SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 3

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JCMC Flatiron, LLC,

Plaintiff,

-against-

PRINCETON HOLDINGS LLC and JOSEPH TABAK,

Defendants.

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Index No. 653586/2013
Motion Date: 01/25/2018
Motion Seq. No. 003

**HON. EILEEN BRANSTEN, J.:**

This breach of contract action comes before the Court on a motion by Defendants Princeton Holdings LLC ("Princeton") and Joseph Tabak ("Tabak") for summary judgment. Plaintiff JCMC Flatiron, LLC ("JCMC") opposes the motion. For the reasons set forth below, the motion is denied.

## I. BACKGROUND

This action arises out of a joint venture between Plaintiff JCMC and Defendant Princeton to acquire tenant-in-common interests in fourteen valuable midtown Manhattan commercial properties. JCMC is a Delaware limited liability company with its principal place of business in New York. Joseph Chetrit is JCMC's principal and has over thirty years of experience in the real estate business. *See* Defendants' 19-a Statement ("Def. 19-a") ¶ 2; Plaintiff's 19-a Response Statement ("Pl. 19-a") ¶ 3. Defendant Princeton is a New York limited liability company and Defendant Joseph Tabak is Princeton's Chief

Executive Officer. *See* Def. 19-a ¶ 1. Although not expressly stated, it appears that the parties are all regularly involved in the acquisition and development of real estate.

**A. The Letter Agreements**

In 2011, Princeton entered into a series of transactions (collectively the "Letter Agreements") to acquire, with a third party, 50% of non-party Michael Ring's interests in fourteen Manhattan properties (collectively the "MR TIC Interests").[1] *See* Def. 19-a ¶6. Pursuant to the Letter Agreements, Princeton had the right to acquire the MR TIC Interests for the aggregate purchase price of $112,500,000. *See* Comp. ¶ 11. In accordance with the Letter Agreements, Princeton deposited $10,066,082.03 in escrow to secure its rights under the Letter Agreements. *See id.* ¶ 12.

The fourteen properties consisted of mixed-use buildings, aggregating approximately 1,000,000 square feet located in the Midtown South, Chelsea, and Flatiron areas of Manhattan (hereinafter the Ring Portfolio). *See* Def. 19-a ¶ 7. Michael Ring owned a 50% interest in thirteen of the Ring Portfolio Properties and only a 25% interest in one of the other properties, 251 Park Avenue South. *See id.* ¶ 8. The remaining interest was owned by Michael Ring's brother, Frank Ring. *See id at ¶ 6.* While the Ring Portfolio was owned by Michael and Frank Ring, the properties were left vacant and in a state of disrepair. *See* Def. 19-a ¶ 11.

[1] In Plaintiff's response, the Plaintiff disputes the percentage that can be acquired noting that the parties could effectively acquire 56.25% of Michael Ring's interest.

**B. The Ring Arbitration and Litigation**

Shortly after the Letter Agreements were executed, Michael Ring attempted to unilaterally terminate the Letter Agreements. *See* Def. 19-a ¶ 12. As a result, Princeton and non-party The Bluestone Group commenced litigation and arbitration proceedings against Michael Ring to enforce the Letter Agreements. *See* Pl. 19-a ¶ 12. On April 18, 2012, the Arbitrator issued a Partial Final Award (the "First Arbitration Award"), holding, *inter alia*, that the Letter Agreements were a "binding and enforceable agreement" and directing the parties to "negotiate final LLC Documents in good faith, proceed to a Closing and notify the Arbitrator to the extent there are further disputes requiring resolution." *See* Def. 19-a ¶ 14; *See also* Santolli Affirm. Ex. 21 at 16. Ultimately, the Arbitrator issued three additional partial final awards, the last of which was issued on October 12, 2012. *See* Def. 19-a ¶ 27.

On May 31, 2011, Princeton commenced an action to confirm the First Arbitration Award in New York Supreme Court, captioned *Princeton Holdings LLC v. Michael Ring & the Broadsmoore Group, LLC*, Index No. 651483/2011. *See id at* ¶ 16; *see also* Santolli Affirm. Ex. 25. Michael Ring cross-moved to vacate the First Arbitration Award. *See* Def. 19-a ¶ 16; *see also* Santolli Affirm. Ex. 26. However, the motions were never resolved by the Court, as the action was discontinued with prejudice pursuant to the parties' Stipulation of Discontinuance, dated June 18, 2013, filed by Extell Development Company ("Extell") and Michael Ring. *See* Def. 19-a ¶ 17, *see also* Santolli Affirm. Ex. 73.

