SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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SOZO INVESTMENT PARTNERS L.P.,

Plaintiff,

- v -

1600 N 11TH STREET CRCP LLC and CHRISTOPHER RAHN

Defendants.

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INDEX NO. 656532/2022

MOTION DATE 08/23/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for DISMISS / CONVERTED SUMMARY JUDGMENT

Plaintiff Sozo Investment Partners, LP (Sozo) brings this action against defendants 1600 N 11th Street CRCP LLC (CRCP) – a developer – and Christopher Rahn for, *inter alia*, specific performance for plaintiff's right to certain real property in Philadelphia, Pennsylvania (the Property) that plaintiff alleges CRCP was to convey to plaintiff. In their answer, defendants assert counterclaims[1] for malicious prosecution, slander of title, quiet title, declaratory judgment that plaintiff has no interest in the Property, and injunctive relief barring plaintiff from asserting that plaintiff has an interest in the Property. Plaintiff moves to dismiss these counterclaims and certain affirmative defenses. Defendants cross-move under CPLR 3211 (a)(1), (a)(5) and (a)(7) or, in the alternative, under CPLR 3212 to dismiss plaintiff's first and third causes of action for specific performance and under CPLR 3212 for summary judgment on their counterclaims for quiet title, declaratory judgment, and injunctive relief.

BACKGROUND

In January 2021, CRCP purchased the Property located near Temple University's main campus, for the purpose of developing 320 units of high-end student housing (the Project) given an increase in demand for on-campus living

[1] Defendants asserted seven counterclaims but have withdrawn their first two counterclaims for tortious interference.

(NYSCEF # 1 – Complaint, ¶'s 2; 15-16). In March 2021, defendants engaged Volumetric Building Companies (VBC) to provide construction services for the Project (*id.*, ¶ 2). However, defendants were unable to pay VBC for its services, and VBC filed a mechanic's lien a few months later. VBC reached out to plaintiff to secure rescue financing (*id.*, ¶'s 3-4).

On August 2, 2021, plaintiff's managing member, Michael Hanna, met with a VBC representative and Rahn to discuss financing of the Project (NYSCEF # 56 – Hanna Aff, ¶ 5). The meeting resulted in a two-page agreement (the Agreement), which Hanna signed on behalf of plaintiff, and Rahn signed on behalf of CRCP, evidencing the parties' intent to form an entity – the Operating Company – for the purpose of investing in and developing the Property (NYSCEF # 5).

Section 1 of the Agreement provides for the economic splits of the net proceeds that the parties contemplated sharing. Section 2 states that the Agreement is fully binding only subject to plaintiff's right to conduct due diligence and obtain financing. Section 3 requires the parties to use best efforts to finalize and execute the operating agreement with respect to the ownership and operation of the Operating Company and which would contain the economic splits, among other things (*id.*).

In his affidavit, Hanna states that prior to signing the Agreement, "Rahn specifically agreed to transfer the Property to Sozo or one of its affiliates in exchange for Sozo's investment . . .. Indeed, that was the essence of our agreement" (NYSCEF # 56, ¶'s 10-11). The Agreement does not expressly provide for any transfer of the Property to plaintiff. The only mention of "transfer" is the handwritten language in the blank space of the first page, which, according to plaintiff, provides that transfer tax costs and other existing costs would be "absorbed by [Developer]" (NYSCEF # 5 at 1; # 19 – MOL at 4). Hanna states that this negotiated term came about because plaintiff's acquisition of title to the Property would likely trigger real estate transfer taxes, and he and Rahn agreed that CRCP would bear such cost (NYSCEF # 56, ¶ 11-12). The Agreement also defines CRCP as the "Existing Owner" (NYSCEF # 5 at 1).

Plaintiff alleges that defendants thereafter breached the Agreement in bad faith, including by refusing to negotiate the terms of a subsequent draft agreement that plaintiff had prepared and sent to defendants on November 18, 2021, which provided for the transfer of the Property to plaintiff (*id.*, ¶ 7; NYSCEF # 8 – draft PSA). Defendants also allegedly stalled and obfuscated the re-zoning process (NYSCEF # 1, ¶ 45). Eventually, "after months of Defendants' chicanery," Rahn allegedly told plaintiff in February and again in March of 2022 that CRCP would not sign the draft PSA "no matter what" (*id.*, ¶'s 46-47).

On May 27, 2022, plaintiff commenced this action in New York. Plaintiff notes that the court has jurisdiction pursuant to CPLR 301 in that defendant transacts business in New York, and the Agreement provides that "venue for any

dispute hereunder shall be a federal or state court located in the State of New York" (NYSCEF # 1, ¶ 12).

