Motion Sequence Number 002

BY ORDER OF JUSTICE RAMOS, THESE MOTION PAPERS MAY NOT BE TAKEN APART OR OTHERWISE TAMPERED WITH

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ARISTONE REALTY CAPITAL LLC, *Plaintiffs,* **- against -** **9 E 16th STREET LLC, REGAL INVESTMENTS INC., CROWELL & MORING, MAURICE LABOZ, individually, and WILLIAM PUNCH, individually,** *Defendants.*	**Index No. 651302/2011**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS 9 E. 16th STREET LLC, REGAL INVESTMENTS, INC., MAURICE LABOZ AND WILLIAM PUNCH'S MOTION TO DISMISS

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Pursuant to New York Civil Procedure and Rules Section 3211(a)(7), Plaintiff Aristone Realty Capital, LLC, responds in opposition to Defendants 9 E 16th Street LLC, Regal Investments, Inc., Maurice Laboz, individually, and William Punch, individually ("Regal Defendants") Motion to Dismiss (the "Motion").

I.
PRELIMINARY STATEMENT

The Regal Defendants fail to demonstrate that Plaintiff has pled no facts which, taken together, maintain any cause of action cognizable at law. As such, the Court must deny the Motion and allow the parties to pursue discovery and trial. Here, in a face to face meeting with Seller at which Seller's lawyer and agent, Douglas Arntsen presided, the parties agreed to all material terms of a sale and purchase of the Property at 9 East 16th Street. Afterward, the parties formulated a final written agreement memorializing the agreed upon terms of that sale. The final "execution versions" of the agreement were sent by Arntsen to Plaintiff in an electronic email that constitutes Seller's electronic signature. Thus, contrary to the Regal Defendants' collective arguments, here, there was an offer, an acceptance – *i.e.* a meeting of the minds – which meeting of the minds was memorialized in writing and satisfies the State of Frauds. Furthermore, should the Court question application of the Statute of Frauds, the facts of this case are such that Plaintiff's performance, coupled with the acts of the Seller and its agents, are sufficient to exclude application of the Statute of Frauds and/or estop the Regal Defendants from avoiding this contract. In short, the Court need not look very far to find a cognizable action at law and, thus, must deny the Motion.

II.
SUMMARY OF RELEVANT FACTS

On Thursday, March 31, 2011, Defendant Seller's sent to Plaintiff "execution versions" of an agreed upon Contract for Purchase of the Property (the "Contract") located at 9 East 16th Street, N.Y., N.Y. (the "Property"). *See* Plaintiff's Complaint attached as Ex. A to the Affirmation of Luke McGrath in Support of Plaintiff's Opposition to Motion to Dismiss Plaintiff's Complaint dated August 24, 2011 filed herewith ("Compl.") at para. 17; *see also* Compl., Ex. A at 1. Seller's Agent, lawyer, Douglas Arntsen ("Arntsen") of the Crowell Firm, sent the email attaching the documents (the "Offer Email"). *See* Compl. at para. 17. The Offer Email contained no "subject to final review" language, but instead carried the weight of apparent authority – including the fact that it "carbon copied" William "Bill" Punch ("Punch" or "Seller"), Seller's principal. *See* Offer Email, Compl., Ex. A at 1. The Offer Email clearly stated that upon Plaintiff's wiring of a deposit and return of executed copies, the Seller would remit fully executed documentation. *See* Compl. at para. 18; *see also* Offer Email, Compl., Ex. A at 1. Furthermore, the Offer Email constitutes the electronic signature of Seller's agent, Arntsen. *See* Offer Email, attached to the Compl., Ex. A at 1.

The next Monday, April 4, 2011, Plaintiff accepted Defendant Seller's Offer Email to sell the Property by executing the Contract and wiring the deposit required under the Contract. *See* Compl. at para. 19; *see also* Declaration of Patrick McGrath dated August 8, 2011 (P. McGrath Decl.) at para. 4.

Three days later, on April 7, 2011, Plaintiff received an email from Seller's broker, Frankovitch of NEG/Atlas, which stated that Seller's lawyer at the Crowell & Moring firm, Arntsen, was now blocking the transaction for his own personal reasons,

stating, "[a]t this point Maurice's attny wants to no longer do the deal because of Rick Newman, and the tension he has caused w the senior partners." *See* P. McGrath Decl. at para. 6; *see also* P. McGrath Decl., Ex. A (copy of quoted email).

