SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651240/2013
IMPERIUM CAPITAL, LLC
vs.
KRASILOVSKY (MERCER) FAMILY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 7/16/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for dismiss and cancel a lis pendens.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 4-13, 34

Answering Affidavits — Exhibits _____ No(s). 17-29

Replying Affidavits _____ No(s). 31

Upon the foregoing papers, it is ordered that this motion is

and cross-motion are

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/2/13

SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

☒ cross-motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

IMPERIUM CAPITAL, LLC,

Index No. 651240/2013

Plaintiff,

DECISION & ORDER

-against-

KRASILOVSKY (MERCER) FAMILY LIMITED PARTNERSHIP,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

This is an action to enforce a letter of intent to purchase certain property located in Lower Manhattan. Defendant, Krasilovsky (Mercer) Family Limited Partnership (the Krasilovsky Partnership), moves to dismiss the complaint on the basis of documentary evidence and the Statute of Frauds and seeks cancellation of the notice of pendency filed against the property by plaintiff Imperium Capital, LLC (Imperium). Plaintiff opposes and cross-moves to add The Krasilovsky (Mercer) Realty Trust (the Realty Trust) as a defendant. Defendant opposes.

I. Background

By an instrument dated May 15, 2000, Monroe and Harriet Krasilovsky created the Realty Trust for the sole benefit of the beneficiaries listed on the schedule attached thereto, to be amended from time to time (affidavit of Lois Krasilovsky, sworn to on April 30, 2012, exhibit E [Trust Instrument] ¶ 1). Under the Trust Instrument, the trustee or trustees of the Realty Trust had no authority to deal with the trust estate except as specifically directed by the beneficiaries of the trust (Trust Instrument ¶ 3). The original trustees of the Realty Trust were Monroe and Harriet Krasilovsky (*see id.*). On December 13, 2006, however, Lois Krasilovsky, their daughter, was appointed as the trustee of the Realty Trust (affidavit of Lois Krasilovsky, exhibit F

[Certificate of Appointment]). It is unclear from the record who the present beneficiaries of the Realty Trust are.[1]

Imperium is a sophisticated real estate investment and development company, which, since 2010, has acquired more than one million square feet of New York City property (affidavit of Matthew Avital, sworn to on May 29, 2013 ¶ 7). In February 2013, a real estate professional, Matthew Avital, came across information on the website PropertyShark.com relating to the Property (*id.* at ¶¶ 1, 9). PropertyShark listed the owner of the Property as "M&H Krasilovsky", and Avital subsequently obtained the contact information of Ms. Krasilovsky (*id.* at ¶ 9). After originally refusing, Ms. Krasilovsky told Avital that she was interested in selling the Property (*id.* at ¶¶ 11–12). On March 7, Avital sent Ms. Krasilovsky a written offer by Imperium, addressed to her personally, to purchase the Property for $3.75 million (*id.* at exhibit B). That same day, Ms. Krasilovsky wrote to Avital explaining that the "offer will need to be made out to [the Krasilovsky Partnership]" (*id.* at exhibit C). In fact, the Property belonged to the Realty Trust,

---

[1] The Certificate of Appointment recites that the sole beneficiary of the Realty Trust is the defendant Krasilovsky Partnership, with Lois Krasilovsky and her brother, Richard Krasilovsky, as the limited partners and another trust, the Harriet Krasilovsky Revocable Trust (the Revocable Trust), as the general partner. The terms governing the partnership and the Revocable Trust, respectively, are not set forth in the record. Defendant has submitted a Schedule of Beneficial Interests, which names each partner of the Krasilovsky Partnership as a beneficiary of the Realty Trust and which is signed by each such partner "as beneficiary." There are irregularities in the trust documents which give the court pause: (I) in the Certificate of Appointment, the date of the Trust Instrument is given as April 18, 2000, rather than May 15, 2000; (ii) the top of the third page of Exhibit F contains a signature block for the trustee of the Revocable Trust, but no actual signature appears above it; (iii) that same page contains a signature by Richard Krasilovsky consenting to a "termination," but it is not clear who or what is being terminated; (iv) the final page is undated; and (v) it appears that such final page is a continuation of the signatures on the second page. As a result, it is unclear which document the signatures on the *third* page pertain to, and if those signatures belong to the Certificate of Appointment, why the beneficiaries of the Revocable Trust needed to execute the Certificate of Appointment appointing Lois Krasilovsky as the trustee of the Realty Trust.

having been conveyed by Monroe and Harriet Krasilovsky through a quitclaim deed dated May 15, 2000 (affidavit of Lois Krasilovsky, exhibit A). This deed was recorded against the Property on the Automated City Register Information System (ACRIS), the online records maintained by the Office of the City Register for New York City, and those records reflect no subsequent conveyance. Imperium followed Ms. Krasilovsky's direction and addressed the offer letter to the Krasilovsky Partnership, and on March 9, she signed the letter on behalf of the Krasilovsky Partnership as seller (*id.* at ¶ 20, exhibit G [the LOI]).

