SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MORTGAGE EQUICAP, LLC, d/b/a EQUICAP,

Plaintiff,

- against -

GLACIER GLOBAL PARTNERS, LLC, YANIV BLUMENFELD, and COLONNADE GROUP, LLC,

Defendants.

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Index No.: 151077/2015

Motion Seq, Nos.: 001 & 002

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C:

Plaintiff Mortgage Equicap, LLC, d/b/a Equicap ("Equicap"), brings this action against defendants Glacier Global Partners, LLC ("GGP"), its managing member, Yaniv Blumenfeld ("Blumenfeld") (Blumenfeld and GGP collectively, "Glacier Defendants"), and Colonnade Group, LLC ("Colonnade"), to recover a brokerage fee (the Glacier Defendants and Colonnade, collectively, "defendants"). The Verified Complaint asserts causes of action for fraud against the Glacier Defendants ("First Cause of Action") and breach of contract against Colonnade ("Second Cause of Action").

In Motion Sequence Number 001, Equicap moves for summary judgment pursuant to CPLR 3212 on its breach of contract claim against Colonnade and Colonnade cross-moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint in its entirety as to Colonnade. In Motion Sequence Number 002, defendants move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint in its entirety. Motion Sequence Numbers 001 and 002 are consolidated for disposition.

BACKGROUND

In July 2014, Colonnade, a New York real estate development company, engaged Equicap, an investment advisory firm, to locate equity financing or a joint venture partner for the

acquisition and development of two properties in New York, New York: 239-241 Third Avenue ("239 Third Avenue") and 243 Third Avenue ("243 Third Avenue") (239 Third Avenue and 243 Third Avenue, collectively the "Property"). Equicap introduced Colonnade to GGP.

On August 28, 2014, GGP and Colonnade executed a Letter of Intent ("LOI") "detailing their collaboration in the development of the Property" (Verified Complaint, ¶ 13). The LOI states that it is between GGP, "its affiliat[es][1] and successors ('Glacier') and Colonnade, [its] affiliates and successors, [C]olonnade and collectively with Glacier, the 'Joint Venture Members,'" and outlines the terms and conditions for "the acquisition and development of the Property (the 'Joint Venture')" (Blumenfeld Affidavit, Exhibit "A"at Glacier0004687). In pertinent part, the LOI provides, as follows:

> "the terms herein shall be subject to the terms of a mutual[ly] acceptable joint venture agreement between the Joint Venture and the LP Equity Partner.
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> * * *
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> "***Financing***: . . . [T]he Joint Venture shall seek to obtain on terms agreeable to the Joi[nt] Venture Members a joint venture limited partner equity investor ('LP Equi[ty] Partner') to partner with the Joint Venture on terms and conditions beneficial [to] the Joint Venture, including the payment of a promoted interest to the Joi[nt] Venture."
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> * * *
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> "***Broker***: Glacier and Colonnade represent and warrant that each has not dealt with a[ny] broker, agent or similar person in connection with the transaction contempla[ted] hereunder except for Equicap, whose commission of not more than 3% [of] Glacier's equity contribution to the Joint Venture,

[1]The text appearing on the right side in all copies of the LOI provided by the parties is cut off. The parties agreed on the record as to the intended use of the word "affiliates" and as to the language in the section entitled "Broker" (Tr. Oral Argument, 3/20/17 at 5-7).

> shall be paid at closing as [an] expense of the Joint Venture."
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> * * *
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> "This Letter of Intent is intended as an expression of the mutual intent of the parties as to certa[in] aspects of a proposed transaction. However, the parties agree that there are material terms as to whi[ch] agreement has not been reached and this letter is not to be construed as a legally binding or definiti[ve] contract . . . and is expressly subject to further due diligence and execution of a joint ventu[re] agreement satisfactory to the parties and their respective counsel, each party acting in its absolu[te] discretion. Moreover, except for the confidentiality and exclusivity provision, no past or future actio[n] course of conduct or failure to act relating to the Project or the negotiation of the Joint Ventu[re] Agreement will give rise to or serve as the basis of any obligation or other liability on the part of Glaci[er] or Colonnade" (*Id.* at Glacier0004687, Glacier0004688, Glacier0004690, Glacier0004691.)