On May 31, 2022, plaintiff filed a *lis pendens* in Pennsylvania,[2] which defendants assert improperly places a cloud on CRCP's title and hinders its ability to sell the Property (NYSCEF # 21 – Opp at 5). On July 19, 2022, the Pennsylvania Court of Common Pleas denied defendants' motion to strike the *lis pendens*, finding that plaintiff "sufficiently pled and provided that there may be a valid claim for specific performance to be litigated" in this action, "specifically as to whether the language of 'transfer tax costs' as written in the Agreement demonstrated an intent and meeting of the minds that [defendants] agreed to sell the Property to [plaintiff]" (NYSCEF # 15 – Order; # 39 – Opinion, at 5-6).

DISCUSSION

The Discussion section will first address plaintiff's invocation of the Anti-SLAPP law to assert a heightened standard of review; followed by plaintiff's motion to dismiss various counterclaims and affirmative defenses; and then defendants' motion for summary judgment on certain causes of action.

The Anti-SLAPP Statute

Plaintiff contends that New York's anti-SLAPP – Strategic Lawsuit Against Public Participation – law requires defendants' claims to be analyzed under a heightened standard and entitles plaintiff to recover its costs and attorneys' fees in connection with dismissal (NYSCEF # 19 at 9). Plaintiff asserts that the anti-SLAPP statute applies as the Project has drawn controversy such that it is not a purely private matter (NYSCEF # 37 at 3-4). Defendants disagree, insisting that this case is a purely private matter (NYSCEF # 21 at 16).

Under the anti-SLAPP statute, if a party making a motion to dismiss "has demonstrated that the action, claim, cross claim, or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law" then the motion "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211 [g]). The civil rights law defines an "action involving public petition and participation" as one in connection with "an issue of public interest" (NY Civ Rights Law § 76-a [a]). "Public interest" means "any subject other than a purely private matter" (*id.* § 76-a [d]). "New York courts have generally applied a broad interpretation to what constitutes a matter of public concern" (*Aristocrat Plastic*

[2] *Sozo Investment Partners, LP v 1600 N 11th Street CRCP, LLC, et. al*, Court of Common Pleas, Phila. County, Trial Division, No. 02597, May Term, 2022.

Surgery, P.C. v Silva, 206 AD3d 26, 29 [1st Dept 2022] [interpreting the 2020 amendments to the anti-SLAPP statute and finding that negative website reviews about a medical practice does constitute a matter of public interest]).

Plaintiff argues that the "development of student housing in downtown Philadelphia is undoubtedly a matter of public interest" because, allegedly, "the project has occasioned controversy, criticism, and rebukes from local planning and development authorities" (NYSCEF # 19 at 9, n 4; NYSCEF # 37 at 3). Assuming that to be true, it is nonetheless clear that what is before the court, including the Agreement's actual scope covering the economic splits for sharing of proceeds and all other terms (including those readily apparent and those alleged), is a purely private matter (*Ashkenazy v Gindi*, 2022 WL 2663505 at *58 [Sup Ct, NY County 2022] [rejecting the idea that the action involving a business dispute between real estate investors constituted a matter of public interest where there was no allegation of any larger controversy that "affects the general public or some segment of it in an appreciable way"]). Accordingly, the anti-SLAPP statute does not apply and plaintiff's motion for costs and attorneys' fees is denied.

CPLR 3211 Motion to Dismiss Standard

CPLR 3211 (a) provides: "A party may move for judgment dismissing one or more causes of action . . . on the ground that: 1. a defense is founded upon documentary evidence . . . or 5. the cause of action may not be maintained because of . . . statute of frauds . . . or 7. the pleading fails to state a cause of action." On a motion to dismiss pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]).

Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, under CPLR 3211 (a) (1), in "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under CPLR 3211 (a) (1) may result only when "it has been shown that a material fact as claimed by the pleader" is not a fact at all and "no significant dispute exists regarding it" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]). Respecting affirmative defenses, CPLR 3211 (b) provides: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."

Defendants' Third and Fourth Counterclaims for Malicious Prosecution and Slander of Title (respectively)

Plaintiff asserts that defendants' counterclaim for malicious prosecution fails given the order of the Pennsylvania court in plaintiff's favor (NYSCEF # 19 at 12). Plaintiff further posits that this action and the *lis pendens* may not be grounds for a slander of title claim and that defendants have failed to plead special damages with particularity (*id.* at 12-13). Defendants counter that the court should allow defendants' claim for malicious prosecution to proceed because plaintiff's claims for specific performance clearly lack merit (NYSCEF # 21 at 17). And defendants posit that they adequately alleged each element of their slander of title counterclaim and maintain that the *lis pendens*, which is distinguishable from a notice of pendency, can form the basis of a slander of title claim (NYSCEF # 21 at 18). In reply, plaintiff draws attention to defendants' failure to cite authority that a malicious prosecution claim can be maintained based on pending litigation and contests defendants' distinction between a notice of pendency and a *lis pendens* (NYSCEF # 37 at 5-6).

