At an IAS Term, Part Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of November, 2016.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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Decision & Order

BEVERLY KESSLER, ROBERT KESSLER, JERROLD GENDLER M.D., JOSEPH QUENQUA, AND "JANE DOES #1-100", ON THEIR OWN BEHALF, AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Plaintiffs,

- against -

Index No. 514588/15

CARNEGIE PARK ASSOCIATES, L.P., CARNEGIE PARK TOWER, LLC, THE RELATED COMPANIES, L.P., 200 EAST 62ND OWNER, LLC; HFZ 90 LEXINGTON AVENUE OWNER LLC, HFZ 88 LEXINGTON AVENUE OWNER LLC, HFZ 235 WEST 75TH STREET OWNER LLC, HFZ 344 WEST 72ND STREET LLC, CLASSON ESTATE ONE LLC, 380 PROSPECT PARTNERS LLC, 466 FIFTEENTH STREET PARTNERS LLC, AND "JOHN DOES #1-100",

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	18-20, 78 24-29 54-75, 82-102,145
Opposing Affidavits (Affirmations)	80,103-106,107-117,125-126 119-123,147
Reply Affidavits (Affirmations)	129-132
Memoranda of Law	79, 81, 118 30 76

Upon the foregoing papers, in this proposed class action brought by plaintiffs Beverly Kessler (Beverly), Robert Kessler (Robert), Jerrold Gendler, M.D. (Jerrold), Joseph Quenqua (Joseph), and "Jane Does #1-100," on behalf of themselves and those similarly situated, namely, all other individuals who were disabled or 62 years of age or older when they resided in a New York City rental building that was converted into a condominium or a cooperative during their tenancy (collectively, plaintiffs) against defendants Carnegie Park Associates, L.P. (CPA), Carnegie Park Tower, LLC (CPT), The Related Companies, L.P. (Related), 200 East 62nd Owner, LLC (200 East 62nd Owner), HFZ 90 Lexington Avenue Owner LLC (HFZ 90), HFZ 88 Lexington Avenue Owner LLC (HFZ 88), HFZ 235 West 75th Street Owner LLC (HFZ 235), HFZ 344 West 72nd Street Owner LLC (HFZ 344), Classon Estate One LLC (Classon), 380 Prospect Partners LLC (380 Prospect), 466 Fifteenth Street Partners LLC (466 Fifteenth), and "John Does #1-100" (collectively defendants), plaintiffs move, by order to show cause, under motion sequence number one, for an order, pursuant to CPLR 6301, granting them a preliminary injunction as follows: (1) enjoining defendants from giving possession of apartments, which had been previously occupied by tenants who were disabled and/or were 62 years of age or older, to any prospective buyers or third-party individuals, from otherwise taking steps to frustrate or prevent the members of this protected class of tenants from re-occupying the apartments in which they had once resided, and from transferring the rights of use, occupancy, and possession to any third party other than the members of this protected class, and (2) requiring defendants to take the following steps and

actions: (a) immediately account for and provide a reconciliation of all apartments in their buildings which were occupied by persons who were disabled and/or were 62 years of age or older at the time that the offering plans were declared effective for these buildings, (b) provide all documentation, including leases, riders, lease renewals, correspondence, and opt-in forms concerning the persons residing in the apartments in the subject buildings between the time that the offering plan for each building was sent to the Office of the Attorney General and the time that the offering plan was declared effective, (c) disclose all contracts and agreements in which defendants have sold or are in contract to sell apartments in their buildings that had been occupied by persons who were disabled and/or were 62 years of age or older at the time that the offering plan was declared effective for each of these buildings, (d) disclose to the prospective purchasers of apartments in defendants' buildings that this class action has been filed, in which members of the class are asserting rights to the use, occupancy, and possession of the apartments that they may be purchasing and that these buildings may have a number of units which are occupied by members of this class, and (e) identify all other legal proceedings to which defendants are parties.

200 East 62nd Owner moves, under motion sequence number two, pursuant to CPLR 3211 (a) (7), for an order dismissing plaintiffs' amended complaint as against it in its entirety, or, in the alternative, for an order transferring the claims against it to New York County pursuant to CPLR 507. CPA, CPT, and Related move, under motion sequence number three, for an order: (1) pursuant to CPLR 507, transferring venue of this action to

New York County, or, in the alternative, (2) pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' amended complaint as against them in its entirety.

FACTS AND PROCEDURAL BACKGROUND

On December 20, 1984, CPA purchased property, located at 200 East 94th Street, in Manhattan, from the City of New York, and, in 1987, the subject building was constructed on its property (the building). The building was a 31-story tower that consisted of luxury residential apartments on the first through penthouse floors and four commercial units. None of the apartments were rent-controlled, and the tenants paid market-rate rents for their apartments. Beverly, Robert, Jerrold, and Joseph are all senior citizens who resided as tenants in rental apartments in the building. From approximately 2008 to March 2015, Beverly and Robert occupied apartment # 216 and Joseph occupied apartment #2718. Jerrold occupied apartment #2011 from approximately 2004 to 2015.

By 2014, during the time that plaintiffs were tenants, CPT had acquired ownership of the building from CPA. On April 30, 2014, CPT submitted a non-eviction offering plan to the Office of the Attorney General of the State of New York to convert the building into a condominium with 325 residential units, which was to be offered by it under the terms set forth in the offering plan. The Office of the Attorney General accepted CPT's offering plan for filing on December 22, 2014, and the offering plan was declared effective on August 14, 2015.

