SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
J.S.C.

HASHKAOT LLC, a Commonwealth of Virginia limited liability company,

Plaintiff,

-against -

UNION SENIOR CITIZENS' PLAZA, INC., A New York Not for Profit corporation, UNION SENIOR PLAZA, L.P., a New York limited partnership, UNION SENIOR CITIZEN PLAZA HOUSING DEVELOPMENT FUND COMPANY, INC., a New York Not for Profit Corporation, and GREYSTEEL NEW YORK, LLC, a foreign limited liability company,

Defendants.

TRIAL/IAS PART 5

Index No.: 608815-2022
Motion Date: 11-28-2022
Sequence No.: 001

Motion Date: 12-15-2022
Sequence No.: 002

DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 001:

Notice of Motion, Affirmation, and Exhibits..... 1
Memorandum of Law in Support..... 2
Memorandum of Law in Opposition..... 3
"Reply Affidavit"of David C. Goldstein in Opposition..... 4
"Reply Affidavit" of Peter Wolf in Opposition 5
Reply Memorandum of Law in Further Support..... 6
Supplemental Affirmation and Exhibits 7

Sequence No. 002:
Notice of Motion, Affirmation..... 1
Opposition to Plaintiff's Motion..... 2

PRELIMINARY STATEMENT

In Sequence No. 001, defendants Union Senior Citizen's Plaza, Inc., Union Senior Plaza, L.P., and Union Senior Citizen Plaza Housing Development Fund Company, Inc. move: (1) pursuant to CPLR 3212 for summary judgment dismissing the complaint (counts I through V) insofar as asserted against them; (2) for leave to enter a default judgment against plaintiff on the issue of

liability with respect to their counterclaims; (3) for leave to enter a judgment declaring that: (a) no enforceable contract exists between Union Senior Plaza, L.P. and plaintiff governing a sale of the real property at issue, and (b) plaintiff's notice of pendency is improper, has no legal effect, and is judicially removed; (4) in the alternative to the entry of a default judgment on its counterclaims, pursuant to CPLR 3212, for summary judgment on the issue of liability on their counterclaims (Counts II-IV) against plaintiff; (5) to direct the Nassau County Clerk to immediately cancel the notice of pendency filed by plaintiff; (6) for all costs and expenses incurred to date in this litigation, including attorneys' fees, in an amount to be determined at a subsequent proceeding; and (7) for such other, further relief as the Court deems just and proper. Opposition and reply have been submitted.

In Sequence No. 002, plaintiff moves for permission to file a sur-response with respect to Motion Sequence No. 001. Opposition has been submitted.

BACKGROUND

In July 2022, plaintiff commenced this action against defendants Union Senior Citizens' Plaza, Inc., Union Senior Plaza, L.P., Union Senior Citizen Plaza Housing Development Fund Company, Inc. (hereinafter individually as Housing Development Fund and collectively with Union Senior Citizens' Plaza, Inc. and Union Senior Plaza, L.P. as the Union defendants) and Greysteel New York, LLC (hereinafter Greysteel), the real estate broker for Union Senior Plaza, L.P., for specific performance concerning the purchase of real property located at 151 S. Franklin Street, Hempstead, New York (hereinafter the subject property), a senior affordable living housing complex, pursuant to the terms set forth in its letter of intent, dated May18, 2022 (Count I against the Union defendants) and to recover damages for promissory estoppel (Count II against the Union defendants); breach of implied duty of good faith and fair dealing (Count III against the Union defendants); unjust enrichment (Count IV against the Union defendants); misrepresentation (Count V against the Union defendants and Greysteel); and unjust enrichment (Count VI against Greysteel)(*see* NYSCEF Doc. No. 2/Union Defendants' Ex. 9: Complaint). The complaint was verified by plaintiff's principal (*see id.*). Attached as exhibits to the complaint were Greysteel's confidential offering memorandum (hereinafter the Offering); plaintiff's initial letter of intent, dated March 31, 2022, addressed to Greysteel which was not signed by either purchaser or seller; email between plaintiff's real estate broker and Greysteel regarding plaintiff's proof of funds; plaintiff's second letter of intent, dated May 4, 2022, addressed to Greysteel which was signed by plaintiff's principal/managing member but not by seller; plaintiff's final letter of intent, dated May 18, 2022 [hereinafter LOI], addressed

to Greysteel which was signed by plaintiff's principal/managing member but not by seller; and emails between Greysteel and plaintiff's real estate broker concerning Greysteel's acknowledgment of plaintiff's final letter of intent (*see* NYSCEF Doc Nos. 3-8). Plaintiff also filed a notice of pendency against the subject property, the proposed sale of which is the subject of this litigation (*see* NYSCEF Doc. Nos. 9 & 10/Union Defendants' Ex. 8: Notice of Pendency).