"The tort of malicious prosecution requires proof of (1) the commencement or continuation of a [proceeding]; (2) the termination of the proceeding in favor of the [claimant]; (3) the absence of probable cause for the . . . proceeding; and (4) actual malice (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] [citations and quotation marks omitted]). A claimant "must also allege and prove special injury" (*id.*).

Defendant's malicious prosecution counterclaim is dismissed as, at minimum, fatal here is that defendants have failed to plead the termination of a proceeding in their favor (*see e.g. Shawe v Elting*, 161 AD3d 585, 586 [1st Dept 2018]).

The elements of the tort of slander of title are: (1) a communication falsely casting doubt on the validity of the complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages (*39 Coll. Point Corp. v Transpac Cap. Corp.*, 27 AD3d 454, 455 [2d Dept 2006]). "There is no doubt that the act of wrongfully filing of record an unfounded claim to the property of another is actionable as slander of title" and "[t]he wrongful filing for record of a document which casts a cloud upon another's title to or interest in realty is clearly such an act of publication as to give rise to an action for slander of title, *if provable damages result*" (*id.* [emphasis added]). "The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser" (*Rosenbaum v City of New York*, 8 NY3d 1, 12 [2006]).

Defendants have failed to identify a particular purchaser or otherwise substantiate special damages, which requires dismissal. Defendants' reliance on *Arbor Secured Funding, Inc. v Just Assets NY 1* is inapposite as that court denied summary judgment on a slander of title claim on the basis of the claimant having filed a contract of sale for the properties which it claimed to have lost by virtue of the alleged improper filings, which defendants have not done here (10 Misc 3d

1077(A) [Sup Ct, NY County 2006]). Defendants' slander of title counterclaim is dismissed.

Defendant's Fifth, Sixth, and Seventh Counterclaims for Quiet Title under NY Real Prop. Acts Law; Declaratory Judgment; and Injunctive Relief (respectively)

The gist of defendants' claims in these three counterclaims are that defendant Developer is the legal owner of the Property; that despite plaintiff's assertions in its *lis pendens* in Pennsylvania and this action in New York, plaintiff has no interest in the Property; and that the *lis pendens* has put a cloud of the Property's title. Thus, defendants seek a declaratory judgment and injunctive relief to clear up plaintiff's continued assertion of interest in the Property in this action and the cloud on its title caused by the *lis pendens*.

At the outset, plaintiff does not dispute that CRCP owns legal title to the Property (NYSCEF # 19 at 3). Plaintiff argues that while the contract claims may be litigated in New York pursuant to the Agreement's forum-selection clause, the quiet title claim pursuant to NY Real Prop Acts Law Section 121 may not be adjudicated here as the Property is in Pennsylvania (NYSCEF # 19 at 13).

To maintain a cause of action to quiet title to real property, a claimant "must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument, that is actually invalid or inoperative" (*Davis v Augoustopoulos*, 198 AD3d 528, 529 [1st Dept 2021]). And as defendants correctly point out, the quiet title claim can be adjudicated in New York as New York Real Property Law does grant jurisdiction to the Pennsylvania Property (*see e.g. Sarrica v Sarrica*, 41 AD2d 613, 613 [1st Dept 1973] [respecting an action involving Florida real property, finding that having "acquired in personam jurisdiction over the parties, our courts may determine their rights to foreign realty"]; *see also MDO Dev. Corp. v Kelly*, 735 F Supp 591, 592 [SDNY 1990] [noting "the cases are clear that . . . the Court may make such orders as are necessary to effect justice between the parties" involving their dispute about the appropriateness of imposition of a constructive trust on defendants' Connecticut real property]). The *lis pendens* constitutes a removable cloud on the Property, but it is not for this court to adjudicate whether the *lis pendens* is actually invalid or inoperative. Accordingly, plaintiff's motion to dismiss this counterclaim is denied.

Plaintiff also urges dismissal of that defendants' declaratory judgment as it mirrors the relief sought in the complaint (NYSCEF # 19 at 14). Defendants assert that their declaratory judgment action is warranted as it may forestall later litigation (NYSCEF # 21 at 14). But plaintiff does not see how defendants' declaratory judgment action would provide different or additional relief beyond a defeat of plaintiff's claims (NYSCEF # 37 at 6-7).

CPLR 3001 provides: "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

Adjudication of the sixth counterclaim for a declaratory judgment is better left to a later stage in this action when the state of the various claims and counterclaims are clearer (*see e.g. Hudson Valley Oil Heat Council, Inc. v Town of Warwick*, 7 AD3d 572, 574 [2d Dept 2004] ["While a court may dismiss a declaratory judgment action in a proper exercise of discretion, the mere existence of other adequate remedies does not mandate dismissal"]). Plaintiff's motion to dismiss the counterclaim for a declaratory judgment action is therefore denied.

