

At an IAS Term, Part Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of January, 2019.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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A.J. RICHARD & SONS, INC.,

Index No. 514736/2015

Plaintiff,

- against -

Mot. Seq. 6 & 7

FOREST CITY RATNER COMPANIES, LLC,

Defendant.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>124-157, 161 163-164, 166-211</u>
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	<u>258-264 266-267</u>
Memoranda of Law _____	<u>158 257 165 265</u>

Upon the foregoing papers, in this action by plaintiff A.J. Richard & Sons, Inc. (A.J. Richard) against defendant Forest City Ratner Companies, LLC (Forest City), Forest City moves, under motion sequence number six, for an order: (1) granting it partial summary judgment dismissing plaintiff's first, second, and fourth causes of action against it; and (2) vacating the preliminary injunction issued by Justice Martin Solomon on February 16, 2016. A.J. Richard cross-moves, under motion sequence number seven, for an order: (1) pursuant

to CPLR 3212, granting it summary judgment in its favor on all causes of action set forth in its complaint dated December 7, 2015; (2) declaring that: (a) the letter of intent between it and Forest City dated December 2, 2006 (the LOI) is a valid and binding contract between them; (b) it has performed under the LOI; (c) Forest City is in breach of the LOI; (d) it would be irreparably harmed if Forest City or those working in concert with Forest City obtained its property at 590 Atlantic Avenue, in Brooklyn, New York (the property), other than pursuant to the terms of the LOI; and (e) it has no adequate remedy at law; (3) enjoining Forest City and those working in concert with Forest City from breaching the LOI; (4) compelling Forest City to specifically perform its obligations pursuant to the LOI; (5) setting this matter down for a hearing to award it incidental damages resulting from Forest City's prior breaches of the LOI; and (6) granting it such other and further relief as this court may deem just and proper, including costs, disbursements, and reasonable attorneys' fees.

Factual and Procedural Background

The Atlantic Yards Project is a development project covering 22 acres in and around the Metropolitan Transit Authority's Vanderbilt Yards in downtown Brooklyn (the project site). In early 2005, the City of New York entered into a Memorandum of Understanding (MOU) with Forest City, a New York limited liability company, authorizing Forest City to act as the developer for the Atlantic Yards Project. The MOU contemplated that the New York State Urban Development Corporation d/b/a the Empire State Development Corporation a/k/a Empire State Development (the ESDC) would seek approval for the acquisition by eminent domain of the fee interests of tenants occupying space on Site 5. The Atlantic Yards Project was launched in 2006, undertaken by the ESDC, with assistance and subsidies provided by the City of New York, the New York City Economic Development Corporation, and affiliates of Forest City.

As of December 2006, Forest City owned or had agreements to acquire a substantial portion of the project site. The ESDC also agreed to use its powers of eminent domain to acquire all properties needed to assemble the project site. Implementation of the Atlantic

Yards Project was delayed for several years due to litigation challenging the project, along with the recession and financial crisis that began in 2006. In June 2010, construction on the initial phase of the Atlantic Yards Project began, which started with the Barclays Center. The remainder of the Atlantic Yards Project is now known as Pacific Park, and construction is currently in progress in this area.

A.J. Richard is a company based in Farmingdale, Long Island, which owns and operates a chain of 67 P.C. Richard & Son, Inc. (P.C. Richard) consumer appliance and electronic stores located in the New York metropolitan area. A.J. Richard has operated its Brooklyn flagship P.C. Richard appliance store on the property since 1997. The property is located at one of the most important commercial intersections in Brooklyn, and is a uniquely desirable location. The property is near 10 subway lines and a Long Island Railroad hub, and is across the street from the Barclays Center. The property is easily accessible by foot or bike from Boerum Hill, Brooklyn Heights, Carroll Gardens, Clinton Hill, Cobble Hill, downtown Brooklyn, Fort Greene, and Park Slope, and has free customer parking on site. The property is located at Site 5, which has been designated for redevelopment as part of the Atlantic Yards Project.

In 2005 and 2006, A.J. Richard was preparing to join the public challenges to the Atlantic Yards Project, including challenging the ESDC's planned use of eminent domain to acquire the property for redevelopment. A.J. Richard acquired an environmental consultant in preparation for its challenge. In 2005, Forest City approached A.J. Richard with an offer to relocate its P.C. Richard store to several alternative sites. A.J. Richard rejected Forest City's relocation proposals since none of the alternative locations provided the same unique characteristics as the property at Site 5.

In early 2006, when the Atlantic Yards Project was in its early stages, Forest City made an alternative proposal to A.J. Richard, whereby it would purchase the property from A.J. Richard in exchange for a Replacement Property in the same location after the redevelopment of Site 5 was complete. At that time, Forest City was planning to redevelop

the property as a mixed-use building at Site 5 and convert the building to a condominium form of ownership with retail and/or commercial spaces on the ground floor and a residential or office tower. Final governmental approvals for the proposed redevelopment had not yet been obtained, and the precise parameters of the redevelopment were still unknown.

Forest City and A.J. Richard had discussions concerning the potential transaction relating to the proposed redevelopment of Site 5. The parties discussed that A.J. Richard would be out of possession of the property during the time that it took to redevelop it, as well as the entry into a potential agreement whereby A.J. Richard would receive compensation for its lost profits during that time period and be given ownership of a Replacement Property in the mixed use building to be built on the site. The parties continued to discuss this potential transaction and proceeded to negotiate the LOI to memorialize the essential terms of the transaction.