### C. The Contribution Agreement

Following the First Arbitration Award, Princeton began contacting parties in the commercial real estate industry about a potential transaction involving Princeton's interest in the Ring Portfolio. *See* Def. 19-a ¶ 19. On August 7, 2012, Princeton and JCMC entered into a contribution agreement ("Contribution Agreement"). *See id. at* ¶21. JCMC paid Princeton $12.5 million and deposited an additional $1 million for expenses. *See id* at ¶ 43. In return, JCMC received an assignment of the $10.1 million Princeton had paid as a deposit to secure the Letter Agreements. *See id.* At the time the Contribution Agreement was executed, Princeton was still engaged in the Ring Arbitration and Ring Litigation. *See id.* ¶ 25.

Defendants argue that JCMC would become a 50% partner with Princeton if Princeton closed on the acquisition of the MR TIC Interests and if JCMC paid the product of $460,000 multiplied by the Acquired Percentage Points under Section 2(b)(iv)(A) of the Contribution Agreement. *See id at* ¶ 32. Acquired Percentage Points were defined as "the number of percentage points of the MR TIC Interests acquired by the Company, directly or indirectly (including through one or more entities) on the Closing Date pursuant to the Letter Agreements and any Remaining Interest Agreements." *See* Def. 19-a ¶ 33; Santolli Affirm. Ex. 1 § 1.

**D. Princeton Assigns Its Rights Under the Letter Agreement to Extell**

On December 6, 2012, Michael Ring and Extell entered into an agreement relating to a potential settlement transaction with Princeton; Extell agreed it would acquire Princeton's interest in the Portfolio. *See* Def. 19-a ¶¶ 57-58. Around the same time in December 2012, Princeton and Extell began discussions regarding a potential settlement for the Letter Agreements. *See* Def. 19-a ¶ 57; Pl. 19-a ¶ 57.[2] In January 2013, Extell, through its President Gary Barnett, offered Princeton $65 million for a payout with Michael Ring. *See* Def. 19-a ¶¶ 61, 63. Representatives from JCMC and Princeton had multiple communications regarding the Extell transaction prior to closing. *See* Def. 19-a ¶¶ 63-67. Plaintiffs assert Joseph Tabak, Princeton's representative, never discussed that he was selling the MR TIC Interest and/or the Letter Agreements to Extell and never discussed the settlement between Princeton and Michael Ring with the Plaintiff. *See* Pl. 19-a ¶ 64.

Nevertheless, on April 19, 2013, Princeton and Extell executed a contract titled "Purchase Agreement" (the "Extell Purchase Agreement") and the transactions contemplated therein closed on June 18, 2013. *See* Pl. 19-a ¶ 72. On June 19, 2013, Princeton's counsel informed JCMC's counsel that the Extell Purchase Agreement had closed. *See* Pl. 19-a ¶ 65. In connection with the Extell Purchase Agreement, Princeton

[2] The parties dispute whether the agreement between Extell and Michael Ring or the discussions between Extell and Princeton occurred first.

received $65 million, of which Princeton distributed $21,410,048 to JCMC. *See Id.* ¶¶ 89-90.

At the time Princeton and Extell executed the Extell Purchase Agreement, the litigation and arbitration proceedings between Princeton and Michael Ring—as to whether the Letter Agreements were enforceable—were still pending. *See* Def. 19-a ¶ 87. After the Extell Purchase Agreement transaction closed on June 18, 2013, Extell substituted itself for Princeton and filed stipulations of discontinuance litigation and arbitration proceedings. *See id.* ¶ 88.

