

<b>Concord Assoc., L.P. v EPT Concord, LLC</b>
2014 NY Slip Op 33600(U)
March 20, 2014
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

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

Plaintiffs,

-against-

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

Defendants.

**DECISION and ORDER  
Index # 1611-2011**

**Motion to Lift Stay  
Motion for Bond  
Motion to Discontinue**

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APPEARANCES:

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, One North Lexington Avenue, White  
Plains, New York 10601, By: Alfred E. Donnellan, Esq., Attorneys for Plaintiffs

Morrison Cohen LLP, 909 Third Avenue, New York, New York 10022, By: Y. David Scharf,  
Esq., Attorneys for Defendants

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, New  
York 10019, By: Robyn Tarnofsky, Esq. Attorneys for Non-Party Empire Resorts, Inc.

LaBuda, J.

Defendants, by motion dated October 29, 2013, move for an order lifting the stay of proceedings issued by this Court in this action by decision and order dated July 12, 2012, or in the alternative, requiring Plaintiffs to post an undertaking in the form of a bond or cash in the amount of \$12,038,000.00. Plaintiffs submitted an affirmation in opposition. Defendants submitted a reply. This Court initially denied Defendants' motion by Decision and Order dated December 6, 2013. Upon Defendants' application for reconsideration, the Court heard oral argument on December 19, 2013, and received a copy of the transcript on January 31, 2014.

**Factual Background**

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' inability 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 (hereinafter, "Concord Resort"), 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 referred to as the Racino tract. A restrictive covenant was signed by EPT Concord II, which prohibited the development of a casino on the Resort parcel; said restrictive covenant would continue to run with the land unless Plaintiffs failed to fulfill certain financing and other conditions on or before December 31, 2011. Plaintiffs retained approximately 160 acres of the property, referred to as the Casino parcel.

In consideration of the transfer of the Resort property, EPT Concord II entered into a Casino Development Agreement (hereinafter, "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 and Resort parcels, including the Racino tract portion of the Resort parcel. 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 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, although Plaintiffs argue that they would have been able to commence development had Defendants not conspired with each other and third parties to block Plaintiffs from fulfilling the conditions of the MCA. Regardless, after Defendants initially 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, accusations of conspiracy and antitrust violations, and 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.

Defendants wish to move forward with developing their approximately 1600 acres as a resort, with a casino and other features. In mid-March, 2014, Defendants held a press conference in New York City detailing their plans. 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. It is Plaintiffs' contention that Defendants entered into agreements with each other and third parties with the intent of thwarting Plaintiffs' ability to fulfill the contract conditions, that Plaintiffs were ready, willing and able to

obtain financing and meet the contract requirements prior to December 31, 2011, and had it not been for Defendants' group efforts to interfere with Plaintiffs' progress, they would have met those obligations. Specifically, 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 Casino 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, with whom they share a parent company, to include a casino on the 1600 acre parcel.

### **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, were similar to or the same as the issues Plaintiffs raised in their state actions with regard to financing, the restrictive covenant, and alleged conspiratorial actions of Defendants,

third parties, and a foreign parent company. Therefore, by Decision and order dated July 12, 2012, this Court stayed the pending Sullivan action. By sealed order dated September 18, 2013, the United State District Court for the Southern District of New York (Hon. Edgardo Ramos), dismissed Plaintiffs' first amended complaint—dismissed the federal antitrust claims with prejudice, declined to exercise supplemental jurisdiction over Plaintiffs' state law claims, and dismissed the state law claims without prejudice.<sup>1</sup> Plaintiffs have since filed a motion in the District Court for the Southern District of New York for reconsideration of that dismissal and for permission to file a second amended complaint to correct what Plaintiffs refer to as technical pleading deficiencies in the first amended complaint. Plaintiffs also appealed the District Court's dismissal decision to the United States Court of Appeals for the Second Circuit, which appeal has been stayed pending the District Court's disposition of Plaintiffs' pending motion for reconsideration.

### **Defendants' Motion**

After reviewing the sealed and confidential District Court decision, dated September 18, 2013, and considering all submissions and the oral arguments, Defendants' motion to lift the stay is granted to the extent that this Court will lift the stay previously ordered on July 12, 2012. The prior circumstances underlying this Court's issuance of a stay in July of 2012 have substantially changed in that there has been a "determination of the action brought by Plaintiffs in the United States District Court, Southern District of New York, Case No. 12 CIV 1667." *See, Kwiatowski v. National Student Marketing Corp.*, 85 AD2d 559 [1<sup>st</sup> Dept. 1981]; *Gunn v. Palmieri*, 158 AD2d 671 [2<sup>nd</sup> Dept. 1990].

The Federal District Court dismissed the federal claims with prejudice and declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. That constitutes a "determination" under the Federal Rules of Civil Procedure. *See FRCP 59(e)*. Although Plaintiffs have filed a motion for reconsideration of the Federal District Court's decision to dismiss, for permission to file a second amended complaint in the federal antitrust action, and have filed an appeal to the Second Circuit Court of Appeals appealing the dismissal, a further stay of this action in state court would not be in the interests of justice, nor is it warranted at this time. *Gunn v. Palmieri, supra*. This Court has concluded that based on the language of the federal decision dismissing Plaintiff's first amended complaint,<sup>2</sup> there has been a "determination of the action brought by Plaintiffs in the United States District Court, Southern District of New York, Case No. 12 CIV 1667." *See FRCP 59(e); McCrary v. Lee*, No. 12-CV-2867, 2013 US Dist LEXIS 15288 at \*5 [SDNY Oct. 29, 2013]. A pending appeal is not grounds, in and of itself, on which to continue a stay when another court has made a determination. *All Metro Health Care Services, Inc. v. Edwards*, 2009 N.Y. Misc. LEXIS 5756; 2009 NY Slip Op

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<sup>1</sup>*Concord Associates, LP v. Entertainment Properties Trust*, 12 Civ. 1667 [SDNY].

<sup>2</sup>Due to the federal decision having been sealed, this Court cannot elaborate on any of the details in that decision nor quote any of the specific language used by the court.

**31177(U), at \*7 [Sup. Ct. Nassau Co. May 7, 2009]**. Therefore, based on the District's Court's determination, this Court finds no reason not to lift the stay.

In addition, subsequent to this Court's July 12, 2012, Decision and Order staying the state court proceedings, the voters of the State of New York, in the November 2013 election, voted favorably for full, non-Indian affiliated gambling casinos to be authorized throughout the state. As a consequence of the favorable vote, the Governor's Office created a panel to determine where the first set of casinos will be built. One of the many considerations the panel must consider is the economic impact a casino/resort will have on the locality in which it is proposed. As the unemployment rate, real estate market, and overall economy of Sullivan County have not improved at all since July 12, 2012, it is very likely that an applicant for a casino/resort in the general area of the southern Catskills may be granted a gaming license. The application process for the initial limited number of available licenses will take place in early 2014 and the panel's decisions on those applications are expected on or before December 31, 2014.

As Defendants point out, based on the Federal Rules of Civil Procedure and the specific rules for the Southern District of New York, the earliest Judge Ramos will rule on Plaintiffs' motion for reconsideration is May of 2014, but it can be in as late as September of 2014. If Judge Ramos denies the motion for reconsideration, then the Second Circuit Court of Appeals will lift its stay and hear Plaintiffs' appeal. Again, based on the federal rules and rules specific to the Second Circuit, the earliest the appeal could be considered and determined would be in 2015, and possibly as late as 2016. During that time, the period for applying for initial gaming licenses in New York and the granting of those licenses will have come and gone. Until the specific state issue of whether the restrictive covenant concerning the development of a casino by Plaintiffs and/or Defendants is resolved, all of the parties' abilities to obtain a gaming licence may be adversely affected; the restrictive covenant affects Defendants' ability to build and operate a casino, and therefore may logically affect the panel's decision on whether to issue a gaming license to Defendants at that location. In addition, considering the continued blighted conditions of the many miles surrounding the former Concord Hotel site, and the low median income and high employment rate in Sullivan County, it would not serve any interests of justice to continue to stay the state court action for anywhere from months to years, possibly resulting in the loss of gaming facilities and resorts in Sullivan County. *See Gunn v. Palmieri, supra*.

Based on the above, it is


**ORDERED** that Defendant's motion to lift the stay is granted; and it is further

**ORDERED** that Defendants' motion for the Court to order plaintiffs to post a bond or cash undertaking is denied as moot; and it is further

**ORDERED** that Defendants' motion for summary judgment is restored to the calendar and shall be placed on the Court's calendar for oral argument on April 10, 2014, at 11:00 am.

This shall constitute the Decision and Order of this Court.

DATED: March 20, 2014  
Monticello, New York



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Hon. Frank J. LaBuda  
Acting Justice Supreme Court

Papers considered:

Notice of Motion, by Y. David Scharf, Esq., dated October 29, 2013  
Affirmation with Exhibits, by Y. David Scharf, Esq., dated October 29, 2013  
Affidavit, by James Lee, dated October 29, 2013  
Affirmation in Opposition with Exhibits, by Alfred E. Donnellan, Esq., dated November 26, 2013  
Reply Affirmation with Exhibit, by Y. David Scharf, Esq., dated December 6, 2013  
Notice of Motion for Reconsideration, United States District Court, Southern District of New York, by James I. Serota, Esq., Scott Martin, Esq., and Roy Taub, Esq., dated October 2, 2013  
Documents Filed Under Seal in United States District Court, Southern District of New York, by Counsel fo Plaintiffs and Defendants  
Decision Dismissing Plaintiffs' Antitrust Complaint Filed under Seal, United States District Court, Southern District of New York, Hon. Edgardo Ramos, dated September 18, 2013