STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
	(FILED: June 10, 2013)	
GEONOVA DEVELOPMENT COMPANY, LLC	:	
V.	:	**C.A. No. PB-09-5341**
THE CITY OF EAST PROVIDENCE	:	

DECISION

SILVERSTEIN, J. Before the Court is Defendant City of East Providence's (the "City") Motion for Summary Judgment on all counts of Plaintiff GeoNova Development Company, LLC's (GeoNova) Amended Complaint and all counts of the City's Counterclaim. Since this Motion was briefed and argued, the Court heard and granted GeoNova's Motion for Leave to Amend Amended Complaint. Although expressly given the opportunity in the Decision on the Motion to Amend, the parties have informed the Court that they need not present any additional briefing on this Motion for Summary Judgment. Therefore, the Court considers this Motion for Summary Judgment as applied to the newly pled facts and allegations in the Proposed Second Amended Complaint.

I

Facts and Travel

The Court described the general facts in its recent Decision on GeoNova's Motion to Amend. See GeoNova Development Co. v. City of East Providence, No. PB-09-5341, filed May 10, 2013, Silverstein, J. The Court need not repeat those facts here. However, a brief timeline of events is helpful to the analysis below. On July 7, 2002, the City submitted its Application for Brownfields Economic Development Initiative (BEDI Application) to the U.S. Department of

Housing and Urban Development (HUD). On February 20, 2003, the City submitted its Section 108 Loan Guarantee Application (Section 108 Application) to HUD. Both applications reference GeoNova as the developer of the East Pointe Development Project (the "Project"). In August and September of 2003, the City and GeoNova were exchanging drafts of a Development and Financing Agreement that would, in part, govern their relationship regarding the Project. On September 8, 2003, an email exchange (described in more detail below) took place between counsel for both parties regarding the time frame for completion of the Project. On September 26, 2003, the City and GeoNova entered into the Development and Financing Agreement.[1] The pertinent additional facts are woven into the discussion on the merits below.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and

[1] This is the most critical document for this Motion. At the same time, the City also: (1) loaned the $3 million from the HUD Loan Guaranty to GeoNova; (2) made a conditional grant of the $2 million BEDI Grant to GeoNova; (3) leased the property for the Project (the "Property") to GeoNova under the terms of the Ground Lease; and (4) took back a Leasehold Mortgage on the Property.

conclusions. Hill, 11 A.3d at 113. Further, testimony should not be considered where the witness "laid no foundation for his personal knowledge[,] . . . gave no indication of the source of his knowledge, and . . . made no showing that he was competent to testify to the facts alleged in his affidavit." Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513-14 (R.I. 1983) (noting affidavit amounted to "little more than hearsay").

When it is concluded "'that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law,'" summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "'Summary judgment is an extreme remedy that should be applied cautiously.'" Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)). "Nevertheless, Rule 56 of the Superior Court Rules of Civil Procedure constitutes a procedural device that, in the proper circumstances, plays an appropriate role in separating the wheat from the chaff in the litigation process." Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 557 (R.I. 2009).

III

Discussion

The Motion for Summary Judgment can essentially be boiled down to two issues: (1) whether there is a genuine issue of material fact as to whether there was a HUD requirement that the Project be completed in five years, and (2) whether there is a genuine issue of material

fact as to whether GeoNova has an equitable or beneficial ownership interest in the Property on which the Project was to be built (the "Property").[2] The Court will discuss these issues and how they relate to the Motion for Summary Judgment in seriatim.

A

The Alleged Five-Year HUD Requirement

"Fraud vitiates all contracts." Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003) (citations and internal quotation marks omitted). "To establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon and that the plaintiff justifiably relied thereon to his or her damage." Id. (citations and internal quotation marks omitted). If GeoNova can put up evidence of fraud, then a fact is in dispute and summary judgment is not appropriate. Hill, 11 A.3d at 113 (burden on nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence").