As to defendants' counterclaim for injunctive relief, plaintiff argues that it is not a proper counterclaim but a remedy (NYSCEF # 19 at 14-15). Plaintiff argues that defendant's allegation that serious harm may come if a sale of the Property cannot go forward is no basis to sustain a legally deficient counterclaim (NYSCEF # 37 at 7).

Plaintiff's argument that the claim is a remedy that cannot stand alone is unavailing because "it is permissible to plead a cause of action for a permanent injunction" (*Weinreb v 37 Apartments Corp.*, 97 AD3d 54, 59 [1st Dept 2012]). Given the denial of certain other of defendants' counterclaims at this stage, it is not the case, as plaintiff avers, that defendants do not have any remaining substantive cause of action. Plaintiff's motion to dismiss the counterclaim for injunctive relief is denied.

Defendants' Affirmative Defenses

Defendants' affirmative defenses that plaintiff seeks to dismiss are – (third) lack of personal jurisdiction, (fourth) unclean hands, (fifth) breach of contract, (sixth) breach of the implied covenant of good faith and fair dealing, (ninth) statute of frauds, and (tenth) incorrect party.

Third Affirmative Defense – Lack of Personal Jurisdiction

Defendants claim that this court does not have personal jurisdiction over defendant Rahn because Rahn is neither a citizen of New York nor a party to the Agreement that designated New York as the venue for the parties' disputes (NYSCEF # 4 at 22). Plaintiff argues that because Rahn was the primary actor in the New York transaction, there is jurisdiction (NYSCEF # 19 at 15-16). Defendants maintain that plaintiff's request to strike the personal jurisdiction defense is unwarranted (NYSCEF # 21 at 19).

Plaintiff's motion to dismiss Rahn's lack of personal jurisdiction defense is granted as defendants have wholly failed to substantiate this defense (NYSCEF # 21 at 19). Plaintiff is correct that it is irrelevant that, as defendants put forth, the

defense would be waived if not raised (NYSCEF # 37 at 8). What matters is the applicability of the defense—or in this case the lack thereof.

Fourth Affirmative Defense – Unclean Hands

For their unclean hands affirmative defense, defendants claim that plaintiff's culpable conduct bars or mitigates its claims (NYSCEF # 4 at 22). Defendants point to plaintiff's inequitable conduct in failing to form the Operating Company or transfer funds to CRCP, Rahn, or VBC, thereby causing its own losses (NYSCEF # 21 at 19-20). Plaintiff notes that none of the allegations in defendants' answer involve immoral or unconscionable conduct needed for an unclean hands defense (NYSCEF # 19 at 16).

The doctrine of unclean hands prevents a claimant from obtaining equitable relief where the claimant "has engaged in inequitable or unconscionable conduct connected with the matter in litigation, and where the party invoking the doctrine of unclean hands was injured by such conduct" (*Cohn & Berk v Rothman-Goodman Mgmt. Corp.*, 125 AD2d 435, 436 [2d Dept 1986]).

Accepting the facts in defendants' Answer and Counterclaims as true as the court must on this motion to dismiss, plaintiff has not established at this stage how plaintiff's own failure to provide financing, or otherwise carried on the disputed transaction, does not constitute inequitable or unconscionable conduct (NYSCEF # 37 at 9). Plaintiff's allegation that the lack of financing was defendants' fault cannot be sustained on the present motion to dismiss (*see Perine Intern. Inc. v Bedford Clothiers, Inc.*, 2015 WL 5698668 at *5 [Sup Ct, NY County 2015] [denying resolution of unclean hands defense on motion to dismiss as premature]). Thus, plaintiff's motion to dismiss defendants' unclean hands defense is denied.

Fifth and Sixth Affirmative Defenses – Breach of Contract and Breach of Implied Covenant (respectively)

As for the breach of contract and breach of implied covenant of good faith and fair dealing defense, defendants reiterate that plaintiff failed to fulfill its obligation to invest money in the Project (NYSCEF # 21 at 20). Defendants contend that this defense as well as the covenant of good faith and fair deal defense may be better suited for a summary judgment motion (NYSCEF # 21 at 21-21). Plaintiff contests that it breached the Agreement or any other agreement (NYSCEF # 19 at 17).

Plaintiff argues that defendants' position that plaintiff breached the Agreement by failing to invest money in the development of the Property is inconsistent with the terms of the Agreement (NYSCEF # 19 at 17-18). Specifically, plaintiff argues that the Agreement gave plaintiff until December 31, 2021, to complete due diligence and obtain funding (*id.*; NYSCEF # 5 at 1). However, accepting the facts as alleged in defendants' Answer and Counterclaims as true, and according them the benefit of every possible favorable inference, it is premature to

determine plaintiff's arguments as to whether Hanna and Rahn agreed to a timeline for the financing or whether defendants frustrated plaintiff's due diligence efforts (*see e.g. Gedula 26, LLC v Lightstone Acquisitions III, LLC*, 150 AD3d 583, 583 [1st Dept 2017] [finding dismissal of a breach of contract claim to be premature where discovery may support the allegation]).[3] Plaintiff's reliance on *R/S Assocs. v New York Job Dev. Auth.* (98 NY2d 29, 32 [2002]) is unavailing as that court found the contract to be unambiguous, whereas here, plaintiff itself has suggested the need to "grapple" with the parties' "course of performance" and extrinsic evidence to understand what the parties agreed. Notably, plaintiff stated that extrinsic evidence was needed (NYSCEF # 24 – Tr of Lis Pendens Hearing at 13).[4]

As to the breach of implied covenant of good faith and fair dealing affirmative defense, defendants claim that, to enter into the Agreement, plaintiff represented that plaintiff could obtain initial funding within fourteen days of the Agreement. But plaintiff failed to do so, and thus, plaintiff cannot claim that defendants breached the contract (NYSCEF # 4 at 23). Plaintiff points out that the alleged violation of the implied covenant of good faith and fair dealing was based on pre-Agreement statements. Plaintiff also asserts that that defense should be dismissed as duplicative to the breach of contract defense (NYSCEF # 19 at 18).

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (*Atlas Elevator Corp. v United Elevator Grp., Inc.*, 77 AD3d 859, 861 [2d Dept 2010]). "This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.*). A cause of action for violation of this implied covenant cannot be maintained where it is premised on the same conduct that underlies a separate breach of contract cause of action and is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1st Dept 2011]).

It is premature to determine whether this cause of action is duplicative with defendants' breach of contract claim. If "part of an entire contract is void under the statute of frauds, the whole contract is void. However, where an oral agreement is a severable one . . . having two or more parts not necessarily dependent upon each other, that part which, if standing alone, is not required to be in writing, may be enforced, provided such apportionment of the agreement may be accomplished without doing violence to its terms or making a new contract for the parties"

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[3] Given this conclusion, the court need not and does not reach defendants' contention that plaintiff represented at signing that plaintiff would be able to provide some funding within 14 days of the Agreement and full financing within 45 days (NYSCEF # 29, ¶ 15).

[4] Plaintiff asserted before the Pennsylvania court: "This is kind of an unusual agreement . . . [and] some court somewhere is going to have to grapple with extrinsic evidence to really understand what the parties agreed. And there are emails and there are drafts and there are other agreements. There's a course of performance over months . . . . They're talking about equity financing" (NYSCEF # 24 – Tr of Lis Pendens Hearing at 13-1:14).

(*Apostolos v R.D.T. Brokerage Corp.*, 159 AD2d 62, 65 [1st Dept 1990]). It remains to be seen whether the Agreement's other provisions may be divisible from the disputed Property-transfer arrangement that is allegedly barred by the statute of frauds. Accordingly, plaintiff's motion to dismiss defendants' breach of implied covenant of good faith and fair dealing defense is denied.

Ninth Affirmative Defense – Statute of Frauds

At the onset, by interim order dated September 23, 2022, this court found as untimely defendants' cross motion under CPLR 3211 (a) (1) and (5) to dismiss plaintiff's first and third causes of action for specific performance and converted it to a motion for summary judgment. The parties were granted leave to supplement their filings (NYSCEF # 37 at 11; # 42 – interim order). The parties submitted supplemental filings including a briefing on the statute of frauds.

Defendants' statute of frauds affirmative defense argues that the Agreement does not obligate CRCP to transfer the Property to plaintiff, therefore such purported transfer-obligation is unenforceable (NYSCEF # 4 at 24). Defendants point out that, significantly, the Agreement lacks all material terms as price is not specified (NYSCEF # 21 at 21).

Plaintiff argues that the statute of frauds defense fails because the parties did come to a sufficiently definite price: the Agreement, in setting out economic splits, sufficiently provided a formula for the distribution of proceeds, and the draft purchase agreement also sets out a cognizable formula for establishing the purchase price (NYSCEF # 37 at 10-11). But defendants disagree that price was sufficiently defined by either the economic splits or the draft purchase agreement (NYSCEF # 105 at 9-10).

Plaintiff asserts that the Agreement requires the transfer of the Property to plaintiff, as confirmed by extrinsic evidence already submitted and which would be further corroborated by discovery, thus summary judgment should be denied (NYSCEF # 102 at 8-9; # 100 – Bergman aff). In support, plaintiff submits Hanna's affidavit with forty-one exhibits[5] and an affidavit of Ryan Moore attaching a