By September 2006, Forest City viewed it as urgent to finalize and sign the LOI as soon as possible, given the public opposition to the Atlantic Yards Project. By an email dated September 8, 2006, Andrew Zlotnick (Mr. Zlotnick), who was Forest City's primary negotiator for the LOI, informed his colleagues that "in light of some of the public comments made about Site V, it's very important that we get this LOI signed and out to bed ASAP." On September 20, 2006, Mr. Zlotnick sent Thomas P. Pohmer (Mr. Pohmer), A.J. Richard's vice-president and chief financial officer, a proposed first draft of the LOI. Between September and December 2006, the parties negotiated extensively over the LOI's terms and prepared multiple drafts of the LOI. On December 2, 2006, the parties executed the LOI. The 12-page long LOI contained detailed specifications regarding Forest City giving A.J. Richard equivalent space for its store on the lower floors of the new tower at Site 5.

The LOI stated that it was setting forth the proposed terms of the understanding between A.J. Richard and Forest City with respect to the proposed redevelopment of the property. The LOI contained a section, entitled "Exclusivity," which provided that Forest City "shall be [A.J.] Richard's exclusive purchaser of the property and exclusive developer

for the Replacement Property and the Proposed Redevelopment.” The LOI required the parties to “negotiate specific terms and conditions of the sale of the [p]roperty to F[orest] C[ity] to be set forth in a purchase and sale agreement to be executed by the parties, as well as a development agreement as provided [t]herein.” This exclusivity provision of the LOI further provided as follows:

“F[orest] C[ity] may elect to abandon the Proposed Redevelopment at any time prior to giving [A.J.] Richard the ‘Go Dark Notice’ as herein defined. Upon delivery by F[orest] C[ity] of such notice, F[orest] C[ity] shall have no further rights hereunder and [A.J.] Richard shall be deemed automatically released from the exclusivity granted to F[orest] C[ity] hereunder, which shall be deemed null and void.”

The LOI contained a section, entitled “Purchase and Sale Agreement.” This section provided that Forest City and A.J. Richard “agree[d] to negotiate in good faith a purchase and sale agreement of a fee simple interest in the [p]roperty by F[orest] C[ity] free and clear of all liens, mortgages, and other encumbrances to title, upon the terms described in this letter of intent and as otherwise may be agreed to by the [p]arties.” This section contained certain terms and conditions of sale required to be set forth in the purchase and sale agreement. This included a provision that in addition to any other monies to be paid to A.J. Richard, Forest City was required to advance to A.J. Richard the then principal amount of any mortgages encumbering the property as of closing, not to exceed three million dollars. In addition, the purchase and sale agreement was required to provide that A.J. Richard “shall waive any right to make any claim against or challenging the proposed Atlantic Yards development . . . or the public approval process (or any aspect thereof) or otherwise make any claim or participate in any condemnation or taking of the [p]roperty.”

The LOI set forth a section, entitled “Proposed Redevelopment,” which described the proposed redevelopment of a mixed use building at Site 5. It provided that “approximately 30,193 square feet will be sold to [A.J.] Richard as a commercial condominium unit,” which

was referred to as the Replacement Property. It set forth the location of the Replacement Property as 4th Avenue between Pacific Street and Atlantic Avenue. It described the dimensions of the Replacement Property as “a ground floor space consisting of approximately 22,000 square feet and a mezzanine of approximately 8,190 square feet.” It required that there be “on-site parking with not less than 18 parking spaces exclusively for [A.J.] Richard, or, alternatively, 33 parking spaces to be shared by all retail customers of the building.” It further required that there be “an enclosed loading dock on the Pacific Street side of the building.” The LOI also stated that Forest City’s architects had prepared a preliminary ground floor and mezzanine layout of the Replacement Property. This layout of the Replacement Property was attached to, and made part of, the LOI.

This “Proposed Redevelopment” section required A.J. Richard to “go dark” at the property at any time commencing on or after January 31, 2008 by ceasing operations at the property and vacating the property on 90 days’ notice from Forest City (the Go Dark Notice), subject to certain blackout periods. This section provided that A.J. Richard would have no obligation to “go dark” unless Forest City had a commitment letter in place for its construction financing for the building. The Go Dark Period was defined in this section as the period from the actual date that A.J. Richard closed its retail operations at its store through and including the date that A.J. Richard was permitted to reopen its retail operations in the Replacement Property.

The LOI also contained a section, entitled “Development Agreement.” This section provided that Forest City would develop the Replacement Property in accordance with the terms of the development agreement to be entered into by the parties, and it set forth the required terms to be contained in the development agreement. It specified that Forest City would deliver the Replacement Property to A.J. Richard “substantially complete in ‘vanilla box’ condition.” It specifically set forth the meaning of “vanilla box” condition as requiring, among other things, that: Forest City shall provide not less than 600 amps @ 120/208 volts of electric service to a panel in the Replacement Property and would install a walker duct

system per A.J. Richard's specifications; Forest City was to provide ADA compliant space including an elevator, if required; Forest City was to provide water cooled DX units or air-cooled DX units, plumbing, [and] sprinklers; and Forest City was to provide exterior doors to the Replacement Property.

This "Development Agreement" section also required Forest City to deliver substantial completion of the Replacement Property within 18 months of the Go Dark Period, and provided that the development agreement must provide for daily penalties to be agreed by the parties for Forest City's failure to timely deliver substantial completion of the Replacement Property. It specified that such daily penalties shall be in the amount of \$10,400 per day for the first 90 days following such period, \$11,500 per day for the next 60-day period, and \$12,596 per day for the period immediately thereafter until substantial completion of the Replacement Property was delivered. In addition, the LOI provided that Forest City was required to pay liquidated damages of one million dollars to A.J. Richard if Forest City did not commence construction of at least 2,000 residential units within the footprint of the proposed Atlantic Yards Project within 10 years of the completion of the redevelopment of the Site 5 building.