Pursuant to an "Interim Limited Liability Company Agreement" ("LLC Agreement"), dated October 9, 2014, defendants formed GGP-CG Holdings LLC ("GGP-CG") to acquire the Property (Blumenfeld Affidavit, Exhibit "B" at 1). GGP-CG consists of two members: GGP Gramercy 20 LLC ("Gramercy 20" or the "Glacier Member"), and CG Third Avenue LLC (the "Colonnade Member") (*Id.*). The LLC Agreement provides, in pertinent part, that:

> "the Company [GGP-CG] has been formed for the purpose of implementing the Members' agreement with respect to . . . (c) the proposed terms and conditions set forth in the letter of intent attached hereto as Exhibit A (the 'Letter of Intent') upon which the Members, subject to the terms of this Agreement, intend to amend and restate this Agreement and enter into development and management agreements following consummation of the Property Acquisition Transactions . . . . " (*Id.*).

The LLC Agreement also states that:

> "Each Member hereby agrees as a condition to the effectiveness of this Agreement to make the initial capital contribution to the Company described in this Section (the "Initial Capital Contribution"), and, in exchange for such agreement, the Company

> hereby issues to each member a percentage of the membership interests in the Company. . . . For the avoidance of doubt . . . (d) the Glacier Member (together with, or in substitution for, any applicable third party equity provider) will contribute the balance of equity capital required by the Company or any Subsidiary" (*Id;* at § 8).
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> ". . . The parties further acknowledge that without altering the Glacier Member's Percentage Interest, all or a portion of the Glacier Member's Initial Capital Contribution may be characterized as common equity, or as preferred equity, mezzanine debt or mortgage debt of multiple priorities, or any combination of the foregoing, as determined by the Glacier Member in its sole discretion . . . ." (*Id.*).

With respect to Equicap's fee, the LLC Agreement states that neither member "dealt with any broker, finder or similar party in connection with the transactions contemplated by this Agreement other than Equicap" and that "[t]he parties shall negotiate with [Equicap] the amount to be paid to such broker" once the Joint Venture purchases the Property (*Id.*, § 30).

The Glacier Member of GGP-CG, Gramercy 20, consists of three members: GGP Gramercy 20 SE LLC, GGP Gramercy 20 MM LLC ("Gramercy 20 MM"), the manager of Gramercy 20, and an undisclosed investor ("Undisclosed Investor").[2]

On October 9, 2014, Gramercy Club CG LLC, a Delaware limited liability company wholly owned by GGP-CG, acquired 239 Third Avenue. According to Blumenfeld, the $12,652,768 purchase price was financed with: (1) a $6,000,000 temporary bridge loan ("Bridge Loan") from an unrelated entity, GC Club Holdings LLC; (2) a $5,000,000 loan from the Undisclosed Investor, "which was subsequently converted to the [Undisclosed Investor's] equity in the Transaction"; (3) a $500,000 equity contribution from CG Third Avenue LLC; and (4) a

[2] In their papers, Equicap refers to the Undisclosed Investor as "Moshe," whereas defendants refer to him as "Limited Partner" (Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 5; Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 9).

$1,000,000 equity contribution from a GGP affiliate (Blumenfeld Affidavit, ¶ 21). The Undisclosed Investor invested through Gramercy 20.

On October 9, 2014, Daniel Hilpert ("Hilpert"), the sole member and owner of Equicap, contacted defendants regarding his fee (Blumenfeld Affidavit, Exhibit "D"). In the exchange that followed, Blumenfeld estimated that Glacier's total equity investment in the joint venture would be $1,200,000 and calculated Equicap's fee, of three percent, at $36,000 (*Id.*, Exhibit "H"). Hilpert rejected Blumenfeld's offer and speculated that, having closed on 239 Third Avenue "with 11MM[,] . . . [Glacier] will have effectively around 5MM of equity in the deal" (*Id.*, Exhibit "I"). Blumenfeld responded that the acquisition had been financed with "100% debt" (*Id.*, Exhibit "J") and that "the whole amount [was] recorded as both mortgage and mezz" (*Id.*, Exhibit "L"). During the exchange, Blumenfeld also stated that "we bridged the closing with a short term loan funding 100% of the proceeds. This was a personally guarantied [sic] short term loan for two months" (*Id.*, Exhibit "M").

