STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CONIFER REALTY, LLC,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/02265

CATHOLIC HEALTH SYSTEM, INC.,

Defendant.

I am of the opinion that the agreement claimed in the cause of action for breech of contract is governed by the Statute of Frauds. General Obligations Law §5-701(a)(1). Conifer contends that an agreement was formed between it and CHS arising out of (1) CHS's Request for Qualifications in connection with a major redevelopment of one of it's facilities, (2) Conifer's August 23, 2002, submission responding to CHS's Request for Qualifications in regard to the affordable housing component of the "strategic redevelopment" of Our Lady of Victory Hospital campus, and (3) the January 7, 2003, letter of CHS's vice president in charge of the strategic redevelopment of the OLVH campus designating Conifer as CHS's "choice to develop this project," together with the 15% development fee information enclosed with Conifer's response to the request for qualifications, and the March 5, 2003, memorandum expressing Conifer's "willing[ness] to reduce

their fee to $800,000." The statute applies to any contract which, "by its terms," is impossible of performance within a year.

The court acknowledges the authorities cited by Conifer, Kron v. Harqler Fabrics, Inc., 91 N.Y.2d 362, 366 (1998); D & N Boenang, Inc. v. Kirsch Beverages Inc., 63 N.Y.2d 449, 455 (1984); and esp. Freedman v. Chemical Construction Corp., 43 N.Y.2d 260, 265 (1977), but if the documents alleged to support the creation of a contractual relationship have terms clearly encompassing performance over the course of many years, then the court must find that the statute is implicated. Shirley Polykoff Advertising, Inc. v. Houbigant, Inc., 43 N.Y.2d 921 (1978), which was decided as a companion matter with Freedman. In this case, CHS's proposed time-line in the Request for Qualifications refers to a multi-year project in which "[e]ach component part . . . has it's own proposed time-line as listed below:

> ***Skilled Nursing-***submit NYS certificate of need July 2002, approval February 2003, construction begins mid 2003, complete early 2004 with transfer of existing skilled nursing residence from Mercy Hospital in Spring of 2004. ***PACE***, feasability complete August 2002, apply for Medicaid/Medicare waiver October 2002, 90-day common, approval in January 2003, construction begins March 2003 with completion and enrollment by October 2003. ***Low Income Housing***-Need to complete studies to determine demand in environmental studies for grant application to Federal Government. Begin HUD or DHRC applications September 2002, submit application June 2003, approval late 2003,

> construction January 2004, residence move in mid-2004."

Conifer's response to this proposed deadline, "differ[ing] slightly from the suggested time-line in the RFQ," clearly encompassed performance "occurring from October 2002 through September 2004." Conifer's Response (answer to question #4 entitled "Time-line"). It is true that Conifer only proposed to be the developer of the low income housing or affordable housing component of the overall project, but its proposed time-line, "[b]ased upon our knowledge and experience with the low income housing tax credit process," was from October 2002 through September 2004.

Because, in Freedman, "neither party . . . contended that the alleged agreement contained any provision which directly or indirectly regulated the time for performance," this case is accordingly distinguishable. The documents alleged to make up the agreement contained such provisions. Furthermore, inasmuch as there are no termination provisions alleged to take the claimed agreement out of the statue of frauds, the reference to performance in multiple years means that the contract cannot by its own terms be performed within a year. See Shirley Polykoff Advertising, Inc. v. Houbigant, Inc., 43 N.Y.2d at 922 (promise as part of the consideration for designing and advertisement that defendant will pay plaintiff an additional fee for every year in which the advertisement is used).

Accordingly, the court turns to the question whether the writings alleged to support the existence of the contract satisfy the statute of frauds. On this question, the court agrees that the writings are satisfactory under General Obligations Law §5-701(a). There are two aspects to this analysis: First, whether the signed or unsigned writings alleged to constitute the contract may be considered together to show that a contract was entered into, and second, whether those writings themselves constitute an agreement or only an agreement to agree.

On the first point it is clear that the "agreement may consist of signed and unsigned writings, 'provided that they clearly refer to the same subject matter or transaction.'" Ruppert v. Ruppert, 245 A.D.2d 1139, 1140 (4th Dept. 1997)(citing Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 55). Furthermore, "parole evidence is admissible to show the connection between the writings and the defendant's agreement to them." Western New York Land Conservancy, Inc. v. Town of Amherst, 4 A.D.3d 889, 890 (4th Dept. 2004); see also, Ruppert, 245 A.D.2d at 1140-41. When "the signed and unsigned writings, when read together, provide all essential terms of the contract and clearly refer to the same transaction." American Linen Supply Co. v. Penn Yan Marine Manufacturing Corp., 172 A.D.2d 1007, 1008 (4th Dept.)(quoted in Ruppert, 245 A.D.2d at 1141. For these reasons, I find that the documents above described,

which are alleged to make up the writing, and in particular the January 7th letter subscribed to by CHS's principal, and which made the developer designation of Conifer in connection with the Request for Qualifications and Conifer's response thereto, a contract if it is not merely an agreement to agree.

