At an IAS Term, 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 29th day of May, 2018.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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CHAIM MILLER and 49 DUPONT LOFTS LLC,

Plaintiffs,

- against -

JOSEPH BRUNNER, et. al.,

Defendant(s).

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DECISION AND ORDER

Index # 509929/2018

Mot. Seq. 1 & 2

The following e-filed papers numbered 4 to 24 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	4 - 24
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	

After oral argument and upon the foregoing papers, the motion by Plaintiffs, brought by order to show cause, seeking an Order extending, suspending and/or staying the expiration date of certain letters of credit issued by Investors Bank naming 49 Dupont Realty Corp. ("Dupont Realty") as beneficiary and Dupont Street Developers LLC ("Dupont Developers") as the applicant, which are secured by $4,700,000 in collateral held in accounts at Investors Bank, or, in the alternative, directing Investors Bank to deposit the $4,700,000 in collateral with the Court (motion sequence 1) is hereby denied. Further, the motion by Plaintiffs, brought by order to show cause (motion sequence 2), seeking, among other things, reargument of this Court's denial of an interim stay in motion sequence 1 and, upon reargument, an Order granting Plaintiffs' various injunctive relief is granted to the extent that this Court grants reargument, but that the Court adheres to its original decision, and thus, Plaintiffs' requested injunctive relief is denied.

Background

This action is related to a previous and pending action before this Court captioned *Chaim Miller, et. al. v. Joseph Brunner, et. al.*, Kings County Supreme Court Index Number 512723/2015 (hereinafter referred to as the "Related Action"). Plaintiffs' claims in both actions arise from an

alleged scheme orchestrated by Defendant Joseph Brunner ("Brunner"), to deprive Plaintiffs of their contractual right to acquire title to valuable real property located at 49 Dupont Street in Brooklyn, New York (hereinafter the "Property").

The following allegations are derived from Plaintiffs' complaint in both actions. Pursuant to a written contract of sale dated June 8, 2012 ("Contract of Sale"), Brunner's entity, Dupont Developers, contracted to purchase the Property from Dupont Realty for approximately $20 million. Brunner thereafter effectuated a transfer of the contract rights from Dupont Developers to Defendant Anmuth Holdings, LLC ("Anmuth"), an entity controlled by Brunner. In or about June 2013, Brunner agreed to sell or "flip" his contract of sale to Plaintiff Chaim Miller ("Miller"), who formed Plaintiff 49 Dupont Lofts LLC for the purpose of receiving Brunner's rights to the Contract of Sale, for $39 million. Miller intended thereafter to "flip" the contract to a consortium of Chinese-based buyers led by Defendant Bo Jin Zhu ("Zhu") for approximately $49 million in such a way that the group led by Zhu would purchase the Property from Dupont Realty. However, Plaintiffs allege that Brunner told Miller that it was illegal for him to assign the contract of sale to Zhu's group. That instead, Brunner told Miller that he would assign his Contract of Sale to Zhu's group for over $49 million and that he would give approximately $11 million, less Brunner's actual costs in obtaining a letter of credit, from that sale to Miller.[1] The motions currently before this Court concern these letters of credit.

It is undisputed that a portion of the subject Property is listed on the New York State Registry of Inactive Hazardous Waste Disposal Sites and on the New York State Department of Environmental Conservation ("NYSDEC") Spills Database for petroleum discharge. As a result of these environmental conditions, pursuant to an Order on Consent and Administrative Settlement with NYSDEC, Dupont Realty, the "original" seller and owner of the Property, was obligated to implement an environmental remediation program and obtain a certificate of completion from NYSDEC. As part of the Contract of Sale, Brunner assumed Dupont Realty's remediation responsibilities under the NYSDEC Order. To ensure Brunner's compliance with payment of any remediation costs, upon the sale of the Property to Brunner, Brunner was contractually bound to provide a letter of credit in favor of Dupont Realty and to keep them in effect until remediation was completed. Accordingly, on May 20, 2014, after Brunner provided the cash collateral in the amount of $4,770,550 to Investors Bank, Investors Bank issued three letters of credit in the aggregate face amount of $4.7 million ("LCs") in favor of Dupont Realty, as beneficiary. The LCs' original expiration date was May 20, 2015.

[1] Plaintiffs allege that this arrangement with Brunner was encapsulated in a "side agreement" dated January 28, 2014.

