

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2177CV00741

OLD TOWN PROPERTIES, LLC

vs.

ROBERT GREEN¹ & others²

DECISION AND ORDER ON:
PAPERS NO. 18, 19, 20, 24, AND 96

INTRODUCTION

This case arises out of plaintiff Old Town Properties, LLC’s (“Old Town”) unsuccessful attempt to purchase various parcels of real property located in Marblehead, Massachusetts (the “Marblehead Properties”), from defendants Robert Green (“Robert”) and Elizabeth Kelly Green (“Elizabeth”) (collectively, the “Defendants”).³ In connection with this unsuccessful transaction, on July 21, 2019, Old Town filed the Verified Complaint (Paper No. 1), asserting claims against the Defendants for breach of contract (Count I) and breach of the implied covenant of good faith

¹ Individually and as trustee of 43 Elm Street Realty Trust, 15 Green Street Realty Trust, 23 State Street Realty Trust, 151 Jersey Street Realty Trust, 7-9 Evans Road Property Trust, 5 Evans Road Realty Trust, 15 Harris Street Realty Trust, and 21 State Street Realty Trust

² Elizabeth Kelly Green, a/k/a Kelly Green, individually and as trustee of 2 Ocean Avenue Nominee Realty Trust and trustee of 21 State Street Realty Trust; and Jim Anthony, Diane Anthony, Heather Clocher, Cynthia Wright, Elizabeth Lane, Lily Makor, Christina Tamba, Rayner Alvarez, Londyn Shapiro, Joelene Williams, David Williams, Miriam Barry, Melvin Vasquez, Alicia Harkness, Michael Silch, Frederick Brinkman, Jay Curtis, Winter Morrissey, Ken Leeder, Koe Tauro, Wendy Bell, Jane McClellan, Jeff Dunleavy, Kathleen Rain, Luis Angel Ortega, Alisa Alvarez, Serena Picanso, Michael Irving, Anna Irving, Robert Leahy, Carol Rinaldi, Mariano Ozuma, Kerry Breyman, Adele Audet, Angelica Chaves, Eric Moers, Danny Ruiz, Deanna Ruiz, Thomas Berry, Brenda Nardiello, Mercy Boez, Sarah Kimball, Modelyn Wernig, Mathais Cardon, Andia Haliotis, Andy Fucillo, Hannah Alverez, Micahel Ehlert, Arthur Hunsicker, Yvone Nicosia, Jill Nicosia, Kristen Meshulam, Grace Cole, Amy Barbour, Danielle Nazarenko, Matthew Gershun, Debbie Stockdale, Keri Moise, Bethany Spangler, Lisa Grant, Anthony Graciale, DeWayne Sullivan, Sammy Essa, Frieda Essa, Eric Cole, and Louie Vasquez

³ The “Marblehead Properties” are identified in the First Amended Complaint as follows: 43 Elm Street, Marblehead; 15 Green Street, Marblehead; 23 State Street, Marblehead; 151 Jersey Street, Marblehead; 2 Ocean Avenue, Marblehead; 7-9 Evans Road, Marblehead; 5 Evans Road, Marblehead; 15 Harris Street, Marblehead; 21 State Street, Marblehead; 25 State Street, Marblehead; and 27 State Street, Marblehead.

and fair dealing (Count II). This matter is currently before the court on a variety of motions, which it addresses below.

DEFENDANTS' MOTION TO STRIKE (PAPER NO. 20)

The Motion to Strike (Paper No. 20) is **DENIED**. Therein, the Defendants seek to strike Old Town's Motion for Leave to Amend (Paper No. 18) and its Motion for Approval of Memorandum of Lis Pendens (Paper No. 19). They argue these motions were filed in violation of Mass. Super. Ct. R. 9A, and that there was no reasonable basis for either Old Town's emergency filing or its request for ex-parte relief. Notwithstanding any filing violation, for the sake of judicial economy, the court deems it prudent to address the merits of both motions. There is no prejudice to the Defendants, as both the Defendants and Old Town had an opportunity to address the issues raised in these motions at the hearing on January 20, 2022.

