IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

FOUNTAIN SQUARE PROPERTIES, LLC,	:	
	:	
Plaintiff	:	
	:	
v.	:	**Case No. 257398-V**
	:	
GROSVENOR HOUSE ASSOCIATES, LP ET AL.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

On August 23, 2007, the Court held a hearing on the Defendants' motion for summary judgment on Counts IV and V of the Second Amended Complaint.[1] The Court also heard the Plaintiff's Motion to Compel Production of Documents based on the Crime-Fraud Exception to the Attorney-Client Privilege. At the conclusion of the hearing the Court took both motions under advisement.

All submissions have been reviewed and the motions are now ripe for decision. No further hearing is necessary. *Phillips v. Venker*, 316 Md. 212, 219 & n. 2 (1989).

I.

In Maryland, summary judgment may only be granted if two conditions are met. First, the moving party must establish there is no genuine dispute as to any material fact. Second, the moving party must establish that it is entitled to judgment as a matter of law. Maryland Rule 2-501(f). *David A. Bramble, Inc. v. Thomas,* 396 Md. 443, 453-54 (2007); *City of Baltimore Development Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 314-15 (2006); *Remsburg v. Montgomery*, 376 Md. 568, 579-80 (2003). Absent the concurrence of both elements, the motion must be denied. *Okwa v. Harper*, 360 Md. 161, 177-78 (2000); *Green v. H & R Block, Inc.*, 355 Md. 488, 502 (1999); *Warner v. German*, 100 Md. App. 512, 516-17 (1994). As well,

[1] Previously, the Court denied the Defendants' motion to dismiss counts IV and V of the Second Amended Complaint (the fraud counts) but granted the Defendants' motions to dismiss counts I, II, and III (the contract counts), because the substance of these counts had been previously dismissed by Judge Thompson as legally insufficient to established a binding contract for the purchase and sale of the property in question. *See Cochran v. Norkunas*, 398 Md. 1, 21 (2007).

the Court has the discretion to deny summary judgment, even if the technical requirements of Maryland Rule 2-501 have been met. *Dashiell v. Meeks*, 396 Md. 149, 164-65 (2006); *Porter Hayden Co. v. Commercial Union*, 339 Md. 150, 164-65 (1995); *Metropolitan Mortgage Fund, Inc. v. Basiliko*, 288 Md. 25, 28 (1980); *Mathis v. Hargrove*, 166 Md. App. 286, 306 (2005).

Facts are material for summary judgment purposes if they "somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111 (1985). "Facts that do not pertain to the core questions involved are not 'material' and, consequently, are insufficient to avert a proper motion for summary judgment." *Warner*, 100 Md. App. at 517. Nevertheless, if the material facts, even if undisputed, are susceptible to more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact. *Haas v. Lockheed Martin Corp.*, 396 Md. 469,478-79 (2007); *United Services Auto Ass'n v. Rily*, 393 Md. 55, 66-67 (2006). Also, summary judgment is generally not appropriate when: (i) matters such as knowledge, intent, and motive are essential elements of a claim or defense; and (ii) are truly at issue in the case. *Okwa*, 360 Md. at 178; *Brown v. Dermer*, 357 Md. 344, 355-56 (2000).

In considering a motion for summary judgment, the ultimate question for this Court is whether the non-moving party has adduced sufficient facts, and reasonable inferences that may be drawn from those facts, such that "the jury could reasonably find for the plaintiff." *Seaboard Surety Co. v. Richard F. Kline, Inc*., 91 Md. App. 236, 244 (1992). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). It is important to recall that "all reasonable inferences from the facts are to be considered in the light most favorable to the non-moving party. . . ." *Warner*, 100 Md. App. at 516. *Accord, Green v. H & R Block, Inc*., 355 Md. at 502 ("Where multiple inferences may be drawn from the facts, they must be resolved in favor of the nonmoving party.") Of equal importance, credibility is not to be determined on summary judgment. *King*, 303 Md. at 111. *See also Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir.

1979)(summary judgment is not appropriate when affidavits present conflicting facts requiring credibility determinations).

It is with proper regard for these principles that the Court reviews the facts currently of record.

II.