A section in the LOI, entitled "Duties of FC," described Forest City's duties. This included funding "'soft costs' associated with developing a program for the Proposed Redevelopment and a conceptual design for the Proposed Redevelopment" by the architect. In this section, the parties agreed to "use union labor only in connection with the Proposed Redevelopment and the construction of the interior improvements to the Replacement Property."

A section of the LOI, entitled "Duties of [A.J.] Richard," required A.J. Richard to use its own architect for the Replacement Property, at its own cost and expense, after Forest City delivered the Replacement Property to it in the condition required by the development agreement. It also required A.J. Richard to promptly commence and complete construction

of its improvements to the Replacement Property upon Forest City's delivery of it in the condition required by the development agreement.

A section of the LOI, entitled "Payments," set forth that Forest City will make payments to A.J. Richard annually in the amount of \$3,800,000 per year each year during the Go Dark Period, commencing on the first anniversary of the date specified in the Go Dark Notice for the commencement of the Go Dark Period. This was subject to an adjustment on a per diem basis, through and including the last day of the Go Dark Period. This amount represented A.J. Richard's "lost profits during such Go Dark Period."

A section of the LOI, entitled "Purchase Price," provided that "[t]he purchase price for the [p]roperty shall be the Replacement Property." A section of the LOI, entitled "Approvals," required A.J. Richard to cooperate and work with Forest City in subdividing the zoning lot on Block 927 and obtaining all other approvals that Forest City determined were necessary. A section of the LOI, entitled "Public Inducements," stated that Forest City would "negotiate with any relevant governmental entities for appropriate public inducements to enable the Proposed Redevelopment to be constructed," and A.J. Richard agreed to cooperate with Forest City in obtaining such inducements.

A section in the LOI, entitled "Confidentiality Agreement," provided that the parties agreed not to disclose the terms of the LOI to any third party except governmental authorities. In this section, A.J. Richard agreed that it would "not issue any publicity statements or respond to inquiries of news organizations regarding the Proposed Redevelopment or its role therein without the prior agreement of F[orest] C[ity]."

In a section of the LOI, entitled "Broker," the parties agreed that there was no broker used in connection with the LOI. A section of the LOI, entitled "Applicable Law," provided that the LOI would be governed by the laws of New York.

A section of the LOI, entitled "Amendment," provided that the LOI "shall not be modified except by an amendment in writing, dated and signed by all Parties." There were also sections in the LOI, entitled "Multiple Counterparts," "Costs," "Assignment," and

“Compliance with laws,” which provided, respectively, that the LOI could be executed in one or more counterparts, that the parties shall be responsible for the payment of their own costs, that Forest City “shall not assign its rights under the purchase and sale agreement or development agreement prior to substantial completion of construction of the Replacement Property, to a non-affiliated company without the prior written consent of [A.J.] Richard,” and that, among other things, if Forest City were “required to obtain a ‘No-Action Letter’ from the Attorney General of the State of New York in connection with the transactions contemplated hereunder, [A.J.] Richard agree[d] to cooperate with F[orest] C[ity] in the making of any application for [it].”

A section of the LOI, entitled “Agreement,” provided as follows:

“Upon the full execution and delivery of this [LOI] and issuance of final governmental approvals for the Proposed Redevelopment, F[orest] C[ity] shall cause its counsel to prepare the proposed Purchase and Sale Agreement and Development Agreement. The parties shall negotiate such agreements in good faith to reach final agreement within a commercially reasonable period of time.”

The LOI directed A.J. Richard to indicate its agreement with its terms by signing the enclosed duplicate counterpart and returning it to Forest City. The LOI was signed by Forest City by David L. Berliner, its senior vice-president, and by A.J. Richard by Mr. Pohmer, its vice-president and chief financial officer.

By a notice from the ESDC dated December 8, 2006, six days after the parties executed the LOI, A.J. Richard was informed that the ESDC had approved a Determination and Finding under Article 2 of the New York Eminent Domain Procedure Law for the use of eminent domain to acquire land for the Atlantic Yards Project. This notice stated that anyone seeking judicial review of the Determination and Findings was required to do so within 30 days from the date of completion of the ESDC’s newspaper publication on December 12, 2006, i.e., no later than January 11, 2007. Although A.J. Richard had

previously intended to bring a challenge, A.J. Richard, in recognition of its obligations under the terms of the LOI, did not challenge the ESDC's determination to exercise its power of eminent domain, nor did it issue any public statements in opposition to the Atlantic Yards Project.

Thereafter, A.J. Richard and Forest City drafted detailed purchase and sale agreements and development agreements (the Implementing Documents), as provided by the LOI, in order to implement the transaction that had been agreed upon in the LOI. From February 2007 to January 2008, A.J. Richard and Forest City exchanged various drafts of the Implementing Documents and their comments concerning them.

On April 11, 2008, A.J. Richard's outside counsel, Joseph Sferrazza, Esq. (Mr. Sferrazza), sent a letter to Forest City, stating that A.J. Richard had learned of credible statements by persons involved in the Atlantic Yards Project that Forest City intended to market the proposed building without including A.J. Richard as an occupant with ownership of the store in the proposed building, as contemplated in the LOI. The letter sought an unequivocal assurance from Forest City that it intended to perform all of its obligations pursuant to the LOI, noting that A.J. Richard considered the LOI to be a binding contract, notwithstanding the absence of a more formal contract. This letter further stated that if A.J. Richard did not receive the requested assurance by April 18, 2008, A.J. Richard would consider the agreement set forth in the LOI to have been anticipatorily breached by Forest City and would seek appropriate remedies.

