

**Concord Assoc., L.P. v EPT Concord, LLC**

2012 NY Slip Op 33798(U)

July 12, 2012

Supreme Court, Sullivan County

Docket Number: 1611-2011

Judge: Frank J. LaBuda

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN

-----X  
CONCORD ASSOCIATES, L.P., CONCORD  
RESORT, LLC and CONCORD KIAMESHA LLC,

Plaintiffs,

DECISION and ORDER  
Index # 1611-2011

-against-

EPT CONCORD, LLC and EPT CONCORD II, LLC,  
DANIEL BRIGGS, COUNTY CLERK OF  
SULLIVAN COUNTY,

Defendants.

-----X  
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LaBuda, J.

Plaintiffs, by motion filed January 19, 2012, move to dismiss Defendants' three counterclaims pursuant to CPLR 3211(a)(4) and (7), or alternatively, for an order staying Defendants' counterclaims pursuant to CPLR 2201, pending the disposition of an action filed in Supreme Court, Westchester County, involving the same parties.

Defendants, by motion filed February 23, 2012, move for an order (1) converting the motion to dismiss into a motion for summary judgment, pursuant to CPLR 3211(c) with respect to Defendants' first two counterclaims; (2) granting summary judgment to Defendants on their first and second counterclaims pursuant to CPLR 3211(c) and 3212; (3) denying Plaintiffs' motion to dismiss Defendants' third counterclaim; (4) denying plaintiffs' motion to stay the counterclaims; and (5) granting such other and further relief as the Court deems just and proper. The Plaintiffs have not submitted any papers in opposition to Defendants' motion.

Plaintiffs submitted a reply affirmation with supporting memorandum of law, dated March 23, 2012, in further support of their motion to dismiss, in opposition to Defendants' motion for summary judgment, and in the alternative, for a stay off all state court proceedings until resolution of a federal action plaintiffs filed in the United States District Court, Southern District of New York, on March 7, 2012 (*Concord Associates, LP, et al v. Entertainment Properties Trust*, 12 CIV 1667).

Defendants subsequently submitted a reply with memorandum of law in further support of their motion for summary judgment, dated April 19, 2012.

#### **Procedural History**

Plaintiffs commenced this action in Supreme Court, Sullivan County, on or about June 7, 2011, and filed an amended complaint on or about October 24, 2011 (the Supreme Court, Sullivan County action hereinafter referred to as the Sullivan action). On or about the 9<sup>th</sup> of November, 2011, Defendants served an amended verified answer. In early December, 2011, Defendants served and filed a second amended verified answer and counterclaims to the amended verified complaint.

In the interim, on November 9, 2011, Plaintiffs moved for an order discontinuing the Sullivan action without prejudice pursuant to CPLR 3217(b) and cancelling the Notice of Pendency. While Defendants were preparing the aforementioned answers and counterclaims, Plaintiffs filed an action in Supreme Court, Westchester County (Westchester action), involving the same parties, seeking money damages in connection with the same set of events and similar issues involved in the Sullivan action. Defendants opposed the motion to discontinue the Sullivan action as it related to their counterclaims, which sought a declaratory judgment. The Defendants also requested a hearing to determine the amount of costs and attorney fees to be assessed to Plaintiffs as result of what Defendants categorized as wasteful litigation maneuvers.

By Decision and Order dated February 8, 2012, this Court granted Plaintiffs' motion to discontinue their Sullivan action without prejudice, and denied Defendants' motion to dismiss the action as moot. The Court further elected to sever Defendants' counterclaims pursuant to CPLR §603. The Court denied Defendants' request for a hearing on the issue of attorneys' fees and costs.

By Decision and Order entered May 1, 2012, Supreme Court, Westchester County (Hon. Gerald E. Loehr), stayed the Westchester action pending a decision by this Court on the parties' outstanding motions in the Sullivan action.

In the interim, Plaintiff filed a federal antitrust action in United States District Court, Southern District of New York seeking damages in excess of \$1.5 billion (hereinafter referred to as the "federal action"). The issues raised in the federal action, although in the context of an antitrust suit, are similar to or the same as the issues Plaintiffs raise in their state actions with regard to financing, the restrictive covenant, and alleged conspiratorial actions of Defendants and third parties.

### FACTS

The Plaintiffs owned two large parcels of land in the Town of Thompson, County of Sullivan that were formally utilized as the Concord Hotel. Plaintiffs claim they intended to redevelop the property as a gaming facility, casino facility and resort. Plaintiffs intended to utilize one parcel as a casino and the other parcel as a resort.

Due to Plaintiffs' failure to meet certain financial obligations with regard to an approximately \$162,000,000.00 loan from Defendants, the parties engaged in protracted litigation in New York State Supreme Court and the U.S. District Court for the Western District of Missouri. As a resolution to said litigation, Plaintiffs and Defendants entered into a Settlement Agreement dated June 18, 2010, by which Plaintiff, Concord Resort, LLC, agreed to convey real property to Defendant, EPT Concord II. In a deed dated June 18, 2010, Concord Resort conveyed the Resort parcel (approximately 1600 acres) to EPT Concord II, which included certain tracts of land that are part of the Hotel/Casino Parcel and the Racetrack Parcel. A restrictive covenant was signed by EPT Concord II, which prohibited the development of a casino on the Resort parcel by EPT Concord II; said restrictive covenant would continue to run with the land unless Plaintiffs failed to fulfill certain conditions on or before December 31, 2011. Plaintiffs retained approximately 160 acres of the property.

In consideration of the transfer of the Resort property, EPT Concord II entered into a Casino Development Agreement (CDA) with Concord Associates and Concord Kiamesha on June 18, 2010. This Agreement required EPT Concord II to provide certain easements, leases and other agreements regarding the use and development of a hotel, a gaming facility, including a casino and a harness horse track, and other improvements on the Casino property and Racino tract. The CDA contained financing requirements for the construction and development of the Casino/Hotel project. In addition, Concord Kiamesha LLC and Concord Raceway Corp. signed an Amended and Restated Master Credit Agreement (MCA) by which they agreed to borrow up to \$275 million dollars to fund the project in accordance with very specific funding requirements.

Both parcels in question remain undeveloped. The record indicates none of the Plaintiffs have been able to develop any of the property in question since 1999. After Defendants infused

over \$162 million dollars as a loan into the project, Plaintiffs failed to move forward with any development of the property. Due to continuous financing and money management issues, as well as protracted litigation, over 1700 acres in an already economically depressed and blighted area have sat idle for almost 13 years. The original Concord Hotel and other structures on the property were demolished years ago, so all that remains are two large vacant parcels.

The Defendants wish to move forward with developing their 1600 acres as a resort, with a casino and other features. It is Defendants' contention that Plaintiffs failed to meet the financing and other conditions as set forth in the Casino Development Agreement (CDA) in accordance with the Master Credit Agreement (MCA). Therefore, Defendants contend the restrictive covenant on their parcel expired on December 31, 2011.

Plaintiffs contend they timely had financing in place, and that Defendants interfered with said financing opportunity, causing Plaintiffs to lose the opportunity to obtain the funding necessary to develop their 160 acre parcel. Plaintiffs maintain the Defendants intentionally interfered with their ability to timely secure financing, because in early 2011 Defendants allegedly conspired with a third party to include a casino on the 1600 acre parcel.

#### **PLAINTIFF'S MOTION FOR A STAY—CPLR 2201**

Plaintiffs have requested a stay pending the outcome of the federal action.

CPLR §2201 states, "Except as otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

Issuance of a stay is discretionary with the trial court. *Research Corp. v. Singer General Precision, Inc.*, 36 AD2d 987, 988 [3<sup>rd</sup> Dept. 1971]. A court may grant a stay to provide "an unnecessary multiplicity of suits." *Trieber v. Hopson*, 27 AD2d 151, 152 [3<sup>rd</sup> Dept. 1967]. When a decision in one action "will determine all the questions in the other action..." a stay is appropriate. *Krubicki Const. Corp. v. Bucon Inc.*, 282 AD2d 796, 797 [3<sup>rd</sup> Dept. 2001]. If a party to a state action subsequently brings a federal action and the issues are sufficiently similar, a stay of the state court action is appropriate. *Proctor & Gamble Distributing Company v. Lloyd's Underwriters*, 44 Misc2d 872 [Sup. Ct. New York Co. 1964]. When resolution of an issue in one case resolves the dominant issue in the other case, a stay of the latter court proceeding is warranted. *Research Corp. v. Singer General Precision, Inc.*, 36 AD2d at 988. This is especially appropriate for cases in which a party subsequently files an action in federal court. When "judgment in the Federal Court will probably determine the entire controversy" the state proceeding should be stayed. *Proctor & Gamble Distributing Company v. Lloyd's Underwriters*, 44 Misc2d at 875.

In the instant matter, the Plaintiffs' federal action raises issues that when resolved, will determine whether Plaintiffs fulfilled the obligations under the CDA; whether they timely obtained financing, and whether the financing met the contractual requirements. Resolution of

the issue of whether Defendants conspired with each other and/or third parties to thwart the financing and construction efforts of Plaintiffs, thereby causing them to fail to meet the December 31, 2011, deadline for acceptable financing goes to the crux of the matter pending in the Sullivan action in state court. *See, Trinity Products, Inc. v. Burgess Steel LLC, 18 AD3d 318, 319 [1<sup>st</sup> Dept. 2005]*. It is likely that if the federal action results in a favorable decision for Plaintiffs, at least two of Defendants' three counterclaims in the Sullivan action will be resolved. *Krubicki Const. Corp. v. Bucon Inc., supra*. If Plaintiffs are unsuccessful in their federal action, then the Sullivan action will move forward.

In addition, after close examination, this Court finds that the issues raised in the federal action are similar to, and in some instances, the same as those raised in the Sullivan action. Although the dominant issues in the Sullivan action are whether Plaintiffs' financing was acceptable and whether Plaintiffs were able to obtain financing in a timely manner, the underlying issues, which Plaintiffs raise in their federal action, are whether Defendants unreasonably rejected the financing and whether Defendants acted in a manner to cause plaintiffs to miss the financing and construction deadline. *Research Corp. v. Singer General Precision, Inc., supra*.

Last, there is no evidence that Plaintiffs brought the federal action in bad faith or to stall the pending state actions in Westchester or Sullivan Counties. To the contrary, Plaintiffs have raised issues by way of an antitrust action, which can only be resolved by a federal court. *Id.*, at 988.

Based on the above, it is

**ORDERED** that all further proceedings in this action, except upon leave of this Court, are stayed until determination of the action brought by Plaintiffs in the United States District Court, Southern District of New York, Case No. 12 CIV 1667.

This shall constitute the Decision and Order of this Court.

DATED: July 12, 2012  
Monticello, New York



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Hon. Frank J. LaBuda  
Acting Supreme Court Justice