The Plaintiff, Fountain Square Properties, L.L.C. ("Fountain Square") is a company that buys residential properties, often converting them to condominiums, and then sells or leases the units.

Defendant Grosvenor House Associates, LP ("Grosvenor House Associates") is a Maryland limited partnership, which formerly owned a property known as Grosvenor House located in Rockville, Maryland. NHP Multi-Family Capital Corporation ("NHP") is a District of Columbia corporation that acted as a general partner in Grosvenor House Associates. Defendant Apartment Investment and Management Company ("AIMCO") is a Maryland corporation that was a general partner or the agent of Grosvenor House Associates. Holliday Fenoglio Fowler L.P. ("HFF") is a Texas limited partnership that is licensed as a real estate broker in Maryland. HFF was hired by the Defendants as the exclusive real estate broker for the sale of Grosvenor House.

On September 15, 2004, the Plaintiff made an unsolicited offer, by way of a proposed letter of intent ("LOI") to engage in negotiations to purchase Grosvenor House for $95 million. On September 21, 2004, Harry G. Alcock, the executive vice-president of AIMCO, edited the draft LOI, adding certain terms. Mr. Alcock increased the proposed purchase price to $100 million and added that the earnest money deposit of $500,000.00 was made non-refundable. Although Mr. Alcock did not date the LOI, he sent the edited LOI to the Plaintiff by facsimile.

The Plaintiff initialed Mr. Alcock's changes and returned it to him by facsimile on September 23, 2004.[2]

The LOI is the centerpiece of the parties' dispute. One thing is clear, the LOI did not constitute a contract binding on either party to buy or sell the property. By its terms, the LOI was qualified, stating that the parties "contemplate the drafting, negotiation and execution of a more detailed purchase and sale agreement and intend to be bound only by such purchase and sale agreement and not by this letter of intent." Deft's Ex. 1. Despite this reservation, and the parties' explicit decision not to form a contract for the purchase and sale of the property, the LOI also states, as follows:

> Notwithstanding the foregoing, purchaser and seller acknowledge and agree that the provisions of the paragraphs having the headings of "exclusive negotiations" and "nature of letter of intent" ***will be binding and enforceable against purchaser and seller regardless of whether the parties execute and deliver a purchase and sale agreement***.

Deft's Ex. 1, at p. 4. (Emphasis added).

The two provisions of the LOI, said to be binding on the parties by virtue of the above-quoted paragraph, are at the heart of the Plaintiff's fraud claims. *First*, the "letter of intent" clause stated: "At the acceptance of this Letter of Intent, Purchaser and Seller shall immediately enter into good-faith negotiations for a mutually acceptable Purchase and Sale Agreement." *Second*, the "exclusive negotiations" clause states, in pertinent part, that as long as the parties are negotiating towards a purchase and sale agreement "Seller (a) will not offer the Property for sale to anyone other than Purchaser, (b) will cease any current negotiations for the sale of the Property other than to Purchaser, and (c) will not enter into any new negotiations with any third parties for the sale of the Property."

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[2] Mr. Alcock testified at his deposition that he did not mean to sign the Plaintiff's LOI, even with his changes and that it was signed and returned by mistake. Even if true, this is of no moment. *See, e.g., Holloman v. Circuit City Stores, Inc.*, 391 Md. 580, 595 (2006); *Canaras v. Lift Truck Services, Inc.*, 272 Md. 337, 344-45 (1974); *Merit Music Service, Inc. v. Sonneborn*, 245 Md. 213, 220-21 (1967); *McGrath v. Peterson*, 127 Md. 412, 416 (1916).

A third provision of the LOI governed the timing of the parties' negotiations and, in substance, their obligations under the "binding" portions of the LOI. The "purchase and sale" clause states that the Plaintiff is to provide a proposed form of agreement "no later than five (5) business days following the execution of this Letter of Intent." This provision goes on to states that the parties would then "endeavor in good-faith to enter into and execute the Purchase and Sale Agreement no later than twenty (20) days thereafter."