The Union defendants answered the complaint on August 18, 2022 (*see* NYSCEF Doc. No. 25/Union Defendants' Ex. 10: Union Defendants' Answer). In their answer, they raised various affirmative defenses including that the causes of action set forth against them were barred by the statute of frauds and the fact that no contract of sale to sell the subject property existed (*see id.*). Moreover, the Union defendants interposed four counterclaims against plaintiff, to wit: for a judgment declaring that no enforceable contract existed between plaintiff and Union Senior Plaza, L.P. with respect to the sale of the subject property and that plaintiff's notice of pendency is improper and has no legal effect (Count I); for special damages for slander of title due to the improper filing by plaintiff of the notice of pendency and an injunction with respect to the removal of the notice of pendency (Count II); for damages for tortious interference with the contract of sale (Count III); and for damages for tortious interference with prospective economic advantage (Count IV)(*see id.*). Annexed as exhibits to the Union defendants' answer was the amended and restated agreement of limited partnership of Union Senior Plaza, L.P.; option and right of first refusal agreement (hereinafter ROFR) between Union Senior Plaza, L.P., and Housing Development Fund; letter dated February 17, 2022, from Alden Torch Financial, regarding a certain assignment and assumption agreement and transfer of LP interests; letter dated May 23, 2022, from Alden Torch Financial, regarding proposed sale of the subject property; emails, dated June 2022, between counsel for Alden Torch Financial and plaintiff regarding ROFR; letter dated June 16, 2022, from Alden Torch Financial, to Housing Development Fund, and its counsel regarding ROFR; and letter from counsel for Housing Development Fund, dated June 21, 2022, to Union Senior Plaza, L.P. and Alden LP, LLC, regarding election of ROFR (*see* NYSCEF Doc. Nos. 26-32/Union Defendants' Ex. 1-7: Exhibits A through G to the Union Defendants' Answer). The answer and counterclaims were verified by the chair of the Board and president of Union Senior Citizens' Plaza, Inc., the sole owner of Housing Development Fund, which is the general partner of Union Senior Plaza, L.P. (*see* NYSCEF Doc. No. 33/Union Defendants' Ex. 10: Verification of Marilyn Thornton).

The Union defendants move, pursuant to CPLR 3212, for summary judgment dismissing the

complaint (counts I through V) insofar as asserted against them; for leave to enter a default judgment against plaintiff on the issue of liability with respect to their counterclaims; and (3) for leave to enter a judgment declaring that: (a) no enforceable contract exists between Union Senior Plaza, L.P. and plaintiff governing a sale of the real property at issue, and (b) plaintiff's notice of pendency is improper, has no legal effect, and is judicially removed; (4) in the alternative to the entry of a default judgment on its counterclaims, pursuant to CPLR 3212, for summary judgment on the issue of liability on their counterclaims; (5) to direct the Nassau County Clerk to immediately cancel the notice of pendency filed by plaintiff; (6) for all costs and expenses incurred to date in this litigation, including attorneys' fees, in an amount to be determined at a subsequent proceeding; and (7) for such other, further relief as the Court deems just and proper. Opposition and reply have been submitted.

Plaintiff moves for permission to file a sur-response with respect to Motion Sequence No. 001. Opposition has been submitted.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], *quoting Vega v Restani Constr. Corp.*, 18 NY3d 499,503 [2012]). "Only if the movant meets that standard does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact" (*Scurry v New York City Hous. Auth.*, 193 AD3d 1, 9 [2nd Dept. 2021]; *see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). "Ultimately, the role for the court in addressing motions for summary judgment is issue finding rather than issue resolution" (*Scurry v New York City Hous. Auth.*, 193 AD3d at 9; *see Kriz v Schum*, 75 NY2d 25, 33 [1989]).