[5] The exhibits include various copies of email conversations, text messages, and certain materials regarding the Property, the Project, and the owner CRCP. The emails can be loosely categorized as (i) communicating about certain due diligence materials on the Property's title history, environmental facets, and contractual arrangements (NYSCEF #'s 57; 61-62; 67; 69; 71-72; 92) (ii) arranging to talk (NYSCEF #'s 73; 78); (iii) coordinating preparation of Rahn's biography; (NYSCEF #'s 74; 76-77; 79-80; 85); (iv) charting a path forward for VBC's construction work on the Project (NYSCEF #'s 83; 85; 88; 91); and (v) relating to financing of the Project (NYSCEF #'s 93-95). The texts can be similarly categorized (NYSCEF #'s 75; 86-87; 89-90; 96-97). The due diligence materials include various title and transfer information (NYSCEF #'s 58; 60; 66); various agreement

photograph depicting the undeveloped condition of the Property.[6] (NYSCEF # 56; NYSCEF #'s 57-97; NYSCEF # 98 and 99 – Moore Aff and Photograph). Plaintiff further argues that even if the Agreement were otherwise insufficient to compel transfer, the part performance exception applies (NYSCEF # 102 at 16-19).

Plaintiff lists defendants' part performance as follows: complying with their obligation to provide information in response to plaintiff's right to conduct due diligence on the Property; sending Hanna various documents related to the property; placing Hanna in contact with contractors and other third parties working on the Project; responding to specific due diligence requests in a document referencing the transaction as an "acquisition"; preparing a biography for Hanna to share with prospective investors; and continuing to keep Hanna informed about the Project (*id.* at 17). Plaintiff argues that defendants' conduct here meets the standard for part performance by being "unequivocally referable to the" Agreement to transfer the Property (*id.*).

Plaintiff lists its own part performance to finance the Project as follows: negotiating term sheets expressly referencing the Project; drafting presentations to be shared with prospective lenders; securing letters of intent from investors; discussing financing on multiple occasions with Rahn; and assuming control over the relationship with VBC including by having calls to address payment of invoices (*id.* at 17-18).

Defendants disagree that the part performance plaintiff listed is sufficient to defeat the statute of frauds or that further discovery is needed at this juncture (NYSCEF # 105 at 7-11). And defendants assert that the statute of frauds applies because the Agreement at best provides for transfer to an entirely new entity that does not exist (NYSCEF # 105 at 6-7). Finally, plaintiff contends that defendants' motion for summary judgment on their counterclaims is premature as issue has not been joined given that plaintiff moved to dismiss defendants' counterclaims rather than answer them (NYSCEF # 37 at 13-14).

Under the statute of frauds, a contract for the sale of real property "is void unless the contract or some note or memorandum thereof, expressing the

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documents relating to the Property (NYSCEF # 59; 63-65); the CRCP operating agreement (NYSCEF # 68); an environmental report (NYSCEF # 70); VBC's notice of intent to stop work (NYSCEF # 84); and a financing letter of intent (NYSCEF # 94). Plaintiff also proffered two exhibits with the NYSCEF caption "Meeting" to support Hanna's assertion that he and Rahn spoke frequently including in late November (NYSCEF #'s 81-82; NYSCEF # 56, ¶ 24).

[6] Plaintiff states that the photograph "depicts portions of a parking lot with several large mounds of dirt [which] is starkly at odds with Rahn's sworn statement (NYSCEF 29 at ¶ 29) that the Project was 'nearing completion' in August 2022" (NYSCEF # 102 at 8). Defendants respond with their own affidavit and a photograph of the Property to support Rahn's prior statement that the Project was nearing completion with construction set to end by October or November of 2022 (NYSCEF # 106).

consideration, is in writing, subscribed by the party to be charged" (NY Gen Oblig Law § 5-703 [2]). "To satisfy the statute of frauds, a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement" including the terms of payment (*Behrends v White Acre Acquisitions, LLC*, 54 AD3d 700, 701 [2d Dept 2008] [citations and quotation marks omitted]). "[W]here a contract's material terms are not reasonably definite, the contract is unenforceable" (*id.*). If a contract for the conveyance of real property "is incomplete and it is necessary to resort to parol evidence to ascertain what was agreed to, the remedy of specific performance is not available" (*Sabetfard v Smith*, 306 AD2d 265, 266 [2d Dept 2003]).

"While the statute of frauds empowers courts of equity to compel specific performance of agreements in cases of part performance, the claimed partial performance must be unequivocally referable to the agreement. . . . It is not sufficient that the oral agreement gives significance to the plaintiff's actions. Rather, the actions alone must be unintelligible or at least extraordinary, [and] explainable only with reference to the oral agreement" (*Pinkava v Yurkiw*, 64 AD3d 690, 692 [1st Dept 2009] [citations and quotation marks omitted]).

Plaintiff's present arguments that the Agreement unambiguously contemplates transferring the Property to plaintiff or an affiliate is without merit (NYSCEF # 102 at 10-11).[7] The handwritten transfer-tax-cost language at best ambiguously indicates that a transfer was contemplated but not necessarily one to plaintiff's control.