Although both sides agree that they never formed a binding contract to purchase and sell the property, the Defendants, at least implicitly, concede that certain provisions of the LOI, discussed above, were binding on the parties. Under the objective theory of contracts as applied in Maryland, *see generally See Cochran v. Norkunas, supra*, the binding nature of these provisions seems irrefutable, because there was a mutual manifestation of assent to be bound to these terms. In any event, for summary judgment purposes, the Defendants have not shown the absence of a genuine dispute as to how these provisions were to operate, the nature and scope of the parties obligations under these terms, and whether the parties' conduct comported with these provisions. Hence, the issue of whether the parties fulfilled their duties under these provisions of the LOI cannot be decided by summary judgment. *Cochran*, 398 Md. at 16 n. 8.

III.

What happened after the execution of the LOI is a subject of much heated debate. The Plaintiff contends in Count IV that the Defendants made affirmative misrepresentations in connection with their intention to perform the promises contained in the "binding" provisions of the LOI, discussed above. Specifically, the Plaintiff says the Defendants did not engage in good-faith negotiations and did not refrain from offering the property for sale to, and from negotiating with others during the 20 day exclusivity period. The Plaintiff contends in Count V that after the execution of the LOI the Defendants engaged in misleading conduct, made other misrepresentations and half-truths, and otherwise concealed their true intentions.

The Defendants counter, stating this case simply shows an unsuccessful commercial real estate negotiation between sophisticated parties that, like many other possible deals, failed to come to fruition. In their view, nothing nefarious occurred, everything was out in the open, and the Defendants were well within their rights to tell the general market that the property was for sale in order to ascertain the true market value of the property before entering into a definitive sales contract. According to the Defendants, they did not violate a single provision of so-called binding portions of the LOI and the Plaintiff never relied on any post-LOI representations, much less did so reasonably. They counter, as well, that the Plaintiff never negotiated in good-faith and deliberately attempted to miscast the phrase "offer for sale" in the LOI to mean that the Defendants could not even tell the market that the property was available. The Defendants also accuse the Plaintiff of attempting to renege on the $500,000.00 non-refundable deposit provision added by Mr. Alcock, as well as continually providing unacceptable drafts and changes to the draft purchase and sale agreement. In short, the Defendants say the reason the Plaintiff lost the deal is that the Plaintiff over- or mis-played its hand, and not because of any fraud by the Defendants.

The Plaintiffs counter that the Defendants never intended to abide by the LOI and in fact contemporaneously marketed the property to other prospective buyers. According to the Plaintiff, the Defendants never had the intention either of abiding by the "good faith" negotiation provision or the "no-shop" provision at the time they signed the LOI. In short, Fountain Square believes that the Defendants simply used it as a placeholder in order to solicit higher offers and, ultimately, secure a higher offer for the property and to close the transaction before the end of 2004.

The record discloses that the Defendants formally engaged HFF to solicit offers for the property on September 30, 2004, but that an agreement between the Defendants and HFF was

reached earlier, perhaps by September 27, 2004. This engagement occurred mere days after Mr. Alcock signed the LOI and returned it to Fountain Square.

On October 1, 2005, HFF sent an announcement regarding the property to over 2,000 potential buyers. The announcement, read in the light most favorable to the Plaintiff, is an offer by the Defendants to sell the property. Among other things, HFF's e-mail states: (1) HFF "is pleased to present Grosvenor House, a 405 unit, 20 story luxury apartment building and excellent condo conversion candidate in suburban Washington, D.C"; (2) "[t]iming is a critical element of the transaction for the seller and offers must be submitted by 5:00 p.m. on Tuesday, October 12, 2004"; (3) "[t]he purchaser will be required to complete its due diligence by October 29, 2004 and close by year end." Deft's Ex. 8. The property also was advertised for sale on the Defendants' and HFF's website. A reasonable jury could find that HFF, as the Defendants' disclosed agent, offered the property for sale to potential buyers other than Fountain Square within the 20 day exclusive negotiation period.

