

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

MATTONE GROUP LLC, et al. X

- against -

TELESECTOR RESOURCES GROUP, INC.,
et al. X

INDEX NO. 27280/2007

MOTION
CALENDAR NO. 40

MOTION SEQ. NO. 2

BY: KITZES, J.

DATED: JANUARY 29, 2008

Defendant Telesector Resources Group, Inc., defendant Verizon Communications, Inc., and defendant Verizon New York, Inc. (collectively "Verizon") have moved for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against them.

Defendant Telesector Resources Group, Inc. d/b/a Verizon Services Group owns a 9.8 acre parcel of real property known as both 135-02 Springfield Boulevard, Springfield Gardens, New York and 184-04 Merrick Boulevard, Springfield Gardens, New York. In 2007, defendant Telesector notified the public through defendant Newmark & Company Real Estate, Inc, a real estate broker, that the property was for sale and that prospective buyers had until June 20, 2007 to submit bids. The notice further provided in relevant part: "Neither the offeror nor the seller will be bound to a contract of sale unless both parties sign and deliver it. The sale is subject to the approval of the senior management of Verizon Communications, Inc."

Plaintiff Mattone Group LLC, a developer of commercial real estate properties, communicated its interest in the property

to the seller and on May 1, 2007 entered into a confidentiality agreement with defendant Newmark promising, inter alia, not to disclose information concerning the property not available to the general public. Paragraph 15 of the confidential agreement provided in relevant part: "Proposed Purchaser acknowledges that the Property may be offered under the Proposed Transaction by the Owner or Broker to any third party, at the Owner's sole discretion. This Agreement is not an offer to sell and shall not be construed as such." Plaintiff Mattone took steps toward the acquisition of the property, including (1) organizing plaintiff JMM Verizon, LLC and plaintiff Mattone Group Verizon, LLC (2) retaining the law firm of Chadbourne & Parke LLP, (3) hiring a mortgage banking firm, (4) hiring a title insurance company, (5) hiring an environmental testing and consulting firm, (6) hiring a company to test for asbestos and lead paint, (7) hiring an architect, and (8) contacting potential tenants and developmental partners.

Plaintiff Mattone alleges that by October 15, 2007, it had reached an understanding with Verizon concerning the basic terms of the agreement, including (1) a price of \$21,250,000 with a down payment of \$2,125,000, (2) the buyer's obligation not contingent on the ability to obtain financing, (3) the seller's obligation to deliver insurable title, (4) closing on November 15, 2007, and (5) a leaseback of the property to Verizon for a period of one year at a rent of \$1,560,000. Plaintiff Mattone further alleges that e-mail exchanged between the parties amount to writings confirming the existence of an agreement.

On October 15, 2007, the attorney representing Verizon sent an e-mail to plaintiff Mattone which stated: "I have been informed by my client that the parties have reached a resolution on the purchase price (\$21,250,000.00) and was directed to prepare and distribute revised documents. Attached are the revised documents, contract and lease, clean and redlined versions. Note, per what was communicated to me, I have deleted the provisions dealing with due diligence termination right and the existing violations. Aside from these, and the price change, there are no other changes of substance." On October 18, 2007, the attorney representing Verizon sent another e-mail to plaintiff Mattone which, after mentioning violations and a closing date, goes on to state: "Assuming the foregoing is acceptable, I will send execution copies of the contract." The contracts that had been sent to plaintiff Mattone were stamped "Draft- October 15, 2007" and "For Discussion Purposes Only." Plaintiff Mattone allegedly communicated its assent to the contract by October 18, 2007.

Mattone subsequently (1) began extensive environmental testing, (2) identified potential development strategies and partners, and (3) negotiated bridge financing. Mattone discovered that harmful chemicals contaminated the property and communicated its concern to Verizon.

By e-mail dated October 22, 2007, Michael X. Mattone, the CFO of plaintiff Mattone, informed Verizon that lenders had concerns about environmental problems at the site, such as a spill. The e-mail went on to state: "As the other potential

[environmental] issues on the site have seemed to grow in complexity over the past few weeks, I can no longer say that we are comfortable being hard on a contract with no financing contingency. The recent results, at a minimum, raise the specter that either a lender will not lend on the site or will do so but in the process impose conditions that we cannot meet." Although Mr. Mattone had previously thought that financing the acquisition was a "no brainer and a risk we were willing to assume," he concluded the e-mail by stating "The recent enviro [sic] results have injected a sizeable change into that thinking." On October 26, 2007, plaintiff Mattone sent an e-mail to Verizon, inquiring "[A]re the lease and P & S in shape to sign?" However, on October 26, 2007, Verizon informed Mattone that it had decided to sell the property to another buyer, which Mattone subsequently discovered to be defendant United Parcel Service ("UPS"). Defendant Newmark served as Verizon's broker in the sale to UPS.

On or about November 1, 2007, the plaintiff brought this action for, inter alia, breach of contract, specific performance, and promissory estoppel.

CPLR 3211(d) provides in relevant part: "Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court ... may order a continuance to permit disclosure to be had and may make such other order as may be just." (See, Mayo v Grotthenthaler, 25 AD3d 998; Ying Jun Chen v Lei Shi, 19 AD3d 407; Bordan v North Shore University Hosp., 275 AD2d 335.)

The plaintiffs have shown a need for discovery on the issue of whether the individual or individuals who purportedly entered into a contract through e-mail communications had the authority to bind the seller. (See, GOL 5-703[2]; Urgo v Patel, 297 AD2d 376; DeMartin v Farina, 205 AD2d 659; Gold v Vitucci, 168 AD2d 607.) Moreover, in order to give both sides a full opportunity to submit any evidentiary material in their possession pertaining to Statute of Frauds issues, this motion will be converted into one for summary judgment pursuant to CPLR 3211(c). (See, Shah v Shah, 215 AD2d 287, 289; Four Seasons Hotels Ltd. v Vinnik, 127 AD2d 310.)

Accordingly, pursuant to CPLR 3211(c) this motion is converted into one for summary judgment. Unless otherwise agreed, the Verizon defendants shall re-calendar their motion for March 19, 2008 in IAS Part 17 upon seven days notice to the plaintiffs. Unless otherwise agreed, the plaintiffs may conduct discovery limited to the issue of whether the individual or individuals who sent the e-mails allegedly satisfying the Statute of Frauds had the authority to enter into a contract on behalf of the seller, and, unless otherwise agreed, such discovery shall be concluded by March 5, 2008.

Short form order signed herewith.

J.S.C.