Even if, for argument's sake, the Agreement were deemed to unambiguously provide for transfer to plaintiff or its affiliate,[8] still the Agreement fails to satisfy the statute of frauds, at least as to the remedy of specific performance, by failing to identify the terms of payment, rendering such transfer provision incomplete and unenforceable (*Behrends*, 54 AD3d at 701). Plaintiff's argument that the "economic terms were set whereby [plaintiff] agreed to invest in the Project in exchange for a certain share of proceeds and the parties agreed to an allocation of costs incident to the transfer of the Project" is insufficient (NYSCEF # 19 at 19). In arguing that the economic splits constitute a cognizable formula by which the purchase price can be readily ascertained, plaintiff conflates the Agreement's distribution of proceeds with the purchase price (NYSCEF # 37 at 10). As defendants argue, the economic splits do not provide any cognizable formula, reference, or value associated with the land itself (NYSCEF # 105 at 9-10).

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[7] As noted above, plaintiff has previously stated that it would be necessary to "grapple with extrinsic evidence" (NYSCEF # 24 at 13-1:14).

[8] Given the holding, the court need not reach defendants' capacity argument respecting the non-formation of the Property's purported transferee (NYSCEF # 105 at 6-7)

Plaintiff also attempts to establish the terms of the parties' transaction by asserting that the draft PSA specifies a purchase price (NYSCEF # 37 at 11). As plaintiff admits that defendants never negotiated the terms of the draft PSA, it is thus insufficient to satisfy the statute of frauds (NYSCEF # 102 at 7; *Chan v Chin*, 62 AD3d 471 [1st Dept 2009] [finding documents failed to satisfy the statute of frauds where "there was never a meeting of the minds" on price and "negotiations continued even after a closing was concluded unsuccessfully"]).

The cases plaintiff cites on this point are unavailing (*Dahm v Miele*, 136 AD2d 586, 588 [2d Dept 1988] [finding agreement did not violate the statute of frauds on basis of alleged ambiguity as to price because formula for purchase price was readily ascertained from signed letter agreement without resort to parol evidence]; *Tetz v Schlaier*, 164 AD2d 884, 885 [2d Dept 1990] [stating that "whether an instrument satisfies the Statute of Frauds is based solely on the language in the document itself, without consideration of parol evidence"]). Accordingly, the court need not reach, and does not reach, the issue of whether the draft PSA even specified a sufficiently ascertainable price as the document constitutes parol evidence that may not be used to establish a right to specific performance (*see Sabetfard*, 306 AD2d at 266).

Plaintiff argues that even if the Agreement were otherwise insufficient to compel transfer, the part performance exception to the statute of frauds applies. This court disagrees to the extent plaintiff seeks the remedy of specific performance. The post-Agreement activities plaintiff identifies are consistent with the unambiguous, explicit provisions of the Agreement, including for plaintiff to manage and control the venture[9] and to obtain financing subject to plaintiff's right to conduct due diligence and for defendants to provide due diligence information pursuant to a contemplated financing of the Project. Such activities are not unequivocally referable to the purported agreement to transfer the Property to plaintiff nor are they "unintelligible" or "extraordinary" and "explainable only with reference to the" alleged transfer agreement (*Pinkava*, 64 AD3d at 692).

Furthermore, the post-Agreement activities plaintiff argues as supporting part performance are insufficient in that regard as they generally constitute preparatory due diligence (*see e.g. RTC Properties, Inc. v Bio Res., Ltd.*, 295 AD2d 285, 286 [1st Dept 2002] [holding that conduct that can be reasonably explained as constituting preparatory due diligence is insufficient to satisfy the part performance exception to the statute of frauds]; *cf Pinkava*, 64 AD3d at 692 [finding triable facts as to part performance where actual payment completed $51,000 out of an alleged $150,000 purchase price via an oral agreement for real estate conveyance and the tendered balance was refused]; *compare also Panetta v Kelly*, 17 AD3d 163, 164 [1st Dept 2005] [finding triable facts as to part performance where it was undisputed

[9] It is noted that plaintiff has not demonstrated that the Agreement provided that the venture would necessarily take title of the Property itself.

that entire purchase price for real property was paid and no other scenario explains such financing and other expenses and improvements other than the alleged oral argument for transfer]).

To the extent the post-Agreement activities can be deemed to extend beyond preparatory due diligence, such as plaintiff's alleged take-over of control of the relationship with VBC, they are not unequivocally referable to the alleged Property transfer as they could also be explained by plaintiff's abiding by the Agreement's explicit provisions for plaintiff to manage and control the contemplated venture and plaintiff's motivation to earn the economic splits from such venture (*see e.g. Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983] [rejecting the application of the part performance exception on the basis that while an alleged agreement otherwise barred by the statute of frauds provided a possible motivation for plaintiff's actions, the performance is equivocal, for it is as reasonably explained by the possibility of other expectations, such as the receipt of compensation other than in the form of that sought by the plaintiff]).