Fountain Square contends that it did not become aware of the Defendants' engagement of HFF to market the property until October 5, 2004, when a third-party sent it HFF's marketing e-mail (Deft's Ex. 8). Fountain Square claims that it promptly contacted Mr. Alcock about HFF's marketing efforts and that Mr. Alcock assured them that such efforts were a "mistake" and would be stopped immediately. Counsel for the Defendant, in a letter to Fountain Square dated October 5, 2004, tells a slightly different version, contending that the LOI allowed ordinary marketing activities "so long as [the Defendant] does not begin or continue negotiations for the sale of the property to a party other than [the Plaintiff]." Deft's Ex. 9 The reply of the Plaintiff's counsel did not respond directly to the interpretation of the Defendants' counsel but simply stated, in pertinent part, that the Plaintiff "would prefer not to make any modifications of the existing letter of intent, the language of which is clear." Deft's Ex. 10. Thus, we have an exchange of two very "lawyerly" letters.

Two days later, on October 7, 2004, Fountain Square encountered HFF on the property preparing to conduct a tour with a prospective buyer. Again, Fountain Square contacted Mr. Alcock, who claimed that he had been unable to cancel some meetings, such as the October 7th tour, but assured Fountain Square that he would instruct HFF to cease marketing the property. According to Fountain Square, Mr. Alcock assured Fountain Square that the deal was Fountain Square's for $100 million if the transaction could close by year-end. The Defendants' dispute much of the foregoing.

According to Fountain Square, despite Mr. Alcock's assurances, the Defendants did not instruct HFF to cease marketing the property and, in fact, thereafter HFF secretly marketed the property and negotiated a sales price with others, while the Defendants pretended to negotiate a purchase and sale agreement with Fountain Square. The Defendants' counter that Fountain Square was well aware that HFF was marketing the property and that nothing was hidden. The Defendants' acknowledge that Fountain Square had requested HFF to "stand down" but that the parties simply disagreed about what was permitted under the LOI.

On October 8, 2004, the Defendants informed Fountain Square that it usually did not conduct face-to-face meetings to negotiate purchase agreements. On October 12, 2004, Fountain Square submitted a purchase and sale agreement to the Defendants for its review and comment. That same day, according to Fountain Square, HFF received 13 offers for the property from others, four of which exceeded the Plaintiffs' $100 million offer, one of the offers was for $117.5 million. Defts' Ex. 16. On October 13, 2004, within hours after the Defendants received the substantially higher offers, Ms. Robinson, an outside attorney for the Defendants attempted to reach Fountain Square to schedule an "urgent" face-to-face meeting to discuss the draft purchase agreement Fountain Square had submitted on October 12, 2004. The next day, October 14, 2004, Ms. Robinson flew from Denver to Virginia to meet with the Plaintiff and discuss the draft purchase agreement. But when she arrived at the meeting, Ms.

Robinson announced that she did not have authority either to negotiate or finalize a contract. An hour into the meeting, Mr. Asarch, in-house counsel for AIMCO, joined the meeting by telephone. Mr. Asarch did not tell Fountain Square about the 13 other offers for the property (four of which exceeded Fountain Square's offer) and did not discuss price. The Defendants contend that Mr. Asarch did have authority to negotiate and reach an agreement but that the parties still were too far apart on material terms. At the conclusion of the meeting, Robinson said that she would revise the contract and send Fountain Square another draft.

The Defendants calculated that its 20 day exclusive negotiating period with Fountain Square expired on October 19, 2004. The Defendants and HFF readied and sent out letters soliciting "best and final offers" before the close of business on October 19, 2004, to the prospective buyers (other than Fountain Square) from whom they had received serious indications of interest. The Defendants sent a letter on October 20, 2004, terminating the LOI and declaring the negotiations with Fountain Square to be over. The last contact Fountain Square had with the Defendants was October 21, 2004. The property was sold to another buyer, located by HFF, for $120.5 million in October 2004 as a result of HFF's marketing efforts.

IV.

The elements of actionable fraud have been set forth many times by Maryland's appellate courts and need not be repeated. *See Hoffman v. Stamper*, 385 Md. 1, 28 & n.12 (2005); *Tufts v. Poore*, 219 Md. 1, 10-12 (1959); *Appel v. Hupfield*, 198 Md. 374, 378-79 (1951); *Bocchini v. Gorn Management Co*., 69 Md. App. 1, 19-21 (1986); *Kalb v. Vega*, 56 Md. App. 653, 662 (1983).

