SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 652593/2013
119 SPRING LLC
vs.
119 SPRING STREET COMPANY LLC
SEQUENCE NUMBER : 001
PREL INJUNCT / TEMP REST ORDER

INDEX NO. 652593/13
MOTION DATE 9/17/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** preliminary injunction

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12-2-13

Eileen Branston J.S.C.

HON. EILEEN BRANSTEN
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

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

----------X

119 SPRING LLC,

Plaintiff,

-against-

119 SPRING STREET COMPANY, LLC, ESILDA BUXBAUM, JOSEPHINE CORBO HARRIS, OLIVER LEWIS HARRIS, LYNN REISER-HECHTMAN, individually and as EXECUTOR OF THE ESTATE OF MARTIN HECHTMAN, EDWARD E. O'CONNELL, JILL A. O'CONNELL, TAR BEACH CLUB, INC. and DOV HECHTMAN,

Defendants.

----------X

Index No. 652593/2013
Motion Date: 9/17/2013
Motion Seq. No.: 001

BRANSTEN, J.

Plaintiff 119 Spring LLC brings the instant action seeking, *inter alia*, to enjoin Defendants 119 Spring Street Company, LLC, Esilda Buxbaum, Josephine Corbo Harris, Oliver Lewis Harris, Lynn Reiser-Hechtman, individually and as Executor of the Estate of Martin Hechtman, Edward E. O'Connell, Jill A. O'Connell, Tar Beach Club, Inc.[1] and Dov Hechtman from transferring their interests in the property located at 119 Spring Street in Manhattan to any entity other than Plaintiff. Presently before the Court is

[1] Although Plaintiff initially sought restraints as to Defendant Tar Beach Club, Inc. ("Tar Beach"), after oral argument on the instant motion, Plaintiff and Tar Beach filed a stipulation of discontinuance.

Plaintiff's motion for a preliminary injunction. All Defendants, with the exception of Dov Hechtman, oppose. For the reasons that follow, Plaintiff's motion is denied.

I. Background

This litigation stems from Plaintiff's negotiations with Defendants regarding the building located at 119 Spring Street in Manhattan (the "Building"). The Building, which is owned by a cooperative named Tar Beach, includes retail space on the ground floor that is leased to Defendant 119 Spring Street Company, LLC (the "LLC"). The LLC is owned by Defendants Esilda Buxbaum, Josephene Corbo Harris, Oliver Lewis Harris, Lynn Reiser-Hechtman (individually and as Executor of the Estate of Martin Hechtman), Edward E. O'Connell and Jill A. O'Connell (the "Individual Defendants"). The lease of the ground floor retail space is referred to by the parties as the "master lease."

Defendants assert that the LLC, through its members, the Individual Defendants, began to consider the sale of the master lease in 2012. After negotiations with Plaintiff, the LLC agreed upon a letter of intent for a proposed transaction for the Building's retail space on May 21, 2013 (the "May LOI").

A. *May LOI*

The terms of the May LOI are at the core of this motion. The May LOI stated a purchase price of $14,000,000 for the acquisition of "all of the issued and outstanding membership interests in 119 Spring Street Company, LLC." *See* Compl. Ex. A at 1 (May LOI). In addition, the May LOI contained the following provisions:

- "the parties agree to negotiate, in good faith, additional terms of the Purchase to be incorporated in a formal purchase and sale agreement(s) among Purchase and the Individual Sellers (the "Purchase Agreement") by July 17, 2013" (the "Good Faith Requirement");

- "[w]ithin three (3) business days after the full execution of this letter agreement by all parties hereto, Purchaser shall deposit the amount of $700,000 (the "Deposit") in immediately available funds into an account to be specified ..." (the "Deposit Paragraph");

- "[t]he parties agree that they have dealt with no brokers, agents or finders in connection with the contemplated transactions, except for Marshall Real Estate ("Broker")" (the "Broker Paragraph"); and,

- "the Company agrees (for itself and the Individual Sellers) to maintain complete confidentiality and that neither the Company nor the Individual Sellers will solicit or enter into any contract, or into any contract negotiations, regarding the Company, the [Building] and/or [the master lease] ... with any other party commencing on the date of this letter agreement and continuing for a period ending on ... July 17, 2013..." (the "Exclusivity Paragraph").

Id. at 1-2.

In the event that the parties failed to enter into a purchase agreement by July 17, 2013 "for any reason whatsoever," the May LOI provides that the LOI "shall be deemed

null and void, ab initio, and the parties shall have no further obligations hereunder, except for the paragraphs entitled Deposit, Broker and Exclusivity (the "Binding Provisions")." *Id.* at 2. Notably, this provision does not include the "Good Faith Requirement" among the so-called "Binding Provisions" that survive the expiration of the May LOI.

While the "Good Faith Requirement" was not included as a "Binding Provision" surviving termination of the May LOI, the letter of intent goes on to state that the agreement is "non-binding," except for "the Binding Provisions *and the provisions regarding the parties' obligations to negotiate, in good faith, the terms of the Purchase Agreement until July 17, 2013* ..." *Id.* at 3 (emphasis added).

B. *Post-LOI Negotiations*

Three days after the May LOI was signed, LLC counsel sent a draft purchase agreement to Plaintiff's counsel. The parties sharply dispute what happened after this draft was sent.

1. Plaintiff's Contentions

Plaintiff contends that it was prepared to sign the purchase agreement when Defendants advised that they wanted to structure the transaction differently. (Compl. ¶ 24.) Defendants purportedly sought to have plaintiff purchase the LLC's interest in the

master lease, instead of purchasing the Membership Interests, as contemplated in the May LOI. *Id.* Since Plaintiff did not object to the change, Plaintiff's counsel prepared a new draft and sent it to LLC counsel on June 21, 2013. *Id.* ¶ 25. After this new draft was sent, Defendants allegedly refused to proceed with the finalization of the purchase agreement and neither responded to Plaintiff's draft nor prepared a new version of the agreement. *Id.* ¶ 26. Instead, LLC counsel informed Plaintiff that "there has been a change in the thinking of the co-op which makes the draft contract that [Plaintiff's counsel] sent last week no longer applicable." *Id.* ¶ 27.

On July 2, 2013, the Individual Defendants purportedly then demanded $41,000,000 for the assignment of the master lease with a 15-year extension. *Id.* ¶ 29. Although Defendants later allegedly decreased their demand to $26,000,000, Plaintiff informed Defendants that it wished to sign the draft purchase agreement circulated by LLC counsel on May 24, 2013. *Id.* ¶¶ 32-33. After the parties failed to sign a purchase agreement by July 19, 2013, LLC counsel emailed Plaintiff to notify it that the LOI was "null and void, ab initio." *Id.* ¶ 34.

2. Defendants' Contentions

Defendants present a different version of events. After the May 24, 2013 draft purchase agreement was circulated by LLC counsel, Defendants contend that Plaintiff

continued negotiating with Tar Beach for the transaction described in the defunct April LOI. *See* Affirmation of Marshall Biel ("Biel Affirm.") ¶ 29. The April LOI differed from the May LOI in that provided a longer term for the master lease and an assignment of the lease rather than a purchase of the LLC. *Id.*

Plaintiff then sent a draft agreement on June 18, 2013, which allegedly set forth terms materially different from the May LOI. *Id.* ¶ 31. This draft provided for an assignment of the master lease, instead of a purchase of the membership agreements. *Id.* In addition, the agreement was made contingent on a simultaneous transaction with the co-op under which the LLC's master lease, after being assigned to Plaintiff with Tar Beach consent, would be terminated and replaced by Plaintiff's purchase of shares in the co-op that would be allocated to the ground floor retail space. *Id.* ¶ 32. As explained by Defendants, Plaintiff's draft would grant Plaintiff the LLC's interest in the retail store, as well as the co-op's interest, which would give Plaintiff the rights to the retail space in perpetuity. *Id.* ¶ 33.

According to Defendants, Plaintiff's draft was not accepted; however, the parties continued to explore different options by which Plaintiff could obtain Tar Beach's consent to the assignment of the master lease and its extension to at least 49 years. *Id.* ¶¶ 37-38. Ultimately, no agreement was reached by the parties before July 17, 2013. *Id.* ¶ 42. On July 18, 2013 – one day after the expiration date in the May LOI – one of

Plaintiff's principals emailed Defendant Buxbaum, stating that Plaintiff was prepared to sign the May 24, 2013 draft circulated by Defendants. *Id.* ¶ 43. Asserting that the May LOI has expired, Defendants refused to sign the May draft. *Id.* ¶ 44.

C. *The Instant Action*

On July 24, 2013, Plaintiff commenced the instant action, asserting claims against all Defendants for injunctive relief, specific performance, and breach of contract. In addition, Plaintiff asserted tortious interference with contract and tortious interference with prospective business relations claims against Defendant Dov Hechtman.

In conjunction with its Complaint, Plaintiff filed a motion to enjoin Defendants from transferring their interests in the property located at 119 Spring Street in Manhattan to any entity other than Plaintiff. Defendants submitted opposition, and the Court heard oral argument on September 4, 2013.

II. Preliminary Injunction Standard

Under CPLR § 6301, "[a] preliminary injunction may be granted in any action... where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." A

preliminary injunction is a "drastic remedy," and thus "is appropriate only where a party has established (1) likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of equities in favor of the relief sought." *N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 A.D.2d 313, 314 (1st Dep't 1997) (citations omitted). The movant must provide "clear and convincing" evidence as to each of these three elements. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Temple-Ashram v. Satyanandji*, 84 A.D.3d 1158, 1161 (2d Dep't 2011) (internal quotation marks and citation omitted).

III. Analysis

Plaintiff asserts that its motion for preliminary restraints should be granted, since it is likely to succeed in showing that the Defendants breached three of their obligations under the May LOI: (1) to negotiate in good faith the additional terms of the purchase; (2) to keep the term of the LOI confidential; and, (3) to refrain from soliciting offers from third-parties. In addition, Plaintiff claims irreparable injury due to the "uniqueness" of the Membership Interests and master lease and asserts that the relief sought will be forfeited unless Defendants are enjoined from disposing of the Membership Interests and master lease. These arguments will be considered in turn.

A. *Likelihood of Success on the Merits*

To assess the likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action." *1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). "While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers." *Id.* (internal citations omitted). "Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." *Id.* Where denial of injunctive relief would render the final judgment ineffectual, "the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced." *The Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1998).

1. Good Faith Negotiation Provision

Plaintiff first contends that Defendants breached their obligation under the May LOI to negotiate any additional terms of the Purchase Agreement "in good faith."

Notwithstanding the expiration of the May LOI on July 17, 2013, Plaintiff contends that this "Good Faith Requirement" remains binding and enforceable.

Even accepting all of Plaintiff's allegations regarding the parties' negotiation process as true, the terms of the May LOI are sufficiently ambiguous and imprecise as to preclude a determination that Plaintiff established "a clear right" to the relief sought. *See SportsChannel Am. Ass'n v. Nat'l Hockey League*, 186 A.D.2d 417, 418 (1st Dep't 1992). Specifically, the terms of the May LOI are ambiguous as to the survival of the "Good Faith Requirement" clause following the termination "ab initio" of the agreement. Although the May LOI states that only the "Deposit, Broker and Exclusivity" provisions – defined as the "Binding Provisions" – survive the expiration of July 17, 2013 agreement, the May LOI later carves out both the "Good Faith Requirement" and the Binding Provisions from its designation of the agreement as "non-binding." In short, the May LOI expressly excludes good faith from its definition of "Binding Provisions" but then states the double negative that all provisions except for the good faith and Binding Provisions are non-binding. These two terms thus conflict as to whether the good faith provision is binding and thus survives the termination of the agreement ab initio. Given this ambiguity, the Court cannot conclude that Plaintiff has demonstrated a "clear right" to the relief sought. *See Credit Index, L.L.C. v. RiskWise Int'l L.L.C.*, 282 A.D.2d 246, 247 (1st Dep't 2001) ("It is by no means clear from the contract terms that the defendant has in

fact violated the parties' agreement, and where contractual language leaves the rights of the parties open to doubt and uncertainty, injunctive relief is inappropriate.") (internal citations omitted); *Gulf & Western Corp. v. N.Y. Times Co.*, 81 A.D.2d 772 (1st Dep't 1981) ("We find the terms of the agreement concerning the right of first refusal to be ambiguous. ... The preliminary injunction should not have been granted."). Accordingly, Plaintiff has failed to demonstrate a likelihood of success on the merits with regard to the good faith negotiation provision.

2. Confidentiality and Exclusivity Provisions

Next, Plaintiff alleges "upon information and belief" that Defendants solicited other offers for the Membership Interests or the master lease in violation of the confidentiality and exclusivity provisions in the May LOI. Although the burden is on Plaintiff to offer "clear and convincing evidence" demonstrating its likelihood of success on the merits with regard to this purported breach, *see Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), Plaintiff here makes no factual showing in its papers whatsover. Since Plaintiff failed to produce factual support for its claim, the Court concludes that it has not established a likelihood of success on the merits. *See U.S. Re Co., Inc. v. Scheerer*, 41 A.D.3d 152, 154-55 (1st Dep't 2007) (denying preliminary injunction for failure to show likelihood of success where movant "produced no factual support ... to substantiate" its

claim); *Bus. Networks of New York, Inc. v. Complete Network Solutions Inc.*, 265 A.D.2d 194, 194 (1st Dep't 1999) (rejecting preliminary injunction where "Plaintiff fails to present any evidentiary support for its assertions" regarding Defendant's conduct); *Faberge Int'l Inc. v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985) (denying preliminary injunction where movant's "proof rested solely on speculation and conjecture).

B. *Irreparable Harm*

Notwithstanding its inability to demonstrate a likelihood of success on the merits, Plaintiff nonetheless contends that an injunction must be granted, since otherwise, it will suffer irreparable harm. Plaintiff asserts that without restraints, the Membership Interests or master lease could be transferred to another entity, rendering any judgment here ineffectual. Although Plaintiff is correct that preliminary restraints may be granted where denial of injunctive relief would moot the final judgment, Plaintiff nonetheless must demonstrate a likelihood of success on the merits of its claims. While "the degree of proof required" to establish the requisite likelihood of success element is "accordingly reduced" under such circumstances, the showing is not minimized to the point of non-existence. *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990). Otherwise, any plaintiff asserting a claim for specific performance would be entitled

without further analysis to a preliminary injunction, jettisoning the well-hewn three-part test for relief under CPLR 6301.

Moreover, Plaintiff claims that conveyance of the Membership Interests or master lease will cause it irreparable harm, since the Membership Interests and master lease are "unique and cannot be duplicated." *See* Pl.'s Moving Br. at 10. Plaintiff offers no support for this assertion, and as such, does not meet its burden of demonstrating this element by "clear and convincing evidence." *Doe*, 73 N.Y.2d at 750. Further, invocation of the word "unique" does not compel a finding of irreparable harm. To the contrary, the Court of Appeals has held that "the word 'uniqueness' is not ... a magic door to specific performance." *Van Wagner Adver. Corp. v. S&M Enter.*, 67 N.Y.2d 186, 192 (1986). Indeed, "[t]he point at which a breach of contract will be redressable by specific performance thus must lie not in any inherent physical uniqueness of the property but instead in the uncertainty of valuing it..." *Id.* at 193. Here, Plaintiff makes no showing regarding the valuation of the Building, the Membership Interests, or the master lease, let alone the difficulty or uncertainty of such a valuation. In the absence of such a showing, the Court cannot simply assume that the Membership Interests and master lease cannot be adequately valued. Accordingly, the Court concludes that Plaintiff has not demonstrated irreparable harm.

C. *Balancing of the Equities*

Finally, Plaintiff argues that the balance of the equities is in its favor since it may lose its ability to acquire the Membership Interests and the master lease, while Defendants risk nothing through this litigation. However, Plaintiff's argument presupposes that it has any right to acquire the Membership Interests and master lease under the now-expired May LOI. In essence, Plaintiff seeks a revival and extension of the May LOI to hold Plaintiff bound to the exclusivity provision despite the agreement's expiration, and Plaintiff bases its right to relief on ambiguous contract language regarding the survival of the Good Faith Requirement, with no factual demonstration whatsoever with regard to its confidentiality and exclusivity claims. Although Plaintiff states that it seeks to maintain the "status quo," the May LOI was expired at the time of Plaintiff's motion. Thus, the balance of the equities does not favor the imposition of contractual terms on Defendants, where Plaintiff has failed to demonstrate a likelihood of success on the merits on this motion with respect to the enforcement of those terms.

(*Order follows on the next page.*)

IV. Conclusion

Accordingly, for the foregoing reasons, it is

ORDERED that Plaintiff's motion for a preliminary injunction is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
~~November~~ ___, 2013
December 2, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.