By a letter dated April 17, 2008, Forest City's counsel, Harold P. Weinberger, Esq., wrote back, disagreeing with the assertion that the LOI was a binding contract. Shortly thereafter, however, Forest City reached out to A.J. Richard to resume work on the Implementing Documents. By a letter dated April 22, 2008, A.J. Richard's outside counsel, Mr. Sferrazza, stated that he disagreed with Forest City's legal characterization and effect of the LOI and reserved all rights with respect to this issue. He noted, however, that further debate on that issue would serve no purpose since the parties were proceeding towards

finalizing the Implementing Documents. The parties exchanged additional drafts of the Implementing Documents in June 2008 and January 2009.

By mid-2009, Sadie R. Mitnick (Ms. Mitnick), Forest City's senior vice-president, in a May 20, 2009 email, described the Implementing Documents as "almost done," and noted that Forest City had to hire an outside firm to "do the condo doc[uments]." On October 7, 2009, A.J. Richard's counsel, Michael P. Stafford, Esq., contacted Ms. Mitnick, to note the very minor remaining open items, including the formal approval of the ESDC, and to urge Forest City to return to finalizing the Implementing Documents. In response, Forest City informed A.J. Richard that due to economic uncertainty caused by the recession and financial crisis, it was delaying the proposed development of Site 5. Ms. Mitnick informed A.J. Richard that if Forest City ever developed Site 5, it would do so at the end of the Atlantic Yards Project, and that there was a good chance that Forest City would never develop Site 5. She further informed A.J. Richard that because of the uncertainty surrounding the future of Site 5 and the Atlantic Yards Project as a whole, which had developed as a result of the economic and financial crisis, Forest City wanted to suspend discussions regarding the Implementing Documents and avoid expending further resources on the Implementing Documents at that time.

In April 2015, unbeknownst to A.J. Richard, Forest City directed the ESDC to begin the condemnation proceedings for the property by the end of the year. In September 2015, the ESDC commissioned appraisals in order to begin the process of acquiring the Site 5 properties in furtherance of the Atlantic Yards Project. By a letter dated September 2, 2015, the ESDC gave notice to A.J. Richard of its intention to acquire the property through eminent domain and begin the condemnation process with respect to the property. The ESDC sought access to the property and certain information for purposes of conducting its appraisal.

In late October 2015, A.J. Richard contacted Forest City and stated that it viewed the LOI as a binding contract and asked whether Forest City intended to consummate the transaction. In mid-November 2015, Forest City responded and advised A.J. Richard that it

did not consider the LOI to be a binding agreement for the purchase and sale of the property. Forest City further informed A.J. Richard that it intended to proceed with the development of Site 5 without delivering the Replacement Property to A.J. Richard in exchange for A.J. Richard's existing property at Site 5, and that A.J. Richard would no longer be permitted to operate at the property site. Forest City stated that the ESDC would imminently bring an action to take title to the property by eminent domain.

Consequently, on December 4, 2015, A.J. Richard filed the instant action against Forest City. A.J. Richard's complaint contains four causes of action. A.J. Richard's first cause of action seeks a declaratory judgment that the LOI is a valid and binding contract between it and Forest City, that it has performed under the LOI, that Forest City is in breach of the LOI, that it would be irreparably harmed if Forest City or those working in concert with Forest City were to obtain the property other than pursuant to the terms of the LOI, and that it has no adequate remedy at law. A.J. Richard's second cause of action for breach of contract alleges that Forest City has breached its contractual obligations under the LOI by directing the ESDC to initiate proceedings to take title to the property without Forest City purchasing the property and without conveying to it the Replacement Property, and by explicitly repudiating its obligations under the LOI. A.J. Richard's third cause of action for breach of contract alleges that Forest City breached its contractual obligations under the LOI by failing to negotiate in good faith, including by, in September 2015, directing the ESDC to seize title to the property by eminent domain, and, in November 2015, explicitly repudiating its obligations under the LOI and declaring that it will not honor the LOI. A.J. Richard, in its second and third causes of action, seeks specific performance, and an award of incidental damages resulting from Forest City's alleged breaches of the LOI. A.J. Richard's fourth cause of action for promissory estoppel alleges that in the alternative, it is entitled to specific performance because Forest City should be promissory estopped from acquiring the property by a method other than that prescribed in the LOI or upon terms other than those set forth in the LOI. It asserts that A.J. Richard reasonably and foreseeably relied

on Forest City's promises in the LOI to its detriment, and A.J. Richard will suffer irreparable harm if Forest City is not ordered to specifically perform its obligations under the LOI.

