

**Riverside S. Planning Corp. v CRP/Extell
Riverside, L.P.**

2008 NY Slip Op 30836(U)

March 13, 2008

Supreme Court, New York County

Docket Number: 0115909/2007

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 56

Justice

Index Number : 115909/2007

RIVERSIDE SOUTH PLANNING CORP.

VS.

CRP/EXTELL RIVERSIDE, L.P.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 2/29/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/13/08

HON. RICHARD S. LOYD, III


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
RIVERSIDE SOUTH PLANNING CORPORATION,

Plaintiff,

Index No. 115909/07

-against-

CRP/EXTELL RIVERSIDE, L.P. and
CRP/EXTELL PARCEL I, L.P.,

Defendants.

-----X
Hon. Richard B. Lowe, III

FILED
MAR 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Defendants CRP/Extell Riverside, L.P. and CRP/Extell Parcel I, L.P. (“Defendants” or “Extell”) move to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7).

Background

The following facts are taken from the Complaint¹:

Plaintiff Riverside South Planning Corporation (“Plaintiff” or “RSPC”) is a not-for-profit corporation responsible for the planning, design, and construction of land located on the West Side of Manhattan and known as Riverside South.

In the 1990's a plan for development was proposed by Donald J. Trump (“Trump”) who purchased Riverside South. There was opposition to the proposed plan among various civic groups who organized to seek alternatives. After extensive negotiation among those civic groups, Trump, and the local government, the Riverside South Development Plan (the “Development Plan”) was introduced.

The civic groups withdrew their opposition and supported the Development Plan through

¹Dolan Affirmation Exhibit 1

[* 3]

creation of the RSPC . In exchange, Trump agreed to withdraw his original proposal and to implement the new Development Plan which focused on environmental sustainability and design criteria. The project contemplated sixteen buildings on seventy-six acres, a new park and substantial changes to the nearby Miller Highway. The plan also called for parks, open spaces, and public art programs to be included.

In 1993, an agreement between Trump and RSPC was entered into (the “1993 Agreement”) which set forth the terms upon which the civic groups committed to support the Development Plan. Under the 1993 Agreement, the RSPC was to have an active role in planning and developing Riverside South which included ensuring the development abided by the environmental sustainability and design principles of the Development Plan. Specifically, the 1993 Agreement binds Trump to abide by certain design guidelines that defined Riverside South’s development and the procedures required to implement them. In the 1993 Agreement, Trump agreed as follows:

I agree to develop the project in substantial conformity to design guidelines which will be administered in accordance with the attached procedures, and not to apply for any major modifications or rezonings . . .without approval of a majority of the members of RSPC (which approval will not be unreasonably be withheld or delayed).

(*Notice of Motion* Exhibit 2 p 1-2). Trump also agreed to fund RSPC for three years, after which, in good faith, he would consider continued funding (*Id* at 3-4).

In 1994, Trump sold his title in Riverside South to Hudson Waterfront Associates, L.P. (“Hudson Waterfront”) , an entity in which he retained an interest, but not control. On or about June 17, 2005, Extell purchased its interest in Riverside South from Hudson Waterfront.

[* 4]

RSPC alleges that Extell assumed the obligations in the 1993 Agreement through a 2005 Assignment and Assumption Agreement with Hudson Waterfront which was entered into when Extell purchased its interest in Riverside South. According to the Complaint, for a time Extell recognized the 1993 Agreement and acted consistently with its obligations, including funding RSPC, having architects correspond with RSPC, and promising to provide plans for construction on a new building ("Building 1").

Despite assuming the obligations contained in the 1993 Agreement, RSPC alleges Extell stopped abiding by them and is presently refusing to honor the agreed upon Design Guidelines without seeking RSPC's approval for its non-compliant construction. It is further alleged that Extell has failed to conduct the required environmental sustainability assessments and calculations. Further, Extell has refused to involve RSPC in any aspect of Riverside South's planning and design.

Extell argues it is not bound by the 1993 Agreement because of the inclusion of a "sunset provision" pursuant to which, according to defendants, the 1993 Agreement was to continue for a maximum of ten years. The "sunset provision" states:

The agreements in this letter relating to design guidelines, park maintenance and operation, and restrictions on major modifications and rezoning shall survive the dissolution of RSPC, in which event approvals and consents of RSPC regarding these matters shall be granted by a majority of a three (3) person panel (including Donald J. Trump) to be acceptable to both me and the other members of the board of RSPC. *The agreements contained herein shall continue for ten (10) years, or such lesser period as either of the following conditions shall no longer remain satisfied: (1) the Special Permits shall remain in effect; and (2) I [Donald J. Trump] shall own, directly or indirectly, all or any portion of the Subject Property.*

(Dolan Affirmation Exhibit 2 p 3)(emphasis added). The 1993 Agreement later goes on to define

[*5]
an additional agreement by Trump whereby he stated:

I agree that I will require any person who purchases any Parcel of the Subject Property from me so long as the Special Permits remain in effect, to agree to abide by the agreements in this letter insofar as they relate to the development of the project and the park, delegation of park maintenance, and the restrictions on seeking changes in the approved plan. In particular, I will contractually require the purchaser(s) to agree to develop such parcel in accordance with these guidelines and not to apply for any changes or modifications in the approved plan not permitted hereunder so long as the Special Permits remain in effect without approval of a majority of the members of the RSPC, which approval is not to be unreasonably withheld or delayed.

