SHIRLEY WERNER KORNREICH
J.S.C

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

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MG WEST 100 LLC, GETZ OBSTFELD and MATTHEW LONUZZI,

Plaintiffs,

-against-

ST. MICHAEL'S PROTESTANT EPISCOPAL CHURCH a/k/a ST. MICHAEL'S CHURCH,

Defendant.

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Index No.: 651170/2013

DECISION AND ORDER

KORNREICH, SHIRLEY WERNER, J.:

Defendant St. Michael's Protestant Episcopal Church (the Church) moves for 1) summary judgment dismissing plaintiffs' demands for specific performance, injunctive relief and money damages other than out-of-pocket costs; and 2) the cancellation of the notice of pendency filed by plaintiffs. Plaintiffs oppose. For the reasons stated below, the motion is granted.

I. Background

Although this is defendant's motion for summary judgment, since there has been no discovery in the case and the facts, for the most part, are undisputed, the facts set forth herein are drawn from plaintiffs' amended complaint (AC). In March 2008, plaintiffs MG West 100 LLC, Getz Obstfeld, Matthew Lonuzzi and the Church executed a "Memorandum of Understanding" concerning a proposed sale to plaintiffs of certain lots owned by defendant (AC, exhibit A [the MOU]). The MOU contemplated the construction of a condominium on the lots in question (the Project), with certain units to be owned by the Church and others to be sold to the public as market-rate residential apartments (*id.* at ¶ 2). The parties anticipated entering into a purchase and sale agreement for the conveyance of the subject property upon the closing of a construction

loan, and a development agreement for construction of the project (*id.* at ¶ 8). The MOU imposed certain terms and conditions to be incorporated into the future agreements (*see id.* at ¶¶ 6 & 8).[1] Further, the MOU recognized that "[t]he Project would greatly benefit from 421-a tax abatements." The parties, therefore, committed to each use "commercially reasonable efforts" to secure these benefits prior to June 30, 2008, which was the deadline for the expiration of the tax abatement program in the Project's location (*id.* at ¶ 5). The MOU was signed on behalf of defendant by Canon George W. Brandt, the rector of the Church at the time.

After signing the MOU, plaintiffs submitted construction plans to the Department of Buildings and obtained work permits (amended complaint ¶ 14 [a]). Also, in order to preserve the 421-a benefits, plaintiffs surveyed, cleared and excavated the site, began installing a foundation, and submitted an application for a preliminary certificate of eligibility to the Department of Housing Preservation and Development (*id.* at ¶ 14 [b] & [d]). Finally, plaintiffs obtained a construction financing proposal from a potential lender (*id.* at ¶ 14 [e]).[2] Plaintiffs claim that they spent at least $500,000 in performing the above work (*id.* at ¶ 14 [c]).

No further work was performed, and the parties never executed the purchase and sale or the development agreements (*see* AC ¶ 15). In April 2012, more than four years after the MOU was executed, the Church informed plaintiffs that it had received other offers for the development of the land (*id.* at ¶ 16). Though plaintiffs submitted, allegedly at the Church's request, a new proposal for the Project, in July, the Church advised plaintiffs that it would not be moving forward with the MOU.

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[1] The MOU appears to lack a Paragraph 7.

[2] Generally speaking, defendant does not appear to dispute that plaintiffs took these actions (*see* answer ¶ 14).

Plaintiffs commenced this action on April 2, 2013, filing a summons and complaint and a notice of pendency against the subject premises. After the Church moved to dismiss, plaintiffs filed the AC on September 19, 2013. The AC seeks: 1) a declaratory judgment that the MOU is "binding and enforceable"; 2) a judgment directing specific performance of the MOU; 3) compensatory and consequential damages and lost profits caused by the Church's breach of the MOUand refusal to finalize the contract and transfer the property; 4) a permanent injunction enjoining the sale of the property to anyone else; 5) and 6) unjust enrichment and quantum meruit for the reasonable value of the services plaintiffs rendered to the Church. On October 25, 2013, the Church answered and moved for partial summary judgment, asserting, among other defenses, that the causes of action are barred, in whole or in part, by Section 12 of the Religious Corporation Law.

II. Defendants' Submissions

In support of its motion, defendant, through one of its wardens, avers that it is an incorporated Protestant Episcopal Church within the Episcopal Diocese of New York (the Diocese) (affidavit of Frederick Wright Hamlin, sworn to on Oct 21, 2013 ¶ 10). It has submitted a copy of the guidelines adopted and published by that diocese's Standing Committee regarding the sale of parish real property which were in effect at the time the MOU was executed (affidavit of Sara Saavedra, sworn to Oct 25, 2013, exhibit 1 [Guidelines]). The Guidelines state that "[a]s soon as the outlines of a potential property sale . . . take shape," the parish should send a letter to the diocese "describing the transaction in enough detail so that financial considerations . . . can be assessed" (Guidelines § III [A]). The Guidelines provide that "[w]hen the proposed sale . . . is in final form, the congregation makes formal application to the Bishop and Standing Committee for consent," which application shall include, *inter alia*, copies of "the complete

signed contractual agreement" and "the Vestry resolution authorizing the property transaction" (*id.* at § III [B]) (emphases omitted). The Church avers that no final contract of sale was ever agreed to, the Vestry never met to authorize the transaction, no application to the Bishop or Standing Committee was ever even made and consent was never obtained (Hamlin affidavit ¶¶ 28, 46—47). The secretary of the Standing Committee has similarly testified that neither the Standing Committee nor the Bishop ever received an application by defendant to sell the real property to plaintiffs, and never approved or consented to any such transaction (Saavedra affidavit, ¶¶ 9—11).