"Under the statute of frauds, a contract for the sale of real property must be evidenced by a writing" (*Cohen v Holder*, 204 AD3d 973, 975 [2nd Dept. 2022]; *see* General Obligations Law § 5-703[1]; *Piller v Marsam Realty 13th Ave., LLC*, 16 AD3d 773, 773 [2nd Dept. 2016]). The writing

must "identify the parties, describe the subject matter, be signed by the party to be charged, and state all of the essential terms of an agreement" (*O'Hanlon v Renwick*, 166 AD3d 890, 891 [2nd Dept. 2018]; *see Ehrenreich v Israel*, 188 AD3d 818, 819 [2nd Dept. 2020]; *Piller v Marsam Realty 13th Ave., LLC*, 136 AD3d at 773-774). "In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities" (*443 Jefferson Holdings, LLC v Sosa*, 174 AD3d 486, 487 [2nd Dept. 2019]; *see Ehrenreich v Israel*, 188 AD3d 818, 819 [2nd Dept. 2020]). "'[T]he writing must set forth the entire contract with reasonable certainty so that the substance thereof appears from the writing alone . . . If the contract 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'" (*Nesbitt v Penalver*, 40 AD3d 596, 598 [2nd Dept. 2007], *quoting Checkla v Stone Meadow Homes, Inc.*, 280 AD2d 510, 510-511 [2nd Dept. 2001][internal quotation marks omitted]).

Here, in support of their motion, the Union defendants submit, among other things, the complaint, verified by plaintiff's principal[1], which referred to and incorporated the exhibits annexed thereto. In its accompanying memorandum of law in support of this motion, the Union defendants contend that plaintiff "admits in its Complaint that the purported agreement to sell the Property arises from a real estate broker allegedly stating that [plaintiff] had the 'winning bid' and that a written purchase agreement would be forthcoming from the parties's counsel. (Compl. 42, 47). But there is no allegation- nor any evidence because none exists- that there was ever a written agreement to sell [plaintiff] the Property that was signed or accepted in writing by the Union Defendants (or anyone for that matter)" (Union Defendants' Memorandum of Law in support, pp. 11-12).

According to the complaint, after plaintiff submitted its LOI, during a telephone conversation, which occurred on May 27, 2022, its real estate broker was informed by Greysteel that plaintiff was the winning bidder, that the owner of the property Union Senior Plaza, L.P. had accepted the terms set forth in plaintiff's LOI, and that a purchase and sale agreement would be

[1] CPLR 105 provides that "[a] 'verified pleading' may be utilized as an affidavit whenever the latter is required" (CPLR 105[u]; *see Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 891 [2013]). The Court notes that plaintiff does not raise any objections to the Union defendants' use of the verified pleadings and certain documents which were annexed to their counsel's affirmation to support this motion.

forthcoming from counsel for Union Senior Plaza, L.P. (*see* Union Defendants' Ex. 9: Verified Complaint ¶¶ 42-43). In its complaint, plaintiff also acknowledged about being advised thereafter about the ROFR held by Housing Development Fund (*id.* at ¶ 48).

In support of its cause of action for specific performance, plaintiff alleged that "[t]he written Offering, LOI, and representations of [its real estate broker] and [Greysteel, the real estate broker for Union Senior Plaza, L.P.]- the parties' agents- all together constituted a contract, to which [the Union defendants] agreed to be bound" and that "[t]he Offering, emails and LOI constitute a writing for purposes of the statute of frauds" (*id.* at ¶¶ 70-71).

The written Offering refers to Greysteel's confidential offering memorandum, annexed as an exhibit to the complaint (*see* NYSCEF Doc. No. 3 and Ex. A to Complaint: Greysteel Offering). According to the Section of the Offering entitled "Property Tour & Offer Process", "[o]ffers should be submitted in the form of a non-binding Letter of Intent to Henry Mathies []. Terms and conditions of Purchasers' offer should at the minimum include: Offer price; Earnest money deposit; Due diligence and closing period; Description of Purchaser qualifications and proof of funds" (*id.* at p. 2). On the last page of the Offering, under "License Information and Online Disclosures", it states, in part, that "[t]his Confidential Offering Memorandum [] is solely for the use of the owner. . . Greysteel does not have authority to legally bind the owner and no contract or agreement providing for any transaction shall be deemed to exist unless and until a final definitive contract has been executed and delivered by owner" (*id.* at p. 29).