(*Id* at 3).

Extell argues that it is no longer bound by the terms of the 1993 Agreement by virtue of the “sunset provision” in the agreement. According to Extell, the “sunset provision” makes it clear that the parties intended the period ending ten years from its signing to be the maximum term of the 1993 Agreement.

RSPC argues, on the other hand, that the “sunset provision” does not exclude Extell’s obligations under the 1993 Agreement because it does not apply to Trump’s obligation to cause any successors to abide by the Design Guidelines. Furthermore, it does not apply by virtue of defendants entering into the 2005 Assignment and Assumption agreement. Therefore, the “sunset provision” does not apply to successors to the 1993 Agreement who remain responsible to the commitment to develop the property according to the environmental sustainability and design principles demanded by the civic groups. Furthermore, the defendant successors are bound by the obligation to exercise good faith in considering continued funding of the RSPC .

Extell is presently constructing Building 1 with more glass than the Design Guidelines

[* 6]

permit without the approval of the RSPC and it is refusing to involve RSPC in any aspect of Riverside South's planning or design. Therefore, this action was brought which seeks relief including an injunction preventing further construction of Building 1.

Discussion

When considering a motion to dismiss pursuant to CPLR §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where dismissal is sought pursuant to CPLR § 3211(a)(1), the movant cannot prevail unless it is established that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Live Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Contracts must be construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967 [1985]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). Conversely, "[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more meanings" (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006]; *citing Feldman v National Westminster Bank*, 303 AD2d 271, 271 [2003]). The existence of ambiguity is determined by examining the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed" (*Kass v Kass*, 91 NY2d 554, 566 [1998]). The wording of the contract must be considered "in light of the obligation as a whole and the intention of the parties as manifested thereby" (*Id.*). The court must read the clauses in question in the context of the

entire agreement so as to not adopt an interpretation that would render any individual provision superfluous (*see Two Guys From Harrison-N.Y., Inc. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403-04 [1984]).

In this action, the court is asked to focus on the 1993 Agreement and, in particular, its “sunset provision”. The issue is whether the only reasonable construction of the words constructing the “sunset provision” requires the court to conclude that the entire 1993 Agreement expired no later than 2003.

Plaintiff argues the placement of the “sunset provision” at the end of the paragraph dealing with Trump’s obligations relating to Design Guidelines, park development and restrictions on modifications makes it clear that the provision was to affect only those specific obligations as they apply to Trump. The plaintiff argues that had the parties intended the “sunset provision” to govern the whole agreement, they would not have embedded it as the third sentence of a paragraph dealing primarily with dissolution of RSPC and a specific subset of Trump’s obligations. Therefore, according to Plaintiff, the “sunset provision” does not apply to later provisions in the 1993 Agreement which impose an obligation on Trump to require future developers to honor the Design Guidelines.

The defendants argue the “sunset provision” applies to all terms appearing in the 1993 Agreement - - including Design guidelines, environmental sustainability, and whether it must reasonably consider continuing to finance the RSPC. Because it applies to the entire agreement, according the defendant, Trump’s obligation to bind future developers to its terms expired as well. Extell argues that the phrase within the provision which reads “agreements contained herein” actually means all of the agreements set forth in the 1993 Agreement. According to

Extell, Plaintiff's interpretation rewrites the agreement whereby the "sunset provision" would read "[t]he agreements *set forth above but not below* shall continue for ten (10) years, or such lesser period . . ." (Def Memo of Law at 8).

This court finds the 1993 Agreement ambiguous whereby it is unclear whether the "sunset provision" applies to the entire agreement or only to those obligations recited in the paragraph in which the provision is embedded. Both interpretations proffered by the parties are reasonable. Looking at the entire body of the contract it is reasonable to conclude that where the "sunset provision" comes at the end of a distinct set of obligations and immediately follows a provision reiterating that distinct set, it is that set that the phrase "agreements contained herein" refers. It is arguable that if it was intended by the parties that the provision apply to the entire agreement, it would follow *all* of the obligations charged to Trump.

The 1993 Agreement itself is ambiguous as to the scope of the "sunset provision, however, the court also notes that the 1993 agreement clearly states that its intent is to "ensure the development of the site in accordance with the approved plan" (Notice of Motion Ex 2 at 1). Defendant's interpretation which cuts off the obligation of subsequent developers after ten years appears to be inconsistent with the intent of the contract because ten years is an inconceivably short amount of time within which to develop a project as large as Riverside South. The Design Guidelines were meant to effectuate a unified design for the project which spans 76 acres and conceived of 16 buildings. Completion of a project of this magnitude within ten years is almost inconceivable. At this stage of the litigation, to interpret the provision as urged by the Defendants would seemingly destroy the original intent of the parties.

Therefore, because there are questions as to the scope of the "sunset provision", it is

ambiguous and dismissal is inappropriate at this time

Conclusion

Therefore, based on the foregoing, it is hereby
ORDERED that the motion to dismiss is denied.

Dated: March 13, 2008

ENTER:



HON. RICHARD E. LOWE, III
J.S.C.

FILED
MAR 25 2008
NEW YORK
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