On February 18, 2016, Justice Solomon granted a motion by A.J. Richard for a preliminary injunction restraining Forest City and all those acting in concert with it from taking any action: (1) to convey or contract to convey any lease or other property interest in the property, or in the retail space on the lower floors of any tower erected on Site 5; (2) to impair Forest City's ability to perform its obligations to purchase the property and to provide A.J. Richard with a Replacement Property at the same location in the lower floors of any tower erected on Site 5 with the specifications set forth in the LOI; or (3) to deprive A.J. Richard of title to or possession of the property, including, but not limited to, causing or attempting to cause the ESDC or its affiliates to act to strip A.J. Richard of title or possession. Forest City appealed the February 18, 2016 order. A motion by Forest City to the Appellate Division, Second Department, seeking to modify the preliminary injunction, pending a hearing and determination of an appeal from the February 18, 2016 order, was denied (*A.J. Richard & Sons, Inc. v Forest City Ratner Companies, LLC*, 2016 NY Slip Op 67629[U] [2d Dept Mar. 18, 2016], *rearg denied* 2016 NY Slip Op 70693[U] [2d Dept Apr. 18, 2016]). After briefing on the merits, Forest City voluntarily withdrew its appeal. By an order dated October 13, 2016, the court issued an order directing that A.J. Richard provide an undertaking in the amount of \$500,000.

On December 21, 2017, Forest City filed its instant motion. On March 22, 2018, A.J. Richard filed its instant cross-motion. Prior to filing the motion and cross-motion, the parties, on December 13, 2017, stipulated that their submissions would be filed under seal since they contain confidential and highly sensitive commercial information.

Discussion

Forest City, in its motion, seeks summary judgment dismissing A.J. Richard's first cause of action for a declaratory judgment, second cause of action for breach of contract, and fourth cause of action for promissory estoppel, but does not seek dismissal of A.J. Richard's

third cause of action for breach of contract. It also seeks to vacate the preliminary injunction. In support of its motion, Forest City contends that the LOI is not a binding agreement. Forest City argues that the LOI was a mere agreement to agree, and is unenforceable as a contract.

A.J. Richard, in its cross motion, seeks summary judgment in its favor on its first, second, third, and fourth causes of action. It argues that the LOI was a binding contractual agreement, and that Forest City must be ordered to specifically perform its obligations under the LOI.

In determining whether the parties intended to enter into a binding contract, “an objective test is generally to be applied,” which “means that the manifestation of a party’s intention rather than the actual or real intention is ordinarily controlling” (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1st Dept 1987]; see also *Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1st Dept 1993]). The manifestation of a party’s intention to be bound by an agreement is evidenced by its language and terms (*Conopco, Inc.*, 190 AD2d at 588). “[O]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court,” and the intention of the parties is to be gathered from the language and terms of the instrument itself (*Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 [1st Dept 1995]).

Here, the language and terms of the LOI manifest the parties’ intention to be bound by the LOI (see *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]; *Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1998]). The LOI set forth all of the material terms of the agreed-upon transaction, including the parties, purchase price, location, and size of the Replacement Property; mortgage arrangements; Go Dark Payments; assumption of costs; and terms of delivery. The LOI further included detailed specifications with respect to the Replacement Property, including parking spaces, loading dock requirements, and a preliminary floor plan which could only be changed upon the “reasonable approval” of A.J. Richard. In addition, the LOI provided that Forest City “will deliver the Replacement Property to [A.J.] Richard substantially complete in ‘vanilla box’

condition,” which is defined therein as meaning that Forest City “shall provide,” among other things, specified electrical system capacity, and meet certain air conditioning system requirements, accessibility requirements, and requirements for plumbing, sprinklers, and modes of ingress and egress.

Forest City asserts that the LOI requires the parties to negotiate the specific terms and conditions of the sale of the property be set forth in a purchase and sale agreement and a development agreement, i.e., the Implementing Documents, and that the LOI also calls for the preparation of a condominium offering plan, declaration and condominium bylaws. Forest City argues that this renders the LOI a non-binding agreement to agree and unenforceable as a contract.

Forest City’s argument is rejected. “A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement” (*Conopco, Inc.*, 190 AD2d at 588; *see also Four Seasons Hotels*, 127 AD2d at 317). Where an agreement contains all of the essential terms of the contract, “the fact that the parties intended to negotiate a ‘fuller agreement’ does not negate its legal effect” (*Conopco, Inc.*, 190 AD2d at 588). Thus, an agreement is not rendered ineffective simply because certain non-material terms are left for future negotiation or because the agreement states that the parties will execute a further more formal agreement (*see RES Exhibit Servs., LLC v Genesis Vision, Inc.*, 155 AD3d 1515, 1518 [4th Dept 2017]; *Sustainable PTE Ltd. v Peak Venture Partners LLC*, 150 AD3d 554, 555 [1st Dept 2017]; *Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617, 618 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]; *Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009]; *Pescatore v Manniello*, 19 AD3d 571, 572 [2d Dept 2005]; *Conopco, Inc.*, 190 AD2d at 588). “Where the parties have manifested [an] intention to make a binding agreement, the mere fact of open terms will not permit them to disavow it” (*Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp 491, 502 [SD NY 1987]).

While it is true that if an agreement “leaves open terms of too fundamental importance, it may be incapable of sustaining binding legal obligation” (*id.* at 497), here, the

matters to be negotiated are non-essential terms that “concern fine details,” which “may still be decided by the parties without effecting the viability of the contract” (*Tetz v Schlaier*, 164 AD2d 884, 885 [2d Dept 1990]). “Such terms are by no means incompatible with [the] intention to be bound” (*Teachers Ins. & Annuity Assn. of Am.*, 670 F Supp at 500).

With respect to the fact that the LOI requires Forest City to prepare and deliver Implementing Documents (i.e., the purchase agreement and the development agreement), this does not render the LOI unenforceable. The LOI contains all of the essential terms of a binding contract, and does not contain an express reservation by either party of the right not to be bound until a more formal agreement is signed (*Bed Bath & Beyond Inc. v IBEX Constr., LLC*, 52 AD3d 413, 414 [1st Dept 2008]; see also *Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383-384 [1st Dept 2008]). The fact that there would be a preparation of a condominium offering plan, declaration and condominium bylaws before A.J. Richard could take possession of the Replacement Property also does not affect the binding nature of the LOI.