Plaintiffs allege that the offering plan constituted a unilateral option contract which contained terms for tenants who resided in the building under which they could either purchase the apartments in which they lived or remain in occupancy of their apartments as tenants. They assert that these contractual provisions granted an option to tenants, who were 62 years of age or older or disabled and in occupancy of their apartments on the date that the Attorney General accepted the offering plan for filing, to elect, within 60 days of the date the Attorney General accepted the plan for filing, on forms promulgated by the Attorney General and presented to them, to become non-purchasing tenants. They further assert that the offering plan provided that if they elected to become non-purchasing tenants, they could not be evicted from their apartments and had the right to remain as tenants with rents that were protected from unconscionable increases.

Plaintiffs allege that since they were all senior citizens on the date that CPT's offering plan was filed with the Office of the Attorney General, CPT should have given them the option to become non-purchasing tenants who would be protected from eviction and unconscionable rent increases. They assert that CPT failed to give them a form to elect to become non-purchasing tenants. They claim that if they had been given the form to elect to become non-purchasing tenants, they would have exercised their right to become non-purchasing tenants with protective rights, as senior citizens. They allege that instead of giving them the right to become non-purchasing tenants, CPT refused to offer them renewal leases with terms extending beyond the date when the offering plan was to be declared

effective and informed them that they were required to vacate their apartments when their leases expired. They state that when their leases expired in 2015, CPT sent them termination notices, and demanded that they give up possession of their apartments or be subject to eviction.

Upon the expiration of their leases, plaintiffs vacated their apartments and they are presently no longer in possession of them. After plaintiffs vacated their apartments, CPT sold or entered into contracts to sell nearly 87% of the condominium units in the building.

On December 1, 2015, plaintiffs filed their summons and complaint in this action against CPT, CPA (who, as previously noted, was the prior owner of the building), and Related (an affiliated entity). Since plaintiffs have brought this action as a proposed class action, on behalf of other tenants who are similarly situated, they have additionally named, as defendants, other owners of New York City apartment buildings who, pursuant to non-eviction offering plans, have converted those buildings from rental apartments to condominiums or cooperatives, and who, they claim, have also failed to offer tenants (who have not been named or identified), who are age 62 or older or are disabled, the opportunity to become non-purchasing tenants with protection from eviction and unconscionable rent increases.

These other named defendants are: (1) 200 East 62nd Owner, who was the sponsor of the conversion of a building, located at 200 East 62nd Street in Manhattan, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney

General on April 21, 2014 and accepted for filing on May 18, 2015, (2) HFZ 90, who was the sponsor of the conversion of a building, located at 90 Lexington Avenue, in Manhattan, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on November 26, 2013 and accepted for filing on May 18, 2015, (3) HFZ 88, who was the sponsor of the conversion of a building, located at 88 Lexington Avenue, in Manhattan, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on November 26, 2013 and accepted for filing on May 18, 2015, (4) HFZ 235, who was the sponsor of the conversion of a building, located at 235 West 75th Street, in Manhattan, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on November 13, 2013, accepted for filing on November 20, 2014, and declared effective on November 25, 2015, (5) HFZ 344, who was the sponsor of the conversion of a building, located at 344 West 72nd Street, in Manhattan, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on June 14, 2013 and accepted for filing on August 22, 2015, (6) Classon, who was the sponsor of the conversion of a building, located at 143 Classon Avenue, in Brooklyn, New York, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on September 19, 2014, accepted for filing on January 26, 2015, and declared effective on March 31, 2015, (7) 380 Prospect, who was the sponsor of the conversion of a building, located at 382 Prospect Place, in Brooklyn, New York, to cooperative ownership, whose non-eviction offering plan

was submitted to Office of the Attorney General on December 20, 2013 and accepted for filing on September 15, 2014, and (8) 466 Fifteenth, who was the sponsor of the conversion of a building, located at 466 15th Street, in Brooklyn, New York, to condominium ownership, whose non-eviction offering plan was submitted to the Office of the Attorney General on April 8, 2011 and accepted for filing on May 24, 2012.

Plaintiffs filed an amended complaint on February 11, 2016. Plaintiffs' amended complaint alleges nine causes of action. Plaintiffs' first cause of action for breach of contract alleges that defendants breached the terms of their respective offering plans by failing to affirmatively offer them the contractual right to elect to become non-purchasing tenants as defined in the offering plans, and failing to comply with the terms of the offering plans, which conferred special contractual rights upon them, including the right to remain in their apartments for as long as they desired to live there. They further allege, in this cause of action, that defendants breached their offering plans by failing to provide them with lease renewals, failing to provide them with leases protected from unconscionable rent increases, and wrongfully evicting them from their apartments. They claim that by wrongfully evicting them, defendants received an enormous financial windfall by being able to sell their vacant apartments for approximately three times more than the value of these apartments if they had remained occupied by them as tenants.

Plaintiffs' second cause of action for eviction alleges that defendants were required to provide continual lease renewals to them, and that by failing to offer them lease renewals,

they were unlawfully evicted from their apartments. Plaintiffs' third cause of action for constructive eviction alleges that defendants' failure to offer them lease renewals amounted to constructive eviction from their apartments.