The "Mortgage, Security Agreement, and Assignment of Leases and Rents," executed in connection with the Bridge Loan, misidentifies the mortgagor as "Gramercy Club **G**C, LLC" (*Id.*, Exhibit "O" at 1), and the "Mortgage Note" is by "Gramercy Club **G**C, LLC, a New York limited liability company" (*Id.*, Exhibit "P" at Glacier0004307) [emphasis supplied]. Defendants state that both documents intend to refer to "Gramercy Club CG, LLC, a Delaware Limited Company," and that the documents misstate the name "due solely to a scrivener's error" (Plaintiff's Affirmation in Opposition to Motion for Summary Judgement, Exhibit "4" at 2-3). Defendants admit that neither the Mortgage, Security Agreement and Assignment of Leases and Rents, or Mortgage Note were corrected to reflect the accurate name of "Gramercy Club CG, LLC" and a corrected version of the mortgage document was never recorded.

In addition, while both documents are dated October 9, 2014, defendants admit that they were executed after such date (*See* Defendants' Response to Plaintiff's Statement of Additional Material Facts, ¶ 4). No mortgage was ever recorded in connection with the Joint Venture's acquisition of 239 Third Avenue. In addition, while Blumenfeld executed a personal guaranty in connection with a loan from the Undisclosed Investor, dated October 9, 2014 (*see* Blumenfeld Affidavit, Exhibit "Q" at Glacier 0008463), "[n]o written personal guaranty was executed by Mr. Blumenfeld back in October 2014" (Affirmation in Opposition to Motion for Summary Judgement, Exhibit "7").

On October 23, 2014, GGP sent Equicap a written release ("Release") regarding the "[e]quity investment in 239-243 Third Avenue, New York, NY (the 'Transaction')." (Blumenfeld Affidavit, Exhibit "C"). The Release states:

> "Provided that you countersign and return this letter to the undersigned by Friday October 24, 2014, we will remit to you the sum of $25,000 as a brokerage commission in connection with your assistance in the joint venture with Colonnade Group for the Transaction."
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> "Your countersignature and acceptance of such sum shall conclude this transaction and constitute the complete waiver, satisfaction and release of all claims, liabilities, demands and obligations between you and Glacier Global Partners LLC, its affiliates, officers, directors, partners and members (collectively, 'Glacier') in connection with the Transaction (excluding Colonnade Group, its partners, officers, or affiliates which is separately responsible to you for an additional $25,000 commission)" (*Id.*).

Hilpert executed the release on behalf of Equicap on October 24, 2014, and GGP paid Equicap $25,000 (Hilpert Deposition at 73). Colonnade has not made any payment to Equicap.

On December 30, 2014, Colonnade 243 Property LLC, which is wholly owned by GGP-CG, acquired 243 Third Avenue for $11,069,891. According to Blumenfeld, GGP obtained $14,000,000 in first mortgage financing from Bank Leumi, which it used to purchase 243 Third

Avenue and to pay off a portion of the Bridge Loan. Blumenfeld states that the Undisclosed Investor and GGP then satisfied the remainder of the Bridge Loan, with the Undisclosed Investor paying approximately $2,250,000, and GGP contributing approximately $750,000 in equity. According to defendants, Glacier's equity contribution to the Joint Venture totaled $1,750,000 [$1,000,000 in equity for the acquisition of 239 Third Avenue and $750,000 in equity for the acquisition of 243 Third Avenue] (Blumenfeld Affidavit at ¶¶ 23-28).

According to plaintiff, In December 2014 Gregory Altshuler ("Altshuler"), Colonnade's principal, allegedly "told [Hilpert] the funds to purchase 239 Third Avenue were provided by Glacier and were equity, not debt" (Hilpert Affidavit in Opposition, ¶ 25). In February 2015, Equicap commenced the instant action, alleging that: (1) the Glacier Defendants fraudulently induced it to enter the Release; and (2) Colonnade breached its promise to pay Equicap three percent of Glacier's equity in the Joint Venture.

DISCUSSION

Summary Judgment

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Upon such a showing, the burden shifts to the opposing party "'to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Id.*, quoting *Alvarez*, 68 NY2d at 324). The court reviewing a motion for summary judgment will construe the facts "in the light most favorable to

the opponent of the motion" (*People v Greenberg*, 95 AD3d 474, 484 [1st Dept 2012], *affd* 21 NY3d 439 [2013]).