The LOI, which is denominated as such, states that it "is a general description of the terms upon which Imperium . . . is prepared to enter into negotiations . . . to purchase [the Property]" (LOI 1). According to the LOI, Imperium was prepared to buy the Property for $3.75 million in cash (*id.*). However, the letter further states that "[i]t is understood that if the parties reach an agreement, a definitive Purchase Agreement . . . will be prepared and executed containing the terms outlined herein and such additional or other terms as may be mutually acceptable to the parties" (*id.*). The LOI provides for a 10% deposit to be put down "upon execution of a Purchase and Sale Agreement" (*id.*). Under the heading "Contingencies", the LOI states: "None. All due diligence will be performed during contract negotiations" (*id.*). The date of closing was to occur ten days "after signing of Purchase & Sale Agreement" (*id.*). The LOI notes that the offer was subject to the tenant's right of first refusal, obligates the parties to "maintain confidentiality with respect to this Letter of Intent and the following Agreement of Sale," and states that it shall "bind and inure to the benefit of and be enforceable by Purchaser" (*id.* at 2). It contains no exclusivity provision and no representations or warranties.

On March 29, 2013, defendant notified Imperium that it would not be proceeding with the sale, as it had received a higher offer from another buyer (complaint ¶ 8). Indeed, by March 26,

2013, Ms. Krasilovsky, as trustee of the Realty Trust, had already signed a contract to sell the Property for $4.4 million to non-party Tribeca Equities LLC (Avital affidavit, exhibit I). Imperium responded by filing a notice of pendency and commencing this action on April 8, 2013, seeking a declaratory judgment that the LOI is a binding agreement and an order directing defendant to sell the Property to plaintiff pursuant to the LOI's terms.

II. Standard

On a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty* Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [citing *McGill v Parker*, 179 AD2d 98, 105 (1992)]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 (2d Dept 2012); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames*, *id.* [citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro,* 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames*, 1 AD3d at 250 [citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994)]).

III. Discussion

A. Statute of Frauds

Under the Statute of Frauds, an agreement to sell real property must be memorialized by a

written contract, "subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing" (General Obligations Law § 5–703 [2]). Defendant maintains that the LOI is void as a contract of sale because the owner of the Property is the Realty Trust, rather than the entity that signed the LOI, the defendant Krasilovsky Partnership. It further contends that dismissal is required since there is no writing authorizing Lois Krasilovsky or the Krasilovsky Partnership to sign for the Trust. The court denies dismissal on the basis of the Statute of Frauds.

A contract signed by an agent is not void under the Statute of Frauds for failure to disclose the identity of the principal (*Kursh v Verderame*, 87 AD2d 803, 803 [1st Dept 1982]). Here, discovery is necessary on the issue of whether the Realty Trust authorized, in writing, the Krasilovsky Partnership to act on its behalf. Moreover, the Statute of Frauds ought not to be used to immunize fraudulent conduct (*Channel Master Corp. v Aluminium Limited Sales, Inc.*, 4 NY 403, 408 [1958]). Where an agent, with the full knowledge of its principal, holds itself out as the true party to the contract, the undisclosed principal may very well be estopped from invoking the Statute of Frauds to avoid the agent's acts (*Levy v Rothfeld*, 271 AD 973 [2d Dept 1947]). To hold otherwise would reward the principal for affirmatively misleading its counter-party into believing that no such written authorization was necessary and that a satisfactory signature under the Statute of Frauds had been obtained.