**E. Procedural History**

JCMC commenced this action by filing the Summons and Complaint on October 16, 2013, alleging seven causes of action against Defendants for breach of contract, breach of fiduciary duty, constructive trust, breach of the covenant of good faith and fair dealing, fraud, conversion, and an accounting. Defendants moved to dismiss the Complaint on December 9, 2013. On September 29, 2014, the Court entered a Decision and Order granting in part and denying in part Defendants' motion to dismiss. *See* NYSCEF No. 66. The Court dismissed JCMC's causes of action for breach of fiduciary duty, constructive trust, breach of the implied covenant of good faith and fair dealing, conversion, and accounting. The Court denied the motion as to JCMC's breach of contract and fraud causes of action and defendants filed an answer to the Complaint on December 12, 2014.

In its surviving causes of action, JCMC contends that Princeton breached the Contribution Agreement by assigning its interests in the Letter Agreements to third party Extell and that JCMC did not receive sufficient payment for its share of the assignment proceeds, specifically, lost profits, tax consequences from the loss of the like-kind transfer and good will. JCMC also claims that Tabak made a series of misrepresentations, which induced JCMC to enter into the Contribution Agreement, and argues both Defendants deliberately took steps to conceal their negotiations with nonparty Extell and the subsequent sale of their interest in the Letter Agreements.

## II. ANALYSIS

Defendants move for summary judgment dismissing JCMC's breach of contract and fraud claims pursuant to CPLR 3212.

### A. Summary Judgment Standard

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *see also Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

Summary judgment is a drastic remedy, to be granted only where the moving party has "tendered sufficient evidence to demonstrate the absence of any material issues of

fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *See Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012). The moving party's failure to "make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." *See id.*

**B. Legal Capacity to Sue**

Defendants argue JCMC does not have legal capacity to maintain this action on the basis that JCMC is a foreign limited liability company ("LLC") that is not authorized to do business in New York. Defendants first raised this issue as an affirmative defense in their Answer. Limited Liability Company Law § 808 precludes the maintenance of an action by foreign corporations doing business in New York State without a certificate of authority. Similarly, Business Corporation Law § 1312 contains an equivalent prohibition that is applicable to LLCs.

At the outset, the court acknowledges receipt via e-filing (NYSCEF No. 242) on March 2, 2018 and by hand delivery on March 5, 2018 copies of JCMC's certificate of authority to do business in New York entitled Certificate of Publication, pursuant to Section 802 of the LLC Law, dated February 20, 2018 and issued by the NYS Department of State.

Generally, a foreign LLC's "failure to obtain a certificate of authority to do business in New York before initiating the action" is considered a nonfatal jurisdictional defect that is curable. *Basile v. Mulholland*, 73 A.D.3d 597, 597 (1st Dep't 2010). This defect may be cured before the end of the litigation by obtaining the certificate of authority prior to the resolution of the action and "its absence is an insufficient basis upon which to grant summary judgment." *Uribe v. Merchants Bank of N.Y.*, 266 A.D.2d 21, 22 (1st Dep't 1999) (applying BCL §1312).

In complying with the requirements of Limited Liability Company Law § 808 by procuring such certificate of authority to conduct business within the state, and submitting proof thereof, this aspect of the Defendants' motion is mooted.

**C. Breach of Contract Claims**

In order to sustain a breach of contract action, plaintiff must establish the existence of a valid agreement, plaintiff's performance of its obligations thereunder, defendant's breach of its obligations and resulting damages. *See Morris v. 702 E. Fifth St. HDFC,* 46 A.D.3d 478, 479 (1st Dep't 2007); *Flomenbaum v. N.Y. Univ.*, 71 A.D.3d 80, 91 (1st Dep't 2009), *aff'd* 14 N.Y. 3d 901 (2010).

Princeton argues that it did not breach the Contribution Agreement by entering into the Extell Purchase Agreement because the Contribution Agreement was structured so that (1) JCMC would have a purely passive role, (2) no obligation was imposed on Princeton to close on the acquisition of the MR TIC Interests, and (3) Princeton would

have sole discretion to make all decisions regarding the Letter Agreements, including settling disputes with Michael Ring. In addition, Princeton asserts it informed JCMC about the Extell Purchase Agreement and acted in good faith in accordance with the terms of the Contribution Agreement. Princeton further argues JCMC was not damaged by Princeton's decision to treat the Extell Purchase Agreement as if it had closed with Michael Ring.