Plaintiffs allege that Brunner used Miller's funds as collateral to obtain the LCs. In support of this contention, Miller proffers a document entitled Agreement Regarding Letter of Credit dated September 18, 2014, signed by Brunner on behalf of Anmuth (hereinafter referred to as the "Miller/Brunner Agreement"), which provides, in relevant part, that "Miller has an interest in the funds used as collateral for the Letters of Credit." Further, it provides:

> "In the event that Anmuth Holdings LLC receives a return of the collateral of $4,700,000.00 that was given to Investors Bank as collateral security for the Letters of Credit, the first $70,500.00 will be used to pay Anmuth back its fees, and from the remainder, Miller shall be entitled to receive the last $4,353,500 ($4,424,000 applied towards the letter of credit less the fees in connection therewith). Anmuth will deliver same to Chaim Miller promptly upon receipt of same."

Upon request by Brunner or Brunner's entity, Investors Bank extended the LCs for additional one-year periods in 2015, 2016, and 2017 with the latest expiration date being May 20, 2018.

Prior to the LCs' expiration date in 2016 and thereafter again in 2017, Plaintiffs sought, in the Related Action, a preliminary injunction enjoining Brunner, Anmuth, and any person or entity acting in concert with them from renewing the LCs on the basis that Miller never consented to his monies being used as collateral beyond the LCs' original expiration date of May 20, 2015. According to Miller, pursuant to the Miller/Brunner Agreement, he was entitled to a "return" of $4,353,500 on or around May 20, 2015. Plaintiffs' 2016 application for a preliminary injunction was denied by this Court's Decision dated June 3, 2016. Plaintiffs' 2017 application for a preliminary injunction was denied by the Hon. Leon Ruchelsman by Decision dated March 21, 2017.

On May 2, 2018, Plaintiffs sought, in the Related Action and by way of emergency application, an injunction directing Investors Bank to release the collateral directly to Miller upon the expiration or cancellation of the letters of credit and a temporary restraining order ("TRO") enjoining Investors Bank from releasing the collateral to any person or entity pending hearing of the motion. It is undisputed that Investors Bank had no intention of renewing the LCs upon the LCs' expiration date of May 20, 2018. Relying on the Miller/Brunner Agreement, Plaintiffs argued that Miller was entitled to the collateral directly from Investors Bank, and that pending the Court's determination as to Miller's entitlement, the Court should issue a stay enjoining Investors Bank from releasing the collateral to anyone other than Miller. The TRO was granted by the Hon. Peter Sweeney the same day, May 2, 2018.

As a result of the May 2, 2018 TRO in the Related Action, the upcoming LCs' expiration date, and the undisputed intention of Dupont Realty to draw down on the LCs prior to their

expiration, the affected parties filed an onslaught of preliminary injunction applications and TROs in the Related Action and the instant action, which was commenced by Plaintiffs on May 14, 2018, and which added Investors Bank, Dupont Realty and Greenacre Realty, Inc.[2] as defendants, among others. Upon presentment of Brunner's emergency application/motion, which was filed in response to Plaintiffs' emergency TRO and application, on May 3, 2018, by short form order, Justice Sweeney modified the May 2, 2018 TRO "to the extent of further restraining any party, entity or person from drawing down on the letters of credit."

On May 16, 2018, this Court heard oral argument as to the continuation of the TROs in the Related Action that were the subject of Justice Sweeney's orders. The Court also heard Plaintiffs' application for a TRO and preliminary injunction in the instant action, which was filed the same day, on May 16, 2018. This time, Plaintiffs sought an injunction staying the May 20, 2018 expiration date on the LCs until the conclusion of this litigation. Plaintiffs argued that a stay was necessary because, absent a stay, Dupont Realty would drawn down on the LCs due to their upcoming expiration date. According to Plaintiffs, if the expiration date was extended by the Court, Dupont Realty would not be "forced" or compelled to draw down on the LCs and, in turn, the collateral would be preserved, i.e., Investors Bank would not use the collateral to repay itself the monies paid out on the draw-down. Plaintiffs argued that due to the competing interests and claims to the collateral by Miller, Brunner and Dupont Realty, the LCs should be extended by the Court to preserve everyone's interests.

By short form order dated May 16, 2018, this Court lifted and vacated the May 2 and 3, 2018 TROs issued by Justice Sweeney in the Related Action and simultaneously struck the requested TRO staying the expiration date of the LCs in the instant action. The motions were then calendared for May 23, 2018.

On May 18, 2018, Plaintiffs moved by way of emergency application in the instant action seeking reargument of this Court's May 16, 2018 Orders, and upon reargument, granting a stay of the expiration date of the LCs, an injunction barring any person or entity from drawing down or requesting payment on said LCs, and an injunction against Investors Bank enjoining them from releasing the collateral to any person or entity. Plaintiffs also seek to consolidate this action with the Related Action. On May 18, 2018, the Hon. Ellen Spodek granted Plaintiffs a TRO pending the hearing date.