Forest City states that the draft transaction documents contain numerous substantive terms that were not included in the LOI. Forest City asserts that the property could not be developed based on the LOI without the negotiation of further terms since this was a complex transaction involving the purchase and redevelopment of commercial real estate. Forest City relies upon certain open terms with respect to: the precise dates of “blackout periods” during which Forest City could not give A.J. Richard notice to vacate the property; the identity of any corporate affiliates that might be parties to the agreed-upon transaction; and Implementing Document details, such as termination rights, due diligence periods, representations and warranties, conditions to closing, apportionment of taxes, and preparation of plans and specifications. However, none of these open terms are essential terms which could affect the binding nature of the LOI. While Forest City further argues that the size of the Replacement Property was subject to change, it omits the fact that any such change was

conditioned on “the reasonable approval of [A.J.] Richard,” and, therefore, this term does not affect the binding nature of the LOI.

Forest City asserts that the LOI did not state that the parties intended to be legally bound. However, there is no requirement in a contract that it state that the parties are bound by it. Rather, it is the fact that the language of the agreement evinces a binding contract which determines that the parties are bound (*see Brown Bros. Elec. Contrs.*, 41 NY2d at 399; *Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC*, 160 AD3d 632, 635 [2d Dept 2018], *lv dismissed* 32 NY3d 1080 [2018]).

Forest City relies on the fact that on September 20, 2006, Mr. Zlotnick, Forest City’s lead negotiator, sent the initial draft of the LOI to Mr. Pohmer of A.J. Richard. In his email attaching this initial draft, Mr. Zlotnick stated:

“I am sending this draft to you for discussion purposes only with the understanding that it is not, and shall not be deemed to be, an offer, and except for the provisions contained in the LOI which expressly survive, that the parties will only be bound when they sign definitive written agreements described in the LOI.”

Forest City’s reliance upon this email to argue that no binding contract existed is misplaced. As previously noted, it is the objective manifestation of intention as expressed by the LOI which is controlling, as opposed to Mr. Zlotnick’s subjective intention, which was expressed two months before the final LOI was executed. “[T]he existence of a binding contract is not dependent on the subjective intent of [Mr. Zlotnick]” (*Brown Bros. Elec. Contrs.*, 41 NY2d at 399; *see also Vincent Crisafulli Testamentary Trust v AAI Acquisition, LLC*, 60 Misc 3d 1224[A], 2018 NY Slip Op 51219[U], *3 [Sup Ct, Albany County 2018]). Significantly, following Mr. Zlotnick’s email, the terms of the LOI were negotiated for months through multiple drafts, but the final LOI does not contain any language stating that the LOI was not binding. There was no “express reservation of the right not to be bound” until the signing of a more formal agreement (*Bed Bath & Beyond Inc.*, 52 AD3d at 414; *see*

also Stonehill Capital Mgt., LLC v Bank of the W., 28 NY3d 439, 453 [2016]). The lack of an expressed reservation of the right not to be bound by the LOI in the absence of further agreements strongly favors a finding of a binding agreement (*see Metropolitan Lofts of NY, LLC*, 160 AD3d at 635; *Netherlands Ins. Co. v Endurance Am. Specialty Ins. Co.*, 157 AD3d 468, 469 [1st Dept 2018]; *Res Exhibit Services, LLC*, 155 AD3d at 1518; *Moshan v PMB, LLC*, 141 AD3d 496, 496 [1st Dept 2016]; *Bed Bath & Beyond Inc.*, 52 AD3d at 414; *Emigrant Bank*, 49 AD3d at 384). Notably, the reason that further agreements were required is related to the fact that a condominium was involved which has certain legal requirements and formalities that must be followed. In fact, Mr. Zlotnick testified, at his deposition, that Forest City could not “do a pre-sale of the property” to A.J. Richard because Forest City had not filed an offering plan (Mr. Zlotnick’s deposition tr at 89).

Forest City argues that the LOI does not purport to contain the definitive terms of the proposed transaction since it states that it is an “outline for the proposed redevelopment of the [p]roperty” which includes “proposed terms of [the parties’] understanding with respect to such redevelopment.” This argument is rejected. This language does not amount to an express reservation of the right not to be bound or a condition precedent to the formation of a binding contract (*see Bed Bath & Beyond Inc.*, 52 AD3d at 414; *Emigrant Bank*, 49 AD3d at 383-384). Similarly, the mere fact that the parties referred to their agreement as a “Letter of Intent” and called for the execution of a purchase agreement and development agreement does not render it an unenforceable agreement to agree (*see Bed Bath & Beyond Inc.*, 52 AD3d at 414; *Hajdu-Nemeth v Zachariou*, 309 AD2d 578, 578 [1st Dept 2003]).

The plain language used in the LOI manifests the intention of the parties to be bound by it. The LOI contained extensive language that makes sense only in the context of a binding contractual commitment. The LOI used mandatory terms with respect to the parties’ obligations, such as “shall” and “will” throughout its provisions, indicating its binding nature. There is no explanation as to why the parties would use such mandatory language to refer to commitments if they were merely optional or precatory. Furthermore, the LOI stated

that by signing, the parties “indicate[d] . . . agreement with the terms of this [LOI].” This is indicative of a binding agreement. In addition, the LOI referred to “rights” created by it and set forth a mechanism for the termination of such rights in the “Exclusivity” section of the LOI, which stated that Forest City could elect to abandon the proposed redevelopment and upon delivery by Forest City of such notice, Forest City “shall have no further rights hereunder and [A.J.] Richard shall be deemed automatically released from the exclusivity granted to F[orest] C[ity] hereunder.” Forest City does not explain why a document that created no binding rights would provide for the termination of “rights hereunder,” or why a document that created no binding obligations would nonetheless provide for their “automatic[] release[.]”