Plaintiffs' fourth cause of action for loss of quiet enjoyment alleges that defendants, by their actions, interfered with their peaceful and quiet enjoyment of their apartments, and that defendants' actions amounted to a breach of the covenant of quiet enjoyment. Plaintiffs' fifth cause of action, pursuant to RPAPL 853, alleges that they were disseized and ejected from their homes by unlawful means committed by defendants which were intentional and/or reckless. Plaintiffs' sixth cause of action for breach of the covenant of good faith and fair dealing (consequential damages) alleges that defendants had an implied covenant with them that they could remain as tenants in their apartments and would not be evicted from them if they chose not to purchase them, and that defendants also had an implied covenant with them to offer them continuous lease renewals protected from unconscionable rent increases if they chose not to purchase their apartments. They assert that defendants breached these implied covenants with them, and, as a result, they are entitled to consequential damages. Plaintiffs' seventh cause of action for a declaratory judgment alleges that defendants should be directed to offer them a 60-day opportunity to elect to become non-purchasing tenants as eligible senior citizens and eligible disabled persons as affirmatively provided in the offering plans, and that those plaintiffs who do elect to become non-purchasing tenants should be allowed to return to the apartments in which they had previously resided and should be given all of

the protections of the status of eligible senior citizens and eligible disabled persons, including being given lease renewals that are protected from unconscionable rent increases.

Plaintiffs' eighth cause of action, pursuant to RPAPL 601, alleges that due to their wrongful eviction by defendants, they lost the use and occupancy of their apartments. Plaintiffs' ninth cause of action for unconscionable rent increases alleges that defendants failed to comply with the terms of the offering plan by failing to proffer to them renewal leases protected from unconscionable rent increases.

Plaintiffs' first, second, third, fourth, fifth, seventh, and ninth causes of action seek damages of not less than one hundred million dollars. Plaintiffs' sixth cause of action seeks damages of two hundred million dollars. Plaintiffs' eighth cause of action seeks damages of not less than twenty million dollars.

On April 8, 2016, plaintiffs filed their instant motion for a preliminary injunction. Plaintiffs' motion is opposed by defendants. 200 East 62nd Owner filed its motion on April 11, 2016, and CPT, CPA, and Related filed their motion on April 12, 2016. At a hearing held on April 18, 2016, plaintiffs' request for a temporary restraining order, pursuant to CPLR 6313, pending the decision on their motion for a preliminary injunction, was denied.

DISCUSSION

CPT, CPA, and Related's Motion to Dismiss

CPT, CPA, and Related, in their motion, initially point to the fact that only CPT was the sponsor of the offering plan, and that CPT, alone, submitted the offering plan to the

Office of the Attorney General. CPA and Related did not own the building or sponsor the offering plan upon which plaintiffs base their claims. While CPA and Related are affiliated with CPT, they are distinct and separate legal entities from CPT. Plaintiffs have not alleged any basis upon which their claims for liability can be predicated as against CPA or Related. Thus, dismissal of plaintiffs' amended complaint as against CPA and Related is mandated (*see* CPLR 3211 [a] [1], [7]).

With respect to CPT, CPT's offering plan (at page 25) provided that it was a non-eviction plan and was being presented in compliance with General Business Law § 352-eeee, which sets forth the procedure for converting dwelling units to condominium ownership. CPT's offering plan, under "Rights of Existing Tenants," at page 158, provided that "this is a non-eviction plan," and that "no non-purchasing tenant will be evicted by reason of conversion to condominium ownership." CPT's offering plan set forth a summary of rights of existing tenants in accordance with General Business Law § 352-eeee, and included a copy of this statutory section in Part II. CPT's offering plan defined "Non-Purchasing Tenant" as "a person who has not purchased a Residential Unit pursuant to the Plan and who is a tenant entitled to possession *at the time the Plan is declared effective*" (emphasis added).

CPT's offering plan expressly specified (at page 160) that "[u]nder this non-eviction Plan, tenants whose leases expire and against whom holdover proceedings are commenced before the Plan is declared effective retain only the minimal protections available to common-law 'tenant at sufferance,' and ARE NOT PROTECTED from eviction for failure

to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases absent some special circumstances, as found by a court of competent jurisdiction." This page of the offering plan further provided that "Non-Purchasing Tenants shall have no rights with respect to their Residential Units except as specifically set forth above and in the [General Business Law]," and that "[n]othing contained herein shall be deemed to grant Non-Purchasing Tenants any additional rights of occupancy with respect to the Residential Units."

At the time that CPT's non-eviction offering plan was declared effective, where tenants' leases expired during the time between the date the offering plan was submitted to the Office of the Attorney General (i.e., the New York State Department of Law) and the date the offering plan was declared effective, the New York State Department of Law's regulations, 13 NYCRR Parts 18 and 23, only extended protections against eviction to non-purchasing tenants who qualified as "eligible senior citizens" or "eligible disabled persons" in eviction plans, and did not offer these protections where the offering plan was a non-eviction plan. On November 10, 2015, approximately three months after CPT's offering plan was declared effective, the Department of Law adopted an emergency rule to amend 13 NYCRR Parts 18 and 23. A Real Estate Finance Bureau Memorandum, dated November 10, 2015, was published by the Department of Law, pursuant to State Administrative Procedure Act § 102 (14), to summarize the provisions of these emergency regulations "so that sponsors of condominium and cooperative non-eviction conversion offerings c[ould] conform their

offering plans accordingly." The Real Estate Finance Bureau Memorandum, in its introduction, set forth that the Department of Law had revised 13 NYCRR Parts 18 and 23, which concern "protections for senior citizen and disabled market-rate tenants whose buildings are converting to condominium or cooperative ownership to make clear that the non-purchasing tenant election process for eligible senior citizens and eligible disabled persons is also available to market-rate tenants in non-eviction plans."