The LOI, provided as an exhibit to the complaint and the contents of which is incorporated into the complaint, stated that plaintiff was "offering to purchase the [subject property]" and listed "[t]he general terms and conditions of this proposal" (NYSCEF Doc. No. 7 and Ex. E to Complaint: LOI). After the proposed terms were set forth, the letter stated "[p]lease have Seller indicate acceptance of the foregoing by signing a copy in the space provided below and return to me" (*id.*). The LOI was signed by plaintiff's managing member, who is the same individual who verified the complaint (*see id.*). The signature space for the "SELLER" is blank (*see id.*). Greysteel acknowledged receipt of the LOI via email and stated that Greysteel's associate would "be in touch with the seller's feedback shortly" (NYSCEF Doc. No. 8 and Ex. F to Complaint: Email exchange between plaintiff's broker and Greysteel dated May 18, 2022).

In addition, to relying on the complaint to demonstrate that the owner of the property, Union Senior Plaza, L.P., "the party to be charged", did not sign any agreement to sell the subject property, the Union defendants also submit as an exhibit to their papers, the amended and restated agreement of limited partnership of Union Senior Plaza, L.P., executed August 29, 2000 (*see* Union Defendants' Ex. 1: Limited Partnership Agreement). Housing Development Fund was identified as the general partner of Union Senior Plaza, L.P., Related Corporate SV SLP, L.P., as the special limited partner, and Related Corporate Partners XV, L.P., as the investor limited partner. In defining terms set forth in the limited partnership agreement, Article I defined "apartment complex", in part, as "the real property the legal title to which is held by the General Partner [Housing Development Fund] as nominee for the Partnership [Union Senior Plaza, L.P.](as set forth in the Nominee Agreement) located in Hempstead, New York" (*id.* at p. 2). The purpose of the partnership was "investment in real property and the provision of low income housing" (*id.* at p. 14, Article 2.5).

The Union defendants also submit a copy of the ROFR, also executed on August 29, 2000, between Union Senior Plaza, L.P., and Housing Development Fund, as grantee, the purpose of which was "to provide for the continuation of the Project as low-income housing upon termination of the Partnership" (Union Defendants' Ex. 2: ROFR). The ROFR provides that, "[i]n the event that, [Union Senior Plaza, L.P.] receives a bona fide offer to purchase the Property, Grantee shall have a right of first refusal to purchase the Property . . . subject to the Grantee qualifying as a 'qualified nonprofit organization' as defined under Section 42(i)(7)(A) and 42(h)(5)(C) of the [Internal Revenue] Code [of 1986]"[2] (*id.* at ¶ 2). The ROFR provides that Union Senior Plaza, L.P. "shall not accept any such [bona fide] offer unless and until the Refusal Right has expired without exercise by Grantee under Paragraph 5 hereof" (*id.*).

The Union defendants also submit evidence that the special limited partner assigned their interests in Union Senior Plaza, L.P. to Alden LP, LLC, which engaged the services of Greysteel to act as the broker to sell the subject property (*see* Ex A. to Union Defendants' Ex. 3).

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[2]"The LIHTC [Low-Income Housing Tax Credit] program is a creature of federal law that accords favorable tax treatment to investments in low-income housing by providing tax credits to offset significant tax liabilities. An important purpose of this legislation is to encourage LIHTC properties to end up with not-for-profit organizations that will keep the units affordable. It does this by expressly allowing these organizations to have a ROFR [right of first refusal] to purchase projects at below market prices" (*Riseboro Community Partnership Inc. v SunAmerica Hous. Fund No. 682*, 401 FSupp3d 367, 375 [ED NY 2019]).

Based on the evidence which the Union defendants submit in support of their motion, they establish, prima facie, that there is no writing that satisfies the statute of frauds since Union Senior Plaza, L.P. did not execute any documents showing that it intended to be bound by the terms set forth in plaintiff's LOI (*see Ehrenreich v Israel,* 188 AD3d at 819-820; *Piller v Marsam Realty 13th Ave., LLC*, 136 AD3d at 774; *see also Urgo v Patel*, 297 AD2d 376, 377-378 [2nd Dept. 2002]). Moreover, according to the allegations set forth in the complaint, before plaintiff was provided with any writing from Union Senior Plaza, L.P. agreeing to the terms of the LOI, plaintiff was advised of the existence of the ROFR on June 7, 2022 and subsequently that the ROFR was being exercised.