First Cause of Action for Fraud against the Glacier Defendants

Defendants seek summary judgement dismissing the complaint as against the Glacier Defendants, arguing that the Release bars Equicap's fraud claim, and that, in any event, Equicap can neither establish that the Glacier parties made any material misrepresentations to Equicap nor that Equip reasonably relied on any such misrepresentations. In addition, defendants contend that, should the court determine that the Release is unenforceable, the Glacier Defendants' liability is limited to $1,250, which is the difference between half of three percent of $1,750,000 ($52,500) and the $25,000 they already paid (Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 2-3).[3] Equicap counters that the Release was never intended to bar an unknown fraud claim, and that there are issues of fact regarding the elements of such a claim, including the existence of material misstatements and the reasonableness of Equicap's reliance.

The signing of a release generally "constitutes a complete bar to an action on a claim which is the subject of the release. . . , including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks and citations omitted]). However, "a party that releases a fraud claim may later challenge that release as fraudulently induced . . . if it can identify a separate fraud from the subject of the release" (*Id.*). Once defendants establish that they "[have] been released from any claims, a signed release

[3]Altshuler testified at his depositions that "Glacier wanted us to pay 50 percent of [the fee to plaintiff] and they requiring [*sic*] us to pay 50 percent" (Melzer Affirmation Exhibit "B" Altshuler Deposition at 35). Blumenfeld testified that "there was an agreement . . . to split the commission 50/50 between the Glacier Member and the actual member (Melzer Affirmation Exhibit "A" [Blumenfeld Deposition at 12]).

'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" (*Id.*).

A claim for fraudulent inducement requires plaintiff to establish "the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury" (*Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009] [internal quotation marks and citation omitted]). "[A]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012] [internal quotation marks and citations omitted]). "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006] [internal citation omitted]).

Here, the Release states that it "constitute[s] the *complete* waiver, satisfaction and release of *all* claims, liabilities, demands and obligations" between Equicap and the Glacier Defendants "in connection with the Transaction" (Blumenfeld Affidavit, Exhibit "C" [emphasis added]). Equicap urges this court to read the Release narrowly, as a release of Equicap's claim for a commission only. It contends that there was no intention to release a fraud claim, as Equicap did not learn of Blumenfeld's alleged misrepresentations regarding the financing for 239 Third Avenue until after it executed the Release. However, the Release's broad language reaches "all claims . . . in connection with the Transaction" (*Id.*), and this necessarily encompasses Equicap's previously unknown fraud claim [*see Long v O'Neill*, 126 AD3d 404, 407-408 [1st Dept 2015]

[rejecting plaintiff's argument that "he believed his claims did not exist when he executed the settlement agreement," finding that "the release disposed of even unripe and contingent claims" because it " "broadly barred 'all and/or any' claims 'arising from or resulting from or in connection with'" the subject matter of the suit]; *see also Serbin v Rodman Principal Invs., LLC*, 87 AD3d 870, 870 [1st Dept 2011]).

Having released all claims in connection with the Joint Venture, Equicap now bears the burden of demonstrating that the Glacier Defendants procured the Release through fraud, by "identify[ing] a separate fraud from the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d at 276). Equicap fails to do so. Instead, it alleges that Blumenfeld misrepresented the amount of equity Glacier contributed to the Joint Venture, causing Equicap to release its claim against Glacier for an amount less than the actual value of its claim. Such allegations fall squarely within the subject matter of the Release and, therefore, are insufficient to overcome it (*see Id.* at 278 (internal quotation marks and citation omitted) (affirming dismissal of fraud claim where plaintiffs "ask[ed] to be relieved of [*sic*] the release on the ground that they did not realize the true value of the claims they were giving up").

What is more, whatever the falsity of Blumenfeld's statements, Equicap cannot demonstrate that, in executing the Release, it reasonably relied on such statements. Equicap argues that, at the time it executed the Release, it could not independently verify any of Blumenfeld's statements, because there was no public information available. It also claims that, had it requested supporting documents, defendants would have declined to produce them due to confidentiality provisions. Nonetheless, in his deposition, Hilpert testified that, while "it's not customary for the broker to be shown any closing documents . . . it's always [his] right to request the information afterwards" (Hilbert Affidavit, Exhibit "3" [Hilpert Deposition tr at 60:10-19]).