The Real Estate Finance Bureau Memorandum, in its Summary of the Revised Regulations, stated as follows:

> "In brief, the emergency rule allows market-rate tenants whose buildings are converting to condominium or cooperative ownership pursuant to non-eviction plans to have the option to elect eligible senior citizen or eligible disabled person status during the conversion process. As previously drafted, the Department of Law's regulations only extended the election process to eligible senior citizens and eligible disabled tenants in eviction plans. As a result, tenants subject to non-eviction plans risked eviction from the date the offering plan was submitted to the Department of Law until the date the offering plan was declared effective, a period that could last between 10 and 24 months. Such a gap in tenant protection was inconsistent with the plain language of the Martin Act as well as the statute's legislative intent to protect all eligible senior citizens and eligible disabled persons from displacement during the conversion process.
>
> "The Department of Law has therefore amended its regulations on an emergency basis to make clear that the protections for senior citizen and disabled market-rate tenants apply to both eviction and non-eviction plans, thereby limiting the period during which eligible market-rate tenants subject to non-eviction plans are susceptible to displacement. In making this change, the Department of Law has ensured that its regulations are

> consistent with the tenant protection provisions of the Martin Act while still allowing property owners to convert to condominium and cooperative ownership."

The Real Estate Finance Bureau Memorandum, under the heading, "The Compliance Requirements for New Conversion Offerings," stated that "[u]nder the emergency regulations, sponsors of new condominium or cooperative conversion non-eviction offerings [would] now [be] required to," among other things, include, in the Notice to Tenants, language stating that the eligible senior citizen and eligible disabled tenants had "the right to elect to become a non-purchasing tenant within 60 days from the date [the tenant] first received the offering plan from the sponsor," "[i]nclude with the Notice to Tenants the eligible senior citizen and eligible disabled person election forms promulgated by the Department of Law," "[i]nclude in the offering plan the information of eligible senior citizens and eligible disabled persons detailed in 13 NYCRR § § 18.3 (l) and 23.3 (m)," "include the eligible senior citizens and eligible disabled persons election forms as an exhibit to the offering plan when it is submitted to the Department of Law for filing," and "[p]rovide renewal leases to eligible non-purchasing tenants who timely elect eligible senior citizen or eligible disabled person status."

The Real Estate Finance Bureau Memorandum set forth that the emergency regulations applied "to any and all *future* 13 NYCRR Parts 18 and 23 offerings submitted to the Department of Law," and also affected "[o]ffering plans that the Department of Law ha[d] accepted for submission, but ha[d] not yet accepted for filing" (emphasis added). It

further set forth that this emergency measure would be in effect for 90 days, and that the Department of Law had submitted a "Notice of Proposed Rule Making" in order "to permanently effectuate this change."

The emergency regulations, which went into effect on November 10, 2015, expired on February 8, 2016. A Real Estate Finance Bureau Memorandum, dated February 8, 2016, published by the Department of Law, discussed the fact that following the publication of the "Notice of Emergency Adoption and Proposed Rule Making" in the State Register on November 25, 2015, numerous public comments were received which "expressed concern that the language contained in the emergency regulations and proposed permanent regulations failed to make clear that such regulations [we]re solely prospective in application." It noted that the commentators had "explained that any retrospective application could be unduly burdensome to sponsors of conversion plans because units that sponsors expected to be available for sale could now be encumbered by unanticipated tenancies." It expressly stated that "[t]he Department of Law never intended for its regulations to be retrospective in application, nor punitive in nature towards sponsors." It explained that the Department of Law, therefore, "decided to let its emergency regulations expire on February 8, 2016 without permanently adopting the language contained therein,"[1] and, instead, "revis[ed] the proposed permanent regulations published on November 25, 2015

[1]Non-eviction conversion plans accepted for filing between November 10, 2015 and February 8, 2016 were required to adhere to all of the requirements of the emergency regulations published in the State Register on November 10, 2015.

to make abundantly clear that the regulations will affect only *future* condominium and cooperative conversion offerings." It set forth that the revised regulations explicitly state that only sponsors who have submitted their conversion offering plans to the Department of Law on or after September 1, 2016, and executed a contract of sale for the building or group of buildings or acquired the building or group of buildings on or after September 1, 2016, must comply with the new regulatory requirements," and that the Department of Law believed that "these revisions effectively dispel any confusion regarding retrospective application." It noted that since the emergency regulations expired on February 8, 2016 and the revised regulations would not be effective until September 1, 2016, during the period from February 9, 2015 to August 31, 2016, the regulations published prior to November 10, 2015 would be in effect. It specified that those regulations "only require[d] disclosure of the non-purchasing tenant election process for eligible senior citizens and disabled persons in eviction conversion plans." It clarified that the Department of Law believed that its revised regulations and those published in the State Register on November 25, 2015 had the same goal of "protecting *future* senior and disabled market-rate non-purchasing tenants from eviction during the conversion process in accordance with the intent of the Martin Act," and that the revised regulations "simply clari[fied] that such protections apply only prospectively." It noted that "the September 1, 2015 effective date ensure[d] that [the] regulations [would not be] unduly burdensome to sponsors of conversion plans" since it would "provide them adequate time

to adjust their business plans to reflect that certain tenants may remain in occupancy as non-purchasing tenants for longer than previously anticipated."

In addition, notice of the revised rules, published in the New York State Register Volume XXXVIII, Issue 8, dated February 24, 2016, entitled "Clarification of Protections for Senior and Disabled Tenants During Condominium or Cooperative Ownership Conversion," provided, under the heading "Needs and Benefits," as follows:

> "Current [Department of Law] regulations, drafted in 1989, only extend the 'eligible senior citizen' and 'eligible disabled person' election process to tenants subject to eviction plans. Senior and disabled market-rate tenants subject to non-eviction plans currently have no mechanism to elect to become 'eligible senior citizens' and 'eligible disabled persons,' and as such, cannot take advantage of the 'non-purchasing tenant' protections available to them under the statute. Consequently, this class of tenants risks eviction from the date the offering plan is submitted to the [Department of Law] until the date the offering plan is declared effective - a period that can last 10 to 24 months, and during which a property owner may permit market-rate leases to expire without offering renewal leases" (2016 NY REG TEXT 409901 [NS] at 4).