Moreover, as discussed above, the “Amendment” section of the LOI provided that it “shall not be modified except by an amendment in writing, dated and signed by all [p]arties,” and the “Applicable Law” section of the LOI designated New York law as governing the LOI. Forest City offers no explanation as to why the parties would provide for amendment procedures and governing law, or a liquidated damages provision for a document that it believed was of no legal effect. Thus, the LOI was replete with the terminology of a binding contract, evincing the parties’ intention to create mutually binding contractual obligations, which is incompatible with Forest City’s contention that it was free to walk away from the deal upon deciding that its interests were no longer served by it (*see Teachers Ins. & Annuity Assn. of Am.*, 670 F Supp at 499).

Forest City criticizes A.J. Richard’s failure to take legal action after A.J. Richard sent the April 11, 2008 letter which sought an unequivocal assurance that Forest City intended to perform all of its obligations pursuant to the LOI. However, as noted above, A.J. Richard’s counsel noted that further debate on that issue would serve no purpose since the parties were proceeding towards finalizing the Implementing Documents, and the parties, in fact, exchanged additional drafts of the Implementing Documents in June 2008 and January 2009.

Based upon the foregoing, there is no question that Forest City has repudiated its

obligation to consummate the agreed-upon transaction with A.J. Richard while proceeding with the redevelopment of Site 5. Forest City cannot rely upon the fact that the Implementing Documents were never executed as a defense to A.J. Richard's breach of contract claim since its own nonperformance and repudiation of the LOI has prevented such execution from occurring (*see Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 134 AD3d 811, 815 [2d Dept 2015]). Forest City informed A.J. Richard that it was suspending finalization of the Implementing Documents because of the uncertain future of the Site 5 redevelopment, and not because of any failure to reach an agreement as to the Implementing Documents. Six years later, in November 2015, Forest City resumed the redevelopment of Site 5, but refused to honor its obligations in the LOI to negotiate in good faith to finalize and execute the Implementing Documents.

Forest City argues that when A.J. Richard contacted Forest City, in late October 2015, more than six years after the parties had discontinued their negotiations relating to the LOI, and A.J. Richard stated that it viewed the LOI as a binding contract, the deal had died years before. Forest City contends that good faith negotiations had not led to an agreement within a commercially reasonable period of time, and that it had, therefore, fulfilled its obligations under the LOI. This contention is devoid of merit. The reason that the negotiations had not led to the execution of the Implementing Documents, i.e., the purchase agreement and the development agreement, was solely because Forest City represented that it was no longer proceeding with the redevelopment of the site, not because of a failure to reach agreement on the terms of the purchase agreement and the development agreement. Forest City cannot rely upon its own suspension of negotiations to claim that a commercially reasonable time had passed. Forest City's resumption of the redevelopment project on Site 5 reactivated its obligations under the LOI to resume good faith negotiations in executing the Implementing Documents in order to move forward with providing A.J. Richard with the Replacement Property. Forest City was not entitled to simply ignore its obligations to A.J. Richard under the LOI, renounce the deal, abandon any negotiations as to the Implementing Documents,

and direct the ESDC to resume condemnation proceedings to acquire the property, nor were they free to renounce the deal and abandon the negotiations (*see Teachers Ins. & Annuity Assn. of Am.*, 670 F Supp at 498). Indeed, to rule otherwise would “disappoint legitimately bargained contract expectations” (*id.* at 499).

Thus, A.J. Richard is entitled to summary judgment on its first cause of action for a declaratory judgment that: the LOI is a valid and binding contract between it and Forest City; it has performed under the LOI; Forest City is in breach of the LOI; it would be irreparably harmed if Forest City or those working in concert with Forest City obtain the property, other than pursuant to the terms of the LOI; and it has no adequate remedy at law. Forest City’s motion for summary judgment dismissing A.J. Richard’s first cause of action must, therefore, be denied.

A.J. Richard is also entitled to summary judgment in its favor on its second and third causes of action for breach of contract. A.J. Richard has demonstrated that Forest City has breached its duties under the LOI by expressly repudiating its obligations under the LOI, declaring that it will not honor the LOI, failing to continue to negotiate in good faith, and directing the ESDC to seize title to the property by eminent domain. In opposition, Forest City has failed to raise any genuine triable issue of fact, and that branch of its motion for summary judgment dismissing the second cause of action must be denied. As previously noted, Forest City’s motion did not seek dismissal of the third cause of action.

Forest City argues that A.J. Richard is not entitled to the remedy of specific performance. This argument is rejected. A party to a preliminary commitment, such as the LOI now at issue, may enforce such an agreement by seeking equitable relief, i.e., an injunction or specific performance. Specific performance is awarded on a breach of contract claim where the property is unique and the plaintiff has no adequate remedy at law, so long as the plaintiff has “substantially performed its contractual obligations and . . . is ready, willing, and able to satisfy those obligations not yet performed” (*Johnson v Phelan*, 281

AD2d 394, 395 [2d Dept 2001]; see also *Alba v Kaufmann*, 27 AD3d 816, 818 [3d Dept 2006]). Here, A.J. Richard has met these requirements.