Hilpert chose to trust Blumenfeld and did not request any supporting documents. Equicap "chose to cash out [its] interest[] and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d at 279). Therefore, "hav[ing] been so lax in protecting [itself] . . . [Equicap] cannot fairly ask for the law's protection" (*Id.* [internal quotation marks and citation omitted]) (finding plaintiff's reliance was not reasonable where "plaintiffs knew that defendants had not supplied them with the financial information necessary to properly value [their claim], and that they were entitled to that information"); *see also Ventur Group, LLC*, 68 AD3d at 639 (finding that plaintiff could not establish justifiable reliance on misrepresentations, "even though its ability to review client agreements was limited due to securities regulations governing confidentiality," where plaintiff "failed to make any effort to verify" the information it was provided).

For the foregoing reasons, defendants' motion for summary judgment is granted to the extent of dismissing the complaint as against the Glacier Defendants.

Second Cause of Action for Breach of Contract

Equicap seeks summary judgment on its breach of contract claim against Colonnade. It argues that, pursuant to the LOI, it is entitled to three percent of all equity Glacier contributed to the Joint Venture, including the $5,000,000 that the Undisclosed Investor, acting as a member of 20 Gramercy, contributed towards the acquisition of 239 Third Avenue. On this cause of action against Colonnade, plaintiff alleges it is entitled to 3% of Glacier's total equity investment, or $180,000, plus interest from October 2014.[4] Defendants argue that their motion for summary judgment dismissing the claim should be granted because Equicap is not a party to the LOI, the

[4]$5,000,000 from the investor referred to as Moshe, and $1,00,000 from a Glacier subsidiary (Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 5-9).

LOI is not binding on Colonnade, and that, in any event, the Release caps Colonnade's liability to $25,000. In the alternative, defendants contend that the LOI provides that the Joint Venture would seek a limited partner, whose contribution would have no bearing on Equicap's commission. Under this scenario, they argue, Colonnade's liability is capped at $26,250, or half of three percent of $1,750,000.

To recover for breach of contract, plaintiff must demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant[s'] breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). To recover as a third-party beneficiary to a contract, plaintiff "must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006]). "Incorporation by reference . . . is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document beyond all reasonable doubt" (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995] [internal quotation marks and citation omitted]).

The interpretation of an unambiguous contract and whether a contract is ambiguous are questions of law for the court (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the court must consider the parties' intentions, "[t]he best evidence of [which] . . . is what they say in their writing" (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citation omitted]). "[P]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.

Form should not prevail over substance and a sensible meaning of words should be sought" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009] [internal quotation marks and citation omitted]). "An interpretation that gives effect to all the terms of an agreement is preferable . . . . Therefore, where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986–987 [1st Dept 2009] [internal quotation marks and citations omitted]). "[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d at 277 [internal quotation marks and citation omitted]).

Here, the Release does not bind Equicap to accept $25,000 as its fee from Colonnade. While the Release states that Colonnade "is separately responsible to [Equicap] for an additional $25,000 commission," it contains neither a promise by Colonnade to pay, nor an agreement by Equicap to accept that sum (Blumenfeld Affidavit, Exhibit "C"). Moreover, the Release expressly "exclud[es] Colonnade Group, its partners, officers, or affiliates" (*Id.*). As such, the court declines "to interpret [the Release] as impliedly stating something which the parties have neglected to specifically include" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d at 277).

In addition, Equicap is a third-party beneficiary of the LOI and the LLC Agreement. First, there is a valid agreement between Glacier and Colonnade. While the LOI "is not to be construed as a legally binding or definiti[ve] contract" (Blumenfeld Affidavit, Exhibit "A" at Glacier0004691), the LLC Agreement incorporates the LOI by reference when it provides that the "the proposed terms and conditions set forth in the letter of intent attached hereto as Exhibit

A" are to be implemented "subject to the terms of [the LLC Agreement]" (*Id.*, Exhibit "B" at 1; *see Shark Info. Services Corp. v Crum & Forster Commercial Ins.*, 222 AD2d at 252). Second, both the LOI and the LLC Agreement provide that neither Colonnade nor Glacier "dealt with any broker . . . in connection with the transaction contemplated . . . other than Equicap," and that Equicap "shall be paid" upon the Joint Venture's acquisition of the Property (Blumenfeld Affidavit, Exhibit "B", § 30; Exhibit "A" at Glacier0004690). Therefore, the LOI and the LLC Agreement "represent[] an admission by defendants . . . that plaintiff[] rendered some services with respect to the transaction and [is] entitled to the reasonable value thereof" (*see Ficor, Inc. v National Kinney Corp.*, 67 AD2d 659, 659-660 [1st Dept 1979] [finding plaintiffs entitled to proceed as third-party beneficiaries to a contract of sale]; *see also Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [1st Dept 2003] [broker entitled to summary judgment as third-party beneficiary, "[w]here a contract of sale or lease agreement admits the broker's performance of services and includes an express promise by the seller to pay the broker's commission"]).