In opposition, the evidence submitted by plaintiff does not raise a triable issue of fact as to whether there is a writing from the Union defendants which would satisfy the statute of frauds with respect to the conveyance of the subject property. Plaintiff argues that a binding contract can be formed by oral acceptance and that its LOI included all necessary material terms such that the execution of a contract was a formality so that, here, questions of fact exist as to whether the statute of frauds was satisfied. However, in support of its position that a valid contract may exist to satisfy the statute of frauds when there is evidence that a party orally accepts a written offer, plaintiff relies on cases in which the party to be charged by the contract provided the writing as opposed to what has occurred in this action (*see e.g. Tymon v Linoki*, 16 NY2d 293 [1965][ample evidence to support finding of a binding contract given plaintiff's oral acceptance of defendant's written offer to sell certain real property]; *Mor v Fastow*, 32 AD3d 419, 420 [2nd Dept. 2006][question of fact existed as to whether plaintiff orally accepted defendants' written offer to transfer real property in satisfaction of an underlying debt warranting denial of defendants' motion for, inter alia, summary judgment dismissing the complaint]; *MacLaeon v Lipchitz*, 56 NYS2d 609, 615 [Sup. Ct. Queens County 1945][oral acceptance by plaintiff of written offer by defendant to sell certain real property raised an issue of fact]; *Vertex Capital Corp. v V-Formation Inc.*, 2002 WL 3101878, at *3-4 [SD NY 2002][issue of fact existed as to whether plaintiff orally accepted defendant's written offer with respect to a finder's fee for obtaining certain financing]). Similarly, the cases in which plaintiff relies for the position that its LOI was sufficient to bind the parties involved instances where both parties signed the LOI (*see Twenty 6 Realty Partners Inc. v GSS N3 LLC*, 192 AD3d 463 [1st Dept. 2021][question of fact existed as to whether the person who signed on behalf of seller-defendant had authority to convey the property]; *O'Hanlon v Renwich*, 166 AD3d 890 [2nd Dept. 2018][plaintiff and defendant signed a document acknowledging that the parties had entered into an agreement for

plaintiff to purchase certain real property]). Consequently, the caselaw upon which plaintiff relies does not support its position that issues of fact exist on the basis of whether Union Senior Plaza, L.P. orally accepted plaintiff's written LOI to purchase the subject property.

Plaintiff's contention that a question of fact exists since the ROFR could not be triggered unless the LOI was accepted by Union Senior Plaza, L.P., orally through Greysteel, its broker, is also without merit since there is no evidence demonstrating that there is a writing satisfying the statute of frauds where there is no writing from the party to be charged. In addition, plaintiff's argument that there necessarily had to have been acceptance of an offer to purchase as a condition precedent to exercising the ROFR would negate a party's ability to ever exercise a ROFR.

Plaintiff also argues that questions of fact exist as to why Housing Development Fund, which has legal title to the property and not Union Senior Plaza, L.P. according to deeds that plaintiff annexes to its opposition, has a ROFR to purchase property it already owns, whether Alden Financial is behind the push for Housing Development Fund to exercise the ROFR, and whether the ROFR issued pursuant to 26 USC § 42 is applicable since Housing Development Fund owns the property and not Union Senior Plaza, L.P. However, the amended and restated agreement of limited partnership of Union Senior Plaza, L.P., executed August 29, 2000, provided that Housing Development Fund, as the general partner of Union Senior Plaza, L.P., would hold legal title to the subject property as nominee for Union Senior Plaza, L.P. (*see* Union Defendants' Ex. 1: Limited Partnership Agreement at p. 2). In any event, the issues raised by plaintiff do not have a bearing upon whether the statute of frauds has been satisfied. Consequently, plaintiff's argument, in the alternative, that these questions of fact require discovery rendering the Union defendants' motion premature and warranting denial pursuant to CPLR 3212(f) is without merit. Plaintiff does not provide a basis to postpone the determination of this motion since plaintiff does not show that any evidence relevant to the issue of whether the LOI is enforceable under the statute of frauds could be obtained by engaging in discovery (*see Deerin v Ocean Rich Foods, LLC*, 158 AD3d 603, 606 [2nd Dept. 2018]; *Jee v B.P. Cleaners, Inc.*, 215 AD2d 651, 652 [2nd Dept. 1995]).