III. Standard

On a motion made pursuant to CPLR 3212, the burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a

summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

IV. Discussion

A. Specific Performance and Injunctive Relief

The state may resolve disputes involving church property so long as doing so does not require consideration of doctrinal matters (*Diocese of Albany v Trinity Episcopal Church*, 250 AD2d 282, 285 [3d Dept 1999]). New York forbids a religious corporation from selling real property without first obtaining court approval (Religious Corporations Law § 12 [1]). Normally, notice of such petition must be given to the State Attorney General (Not-For-Profit Corporation Law § 511 [b]). However, for churches belonging to certain hierarchical religious organizations, including the Protestant Episcopal church, the notice requirement is replaced by a requirement that the sale be approved by the appropriate supervisory figure or body prior to making the petition (Religious Corporation Law § 2–b [1] [d–1]).

Indeed, land held by an Episcopal parish church typically does not belong to the parish. According to the constitution and canons of the Episcopal Church of the United States of America, "all real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for . . . the Diocese . . . in which such Parish, Mission or Congregation is located" (canon 7, § 4), and it has consequently been held that in the event of a rupture between an Episcopal parish and its diocese governed by these canons, the parish's real property shall revert to the diocese from which it has disassociated itself or been expelled (*Diocese of Rochester v Harnish*, 11 NY3d 340, 351—52 [2008]; *Diocese of* Albany, 250 AD2d at 287—90). As a result, in order to sell real property, an incorporated Protestant Episcopal church must first obtain the consent of the bishop and the standing committee of the diocese to

which the church belongs (*Diocese of Albany*, 250 AD2d at 287 citing Religious Corporation Law § 12 [2]). A contract concerning real property entered into by a church without such consent is "void *ab initio*" (*Soho Ctr. For Arts & Educ. v Church of St. Anthony of Padua*, 146 AD2d 407, 411 [1st Dept 1989] [denying specific performance of lease entered into without consent of bishop] quoting *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 217 [4th Dept 1983]).[3]

Defendant argues the court cannot order specific performance of the sale contemplated by the MOU since the transaction was never approved by either the Bishop or the Standing Committee of the Diocese. In opposition, plaintiff Getz Obstfeld submits an affidavit in which he avers that Canon Brandt told him that "he had spoken with both the Bishop and members of the Standing Committee of the Episcopal Diocese, that they supported the Project and approved the sale of the Project Property, and that formal approval of the sale would be forthcoming when a deed for the transfer of the Project Property was presented" (affidavit of Getz Obstfeld, sworn to on Nov 26, 2013, ¶ 4). Even ignoring the fact that Obstfeld's report of the Canon's oral statement does not meet the Standing Committee Guideline requiring a detailed letter from the parish to the diocese describing the transaction, it is double-hearsay. This double-hearsay statement of an oral commitment to sell real property is not sufficient to raise an issue of fact as to whether the Bishop or Standing Committee actually consented to the sale (*Briggs v 2244 Morris, L.P.*, 30 AD3d 216, 216 [1st Dept 2006] citing *Narvaez v NYRAC*, 290 AD2d 400, 401—01 [1st Dept 2002]) or that Canon Brandt had apparent authority to bind the Church to

[3] Plaintiffs' attempt to distinguish these cases is unpersuasive (transcript, Mar 6, 2014, 33). Their reliance on *Rende & Esposito Consultants, Inc. v Park Slope Dev. Corp.*, 131 AD2d 740, 743 (2d Dept 1987) and *Norgate Homes, Inc. v Cent. State Bank*, 82 AD2d 849 (2d Dept 1981) for the idea that the court can order the Church to convey the subject property is misplaced, as the former case did not involve the issue of denominational approval, while the latter did not involve a religious corporation at all.

such a conveyance (*56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134 [1st Dept 2006] ["It is axiomatic that apparent authority must be based on the actions or statements of the principal"] citing *Hallock v State of New York*, 64 NY2d 224, 231 [1984]).

