STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 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 Plaintiff GeoNova Development Company, LLC's (GeoNova) Motion for Leave to Amend Amended Complaint (the "Motion"). GeoNova seeks to file a Second Amended Complaint to conform to the evidence obtained through discovery up to this point. The City of East Providence (the "City") opposes the Motion based on theories of unfair prejudice, judicial estoppel, and futility.

I

Facts and Travel

The waterfront property at the former site of the Ocean State Steel Mill (the "Property") sits vacant in East Providence. Because of its historic industrial use as a steel mill, the land had been contaminated with heavy metals and other materials. GeoNova held an exclusive license to an innovative technology for remediating such contamination, and that technology brought GeoNova to East Providence in 2002. At the time, the Property was owned by PIMAG Aktiengesellschaft (PIMAG), a Liechtenstein corporation. GeoNova paid PIMAG for an option to purchase so that it could conduct due diligence and feasibility studies, and it renewed the option for an additional period and an additional fee. GeoNova attempted to secure private investment to help develop the land but could not because the project was only at the pre-

remediation and pre-permit stage. Desiring to develop this waterfront area, the City joined GeoNova toward a goal of remediating the Property and developing it into a mixed residential and commercial use area to be called "East Pointe." To achieve this goal, however, a complex series of transactions—involving PIMAG, GeoNova, the City, and the United States Department of Housing and Urban Development (HUD)—had to occur.[1] Those transactions and subsequent events form the basis for this controversy.

The City filed a Motion for Summary Judgment on all counts of GeoNova's Amended Complaint and all counts of the City's Counterclaim. In opposition, GeoNova raised a fraud defense, alleging that the City had (wrongly) claimed that HUD required that the entire project—remediation, development, and the associated job creation—be completed in five years. The City responded, among other arguments, by pointing out that GeoNova had not pled fraud anywhere at that point. At the hearing on the Motion for Summary Judgment, GeoNova asserted that it believed that fraud could be raised in opposition to a motion for summary judgment, but that it would "file that motion to amend as directed by the Court." Summ. J. Hr'g Tr. 41:8-9, Feb. 26, 2013. The Court responded, "The Court is going to ask you to do it within ten days, particularly because it's a Rule 9 issue also." Id. at 41:18-20. At the end of the hearing, and in

[1] GeoNova entered into an Agreement of Sale and Purchase with PIMAG (PIMAG Agreement) on February 3, 2003. In the Proposed Second Amended Complaint, GeoNova alleges that it "assigned its rights in the PIMAG Agreement to the City consistent with the terms of the [Development and Finance] Agreement [between the City and GeoNova] . . . ." Proposed Second Am. Compl. ¶ 33. The Development and Finance Agreement states that "the City will acquire title to the Property as nominee for GeoNova subject to all applicable provisions hereof" and that "[t]he City shall not, in any event, be the assignee of GeoNova under GeoNova's purchase and sale agreement and the City shall not assume or be liable or obligated to perform any of GeoNova's covenants or obligations thereunder." Development and Finance Agreement 9(a). It presently is unclear to the Court how the City obtained title to the Property, but for the purposes of the pending Motion that is not of consequence.

response to a question from GeoNova's counsel about scheduling the Motion, the Court mused, "Perhaps you can just run it by [the City's counsel] and have an agreement on it." Id. at 46:13-14. The City's counsel responded, "We ought to be able to do that by stipulation." Id. at 46:15-16. Nevertheless, the City objected to GeoNova's Motion.

II

Standard of Review

Superior Court Rule of Civil Procedure 15 governs amendments to pleadings. Aside from the one amendment permitted as a matter of course prior to the serving of a responsive pleading, Rule 15(a) provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "The 'true spirit of the rule is exemplified' by the words 'and leave shall be freely given when justice so requires.'" Harodite Indus. v. Warren Elec. Co., 24 A.3d 514, 530 (R.I. 2011) (quoting Medeiros v. Cornwall, 911 A.2d 251, 253 (R.I. 2006)). To stay true to that spirit, the Supreme Court has "consistently held that trial justices should liberally allow amendments to the pleadings." Id. (internal quotations and citations omitted). While the trial justice has discretion regarding whether or not to grant leave to amend, the Supreme Court has also noted "that that discretion is inherently constrained by the plain language of Rule 15(a) and our cases interpreting same; the proverbial scales are tipped at the outset in favor of permitting the amendment." Id. at 531 (emphasis in original).