The parties have engaged in extensive, thorough discovery and have presented to the Court reams of documents, deposition excerpts, e-mails, and affidavits. Each side has cogently interpreted these evidentiary materials to present its version of the pertinent events, including

the parties' various conversations, e-mails, and meetings. After an extensive review of both sides' submissions, the Court concludes that the Defendants have not carried their burden to show the absence of a genuine dispute over the pertinent material facts. Maryland Rule 2-501(a). For that reason alone summary judgment must be denied.

Under Maryland Rule 2-501(b); *see Educational Testing Service v. Hildebrant*, 399 Md. 128, 145 (2007), the Plaintiff has adduced sufficient evidence at this juncture, when viewed in the proper light, to show that the Defendants did not intend to abide by either: (1) the "good faith" negotiation provision of the September 21, 2004 LOI; or (2) the 20 day exclusivity provision of the LOI because the Defendants in fact offered the property to sale to others during the exclusivity period. There also is a question, albeit more attenuated, as to whether there were, in fact, good faith negotiations between the parties to the LOI towards a final agreement. *See Educational Testing*, 399 Md. at 141 ("In every contract there exists an implied covenant that the parties to the contract will act in good faith when dealing with each other.") There also is evidence, sufficient under Maryland Rule 2-501(b), to show that: (3) the Defendants harbored wrongful intent at the time the letter was signed; and (4) the Defendants intended the Plaintiff to rely upon its representations. If all of this is proven at trial, a reasonable jury could find, under the requisite evidentiary standard, the material elements of the tort of deceit and, consequently, find in favor of the Plaintiff on the issue of liability. *McAleer v. Horsey*, 35 Md. 439, 452-54 (1872); *First Union National Bank v. Steele Software Systems Corp.*, 154 Md. App. 97, 134-35 (2003).

There also is sufficient evidence, for summary judgment purposes, that after making materially false factual assertions on which the Defendants intended and the Plaintiff did rely, the Defendants concealed or intentionally withheld information about other potential bidders which the Plaintiff had a right to know. *See Walsh v. Edwards*, 233 Md. 552, 557 (1964);

Fowler v. Benton, 229 Md. 571, 581-82 (1962); *Brager v. Friedenwald*, 128 Md. 8, 32 (1916). *See also Zirn v. VLI Corp*., 681 A.2d 1050, 1053-56 (Del. 1996).

At trial the Plaintiff must prove by clear and convincing evidence that the Defendants withheld material information with the intent to defraud the Plaintiff. In determining whether the allegedly withheld information was material, the courts generally look to whether a reasonable person would have relied on the omitted information. *See Shulton, Inc. v. Rubin*, 239 Md. 669, 685-86 (1965). In certain circumstances, however, a fact may be regarded as material, regardless of what a reasonable person may have thought, if the person stating or concealing the fact knows that the person with whom he is dealing probably will use the fact in determining his course of action. *Brodsky v. Hull*, 196 Md. 509, 515-16 (1950). Conversely, if the concealed facts are either known to or through the exercise of reasonable diligence knowable by the allegedly defrauded party the Defendants' silence may not be actionable. *Polson v. Martin*, 228 Md. 343, 348-50 (1962). The extent to which the Plaintiff was aware of the allegedly concealed information, whether there was reasonable reliance and whether the Defendants' conduct proximately caused any legally cognizable loss are quintessentially questions of fact. *Diamond Point Plaza Ltd. Partnership v. Wells Fargo Bank*, N.A., 2007 WL 2389827 (Md. Aug 23, 2007).

In summary, whether any or all of the Plaintiff's allegations can be proven to the satisfaction of the trier of fact remains to be seen. *See Hoffman*, 385 Md. at 26-31; *Mathis v. Hargrove*, 166 Md. App. 286 (2005); *Finch v. Hughes Aircraft Co*., 57 Md. App. 190 (1984). All things considered, the circumstances of this case militate in favor of "a full hearing on the merits." *Metropolitan Mortgage Fund, Inc.*, 288 Md. at 28. The Court has ample authority to grant the appropriate relief if after receipt of the evidence, any part of the case should not be submitted to the jury or that Court should not allow the entry of a judgment. *See, e.g*., Maryland Rules 2-519, 2-532, 2-533, 2-535.