The LLC Agreement does not alter the LOI's promise to pay Equicap a "commission of not more than 3% [of] Glacier's equity contribution to the Joint Venture" (Blumenfeld Affidavit, Exhibit "A" at Glacier0004690). The LLC Agreement merely provides that "[t]he parties shall negotiate with [Equicap] the amount to be paid" (*Id.*, Exhibit "B", § 30. This does not conflict with the LOI, as these "provisions reasonably can be reconciled" (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d at 987 [internal quotation marks and citation omitted]). By requiring defendants to engage Equicap in negotiations, the LLC Agreement allows the parties to come to a different arrangement if they so choose. It does not eliminate the obligation to pay three percent of Glacier's equity contribution. As discussed above, while the

Glacier Defendants came to a different arrangement with Equicap (*i.e.* the Release), Colonnade did not. Therefore, Colonnade is bound to pay the commission, as provided in the LOI.

Finally, the parties dispute whether the Undisclosed Investor's contributions are part of Glacier's equity contribution to the Joint Venture for purposes of calculating Equicap's fee. Equicap accepts that had a limited partner joined Colonnade and Glacier as a Joint Venture Member, his equity contributions would not to be included in calculating Equicap's fee.[5] However, Equicap argues that, because the LOI defines "Glacier" to include GGP's affiliates, Glacier's equity contribution must include the $5,000,000 that the Undisclosed Investor contributed in October 2014, because he made the contribution as a member of Gramercy 20.

Even assuming, without deciding, that Gramercy 20 is a GGP affiliate,[6] to treat the Undisclosed Investor's contribution to the Joint Venture as Glacier equity, would ignore the parties' intention, as expressed in the unambiguous language of the LOI and the LLC Agreement, and would elevate form over substance. The LOI provides, with respect to financing, that "the *Joint Venture shall seek* to obtain on terms agreeable to the Joi[nt] Venture Members a joint venture limited partner equity investor ('LP Equi[ty] Partner') *to partner with the Joint Venture* on terms and conditions beneficial to the Joint Venture" (Blumenfeld

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[5]Plaintiff refers to the Hilpert deposition testimony wherein he stated that the LP equity partner contemplated in the LOI, was to be in addition to the equity contributed by Glacier (Hilpert Affidavit, Exhibit "3" [Hilpert Deposition tr. at 32-33]).

[6] It is not clear from the record whether Gramercy 20 is an affiliate of GGP. Pursuant to its operating agreement, Gramercy 20 is an affiliate of any entity that "[c]ontrols . . . or is under common control with" Gramercy 20 (Blumenfeld Affidavit, Exhibit "G" at 2). Equicap argues that Gramercy 20 is either controlled by, or is under common control with, GGP, because Blumenfeld is the managing member of GGP and also the manager of 20 Gramercy. Even assuming, without deciding, that this satisfies the Operating Agreement's definition of control, it is not clear that Blumenfeld is the manager of 20 Gramercy. In Blumenfeld's deposition, he stated that he is one of the managers of Gramercy 20 MM, which, in turn, is the manager of Gramercy 20 (*See* Hilpert Affidavit, Exhibit "5" [Blumenfeld Deposition tr. at 21:9-14]. However, Blumenfeld could not remember "whether there is another manager within [Gramercy 20 MM]" (*Id.* at 21:21-23).