Under the heading "Compliance Schedule," this February 24, 2016 notice of the revised rules further provided:

> "The revised regulations will go into effect on September 1, 2016. Additionally, the revised regulations apply only to conversion plans submitted to the [Department of Law] on or after September 1, 2016 wherein the sponsor executed a contract of sale or acquired the building or group of buildings subject to conversion on or after September 1, 2016. The revised regulations will not apply to conversion plans not satisfying this requirement, and *are not retroactive in application*" (2016 NY REG TEXT 409901 [NS] at 5 [emphasis added]).

In clarifying that the revised regulations were not retroactive, the Department of Law stated:

> "There was concern that the current language of both the emergency and proposed regulations failed to make clear that such regulations were prospective in application. Specifically, they explained that any retrospective application of the regulations would result in undue burdens on sponsors. The commenters suggested that if the regulations were to apply retrospectively, units that sponsors expected to be available for sale could be encumbered by unanticipated tenancies. One commenter stated that such unforeseen changes would 'likely have far-reaching economic impact on developers who will suddenly find themselves with assets vastly diminished in value.' Notwithstanding, many commenters said they understood why the Department of Law was amending the regulations to extend the election process to seniors and disabled persons in non-eviction plans, but asked that the requirement be set into the future so as to make clear the change is not retrospective and to give developers an opportunity to reorganize their existing business plans. Because the emergency and proposed regulations were never meant to be retrospective in application, nor punitive in nature toward sponsors, the Department of Law has decided to revise the proposed regulations published in the State Register on November 25, 2015 to make abundantly clear that the regulations affect only future condominium and cooperative conversion offerings. The Department of Law always intended that these regulations would only apply prospectively, for the reasons stated by the commenters as well as the fact that retrospective application of these regulations would disrupt already settled tenant and purchaser relationships. The Department of Law has included a specific effective date in its revised regulations to dispel any additional confusion about their retrospective application. Indeed, the revised regulations state that only sponsors who have submitted their conversion offering plans to the Department of Law on or after September 1, 2016, and executed a contract of sale for the building or group of buildings or acquired the building or group of buildings on or after September 1, 2016,

> must comply with the new regulatory requirements. The Department of Law has also revised its Regulatory Impact Statement, Regulatory Flexibility Analysis, and Rural Area Flexibility Analysis to reflect these changes. The Department of Law believes that the above revisions effectively address any concerns of retrospective application. In addition, the Department of Law maintains that the prospective application of the revised application is not unduly burdensome to sponsors of conversion offerings. Although sponsors may need to adjust their existing business plans to take into account that certain tenants may remain in occupancy for a greater period of time than anticipated, senior and disabled market-rate non-purchasing tenants must continue to pay prevailing market rents; therefore, the cost to sponsors should be minimal, as there are no restrictions on rent, other than a prohibition against imposing unconscionable rent increases. The September 1, 2016 effective date in the revised regulations ensures that sponsors have adequate time to adjust their business plans accordingly" (2016 NY REG TEXT 409901 [NS] at 8).

In the Real Estate Finance Bureau Memorandum published by the Department of Law, dated August 31, 2016, under the heading, "Summary of Revised Regulations," stated that "[a]s previously drafted, the Department of Law's 13 NYCRR Parts 18 and 23 regulations only extended the election process to eligible senior citizens and eligible disabled tenants in eviction plans," and that "[a]s a result, tenants subject to noneviction plans risked eviction from the date the offering plan was submitted to the Department of Law until the date the offering plan was declared effective." Under the heading "Applicability of the Revised Regulations," the August 31, 2016 Real Estate Finance Bureau Memorandum expressly stated that "[t]he revised regulations affect only sponsors of conversion offerings who have both (1) submitted their conversion offering plan to the Department of Law on or after

September 1, 2016 and (2) executed a contract for the building or group of buildings or acquired the building or group of buildings on or after September 1, 2016." It specifically provided that "[t]he revised regulations have no retroactive application, and apply only to *future* conversion offerings."

Here, plaintiffs' claim that CPT breached the terms of its non-eviction offering plan is predicated on their contention that as eligible senior citizens and eligible disabled tenants, they had the right, under this plan, to become non-purchasing tenants and renew their leases. However, at the time that CPT's offering plan was accepted for filing on December 22, 2014 and even when it was declared effective on August 14, 2015, the emergency regulations, which did not become effective until November 10, 2015, were not yet in effect, and these emergency regulations were not retroactive. The revised regulations, which became effective on September 1, 2016, were also not retroactive. Thus, the regulations that were in effect prior to November 10, 2015 applied to CPT's offering plan, which required disclosure of the non-purchasing tenant election process for eligible senior citizens and disabled persons solely in eviction conversion plans and not in non-eviction plans. Since CPT's offering plan was a non-eviction plan, CPT was not legally required to offer plaintiffs renewal leases and protection from eviction when their leases expired or protection from unconscionable rent increases.

Plaintiffs argue, however, that the language of CPT's offering plan conferred upon them the contractual right to be treated as non-purchasing tenants who may not be evicted

under the offering plan as eligible senior citizens or eligible disabled persons. They contend that this contractual right was created because General Business Law § 352-eeee was incorporated into CPT's offering plan by the attachment of the full text of this section in its offering plan. The fact that CPT included a copy of this statutory section in Part II of its offering plan, however, did not cause the provisions applicable to eviction plans, which afford protections to eligible senior citizens and eligible disabled persons, to be conferred upon plaintiffs since the offering plan specifically disclaimed these protections by expressly stating that "[u]nder this non-eviction Plan, tenants whose leases expire and against whom holdover proceedings are commenced before the Plan is declared effective retain only the minimal protections available to common-law 'tenant at sufferance,' and ARE NOT PROTECTED from eviction for failure to purchase or any other reason applicable to expiration of tenancy and from unconscionable rent increases." This language explicitly contravenes plaintiffs' claim that CPT's non-eviction plan gave them the special protections from eviction afforded to eligible senior citizens and eligible disabled persons in eviction plans.