III

Discussion

The City argues that the Court should deny GeoNova's Motion because (1) "GeoNova's dilatory conduct unfairly prejudices the City," (2) "GeoNova is judicially estopped from

asserting claims inconsistent with its lis pendens filed against the Property," and (3) GeoNova's Motion is futile. (Def.'s Obj. to Mot. for Leave to Amend 5, 9, 11.) The Court will address these arguments in seriatim.

A

Unfair Prejudice

The City contends that GeoNova has waited too long before moving to amend. The City notes that GeoNova has proposed to amend the complaint to add a fraud count nearly four years after this case was filed and nearly ten years after the email exchange that the fraud claim is primarily predicated upon. The City claims that the prejudice is that the City would have "to start discovery over." (Def.'s Obj. to Mot. for Leave to Amend 8.) GeoNova responds that it did not know about the fraud until at least May 2012, when it took the Rule 30(b)(6) depositions of city officials who were unable to state the basis for their belief that there was a HUD requirement of five years. Additionally, the City contends that there is little prejudice because discovery has not closed and there is no trial date set.

The Supreme Court has recently compiled the relevant Rhode Island law into a clearly stated rule on the effect of an alleged delay on a motion to amend a complaint:

> As we have previously stated, Rule 15(a) liberally permits amendment absent a showing of extreme prejudice. It follows that the question of prejudice to the party opposing the amendment is central to the investigation into whether an amendment should be granted. And with respect to a party's delay in moving to amend, we have previously stated that, mere delay is an insufficient reason to deny an amendment. Rather, it is incumbent upon the hearing justice to find that such delay creates substantial prejudice to the opposing party. At the same time, it should also be borne in mind that we have explicitly observed that the risk of substantial prejudice generally increases with the passage of time. In other words, there comes a point when delay becomes undue and excessive, and causes prejudice to the opposing party. Harodite,

> 24 A.3d at 531 (internal quotation marks, citations, and other alterations omitted).

Although GeoNova has had the key email in its possession since 2003, the operative time frame is the time from the Rule 30(b)(6) depositions of the City on May 17, 2012. It is at those depositions that GeoNova alleges that it learned that the five-year deadline was not a HUD requirement.[2] See Proposed Second Am. Compl. ¶¶ 58, 64. Thus, the relevant delay is really a matter of months, rather than the ten years alleged by the City. "[M]ere delay is an insufficient ground for denial of an amendment; however, undue and excessive delay that causes prejudice to the opposing party is grounds for denial." Vincent v. Musone, 572 A.2d 280, 283 (R.I. 1990) (internal quotations and citations omitted). Given that the revelation of fraud was relatively recent and that discovery has not yet closed, GeoNova's delay in seeking to amend the complaint is not undue or excessive; therefore, the delay does not substantially prejudice the City. See Lomastro v. Iacovelli, 56 A.3d 92, 96 (R.I. 2012) (quoting Wachsberger v. Pepper, 583 A.2d 77, 79 (R.I. 1990)) ("[T]o deny a motion to amend because of delay, '[t]he trial justice must find that such delay creates substantial prejudice to the opposing party.'").

The City also submits that permitting GeoNova to amend the complaint will force the City "to start discovery over." (Def.'s Obj. to Mot. for Leave to Amend 8.) While the Court acknowledges that permitting this amendment will require some additional discovery, including the possibility of retaking depositions, permitting the amendment to the complaint would not

[2] In their memoranda on the Motion for Summary Judgment, the parties took diametrically opposed positions on the meaning of those depositions. Contrast Def.'s Reply Supp. Mot. for Summ. J. 11 ("all [of the City's 30(b)(6) deponents] testified that the five year time period was a HUD requirement") with Pl.'s Sur-Reply Supp. Obj. to Mot. for Summ. J. 2 n.1 (all of the City's 30(b)(6) deponents "testified that the five year deadline was not a HUD requirement"). The Court takes no position on those statements here as this Decision considers the Motion to Amend.

force the City to start discovery over. It seems that most, if not all, of the documentary discovery has been completed; the fraud allegations do not seem likely to open the flood gates to more documents. Additionally, only five depositions have been taken to this point, and only two of those have been taken by the City. If the City desires to retake those two depositions, the questions would be confined to the new fraud allegations. In the Court's view, this does not seem to be significant prejudice and the City certainly has not made a "showing of extreme prejudice." See Harodite, 24 A.3d at 531.

