Nesconset ZJ 1 LLC v Nesconset Acquisition, LLC
2016 NY Slip Op 31874(U)
October 4, 2016
Supreme Court, New York County
Docket Number: 652719/2015
Judge: Jeffrey K. Oing
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

----------x

NESCONSET ZJ 1 LLC, HUNTINGTON ACQUISITION 1 LLC, HUNTINGTON REALTY 1 LLC, NESCONSET ZJ REALTY 1 LLC, MIDDLE ISLAND REALTY 1 LLC, and CENTRAL ISLAND REALTY 1 LLC,

Plaintiffs,

-against-

NESCONSET ACQUISITION, LLC, HILAIRE FARM SKILLED LIVING & REHABILITATION CENTER, LLC, SKILLAIRE LLC, NESCONSET NC REALTY, LLC, MDDC REALTY, LLC, and ISLIP DC REALTY, LLC,

Defendants and Counterclaim Plaintiffs,

-against-

NESCONSET ZJ 1 LLC, HUNTINGTON ACQUISITION 1 LLC, HUNTINGTON REALTY 1 LLC, NESCONSET ZJ REALTY 1 LLC, MIDDLE ISLAND REALTY 1 LLC, CENTRAL ISLAND REALTY 1 LLC, HUNTINGTON ZJ 1 HOLDING, LLC, NESCONSET INVESTORS, LLC, EPIC HEALTHCARE MANAGEMENT LLC, LIZER JOSEFOVIC, ZEV FARKAS, JOSEPH SCHLANGER, JONAH JAY LOBELL, SAMUEL J. RIEDER, and LESLIE RIEDER,

Counterclaim Defendants.

----------x

Index No.: 652719/2015

Mtn Seq. Nos. 004 & 005

DECISION AND ORDER

JEFFREY K. OING, J.:

Preliminary Statement

Plaintiffs are Nesconset ZJ 1 LLC, Huntington Acquisition 1 LLC, Huntington Realty 1 LLC, Nesconset ZJ Realty 1 LLC, Middle

Island Realty 1 LLC, and Central Island Realty 1 LLC ("Buyers" or "Plaintiff Buyers").

Defendants are Nesconset Acquisition, LLC, Hilaire Farm Skilled Living & Rehabilitation Center, LLC, Skillaire LLC, Nesconset NC Realty, LLC, MDDC Realty, LLC, and Islip DC Realty, LLC ("Sellers" or "Defendant Sellers")

This action involves a dispute over agreements by defendant Sellers to sell certain nursing homes, related health care facilities, and the real property associated therewith, to plaintiff Buyers, which sale required final approval from the New York State Department of Health ("DOH"), as well as financing arrangements. Sellers attempted to terminate the agreements in July 2015, based on Buyers' purported violations of the assignment clauses therein, but continued to cooperate with Buyers while they were seeking DOH approval, and proceeding with obtaining financing. Buyers claim that in March 2016 they learned that DOH had concerns about the character or competence of one of its members, and they cured that issue by substituting another individual. They then sought an extension of the agreements' deadline of April 18, 2016, under a specific provision of the agreements. Sellers claim that a different provision of the agreements governs, which required Buyers to provide at least $1.2 million in escrow. Buyers failed to do

this, and Sellers thereafter terminated the agreements on May 15, 2016.

Background

On September 18, 2014, Buyers and Sellers entered into the Asset Purchase Agreements ("APAs") and Real Estate Purchase Agreements ("REPAs") for the transfer of two skilled nursing facilities, two adult day health care programs, and the real property on which those facilities are located (Complaint, ¶¶ 1, 26, Engel Affirm., dated June 14, 2016, Ex. A [Engel Affirm.]; Nesconset APA [APA] and Nesconset REPA, Exs. B and C). The APAs and REPAs are materially identical for the two facilities, and were to close at the same time. Because the sale involved regulated senior nursing facilities, Buyers were required to obtain regulatory approvals from DOH (APA §§ 5, 12.3). The closing, therefore, was set to within 30 days after the Buyers obtained all required approvals, which was a defined term that included approval of Buyers' applications to DOH (Complaint, ¶ 35; APA §§ 1.4, 5, 10.1). Specifically, the APAs provided in section 12, entitled "Conditions Precedent to the Obligations of Seller to Close," in section 12.3, that "Buyer shall have received final non-contingent written approval of the [DOH] of the Application," and in section 12.5, that Buyer will have performed and complied with "all terms, agreements, covenants and

conditions of this APA to be complied with by it prior to the Closing" (APA § 12).

The agreements obligated Sellers to cooperate with Buyers' efforts to obtain DOH approval and financing. Specifically, section 9.4 required the Sellers to "provide ... in a reasonable and timely manner all documentation within Seller's control as requested by Buyer in connection with its processing of the Application [to the DOH] or any application for financing the Transaction" (APA § 9.4). Section 9.2.8 further requires Sellers to cooperate with Buyers, including "promptly furnish[ing]" information regarding the "operation and maintenance of the Facility" and providing "reasonable access to the Facility during normal business hours upon request" (APA § 9.2.8). In addition, Sellers were obligated to use their "best efforts to obtain the satisfaction of the conditions specified in Section 11 of this APA," which is entitled "Conditions Precedent to the Obligations of Buyer to Close," and included Buyers' obligations to obtain final non-contingent approval from DOH (APA §§ 9.6, 11.4).

The APAs provided Buyers nineteen months from the date of execution to obtain final DOH approval, namely, April 18, 2016 (APA § 13.1). Specifically, section 13.1 provides:

> Notwithstanding anything to the contrary contained in this APA, if the [DOH] has not issued a final non-contingent written approval of the Application within nineteen (19) months after the date of this APA, Seller

> and Buyer shall each have the right to terminate this APA upon ten (10) days prior written notice to the other party. Notwithstanding the foregoing, if the Application has not been presented to the Public Health and Health Planning Council within nineteen (19) months after the date of this APA with a recommendation of disapproval by [DOH], and if this APA has not otherwise been terminated by Seller pursuant to Section 13.3 hereof, Seller shall grant Buyer such extensions of the nineteen (19) month period as may be requested by Buyer, not to exceed six (6) months; provided that Buyer shall place into escrow with the Escrow Agent an additional $100,000 Contract Deposit for each month of such extension.