Nine days after that, on April 16, 2011, Plaintiff received another email from the broker, Frankovitch of NEG/Atlas, in which he informed Plaintiff that Arntsen, Seller's lawyer at the Crowell firm, was actually Frankovitch's business partner, stating "Doug who is partners in my company atlas is also the clients (sic) attny (sic)." *See* P. McGrath Decl. at para. 7; *see also* P. McGrath Decl., Ex. B (copy of quoted email).

Based upon Frankovitch's representation that Arntsen was his "partner" in Atlas, Plaintiff investigated Atlas and uncovered that Frankovitch's Atlas website listed not just Arntsen, but Crowell & Moring under the heading "partners." *See* P. McGrath Decl. at para. 8; *see also* P. McGrath Decl., Ex. C (copy of quoted email).

Despite Plaintiff's repeated efforts to pursue this transaction based upon the agreed upon terms, the Regal Defendants have denied the existence of a contract and purported to sell the building to another Buyer. According to news quotes, the new buyer has stated that he bought the Property for approximately $17 million – which it now appears that the Regal Defendants dispute. Based upon these and other disputed issues of fact, the Court should deny the Regal Defendants' Motion.

III.

SUMMARY OF ARGUMENT

The Regal Defendants assert four grounds for dismissing the Complaint.: (i) Arntsen is not an agent for the Regal Defendants; (ii) Defendant's acceptance of a wire transfer does not create a contract; (iii) Plaintiff's claims for specific performance,

equitable lien and injunctive relief is barred; and (iv) Plaintiff's equitable claims must fail as a matter of law under the Statute of Frauds. The Regal Defendants also assert that the Notice of Pendency in this matter should be cancelled and that discovery should be stayed.

These assertions are without merit and should be denied for five reasons. *First*, Plaintiff's contract claims are based upon a writing sufficient to satisfy the Statute of Frauds – to wit, the email from Arntsen to Plaintiff, which writing memorializes a meeting of the minds (and is itself an offer, accepted by Plaintiff). *Second*, Arntsen negotiated the sale as the Regal Defendants' agent who acted with apparent authority and the Regal Defendants should be estopped from asserting otherwise. *Third*, Plaintiff's claims for specific performance, equitable lien and injunctive relief are warranted because the Regal Defendants fail to demonstrate that Plaintiff's claims for specific performance, an equitable lien and injunctive relief should be dismissed because Plaintiff's actions were reasonable, in reliance on the Regal Defendants' Offer Email, and unequivocally referable to the Contract. *Fourth*, Plaintiff's claims in quasi-contract are plead in the alternative and will not fail based upon the Statute of Frauds. *Fifth*, the Regal Defendants assert no facts warranting cancelation of the Notice of Pendency or a stay of discovery.

IV.

LEGAL STANDARD ON MOTION TO DISMISS

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the

benefit of every possible favorable inference…." (*Jacobs,* 262 A.D.2d at 608; *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]). On a 3211(a)(7) motion, the "issue is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits." *Jacobs*, 262 A.D.2d at 608. A 3211(a)(7) motion will fail if the Court discerns facts which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits. *Gruen v. County of Suffolk*, 187 A.D.2d 560, at 562 (2nd Dep't 1992). In determining a motion brought pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. *Id.*

V.

ARGUMENTS AND AUTHORITIES

A. Plaintiff's Contract Claims Are Based Upon A Writing Sufficient To Satisfy The Statute Of Frauds – To Wit, The Email From Arntsen To Plaintiff, Which Writing Memorializes A Meeting Of The Minds (And Is Itself An Offer, Accepted By Plaintiff).