Given these facts and the liberal rules on amendments, the timing of the Motion does not unfairly prejudice the City; thus, it is not a reason to deny the Motion.

B

Judicial Estoppel

The City juxtaposes GeoNova's lis pendens on the Property—purporting that GeoNova is the beneficial owner of the Property—against GeoNova's Proposed Second Amended Complaint—alleging fraudulent inducement, which would render the documents granting that purported ownership unenforceable. GeoNova argues that it is permitted to argue alternative theories under Super. R. Civ. P. 8(e)(2), that the lis pendens merely warns all interested persons of its claim of an interest (the equitable and beneficial ownership) in the Property, and that no such finding of beneficial ownership has been made.

Rhode Island recognizes the principle of judicial estoppel. Gaumond v. Trinity Repertory Co., 909 A.2d 512, 519 (R.I. 2006). "Because the rule is intended to prevent 'improper use of judicial machinery,' * * * judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" Id. (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001)). "Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel

focuses on the relationship between the litigant and the judicial system as a whole." D&H Therapy Assoc. v. Murray, 821 A.2d 691, 693 (R.I. 2003). A primary factor when considering a claim of judicial estoppel is whether the "'party seeking to assert an inconsistent position would derive an unfair advantage if not estopped.'" Id. at 694 (quoting New Hampshire, 532 U.S. at 751).

Here, GeoNova has pled in the alternative, as is permitted by Super. R. Civ. P. 8(e)(2). In the Proposed Second Amended Complaint, GeoNova alleges that it is the beneficial owner of the Property pursuant to the Development and Finance Agreement. (Proposed Second Am. Compl. ¶ 78.) Alternatively, GeoNova alleges that the Development and Finance Agreement was procured by fraud; thus, the contract is vitiated. Id. ¶¶ 59, 77. A lis pendens, however, does not unequivocally declare one party's ownership, it puts interested third parties on notice:

> 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) (citations omitted).

Therefore, the positions in the Proposed Second Amended Complaint are not wholly inconsistent with the lis pendens, and even if they were, there is no unfair prejudice to the City. See id.; D&H Therapy, 821 A.2d at 694. Furthermore, "Courts often inquire whether the party who has taken an inconsistent position had 'succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.'" D&H Therapy, 821 A.2d at

694 (quoting New Hampshire, 532 U.S. at 750). Here, no Court has been persuaded of any position, thus there can be no perception that any Court has been misled.

C

Futility

The City argues that the Court should deny the Motion because the claims in the Proposed Second Amended Complaint would be futile, i.e., they could not withstand a motion to dismiss. The City contends that GeoNova has "failed to plead the predicate acts of fraud with particularity pursuant to Rule 9(b)" in Counts I, II, and III, and that Counts II and III fail to state a claim because of a merger provision.

1

Rule 9(b) Particularity

In general, the standard for pleading claims for relief is governed by Super. R. Civ. P. 8(a), which requires: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Allegations of fraud, however, are subject to the heightened pleading standard contained in Rule 9(b): "the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

"What constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule to give fair notice to the adverse party and to enable him to prepare his responsive pleading." 1 Kent, R.I. Civ. Prac. § 9.2 at 92 (1969); see Women's Development Corp. v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001) (citing Kent). While the First Circuit "has interpreted [Federal] Rule 9(b) to require 'specification of the time, place, and content of an alleged false representation,'" not all

commentators are in accord. Greebel v. FTP Software, Inc., 194 F.3d 185, 193 (1st Cir. 1999) (quoting McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980)); 2 Moore's Federal Practice § 9.03[b] (3d ed. 2013) ("[P]laintiffs are not absolutely required to plead the specific date, place, or time of the fraudulent acts, provided they use some alternative means of injecting precision and some measure of substantiation into their allegations of fraud.").