PLAINTIFF'S MOTION FOR LEAVE TO AMEND VERIFIED COMPLAINT SO AS TO REQUEST APPROVAL OF A MEMORANDUM OF LIS PENDENS (PAPER NO. 18)

The Motion for Leave to Amend (Paper No. 18) is **ALLOWED**. “[L]eave to amend should be freely given, see Mass. R. Civ. P. 15(a), . . . and should not be denied but for ‘good reason[.]’” Pishev v. Somerville, 95 Mass. App. Ct. 678, 688 (2019), quoting Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264 (1991). Here, in the court's view, there is no good reason to deny Old Town's request. The lis pendens statute, G. L. c. 184, § 15, requires that a plaintiff seeking a memorandum of lis pendens name, along with the owner of the property subject to the lis pendens, any tenant who occupies the property under a written lease. Old Town requests permission to amend to comply with this statutory requirement. That request shall be granted.

**PLAINTIFF'S MOTION FOR MEMORANDUM OF LIS PENDENS (PAPER NO. 19)
AND DEFENDANTS' SPECIAL MOTION TO DISMISS (PAPER NO. 96)**

Because the court has granted Plaintiff's Motion for Leave to Amend (Paper No. 18), in analyzing the Motion for Memorandum of Lis Pendens (Paper No. 19) and the Special Motion to Dismiss (Paper No. 96), the court relies upon the facts and allegations set forth in the First Amended Verified Complaint (the "FAC"), which Old Town submitted along with its request to amend.

I. BACKGROUND

A. The Parties and the Relevant Properties:

Old Town is a limited liability company with a usual place of business in Boston, Massachusetts. Robert and Elizabeth are husband and wife; they live together at 86 Beacon Street in Marblehead.

Robert alone is trustee of the following realty trusts: 43 Elm Street Realty Trust, declaration of trust dated October 2, 1980; 15 Green Street Realty Trust, declaration of trust dated December 15, 1988; 151 Jersey Street Realty Trust, declaration of trust dated December 15, 1998; 7-9 Evans Road Property Trust, declaration of trust dated October 5, 1993; 5 Evans Road Realty Trust, declaration of trust dated October 5, 1993; 15 Harris Street Realty Trust, declaration of trust dated January 31, 1997; and 21 State Street Realty Trust, declaration of trust dated April 1, 1982. Pl.'s First Amend. Compl., para. 4-11. Elizabeth alone is trustee of the 2 Ocean Avenue Nominee Realty Trust, declaration of trust dated October 26, 1995. Pl.'s First Amend. Compl., para. 13. She and Robert are co-trustees of the 23 State Street Realty Trust.⁴

⁴ The date for the establishment of the 23 State Street Realty Trust is not clear from the FAC. Initially, the FAC states that Robert is the trustee of the 23 State Street Realty Trust, declaration of trust "dated October 5, 1993[.]" Pl.'s First Amend. Compl., para. 6. Later, the FAC states that "Elizabeth along with Robert" is trustee of the 23 State Street Realty Trust, declaration of trust "dated October 25, 1993[.]" Pl.'s First Amend. Compl., para. 14.

Pl.'s First Amend. Compl., para. 6, 14. And, they own the real properties located at 25 and 27 State Street, in Marblehead, as tenants in common. Pl.'s First Amend. Compl., para. 15-16.

According to the FAC, on June 9, 2021, Old Town submitted a standard Massachusetts realtors contract to purchase (the "CTP") to "Robert and Elizabeth individually and in their capacities as [t]rustees" of the various trusts described above, whereby Old Town offered to purchase for \$11,500,000.00 the real properties referred to as the "Marblehead Properties," including: 43 Elm Street, 15 Green Street, 23 State Street, 151 Jersey Street, 2 Ocean Avenue, 7-9 Evans Road, 5 Evans Road, 15 Harris Street, 21 State Street, 25 State Street, and 27 State Street. Pl.'s First Amend. Compl., para. 18. Further, the FAC states that Robert executed the CTP "on behalf of himself individually and the various trusts of which he is trustee and with Elizabeth's apparent and actual authority on behalf of Elizabeth individually and the various trusts of which she is trustee." Pl.'s First Amend. Compl., para. 84. Nevertheless, the FAC contains no facts indicating that Old Town ever communicated with Elizabeth regarding the CTP, or that she was present when Robert executed the CTP. It is undisputed that neither Elizabeth's name nor her signature appear on the CTP.