On this record, the court concludes that the MOU cannot be enforced as a contract to sell real property. The Diocese Guidelines for the sale of property were never followed, and the required consent of the Bishop and Standing Committee to the sale was never obtained. Indeed, consent could not have been obtained without the contracts for sale and development – contracts which were never negotiated or executed during the four years of economic downturn. Hence, plaintiffs are not entitled to an order compelling defendant to convey the subject real property to them. At most, a judgment of specific performance in this action will merely require the Church to submit the deal (if one is reached) to the Diocese, but the Diocese would be free to reject the proposal for any or no reason. Therefore, no grounds exist for permanently enjoining the Church from selling the property to anyone else, nor can it be said that "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Consequently, the notice of pendency is cancelled (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313 [1984] [cancelling notice of pendency in action for specific performance of contract to transfer all stock of company whose sole business was owning and operating office building]).

B. Money Damages

Given that without the Diocese's approval the MOU cannot, as a matter of law, constitute a binding contract to convey real property, the Church's alleged breach of any of its promises that *were* binding do not entitle plaintiffs to their lost profits from the contemplated venture, as such profits cannot properly be said to have been "fairly within the contemplation of the parties

to the [MOU] at the time it was made" (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 374 [1992] quoting *Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). To hold otherwise would make the Church the guarantor of the *success* of a development whose construction could not have begun without the approval of the Diocese, the court and a construction lender, none of whom were parties to the MOU or could be bound by St. Michael's Church (*cf. id.* [no consequential damages on breach of agreements to negotiate where transaction was ultimately subject to approval of the Board of Estimate]; *see also Kenford Co., supra* [lost profits unavailable where county breached contract to allow development of stadium]). Plaintiffs' attempts to distinguish *Goodstein* on the ground that the MOU is more detailed than the letter agreements at issue there, are ultimately beside the point.[4] Where, as here, the completion of a venture depends on contingencies outside of either party's control, lost profits cannot be obtained.

Plaintiffs finally argue that they are entitled to damages measured by the benefit conferred by them upon the Church under their cause of action for unjust enrichment, rather than merely their out-of-pocket expenses (plaintiffs' brief, 23—24). However, other than correctly contesting the MOU's validity as a contract to sell real estate, the Church concedes that the

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[4] That the MOU contains a great amount of detail does not distinguish it from the *Goodstein* letter agreements, which were recognized as "unusually detailed and clearly enforceable" (*Goodstein Constr. Corp.*, 111 AD2d 49, 50 [1st Dept 1985]). From the reported cases, moreover, it would appear that the City and the developer there had agreed upon the purchase price and use for the respective sites (*Goodstein Constr. Corp.*, 80 NY2d at 369). Consequently, plaintiffs' argument that *those* agreements (which neither the court nor, it would appear, the plaintiffs, have ever seen) were clearly less complete than the MOU is highly suspect. It also ignores the tentative language of the MOU, which describes itself as an "outline" of a "proposed transaction" (MOU, 1), "an expression by [the parties] of their mutual understanding of the principal business terms" thereof, and an agreement to "negotiate in good faith" a final contract of sale and development agreement in accordance with the MOU's terms, unless, of course, the parties "mutually agree on alternative terms" (MOU, 8).

MOU is, or, at one point, was, an enforceable contract which imposed obligations on both sides (answer ¶ 26; reply brief 14; transcript 34). Since a contract exists which governs the subject matter of the parties' preparatory work for the contemplated deal, plaintiffs cannot maintain a quasi-contract cause of action for unjust enrichment or quantum meruit against the Church (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382, 388—89 [1987]; *Jandous Elec. Construc. Corp. v City of N.Y.*, 88 AD2d 821 [1st Dept], *aff'd* 57 NY2d 848 [1982]). Accordingly it is

ORDERED that the motion of defendant St. Michael's Protestant Episcopal Church, a/k/a, St. Michael's Church for partial summary judgment against plaintiffs MG West 100 LLC, Getz Obstfeld and Michael Lonuzzi is granted, and (1) the second cause of action for specific performance is dismissed to the extent it demands that defendant convey to plaintiffs the real property that is the subject of this action, (2) the third cause of action for breach of contract is dismissed to the extent it seeks to hold defendant liable for consequential damages and lost profits, (3) the fourth cause of action for an injunction barring the Church from selling the property to anyone other than plaintiffs is dismissed, (4) the fifth and sixth causes of action for unjust enrichment and quantum meruit are dismissed and the remaining causes of action are severed and shall continue; and it is further

ORDERED that the notice of pendency filed by plaintiffs MG West 100 LLC, Getz Obstfeld and Michael Lonuzzi in the Office of the Clerk of the County of New York on April 2, 2013 and indexed against Block 1871, Lots 35, 36 and 29 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 parties are directed to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y. for a preliminary conference on June 17, 2014 at 9:30 a.m.

Date: June 3, 2014

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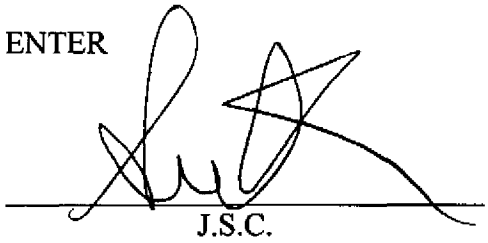

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