GeoNova's essential fraud allegation is that the City represented that the five-year term included in the Development and Financing Agreement was a HUD requirement, but it was not. See Proposed Second Amended Compl. ¶¶ 53-59. This allegation is based primarily, if not entirely, on a short email exchange between David Tracy (counsel for the City) and Charles Rogers (counsel for GeoNova) regarding a draft of the Development and Financing Agreement:

> Tracy: "Where did the 7 years come from to create the jobs?"
>
> Rogers: "Where did the 5 years come from?"

[2] The City argued that GeoNova's fraud argument should not be considered because GeoNova had not pled fraud; however, that argument is no longer available to the City as the Court granted GeoNova leave to amend the Complaint.

> Tracy: "HUD requirement, and we have used the five years in our meetings."
>
> Rogers: "Well, if it's a requirement then that's the end of it. I believe my guys looked at figured [sic] 2 years to complete remediation. Then a few more to develop the residential which is needed to at least partially support the retail, and then some time to develop the retail – so we are up against the 5 years. Maybe the answer is to close w/5 and then try to get HUD to work with us." (Def.'s Opp. Ex. D.)

Thus, as the Court must draw all reasonable inferences in the light most favorable to the nonmoving party, GeoNova has put forth evidence that the City represented to GeoNova that there was a five-year HUD requirement, that the representation induced GeoNova to rely theron, and GeoNova justifiably relied thereon to its damage. See Hill, 11 A.3d at 113 (burden on nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence"); Bogosian, 823 A.2d at 1120.

To counter the email exchange presented by GeoNova, the City argues that "[i]t is undisputed that the five year requirement is a HUD requirement, so the City did not make a material misrepresentation to GeoNova." (City's Reply Mem. 11.) If that statement is true, then GeoNova will have failed to raise an issue of fact as to the falsity of the representation. Bogosian, 823 A.2d at 1120 (requiring false representation). The parties take diametrically opposed positions about whether the five-year term was a HUD requirement. Contrast id. ("[A]ll [of the City's 30(b)(6) witnesses] testified that the five year time period for performance was a HUD requirement.") (emphasis in original) with GeoNova's Sur-Reply Mem. 2 n.1 ("[E]ach of the City's 30(b)(6) witnesses . . . testified that the five-year deadline for the creation of the HUD 108 Jobs was not a HUD requirement.") (emphasis in original). Even more, the parties cite to nearly identical deposition passages to support their diametrically opposed positions. Contrast

City Reply Mem. 11 (citing City 30(b)(6) (Boyle) Dep. at 41-44, City 30(b)(6) (Bachrach) Dep. at 58-59, 86-87, 93-96, and City 30(b)(6) (Tracy) Dep. at 120-124) with GeoNova's Sur-Reply Mem. 2 n.1 (citing City 30(b)(6) (Boyle) Dep. at 42, City 30(b)(6) (Bachrach) Dep. at 79-80, and City 30(b)(6) (Tracy) Dep. at 124-25).

As one could expect when opposing parties have wildly different views of the same evidence, the actual evidence presents a murkier picture. The total effect of all three depositions is that there is no written HUD rule requiring that such a project be done in five years, but essentially that the witnesses claim the City agreed to complete the Project in five years by submitting two applications to HUD that included the five-year term, i.e., the Section 108 Application and the BEDI Application (collectively, the "Applications"). Two of the three 30(b)(6) witnesses seem to say that there is no HUD requirement outside of the time period submitted in these applications. See City 30(b)(6) (Boyle) Dep. at 42:7-8 (stating that "it isn't a, a requirement per se, that it will be five years or six years or seven years . . . ."), City 30(b)(6) (Bachrach) Dep. at 80:19-23 (stating that he was not aware of "any HUD regulation or requirement" that the time period must be five years for a Section 108 loan). All three witnesses, however, did seem to say that the five-year time frame became a HUD requirement because that time frame was put in the applications to HUD. For example, Jeanne Boyle stated:

> "So when we submitted that application, we made a commitment that we were going to expend those funds within a certain period of time. So the BEDI -- both the BEDI application and the Section 108 application indicated that we were going to get this project done within five years, and the five-year number came from GeoNova." City 30(b)(6) (Boyle) Dep. at 42:712-17; see also City 30(b)(6) (Bachrach) Dep. at 95:4-11; City 30(b)(6) (Tracy) Dep. at 124:17-24.