All of plaintiffs' claims, in their amended complaint, are predicated upon and rely upon alleged contractual terms in the offering plan that do not actually exist therein. The offering plan "simply does not say what plaintiff[s] claim it says" (*Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, __ AD3d __, 2016 NY Slip Op 07144, *1 [1st Dept Nov. 1, 2016]). "[W]here factual allegations or legal conclusions are flatly contradicted

by documentary evidence, they are not presumed to be true, or even accorded favorable inference" (*Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]). The documentary evidence of CPT's offering plan, which sets forth the rights and duties of the parties, prevails over plaintiffs' mere allegations in their amended complaint, which contradict CPT's offering plan's actual terms.

Plaintiffs further argue that under the Martin Act, the protections afforded to eligible senior citizens and eligible disabled persons are the same in eviction plans and non-eviction plans. They note that the period of time between the time the offering plan is accepted for filing and the time that it is declared effective is the time period at issue in this litigation. They cite to General Business Law § 352-eeee (1) (e), which defines a "non-purchasing tenant" as "[a] person who has not purchased under the plan and who is a tenant entitled to possession at the time the plan is *declared effective* or a person to whom a dwelling unit is rented subsequent to the effective date" (emphasis added). They note that, therefore, non-purchasing tenant status is triggered when an offering plan becomes effective, rather than at the earlier time when the Office of the Attorney General accepts the offering plan. They assert that in order to provide protection against eviction to eligible senior citizens and eligible disabled persons during the period between when the Office of the Attorney General accepts the plan and when the plan is declared effective, additional provisions were incorporated into the General Business Law which allowed such persons to obtain non-purchasing tenant status as soon as the proposed plans were filed with the Office of the

Attorney General. They contend that with respect to non-eviction plans, those provisions are found at General Business Law § 352-eeee (1) (f) and (g), which contain the definitions for "eligible senior citizens" and "eligible disabled persons," respectively. However, the terms "eligible senior citizens" and "eligible disabled persons," only appear in the section for eviction plans, i.e., General Municipal Law § 352-eeee (2) (d). "General Business Law § 352-eeee (2) (d), by its terms, applies only to eviction plans" (*Walsh v Wusinich*, 32 AD3d 743, 744 [1st Dept 2006]). As discussed above, the revised regulations were promulgated in order to extend "non-purchasing tenant" election rights to "eligible senior citizens" and "eligible disabled persons" that previously were afforded only in eviction plans to future condominium or cooperative non-eviction plans. As previously noted, however, these revised regulations are not retroactive and CPT's offering plan was accepted by the Office of the Attorney General for filing on December 22, 2014, prior to their effective date.

Plaintiffs also argue that the fact that the revised regulations are to be applied prospectively only does not prevent them from asserting their claims. They contend that they are not relying on these regulations, but are, instead, relying on statutory protections only. They assert that they are entitled to those protections as a matter of contract regardless of when and how the Attorney General chose to pass regulations. This argument is devoid of merit. As previously discussed, there is no provision in CPT's offering plan which gave plaintiffs any rights to renewal leases. Furthermore, article 23-A of the General Business Law authorizes the Attorney General to "adopt, promulgate, amend and rescind suitable rules

and regulations" to carry out the provisions of the Martin Act (*see* General Business Law § 352-e [2-b]; § 352-e [6]). The Department of Law's revisions to the regulations, which are prospective in application, are permissible under and consistent with the Martin Act. The court must reject plaintiffs' argument that this court should disregard the Department of Law's determination to apply the revised regulations prospectively only. As discussed above, the reason for not applying the revised regulations retroactively was to afford notice and adequate time to sponsors to adjust their business plans, to avoid an undue burden on sponsors, and to avoid the disruption of already settled tenant and purchaser relationships.

Thus, plaintiffs' first cause of action for breach of contract, which alleges a breach of the terms of the offering plan, fails to state a viable cause of action because, contrary to the allegations in plaintiffs' complaint, CPT's offering plan did not offer eligible senior citizens and eligible disabled persons the option to be treated as non-purchasing tenants with special tenancy rights requiring CPT to provide them with lease renewals and leases protected from unconscionable rent increases. Plaintiffs' second cause of action for eviction, third cause of action for constructive eviction, fourth cause of action for loss of quiet enjoyment, fifth cause of action pursuant to RPAPL 853,[2] sixth cause of action for breach of the covenant of good faith and fair dealing, seventh cause of action for a declaratory judgment, eighth cause of

[2]RPAPL 853 provides that "[i]f a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he [or she] has been put out, is held and kept out by force or by putting him [or her] in fear of personal violence or by unlawful means, he [or she] is entitled to recover treble damages in an action therefor against the wrong-doer."

action pursuant to RPAPL 601,[3] and ninth cause of action for unconscionable rent increases are similarly devoid of merit since they are dependent upon the same allegations and theory which underlie their breach of contract claim, i.e., that they were entitled to renewal leases and protection from eviction as non-purchasing tenants who are eligible senior citizens or eligible disabled persons. Since plaintiffs, under CPT's non-eviction offering plan which pre-dated the revised regulations, were not entitled to the protections during the conversion process that are afforded to eligible senior citizens and eligible disabled persons in eviction plans, these claims fail to state valid causes of action as against CPT and must be dismissed as against it (*see* CPLR 3211 [a] [1], [7]).