**1. Whether Closing on the Letter Agreements is a Condition Precedent**

In essence, Defendants argue JCMC purchased an option to enter into a joint venture, if Princeton was able to close on the MR TIC acquisition. The Contribution Agreement is argued to have neither imposed an obligation on Princeton to consummate the MR TIC acquisition nor did it require Princeton to use "reasonable," "best" or any other type of "efforts" to consummate the MR TIC acquisition.

Both parties acknowledge closing on the Letter Agreements was an express condition precedent to certain obligations under the Contribution Agreement. *See* Def. 19-a ¶ 44; Pl. Opp. Br. at 10; Santolli Affirm. Ex. 1. Specifically, the relied upon language in the contribution agreement states:

> §8(d) The obligation of Contributor to effect the Closing shall be subject to the fulfillment or written waiver by Contributor at or prior to the Closing Date of the following conditions: (iii) The MR TIC Interests Acquisition shall be closing concurrently or immediately following the Closing.
>
> §9 The closing of the transactions in Section 2(b) hereof (the "Closing} shall occur, and the documents referred to in Section 8 shall be delivered

> upon the contribution and assignments to the Company by Contributor and JC Partner as provided in Section 8, by 10:00 am eastern time on the date on which the MR TIC Interests Acquisition is closing (the "Closing Date").

An express condition, or "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." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995). A contractual duty ordinarily will not be construed as an express condition "absent clear language showing that the parties intended to make it a condition." *See Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 79 N.Y.2d 576, 581 (1992).

The Contribution Agreement is riddled with language indicating that the closing of the letter agreements is merely contemplated by the parties agreement. *See Santolli Affirm. Ex. 1* ("WHEREAS, Contributor is a party to a letter agreement . . . dated February 23, 2011, which was amended by two letter agreements, each dated March 14, 2011 . . . pursuant to which Contributor **expects** to acquire . . .). The contract declares the parties were to create a joint LLC; the Defendant would then assign its rights under the letter agreement to the LLC and the Plaintiff would pay money in consideration therefore. *See* Santolli Affirm. Ex. 1 (WHEREAS . . . Contributor will form a Delaware limited liability company . . . Contributor will assign to the company all of Contributor's rights, title and interest in, to and under the letter agreements). There is no dispute, in fact, that the parties contemplated that the consummation of the MR TIC Interests acquisition might never close. *See e.g.*, Santolli Affirm. Ex. 1 § 7 (stating "**If** the Closing occurs); § 9 (providing the Contribution Agreement would terminate if Closing on the

Letter Agreements did not occur within five years of execution of the Agreement). Closing on the Letter Agreement is therefore a condition precedent to the contract.

**a. Whether Defendant' Failure to Close on the Letter Agreement Frustrated Fulfillment of the Condition Precedent**

Plaintiff argues that the Defendant expressly failed to fulfill the condition precedent thereby frustrating the contract. As a result, the Plaintiff argues that the Defendant is barred from using the failure to close on the Letter Agreements as a defense. It is well settled, that a "condition precedent is linked to the implied obligation of a party not to 'do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'". *See A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 N.Y.2d 20, 31 (1998), quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 N.Y. 79, 87 (1933). The general rule is that "a party cannot insist upon a condition precedent, when its non-performance has been caused by himself." *See id.* quoting *Young v Hunter*, 6 N.Y. 203, 207 (1852); *see also Coby Elecs. Co., Ltd. v. Toshiba Corp.*, 108 A.D.3d 419, 420 (1st Dept 2013).

The Defendant argues that this is inapplicable given that the express fulfillment, or nonfulfillment, of the closing on the letter performance was a contemplated and bargained for risk contained within the Contribution Agreement. Specifically, Section 4(b)(i) reads:

> Contributor and its affiliates shall be entitled, in their sole discretion, without obtaining any consent from JC Partner, to: (i) make all decisions with respect to the Letter Agreements and the transactions and other matters addressed in the Letter Agreements, including (A) agreeing to any amendments to the Letter Agreements, (B) negotiating and executing any agreements Contributor determines are necessary in order to carry out, and where relevant close, the transactions contemplated by the Letter Agreements, and (C) any and all decisions with respect to any arbitration or litigation with respect to the Letter Agreements, including the arbitration and litigation currently ongoing with respect to the Letter Agreements *See* Santolli Affirm. Ex. 1 at §4(b)(i).