Further, plaintiff's contention that the Union defendants' answer with counterclaims is a nullity for failure to comply with CPLR 3020(a) is without merit. The Union defendants' answer was verified by the chair of the Board and President of Union Senior Citizens' Plaza, Inc., the sole owner

of the Housing Development Fund, which is the general partner of Union Senior Plaza, L.P. (*see* NYSCEF Doc. No. 33: Verification).

"Where a party's alleged injury is simply that the breaching party failed to perform, there is no reason to preclude the enforcement of the statute of frauds and to sustain a claim for promissory estoppel" (*Future Star Hosp. Advisors, LLC v LaFrieda Veal & Lamb Co.*, 203 AD3d 509, 510 [1st Dept. 2022]; *see Carvel Corp. v Nicolini*, 144 AD2d 611, 612-613 [2nd Dept. 1988]). Here, plaintiff seeks damages with respect to Count II premised upon the allegation that "[e]quity dictates that Union Senior Plaza[, L.P.] be estopped from backing out of the promise to sell the Property to [plaintiff]" (NYSCEF Doc. No. 2/Union Defendants' Ex. 9: Complaint at ¶ 94). Consequently, for the same reason that the Union defendants are entitled to summary judgment dismissing Count I, they are entitled to summary judgment dismissing Count II alleging promissory estoppel.

Similarly, Count III of the complaint, the cause of action alleging breach of the covenant of good faith and fair dealing insofar as asserted against the Union defendants, is also dismissed on that basis since "'[t]he implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct'" (*25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 144 AD3d 665, 667 [2nd Dept. 2016], *quoting Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2nd Dept. 2016]). Due to the fact that there is no contract between plaintiff and Union Senior Plaza, L.P. to purchase the subject property, Count III is dismissed as well.

With respect to Count IV pursuant to which plaintiff seeks to recover damages for unjust enrichment, the elements of such a cause of action are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Alpha/Omega Concrete Corp. v Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1280 [2nd Dept. 2021]). "The theory of unjust enrichment lies as a quasi-contract claim" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "A bare legal conclusion that it is against equity and good conscience to retain an unidentified benefit is

insufficient to adequately allege that an asserted enrichment was unjust" (*Reingold v Bowins*, 180 AD3d 722, 723 [2nd Dept. 2020]).

Here, the Union defendants demonstrate their prima facie entitlement to judgment as a matter of law dismissing Count IV (*see e.g. Swartz v Swartz*, 125 AD3d 818, 829 [2nd Dept. 2016]). In its complaint, submitted as an exhibit, as to Count IV, plaintiff alleged that Union Senior Plaza, L.P., used its offer to obtain a higher purchase price and obtain more money with respect to the ROFR and "[t]o allow Union [defendants] to use [plaintiff's] best and final offer- which was made under the representation that if accepted, [plaintiff] would be the final purchaser- would unjustly enrich Union [defendants] at [plaintiff's] expense" (NYSCEF Doc. No. 2/Union Defendants' Ex. 9: Complaint at ¶¶ 102-103, 106). Plaintiff further alleged that had it known about the ROFR before it made its offer, it may have offered less or "it may have changed the LOI to make it more difficult for it to be matched by the holder of the ROFR" (*id.* at ¶ 105). Towards that end, plaintiff alleged that "[i]t is against equity and good conscience to allow [the Union defendants] not to sell the Property to [plaintiff]" (*id.* at ¶ 107). The Union defendants submit as an exhibit the ROFR which contained the formula for the purchase price of the subject property in the event the ROFR was exercised. The agreement specifically provided that:

> "The purchase price . . . shall be equal to the sum of (i) the amount of outstanding indebtedness secured by the Project, which indebtedness may, subject to the terms of the Permanent Loan Documents, be assumed by the Grantee at its discretion, (ii) the amount of federal, state and local tax liability projected to be imposed on the partners of the Partnership as a result of the sale pursuant to the Refusal Right, including federal income tax liability incurred as a result of the payment of amounts pursuant to this clause (ii), and (iii) the amount of any unreimbursed deficiency in Credits recognized by the Investor Limited Partner with respect to the Project as compared to the Total Credit Amount" (Union Defendants' Ex. 2: Option and ROFR Agreement, ¶ 4).