Affidavit, Exhibit "A" at Glacier0004688 [emphasis added]). Notably, the LOI requires the Joint Venture, rather than the Joint Venture Members, to seek such investment. As such, contrary to Equicap's contentions, the parties never intended or required the LP Equity Partner to come into the venture as a third Joint Venture Member. Moreover, GGP and Colonnade's intention, to allow for flexibility in how such funds would flow into the Joint Venture, is manifest in the LLC Agreement, which provides that "the *Glacier Member (together with, or in substitution for, any applicable third party equity provider*) will contribute the balance of equity capital required by [GGP-CG] or any Subsidiary," and that, "without altering the Glacier Member's Percentage Interest, all or a portion of the Glacier Member's Initial Capital Contribution may be characterized as common equity, or as preferred equity, mezzanine debt or mortgage debt of multiple priorities, or any combination of the foregoing, *as determined by the Glacier Member in its sole discretion*" (*Id.*, Exhibit "B", § 8 [emphasis added]). What is more, Equicap's interpretation, which seeks disparate treatment of the same funds, from the same third-party investor, based solely on how such funds flow into the Joint Venture, impermissibly ignores "the economic substance of [the] transaction . . . [in] determin[ing] the rights and obligations of interested parties" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 564 [1st Dept 2011]; *see also Riverside S. Planning Corp.*, 13 NY3d *v CRP/Extell Riverside, L.P.* at 404 ("[f]orm should not prevail over substance and a sensible meaning of the words should be sought"). For the foregoing reasons, the Undisclosed Investor's contribution is not part of Glacier's equity for purposes of calculating Equicap's damages.

Nonetheless, several issues of fact exist with respect to Equicap's damages. First, it is not clear whether the parties entered a subsequent oral agreement, modifying the LOI's provision that Equicap's commission is "an expense of the Joint Venture" (Blumenfeld

Affidavit, Exhibit "A", Glacier0004690; *see Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 [1988] ("[a]s agents for each other . . . joint venturers are jointly and severally liable to third parties"). Defendants claim that there was a subsequent agreement to evenly split Equicap's commission (*see* Melzer Affirmation, Exhibit "A" [Blumenfeld Deposition tr. at 12:20-13:3]; Melzer Affirmation, Exhibit "B" [Altshuler Deposition tr. at 35:20-24]). However, they do not provide any details and Equicap does not address this contention. Therefore, whether Colonnade is jointly and severally liable for Equicap's commission raises an issue of fact. Second, the submissions on the instant motions make it impossible to ascertain how much equity Glacier contributed to the Joint Venture. For instance, in his Affidavit, Blumenfeld states that the Undisclosed Investor contributed a total of approximately $7,250,000 to the Joint Venture, $5,000,000 of which was initially a loan (Blumenfeld Affidavit, ¶¶ 21, 26). However, the related loan documents indicate that the loan was for $12,000,000 (*Id.*, Exhibits "N", "Q"). Compounding this discrepancy, during his deposition, Blumenfeld testified that the Undisclosed Investor's total investment was $9,500,000 (*See* Hilpert Affidavit, Exhibit "5" [Blumenfeld Deposition tr. at 49:2-5]). Accordingly, Equicap's damages are not immediately calculable on the instant motions for summary judgement.

For the foregoing reasons, Equicap's motion for summary judgment on its second cause of action against Colonnade for breach of contract is granted as to liability only, and defendants' cross-motion for summary judgment dismissing the second cause of action is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendants Glacier Global Partners LLC, Yaniv Blumenfeld and Colonnade Group LLC for summary judgment (Motion Sequence Number 002)

is granted to the extent of dismissing the complaint in its entirety as against Glacier Global Partners LLC and Yaniv Blumenfeld, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and the motion is otherwise denied; and it is further

ORDERED, that the motion of plaintiff Mortgage Equicap, LLC, d/b/a Equicap, for summary judgment on its Second Cause of Action for breach of contract asserted against Colonnade (Motion Sequence Number 001) is granted with regard to liability only; and it is further

ORDERED, that the cross-motion of defendants to dismiss plaintiff's Second Cause of Action for breach of contract asserted against Colonnade (Motion Sequence Number 001) is denied; and it is further

ORDERED, that an immediate trial on the issue of damages on plaintiff's Second Cause of Action for breach of contract against Colonnade shall be had before the court; and it is further

ORDERED, that plaintiff shall, within 20 days from entry of this Order, file a notice of trial for an assessment of damages and serve a copy of this Order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158), whereupon said Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: October 24, 2017

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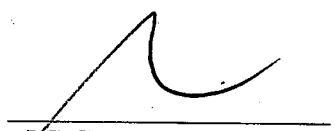

J.S.C.

SHLOMO HAGLER
J.S.C.