The FAC alleges that, at execution of the CTP, Old Town tendered an initial deposit of \$10,000.00, which is currently being held in escrow by J. Barrett and Company ("J. Barrett"). Pl.'s First Amend. Compl., para. 86. And that, in accord with the CTP, Old Town and "Robert and Elizabeth individually and as [t]rustees" were to enter into a standard purchase and sale agreement (the "P&S") on or before 5:00 p.m., on June 21, 2021, at which point Old Town would tender an additional deposit of \$335,000.00. Pl.'s First Amend. Compl., para. 87.

According to the FAC, during times relevant to the transaction with Old Town, Attorney Patricia G. Lausier ("Attorney Lausier") represented Robert and Elizabeth in their individual and

trustee capacities. Pl.'s First Amend. Compl., para. 89. And, she asked Old Town's counsel to draft the P&S. Pl.'s First Amend. Compl., para. 91. Consequently, Old Town's counsel prepared and delivered a draft P&S to Attorney Lausier on June 28, 2021. Pl.'s First Amend. Compl., para. 91. Neither Attorney Lausier nor anyone else on behalf of Robert or Elizabeth responded to this draft. Pl.'s First Amend. Compl., para. 91. Thus, on June 30, 2021, counsel for Old Town delivered to Attorney Lausier a P&S signed by Julius Sokol, Old Town's manager, along with the additional \$335,000.00 deposit, which is currently being held in escrow by J. Barrett. Pl.'s First Amend. Compl., para. 91. Since that time, Robert and Elizabeth have refused to execute the P&S or follow through with selling the Marblehead Properties. Pl.'s First Amend. Compl., para. 92.

B. The CTP

The CTP is attached as Exhibit A to the FAC. It contains certain provisions and information relevant to the current dispute.

First, the CTP identifies that "**BUYER(S)**" as "Julius Sokol, Manager, Old Town Properties[,]" and the "**OWNER OF RECORD ('SELLER')**" as the "Owner of Record" for "21, 23, 25, 27 State Street; 43 Elm Street; 5, 7-9 Evans Road; 15 Harris Street; 15 Green Street; 2 Ocean Avenue; 151 Jersey Street[,] Marblehead, MA[.]"

Next, the CTP states that: "The BUYER offers to purchase the real property described as Multiple Properties – See Attached List[.]" Thereafter, the Addendum to the CTP (the "Addendum"), which is attached after the CTP's signature page, states that the CTP "covers all of the following properties: 21 State Street . . . 23 State Street . . . 25 State Street . . . 27 State Street . . . 43 Elm Street . . . 15 Harris Street . . . 15 Green Street . . . 5 Evans Road . . . 7-9 Evans Road . . . 151 Jersey Street . . . 2 Ocean Avenue[.]" The CTP does not identify the ownership

status for any of these listed properties, and, while it is signed by Robert, it does not include a signature from Elizabeth.

Lastly, the CTP provides that “[t]he SELLER and the BUYER shall on or before 5:00 p.m. on [June 21, 2021] execute the Standard Purchase and Sale Agreement of the MASSACHUSETTS ASSOCIATION OF REALTORS® or substantial equivalent which, when executed, shall become the entire agreement between the parties[.]” And that, “the SELLER agrees to deliver a good and sufficient deed conveying good and clear record and marketable title at 3:00 p.m. on 90 days from signing P&S[.]” In accord with the CTP, Old Town’s obligation to purchase was contingent on it obtaining mortgage financing.

II. Legal Standards:

“A lis pendens is a written notice that alerts prospective buyers of property to pending lawsuits that claim an interest in that property.” Ferguson v. Maxim, 96 Mass. App. Ct. 385, 388 (2019). “Presented with a statutorily compliant verified complaint in which the ‘subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof,’ the judge ‘shall’ make a finding to that effect and endorse the lis pendens.” Id., quoting G. L. c. 184, § 15(b). “The judge’s discretion in this regard is limited: ‘once the judge determines that the subject matter of the action concerns an interest in real estate[,] . . . the allowance or denial of a memorandum of lis pendens hinges on the nature of the claim, not the merits thereof.’” Id. at 388-389, quoting DeCroteau v. DeCroteau, 90 Mass. App. Ct. 903, 905 (2016). “Recognizing the potentially harsh consequences of a lis pendens,” the statute allows a party to move for expedited dissolution or “to bring a ‘special motion to dismiss’ any ‘frivolous’ action or claim on which a lis pendens is based.” Id. at 389, quoting G. L. c. 184, § 15(c).