Consequently the purchase price of the property was set pursuant to the terms of the ROFR agreement and plaintiff's bid had no bearing upon that price. In opposition, plaintiff's submissions do not raise a triable issue of fact. Consequently, Count IV is dismissed (*see Alpha/Omega Concrete Corp. v. Ovation Risk Planners, Inc.*, 197 AD3d at 1280).

Similarly, the Union defendants demonstrate their entitlement to judgment as a matter of law with respect to Count V alleging misrepresentation. A cause of action to recover damages for

fraudulent misrepresentation requires "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011][internal quotation marks omitted]).

Here, as with the prior counts, the Union defendants rely on the complaint to demonstrate that this last cause of action asserted against them has no merit. Plaintiff alleged that "[t]he fact that the Offering and sale of the Property was subject to a ROFR, was omitted by [the] Union [defendants] and Greysteel for the purpose of inducing [plaintiff] to make a higher offer and better terms than it would have made had it been aware of the ROFR", that plaintiff justifiably relied upon the offering which did not mention the ROFR, in formulating its LOI which caused it to suffer damages and loss of the property (NYSCEF Doc. No. 2/Union Defendants' Ex. 9: Complaint at ¶¶ 113-114). As noted supra, the Union defendant's evidence shows that plaintiff's bid had no bearing upon the purchase price set under the ROFR. Further, there is no evidence that plaintiff was caused to suffer any damages as a result of the alleged misrepresentation (*see e.g. Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept. 2007]). In opposition, plaintiff's evidence does not raise a triable issue of fact. Its argument that Alden Financial is behind the push for the ROFR to be exercised does not impact the viability of the ROFR which was executed in 2000. As a result, Count V is dismissed.

To oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer or reply, the non-answering party must demonstrate a reasonable excuse for its default and the existence of a potentially meritorious defense (see *Gershman v Midtown Moving & Stor., Inc.*, 123 AD3d 974, 975 [2nd Dept. 2014]). Here, the Union defendants demonstrate that they served their answer with counterclaims on plaintiff's attorney by filing same on NYSCEF on August 18, 2022, and plaintiff failed to reply within 20 days thereof (*see* CPLR 2103[b]; 3012[a]). In opposition, plaintiff demonstrates that it had a reasonable excuse for failing to reply to the counterclaims in that its counsel inadvertently failed to respond to the counterclaims until September 25, 2022, rather than August 29, 2022. Plaintiff's counsel stated that he was occupied with preparing discovery demands in this action and catching up on work before the Jewish holidays. Although this excuse is "hardly overwhelming", it was adequate given the minimal delay in replying, the fact that the failure to reply in a timely fashion was not willful, and the Union defendants were not prejudiced given that the

counterclaims are essentially seeking the opposite relief from the relief sought by plaintiff on its causes of action (*Thomas Anthony Holdings, LLC v Goodbody*, 210AD3d 547 [1st Dept. 2022]). As to the second counterclaim, plaintiff has a meritorious defense based on the allegations set forth in its complaint which demonstrates that plaintiff filed the notice of pendency based on its belief that an enforceable contract existed between the parties and not due to any malicious intent (*see Properties Hacker, LLC v City of New York*, 189 AD3d 589, 591 [1st Dept. 2020][slander of title requires element of malicious motivation]; *Seidman v Industrial Recycling Props., Inc.*, 83 AD3d 1040, 1041 [2nd Dept. 2011]["the filing of a notice of pendency does not give rise to [] a cause of action [alleging slander of title"]; *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3rd Dept. 2005][slander of title claim requires evidence of malicious intent]). Similarly, with respect to the third and fourth counterclaims, plaintiff has a meritorious defense to them on the basis that it believed that it was acting with justification and not with the sole purpose being to harm the Union defendants (*see e.g. Influx Capital, LLC v Pershin*, 186 AD3d 1622, 162 [cause of action alleging tortious interference with prospective economic advantage requires proof that the interference "was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party"]; *Astro Kings, LLC v Scannapieco*, 185 AD3d 537, 538 [2nd Dept. 2020][for a claim alleging tortious interference with contract, plaintiff must establish that defendant intentionally procured the breach of contract without justification]).