The Regal Defendants assert that Plaintiff's breach of contract claim is barred by the Statute of Frauds, General Obligations Law § 5-703. *See* Motion at 5-7. This assertion is without merit because, as alleged in Plaintiff's Complaint, Seller's agent, Arntsen, sent the Email Offer dated March 31, 2011 at 3:09 PM with an electronic signature that satisfies the signature requirement under the Statute of Frauds. *See Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty LLC* 80 A.D.3d 476 at 477 (1st Dep't 2011); *see also* Offer Email, Compl., Ex. A at 1. The Statute of Frauds requires a writing signed by the person to be charged, or by that person's agent. *See* General

Obligations Law § 5-703. As alleged in the Complaint, and discussed in more detail below, Arntsen was most certainly Seller's agent because: (i) Arntsen negotiated the transaction on behalf of the Seller in face-to-face meetings with Plaintiff in which Punch was also present; (ii) Arntsen referred to Seller as "my firm's client" (*see* Offer Email, Compl., Ex. A at 1); (iii) and Arntsen courtesy copied Defendant Punch on the Offer Email and previous emails and otherwise acted with apparent authority to consummate this transaction. *See* Compl. at para. 18; *see also* Offer Email, Compl., Ex. A at 1. Indeed, Arntsen's email leaves no doubt that he had authority and that there was an offer and acceptance – *i.e.*, a meeting of the minds:

- the Offer Email attached what Arntsen refers to as final "execution versions" of the Contract – which contained all agreed upon terms for the sale of the Property. *See* Compl. at para. 17-18; Compl., Ex. A (attaching contract).

- Unlike the previous emails sent by Arntsen to Plaintiff, this email does not include a disclaimer stating that it is subject to further review/approval. Previous emails exchanged between the parties had such a disclaimer. A lack of a disclaimer in the Offer Email indicates that the terms and conditions of the "execution versions" were NOT subject to further review or approval, but constituted the agreement between the parties. *See* Compl. at para. 17-18; *see also* Offer Email, Compl., Ex. A at 1; *compare* Offer Email dated March 31, 2011, *with* Email from Arntsen to Rick Newman (cc: Punch) dated March 30, 2011, Compl., Ex. A at 2 (the day before the Offer Email, Arntsen emailed Plaintiff and included a disclaimer stating, "Kindly note that this document is currently being reviewed by this firm's client and remains subject to its review and modification in all respects," but, in contrast, in the Offer Email, which also carbon copies Punch, Arntsen does not make such a disclaimer).

- The Offer Email attached wiring instructions for the wiring of escrow funds simultaneously with Plaintiff's execution of the Contract which wiring would constitute performance in reliance on the Offer Email. *See* Offer Email, attached to the Compl., Ex. A at 75.

- The Offer Email states that if Plaintiff performed (sent executed contract and wired the escrow), then Arntsen would remit the fully executed contracts back (which at that point would be nothing more than a ministerial function of papering the file): "Please send me four (4) originals and I'll remit two (2) fully executed contracts back." *See* Offer Email, Compl., Ex. A at 1.

- The Offer Email states that Seller is "arranging for the delivery of the CD" which CD was the required due diligence materials necessary for closing. *See* Offer Email, Compl., Ex. A at 1.

Under New York law, this writing, subscribed by Arntsen as Seller's agent, is a sufficient writing to satisfy the Statute of Frauds. *See Newmark* 80 A.D.3d at 477 (email electronic signature sufficient to satisfy the Statute of Frauds). The writing is sufficient because, to paraphrase *Newmark*, Defendant does not dispute authorship of the Offer Email; the Offer Email was authored by Seller's agent, Arntsen; and there is no evidence that the Regal Defendants rejected the escrow – but instead sent another email stating "$400,000.00 received." *See id.* at 477; *see* Email from Arntsen to Rick Newman dated April 5, 2011, attached to the Compl., Ex. B at 2 (stating "$400,000.00 received"). Critically, the email with the attached "execution versions" set forth all relevant terms of the agreement and, thus, constituted a meeting of the minds. *See id.* at 477-478. Accordingly, Plaintiff has pled a *prima facie* case for breach of contract, and the Court should deny the Regal Defendants' Motion.

B. Arntsen Negotiated The Sale As The Regal Defendants' Agent Who Acted With Apparent Authority, If Not With Express Written Authority, And The Regal Defendants Should Be Estopped From Asserting Otherwise.

