 (2nd Dept.,1999)]:

> A.F.C. cannot avoid partial summary judgment by asserting fraud in the inducement and other arguments related to the inadequacy of the equipment, inasmuch as it entered into the lease modification agreement, made substantial payments thereunder, and continued to use the leased equipment after learning of the alleged fraud and bait and switch tactics in which the plaintiff allegedly engaged. Hence, A.F.C. confirmed and acknowledged its obligations under the lease at a time when it was aware of the purported fraud and of the alleged shortcomings of the TTV (see, European Am. Bank v. Syosset Autorama, 204 A.D.2d 266, 611 N.Y.S.2d 585; Gannett Co. v. Tesler, 177 A.D.2d 353, 577 N.Y.S.2d 248; Klapper v. Integrated Agric. Mgt. Co., 149 A.D.2d 765, 539 N.Y.S.2d 812; Lumber Ind. v. Woodlawn Furniture Corp., 26 A.D.2d 924, 274 N.Y.S.2d 813). "Whether under a waiver or ratification analysis, a party may not avoid an agreement on grounds of fraud if, after acquiring knowledge of the fraud, he affirms the contract by accepting a benefit under it" ( Agristor Leasing-II v. Pangburn, 162 A.D.2d 960, 961, 557 N.Y.S.2d 183; see, Sugar Cr. Stores v. Pitts, 198 A.D.2d 833, 604 N.Y.S.2d 407; see generally, Bowmer v. H.C. Louis, Inc., 243 Cal.App.2d 501, 52 Cal.Rptr. 436). Accordingly, the plaintiff is entitled to partial summary judgment on its claim for unpaid rent.

In the Clearview case, the Appellate Division, in finding, inter alia, that defendant Manorville's counterclaim for rescission was waived by its ratification of the entire transaction after discovery of the purported fraud, stated the following [88 A.D.2d 461, 465 (2nd Dept. 1982)]:

> Manorville abandoned its rescission rights when-cognizant of the fraud-it accepted the benefits of the contract a nd thereby affirmed it (see New York Telephone Co. v. Jamestown Telephone Co., 282 N.Y. 365, 26 N.E.2d 295; Big Top Stores v. Ardsley Top Shoppe, 64 Misc.2d 894, 315 N.Y.S.2d 897, affd. 36 A.D.2d 582, 318 N.Y.S.2d 924). Retention of the benefits was entirely inconsistent with the disaffirmance counterclaims, for it established Manorville's willingness to permit the transaction to stand (see Brennan v. National Equitable Inv. Co., 247 N.Y. 486, 160 N.E. 924; Restatement, Contracts 2d, § 380; 12 Williston, Contracts [3rd ed], § 1527).

In the aforementioned cases relied upon by defendants, the critical element present, which is lacking in the instant matter, is a demonstration that the aggrieved parties discovered the fraud, yet continued to operate under the terms of the respective agreements, thereby deriving the benefit of such agreements. Here, plaintiff contends that the fair market value of the property at issue far exceeded the amount received by it in settlement of the amount due to it as a result of the condemnation.

Defendants' contentions thus amount to mere conjecture, which is insufficient to establish their entitlement to summary judgment. Thus, that branch of the motion also is denied.

(b) Reargument

Defendants seek reargument of this Court's July 3, 2008 decision which denied defendants' motion to dismiss the complaint. In deciding the motion, this Court stated, in pertinent part, the following:

> When deciding a motion to dismiss, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 570-71 [2005], quoting Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 300 [2001]). Although defendants indicate that five separate claims have been asserted, they fail to specify the deficiencies of each claim and aims the motion at the pleading as a whole. The motion, therefore, must be denied in its entirety if at least one cause of action is legally sufficient (Canavan v Chase Manhattan Bank, N.A., 234 AD2d 494 [1996]).
>
> Here, the allegations of plaintiff that defendants made false representations concerning any contact they had with the City regarding prospective condemnation and plaintiff relied upon these representations when it purchased the property were sufficient to state a cause of action for fraud (see Simone v Homecheck Real Estate Servs., 42 AD3d 518 [2007]; Richmond Shop Smart v Kenbar Dev. Ctr., LLC, 32 AD3d 423 [2006]). Additionally, the complaint adequately set forth fraud allegations against the individual defendants. The allegations that the individuals exercised complete dominion over the corporation in order to commit a wrong against plaintiff were sufficient to state a cause of action against the individual defendants based on the theory of piercing the corporate veil (see Ventresca Realty Corp. v Houlihan, 28 AD3d 537 [2006]). Thus, as the complaint asserts potentially viable claims therein, that branch of the motion to dismiss for failure to state a cause of action is denied.
>
> In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of plaintiff's claim (Held v Kaufman, 91 NY2d 425 [1998]; Teitler v

> Max J. Pollack & Sons, 288 AD2d 302 [2001]). Defendants argue that paragraph 15 of the contract of sale for the properties, entitled "Miscellaneous," bars this action. The paragraph states "[a]ll oral or written statements, representations, promises and agreements of Seller and Purchaser are merged into and superseded by this Agreement." However, plaintiff alleged that there was no readily accessible means of discovery of the condemnation proceedings. Inasmuch as plaintiff has alleged in its complaint that the misrepresentations made by defendants concerned matters which were peculiarly within defendants' knowledge, and the contractual provision does not resolve all the factual issues and dispose of the action, that branch of the motion to dismiss based upon documentary evidence must be denied (see Goshen v Mut. Life Ins. Co., 98 NY2d 314 [2002]; Yurish v Sportini, 123 AD2d 760 [1986]). Accordingly, defendants' motion to dismiss is denied.

It is upon the foregoing that defendants seek reargument of the underlying motion. From the outset, CPLR 2221 provides, inter alia, that an application for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, notice of entry dated July 17, 2008 was served upon defendants more than eight months prior to the March 20, 2009 making of the instant cross-motion. Thus, as the cross-motion was not made within the requisite thirty days of notice of entry of the underlying July 3, 2008 decision, the branch of the cross-motion for reargument is denied as untimely. See, Selletti v. Liotti, 45 A.D.3d 668 (2nd Dept. 2007).

Arguendo, even if the cross-motion for reargument was timely, that branch of the cross-motion would still be denied. It is well settled law that a cross-motion to reargue allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law," in determining the prior motion. See, Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). It is within the court's discretion to grant leave to reargue when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order." Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005); CPLR 2221. "The motion does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced (citations omitted)." Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). Here, defendants have failed to make the requisite showing identifying any matters of fact or law which this Court overlooked or misapprehended in determining the prior motion to dismiss the complaint. As those conditions have not been met, such failure does not provide this Court with a basis upon which to grant defendants leave to reargue. Consequently, that branch of the cross-motion seeking reargument, and there upon, reconsideration of the motion to dismiss, is denied.

(c) Vacatur

Defendants also seek, pursuant to NYCRR Rule 202.21(e), an order vacating the Note of Issue on the ground that there is outstanding discovery. Where, as here, the certificate of readiness incorrectly states that all pretrial discovery has been completed, a motion to vacate the note of issue and certificate of readiness may properly be granted. See, Ferreira v. Village of Kings Point, 56 A.D.3d 718 (2nd Dept. 2008); Brown v. Astoria Federal Savings, 51 A.D.3d 961 (2nd Dept. 2008). Here, in the stipulation dated April 3, 2009 , which provided for defendants' motion to be deemed both a cross-motion and opposition, the parties stated, inter alia, the following:

> 3. Subject to approval of the Court, plaintiff consents to the granting of the prong of defendants' motion, pursuant to NYCRR Rule 202.21(e), seeking vacatur of the Note of Issue dated February 27, 2009, and annexed hereto.
>
> 4. The Court [sic] the Clerk of the Court is directed [sic] vacate the Note of Issue and the Note of Issue shall be filed on or before July 10, 2009.

However, despite this stipulation, the Note of Issue was never vacated and there appears to be outstanding discovery. Accordingly, that branch of defendants' motion to vacate the Note of Issue is granted and the Note of Issue hereby is stricken.

(d) Sanctions

Lastly, defendants cross-move for the imposition of sanctions against plaintiff and its counsel, pursuant to provisions of NYCRR Rule 130-1.1. Part 130.1 of the Uniform Rules for the New York State Trial Courts authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. []
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon

> a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

The "intent of [Part 130.1] is to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics." Kernisan v. Taylor, 171 A.D.2d 869 (2nd Dept.1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); Wesche v. Wesche, 51 A.D.3d 909 (2nd Dept. 2008); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2nd Dept. 2006); Lieberman v. Scully, 273 A.D.2d 279 (2nd Dept. 2000). The Rule further provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a "broad pattern of the [defendant's] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation []." Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1st Dept.1999); see, Wecker v. D'Ambrosio, 6 A.D.3d 452 (2nd Dept. 2004). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted)." Id. at 34 (1st Dept.1999).

Here, the gravamen of defendants' arguments in support of sanctions is the purported concealment of the underlying condemnation valuation proceeding. Defendants state the following:

> Plaintiff appeared in the valuation proceeding and its resolution, although impacting this litigation, was concealed by plaintiff and its counsel. Under the cannons of ethics an attorney is duly bound to act in good faith. The hiding of the condemnation settlement from this Court and opposing counsel is not good faith.
>
> Plaintiff's complaint concealed that it was actively litigating the valuation proceeding and then settled the case and recovered from the City of New York the very same damages that it looks to recover from defendants. The sanctionable conduct is further evidenced by the concealment of pertinent documents plaintiff was required to disclose (relating to the ongoing condemnation) and by filing of this action and continued pursuit of the claims even though plaintiff knew that the claims it made in this proceeding were raised by it in the condemnation case and were adjudicated by agreement with the City of New York in another action.

From the outset, it is noted that the irony of this concealment argument is not lost on this Court, as defendants now take exception to alleged tactics which are at the heart of this lawsuit. Nevertheless, notwithstanding defendants' arguments to the contrary, it is this Court's determination that, pursuant to Part 130.1, plaintiff has not engaged in conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Nor has plaintiff engaged in frivolous conduct by engaging in vexatious litigation undertaken to delay or prolong the resolution of this litigation or assert material factual statements that are false. Thus sanctions are not warranted.

**Conclusion**

Accordingly, the motion by plaintiff Beach 104 St. Realty, Inc., for an order granting it partial summary judgment as to defendants' liability on the first and second causes of action sounding in fraudulent concealment and breach of the Covenant of Good Faith and Fair Dealings, pursuant to CPLR § 3212, is denied in its entirety. Those branches of the cross-motion by defendants for an order granting them summary judgment in their favor, or in the alternative, granting defendants' motion for leave to reargue the determination of this Court dated July 3, 2008, are denied. Likewise denied is the branch of the cross-motion for an order imposing sanctions against plaintiff and its counsel, pursuant to provisions of NYCRR Rule 130-1.1. That branch of the cross-motion for an order, pursuant to NYCRR Rule 202.21(e), vacating the Note of Issue is granted, and the Note of Issue hereby is stricken. The parties are directed to appear before this Court on November 4, 2009, to discuss all outstanding discovery concerns, and enter into a stipulation setting forth a discovery schedule, at which time a new Note of Issue date will be assigned by the Court, and such stipulation will be "so-ordered" by this Court. A copy of this order with notice of entry shall be served upon the Clerk of this Part and the Trial Scheduling Part.

Dated: October 8, 2009

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J.S.C.