“[A] claim is ‘frivolous’ if ‘(1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds.” *Id.*, quoting G. L. c. 184, § 15(c). The question, however, is not which evidence should be accorded greater weight, “but whether the party with the burden of proof has shown that the claim made by the moving party was devoid of any reasonable factual support or arguable basis in law.” *Id.* at 390 (quotations and citations omitted). When analyzing this question, the standard of review is the “functional equivalent” of that applied to motions asserted pursuant to Mass. R. Civ. P. 12(b)(6). *Fiore v. Lindsey*, 2017 WL 5969332, at *1 (Mass. Land Ct. Nov. 29, 2017) (Foster, J.) (citation omitted). Thus, while the court is required to draw all logically permissible inferences in favor of the non-moving party, conclusory allegations without factual support are not sufficient to plausibly suggest an entitlement to relief. See *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

III. Analysis

Here, there can be little doubt that, for purposes of G. L. c. 184, § 15(b), the subject matter of Old Town’s claims against the Defendants “constitutes a claim of a right to title to real property or the use and occupation thereof[.]” Old Town alleges that it entered into the CTP with Robert, on behalf of himself and on behalf of Elizabeth, individually and as trustee of the trusts for which they are trustees, for the purchase of the Marblehead Properties, and it seeks specific performance as a remedy for the Defendants’ failure to execute the P&S as Robert agreed they would do.⁵ These facts appear to compel allowance of Old Town’s Motion for Memorandum of Lis Pendens (Paper No. 19); however, the court must also consider the Defendants’ request for special motion to dismiss under G. L. c. 184, § 15(c).

⁵ In other words, Old Town seeks a court order requiring the Defendants to sell it the Marblehead Properties to it.

The claims underpinning Old Town's request for *lis pendens*—the claim for breach of contract and the claim for breach of the implied covenant of good faith and fair dealing—rest on the viability of the CTP. The Defendants argue the CTP is not a legally enforceable contract because Elizabeth did not sign it; yet, it purports to bind her to the sale of certain properties for which she is the owner and/or trustee in violation of the statute of frauds, G. L. c. 259, § 1. On the other hand, Old Town argues the CTP is a legally enforceable contract because Robert had authority to act as agent for Elizabeth with respect to any of the Marblehead Properties for which she was the owner and/or trustee. The court agrees with the Defendants, concluding there is no reasonable factual support or arguable basis in law for Old Town's claims.

More than seventy years ago, in Gordon v. O'Brien, 320 Mass. 739, 741-743 (1947), the Supreme Judicial Court made it clear that marital relationship alone is not sufficient to demonstrate one spouse had authority to act on behalf of the other. There, the Court concluded that there was insufficient evidence to demonstrate that the husband had authority to act as agent for his wife in connection with the sale of her real property. Id. In reaching this conclusion, the Supreme Judicial Court stated that, while “[a] husband may . . . act as agent for his wife in the management and disposition of her property[.]” when that agency relationship is challenged, “proof of the marital relation alone is not sufficient to establish that . . . [the husband] was . . . [the wife's] agent in negotiating the sale of her land[.]” Id. at 741. According to the Court, while the agency relationship need not be established via direct evidence, there must be some facts demonstrating that the husband was acting on the wife's behalf “for her benefit with her consent and knowledge[.]” Id.

In the present case, there are no factual allegations, aside from the existence of their marital relationship and Old Town's conclusory allegation that Robert had authorization to act as

Elizabeth's agent, Pl.'s First Amend. Compl., para. 84, demonstrating Robert had any kind of authority to act on Elizabeth's behalf. This type of conclusory allegation is insufficient to overcome dismissal. See Daddario v. Cape Cod Comm'n, 56 Mass. App. Ct. 764, 773 (2002) (stating conclusory allegations are insufficient to survive dismissal, without well-pleaded facts establishing grounds on which claim rests). Something more is needed to allege a viable agency relationship between Robert and Elizabeth. Compare Tziton Realty Co., Inc. v. Mustonen, 352 Mass. 648, 654 (1967) (finding adequate evidence of agency relationship where husband signed contract "in wife's presence," with "her consent and acquiescence," and it was clear both intended his signature to "represent the signature of both"). Absent factual allegations establishing Elizabeth authorized Robert to act on her behalf, the CTP violates the statute of frauds, which requires that an agreement for the sale of land be in writing "signed by the party to be charged therewith or some person thereunto by him lawfully authorized." G. L. c. 259, § 1. Thus, notwithstanding Old Town's assertions otherwise, the CTP is not a legally enforceable contract.⁶

Separate and apart from the statute of frauds, there are other issues that call into question the enforceability of the CTP. "An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms." Targus Group Internal., Inc. v. Sherman, 76 Mass. App. Ct. 421, 428 (2010); see also Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878 (2000). In the court's

⁶ Here, the court notes that, specifically with respect to 25 and 27 State Street, which Old Town alleges the Defendants own as tenants in common, Robert could have no apparent authority to act on behalf of Elizabeth. It is well-settled that one tenant in common does not have implied authority to bind another tenant in common to an agreement to sell the property held in common ownership. See Goodhue v. Leonardi, 336 Mass. 156, 158 (1957) (stating co-tenant cannot be bound by unauthorized acts of co-tenant).

view, the CTP is not sufficiently complete and definite to constitute a legally binding agreement because certain material terms are missing, or overly ambiguous.

By way of example, the CTP fails to specifically name either Robert or Elizabeth as the Seller; rather, it generically identifies the seller as the “Owner of Record” for “21, 23, 25, 27 State Street; 43 Elm Street; 5, 7-9 Evans Road; 15 Harris Street; 15 Green Street; 2 Ocean Avenue; 151 Jersey Street[,] Marblehead, MA[.]” Thereafter, while the Addendum lists, in summary fashion, the real properties allegedly subject to the CTP, it makes no effort whatsoever to identify the ownership status for any of these properties. Thus, on its face, the CTP fails to clearly identify the seller.

Because the CTP is not a legally enforceable contract, there is no reasonable factual support or arguable basis in the law for Old Town’s claims against the Defendants, and they must be dismissed in accord with G. L. c. 184, § 15(c). Consequently, the Motion for Memorandum of Lis Pendens (Paper No. 19) is **DENIED**, and the Special Motion to Dismiss (Paper No. 96) is **ALLOWED**.

**DEFENDANT ELIZABETH GREEN’S MOTION TO DISMISS PURSUANT TO
MASS. R. CIV. P. 12(b)(6) (PAPER NO. 24)**

Defendant Elizabeth Green’s Motion to Dismiss Pursuant to Mass. R. Civ. P. 12(b)(6) (Paper No. 24) is **DENIED**, as moot. Above the court concludes dismissal of Old Town’s claims against the Greens is warranted under G. L. c. 184, § 15(c); thus, there is no need to address Elizabeth’s separate request for dismissal.

ORDER

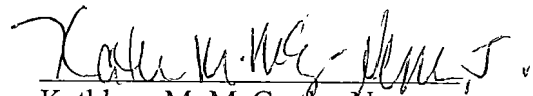
It is hereby **ORDERED** that:

1. Defendants Robert and Elizabeth Green's Motion to Strike (Paper No. 20) is **DENIED**;
2. Plaintiff Old Town's Motion for Leave to Amend Verified Complaint to Request Approval of Memorandum of Lis Pendens (Paper No. 18) is **ALLOWED**;
3. Plaintiff Old Town's Motion for Memorandum of Lis Pendens (Paper No. 19) is **DENIED**;
4. Defendants Robert and Elizabeth Green's Special Motion to Dismiss (Paper No. 96) is **ALLOWED**; and
5. Defendant Elizabeth Green's Motion to Dismiss (Paper No. 24) is **DENIED**.

In accordance with the above, it is further **ORDERED** that, pursuant to G. L. c. 184, § 15(c), the Greens shall recover reasonable attorneys' fees and costs incurred in preparing and pursuing the Special Motion to Dismiss. The Greens shall submit, within twenty-one days (21) days of the date of this order, proof of their attorneys' fees and costs, which proof shall include a detailed affidavit of counsel attesting to the particular tasks performed, the time expended on each task, and the specific costs incurred. Any opposition or other response by Old Town shall be filed within fourteen (14) days after the filing of the Green's submission.

SO ORDERED.

Date: February 17, 2022


Kathleen M. McCarthy-Neyman
Justice of the Superior Court