In addition, the Regal Defendants assert that Arntsen was not Seller's agent. This assertion borders on the incredible. Plaintiff alleges, and attaches documents corroborating the fact, that Arntsen acted as Seller's agent in negotiating and consummating the contract for the sale of the Property. *See* Compl. at para. 15-16. The following documents lend further corroboration to this allegation:

- Email from Arntsen to Rick Newman (cc: Bill Punch) dated March 30, 2011 (the day before the Offer Email, Arntsen states "Kindly note that this document is currently being reviewed by this firm's client and remains subject to its review and modification in all respects" (*see* Compl., Ex. A at 2) but the Offer Email,

which also carbon copies Bill Punch does not make such a disclaimer and Bill Punch did not respond or otherwise indicate that Arntsen did not have authority to act on his behalf in sending the Offer Email). *See* Offer Email, attached to the Compl., Ex. A at 1.

- Email from Seller's broker, Jay Frankovitch, to Patrick McGrath dated April 16, 2011 (stating "Doug who is partners in my company atlas is also the clients (sic) attny (sic).") *See* P. McGrath Decl., Ex. B at 1 (copy of quoted email).

These emails beg the question – if Crowell & Moring represented the Seller, Maurice Laboz and the other Regal Defendants, and Arntsen was the lawyer at Crowell & Moring who negotiated the sale of the Property with Plaintiff, how can the Regal Defendants now assert in good faith that Arntsen was not Seller's agent? In short, they cannot. At best, there may be an open question of whether or not Arntsen had the requisite written authority to sign a real estate contract on behalf of the Seller. In any event, Plaintiff alleges and asserts that Arntsen had such written authority or, at a minimum, had apparent authority such that the Regal Defendants should now be estopped here from avoiding the contract for sale of the Property. *See Korin Group v. Emar Bldg. Corp.*, 291 A.D.2d 270, 270-271 (1st Dept. 2002) (finding that triable issues of fact existed as to existence of an enforceable Contact and estoppel, where Seller's attorney executed the contract despite lacking written authority and the deposit was tendered simultaneously with the execution of the contract).

In fact, Arntsen carbon copied Punch on the Offer Email (as well as previous emails), but Punch did not object or otherwise respond to the emails in which Arntsen communicated the offer for sale and attached the agreed upon "execution versions" of the contract for sale. *See* Offer Email, Compl., Ex. A at 1. Thus, it is more than likely that there does exist a written communication – perhaps an email – from Punch, as Seller, to Arntsen, as agent, giving Arntsen written authority to send the Offer Email – or otherwise

further evincing a meeting of the minds and agreement to the terms of the contract. If this is the case, this email will be the subject of discovery and, considering the Regal Defendants have put its existence at issue, they have waived any privilege, if any would exist, as to such an email. At a minimum, under Rule 3211(d) of the New York Civil Practice Law and Rules, the Court may deny the Regal Defendants' motion because disclosure is needed to determine whether Seller, through Punch or otherwise, gave Arntsen written permission to send the Offer Email or is otherwise estopped from arguing Arntsen lacked such authority.

Accordingly, because Arntsen is Seller's agent and acted with apparent, if not express, authority, the Offer Email satisfies the Statute of Frauds and the Court should deny the Regal Defendants' Motion.

C. Regal Defendants Fail To Demonstrate That Plaintiff's Claims For Specific Performance, An Equitable Lien And Injunctive Relief Should Be Dismissed Because Plaintiff's Actions Were Reasonable, In Reliance On The Regal Defendants' Offer Email, And Unequivocally Referable To The Contract.

The Regal Defendants assert that Plaintiff's claims for specific performance and injunctive relief must fail because Plaintiff's performance is not unequivocally referable to the Agreement. Motion at 8 (citing cases). This assertion is without merit. As discussed above, the writing at issue here satisfies the Statute of Frauds, and, thus, the Regal Defendants' argument that Plaintiff must fit into an exception to the application of the Statute must fail. In any event, as alleged in the Complaint, Plaintiff executed the contract for sale of the Property and simultaneously wired $400,000.00 to Crowell & Moring in actions that are undeniably, unequivocally referable to the agreement and specifically to the Offer Email, which attached wire instructions and stated: "[p]lease send me four (4) originals and I'll remit two (2) fully executed contracts back." *See*

Offer email, attached to the Compl., Ex. A; *see also Korin Group*, 291 A.D2d at 270-271 (simultaneous payment of deposit unequivocally referable to contract). Plaintiff's actions include not only wiring the escrow, but also reviewing the due diligence materials; lining up financing, and otherwise preparing for a "short-close" on this transaction pursuant to the Contract. Thus, at best, the Regal Defendants' argument raises a question of fact as to whether Plaintiff performed and acted in a manner sufficient to satisfy the exception to the Statute of Frauds.