V.

The Defendants contend that damages in this case, if any, are limited to Fountain Square's reliance damages, such as out-of-pocket expenses, and must be limited to the specific terms of the LOI proven to be violated. Two reasons are proffered. The first reason is that this Court is bound by a prior ruling of Judge Thompson which, in granting in part, the Defendant's motion for summary judgment on the original Count V, held that "Plaintiff is limited to its reliance damages incurred as a result of any such fraudulent inducement. Plaintiff may not recover consequential damages or lost profits." Respectfully, this Court is not bound by that interlocutory ruling. *Gertz v. Anne Arundel County*, 339 Md. 261, 273 (1995); *Carey v. Chessie Computer Services, Inc.*, 141 Md. App. 228, 241 (2001); *Baltimore Police Dept. v. Cherkes*, 140 Md. App. 282, 300-301 (2001).

The second reason advanced by the Defendants is that a Maryland appellate court has never approved benefit-of-the-bargain damages in a fraud case in the absence of an enforceable contract, such as a contract for the purchase and sale of realty. *Goldstein v. Miles*, 159 Md. App. 403, 428-30 (2004), does lend support to this proposition.

Fountain Square argues the matter is not so clear and that Maryland law, properly applied to the facts of this case, would allow recovery under a benefit-of-the bargain or lost profits theory. *See Hinkle v. Rockville Motor Co*, 262 Md. 502, 505-13 (1971); *Aeropesca Ltd. v. Butler Aviation International, Inc.*, 44 Md. App. 611, 630-33 (1980). *See also Beardmore v. T.D. Burgess Co.*, 245 Md. 387, 391 (1967); *Venture Associates Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 278 (7th Cir. 1996)(Posner, J.).

The question of damages in this case, assuming fraud is proven by clear and convincing evidence and there is sufficient evidence of damage shown by a preponderance of the evidence, *Hoffman v. Stamper*, 385 Md. at 41, is a knotty question that cannot be resolved at this time.

The parties really have not focused in their briefs on the specific evidence pertinent to this question.

Presumably, much of the damage evidence will be presented through experts. In Maryland, the admissibility of expert testimony turns on fulfilling the requirements of Maryland Rule 5-702 and Maryland Rule 5-703. *Food Lion v. McNeill*, 393 Md. 715, 730-31 (2006); *Rollins v. State*, 392 Md. 455, 498-99 (2006); *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 183-84, 189 (2004); *Wood v. Toyota Motor Corp*., 134 Md. App. 512, 519-24 (2000). Citation is hardly necessary for the proposition that trial courts enjoy wide discretion in determining whether or not to admit expert testimony. *Buxton v. Buxton*, 363 Md. 634, 650-51 (2001); *Oken v. State*, 327 Md. 628, 659-61 (1992). Of course no expert, no matter how well qualified, may stray beyond the area of his expertise, *In re Yve S*., 373 Md. 551, 613 (2003), or offer opinion testimony that he is not qualified to give. *Compare I.W. Berman Properties v. Porter Bros., Inc*., 276 Md. 1, 13-15 (1975) *with Ditto v. Stoneberger*, 145 Md. App. 469, 498-99 (2002). If the expert testimony is legally insufficient, it can be stricken, *Franch v. Ankey*, 341 Md. 350, 365 (1996), or a motion for judgment can be granted. *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182-90 (2003). Also, a motion for summary judgment on the issue of damages can be made at any time, even orally during trial. *Rodriguez v. Clarke*, 400 Md. 39, 74 n. 21 (2007).

VI.

Fountain Square has renewed its motion under the crime-fraud exception to the attorney-client privilege seeking the production of the communications the Defendants (or their in-house counsel) had with the Defendants' transactional attorneys, Ballard Spahr Ingersoll & Andrews, LLP. The Defendants oppose the motion.

As the Court noted in its Memorandum and Order of May 3, 2007, the crime-fraud exception to the attorney-client privilege has long been applied in the federal courts. *See United*

States v. Zolin, 491 U.S. 554, 563 (1989); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977). Only recently, however, has the exception been recognized by Maryland's appellate courts in connection with the attorney-client privilege.