200 East 62nd Owner's Motion to Dismiss

While plaintiffs did not reside in the building at 200 East 62nd Street, they purport to bring this action on behalf of senior citizens and disabled persons who resided there during the process of its conversion into a condominium. 200 East 62nd Owner asserts that all of plaintiffs' causes of action against it are predicated upon contract terms which do not exist in its offering plan.

200 East 62nd Owner notes that Part I-L of its offering plan set forth the rights of non-purchasing tenants under the plan, and (at page 117) expressly provided that it was "a

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[3]RPAPL 601 provides, in pertinent part, that "[i]n an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he [or she] claims."

non-eviction plan, and that no non-purchasing bona fide tenant w[ould] be evicted by reason of conversion to condominium ownership. 200 East 62nd Owner points to the fact that its offering plan (at page 120) further provided that it conferred no rights to non-purchasing tenants other than those expressly set forth therein, or otherwise provided under the General Business Law, by expressly stating: "Non-Purchasing tenants shall have no rights with respect to their Residential Units except as same may specifically set forth above and in the [General Business Law]. Nothing contained herein shall be deemed to grant Non-Purchasing Tenants any additional rights of occupancy with respect to the Residential Units." 200 East 62nd Owner's offering plan did not contain any special provisions applying to senior citizens or disabled persons.

Thus, plaintiffs' claims, as alleged in their amended complaint, rely upon contract terms that do not actually exist in 200 East 62nd Owner's offering plan (*see Madison Equities, LLC*, 2016 NY Slip Op 07144, *1). Although plaintiffs are entitled to the benefit of every favorable inference on a motion to dismiss, the provisions of 200 East 62nd Owner's offering plan, which addressed the rights and duties of the parties, must prevail over plaintiffs' bare allegations in their amended complaint which are flatly contradicted by these provisions (*see Taussig*, 13 AD3d at 167; *Miglietta v Kennecott Copper Corp.*, 25 AD2d 57, 58 [1st Dept 1966]). Since 200 East 62nd Owner's offering plan unambiguously does not contain the terms upon which plaintiffs rely to support their causes of action, they fail to state a viable claim as against 200 East 62nd Owner.

While plaintiffs further argue that under the Martin Act, the protections afforded to eligible senior citizens and eligible disabled persons are the same in eviction plans and non-eviction plans and apply to 200 East 62nd Owner's non-eviction plan, 200 East 62nd Owner's offering plan was submitted by it to the Office of the Attorney General of the State of New York on or about April 21, 2014. In a letter dated May 18, 2015, the Office of the Attorney General stated that the offering plan was accepted and filed. Thus, since 200 East 62nd Owner's offering plan was accepted for filing on May 18, 2015, which was before November 10, 2015, 200 East 62nd Owner was not required to adhere to the requirements of the emergency regulations or the later revised regulations effective on September 1, 2016.

Plaintiffs also argue that 200 East 62nd Owner's offering plan incorporated the protections afforded to eligible senior citizens and eligible disabled persons by annexing a copy of the entire text of section 352-eeee of the General Business Law at pages 643 to 648 of its offering plan. The fact that 200 East 62nd Owner included a copy of this statutory section in its offering plan, however, did not cause the provisions applicable to eviction plans, which afford protections to eligible senior citizens and eligible disabled persons, to be conferred upon plaintiffs since 200 East 62nd Owner's offering plan specifically disclaimed these protections by providing that "[n]othing contained herein shall be deemed to grant Non-Purchasing Tenants any additional rights of occupancy with respect to the Residential Units." As discussed above, the terms "eligible senior citizens" and "eligible disabled persons" only appear in the subdivision of General Municipal Law § 352-eeee applicable to

eviction plans, i.e., General Municipal Law § 352-eeee (2) (d). Moreover, as previously noted, at the time that 200 East 62nd Owner's offering plan was accepted for filing (i.e., prior to November 10, 2015), the Department of Law's regulations then in effect did not give tenants in non-eviction offering plans the same protections afforded to eligible senior citizens and eligible disabled persons in eviction offering plans.

Since each of plaintiffs' causes of action are predicated upon their claim that they were entitled to renewal leases and protection from eviction as non-purchasing tenants who are eligible senior citizens or eligible disabled persons, and plaintiffs, under 200 East 62nd Owner's non-eviction offering plan, were not entitled to the protections afforded to eligible senior citizens and eligible disabled persons during the conversion process in eviction plans, none of these causes of action state a viable claim as against 200 East 62nd Owner. Thus, inasmuch as plaintiffs' amended complaint fails to state any viable claim as against 200 East 62nd Owner, as shown by the documentary evidence, 200 East 62nd Owner's motion to dismiss plaintiffs' amended complaint as against it must be granted (*see* CPLR 3211 [a] [1], [7]).

Change of Venue

CPLR 507 provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." 200 East 62nd Owner and CPT, CPA, and Related sought, in the alternative to their motions to dismiss, to

change the venue of this action to New York County, pursuant to CPLR 507, since their respective buildings are located there. Plaintiffs, in opposition, assert that venue is proper here on the basis that Classon, 380 Prospect, and 466 Fifteenth's buildings are located in Kings County. However, in view of the dismissal of plaintiffs' amended complaint as against CPT, CPA, Related, and 200 East 62nd Owner, the court need not address their motions, insofar as they seek the alternative relief of a change of venue, since they have been rendered moot.