Given the language of this section, it is apparent that a failure of the Defendant to close on the Letter Agreements was a contemplated and negotiated risk. Section 10(b)(ii) of the Contribution Agreement provides, however, that:

> If (x) Contributor is otherwise obligated to close under this Agreement but willfully fails to close under this Agreement in order to enable Contributor to enter into a binding written agreement with another party pursuant to which Contributor will sell or otherwise transfer to such party (including by entering into a joint venture with such party) all or any portion of Contributor's rights under the Letter Agreements, and (y) Contributor enters into such a binding written agreement with such party prior to or within 30 days following the Closing Date, then JC Partner as its sole remedy by reason thereof may elect, by written notice delivered to Contributor within 90 days following the Closing Date (time being of the essence), either (A) the remedy described in clause (i) above, or (B) to pursue any remedy available to JC Partner at law or in equity, including seeking specific performance or monetary damages (but excluding incidental or consequential damages, except for reasonable attorneys fees incurred by JC Partner in pursuing such remedy), it being agreed that if JC Partner does not deliver to Contributor within 90 days following the Closing Date (time being of the essence) a written notice specifying which of remedy (A) or remedy (B) JC Partner is electing. JC Partner shall be deemed to have elected remedy (A) (i.e., the remedy described in clause (i) above) *See* Santolli Affirm. Ex. 1 at §10(b)(ii).

On its face, the contract seemingly contradicts itself in that it grants Defendant an unfettered right to settle the Ring disputes, however, but also anticipated that the Defendant will attempt to close on the Agreement. In construing a contract, "[a]n interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation. Therefore, where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." *See Perlbinder v. Bd. of Managers of 411 E. 53rd St. Condo.*, 65 A.D.3d 985, 986–87 (1st Dep't 2009). Therefore, the court must conclude that the parties did not intend to permit the Defendant to transfer its rights under the Letter Agreement prior to the Closing unless such a transfer was a calculated decision designed to resolve the Ring litigation and arbitration. *See id.* (requiring the Court to reasonably reconcile conflicting provisions so as to give them both effect).

**b. Whether the Extell Purchase Agreement is a Settlement Transaction with Michael Ring**

Defendants argue the structure and terms of the Extell Purchase Agreement evidence the parties' intention to settle the disputes between Princeton and Michael Ring. Specifically, the Extell Purchase Agreement was conditioned on Princeton and Michael Ring exchanging mutual releases of all claims they had against one another. *See* Santolli Affirm. Ex. 27 § 3(a)(iii), Ex. G (Mutual Release). In addition, the Extell Purchase

Agreement provided Extell would be substituted for Princeton in the Ring Arbitration and Litigation. *See id at* §3(a)(iv).

In opposition, JCMC argues that it is clear from the terms of the Extell Purchase Agreement that it was not a settlement agreement. As JCMC argues, the document is titled "Purchase Agreement", does not explicitly provide for the settlement of the Ring Arbitration or Litigation, and refers to Princeton as an "Assignor". The Extell Purchase Agreement provides "Assignors desire to sell and assign to Extell, and Extell desires to purchase and assume from Assignors, all of each Assignor's respective right, title and interest in, to and under the [Letter Agreements]." *See* Santolli Affirm. Ex. 27 at PH000327.

When determining whether a claim has been discharged by an agreement with finality, "[t]he question always is whether the subsequent agreement, whatever it may be, and in whatever form it may be, is, as a matter of intention, expressed or implied, a supersede of, or substitution for, the old agreement or dispute . . . ." *Goldbard v. Empire State Mut. Life Ins. Co.*, 5 A.D.2d 230, 233 (1st Dep't 1958).

Neither the Extell Purchase Agreement, nor the mutual release of the Ring litigations contains the words "Settlement Agreement". *See* Santolli Affirm. Ex. 27. In addition, the court notes that there were two sealing motions decided in connection with this motion. *See January 18, 2018 Decision and Order (Mot. Seq. 4); see also January 18, 2018 Decision and Order (Mot. Seq. 5).* Interestingly, the sealing motions neglected to include numerous exhibits which were filed under seal or in redacted form in support

of the instant motion. *See Plaintiff's 19-A* ¶¶*54-59; 77-85; 93.* These improperly sealed exhibits directly go to the issue of whether the Extell transaction was made as part of a settlement agreement and therefore the question is not ripe for decision in light of the glaring sealing issues.

**2. Whether Defendants Breached their Obligation to Keep Plaintiff Informed, Pursuant to Section 4 (c) of the Contribution Agreement**

Defendants argue they satisfied their obligation under Section 4(c) of the Contribution Agreement by informing JCMC of the Extell Purchase Agreement and the surrounding negotiations. Section 4 (c)(iii) provides, "Contributor shall: . . . inform [JCMC] of any proposed settlement with Michael Ring of the ongoing litigation and arbitration with Michael Ring regarding the MR TIC Interests Acquisition, before entering into any such settlement." *See* Santolli Affirm. Ex. 1 § 4(c)(iii).

On October 15, 2012, Princeton's representative, Joseph Tabak, forwarded an email from his counsel apprising JCMC about obtaining a favorable arbitration award and attached the First Arbitration Award. *See* Santolli Affirm. Ex. 45. On October 17, 2012, Princeton's General Counsel emailed JCMC's representative, Joseph Chetrit, and its attorney, pursuant to Section 4(c) of the Contribution Agreement, with an attached copy of the aforementioned award as well as a Partial Final Arbitration Award Relating to Michael Ring's $55 Million Preferred Equity Investment, dated August 16, 2012, and a Corrected Partial Final Arbitration Award relating to the Sale or Pledge of the Venture

Loan and The Dispute Resolution Provisions of the Definitive Documents dated September 10, 2012. *See* Santolli Affirm. Ex. 46.

On January 8, 2013, Princeton's General Counsel emailed JCMC's attorney, with a copy to Joseph Chetrit, a Uniform Resource Locator (URL) linking "to a site containing copies of every document filed in connection with the Ring litigation as of August 2012". *See* Santolli Affirm Ex. 54.

On January 27, 2013, Tabak emailed Chetrit requesting a meeting to discuss a settlement offer for a payout with Ring. *See* Santolli Affirm. Ex. 56. The next day, Chetrit and Tabak exchanged emails and Chetrit wrote that he was five minutes away from their meeting location. *See* Santolli Affirm Ex. 57. On February 18, 2013, Chetrit emailed Tabak requesting an update about Ring whereupon Tabak responded "You make it sound like I don't update you you [sic] with what's happening. I'm waiting to get this finalized its [sic] not done yet but we are close. As soon as we're done il [sic] tell you" and the parties agreed to meet. *See* Santolli Affirm. Ex. 59 at 2.

Chetrit followed up with Tabak by email on April 25, 2013 and Tabak answered "As I told you I'm done with Garry[3] he should be wrapping up with Azzugi in the next few days", to which Chetrit responds: "R [sic] u [sic] getting a contract from Barnett with a deposit?" *See* Santolli Affirm. Ex. 64. On April 30, 2013, Chetrit writes Tabak "In ref

[3] Presumably, "Garry" refers to Gary Barnett, President and Founder of Extell.

[sic] to Ring, we should ask 12.5M deposit to replace my deposit. This way I take my deposit now (is that doable), see if u [sic] can work this out". *See* Santolli Affirm. Ex. 65 at 2. Tabak emails back: "Joe, because its [sic] a contract with Garry not Ring we can't get the ring deposit involved. Don't worry this is a done deal!!" *See id.*

On May 17, 2013, Chetrit emails Tabak "can I get the deposit that Barnett send [sic] you, and backed [sic] by my deposit I would like to use that money today". *See* Santolli Affirm. Ex. 68.

In addition, as pointed out by defendants, and contrary to plaintiff's allegations of a "secret sale," plaintiff admits in its Memorandum of Law that it was aware of the Extell transaction "two days before that transaction closed". Pl.'s Br. at 16. JCMC's attorney emailed on June 19, 2013 asking whether the deal with Barnett closed, to which Princeton's attorney responds in the affirmative. *See* Santolli Affirm. Ex. 74.

On this record, it appears that Princeton generally complied with its obligations to keep plaintiff informed about the ongoing negotiations consistent with its obligations under the Contribution Agreement.