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[2] According to papers submitted by Greenacre Realty Inc., Dupont Realty changed its name to Greenacre Realty Inc. However, in this Decision, the Court continues to refer to the entity, now known as Greenacre Realty Inc., by its former name, Dupont Realty.

In seeking reargument, Plaintiffs argue that the Court misapprehended and overlooked the consequences of lifting and vacating the TROs because by doing so, Dupont Realty will draw down on the LCs despite the fact that the collateral securing the LCs belongs to Miller. Plaintiffs also contend that Dupont Realty will "run off" with the $4.7 million instead of using the funds for remediation purposes as Dupont Realty no longer owns the Property. Finally, Plaintiffs point out that there is a pending contract of sale for the Property whereby the new purchaser will assume all responsibility for remediation at the Property and provide replacement letters of credit, and thus, that the Court should preserve the "status quo" until such replacement letters of credit are provided.

On May 23, 2018, this Court heard oral argument on these motions and makes the following determination with respect to motion sequence 1 and 2 in the instant action which seek an injunction (1) extending, suspending and/or staying, until the conclusion of this litigation, the expiration of the LC or in the alternative, directing Investors Bank to deposit the collateral with the Court pursuant to CPLR 1006; (2) restraining any party from drawing down or requesting payment on the LCs; and (3) restraining Investors Bank from making payment on the LCs or releasing the collateral to any party. The related motions in the Related Action shall be decided in a separate order.

Discussion

The Court begins with the principle that "[p]reliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant'" (*Abinanti v Pascale*, 41 AD3d 395, 396 [2d Dept 2007][*quoting Peterson v Corbin*, 275 AD2d 35, 37 [2d Dept 2000], *quoting Nalitt v City of New York*, 138 AD2d 580, 581 [2d Dept 1998]]). "To prevail on a motion for a preliminary injunction, the moving party must establish: (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the moving party's position" (*Reuschenberg v Town of Huntington*, 16 AD3d 568, 569 [2d Dept 2005]).

"It is a fundamental principle that the letter of credit is completely independent of the contract between the customer and the beneficiary" (*Chiat/Day, Inc., Advertising v Kalimian*, 105 AD2d 94, 96 [1st Dept 1984]). The purchaser of a letter of credit is not a party to the letter of credit transaction and cannot enjoin the bank from paying, or the beneficiary from demanding, the funds pursuant to the letter of credit (*Id.* at 96-97).

Here, Plaintiffs are not entitled to the various injunctive relief that they seek. Plaintiffs are neither involved in the letter of credit transaction between the bank (Investors Bank) and the beneficiary (Dupont Realty) or even the sales contract between the applicant (Brunner/Anmuth) and the beneficiary (Dupont Realty). Because Plaintiffs do not have a relationship, contractual or

otherwise, with Investors Bank or Dupont Realty, Plaintiffs do not have a legally cognizable claim against them. Presuming the truth of Plaintiffs' allegation that Miller put up the collateral supplied by Brunner to Investors Bank, that fact does not negate the rights and obligations of Dupont Realty and Investors Bank under the letter of credit transaction. Thus, insofar as Plaintiffs seek to interfere in any way with the letter of credit transaction, Plaintiff's application for injunctive relief must fail.

Moreover, Plaintiffs' evidence, specifically the Miller/Brunner Agreement, only proves that Miller has a contingent entitlement to much of the collateral and that entitlement is triggered when the collateral is returned to Anmuth. However, the triggering event has not occurred, and thus, there can be no breach of that Agreement. Plaintiffs cannot force the contingency by way of preliminary injunction impinging upon the rights held by Investors Bank and Dupont Realty based entirely upon the "equities" of the case that Miller may have against Brunner. Thus, to the extent that Plaintiffs' claims have merit, Plaintiffs must seek relief from Brunner or Brunner's related entities.

In addition, to the extent that Plaintiffs suffer any harm as a result of Investors Bank's payment on the LCs, the harm that Plaintiffs are trying to prevent is purely monetary and therefore cannot constitute irreparable harm.

Based upon the foregoing, Plaintiffs' motions for a stay extending the expiration date of the LCs and an injunction restraining actions by Investors Bank and Dupont Realty under the LCs must be denied. That part of Plaintiffs' second order to show cause seeking consolidation of this action with the Related Action is granted.

Accordingly, the TRO imposed by Justice Spodek's Order dated May 18, 2018, shall be lifted and vacated effective 5:00 p.m. on May 31, 2018.

This constitutes the Decision and Order of this Court.

E N T E R,

Sylvia G. Ash, J.S.C.