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Order on Cross-Motions for Partial Summary
Judgment (NICHOLSON DEVELOPMENT
PARTNERS)

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Superio COurt of Fulton County

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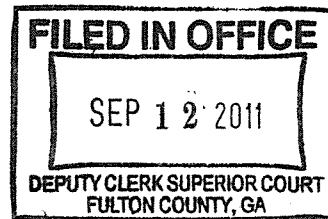
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Long, Elizabeth E., "Order on Cross-Motions for Partial Summary Judgment (NICHOLSON DEVELOPMENT PARTNERS)" (2011). *Georgia Business Court Opinions*. 198.
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COURT

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



NICHOLSON DEVELOPMENT)
PARTNERS, LLC,)
Plaintiff,)
v.)
GAA-NICHOLSON ADVISORS, LLC,)
Defendant.)

Civil Action File No. 2011-CV-197188

ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

On August 30, 2011, counsel appeared before the Court to present oral arguments on the parties' cross-motions for partial summary judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

At issue before the Court is the latest deadlock in a series of disputes over the ownership of a 330-unit residential development in east Baton Rouge Parish, Louisiana, known as the Indigo Park Apartments. The individuals behind the dispute have partnered together in two different limited liability companies at two levels of a complex corporate structure. At one level, the members, Nicholson Advisors, LLC ("Company") and GAA-Nicholson Partners, LP ("Partners"), each own a fifty percent interest in GAA-Nicholson, LLC ("Property Owner"), a single purpose entity formed to acquire and develop the Indigo Park Apartments. At the next level, the members, GAA Nicholson Advisors, LLC ("Advisors") and Nicholson Development Partners, LLC ("Development"), each own a fifty percent interest in Company, one of the owners of Property Owner. At each level, the members have triggered buy-sell provisions under the limited liability companies' operating agreements. In each case, the members have had disagreements over which entity qualifies as the buy-sell purchaser and the amount of the buy-sell price.

On January 27, 2011, this Court addressed the question of which entity, Company or Partners, qualified as the buy-sell purchaser under Property Owner's Operating Agreement and ruled in favor of Company. Now the Court is asked to adjudicate which member, Development or Advisors, qualifies as the buy-sell purchaser under Company's Operating Agreement. Both parties have moved for partial summary judgment on this issue.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

Prior to the Court's January 27, 2011, ruling, Development notified Advisors on December 22, 2010 (the "Buy-Sell Notice"), that it was invoking the buy-sell procedure under Company's Operating Agreement ("Company Buy-Sell"). Development calculated the Buy-Sell Stated Amount as \$3.5 million, which, the parties agree, is to be reduced by all liabilities of the Company in accordance with Section 15.3 of Company's Operating Agreement.

On January 19, 2011, the Court granted Advisors' request for a temporary restraining order in a related action (GAA-Nicholson Advisors, LLC v. Nicholson Development Partners, LLC Case No. 2011CV195075), thereby extending the time to respond to Development's Buy-Sell Notice until January 29, 2011. Following the Court's January 27, 2011, ruling, Advisors responded to Development's Buy-Sell Notice by letter dated January 28, 2011, in which Advisors expressed its intent to become the Buy-Sell Purchaser. The letter also stated that "[Advisors]'s election to purchase all of the Membership Interest of [Development] in [Company] is based on the express understanding and acknowledgment that [Company] has elected to be the purchaser in connection with the buy-sell transaction called for pursuant to the

Operating Agreement of [Property Owner], as amended, and that [Company] will, in fact, fulfill its obligation as purchaser thereunder.”

Development contends that Advisors’ election to be the Buy-Sell Purchaser is not effective because the response was not an unconditional mirror acceptance. In contrast, Advisors argues that its Buy-Sell Response is effective because it reflects its intent to be bound as the Buy-Sell Purchaser, and the language in the Buy-Sell Response did not expressly condition Advisors’ decision to purchase Development’s interest on the consummation of Company’s purchase of Partners’ interest in the Property Owner Buy-Sell. For the reasons set forth below, the Court disagrees.

“[A]cceptance of an offer must be unconditional, unequivocal, and without variance of any sort; otherwise, there can be no meeting of the minds and mutual assent necessary to contract formation.” Lamb v. Decatur Federal Sav. & Loan Ass’n, 201 Ga. App. 583, 585 (1991).

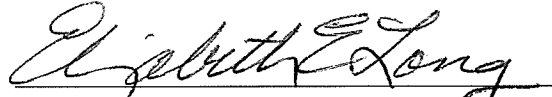
“Accordingly, a subsequent communication by one party to the alleged contract that varies even one term of the original offer” is not an acceptance. Id.

The Court finds that Advisors’ Buy-Sell Response imposes a condition different from the terms of the Buy-Sell Notice: that Company must close the purchase of Property Owner from Partners. For that reason, Advisors’ Buy Sell Response does not amount to a valid acceptance. By basing its election to act as the Buy-Sell Purchaser on the “express understanding and acknowledgement” that Company will close the transaction with Partners in the Property Owner Buy-Sell transaction, an event that may or may not actually take place, the Court disagrees that the response reflects only Advisors’ unqualified intent to be bound as the Buy-Sell Purchaser. Rather, the Court finds that the response reflects Advisors’ intent to be bound as Buy-Sell Purchaser only if Company successfully purchases Partners’ interest in the Property Owner Buy-

Sell transaction. Accordingly, the Court **GRANTS** Plaintiff's Motion for Partial Summary Judgment. Defendant's Motion for Partial Summary Judgment is **DENIED**. Because the Court's ruling did not need to address the evidence at issue in the pending motions to strike, the Court finds the motions moot.

[Signature to follow]

SO ORDERED this 12th day of September, 2011.



Elizabeth E. Long, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies sent via email to:

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