These deposition passages alone seem equivocal on the HUD requirement. However, as the witnesses have made express references to the Applications as the source of this requirement, the Court will look to those Applications to see if they resolve the matter.

The applications do nothing to buttress an argument that there is no dispute that there was a five-year HUD requirement; if anything, they suggest the opposite. First, the Court has found no evidence in the Applications that legally binds the City to the timetables in the Applications. Second, both applications use forward looking language. When describing "Rating Factor 3: Soundness of Approach Project Timeline," the BEDI Application states "the City expects to have the first financial closing including acquisition of this sometime in the fall of 2002" and that "Training and outreach for the job create should occur during fall and spring 2004 . . . ." (BEDI Application, at 19 (Bates H003018) (emphasis added).) More poignantly, the Section 108 Application states that a "projected timeline of the development project is attached as Exhibit 8." (Section 108 Application, at 4 (Bates L002667).) (emphasis added). Exhibit 8 is a "Proposed Timetable." Id. at 64 (Bates L002727) (emphasis added). Third, neither application contains an explicit five-year term. This bulleted list is the entirety of the Proposed Timetable in the Section 108 Application:

- Property Acquisition — May, 2003
- Demolition/Remediation — July, 2003
- Construction Phase I Begins — February, 2004
- Construction Phase II Begins — February, 2005
- East Point Commercial Development Completed — February, 2006
- Phase II Build Out — 3-5 Years

In the light most favorable to GeoNova, one could interpret the three-to-five-year "Phase II Build Out" as starting when the commercial development is completed. Thus, the Projection completion date would be between February 2009 and February 2011: six to eight years after the Section 108 Application was submitted on February 20, 2003. Furthermore, the BEDI Application contains a chart that seems to suggest that the Project would be completed in two and a half years. See BEDI Application, at 24 (Bates H003023). When considering that two and a half year timetable in conjunction with the later timetable of at least three to five years in the Section 108 Application (both of which were submitted to the same agency – HUD), one could draw the inference that the two and a half year timetable did not become a requirement by its inclusion in the BEDI Application. See Hill, 11 A.3d at 113 (court must draw all inferences in favor of nonmoving party).

This body of deposition and documentary evidence permits the inference that no five-year HUD requirement existed. Therefore, GeoNova has met its burden of pointing to evidence that creates a genuine issue of fact as to the HUD requirement. That fact is material (indeed, central) to the resolution of Counts I (Fraud in the Inducement), II (Misrepresentation), III (Declaratory Judgment (Mutual Mistake)), and V (Declaratory Judgment (Breach of Covenant of Good Faith and Fair Dealing)) of the Proposed Second Amended Complaint. The City had argued that the Promissory Estoppel and Unjust Enrichment claims had "nothing to do with this case" because those legal theories only operate in the absence of an enforceable contract. Because fraud vitiates all contracts and there is now a fraud allegation, Counts VII and VIII of the Proposed Second Amended Complaint are subject to a disputed issue of fact. Similarly, whether there was a HUD requirement bears on the resolution to Counts I and II of the City's Counterclaim because the fraud claim would vitiate the contracts that the City seeks to enforce.

Finally, the viability of Counts IV (Declaratory Judgment (Parties' Rights and Obligations Under the Agreement)) and VI (Breach of Contract) of GeoNova's Proposed Second Amended Complaint also depend upon the resolution of the fraud issue.[3]

Therefore, the Court denies the City's Motion for Summary Judgment as to all Counts of GeoNova's Proposed Second Amended Complaint and as to Counts I and II of the City's Counterclaim. The only count remaining for analysis is Count III (Slander of Title) of the City's Counterclaim.

B

GeoNova's Interest in the Property

In Count III of its Counterclaim, the City alleges that GeoNova committed slander of title by (wrongfully) filing a lis pendens on the Property. "Slander of title occurs when a party maliciously makes false statements about another party's ownership of real property, which then results in the owner suffering a pecuniary loss." Keystone Elevator Co., Inc. v. Johnson & Wales University, 850 A.2d 912, 923 (R.I. 2004). "[M]alice, for purposes of slander of title, may be inferred when a party files a notice of lis pendens absent a good-faith belief in his claim to title of the property." Id.

The City argues that it has title to the Property and that GeoNova has a limited interest in the Property. "Following GeoNova's payment default and the City's termination of the Ground Lease, GeoNova has no interest in the Property." (City's Mem. Supp. Summ. J. 12-13.) GeoNova contends that the City is only record or nominee title holder and that GeoNova is the

[3] Count IV is expressly pled in the alternative to Counts I-III as permitted by Super. R. Civ. P. 8(e)(2). See GeoNova Development Co. v. City of East Providence, No. PB-09-5341, filed May 10, 2013, Silverstein, J, at 7. Count VI alleges breach of the Development and Financing Agreement, which the fraud allegation seeks to vitiate; thus, it is impliedly pled in the alternative to Counts I-III.

equitable or beneficial owner of the Property; thus, GeoNova had a good faith belief in its claim to title of the Property when it filed the lis pendens.

The Rhode Island Supreme Court has described a lis pendens in the following way:

> A notice of lis pendens is filed on the public record for the purpose of warning all interested persons that the title to the subject property is being disputed in litigation and that, therefore, any person who subsequently acquires an interest in the property does so subject to the risk of being bound by an adverse judgment in the pending case. The purpose of the notice is to preserve a party's rights in the property pending the outcome of the litigation. Montecalvo v. Mandarelli, 682 A.2d 918, 924 (R.I. 1996).

The Development and Financing Agreement states that "the City will acquire title to the Property as nominee for GeoNova . . . ." (Development and Financing Agreement, at 12.) A "nominee" is "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1149 (9th ed. 2009). Additionally, GeoNova's principal has stated, "At the time it entered into the Development Agreement, GeoNova understood, intended and agreed with the City that GeoNova was and would remain the beneficial owner of the Property and the City would hold title as nominee for GeoNova." (Lee Aff. ¶ 19.) Therefore, viewing this evidence in the light most favorable to GeoNova, there is evidence that GeoNova had a good faith belief in its claim to title of the Property when it filed the lis pendens. Accordingly, GeoNova has met its burden of putting forth evidence establishing that there is a disputed issue of fact as to its ownership interest in the Property. See Hill, 11 A.3d at 113. Because GeoNova's interest in the Property is a genuine issue of material fact, the Motion for Summary Judgment as to Count III of the Counterclaim is denied.

IV

Conclusion

As described above, the Court concludes that there are disputed issues of fact as to whether there was a HUD requirement that the Project be completed in five years and whether GeoNova has an equitable or beneficial ownership interest in the Property. Accordingly, the City's Motion for Summary Judgment is denied as to all counts of GeoNova's Complaint and the City's Counterclaim. Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Geonova Development Company, LLC v. The City of East Providence
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DATE DECISION FILED:	June 10, 2013
JUSTICE/MAGISTRATE:	Silverstein, J.

ATTORNEYS:

For Plaintiff:	John Tarantino, Esq. Nicole Benjamin, Esq.
For Defendant:	Robert C. Corrente, Esq. Christopher L. Ayers, Esq.