Specific performance is an appropriate remedy here (see *Brown v Cara*, 420 F3d 148, 159 [2d Cir 2005])[the preliminary agreement bound the parties to negotiate, in good faith, terms necessary to pursue completion of the transaction]; *Howard Town Ctr. Dev., LLC v Howard Univ.*, 267 F Supp 3d 229, 241 [D DC 2017][parties were bound to abide by the terms of the preliminary agreement and to negotiate the open terms in good faith]; *Imtrac Indus., Inc. v Glassexport Co. Ltd.*, No. 90 Civ 6058 [LBS], 1996 WL 39294, *9 [SDNY Feb. 2, 1996][proper remedy for breach of a binding preliminary agreement is specific performance, i.e., the “good-faith negotiation of a conclusive contract”]; *Teachers Ins. & Annuity Assn. of Am. v Tribune Co.*, 670 F Supp at 498 [a party may demand that the other party “negotiate the open terms in good faith toward a final contract incorporating the agreed terms”]). Forest City must be required to specifically perform its contractual obligations under the LOI. Thus, the parties must specifically perform pursuant to the terms of the LOI and negotiate and finalize the Implementing Documents in good faith in order to complete the transaction.

A.J. Richard, in its notice of cross-motion, also seeks an injunction enjoining Forest City and those working in concert with Forest City from breaching the LOI, and Forest City, in its notice of motion, seeks to vacate the preliminary injunction already issued. Since the court is ordering specific performance, which requires performance of the LOI, this essentially requires Forest City not to breach the LOI. As discussed above, the preliminary injunction, in effect, prevents Forest City and those acting in concert with it from taking any action which would impair specific performance of the transaction. Thus, injunctive relief as heretofore provided in the preliminary injunction shall be continued, pending the specific performance and completion of the transaction.

As to A.J. Richard’s fourth cause of action for promissory estoppel, it is well established that “[t]he elements of a cause of action based upon promissory estoppel are a

clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise” (*Agress v Clarkstown Cent. School Dist.*, 69 AD3d 769, 771 [2d Dept 2010], quoting *Williams v Eason*, 49 AD3d 866, 868 [2d Dept 2008]). Here, as A.J. Richard asserts, there was a clear and unambiguous promise by Forest City to purchase the property in exchange for the Replacement Property in the LOI. It was also reasonably foreseeable that A.J. Richard would rely to its detriment on Forest City’s promise by refraining from challenging the environmental impact statement and condemnation proceedings. Indeed, Mr. Zlotnick admitted, at his deposition, that Forest City was seeking, in exchange for its promises in the LOI, that A.J. Richard would not object to its environmental impact statement or the condemnation process that would follow from it (Mr. Zlotnick’s deposition tr at 52-54). A.J. Richard also stands to suffer harm since Forest City has now sought to proceed with the condemnation process without honoring the LOI.

However, the promissory estoppel claim is barred by the existence of a contract between Forest City and A.J. Richard, namely, the LOI (*see ID Beauty S.A.S. v Coty Inc. Headquarters*, 164 AD3d 1186, 1186 [1st Dept 2018]; *Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]). Since the conduct underlying A.J. Richard’s claim is governed by contract and there is an absence of a duty independent of the agreement, the promissory estoppel claim is duplicative of A.J. Richard’s breach of contract claim and must be dismissed on that basis (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [1st Dept 2008]).

A.J. Richard, in its cross-motion, seeks a hearing in order for the court to award it incidental damages resulting from Forest City’s prior breaches of the LOI. A.J. Richard, however, has not asserted the basis for its entitlement to such incidental damages. A.J. Richard has remained in possession of the property at all times. Insofar as A.J. Richard, in its cross-motion, requests the recovery of attorneys’ fees, costs, and disbursements, “attorneys’ fees and disbursements are incidents of litigation and the prevailing party may

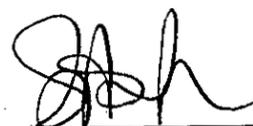
not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). The LOI, in the "Costs" section, provides that the parties shall each be responsible for the payment of their own costs incurred in connection with the LOI. Thus, A.J. Richard is not entitled to recover attorneys' fees, costs, and disbursements.

Conclusion

Accordingly, Forest City's motion is granted insofar as it seeks summary judgment dismissing A.J. Richard's fourth cause of action for promissory estoppel, and is otherwise denied. A.J. Richard's cross motion is granted to the extent that: (1) A.J. Richard is granted summary judgment in its favor on its first cause of action for a declaratory judgment, and it is declared that: (a) the LOI is a valid and binding contract between Forest City and A.J. Richard; (b) Forest City is in breach of the LOI; (c) A.J. Richard has performed under the LOI; (d) A.J. Richard would be irreparably harmed if Forest City or those working in concert with Forest City obtain the property, other than pursuant to the terms of the LOI; and (e) A.J. Richard has no adequate remedy at law; (2) summary judgment in favor of A.J. Richard on its second and third causes of action for breach of contract is granted; (3) Forest City is directed to specifically perform its contractual obligations under the LOI, and, pursuant to the terms of the LOI, Forest City is directed to negotiate and finalize the Implementing Documents in good faith in order to complete the transaction; and (4) Forest City and those working in concert with Forest City are enjoined from breaching the LOI, as previously provided in the preliminary injunction, pending the completion of the transaction. A.J. Richard's cross-motion is otherwise denied.

This constitutes the Decision, Order, and Judgment of the Court.

E N T E R,



HON. SYLVIA G. ASH, JSC