In *Newman v. State*, 156 Md. App. 20 (2003), the exception was given effect by the Court of Special Appeals. Speaking through Judge Greene (now a member of the Court of Appeals), the intermediate appellate court, applying principles largely derived from federal cases, held that it was not error for the trial court to have allowed testimony from the defendant's former counsel about the defendant's intent to commit a future crime. 156 Md. App. at 41-49. The Court of Appeals reversed. *Newman v. State*, 384 Md. 285 (2004).

Speaking through Judge Battaglia, the Court of Appeals held the admission of the evidence to be error because there was "nothing in the record indicating that Newman sought advice or assistance [from the attorney] in furtherance of a crime when she stated her intention to kill her husband and children." 384 Md. at 311 (footnote omitted). The Court did, however, "hold that the crime-fraud exception applies in Maryland to exempt communications seeking advice or aid in furtherance of a crime or fraud, from the protection of the attorney-client privilege." *Id.* at 309. Although the Court in *Newman* provided some guidance concerning procedures to be followed when a party asserts that the crime-fraud exception applies, *Id.* at 311 n. 7, the Court of Appeals expressly declined to "address the burden of proof required to show that the communication was in furtherance of a future crime or fraud." *Id.* at 311 n. 6.

In an earlier decision, the Court of Special Appeals had recognized the crime-fraud exception to the accountant-client privilege, which is wholly a creature of statute and has no foundation in the common law. *Dixon v. Bennett*, 72 Md. App. 620 (1987), *cert. denied*, 311 Md. 557 (1988). However, in *BAA, plc. v. Acacia Mutual Life Ins. Co.*, No. 19, 2007 WL 2141820 (Md. July 27, 2007), the Court of Appeals expressly overruled *Dixon*, holding that there is no crime-fraud exception to the statutorily created accountant-client privilege.

Pertinent to this case, the Court of Appeals, speaking through Judge Eldridge, commented upon *Newman* as follows:

> In *Newman v. State*, 384 Md. 285, 309 (2004), the Court, in an opinion by Judge Battaglia, held "that the crime-fraud exception applies in Maryland to except communications seeking advice or aid in furtherance of a crime or fraud, from the protection of the attorney-client privilege." The Court in *Newman*, however, rejected the State's argument that the crime-fraud exception to the attorney-client privilege should be viewed expansively.

BAA, plc. v. Acacia Mutual Life Ins. Co., No. 19, 2007 WL 2141820 at 20, n. 18 (Emphasis added).

Although the above-quoted footnote from *BAA, plc*. is *dicta*, it is learned *dicta* from a recent decision by the Court of Appeals and cannot be ignored by a Maryland trial court. Moreover, the Court of Appeals recently has cautioned that, absent the clear application of an exception to the attorney-client privilege, a trial court should not compel the disclosure of matters otherwise covered by the privilege. *Haley v. State*, 398 Md. 106, 125-29 (2007).

Prior to the decision in *BAA, plc*, and in view of the dearth of Maryland appellate authority and the declination by the Court of Appeals in *Newman* to address the burden of proof, the court indicated that it generally concurred with the decision by Magistrate Judge Susan Gauvey in *Koch v. Specialized Care Services, Inc*. 437 F. Supp. 2d 362 (D. Md. 2005). As Judge Gauvey noted, many of the federal courts require the party seeking the disclosure to present enough evidence to support a verdict in its favor for the alleged fraud. *Koch*, 437 F. Supp. 2d at 378. Judge Gauvey, not having the benefit of *BAA, plc*., postulated that Maryland would reject the majority federal test and adopt a lesser standard; a standard akin to the reasonable basis test of comment f to § 83 of the Restatement (Third) of the Law Governing Lawyers. Although § 83 of the Restatement, which defines the crime-fraud exception, was cited in *Newman*, 384 Md. at 309, the Court of Appeals in *Newman* neither adopted nor rejected the reasonable basis test of comment f of § 83.