Given that Ms. Krasilovsky is the trustee of the Realty Trust and that she requested the LOI to be addressed to the Krasilovsky Partnership, by imputation the Realty Trust (i.e., Ms. Krasilovsky) had full knowledge that the Krasilovsky Partnership (also Ms. Krasilovsky) was acting as its agent. Defendant's contention that even under the Trust Instrument the consent of Ms. Krasilovsky's brother, Richard Krasilovsky, would be necessary to authorize any sale and that Mr. Krasilovsky was never aware of and did not consent to the proposed sale to Imperium

(affidavit of Richard Krasilovsky, sworn to on April 30, 2013) would be an issue for discovery.

B. Intent to Be Bound

Nonetheless, dismissal is required here. Where it is apparent that the parties to an agreement do not intend to be bound thereby until it is reduced to a definitive writing, no contract exists until a written agreement is produced and executed (*Scheck v Francis*, 26 NY2d 466, 470 [1970]). Consequently, where a letter agreement between two parties calls for the execution of a further, definitive written agreement, the letter agreement does not bind either party to the terms contained therein (*Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]; *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 213 [1st Dept 2005]; *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 297 [1st Dept 2003]).

The LOI purports to be no more than a "general description of the terms upon which Imperium . . . is prepared to enter into negotiations" to purchase the Property (LOI 1). It goes on to say that "*if* the parties reach an agreement, a definitive Purchase Agreement . . . will be prepared and executed" (*id.*) (emphasis supplied). Such future agreement would contain "the terms outlined herein and such additional *or other terms* as may be mutually acceptable to the parties" (*id.*) (emphasis supplied). Hence, it is clear from the words of the LOI that the parties intended to further negotiate to arrive at a final contract of sale. Indeed, the parties acknowledged that the terms of such future contract might differ from those set forth in the LOI, and the contingent language of the LOI ("if the parties reach an agreement . . .") makes it apparent that further negotiations were necessary and an actual sale was not assured. That the LOI recites that it "shall bind and . . . be enforceable by" Imperium does not by itself turn the letter's seven or eight non-committal substantive lines into a binding contract. In any case, that

language can be construed to apply to the confidentiality provision. The fact that the LOI notes that it was subject to the tenant's right of first refusal and that Ms. Krasilovsky notified the tenant of the proposal, merely shows that Ms. Krasilovsky understood plaintiff's offer to be bona fide and of interest (*see* complaint ¶ 10). It does not negate the parties' clear indications of their intent to not be bound to carry out the transaction until a final agreement was reached.

Plaintiff's claims for a declaratory judgment that the LOI is a binding contract for the sale of the Property and for specific performance of the supposedly promised sale, therefore, are dismissed. As plaintiff's cross-motion to add the Realty Trust as a defendant does not remedy the fundamental flaw in Imperium's case, it is denied. While in certain circumstances a letter of intent can be enforceable to the extent of obliging the parties to make a good faith attempt to conclude the proposed transaction (*see Goodstein Constr. Corp. v City of New York*, 67 NY2d 990, 991–92 [1986]; *Brown v Cara*, 420 F3d 148, 156–60 [2d Cir 2005]; *180 Water St. Assoc., L.P. v Lehman Bros. Holdings,* Inc., 7 AD3d 316, 317 [1st Dept 2004]), the complaint here does not advance this theory, and it is not clear from the allegations therein whether such a claim is warranted. In any case, the damages from such a breach would be limited to Imperium's out-of-pocket expenses incurred as a result of reliance on the LOI (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366 [1992]). Accordingly, it is

ORDERED that the motion of defendant Krasilovsky (Mercer) Family Limited Partnership to dismiss the complaint and cancel the notice of pendency filed in this action is granted and the complaint of plaintiff Imperium Capital LLC is dismissed in its entirety; and it is further

ORDERED that the notice of pendency filed in the Office of the Clerk of the County of New York on April 8, 2013 against the name of the defendant Krasilovsky (Mercer) Family

Limited Partnership and against the Property identified as Block 474, Lot 20, be and the same hereby is cancelled, and defendant shall serve a copy of this order upon the Clerk of the County of New York, who is hereby directed to cancel the aforesaid notice of pendency entered in his office, and to enter a notice of that cancellation on the margin of the record of the notice of pendency in his office, in proper form; and it is further

ORDERED that the motion of plaintiff to amend the complaint to add The Krasilovsky (Mercer) Realty Trust as a defendant is denied as moot; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to state a cause of action for breach of contract for failure to negotiate in good faith within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service of a copy of this order with notice of entry and an affirmation by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

Dated: August 2, 2013

ENTER:

J.S.C.