The Regal Defendants further assert that Plaintiff's cause of action for an equitable lien must fail because the Property was not pledged as a security interest. See Motion at 8 (citing *Security Pacific Mrtg. & Real Estate Services, Inc. v. Republic of the Philippines*, 962 F.2d 204, 208-09 (2d Cir. 1992)). The case cited by the Regal Defendants is wholly inapposite and is a case in which an equitable lien was sought by a contractor in the context of a foreclosure sale. This is not the case here. As the Second Circuit noted, a contractor "without the promise of an interest in a particular property must enforce his rights under the [construction] contract and cannot rely upon an equitable lien." *See Security Pacific*, 962 F.2d at 209. Here the contract at issue clearly conveyed an "interest" in the property – it was a contract for sale.

Accordingly, the Court should deny the Regal Defendants' Motion to Dismiss Plaintiff's Second Cause of Action.

D. Plaintiff's Claims In Quasi-Contract Are Plead In The Alternative And Should Not Be Dismissed Without Further Discovery.

The Regal Defendants assert that "[i]n order to rely on the equitable doctrines to overcome the Statute of Frauds, Plaintiff must show that the denial of the requested relief would be unconscionable." *See* Motion at 9. Plaintiff submits that the facts surrounding

Sellers behavior and that of its agent, Arntsen, raises questions that cannot be simply ignored. The bizarre behavior, which includes a lawyer who appears to have decided to "undo" the Contract based upon hurt feelings and who also appears to have been the undisclosed partner of the Seller's broker, at first blush, may amount to the "egregious" behavior under which equity will recognize an exception to the Statute of Frauds. *See* P. McGrath Decl. at para. 7-8 (averring facts (discovered only after Seller's breach) supporting the conclusion that Arntsen was the undisclosed partner of Seller's broker (in addition to being Seller's lawyer and agent and also acting as escrow agent)). In any event, because these claims are pled in the alternative along with Plaintiff's contract claims, these claims should not be dismissed at this juncture. *See International Design Concepts, LLC v. Saks Inc.* 486 F.Supp.2d 229, 241 (S.D.N.Y. 2007) (dismissal of quasi-contract claims premature on motion to dismiss). At a minimum, the Court should not dismiss Plaintiff's quasi-contract claims until there is a more fully developed factual record upon which to make the fact-intensive determination of whether or not there exists a basis for equitable relief here.

E. The Regal Defendants Assert No Facts Warranting Cancelation Of The Notice of Pendency Or A Stay of Discovery.

Pursuant to CPLR 6501, a notice of pendency may be filed in any action in which the judgment would affect the title, possession, use or enjoyment of real property. *See, e.g., 5303 Realty Corp. v. O&Y Equity Corp.*, 64 N.Y.2d 313, 317-318 (1st Dep't 1984). Plaintiff seeks an equitable lien and the transfer of title of the Property. *See* Compl. at para. 31; Prayer for Relief at pg. 6-7. Accordingly, this action affects the title to real property, and the filing of a notice of pendency was proper. *See* CPLR 6501; *see Urgo v. Patel*, 279 A.D.2d 518, 519 (2d Dept. 2001).

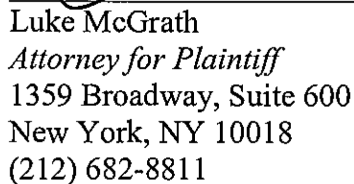
Similarly, aside from conclusory assertions, the Regal Defendants fail to offer any basis to stay discovery in this matter. Indeed, the Regal Defendants' assertions provide ample basis for expedited discovery and have waived the attorney client privilege as to communications between Seller and Arntsen. Accordingly, the Court should deny the Regal Defendants' request to stay discovery in this matter.

VI.
CONCLUSION

Based upon the foregoing, the Court should deny the Regal Defendants' Motion *en toto* and set a schedule for expedited discovery and trial.

Dated: New York, New York
August 24, 2011

DUNNINGTON, BARTHOLOW & MILLER LLP

By: 

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