

**Mountain Cr. Acquisition LLC v Intrawest U.S.
Holdings, Inc.**

2013 NY Slip Op 31209(U)

June 5, 2013

Supreme Court, New York County

Docket Number: 650565/2011

Judge: Eileen Bransten

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

PRESENT: Hon. Eileen Bransten, Justice

PART 3

MOUNTAIN CREEK ACQUISITION LLC,

Plaintiff,

-against-

INTRAWEST U.S. HOLDINGS, INC.,

Defendant.

Index No.: 650565/2011

Motion Date: 4/30/2013

Motion Seq. No.: 002

The following papers, numbered 1 to 3, were read on this motion to grant a preliminary injunction.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: June 5, 2013

Eileen Bransten
Hon. Eileen Bransten, U.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
MOUNTAIN CREEK ACQUISITION LLC,

Plaintiff,

-against-

Index No.: 650565/2011
Motion Date: 4/30/2013
Motion Seq. No.: 002

INTRAWEST U.S. HOLDINGS, INC.,

Defendant.

-----X

EILEEN BRANSTEN, J.

In this action, Defendant Intrawest U.S. Holdings, Inc. (“Intrawest”) moves for a preliminary injunction that enjoins Plaintiff Mountain Creek Acquisition LLC (“MCA”) and any of its affiliates from: (1) controlling, managing or directing, or purporting to control, manage or direct, in anyway, the prosecution, defense and/or settlement of any and all claims, cross-claims, counterclaims and related allegations asserted in, related to or arising in connection with the litigation styled *Black Creek Sanctuary Condominium Association, inc. et al. v. Fortress Investment Group, et al.*, Case No. MRS-L-3417-07, currently pending before the Superior Court of New Jersey in Morris County, New Jersey (“Pending Homeowner Action”); (2) directing or purporting to direct counsel for the defendants in the Pending Homeowner Action; and (3) interfering, or attempting to interfere, in any other way with the Pending Homeowner Action. Further, Intrawest seeks leave to amend its Answer to include counterclaims for injunctive and declaratory relief precluding MCA from further

interfering with the Pending Homeowner Action. Plaintiff opposes. For the reasons stated below, Defendant's motion is denied in its entirety.

Background¹

MCA purchased a New Jersey resort property known as Mountain Creek Resort, Inc. ("MCRI") from Intrawest on April 26, 2010, pursuant to the Stock Purchase Agreement ("SPA"). (Affirmation of Richard Schoenstein dated March 25, 2013 ("Schoenstein Affirm.") ¶ 3.) Individual condominium owners living near MCRI brought the Pending Homeowner Action against MCRI and Intrawest, among others, alleging that the defendants were obligated to build a commercial area near the resort. (Schoenstein Affirm. ¶ 8).

The SPA provides, in part, that in exchange for Intrawest agreeing to indemnify MCRI for any liability arising out of the Pending Homeowner Action, Intrawest shall have the right to control, direct, and manage the litigation without interference from MCA. (Schoenstein Affirm. ¶ 14.) However, Intrawest's control of the Pending Homeowner Action is subject to the condition that any proposed settlement imposing a non-monetary "obligation" on MCRI requires MCA's approval. (Schoenstein Affirm. ¶ 14.)

¹ All facts in this section are undisputed unless otherwise indicated.

Intrawest, on behalf of itself and MCRI, successfully defended the Pending Homeowner Action by obtaining summary judgment on all claims. (Schoenstein Affirm. ¶ 17.) At the center of the Pending Homeowner Action is a contract between MCRI and the plaintiffs in that case, providing that the prevailing party may recover attorneys' fees. MCRI, directed by Intrawest, received a fee award of \$3.2 million. (Schoenstein Affirm. ¶ 18; Letter from Richard Scheonstein to the Court, dated May 29, 2013 ¶ 2.)

Intrawest "desires to have the [settlement] discussions recommended by the [New Jersey] judge," in which "the plaintiffs do not appeal the summary judgment" in exchange for MCRI waiving the claim for attorneys' fees. (Schoenstein Affirm. ¶ 18.) However, MCA has instructed MCRI's counsel in the Pending Homeowner Action to refrain from any settlement involving a waiver of attorneys' fees. (Affidavit of Andrew J. Mulvihill ("Mulvihill Aff.") ¶ 10.) MCA argues that the claim for attorneys' fees constitutes an asset of MCRI and that any settlement waiving the claim would impose a non-monetary "obligation" in contravention of the SPA.

Relevant to this motion, the SPA includes an exclusive remedy provision, Section 8.10. In pertinent part, Section 8.10 states

[MCA] and [Intrawest] acknowledge and agree that the foregoing indemnification provisions in this Article 8 shall be the exclusive remedy of [MCA] and [Intrawest] with respect to [MCRI], the Purchased Stock, the business, operations and affairs of [MCRI], the Assets and the Transactions, and [MCA] and [Intrawest] hereby waive and release the other Party from any

and all claims, whether arising at law or in equity, and whether based in tort or contract, other than those arising from breach of the indemnification provisions in this Article 8 (Schoenstein Affirm. Ex. 1, p. 61.)

Intrawest now seeks to enforce the SPA covenant providing Intrawest with control over the Pending Homeowner Action and to enjoin MCA from directing MCRI's attorneys to refrain from settlement.

I. Defendant's Motion for Preliminary Injunction

A preliminary injunction is a "drastic remedy," and thus "is appropriate only where a party has established (1) likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of equities in favor of the relief sought." *N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 A.D.2d 313, 314 (1st Dept 1997) (citations omitted). Here, Intrawest has failed to meet the requirements for injunctive relief.

A. *Likelihood of Success on the Merits*

The party seeking a preliminary injunction must make a prima facie showing of a right to relief but need not present conclusive proof promising ultimate success. *See 1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011); *Terrell v.*

Terrell, 279 A.D.2d 301, 303 (1st Dep't 2001). Here, Intrust has not shown a likelihood of success on the underlying claims for declaratory or injunctive relief regarding the Pending Homeowner Action.

MCA argues that Intrust waived its right to seek injunctive relief under the SPA. According to MCA, SPA Section 8.10, quoted above, states that Intrust's sole remedy for a breach of the SPA covenant relating to the Pending Homeowner Action is to seek indemnification at a later date. In response, Intrust argues that Section 8.10 does not bar the instant motion. Intrust contends that because the Pending Homeowner Action is excluded from the SPA Section that deals with a threshold and cap for indemnification, Section 8.3(D), the remedial bar in Section 8.10 does not apply. Intrust further contends that because Section 8.10 does not specifically exclude injunctive relief, the injunction may be granted.

One of the fundamental precepts of contract interpretation is that agreements are to be construed according to the parties' intent. *See, e.g., Riverside S. Planning Corp. v. CRP/Extell Riverside L.P.*, 60 A.D.3d 61, 66 (1st Dep't 2008). Because "[t]he best evidence of what parties . . . intend is what they say in their writing," a written agreement that is unambiguous on its face must be enforced per the plain meaning of its terms. *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992); *see W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Accordingly, courts may not fashion a new contract for the parties under the guise

of interpreting the writing. *See, e.g., Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.2d 567, 568 (1st Dep't 2011) (*quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

Here, neither party argues that the exclusivity language of Section 8.10 is ambiguous. Indeed, the plain language of Section 8.10 prohibits “all claims, whether arising at law or in equity . . . other than those arising from a breach of the indemnification provisions.” Black’s Law Dictionary defines a claim as, *inter alia*, “any right to . . . an equitable remedy,” such as a permanent injunction or a declaratory judgment. *Black’s Law Dictionary* (9th ed. 2009). Intrawest seeks to enjoin MCA from breaching the covenant in SPA Section 6.2(A) that allows Intrawest control over the Pending Homeowner Action. While Intrawest’s interpretation of SPA Section 6.2(A) may be compelling, this Court may not eviscerate the plain meaning of the SPA’s waiver of legal and equitable claims. *See Terex Corp. v. Bucyrus Int’l, Inc.*, 94 A.D.3d 548, 550 (1st Dep’t 2012) (upholding indemnification provision as exclusive remedy for financial misrepresentation by seller). Accordingly, Intrawest waived any right to a permanent injunction under SPA Section 8.10.

Intrawest’s contention that injunctive relief is not specifically prohibited by the SPA is unavailing. Intrawest is a sophisticated party that explicitly agreed to a clear waiver of all

claims other than breach of the indemnification provisions.² Intrawest may have a claim for indemnification against MCA relating to the attorney's fees, but Intrawest may not enjoin MCA from breaching one of the SPA's covenants after Intrawest signed away its rights to "any and all claims, whether arising at law or in equity, and whether based in tort or contract." A preliminary injunction seeking to enforce a covenant sounds in breach of contract and, under the clear terms of the SPA, can only be remedied through indemnification.

B. *Irreparable Harm*

The party seeking a preliminary injunction must show that it will suffer irreparable harm absent the equitable relief. *See, e.g., Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 93 A.D.3d 570, 571 (1st Dep't 2012). Injury that is calculable and compensable by money damages cannot support a preliminary injunction. *Gama*, 93 A.D.3d at 571 (denying injunction where decline in airplane's value due to its use can be monetized). Intrawest argues that it will be irreparably injured due to "years of additional litigation . . . and possible adverse decisions." (Defendant's Reply Memorandum of Law p. 6). Further, Intrawest

² The waiver also excluded other claims that are not relevant here.

contends irreparable harm will result if it loses its bargained-for control of the litigation process. *Id.*

In response, MCA argues that any claimed harms are compensable by money damages. Indeed, Intrawest points to no case in which a loss of control over litigation constitutes irreparable harm that cannot be monetized. In both *Bank of America, N.A. v. PSW NYC LLC*, 29 Misc.3d 1216(A) (Sup. Ct. N.Y. Cnty. Sept. 16, 2010) and *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC*, 582 F. Supp. 2d 616 (S.D.N.Y. 2008), the “lost control” found to constitute irreparable injury did not relate to litigation, but rather to control of a corporation or real property.³ The research of this Court reveals no cases where loss of litigation control has been found to constitute irreparable injury. Intrawest fails to allege how monetary indemnification in an amount equal to any adverse judgment on appeal would provide insufficient compensation.

Further, pursuant to SPA Section 8.2(A), “[MCA] shall indemnify . . . [Intrawest] from any and all Losses suffered . . . [as a result of] any breach . . . [of any] covenant of

³ Courts routinely note that it is the unique nature of real property that supports equitable relief in real estate related cases. *See, e.g., EMF Gen. Contracting Corp. v. Bisbee*, 6 A.D.3d 45, 52 (1st Dep’t 2004) (“specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique”).

Also, courts note that the loss of corporate control can be “difficult if not impossible to value . . . [and] could be meaningless or substantially diminished in value by the end of the litigation.” *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC*, 582 F. Supp. 2d 616, 626 (S.D.N.Y. 2008).

[MCA],” such as the breach of Section 6.2(A) regarding control of the Pending Homeowner Action. (Schoenstein Affirm. Ex. 1, p. 57.) Reading Sections 8.2(A) and 8.10 together, the parties intended to monetize any damages, other than those expressly exempted, through the indemnification process.

C. *Balancing of the Equities*

When balancing the equities in deciding a preliminary injunction, a court must weigh the harm that is likely to be suffered if the injunction is denied against the harm if the relief were granted. *See Edgeworth Food Corp. v. Stephenson*, 53 A.D.2d 588, 588 (1st Dep’t 1976). In doing so, a court should not “dramatically alter[], rather than maintain[], the status quo.” *See Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 93 A.D.3d 570, 571 (1st Dep’t 2012) (*quoting N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 A.D.2d 313, 315 (1st Dep’t 1997)).

Here, the maintaining the status quo requires denying the preliminary injunction. MCRI’s claim for \$3.2 million in attorneys’ fees still exists. However, if the Court grants the injunction and Intrawest is permitted to waive the fee claim in a settlement of the Pending Homeowner Action, then the claim would be extinguished. Further, Intrawest has already obtained summary judgment, so the harm that may be suffered by Intrawest is the chance of an adverse ruling on appeal. In contrast, Intrawest “desires to have the [settlement]

discussions recommended by the [New Jersey] judge,” in which Intrawest will permanently extinguish MCRI’s claim for attorneys’ fees. Therefore, this Court finds that Intrawest has failed to show that the harm it may suffer is greater than the proposed harm to be suffered by MCA.

Intrawest has failed to show a likelihood of success on the merits, irreparable injury, or a favorable balancing of the equities and therefore Intrawest’s motion for a preliminary injunction is denied.

II. Defendant’s Motion to Amend the Answer

“Motions for leave to amend pleadings should be freely granted (CPLR 3025[b]), absent prejudice or surprise resulting therefrom . . . unless the proposed amendment is palpably insufficient or patently devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499 (1st Dep’t 2010) (internal citation omitted). Courts will deny a motion to amend when the proposed amendment fails to state a viable claim for relief. *Scotts Co., LLC v. Pacific Emp’rs Ins. Co.*, 61 A.D.3d 464, 464 (1st Dep’t 2009), *aff’g Scotts Co., LLC v. Ace Indem. Ins. Co.*, 18 Misc.3d 1139(A) (Sup. Ct. N.Y. Cnty. Feb. 26, 2008) (Fried, J.) (denying leave to amend where proposed amendment was barred by settlement provision).

Intrawest seeks leave to amend its Answer to include the same relief pursued above on a permanent basis. (Schoenstein Affirm. ¶ 2.) However, as already stated, the

unambiguous terms of the SPA prohibit the relief sought. This Court may not rewrite a clearly-worded and extensively-negotiated contract between sophisticated parties. *See Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.3d 567, 568 (1st Dep't 2011). The proposed amendments fail to state a viable claim for relief. Accordingly, the motion to amend the Answer is denied.

MCA's other arguments are rendered moot. Nothing in this decision and order shall be construed as an opinion as to the ultimate merits of any indemnification claim related to the Pending Homeowner Action.

(Order of the Court follows on next page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that defendant Intrawest's motion for a preliminary injunction is denied;


and it is further

ORDERED that defendant Intrawest's motion to amend its Answer to include new counterclaims for injunctive and declaratory relief is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 5, 2013

ENTER:


Hon. Eileen Bransten, J.S.C.