(Id.). This escrow would consist of $100,000 for each of the two APAs per month extended under this provision, up to $1.2 million for six months. Section 13.3, addressed to termination and default, provided that the non-breaching party to the APAs may terminate if a "breach or default by the other Party of this APA," which "breach, default or failure, whether singly or in the aggregate with other breaches, defaults and/or failures, has a Material Adverse Effect" and it "continues and remains uncured for thirty (30) consecutive calendar days after the non-breaching Party gives written notice" (APA § 13.3). If the APA is terminated pursuant to section 13.1, "the failure to obtain approval of the Application during the time frames set forth in Section 13.1 shall be deemed a default by Buyer having a Material Adverse Effect" (Id.).

The APAs further provided for a limited extension of the contract time limits, in section 10.1, addressed to Buyers'

obligation to submit a Certificate of Need Application to DOH, which provides, in relevant part:

> Notwithstanding anything to the contrary contained in this APA, if Buyer or any proposed member of Buyer is rejected or recommended for disapproval by [DOH] or if the [DOH] indicates that it has concerns about the character or competence of any proposed member of Buyer which concerns would delay or prevent approval of the Application, Buyer shall have the right to substitute another individual and shall be entitled to a reasonable extension of all time limitations set forth in this APA (not to exceed ninety (90) days) in order to make such substitution and have such amended application reviewed by the [DOH].

(APA § 10.1). This section also required Buyer to provide Sellers with "a complete copy of the [Certificate of Need] Application and all correspondence with [DOH]" (Id.).

Section 22 of the APAs prohibited either party from assigning the agreement to any other person or entity without the other party's prior written consent "except that Buyer may assign its rights hereunder to an affiliate owned at least 51% by Lizer Josefovic, Joseph Schlanger and/or Zev Farkas and/or members of their respective immediate family" (APA § 21).

In section 33, the parties agreed that a breach by Sellers of their obligations under section 9 or by Buyers of their obligations under section 10 "shall result in irreparable harm to the other Party for which money damages alone would not be adequate compensation" and the party shall be entitled to

specific performance or other equitable relief and the costs and reasonable attorneys' fees of obtaining such relief (APA § 33).

Sellers Attempt to Terminate on July 23, 2015

On June 4, 2015, Sellers sent a letter to Buyers notifying them that they breached section 21 of the APAs, the assignment provision, claiming that the member of the Buyers that was owned by Schlanger and Farkas held a 50% rather than a 51% ownership (Levy Affirm., dated July 28, 2016 [Levy Affirm.], Ex. C). By letter dated June 10, 2015, Buyers responded to Sellers, arguing that there had been no assignment, and that the identity of the Buyers had not changed, but nonetheless stated that the existing owners would transfer a 1% interest to the entity owned by Schlanger and Farkas so that they would have 51% ownership interest (Levy Affirm., Ex. D; see also Complaint, ¶¶ 46-47). Despite this response, on July 23, 2015, Sellers sent a letter terminating the APAs, purportedly as a result of Buyers' failure to cure the default as to section 21 of the APAs within the 30-day cure period (Levy Affirm., Exs. E and F). On August 3, 2015, Buyers demanded that Sellers rescind the termination, and Sellers refused (Complaint, ¶ 52).

On August 6, 2015, Buyers commenced this action, alleging Sellers' breach of the APAs. In early August 2015, Buyers

obtained contingent regulatory approval, and the parties appeared to be working toward the closing.

By letter dated August 10, 2015, Sellers provided DOH with a copy of the complaint in this action, and the parties' correspondence regarding the July 23, 2015 termination (Levy Affirm., Ex. BB). On December 2, 2015, Sellers sent a letter to DOH advising it that Sellers objected to Buyers' request for a six-month extension to obtain final approval of their applications, and that their applications should be denied (Levy Affirm., Ex. CC).

On March 10, 2016, DOH advised Buyers that it received new information regarding the "character and competence" of one of the Buyers' member, Zev Farkas, and that it needed additional time to investigate (see Burnbaum Affirm., dated June 14, 2016 [Burnbaum Affirm.], ¶ 21).

On April 4, 2016, Sellers answered the complaint and asserted counterclaims for, among other things, fraud (NYSCEF Doc. No. 54).

On April 11, 2016, Sellers again wrote to DOH, enclosing their answer and counterclaims, stating that Buyers' behavior constituted fraud and that they had engaged in a pattern of deceit and concealment, and asking that the DOH approve no further extensions (Levy Affirm., Ex. DD).

By letter dated April 15, 2016, Buyers notified Sellers that they had substituted Farkas's spouse, Zipporah Farkas, as one of the owners of the Buyers because DOH had concerns about the character or competence of Farkas, and that, in accordance with section 10.1, all of the time limitations are extended up to ninety days in order to make such substitution, and have such amended application reviewed by DOH (Engel Affirm., Ex. G).

On April 20, 2016, Sellers sent another letter to DOH, asking that it "rescind its prior conditional approval" for Buyers' applications in light of the character and fitness concerns, and that it grant no further extensions and disapprove the existing applications (Levy Affirm., Ex. EE).

By letter dated April 25, 2016, in responding to Sellers' request for additional information, Buyers informed Sellers that DOH received survey information from Wisconsin about facilities there in which Farkas owned minority and non-controlling interests, through sometime in 2012, in which deficiencies were noted (Levy Affirm., Ex. J).

On May 5, 2016, Sellers sent a new notice of termination of the APAs (Engel Affirm., Ex. H). In it, Sellers stated that they were supplementing their reason for terminating the APAs, effective May 15, 2016, pursuant to section 13.1, because DOH had not issued a final non-contingent written approval of their

Application within nineteen months of execution of the APAs (Id.). Sellers claimed that the notice of substitution pursuant to section 10.1 did not extend the nineteen month deadline (Id.). They also stated that they were terminating because DOH rejected Farkas as one of the putative owners for integrity reasons which was an "apparent breach" of section 8.4 of the APAs, and that they were discontinuing any cooperation (Id.).

On May 17, 2016, DOH informed Buyers that the character or competence concern had been resolved, but that it was delaying processing and approval of Buyers' applications because of Sellers' representations to DOH that the APAs had been terminated, and that it did not intend to recommend approval to the Public Health and Health Planning Council ("PHHPC") prior to its May/June agenda and June 9, 2016 meeting (Burnbaum Affirm., ¶¶ 22-24). This decision was confirmed by email from DOH to Buyers on May 26, 2016 (Burnham Affirm., Ex. 21).