Accordingly, plaintiff's motion to dismiss defendants' statute of frauds defense must be denied.[10]

Tenth Affirmative Defense – Incorrect Party

Defendants claim that CRCP, incorporated in Delaware, is not the owner of the property, and thus, CRCP is an incorrect party (NYSCEF # 4 at 24). Plaintiff's view is that CRCP was properly served, hence, there is no need to make a correction (NYSCEF # 19 at 19). Defendants do not contest that since defendants have both answered on behalf of the property owner; rather, defendants state that they have included this defense under the requirements of CPLR 3211 (e) (NYSCEF # 21 at 17). Plaintiff replies that this claim is nonetheless irrelevant and cannot save an unsubstantiated defense (NYSCEF # 37 at 8).

Plaintiff's motion to dismiss defendants' incorrect party defense is granted as defendants have wholly failed to substantiate it (NYSCEF # 21 at 21).

Defendants' Converted Motion for Summary Judgment

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On

[10] Respecting the Pennsylvania court's denial of defendants' motion to strike the *lis pendens*, it is to be noted that this court's holding means that plaintiff does not have a valid claim for specific performance for transfer of the Property under New York law.

a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate" (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]). "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v Am. Lung Assn*, 90 NY2d 623, 631 [1997]).

Plaintiff's First and Third Causes of Action for Specific Performance

At issue is whether defendants are entitled to summary judgment dismissing the first and third causes of action under the statute of frauds (*Sabetfard*, 306 AD2d at 266). Here, for the reasons indicated above in denying plaintiff's motion to dismiss the statute of frauds defense, defendants have made a prima facie showing entitling them to summary judgment because the Agreement fails to identify the terms of payment, rendering the transfer provision incomplete and unenforceable. Moreover, extrinsic evidence cannot form a basis for overcoming the statute of frauds defense to obtain the remedy of specific performance. Therefore plaintiff has failed to establish the need for conducting discovery prior to resolution of defendants' motion.

Plaintiff posits that there are disputed issues of fact as to what the parties discussed and agreed at their August 2, 2021 meeting (NYSCEF # 102 at 12). Given the statute of frauds, however, such discovery still has no import as to the specific performance claim relating to the alleged Property-transfer.[11] This is not to say that the discovery as to this meeting may or may not impact plaintiff's other causes of action, for which extrinsic evidence may be considered, but which is not now for the court to evaluate.

Nor do *Sw. Marine & Gen. Ins. Co. v Preferred Contractors Ins. Co.* (143 AD3d 577 [1st Dept 2016] [case involving commercial general liability insurance policy]) or *Georgia Malone & Co., Inc. v. E & M Assocs.* (163 AD3d 176 [1st Dept 2018] [case involving claims for, *inter alia*, money damages relating to commission agreement]) upon which plaintiff relies call for a different conclusion than the one which the court has reached. Neither involve the alleged transfer of real property, for which extrinsic evidence generally may not be used to support specific performance in satisfying the statute of frauds. Accordingly, defendants' motion for summary judgment dismissing plaintiff's first and third causes of action is granted.

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[11] In a similar vein, Rahn's credibility is not relevant, therefore the court need not consider the parties' contentions respecting the consistency of Rahn's past statements with the state of development as demonstrated by photographs of the Property.

Defendants' counterclaims

Defendants' motion for summary judgment on their fifth, sixth, and seventh counterclaims is denied as premature as plaintiff has not yet replied to defendants' counterclaims (*see* CPLR 3212 ["Any party may move for summary judgment in any action, *after issue has been joined*" [emphasis added]; *65 N. 8 St. HDFC v Suarez*, 18 AD3d 732, 733 [2d Dept 2005] [holding trial court prematurely granted summary judgment as to counterclaim "since the plaintiff had no opportunity to reply to the counterclaim"]).

CONCLUSION

In view of the above, it is

ORDERED that the branch of Sozo Investment Partners L.P.'s (Sozo) motion for an award of costs and attorneys' fees pursuant to N.Y. Civil Rights Law § 7a(1)(a) is denied; and it is further

ORDERED that the branch of Sozo's motion to dismiss the First, Second, Third, and Fourth counterclaims is granted; and it is further

ORDERED that the branch of Sozo's motion to dismiss the Fifth, Sixth, and Seventh counterclaims is denied; and it is further

ORDERED that the branch of Sozo's motion to dismiss the Third and Tenth affirmative defenses is granted; and it is further

ORDERED that the branch of Sozo's motion to dismiss the Fourth, Fifth, Sixth, and Ninth affirmative defenses is denied; and it is further

ORDERED that the branch of 1600 N 11th Street CRCP LLC (CRCP) and Christopher Rahn's converted motion for summary judgment as to Sozo's First and Third causes of action is granted; and it is further

ORDERED that CRCP and Rahn's converted motion for summary judgment on their Fifth, Sixth, and Seventh counterclaims is denied; and it is further

ORDERED that Sozo shall reply to CRCP and Rahn's counterclaims by November 30, 2022.

11/14/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE