STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-RE-17-11

OLD TOWN UTILITY & TECHNOLOGY PARK, LLC, et al.

Plaintiffs,

v.

MFGR, LLC, et al.

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs Old Town Utility and Technology Park, LLC's ("OTU"); Relentless Capital Company, LLC's ("Relentless"); and Samuel Eakin's ("Eakin") motion for preliminary injunction brought pursuant to M.R. Civ. P. 65(b). Plaintiffs seek to enjoin Defendants MFGR, LLC ("MFGR") and William Firestone ("Firestone") from directly or indirectly affecting transfer of any real property, improvements, fixtures, or equipment, or other property and rights associated with the Expera Mill Facility (the "Facility"). Defendants oppose the motion.[1] The Court heard oral argument on January 5, 2018 at the Capital Judicial Center in Augusta, Maine. Clifford Ginn, Esq., appeared for Plaintiffs and Daniel Mitchell, Esq. appeared on behalf of Defendants.

FACTUAL BACKGROUND

The Court incorporates by reference the Factual Background section on pages 1-5 of its Combined Order on Defendants' Motions to Dismiss (the "Combined Order") filed this same

[1] Plaintiffs do not seek to enjoin Defendants Old Town Holdings II, LLC, and Joseph Everett Deschenes (the "OTH Defendants") from affecting transfer of the Facility. The OTH Defendants nonetheless filed an opposition to Plaintiffs' motion for the purpose of joining the objection filed by MFGR and Firestone. Julia Pitney, Esq., appeared for the OTH Defendants at the oral argument.

day, January 31, 2018, in this action.

STANDARD OF REVIEW

In order to prevail on a motion for a preliminary injunction, the plaintiff has the burden of proving:

> (1) that plaintiff will suffer irreparable injury if the injunction is not granted, (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant, (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility), (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. Univ. of Me., 441 A.2d 691, 693 (Me. 1982). These criteria "are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together in determining whether injunctive relief is proper." *Dep't of Envt'l Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989). Because injunctive relief is an equitable remedy, this Court's grant of injunctive relief is reviewed on appeal for an abuse of discretion. *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 11, 837 A.2d 129.

DISCUSSION

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Only Count I is Relevant to the Analysis of Plaintiffs' Likelihood of Success on the Merits.

Plaintiffs seek injunctive relief in Count I, Count II, and Count VII. The remaining counts seek only damages, and not injunctive relief. Defendants posit that only those counts which explicitly seek injunctive relief may serve as the basis for a preliminary injunction. *Bar Harbor Bank'g & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980); (Def's Opp'n 5.) This presupposition goes unchallenged in Plaintiffs' reply. The Court thus narrows its focus on Plaintiffs' likelihood of success on the merits to only those counts which seek an injunction in

their prayer for relief for purposes of deciding this motion.

Count I states a claim for breach of contract, alleging that MFGR breached a binding agreement between OTU and MFGR whereby MFGR would transfer the Facility, or certain Facility assets, to some combination of OTU and the City of Old Town. (Pl's Compl. ¶¶ 22, 96-101.) Count II seeks specific performance of that agreement. (*Id.* ¶¶ 102-109.) Specific performance is an equitable remedy, not a cause of action. The Court therefore treats Count II as a prayer for relief for MFGR's breach of contract pled in Count I. No independent analysis of this count is required, as Plaintiffs' entitlement to specific performance is entirely dependent on their success in Count I.

Count VII likewise is irrelevant to Plaintiffs' instant motion. Although Plaintiffs seek injunctive relief for the violation of Maine's antitrust statutes[2] alleged in Count VII (*Id.* ¶¶ 127-139), only the attorney general of the State of Maine may seek injunctive relief pursuant to those statutes. *State v. MaineHealth*, 2011 ME 115, ¶ 8, 31 A.3d 911.

B. Plaintiffs Have Failed to Demonstrate A Likelihood of Success on the Merits on Count I

As noted above, Count I alleges that MFGR breached a purported agreement to sell the Facility to OTU and the City. Because Count I is brought only by Plaintiff OTU against solely Defendant MFGR, in the interest of clarity, the Court will refer to these parties by name for the balance of this Order. In its motion to dismiss and again here in opposition, MFGR argues that OTU's breach of contract claim cannot succeed, because the purported contract fails to satisfy Maine's statute of frauds, which requires that any contract for the sale of land be in writing and signed by the party to be charged therewith. 33 M.R.S.A. § 51(4). OTU counters that an offer letter

[2] 10 M.R.S.A. §§ 1101-1108.

dated April 28, 2016 from the City to MFGR, which was countersigned by Firestone, is an enforceable contract for the sale of the Facility which satisfies the statute of frauds.[3] OTU thus stylizes this letter the "4/28/16 Agreement," and the Court will refer to it as such in this Order. In the alternative, OTU argues that the doctrine of part performance applies here as an exception to the statute of frauds.[4]

As discussed in the Combined Order,[5] the 4/28/16 Agreement does not expressly include OTU. OTU has nonetheless claimed that it has standing to enforce the 4/28/16 Agreement as the City's "assign;" or, in the alternative, as the third party beneficiary of the contract. Although these theories were sufficient to survive a motion to dismiss, the Court finds that OTU has failed to demonstrate there is a substantial possibility that it will prevail under either theory.

At the outset, MFGR has challenged the enforceability of the 4/28/16 Agreement. (Def's Reply Mot. Dismiss at 1 n. 1.) On its face, the letter in "general terms" outlines a transaction structure "with the intent to convert [the letter] into a mutually agreeable binding contract . . . ." MFGR's principal argument for purposes of its motion to dismiss and in opposition to the instant motion has been that OTU lacks standing to enforce the 4/28/16 Agreement to the extent that it is a binding instrument between MFGR and the City. However, it has not waived the argument that the 4/28/16 Agreement is a mere proposal that is not enforceable by any party.

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[3] Plaintiffs attached as "Appendix 1" to their motion a 23-page unexecuted agreement for the sale of certain land and assets associated with the Facility that is dated "__ day of July 2016." In the Factual Background section of Plaintiffs' motion, it is described as a "draft" resulting from negotiations between OTU, MFGR, and the City; and Plaintiffs allege that MFGR "verbally agreed to all [its] material terms." (Mot. 11.) Appendix 1 goes unmentioned in the Argument section of the motion, whereas the 4/28/16 Agreement is discussed extensively there and in Plaintiffs' opposition to the MFGR Defendants' motion to dismiss. *See* note 4 *infra*.

[4] These arguments were not raised by Plaintiffs in their motion for preliminary injunction. However, in their reply brief, Plaintiffs incorporate by reference the material in their opposition to the MFGR Defendants' motion to dismiss. (Pl's Reply 1.)

[5] The Court incorporates by reference Part I.A., pp. 5-8, of the Combined Order.

OTU claims that "the City in fact assigned its rights [under the 4/28/16 Agreement] to OTU" and that there was "clear mutual acknowledgement of the validity of the assignment" amongst OTU, MFGR, and the City. (Pl's Opp'n to Def's Mot. Dismiss 4.) "For an assignment to be enforceable there must be an act or manifestation by the assignor indicating the intent to transfer the right to the assignee." *Sturtevant v. Town of Winthrop*, 1999 ME 84, ¶ 11, 732 A.2d 264. Our Law Court has suggested that circumstantial evidence is insufficient to satisfy this requirement of an "act or manifestation." *Id*. ("no evidence of a manifestation of . . . intent to transfer the contract rights" in the absence of direct evidence of such an assignment). Beyond a course of dealing between OTU, MFGR, and the City, OTU has not alleged any "act or manifestation" on the part of the City which indicates its intent to transfer its rights under the 4/28/16 Agreement to OTU.

In *F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992), Maine adopted the Restatement (Second) of Contracts § 302 test for whether a third party beneficiary is an intended beneficiary with a right to enforce the agreement: "A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." The *F.O. Bailey* Court cautioned that an intent to create an enforceable benefit in a third party must be "clear and definite." *Id.* In *F.O. Bailey*, a commercial condominium tenant purported to be a third-party beneficiary of a construction contract between the condominium and a contractor. *Id.* at 467. Despite evidence that the tenant had negotiated with the contractor's architect for the completion of certain work, that the contract required that the contractor complete the work in such a way as to allow the tenant's business to remain open, that some of the work benefitted the tenant exclusively, and that the tenant showed great interest in the work and spent time following its progress, the Law Court held that

these circumstances could not generate a factual issue as to whether the tenant was an intended third-party beneficiary with a right to enforce the contract. *Id.* at 467-68.

Subsequent Law Court authority has emphasized the high bar OTU must clear in order to prevail as a third-party beneficiary. *See Denman v. Peoples Heritage Bank*, 1998 ME 12, ¶¶ 8-9, 704 A.2d 411; *Devine v. Roche Biomedical Labs.*, 659 A.2d 868, 870 (Me. 1995) ("In the absence of contract language, there must be circumstances that indicate with clarity and definiteness that [the promisee] intended to give [the putative third-party beneficiary] an enforceable benefit under the contract."). *See also Thompson v. Miles*, 741 F. Supp. 2d 296, 307 (D. Me. 2010).

Finally, it is unlikely that the doctrine of part performance will operate here as an exception to the statute of frauds. "After having induced or knowingly permitted another to perform in part an agreement, on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void." *Landry v. Landry*, 641 A.2d 182, 183 (Me. 1994). OTU has alleged that it and the other Plaintiffs undertook a significant amount of work on various projects related to getting the Facility sold and operational, but has not explained why an award of money damages is an inadequate remedy. As discussed in Part II.A. *infra*, this was a business venture for profit. Money damages should be adequate. Furthermore, OTU is suggesting a novel application of the doctrine of part performance. The prototypical application of the doctrine would be partial payment. *See id.* Under a promissory estoppel theory, substantial physical improvements to land have also been held adequate to except a contract for the sale of land from the dictates of the statute of frauds. *See Harvey v. Dow*, 2008 ME 192, ¶ 13, 962 A.2d 322 (purchaser built house on lot); *Tozier v. Tozier*, 437 A.2d 645, 648-49 (Me. 1981) (donee built house and outbuildings on lot). OTU analogizes "the web of future tenants, public financing, and business modeling" acquired and developed by

Plaintiffs to partial payment for, or physical improvement to, the Facility. (Pl's Opp'n to Def's Mot. Dismiss 3.). The Court is not convinced that there is a substantial possibility that this novel application could be adopted under Maine law.

Because OTU has failed to demonstrate a substantial possibility that it will prevail on Count I, the Court thus finds that this factor weighs against granting Plaintiffs' motion.

II. PLAINTIFFS HAVE FAILED TO MAKE A SUFFICIENT SHOWING AS TO THE REMAINING FACTORS

A. Irreparable Harm

Plaintiffs claim that they will be irreparably harmed if the Facility is sold to another buyer because their business model could only be executed there, and that "there is not a single other site in the world" where it could be. (Mot. 18.). Defendants counter that whatever harm Plaintiffs have suffered can be quantified and remedied through an award of damages. Defendants also attach affidavits from Mr. Firestone, Mr. Mayo (City Manager of Old Town), and Mr. Deschenes (principal of OTH) suggesting that OTU's claim of irreparable harm lacks merit because OTU lacks the resources to purchase the Facility.

In their reply brief, Plaintiffs urge the Court to disregard Defendants' affidavits as not credible and counter the attack on Plaintiff's capacity to purchase the Facility, but have no retort for the Defendants' argument that Plaintiffs' harm is strictly economical. The Court is thus satisfied that Plaintiffs' harm, if any, is financial in nature and can be remedied by an award of money damages. In sum, the Court finds that this factor weighs against granting Plaintiffs' motion, as Plaintiffs have not demonstrated that the sale of the Facility to another buyer will result in irreparable harm to Plaintiffs.

B. Balance of Harms and the Public Interest

The Court has carefully considered the arguments presented by both sides as to these

factors, but decides that they weigh neither for nor against granting Plaintiffs' motion. The balance of harms essentially boils down to a credibility determination: OTU claims they remain willing to buy the Facility; MFGR claims that OTU lacks the resources, and that CVG is ready to purchase the Facility. Based on the record now before it, the Court is unable to determine whose position is more credible. The Court is convinced that an operational Facility will serve the public interest—a point raised by both sides—but determines that the public interest would be well-served by an operational Facility regardless of who owns or operates it.

CONCLUSION

By reason of the foregoing it is hereby ORDERED:

That Plaintiffs' motion for preliminary injunction is **DENIED.**

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

January 31, 2018
DATE

/s
SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT