New York City Economic Development Corporation v T.C. Foods Import & Export Co., Inc.

2003 NY Slip Op 30173(U)

October 7, 2003

Supreme Court, Queens County

Docket Number: 5856/00

Judge: Joseph S. Levine

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALAN LeVINE IA PART TSP
Justice

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THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

- against -

T.C. FOODS IMPORT AND EXPORT CO., INC., et al.

Index Number 5856 2000

Motion Date August 19, 2003

Motion Cal. Number 52

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The following papers numbered 1 to 7 read on this motion by plaintiff New York City Economic Development Corporation for, inter alia, summary judgment on its complaint.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1-2
Answering Affidavits - Exhibits	3
Reply Affidavits	4-5
Other (Memoranda of Law).....	6-7

Upon the foregoing papers it is ordered that the motion is denied. (See the accompanying memorandum.)

Dated: October 7, 2003

J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: TSP

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THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

INDEX NO.: 5856/00

BY: LeVINE, J.

-against-

DATED: OCTOBER 7, 2003

T.C. FOODS IMPORT AND EXPORT CO., INC., et al.

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Plaintiff New York City Economic Development Corporation ("EDC") has moved for, inter alia, summary judgment on its complaint.

On June 22, 1989, plaintiff EDC, then known as the New York City Public Development Corporation, sold to Globru Realty Corporation a parcel of real property designated as Block 4403, Borough of Queens, New York. Globru covenanted to develop Block 4403 in accordance with the College Point Industrial Plan of 1971, as amended from time to time, and the covenant was to survive the delivery of the deed and run with the land. The indenture of sale specifically provided that "[t]he covenants of the Grantee hereunder shall run with the land and bind Grantee's successor's and assigns." On September 27, 1991, Globru conveyed Block 4403 to defendant T.C. Foods Import and Export Co., Inc. ("TC Foods"). The deed specifically stated that TC Foods would be bound by the covenants set forth in the deed from the plaintiff's predecessor to Globru.

The Fifth Amended College Point Industrial Plan provided

in relevant part: "G. Sign Regulations [:] 1.a. Advertising Signs [:] Advertising signs are prohibited. b. Accessory Business Signs [:] (1) One flat wall sign is permitted for identification for each individual *** business establishment *** (4) Signs shall not be located on or projected above the roofs of buildings and shall not exceed a height of 20 feet above the curb level."

On April 3, 1998, defendant TC Foods, as landlord, entered into a lease with Image Media LLC granting to the tenant "the exclusive privilege of advertising on the premises known as 31-69 College Point Blvd., Flushing, New York, for the erection of a Single Pole illuminated 20' x 60' advertising Bulletin structure ***." The lease had a term of 10 years and required the annual payment of rent in the amount of $24,000. On June 1, 1998, Image Media LLC assigned the lease to defendant/third-party defendant Marathon Outdoor LLC, whose majority owner is defendant/third-party defendant PNE Media, LLC. Defendant PNE alleges that it acquired a 51% interest in defendant Marathon in September, 1998 and that part of the purchase price, $1,658,711.26, represented the value of the lease and related permits. Defendant PNE alleges that it was unaware of the restrictive covenant at the time it acquired its interest in defendant Marathon. Defendant PNE further alleges that applicable zoning regulations allowed the construction of the billboard and that all required permits were obtained for it.

In 1999, at an alleged expense of approximately $285,000, Marathon erected a tall advertising sign in front of defendant TC Foods' place of business which allegedly violated the size, height,

and use limitations imposed by the Fifth Amended Plan. In late April, 1999, plaintiff EDC allegedly first learned of the construction of the billboard, and the plaintiff allegedly gave defendant TC Foods and defendant Marathon notice of the violation before they completed construction. However, defendant Marathon and defendant PNE allegedlywent forward with the construction, and since June, 1999, defendant Marathon and defendant PNE Media, LLC have been using the structure for advertising purposes. The structure has two billboard faces known as NY-410 and NY-411 allegedly capable of generating several hundred thousands of dollars in annual advertising revenue.

This action for breach of the restrictive covenant and unjust enrichment ensued. Plaintiff EDC seeks an injunction requiring the removal of the billboard and a judgment in the amount of the profits made by the defendants for alleged "unjust enrichment." Defendant Marathon and defendant PNE have asserted a counterclaim against plaintiff EDC for a judgment declaring that the restrictive covenant is unenforceable pursuant to RPAPL 1951. The plaintiff filed **a** note of issue on October 19, 2001, although the court permitted discovery to continue.

Defendant Marathon and defendant PNE assert, inter alia, that plaintiff EDC has allowed other landowners or tenants to install signs which violate the restrictive covenant and that the character of the industrial park has changed since the urban renewal plan was first drafted in the late 1960's. Defendant Marathon and defendant PNE allege the following: Although the

Industrial Plan had as its original purpose industrial development in an "attractive, suburban, campus style" atmosphere, with "uniformity and restraint in design features among occupants of the corporate park," the Industrial Plan has been substantially modified over three decades. In 1996, for example, "big box" retailers such as Circuit City, T.J. Maxx, and Toys R Us were allowed to establish outlets in the corporate park because they had potentially more economic value than industrial/office users. The Industrial Plan made "big box retailers" exempt from the restrictions on signs concerning size and number, and, as a consequence, there are now very large signs within the corporate park. The plaintiff has ignored violations of signage restrictions by other parties and has created exemptions from signage restrictions for other parties. There are large signs for Multiplex Cinemas, Toys R Us, Kids R Us, Babies R Us, Old Navy, McDonald's, Starbucks, and Target, among others in the corporate park. There are also two billboards owned by the Department of Citywide Services, a municipal agency, in the vicinity of PNE's billboard, and those two billboards display advertising for McDonald's products and Crest toothpaste. Across the Whitestone Expressway, close to the PNE billboard, there is a row of billboards visible from within the corporate park. The corporate park is now a "hodge podge of mixed uses," and the "suburban, campus" type setting envisioned by the original planners does not exist.

The court notes initially that although the plaintiff did

not bring its motion for summary judgment within the time specified by CPLR 3212(a), the motion may be entertained for the sake of judicial economy. (See, Boehme v A.P.P.L.E.,298 AD2d 540.)

The opponent of a motion for summary judgment has the burden of producing evidence in admissible form sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Defendant Marathon and defendant PNE successfully carried this burden.

RPAPL 1951, "Extinguishment of non-substantial restrictions on the use of land," provides in relevant part: "1. No restriction on the use of land created at any time by covenant, promise or negative easement, or created on or after September 1, 1958, by a special limitation or condition subsequent governed by section 1953, shall be enforced by injunction or judgment compelling a conveyance of the land burdened by the restriction or an interest therein, nor shall such restriction be declared or determined to be enforceable, if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is **of** no actual and substantial benefit **to** the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions **or** other cause, its purpose is not capable of accomplishment, or for any other reason.'' (See, Zimmerman v Seven Corners Development, Inc., 237 AD2d 892; Clintwood Manor, Inc. v Adams, 29 AD2d 278, affd 24 NY2d 759.)

Contrary to plaintiff EDC's contention, RPAPL 1951 is applicable to the case at bar. RPAPL 1951 makes no exceptions for restrictive covenants created by governmental units. In the plaintiff's view, "[t]he legislative history for RPAPL 1951-1955 clearly shows these provisions were originally enacted together as a coordinated statutory scheme related to the extinguishment and modification of restrictions on the use of land, both forfeiture and non-forfeiture." If so, then the Legislature expressly made exceptions for public or governmental purposes in that "coordinated statutory scheme" when it intended to create exceptions, as it did in RPAPL § 1953(4) and RPAPL § 1955(5). The court notes that in 111 Bloominsdale Realty Corp. v Town of Oyster Bay (53 AD2d 604), the Appellate Division, Second Department, affirmed an order denying the dismissal of a complaint against the town, finding that a cause of action had been stated under RPAPL 1951. There is also no merit in plaintiff EDC's contention that defendant Marathon and defendant PNE are impermissibly seeking the partial extinguishment of a restrictive covenant. While the Appellate Division, Fourth Department, has held that RPAPL 1951 does not permit the partial extinguishment of a restrictive covenant (see, Nature Conservancy v Congel, 296 AD2d 840), in the case at bar, the entire Urban Renewal Plan does not amount to one indivisible covenant.

The court's inquiry pursuant to RPAPL 1951 "entails a balancing of the equities and a determination of whether the restrictive covenants are of no actual and substantial value to

[the party seeking enforcement]." (Board of Educ., East Irondequoit Central School Dist. v Doe, 88 AD2d 108, 115; see, Smith v Sheppard, 301 AD2d 913; Hoffman v Lang, 251 AD2d 292; Cody v Anthony Fabiano and Sons InC., 246 AD2d 726.) "[T]he party seeking the extinguishment of the restriction must prove (1) lack of benefit derived from enforcement of the restriction, and (2) legally cognizable reason for the extinguishment of the restriction under RPAPL 1951, such as changed conditions which render the purpose of the restriction incapable of being accomplished ***." (Deak v Heathcote Ass'n, 191 AD2d 671, 672; see, Hoffman v Lang, supra; Cody v Anthony Fabiano and Sons Inc., supra.)

In the case at bar, summary judgment is precluded by issues of fact pertaining to whether the restrictive covenant is of "no actual and substantial benefit" to plaintiff EDC and to whether the purpose of the signage restriction is incapable of being accomplished because of changed conditions. (See, RPAPL 1951[2]; Hoffman v Lang, supra; Deak v Heathcote Assn., supra.)

Accordingly, the motion is denied.

Short form order signed herewith.

J.S.C.