In reaching her decision, Judge Gauvey relied, in part, on *dicta* in *Sears v. Gussin*, 350 Md. 552, 568-69 (1998). In *Sears*, the Court of Appeals noted the holding of the intermediate appellate court in *Dixon* but did not decide the question of whether the crime-fraud exception applied to the client-accountant privilege. 350 Md. at 568-69 & n. 4. Given the later decision in *BAA, plc*. expressly disavowing *Dixon*, and the Court of Appeals' declination in *Newman* to opine on the level of proof needed to overcome the attorney-client privilege, 384 Md. at 311 n.6, the Court now is hesitant to rely, as did Judge Gauvey, on any *dicta* in *Sears v. Gussin*. *See Koch*, 437 F. Supp. 2d at 379-70.

Moreover, in light of Judge Eldridge's recent admonition in *BAA, plc.*, and this Court's independent re-examination of *Newman* and the crime-fraud decisions of the federal appellate courts, and especially those of the United States Court of Appeals for the Fourth Circuit, *see, e.g*., *In re Grand Jury Proceedings #5 Empanelled January 28, 2004*, 401 F.3d 247, 251 (4th Cir. 2005); *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976), the Court must reconsider its previous concurrence with the approach discussed in *Koch*.

Although the matter is not free from doubt, this Court is inclined to follow the federal standard, as applied in the Fourth Circuit, as the rule of decision. Any lesser standard would render the attorney-client privilege "virtually worthless" and allow a party, in a garden variety civil commercial dispute, albeit sounding in deceit, to rummage through opposing counsels' files in the hope of finding evidence to support their claim. In the absence of guidance from the Court of Appeals, the Court is not prepared to vitiate the attorney-client privilege simply because a client committed a fraud; there must be credible evidence that an otherwise confidential, attorney-client communication was made in furtherance of the specific fraud in issue. "The crime-fraud exception has a precise focus: It applies only when the communications between the client and his lawyer further a crime, fraud or other misconduct. It does not suffice that the communications may be related to a crime. To subject the attorney-

client communications to such disclosure, they must actually have been made with an intent to further an unlawful act." *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989). In other words, "the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. If it did, the privilege would be virtually worthless because a client could not freely give, or the lawyer request, evidence that might support a finding of culpability." *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995).

At this juncture of the case, the Plaintiffs' evidence of the relationship or connection between the Defendants' alleged fraud and Defendants' communications with their counsel fall short. The fact that there were a large number of communications between the Defendants and their counsel over the subject matter of the LOI or the potential sale of the property to another party does not provide a sufficient nexus between the Defendants' alleged fraud on the Plaintiff and the Defendants' communications with their counsel. Consequently, if the Plaintiff wants the Court to consider the matter further, the Court, will follow the procedure outlined in Maryland Rule 2-502, and the Court of Appeals' directions in footnote 7 of *Newman*.

In view of the above ruling, it is premature for this Court to conduct an *in camera* review of the withheld documents. Such a review is in any event discretionary. *Zolin*, 491 U.S. at 569-72. In this case, the Court has determined that before the Court conducts any *in camera* review of privileged documents, prudential concerns weigh heavily in favor of holding a hearing under Maryland Rule 2-502 and Maryland Rule 5-104. This will occur after the Plaintiff has presented evidence of fraud at trial, sufficient under Maryland Rule 2-519 and evidence (outside the presence of the jury) that the clients' communications with their lawyers were made to facilitate or conceal the fraudulent activity. At that point, there will be sufficient clarity in the record for the Court to make a reasoned decision. *In re Grand Jury Proceedings*, 401 F.3d at 251; *Duplan Corp.*, 540 F.2d at 1222; *Burlington Industries v. Exxon Corp*., 65 F.R.D. 26, 40 (D. Md. 1974). *Accord, In re Omnicom Group Inc. Securities Litig*., 233 F.R.D.

400, 405-07 (S.D.N.Y. 2006); *Laser Indus. Ltd v. Reliant Technologies, Inc*., 167 F.R.D. 417, 435-36 (N.D. Cal. 1996).

VII.

For the reasons set forth above, it is this 27th day of August, 2007, **ORDERED**:

1. The Defendants' motion for summary judgment is **DENIED**.
2. The Plaintiff's motion to compel the production of documents based on the crime-fraud exception, is **DENIED, WITHOUT PREJUDICE.**

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RONALD B. RUBIN, JUDGE
Circuit Court for Montgomery County, Maryland