The price term of up to the 15% a government agency might approve for reimbursement, together with Conifer's subsequent expressed willingness to reduce the fee to $800,000, is infected with the uncertainty present, for example in Clifford R. Gray, Inc. v. LeChase Constr. Serv., LLC, 31 A.D.3d 983 (3d Dept. 2006), and Pino v. Harnischfeger, ___ A.D.3d ___, --- N.Y.S.2d ----, 2007 WL 2045126 (4th Dept. July 18, 2007). See generally, Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., 74 N.Y.2d 475, 483 (1989). As in Clifford R. Gray, Inc., these writings provide no objective method for supplying a missing term, such as a binding formula, nor does it invite recourse to an objective extrinsic event, condition, or standard to determine price. Id. 31 A.D.3d at 985-86. The only pricing provision that may be said to be agreed to is the provision in Conifer's response suggesting that it's fee would be in line with customary similar reimbursable charges up to 15%, thus requiring "further expressions by the parties." Id. 31 A.D.3d at 986. Also, to the extent Conifer relies on it's expressed willingness to reduce the fee to $800,000, "the record is wholly devoid of evidence that

defendant agreed to the prices proposed by plaintiff." Id. It cannot be said that the contractual price term "is objectively or methodologically ascertainable." Buffalo Newspress, Inc. v. Coleman Comm. Corp., 8 A.D.3d 969, 970 (4th Dept. 2004).

But that is not the end of the matter if plaintiff contends, as indeed it does in plaintiff's memoranda of law and in the fourth cause of action, that these writings constitute a preliminary agreement creating a duty to negotiate in good faith. Teachers Ins. & Annuity Ass'n. of Am. v. Tribune Co., 670 F. Supp. 491, 499 (S.D.N.Y.1987) (Leval, J.). As recently summarized by (now) Circuit Judge Wesley in Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc., 487 F.3d 89 (2d Cir. 2007):

> Judge Leval carefully identified two types of preliminary agreements that exist under New York law. 670 F. Supp. at 498; see also Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 547-48 (2d Cir.1998) (applying the Tribune preliminary agreement framework); Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 71-72 (2d Cir.1989) (same). The first type of preliminary agreement ("Type I") exists "when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation," although they may "desire a more elaborate formalization of the agreement." Tribune, 670 F. Supp. at 498. A Type I agreement is enforceable. Id. The second type of preliminary agreement ("Type II") "does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith." Id.

Id. 487 F.3d at 98 n.4. The Appellate Divisions in New York have embraced the Tribune analysis, Cole v. Macklowe, 40 A.D.3d 396

(1st Dept. 2007)(citing Adjustrite); Richbell Information Services, Inc. V. Jupiter Partners, L.P., 309 A.D.2d 288, 298 (1st Dept. 2003)("Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding" - citing Tribune); The River Glen Assoc., LTD v. Merrill Lynch Credit Corp., 295 A.D.2d 274 (1st Dept. 2002), and the multi-factor test devised in the federal courts to determine whether a preliminary agreement exists, Warwick Assoc. V. FAI Ins. Limited, 275 A.D.2d 653, 654 (1st Dept. 2000)("taking into consideration the various relevant factors" of Adjustrite). These cases also may be viewed as coming within the rubric of Goodstein Constr. Corp. v. City of New York, 67 N.Y.2d 990 (1986). See 180 Water Street Assoc., L.P. v. Lehman Bros. Holdings, Inc., 7 A.D.3d 316 (1st Dept. 2004); SNC, LTD v. Kamine Eng. And Mech. Contr. Co., Inc., 238 A.D.2d 146 (1st Dept. 1997)(also citing Tribune); Trade & Industry Corp. V. Euro Brokers Investment Corp., 222 A.D.2d 364, 367 (1st Dept. 1995); Long Island Lighting Co. v. County of Suffolk, 166 A.D.2d 556 (2d Dept. 1990).