However, plaintiff disputes ever discussing Princeton's sale of the MR TIC Interests and/or the Letter Agreements to Extell; being told about any "settlement" with or between Princeton and Michael Ring (*cf.* Santolli Affirm. Ex. 56); knowing about the existence or signature of the Purchase Agreement until two days prior to its closing; or learning about the specific terms of the contract until it was produced during discovery in this litigation. *See* Chetrit Affid. at ¶¶ 8-10. There is no proof that the Defendants

provided a copy of the stipulations of substitution and of settlement; the mutual releases; or the Extell Purchase Agreement to plaintiff.

While there appears to be a general knowledge as to the fact that there was a settlement offer, there is no documentary evidence which supports the degree to which JCMC was made aware of the settlement. *See e.g.* Santolli Affirm. Exs. 56-57 (requesting a meeting regarding a settlement and confirming a meeting was to occur at 9:00 am on the following day). Summary judgment on this issue is therefore denied.

**D. Fraud Claims**

The essential elements of a cause of action for fraud include a misrepresentation or material omission of fact, known to be false when made, scienter, reasonable reliance and resulting damages. *See Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 421 (1996); *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 A.D.3d 89, 98 (1st Dept 2010); *Lanzi v. Brooks*, 54 A.D.2d 1057, 1058 (3d Dept 1976), *affd* 43 N.Y.2d 778 (1977).

In its complaint, plaintiff alleges that both Princeton and Tabak "engaged in a fraudulent scheme to induce JCMC to substitute its funds for the funds of Defendants invested in the joint venture and to commit substantial funds, . . ., to the joint venture, and then through deception and concealment embarked upon a plan to sell the key asset the joint venture sought to acquire". *See* Comp. ¶91.

Plaintiff further alleges that it relied on these misrepresentations and was damaged as a result of the defendants' fraudulent actions, *id.* at ¶99, notably by having to forego the tax benefits of a like-kind exchange transaction. *See* Chetrit Affid. at ¶¶14-15.

Plaintiff's Representative, Joseph Chetrit, in his affidavit opposing the instant motion states:

> "8. I reaffirm my deposition testimony that I never discussed with Tabak that he was selling the MR TIC Interest and/or the Letter Agreements to Extell Development Company ('Extell').
> 9. I further state that, as I was never told of such a transaction, I also was never told of any settlement with or between Princeton and Michael Ring ('Ring').
> 10. I reaffirm my deposition testimony that I never knew that a contract existed or had been signed between Defendant Princeton Holdings LLC ('Princeton') and Extell until two days prior to the closing of that contract. I never learned the specific terms of the Princeton/Extell contract until the contract was produced during discovery in the above-captioned litigation."

*Id.* at ¶¶8-10.

Chetrit further stated that defendants knowingly made false representations about an impending closing with Michael Ring:

> "11. I reaffirm my deposition testimony that the only discussions that I had with Tabak about his progress with Ring were discussions in which Tabak repeatedly told me that there was positive progress with Ring, that 'the discussions were going well,' and that 'the closing [with Ring] would be happening soon.' Of course, these statements by Tabak were false."

*Id.* at ¶ 11.

While this affidavit lacks any other support and appears suspect in light of the Defendant's proffered evidence in support of its motion, the court notes that the Purchase Agreement contains a confidentiality clause, which provides that Princeton and Extell

"shall treat the information disclosed to each by the other, including without limitation the Contracts,[4] as confidential" until the closing. *See* Santolli Affirm. Ex. 27 at ¶11. Princeton was therefore, arguably, obligated to leave the subject information undisclosed. The Court finds summary judgment on this issue is not warranted as a result.

**E. Damages**

Damages under the Contribution Agreement are limited to those enumerated in Section 10(b). Depending upon the nature of the breach of contract the Plaintiff can either recover its deposit, seek specific performance, or obtain money damages. *See* Santolli Affirm. Ex. 1 §§10(b)(i) and 10(b)(ii). Given the other glaring questions of fact however, it is impossible to determine the proper scope of damages. Therefore summary judgment of this issue is denied.

## III. CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss the complaint is denied; and it is further

[4] In the Purchase Agreement, the Contracts are defined as the Letter Agreements, certain promissory notes, the Pledge and Security Agreement and a Guaranty (Purchase Agreement at 1).

ORDERED that with respect to submissions which have been improperly sealed, the Parties are directed to file a proper sealing motion within 20 days of the notice of entry of this order.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 13, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.