However, plaintiff does not have a meritorious defense with respect to the first counterclaim which seeks a judgment declaring that no contract exists between Union Senior Plaza, L.P. and plaintiff and that the notice of pendency is improper and should be judicially removed from the property given this Court's determination that there is no writing which satisfies the statute of frauds. Consequently, the Union defendants are entitled to enter judgment against plaintiff on the first counterclaim.

CPLR 6514 provides, with respect to a mandatory cancellation of a notice of pendency, as follows:

> "The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or

> if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519" (CPLR 6514[a]).

This section also provides that, "[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs or expenses occasioned by the filing and cancellation, in addition to any costs of the action" (CPLR 6514[c]). Here, in light of this Court's finding that the Union defendants are entitled to judgment dismissing the complaint insofar as asserted against them and on their first counterclaim, this action is "abated" (*see Nastasi v Nastasi*, 26 AD3d 32, 40 [2nd Dept. 2005["The word abate has been commonly interpreted to mean 'to put an end to' or 'to nullify'."]). Consequently, that branch of the Union defendants' motion which seeks cancellation of the notice of pendency pursuant to CPLR 6514(a) is granted. Since no binding contract exists between plaintiff and Union Senior Plaza, L.P. with respect to the purchase of the subject property, in this Court's discretion, it finds that the Union defendants should recover their fair and reasonable costs and expenses arising out of the cancellation of the notice of pendency and costs related to this action (*see* CPLR 6514[c]; *Lake Valhalla Civic Assn., Inc. v BMR Funding, LLC*, 194 AD3d 803, 805 [2nd Dept. 2021]; *Delmaestro v Marlin*, 168 AD3d 813, 816 [2nd Dept. 2019]).

With respect to that branch of the Union defendants' motion which is for summary judgment on its first counterclaim, that branch has been rendered academic in light of this Court's finding that the Union defendants are entitled to enter a default judgment against plaintiff on this counterclaim. In any event, for the reasons that the Union defendants have demonstrated their entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them, they have likewise demonstrated their entitlement to judgment as a matter of law on their first counterclaim. Plaintiff's evidence does not raise a triable issue of fact in opposition.

With respect to those branches of the Union defendants' motion which are for summary judgment on its second, third, and fourth counterclaims, the Union defendants have not submitted evidence demonstrating that plaintiff acted with malice or that it did not believe that it was acting with justification. As a result, those branches of the Union defendants' motion are denied without regard to the sufficiency of plaintiff's opposing papers as to those branches (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Plaintiff's motion for permission to file a sur-reply is denied. In any event, the exhibits which are annexed to plaintiff's proposed sur-reply do not change this Court's findings. The emails

between the senior managing director at Greysteel and vice president of capital transactions at Alden Torch Financial LLC do not suffice to raise an issue of fact concerning the statute of frauds.

Accordingly, it is

ORDERED that those branches of the Union defendants' motion which are for summary judgment dismissing the complaint insofar as asserted against it and for leave to enter a default judgment against plaintiff on their first counterclaim are granted; and it is further

ORDERED that those branches of the Union defendants' motion which are for leave to enter a default judgment against plaintiff on their second, third, and fourth counterclaims and for summary judgment on the issue of liability on their counterclaims are denied; and it is further

ORDERED that, pursuant to CPLR 6514(a), the Nassau County Clerk is directed to cancel the notice of pendency filed against Section 34, Block 286, Lots 2, 50, 136, 137, 149, 150, 236, 251 and 255, and recorded on July 8, 2022, as Document Number 2022-00105589, in Book K, Volume 702, Page 172; and it is further

ORDERED that the parties are to appear in the Supreme Court, Nassau County, third floor, in the undersigned's courtroom, on Monday, April 17, 2023 at 11:30 a.m. for a conference concerning any open issues remaining in this case including discovery; and it is further

ORDERED that the Union defendants' are to submit a judgment on notice, with respect to the declaration sought in their first counterclaim; and it is further

ORDERED that Motion Sequence No. 002 is denied.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 28, 2023

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.