The court finds that a Type II preliminary agreement was created by the designation of Conifer contained in the January 7th letter. Measuring the Response to Request for Qualifications and the January 7th letter designation of Conifer as the developer, "it is clear that it is a binding preliminary

agreement to work toward the goal of [re]develpoing the . . . [affordable or low income housing component of the OLVH campus] within the defined framework, preserving for later negotiation in good faith business, design, financing, construction, and management terms necessary to achieve the goal of developing and exploiting the . . . [site]." Brown v. Cara, 420 F.3d 148, 157-58 (2d Cir. 2005). There was language in these writings clearly indicating an intent to be bound to the extent of making the designation of Conifer as developer within the context of a complex two to three year timeline of necessary performance by Conifer to advance the project forward. Importantly, there were no disclaimers or reservation of rights not to be bound until a more formal development designation agreement could be signed. Cole v. Macklowe, 40 A.D.3d at 397 ("but there is no reservation of any right not to be bound"). Compare The River Glen Assoc., LTD v. Merrill Lynch Credit Corp., 295 A.D.2d 274, supra; Trade & Industry Corp. V. Euro Brokers Investment Corp., 222 A.D.2d at 366-67. In addition, there was partial performance to the extent that Conifer's work product was largely duplicated, with minor modifications, by CHS (with its new developer) for the ultimately successful application for funding made after CHS discharged Conifer.

The context of the parties negotiations, when considered with the peculiar needs of this complex redevelopment project,

including contemplated multiple applications for funding, also militate heavily in favor of Conifer in the overall multi-factor analysis. As in Brown v. Cara, supra, "[h]ere, there can be little debate that . . . construction, financing, and management of the Property, all required more formal and extensive contracts, both practically and as matters of customary form." Id. 420 F.3d at 158. As underscored in Trade & Industry Corp. V. Euro Brokers Investment Corp., supra, the important factor militating in favor of finding a preliminary agreement "is that the plaintiff{,] [as] in Goodstein[,] derived no benefit from its contract with the . . . [owner] unless it developed the subject property[,] [d]evelopment . . . rendered impossible, however, by the . . . [owner]'s decision to make [an] alternative . . . [designation of developer]." Id. 222 A.D.2d at 368. "The allegation is that defendant acted without cause and for improper motives in 'dedesignating' plaintiff in violation of its good-faith contractual obligation to cooperate." Goodstein, 67 N.Y.2d at 992.

Accordingly, CHS fails in its initial burden of proof on summary judgment to show the nonexistence of a preliminary agreement of the Type II variety or that plaintiff's breach of contract, and breach of the duty to negotiate in good faith, causes of action are otherwise barred by the statute of frauds. In any event, Conifer raises an issue of fact on both questions,

requiring denial of CHS's motion addressed to them. On Conifer's motion for summary judgment on the breach of contract claim, it establishes as a matter of law by affidavits attesting to the circumstances that it was dedesignated for illegitimate reasons incompatable with CHS's duty under their agreement to negotiate in good faith, viz, a desire to avoid or cut in half the developer's fee by hiring a former employee of Conifer at a steep discount (see Brace's handwritten memo - "cut developer's fee"), the latter of which largely used Conifer's work product in making the second and successful funding application. Yet, I find CHS raises an issue of fact by references to Conifer's admissions of faulty or careless work in connection with the first failed application for funding. Accordingly, Conifer's motion for summary judgment is also denied. The court adds that Conifer's effort to obtain the benefit of the bargain, i.e., the 15% developer's fee originally envisioned or the $800.000 reduced fee it offered to CHS, as part of its motion for summary judgment must be denied for the additional reason that Conifer is entitled only to out-of-pocket loss occasioned by breach of the duty to negotiate in good faith. Goodstein, 80 N.Y.2d 366, 373; 180 Water Street Assoc., L.P. v. Lehman Bros. Holdings, Inc., 7 A.D.3d at 317. In this sense, plaintiff's first cause of action and its fourth are coterminus, and CHS's motion for summary judgment dismissing that discrete aspect of its breach of

contract claim is granted.

CHS's motion for summary judgment dismissing the cause of action sounding in promissory estoppel is granted, and its motion directed to the cause of action sounding in unjust enrichment or quantum meruit is denied, for the reasons stated in Eber-NDC, LLC v. Star Industries, Inc., ___ A.D.3d ___, N.Y. Slip Op. 5845 (4th Dept., July 6, 2007). The court finds that the injury suffered by Conifer under its theory is not unconscionable, and I am bound by Eber-NDC to hold that as an element of the cause of action sounding in promissory estoppel.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: August 14, 2007
Rochester, New York