By letter date May 23, 2016, Sellers wrote to DOH, asking for information on the nature of the character and competence objections to Zev Farkas, and reiterating their request that no further extension of time be granted to Buyers (Engel Affirm., Ex. I).

The Pleadings

In their complaint for breach of contract, Buyers seek permanent injunctive relief, mandating that Sellers specifically perform the agreements, and money damages (NYSCEF Doc. No. 2).

Sellers answered the complaint denying the material allegations, and asserted numerous affirmative defenses and counterclaims (NYSCEF Doc. No. 54). On June 7, 2016, Sellers amended their answer with counterclaims, asserting five counterclaims: (1) fraud, fraudulent inducement, and fraudulent concealment; (2) aiding and abetting fraud; (3) negligent misrepresentation; (4) civil conspiracy; and (5) rescission. They also assert affirmative defenses based on fraud and fraudulent inducement (fourth and fifth affirmative defenses) (NYSCEF Doc. No. 82).

The Motions

Mtn Seq. No. 004

Plaintiffs Buyers move for a preliminary injunction enjoining defendants Sellers from further obstruction in connection with Buyers' DOH applications, mandating Sellers to cooperate in the approval process, and compelling Sellers to comply with their contractual obligations. In seeking such relief, Buyers assert that Sellers acted to prevent them from obtaining regulatory approval, and failed to use good faith

efforts to cooperate as required by the agreements. Plaintiffs also seek an order granting them partial summary judgment that would declare that they have not breached the Assignment Clauses of the Asset Purchase Agreements and the Real Estate Purchase Agreements, and that Buyers' time to close has not expired.

Defendant Sellers cross-move for summary judgment dismissing the complaint, and cancelling the notices of pendency filed by Buyers.

Mtn Seq. No. 005

Plaintiff Buyers separately move, pursuant to CPLR 3016(b), and 3211(a) (1) and (7), for an order dismissing defendant Sellers' amended counterclaims (fraud, aiding/abetting fraud, negligent misrepresentation, civil conspiracy, and rescission), and their fourth and fifth affirmative defenses (claims barred by fraud and fraudulent inducement).

Mtn sequence nos. 004 and 005 are consolidated for disposition and are disposed of in accordance with the following decision and order.

Arguments

Buyers contend that Sellers have delayed the regulatory process and acted to prevent Buyers from obtaining approvals, delayed and stopped efforts to provide Buyers with information and site visits required by DOH and their lenders, and secretly

urged DOH to deny Buyers' applications. They urge that this Court grant them an injunction requiring Sellers to cooperate with Buyers in connection with DOH approval process and with Buyers' lenders. They also urge that this Court grant them partial summary judgment declaring the July 2015 termination ineffective, and that the contractual deadlines have not expired.

Buyers further seek dismissal of Sellers' counterclaims. The counterclaims allege that Buyers intentionally and negligently misrepresented the ownership of the entities that would buy and operate the facilities, and seek rescission of the agreements based on the misrepresentations. Buyers assert that Sellers' argument running throughout their counterclaims, that they were defrauded because Lizer Josefovic withdrew from membership in Buyers, is unavailing because the agreements do not contain any "key man" provision requiring his participation, and Sellers did not contract for any guaranty of his participation, but, instead, gave Buyers the right to assign their interests so long as any one of Farkas, Schlanger, and/or Josefovic (or their families) held 51% of the assignee. Buyers urge there is no injury resulting from the absence of Josefovic, the alleged misrepresentation was forward looking, and there was no reasonable reliance.

In their opposition and cross motion, defendant Sellers urge that the agreements were appropriately terminated by them and expired by their own terms when plaintiff Buyers failed to get final approval by the contract deadline. They argue that Buyers' attempt to extend the deadline failed because they did not make required escrow payments, and that the section Buyers rely upon does not override the contractual extension provision requiring the escrow payment. Sellers assert that Buyers have made misrepresentations, and failed to meet their obligations under the APAs. In that regard, Sellers assert that Buyers were aware of the competence issue from DOH from March 10, 2016, failed to inform Sellers of it until April 15, 2016, and failed to tell anyone whether DOH granted any extension of its June 3, 2016 deadline on their applications.

In any event, Sellers further argue given that Buyers stated that the character and competence issues had been resolved to DOH's satisfaction on May 17, 2016, there is no further need for any additional extension, and Buyers were aware of Sellers' termination letters of May 5 and 12, 2016, but then failed to seek any additional extensions by posting the required escrow payments. Sellers claim that Buyers have breached obligations under the agreements by misrepresenting that they knew of no issues with any regulators that would cause DOH to delay or deny

their applications, and failing to provide copies of their complete applications and all correspondence with DOH. Lastly, Sellers argue that the mandatory preliminary injunction Buyers seek should be denied because they did not make the heightened showing for such a drastic remedy, it would afford Buyers the ultimate relief they seek in this action, and they cannot show irreparable harm. If granted, Sellers would effectively be forced to sell the facilities and continue to engage in a long-term business relationship with persons to whom they did not sell their facilities or agree to do business based on terminated agreements.

Discussion

The Court will first address the Buyers' motion for a preliminary injunction, and for partial summary judgment, and then Sellers' cross motion for summary judgment. The motion to dismiss the counterclaims will be subsequently addressed.

A. Buyers' Motion

I. Preliminary Injunction

The standard that the movant must demonstrate to obtain a preliminary injunction is well settled: (1) a probability of success on the merits, (2) irreparable injury absent such relief, and (3) that the equities balance in its favor (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Stellar

Sutton LLC v Dushey, 82 AD3d 485, 487 [1st Dept 2011]; Seitzman v Hudson Riv. Assoc., 126 AD2d 211, 213 [1st Dept 1987]). The difficulties lie in whether sufficient facts exist to satisfy each prong of the standard.

1. Likelihood of Success

"As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings" (McLaughlin, Piven, Vogel v Nolan & Co., 114 AD2d 165, 172-173 [2d Dept 1986] [citation omitted]; see also Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d 430, 431 [1st Dept 2016] [prima facie showing is sufficient; actual proof should be left to full merits hearing]; Alexandru v Pappas, 68 AD3d 690, 691 [2d Dept 2009] [as to likelihood of success, plaintiffs need only make "prima facie showing" of their right to relief]). This requirement may be established "even where the facts are in dispute and the evidence need not be conclusive" (Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d at 431 [citation omitted]). Indeed, the principal purpose of a preliminary injunction "is to preserve the status quo and to prevent the dissipation of property, which might make a judgment ineffectual" (Alexandru v Pappas, 68 AD3d at 691 [citation omitted]). The decision to grant or deny an injunction lies in the sound discretion of the

trial court (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d at 840; Matter of Armanida Realty Corp. v Town of Oyster Bay, 126 AD3d 894, 894-895 [2d Dept 2015]).

Here, Buyers are seeking specific performance of the APAs and REPAs asserting that Sellers have breached and repudiated the agreements. Defendant Sellers contend that Buyers failed to meet the contract deadlines and failed to satisfy a condition precedent of the agreements, i.e., obtaining final non-contingent approval of their Applications from DOH.

In construing a contract, courts will look to the parties' intent, which generally may be discerned from the four corners of the document itself. A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (Greenfield v Philles Records, 98 NY2d 562, 569 [2002] [citations omitted]; see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 [2009]).

Specific performance is an equitable remedy to be used when money damages would not be adequate to protect the injured party's expectation interest, and "when performance will not impose a disproportionate or inequitable burden on the breaching party" (Cho v 401-403 57th St. Realty Corp., 300 AD2d 174, 175 [1st Dept 2002] [citations omitted]). It is an available remedy for breach of contract for the sale of real property, or where

the subject matter of the contract is unique so that there is no established market value (Id.). Whether to award specific performance is in the sound discretion of the trial court (Id.).

Generally, in order for a buyer to obtain specific performance it must "show that it was ready, willing and able to fulfill its contractual obligations" (ADC Orange, Inc. v Coyote Acres, Inc., 7 NY3d 484, 490 [2006]). A party to a contract, however, cannot rely on the failure of another to perform a condition precedent to that contract where the party has frustrated or prevented the occurrence of the condition (see MHR Capital Partners LP v Presstek, Inc., 12 NY3d at 646; ADC Orange, Inc. v Coyote Acres, Inc., 7 NY3d at 490; see also Rachmani Corp. v 9 E. 96th St. Apt. Corp., 211 AD2d 262, 269 [1st Dept 1995]). A "condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises'" (MHR Capital Partners LP v Presstek, Inc., 12 NY3d at 645, citing Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 690 [1995] [internal quotation marks and citations omitted]). "Express conditions must be literally performed; substantial performance will not suffice" (Id.).

In ADC Orange, Inc. v Coyote Acres, Inc., *supra*, a contract for the sale of real property contained a condition requiring the

buyer to obtain subdivision approval for the construction of a number of homes. The buyer sought specific performance, and the court held that it was excused from being ready, willing, and able to proceed if the seller frustrated the subdivision approval process (Id.).

The party who frustrates the occurrence of a condition will not only be precluded from using the failure of the condition to avoid the agreement, but also subjects itself to a claim for breach of the implied covenant of good faith and fair dealing (see Merzon v Lefkowitz, 289 AD2d 142, 143 [1st Dept 2001]; see also Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y., 28 NY2d 101 [1971]; Richbell Info. Servs. v Jupiter Partners, 309 AD2d 288, 303 [1st Dept 2003]). Implicit in all contracts "is a promise of good faith and fair dealing that is breached when a party acts in a manner that -- although not expressly forbidden by any contractual provision -- would deprive the other party of receiving the benefits under their agreement" (Sorenson v Bridge Capital Corp., 52 AD3d 265, 267 [1st Dept 2008] [citation omitted]). The breach of the covenant of good faith is a breach of the underlying contract, and the duty of good faith encompasses "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (511 W. 232nd Owners Corp. v Jennifer Realty Co.,

98 NY2d 144, 153-154 [2002] [quotation marks and citations omitted]). For example, where a party agrees to cooperate in obtaining an amended certificate of occupancy, but then refuses to do so, rendering the other party's compliance with the contract condition impossible without judicial intervention, its conduct violates the implied covenant of good faith (see Seitzman v Hudson Riv. Assoc., 126 AD2d at 213-214).

Here, Buyers have submitted prima facie evidence supporting their contention that Sellers frustrated or prevented Buyers' performance with regard to obtaining DOH's final non-contingent approval of their applications through proof of Sellers' communications with DOH from December 2015 through May 2016, the critical time period (Engel Affirm., Exs. E and I; Levy Affirm., Ex. EE). In their letters, Sellers requested that Buyers' application be denied, that no extensions be granted, and requested an in-person meeting to "discuss candidly" the reasons for Sellers' requests (Engel Affirm., Ex. E). Sellers clearly and unmistakably requested that DOH "rescind its prior conditional approvals," and reiterated their request that no further extensions be granted for Buyer to submit its documentation (Engel Affirm., Exs. E and I). Contrary to Sellers' contentions, the record clearly demonstrates that they were not "merely providing information to the NYSDOH to inform it

of the existence of this dispute," but were actively and deliberately requesting that DOH stop consideration of Buyers' application (Opposition Brief at p. 33).

Where the cause of the delay in obtaining final DOH approval is the Sellers' own conduct, they cannot terminate the agreement because of the lack of timely final approval (see RSB Bedford Assoc., LLC v Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept 2011]; Rachmani Corp. v 9 E. 96th St. Apt. Corp., 211 AD2d at 270). Given that all contracts imply a covenant of good faith and fair dealing in the performance thereof, this principle supports plaintiffs' breach claim based on a breach of the implied covenant of good faith (see 511 W 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d at 153).

Sellers' purported bases for terminating the agreements, and their defenses to Buyers' contract claims, appear meritless. First, their claim in July 2015, that Buyers breached by assigning the agreements in violation of section 21 is not supported by the facts. The Buyer entities that executed the agreements are the same now and retain all of their rights thereunder. Moreover, Buyers demonstrated that even if there were a breach of this clause, they promptly cured it within the 30-day cure period by having Jay Lowell and Sam Rieder each transfer a 0.5% ownership share to Farkas and Schlanger, giving

them 51% ownership, and promptly notified Sellers of this transaction (Engel Affirm., Ex. K).

Second, Sellers' claims that they terminated because Buyers failed to meet the contract deadlines also are insufficient. As discussed, supra, Buyers have made a prima facie showing that Sellers frustrated Buyers' performance. In addition, the record appears to show that Buyers had appropriately exercised their right to an extension under section 10.1. That section specifically addressed the applications that Buyers were submitting to DOH, and specifically addressed the circumstances Buyers faced when DOH indicated that it "had concerns about the character or competence of any proposed member of Buyer which concerns would delay or prevent approval of the Application" (APA § 10.1). That provision is a limited right that is available only if DOH expresses concerns about a member of Buyers, and only if Buyers opt to substitute that member. In such a situation, "[n]otwithstanding anything to the contrary contained in this APA," Buyer had the right to substitute another individual "and shall be entitled to a reasonable extension of all time limitations set forth in this APA (not to exceed ninety [90] days)" to make the substitution and have its "amended application" considered and reviewed by DOH (Id.).

Sellers' reading of the contract, in which section 10.1 is overridden by section 13.1, which addresses a termination for failure to obtain PHHPC approval within nineteen months, and permits Buyer to obtain an extension of the contract deadline for six months with the payment of additional escrow, is rejected. That interpretation renders section 10.1 meaningless (see Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc., 63 NY2d 396, 403 [1984]; 150 Broadway N.Y. Assoc., L.P. v Bodner, 14 AD3d 1, 6 [1st Dept 2004]).

Section 10.1 is the more specific provision addressing the precise situation Buyers faced here, providing an additional ninety day window to take into account an amended DOH application. Section 13.1 focuses on the original DOH application, expressly setting forth the nineteen month deadline, and allows Buyers to request an extension of up to six months for any reason, with the payment of an additional escrow deposit. If the parties intended that Buyers were required to post additional escrow under a section 10.1 extension, as Sellers urges, then they could have so provided, but they did not. When DOH indicated that the issue had been resolved by Buyers on May 17, 2016, Sellers betrayed their intentions by sending before May 17 several letters requesting that DOH not consider the applications, and stating that the transaction was terminated,

and that the Buyers committed "deceptive and fraudulent actions" (Engel Affirm., Exs. E and I; Levy Affirm., Ex. EE). DOH then delayed all processing of the applications, and informed Buyers it did not intend to recommend approval to the PHHPC before its agenda and next meeting, and that it was suspending consideration of the application pending the outcome of this litigation (Burnbaum Affirm., ¶¶ 22-24; Burnbaum Supplemental Affirm., dated August 26, 2016, ¶ 6; Complaint, ¶ 24; Levy Affirm., Exs. CC-FF).

Sellers' alternative argument, that any extension under section 10.1 expired for Buyers on May 17, 2016, when the DOH accepted Zipporah Farkas as a substitute for Zev Farkas, is not supported by the language of the provision. That section does not indicate that the "reasonable extension" granted therein will terminate on the date of substitution, and, in fact, provides that the extension was "in order to make such substitution and have such amended application reviewed by [DOH]" (APA § 10.1). As a practical matter, DOH must approve the substitution before the amended application may be presented for final review. Buyers have sufficiently demonstrated that they invoked an extension under section 10.1, notified Sellers of it by letter dated April 15, 2016 (Engel Affirm., Ex. G), before the April 18, 2016 contract deadline.

Sellers' additional argument that Buyers failed to provide complete copies of their DOH applications and all correspondence with DOH, thereby violating section 10.1, is not borne out by the documentary evidence (Burnbaum Affirm., Exs. 5, 6, 8, and 9), and they fail to show that they gave notice of this breach with an opportunity to cure, as required under the agreements. Further, their argument that Buyers' submission of redacted copies of the DOH applications is in breach of the agreements fails to provide a basis to deny relief to plaintiffs. Contrary to Sellers' contention, the redacted applications still revealed that Josefovic was no longer involved in the deal, and, again, Sellers failed to give notice or opportunity to cure this alleged breach.

Based on the foregoing, plaintiff Buyers have demonstrated a likelihood of success on the merits.

2. Irreparable Harm

Irreparable injury absent a grant of injunctive relief also has been shown by plaintiffs. The parties agreed in section 33 that a breach by Sellers of their obligations under section 9, including their obligations to use their best efforts to obtain the satisfactions of the conditions in section 11, including Buyers' obligation to obtain final approval from DOH, "shall result in irreparable harm to the other Party for which money damages alone would not be adequate compensation" and that they

would be "entitled to specific performance or other equitable relief" (APA § 33). While not dispositive, this may be viewed as evidence of an admission that irreparable harm has occurred (see Matter of Reed Found., Inc. v Franklin D. Roosevelt Four Freedoms Park, LLC, 108 AD3d 1, 6 [1st Dept 2013], affg 37 Misc 3d 1226[A] *5, 2012 NY Slip Op 52174[U] [Sup Ct, NY County 2012] [Ramos, J.] [court enforced parties' contract which stated that legal remedies were inadequate, party would suffer irreparable damages, and would be entitled to seek specific performance]; Seitzman v Hudson Riv. Assoc., 126 AD2d at 214; Bank of Am, N.A. v PSW NYC LLC, 29 Misc 3d 1216[A], 2010 NY Slip Op 51848[U] [Sup Ct, NY County 2010] [equitable relief granted where parties agreed that money damages would be inadequate, and their writing should be enforced according to its terms]; cf. LGC USA Holdings, Inc. v Taly Diamonds, LLC, 121 AD3d 529 [1st Dept 2014] [no irreparable harm even where contract entitled party to specific performance upon breach; provision did not provide that loss was irreparable]).

Moreover, preliminary injunctive relief, here, is appropriate because Buyers' loss of the bargained-for right to purchase the real property and nursing home facilities, and to control those assets, is sufficiently unique to warrant a finding

of irreparable harm (see Bank of Am, N.A. v PSW NYC LLC, 29 Misc 3d 1216[A], 2010 NY Slip Op 51848[U] *10).

3. Balancing of Equities

Finally, a balancing of the equities favors the Buyers herein. The threatened injury is more burdensome to Buyers than the harm caused to Sellers through the imposition of the preliminary injunction (see Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp., 69 AD3d 212, 223 [4th Dept 2009]). Without this injunction, which simply requires that Sellers act in good faith as obligated under the agreements by notifying DOH that it may consider the applications, prevents Sellers from terminating and selling to another party, and finds Buyers' requested extension as valid under section 10.1, DOH will not move forward with its consideration of the Buyers' amended Applications, and Buyers will be unable to meet any contractual deadline for obtaining such approval.

Buyers' right to the relief it seeks in this action and, ultimately, its ability to complete its purchase of the nursing home and facilities, would be frustrated in the absence of a preliminary injunction. Simply stated, Buyers are contractually entitled to a bona fide opportunity to complete the approval process free of any interference. Had Sellers cooperated in good faith, DOH would have considered and possibly approved Buyers'

amended application, moving these transactions to the final closing, with Sellers receiving their compensation as the parties originally agreed (see Maestro W. Chelsea SPE LLC v Pradera Realty Inc., 38 Misc 3d 522, 536 [Sup Ct, NY County 2012] [Bransten, J.]). The Sellers, as sophisticated businesses with legal counsel, negotiated these agreements requiring their cooperation, and the record does not indicate any unfair burden in ordering them to comply with them, and refrain from undermining the Buyers' applications. In the end, if Buyers cannot succeed in that regard, then Sellers would be free to sell the assets to another purchaser. Thus, at most, Sellers may be briefly delayed in selling to a theoretical prospective purchaser.

Moreover, a preliminary injunction enjoining Sellers from selling the nursing home, healthcare facilities and real property during the pendency of this action is proper to assure the efficacy of any declaratory or specific performance judgment affirming Sellers' obligations under the agreements (M&A Oasis v MTM Assoc., 307 AD2d 872, 872-873 [1st Dept 2003]; Maestro W. Chelsea SPE LLC v Pradera Realty Inc., 38 Misc 3d at 536).

Based on the foregoing, plaintiffs have satisfied the three prong test for a preliminary injunction, and, as such, that branch of the motion for a preliminary injunction is granted.

Specifically, this Court preliminarily enjoins Sellers: 1) from terminating the contract pending trial of Buyers' claim, 2) from not extending the contract deadline up to an additional ninety days from the service of a copy of this order with notice of entry so that DOH may consider their amended applications, 3) from communicating to DOH that the transaction is not going forward, 4) from engaging in further efforts to undermine Buyers' DOH applications, and 5) from not cooperating therewith (see Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d at 430 [grant of preliminary injunction tolling expiration of notice and enjoining defendant from terminating tenancy or assessing penalty affirmed]; Seitzman v Hudson Riv. Assoc., 126 AD2d at 214 [preliminary injunction granted preventing seller from terminating contract and selling to third party pending trial, where seller agreed to use best efforts to cooperate with buyer in obtaining certificate of occupancy, a condition precedent to closing, but seller, in bad faith, refused to cooperate]).

II. Mandatory Injunction

Buyers also seek a mandatory injunction directing Sellers to comply with their contractual obligations to use their best efforts to obtain satisfaction of Buyers' obligation to acquire final non-contingent written approval of their DOH applications.

> [C]ourts are generally reluctant to grant mandatory preliminary injunctions and such relief will be granted

> only where the right thereto is clearly established ... Where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted.

(Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 265 [1st Dept 2009] [internal quotation marks and citations omitted]; see also Seitzman v Hudson Riv. Assoc., 126 AD2d at 214). In the absence of extraordinary circumstances, such an injunction will not be issued where to do so "would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (SHS Baisley, LLC v Res Land, Inc., 18 AD3d 727, 728 [2d Dept 2005]; see also Monarch Condominium v Raskin, 37 AD3d 288 [1st Dept 2007] [denied where sought ultimate relief]). Moreover, a mandatory injunction, which is used to compel the performance of an act, is a drastic, extraordinary remedy, rarely granted, and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial (Zoller v HSBC Mtge. Corp. (USA), 135 AD3d 933, 934 [2d Dept 2016], quoting Matos v City of New York, 21 AD3d 936, 937 [2d Dept 2005] [quotation marks and other citations omitted]; see Village of Westhampton Beach v Cayea, 38 AD3d 760, 762 [2d Dept 2007]). Such relief requires a more rigorous standard of demonstrating a clear or substantial likelihood of success (see Rosa Hair Stylists v Jaber Food Corp., 218 AD2d 793, 794 [2d Dept

1995]; Almontaser v New York City Dept. of Educ., 519 F3d 505, 508 [2d Cir 2008]).

Here, Buyers failed to show that a mandatory injunction, which effectively grants the ultimate relief Buyers seek, is necessary to preserve the status quo. The preliminary injunction preventing termination of the agreements pending trial on Buyers' claim, extending the agreements' deadline, and ordering Sellers to refrain from further efforts to undermine Buyers' DOH applications, and to refrain from failing to fully cooperate in connection with those DOH applications, protects any rights Buyers have under the APAs and REPAs (see Maestro W. Chelsea SPE LLC v Pradera Realty Inc., 38 Misc 3d at 536 [preliminary injunction granted but mandatory injunction requiring defendant to use best efforts under contract denied as seeking ultimate relief and plaintiff protected by preliminary injunction]).

Accordingly, that branch of the motion seeking a mandatory injunction is denied.

III. Partial Summary Judgment to Buyers on Termination

That branch of Buyers' motion seeking partial summary judgment declaring that Buyers did not breach the assignment clause of the APAs is granted.

First, Sellers' attempt to terminate the agreements by their July 23, 2015 letter is ineffective. The record clearly

demonstrates that there was no assignment by Buyers of the APAs. The termination was purportedly on the ground that there were post-execution changes in Buyers' internal membership, namely, that Buyers were 50% indirectly owned by Zev Farkas and Joseph Schlanger, rather than "at least 51% owned by Lizer Josefovic, Joseph Schlanger, and/or Zev Farkas" which, according to Sellers, violated the assignment clause in section 21 of the APAs (APA § 21).

Contrary to Sellers' contentions, these facts do not constitute an impermissible assignment to a third party which would trigger that provision. Sellers failed to present any proof that Buyers had changed since the contract execution. The Buyer entity that executed the Nesconset APA was Nesconset ZJ 1 LLC (APA at 42), and that entity still retains all its rights under the APA. The other parties to the APAs and REPAs likewise have retained, and not assigned, any rights.

Moreover, even if there were some kind of breach, the APAs permit a non-breaching party to terminate the deal only if the breach "continues and remains uncured for thirty (30) consecutive calendar days" after the non-breaching party provides notice (APA § 13.3). Buyers received notice on June 4, 2015 of the purported breach, and on June 10, 2015, they notified Sellers that Jay Lowell and Sam Rieder each transferred a 0.5% ownership to Farkas

and Schlanger, giving them 51% ownership (Engel Affirm., Ex. K; Complaint, ¶¶ 48-50). Buyers confirmed that DOH was informed of the transfer (Complaint, ¶ 51). Under these circumstances, there was no violation of the assignment provision, and Buyers are granted partial summary judgment declaring that Sellers' termination based on the assignment provisions of the APAs and the REPAs was not warranted and ineffective.

On the issue of the expiration of the time to close, as discussed, supra, with regard to the preliminary injunction motion, Buyers exercised their right under section 10.1 for a reasonable extension of all time limitations (not to exceed ninety days) before the contract expiration date of April 18, 2016. Contrary to Sellers' contention, Buyers were not restricted to also seeking an extension under section 13.1 and posting the additional escrow under these circumstances. Clearly, section 10.1 does not require an escrow payment. Moreover, there was no requirement that they seek such extension from DOH. Plainly, the extension was of the parties' contractual time limitations.

With regard to whether Sellers breached their obligation to use best efforts under section 9 of the APAs, and breached their duty of good faith, by obstructing the regulatory process and the financing of the deal, by requesting that DOH not consider and

deny Buyers' application, by withholding information, and by delaying site visits (compare Robert Heppenheimer Aff., dated July 28, 2016, ¶¶ 17-27, 33-34 with Burnbaum Affirm., ¶¶ 4-20 and Exs. 1-20 annexed thereto), there are triable issues of fact, determination of which must await trial.

B. Sellers' Cross Motion for Summary Judgment

In light of the above determination with regard to the preliminary injunction and partial summary judgment motion, Sellers' cross motion for summary judgment dismissing the complaint on the ground that the contract deadline for obtaining DOH approval has expired, and cancelling the notice of pendency, is denied. Given that determination, that branch of the cross motion seeking attorneys' fees and costs is denied.

C. Buyers' Motion to Dismiss Counterclaims

Plaintiff Buyers' motion to dismiss Sellers' counterclaims, and the fourth and fifth affirmative defenses, is granted, and all of the counterclaims and those affirmative defenses are dismissed.

The first counterclaim fails to allege any fraud, fraudulent inducement or concealment, and is dismissed. To plead fraud, a party must allege a misrepresentation or material omission of fact which the defendant knew was false, that the misrepresentation or omission was made in order to induce

reliance by the other party, justifiable reliance, and damages (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 178 [2011]; Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]; Connaughton v Chipotle Mexican Grill, Inc., 135 AD3d 535, 537-538 [1st Dept 2016]). In addition, the circumstances constituting the wrong must be stated in detail (CPLR 3016[b]).

Here, Sellers allege that Buyers fraudulently misrepresented that Josefovic and his company, EPIC Healthcare, were purchasing the nursing homes and would be managing the properties, and concealed the buying entities' true ownership (Counterclaims ¶ 38 [NYSCEF Doc. No. 82]). They claim that Buyers knew that Josefovic and Epic were to play no post-sale role in the management of the purchased assets, concealed that fact, and made the misrepresentation to induce Sellers into agreements they would not otherwise have entered (Id., ¶ 64). Sellers allege that they fear that Buyers will likely fail to pay post-closing reimbursements, and that they have suffered significant financial and reputational damages, including that the administrator of one of the nursing homes resigned upon a walk-through during the due diligence period by Buyers, and damages suffered because of the filing of a lis pendens in this action and their transactional costs (Id., ¶¶ 95-98).

This claim is insufficiently pleaded for several reasons. First, to the extent that it relies on the potential failure to make post-closing reimbursements, this fails to allege any present loss from the purported fraud. Instead, the allegations involve speculation about the likelihood that Buyers will breach the agreements in the future, and such speculative future harm does not constitute the present injury required for a fraud claim (see Connaughton v Chipotle Mexican Grill, Inc., 135 AD3d at 538 [the "measure of damages is indemnity for the actual pecuniary loss sustained as the direct result of the wrong"] [quotation marks and citation omitted]). With regard to the other alleged damages, Sellers fail to allege how the harm was proximately caused by the misstatement, that is, the counterclaim does not plead facts that supply a plausible basis from which a fact finder could infer that but for these representations Sellers would not have suffered the losses. For example, there is no allegation that the administrator resigned because of a misleading statement by Buyers or that the lis pendens filing was causally connected to any fraudulent representation.

Sellers' claim that they are entitled to their transactional costs for the deal because they would not have entered into the deal absent Josefovic's participation. That claim, however, is not supported by the agreements they executed, which failed to

include any provision that he was a "key man" required for them to go forward. Moreover, they fail to allege how they are prevented from going forward with the deal without his participation.

The fraud counterclaim also fails to allege sufficient facts to show reasonable reliance. Sellers claim that they relied upon prior agreements and understandings that Josefovic was to be involved in the deal. The agreements, however, contain merger clauses which provide that they "contain[] the entire agreement of the parties" and "supercede[] all prior oral and written understandings" (APA § 23), and that:

> all understandings and agreements heretofore had between the parties are merged into this Agreement, which alone fully and completely expresses their agreement, and the same is entered into after full investigation, neither party relying upon any representation, express or implied warranties, guarantees, promises, statement, 'setups', representations or information, not embodied in this Agreement

(REPA § 26). These merger clauses are sufficiently specific to bar Sellers from claiming that they were fraudulently induced into entering into the contracts because of certain oral misrepresentations (see Oseff v Scotti, 130 AD3d 797, 799-800 [2d Dept 2015]; accord McBeth v Porges, __ F Supp 3d __, 2016 WL 1092692 *4-6 [SD NY 2016]; see also Cobalt Partners, L.P. v GSC Capital Corp., 97 AD3d 35, 42 [1st Dept 2012]). Sellers were

sophisticated parties, represented by counsel, who signed these integrated agreements. As such, they cannot conceivably plead that they reasonably rely on misrepresentations not contained in these agreements (see Natoli v NYC Partnership Hous. Dev. Fund Co., 103 AD3d 611, 613 [2d Dept 2013]; see also WT Holdings Inc. v Argonaut Group, Inc., 127 AD3d 544, 544 [1st Dept 2015]; McBeth v Porges, __ F Supp 3d __, 2016 WL 1092692 *4-6)

In addition, the APAs contain a provision permitting Buyers to assign their interests, without Sellers' prior written consent, to a new owner "that is an affiliate owned at least 51% by Lizer Josefovic, Joseph Schlanger and/or Zev Farkas and/or members of their respective immediate family" (APA § 21). Based on that language, an assignment could be made to an owner that could exclude Josefovic completely, without obtaining Sellers' consent. Thus, because the agreements contained a provision in which the parties contemplated that Josefovic could have no role in the transaction at all, Sellers cannot assert that they reasonably relied upon purported representations that he would be involved.

To the extent that Sellers' counterclaim relies upon omissions, it also fails. In order for an omission to constitute fraud there must be a fiduciary relationship between the parties (Cobalt Partners, L.P. v GSC Capital Corp., 97 AD3d at 42-43; SNS

Bank v Citibank, 7 AD3d 352, 356 [1st Dept 2004]). In this case, Sellers do not allege that this transaction "was anything more than at arm's length, between sophisticated commercial parties who had their own advisors" (Cobalt Partners, L.P. v. GSC Capital Corp., 97 AD3d at 43). Moreover, they cannot rely on the "special facts" doctrine to require Buyers to volunteer additional information about Josefovic's role, because that doctrine does not apply. Under that doctrine, if there is no fiduciary relationship between the parties, a party may have a duty to disclose when its "superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (Pramer S.C.A. v Abaplus Intl. Corp., 76 AD3d 89, 99 [1st Dept 2010] [citation omitted]). Here, Sellers fail to allege how the fact that Josefovic was not an investor in Buyers would render the deal without disclosure of this fact inherently unfair. Sellers will receive the same price at closing, and with regard to post-closing reimbursements, the APAs contain provisions regarding such payments (APA §§ 4.3 to 4.7). Accordingly, the fraud counterclaim is dismissed.

Given the absence of an underlying fraud claim, the claims for aiding and abetting fraud (second counterclaim) and for conspiracy to commit fraud (fourth counterclaim) are dismissed (see Weinberg v Sultan, __ AD3d __, 37 NYS3d 13, 15 [1st Dept

2016]; Agostini v Sobol, 304 AD2d 395, 395 [1st Dept 2003]). For these same reasons, the fourth and fifth affirmative defenses of fraud and fraudulent inducement also are dismissed.

Similarly, the rescission claim (fifth counterclaim) fails as a matter of law because of the insufficient pleading of the fraud counterclaim upon which it is predicated (see Gall v Summit, Rovins & Feldesman, 222 AD2d 225, 226 [1st Dept 1995]).

The third counterclaim, which alleges a negligent misrepresentation claim against Buyers, fails to state a claim. To assert such a claim, a party must allege the existence of a special or privity-like relationship which imposes a duty to impart correct information, that incorrect information was imparted, and reasonable reliance on the information (Mandarin Trading Ltd. v Wildenstein, 16 NY3d at 180).

Sellers fail to allege any special relationship between the parties. Instead, the record clearly demonstrates that the parties were engaging in a commercial, arms' length transaction (see Basis Pac-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co., 124 AD3d 538, 539 [1st Dept 2015] [arms' length transaction is not a special relationship]; MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept 2011]). In addition, the agreements at issue do not create a special relationship between the parties. Instead, they include specific

provisions regarding the relationship after the sale with regard to post-execution reimbursements, including installing an employee of Sellers to monitor Buyers, and provide that for one year after the closing the Sellers' computer server and financial records system would remain in place at the facilities (APA § 4.7).

With regard to Buyers' ownership structure, as Buyers correctly assert, the agreements indicate that Sellers completed a full investigation (REPA § 26). The counterclaim fails to allege that Sellers ever asked Buyers about their ownership, and if Sellers sought to require that Josefovic be directly involved, they could have included such a "key man" provision, but they did not.

Accordingly, it is

ORDERED that due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of plaintiff Buyers and against the defendant Sellers and that the plaintiffs are entitled to a preliminary injunction on the ground that the defendants threaten or are about to do, or are doing or procuring or suffering to be done, an act in violation of the plaintiffs' rights respecting the subject of this action tending to render the judgment ineffectual, as set forth in the above decision, and that the undertaking, bond or any other sufficient

security, is fixed in the sum of one hundred thousand dollars ($100,000) conditioned that the plaintiffs, if it is finally determined that they are not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are preliminarily enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants or otherwise, any of the following acts:

1) from terminating the contract pending trial of Buyers' claim;

2) from not extending the contract deadline up to an additional ninety days from the service of a copy of this order with notice of entry so that DOH may consider their amended applications;

3) from communicating to DOH that the transaction is not going forward;

4) from engaging in further efforts to undermine Buyers' DOH applications; and

5) from not cooperating with plaintiff Buyers' DOH applications; and it is further

ORDERED that the branch of plaintiffs' motion for a mandatory injunction is denied; and it is further

ORDERED that branch of plaintiffs' motion for partial summary judgment is granted to the extent of declaring that Sellers' termination based on the assignment provisions of the Asset Purchase Agreements and the Real Estate Purchase Agreements was not warranted and ineffective, and termination was not permitted on this basis, and declaring on the issue of the expiration of the time to close that plaintiff Buyers exercised their right under section 10.1 of the Asset Purchase Agreements for a reasonable extension of all time limitations (not to exceed ninety days) before the contract expiration date of April 18, 2016, and is otherwise denied; and it is further

ORDERED that defendants' cross motion for summary judgment is denied, and its application for attorneys' fees and costs is denied; and it is further

ORDERED that the plaintiffs' motion to dismiss all the counterclaims and the fourth and fifth affirmative defenses in the defendants' answer with amended counterclaims is granted and they are dismissed; and it is further

ORDERED that counsel shall appear for a status conference in Part 48 on October 18, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/4/16

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.