Plaintiffs' Motion for a Preliminary Injunction

While plaintiffs' complaint has been dismissed as against 200 East 62nd Owner, CPT, CPA, and Related, the court must address plaintiffs' motion for a preliminary injunction with respect to the remaining defendants, namely, HFZ 90, HFZ 88, HFZ 235, HFZ 344, Classon, 380 Prospect, and 466 Fifteenth. Plaintiffs seek a preliminary injunction enjoining these defendants from giving possession of apartments, which had been previously occupied by tenants who were disabled and/or were 62 years of age or older, to any prospective buyers or third-party individuals, from otherwise taking steps to frustrate or prevent the members of this protected class of tenants from re-occupying the apartments in which they had once resided, and from transferring the rights of use, occupancy, and possession to any third party other than these tenants. Plaintiffs also seek a preliminary injunction requiring defendants to: (1) immediately account for and provide a reconciliation of all apartments in their buildings which were occupied by persons who were disabled and/or were 62 years of age

or older at the time that the offering plans were declared effective for these buildings, (2) provide all documentation, including leases, riders, lease renewals, correspondence, and opt-in forms concerning the persons residing in the apartments in the subject buildings between the time that the offering plan for each building was sent to the Office of the Attorney General and the time that the offering plan was declared effective, (3) disclose all contracts and agreements in which defendants have sold or are in contract to sell apartments in their buildings that had been occupied by persons who were disabled and/or were 62 years of age or older at the time that the offering plan was declared effective for each of these buildings, (4) disclose to the prospective purchasers of apartments in defendants' buildings that this class action has been filed, in which members of the class are asserting rights to the use, occupancy, and possession of the apartments that they may be purchasing and that these buildings may have a number of units which are occupied by members of this class, and (5) identify all other legal proceedings to which defendants are parties.

"To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor" (*M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. v Werner*, 126 AD3d 859, 860 [2d Dept 2015]; *see also* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Plaintiffs have failed to show a likelihood of success on the merits. Each of these defendants' offering plans were non-eviction plans which were accepted for filing by the Office of the Attorney General prior to November 10, 2015. Specifically, HFZ 90's offering plan was accepted for filing by the Office of the Attorney General on May 18, 2015, HFZ 88's offering plan was accepted for filing by the Office of the Attorney General on May 18, 2015, HFZ 235's offering plan was accepted for filing by the Office of the Attorney General on November 20, 2014, HFZ 344's offering plan was accepted for filing by the Office of the Attorney General on August 22, 2014, Classon's offering plan was accepted for filing by the Office of the Attorney General on January 26, 2015, 280 Prospect's offering plan was accepted for filing by the Office of the Attorney General on September 15, 2014, and 466 Fifteenth's offering plan was accepted for filing by the Office of the Attorney General on May 24, 2012. Since all of these non-eviction offering plan were accepted for filing before November 10, 2015, these defendants were not required to adhere to the requirements of the emergency regulations published in the State Register on November 10, 2015. Furthermore, none of these non-eviction offering plans contain terms which confer any special tenancy rights upon senior citizens or disabled persons.

Plaintiffs have not shown irreparable injury absent the granting of a preliminary injunction. Plaintiffs, in their amended complaint, seek more than $100 million in monetary damages. A movant cannot establish irreparable injury where he or she has an adequate remedy at law, such as money damages (*see Family-Friendly Media, Inc. v Recorder Tel.*

Network, 74 AD3d 738, 739 [2d Dept 2010]; *Schleissner v 325 W. 45 Equities Corp.*, 210 AD2d 13, 14 [1st Dept 1994]). "'Where the plaintiffs can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief'" (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2d Dept 2011], quoting *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2d Dept 2009]). In addition, plaintiffs have already vacated their apartments, and "there can be no irreparable injury where the injury has already been sustained" (*Art Capital Group, LLC v Getty Images, Inc.*, 24 Misc 3d 1247[A], 2009 NY Slip Op 51909[U], *9 [Sup Ct, NY County 2009]; *see also Allen v Pollack*, 289 AD2d 426, 427 [2d Dept 2001]).

Furthermore, the balance of the equities do not lie in plaintiffs' favor. None of the named plaintiffs presently resides or formerly resided in any of these buildings. Plaintiffs allege that the members of the proposed class of plaintiffs no longer occupy the units, and consist of tenants whose former leases terminated during the period between the acceptance of the offering plan with the Office of the Attorney General and the effective date of the offering plan. Defendants have entered into contracts for the sale of their condominium units or cooperative units or have already sold these units. A preliminary injunction, which would prevent defendants from delivering possession and transferring the rights of use and occupancy of the units to buyers, would impair existing contracts for the sale of units scheduled for closing.

To the extent that plaintiffs' motion for a preliminary injunction seeks an order requiring defendants to produce extensive documents and information, it is, in effect, seeking discovery. CPLR article 31 provides the procedure by which parties may seek discovery. Plaintiffs have not demonstrated any basis for seeking such discovery by way of a preliminary injunction. Thus, plaintiffs' motion for a preliminary injunction must be denied in its entirety.

CONCLUSION

Accordingly, plaintiffs' motion for a preliminary injunction is denied in its entirety. 200 East 62nd Owner's motion to dismiss plaintiffs' amended complaint as against it and CPT, CPA, and Related's motion to dismiss plaintiffs' amended complaint as against them are both granted, and plaintiffs' action as against 200 East 62nd Owner, CPT, CPA, and Related are severed and dismissed. In view of the granting of these motions to dismiss, 200 East 62nd Owner's motion and CPT, CPA, and Related's motion, insofar as they seek, in the alternative, an order transferring venue of this action to New York County, have been rendered moot.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. SYLVIA G. ASH, JSC