Here, GeoNova's Proposed Second Amended Complaint carries the Rule 9(b) burden of particularity. In particular, Paragraphs 54-57 of the Second Amended Complaint set forth very particular allegations:

> 54. On September 8, 2003, the City falsely represented to GeoNova that the 5-year deadline for the creation of HUD 108 Jobs was a "HUD requirement" and did so with the intent to induce GeoNova to rely thereon.
>
> 55. Unbeknownst to GeoNova, there was no HUD rule or regulation that required the creation of the HUD 108 Jobs within five years.
>
> 56. On September 8, 2003, the City knew that the deadline for the creation of HUD 108 Jobs was not a HUD requirement.
>
> 57. In justifiable reliance on the City's representation that the five-year deadline was a HUD requirement and that it had no choice but to agree to the five-year deadline, GeoNova agreed to the terms of the [Development and Finance] Agreement with the understanding that the City and GeoNova would cooperate in obtaining an extension from HUD if it became necessary.

These allegations, which are taken directly from Count I, are also incorporated into Counts II and III. Id. ¶¶ 60, 72. Additionally, the Proposed Second Amended Complaint discusses and attaches the September 8, 2003 email exchange that forms the basis for the fraud claim regarding the alleged "HUD requirement." See id. ¶¶ 19-21, Ex. 7. In the Court's view, this Complaint

goes well beyond what Rule 9(b) requires; therefore, lack of particularity is not a reason to deny the Motion.[3]

2

Merger Clause

The City argues that the merger provision in the Development and Finance Agreement causes Counts II and III of the Proposed Second Amended Complaint to fail. For this proposition, the City cites one case. Siemens Financial Services, Inc. v. Stonebridge Equipment Leasing, LLC, 2009 WL 4479246 (R.I. Super. Ct. Nov. 24, 2009) (Silverstein, J). The relevant portion of that case states:

> As previously discussed, as a general rule, integration and exculpatory clauses do not bar claims of fraudulent inducement. However, the same rule is not applicable to claims of negligent misrepresentation, which concern cases where negligently, rather than intentionally made statements are shown to be false. After all, it is only intentional misconduct that justifies judicial intrusion upon contractual relationships in order to prevent the wrongdoer from securing contractual benefits for which he had not bargained. Id. (internal quotations and citations omitted)

First, that case is based on an interpretation of Massachusetts law. See id. In Rhode Island, "fraud vitiates all contracts." Bogosian v. Bederman, 823 A.2d 1118, 1120 (R.I. 2003). Furthermore, Count II is titled "Misrepresentation." Count II does not specify whether the misrepresentation is intentional or negligent, but it certainly can be read as a claim of intentional misrepresentation as GeoNova alleges that the City told GeoNova that the five-year deadline was

[3] Although the City argues that GeoNova "misstates the content of the [September 2003 email]," (Def.'s Mem. Supp. Obj. to Mot. to Amend 15), such a factual argument is not appropriate for this Motion, where the Court is essentially applying Rules 8(e)(2) and 9(b). Thus, the mere allegation is sufficient. Other arguments made by the City that essentially attack the efficacy of the allegations are also not appropriate for adjudication on this Motion. See id. at 16-19.

a HUD requirement "with the intent to induce GeoNova to rely thereon." (Proposed Second Am. Compl. ¶ 61.) Additionally, Count III alleges mutual mistake, which would render the Development and Finance Agreement voidable. See Restatement (Second) of Contracts § 152 (1981). Because both of these theories would nullify the entire contract, including the merger clause, permitting an amendment to the complaint would not be futile.

IV

Conclusion

The Court grants Plaintiff GeoNova's Motion for Leave to Amend Amended Complaint. The City's Motion for Summary Judgment is still pending. The parties are permitted to supplement those motion papers based upon the newly filed complaint. If no such supplementation is needed, the Court will render a Decision as applied to the Second Amended Complaint based on the arguments advanced in the current papers. Prevailing counsel shall present an order which shall provide each party with an opportunity to present such additional facts and/or written legal argument as may be appropriate under the circumstances and which otherwise shall be consistent herewith. Such order shall be settled after due notice to opposing 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:	May 10, 2013
JUSTICE/MAGISTRATE:	Silverstein, J.
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