4-30-2018

The Housing Authority of the City of Atlanta, Georgia, Order on Pending Motions

Alice D. Bonner
Fulton County Superior Court Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, GEORGIA, Plaintiff, v. INTEGRAL DEVELOPMENT, LLC; GRADY REDEVELOPMENT, LLC; CAPITOL GATEWAY, LLC; HARRIS REDEVELOPMENT, LLC and CARVER REDEVELOPMENT, LLC, Defendants/Counterclaim Plaintiffs, v. THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, GEORGIA and CATHERINE BUELL, in her official capacity as President and CEO of The Housing Authority of the City of Atlanta, Georgia, Counterclaim Defendants.	)	CIVIL ACTION FILE NO. 2017CV294880 Bus. Case Div. 1

ORDER ON PENDING MOTIONS

The above-styled matter is before the Court on various pending motions, *to wit*: (1) Defendants' Motion to Dismiss Plaintiff's Complaint ("Defendants' Motion to Dismiss"); (2) Defendants/Counterclaim Plaintiffs' Motion to Add Counterclaim Defendant ("Developer Entities' Motion to Add Counterclaim Defendant"); (3) AHA's Motion to Dismiss Defendants' Counterclaims ("AHA's Motion to Dismiss Counterclaim"); and (4) Plaintiff's Motion to Extend the 90-Day Stay of Discovery. Having considered the pleadings and argument of counsel at a March 7, 2018 hearing held in this matter, the Court finds as follows:

SUMMARY OF FACTS

This case involves the validity and enforceability of various option agreements to purchase parcels of real estate in and around four separate revitalization projects developed by Defendants. Plaintiff Housing Authority of the City of Atlanta ("AHA") is the largest public housing authority in Georgia, and its mission is to facilitate or provide housing assistance to eligible low-income households. Between 1999 and 2002, AHA and Defendants Grady Redevelopment LLC, Capitol Gateway LLC, Harris Redevelopment LLC, and Carver Redevelopment LLC (collectively the "Developer Entities") entered into four Revitalization Agreements which required the Developer Entities to develop four different sites in multiple phases, reserving certain rental units for affordable public housing and certain single-family homes for sale to eligible low-income families. The revitalization projects—which are funded by federal grants and are subject to a regulatory scheme promulgated by the Department of Housing and Urban Development ("HUD")—divided development work into several phases. Earlier phases focused on satisfying HUD's public housing requirements and later phases contemplated market-driven development on certain identified tracts in and around the redeveloped communities ("Further Leverage Properties") on which market rate development would be permissible.

In 2011, after HUD-mandated components of the Revitalization Agreements were completed, AHA and the Developer Entities executed Amendments to each Revitalization Agreement. These Amendments address the Further Leverage Properties and include, *inter alia*: an Option Agreement to purchase the Further Leverage Properties through one or more "owner entities" (comprised of the Developer Entity and AHA) and to share all profits and losses of the development; an approval process under which AHA is to submit the contemplated conveyance

to its Board of Commissioners together with a recommendation from AHA staff to consummate the conveyance; and an appraisal process and method for calculating the purchase price.

On Nov. 3, 2016, each Developer Entity exercised its respective Option Agreement. On Dec. 1, 2016, AHA responded to the exercise notices, claiming they were deficient. On Feb. 1, 2017, AHA's Board voted against moving forward with the appraisal process. After additional negotiations, the Developer Entities each sent a notice of default to AHA on Aug. 11, 2017. Seven days later, AHA responded, denying that it was in default.

AHA initiated this lawsuit as a declaratory judgment action, asserting seven counts seeking the following declarations, respectively:

> (1) conditions precedent have not been satisfied and AHA is not in breach of any agreement;
>
> (2) the recommendation requirements in the Option Agreements (requiring AHA's CEO to submit Defendants' notice of intent to exercise the purchase options with a recommendation to the Board to accept the offers) violates the Georgia Constitution which makes the CEO a fiduciary of AHA who is required to exercise her best judgment to make decisions in AHA's best interest;
>
> (3) the Revitalization Agreements and Option Agreements would place an impermissible financial obligation on AHA if it decides to terminate the parties' agreements for cause, a monetary obligation which violates O.C.G.A. § 36-30-3(a) insofar as it impedes AHA's ability to operate freely;
>
> (4) The contractual provisions in the Amendments are unenforceable and unconscionable on grounds of public policy;[1]
>
> (5) Defendants have breached contractual provisions by demanding performance prior to and inconsistent with the requirements set forth in the parties' agreements and by insisting on enforcement of contractual provisions that call for the development of public land intended for low-income housing without providing such housing thereby preventing AHA's performance and depriving it of the benefit of the agreement;

[1] AHA alleges that the Amendments and Option Agreements allow the Developer Entities to purchase land at circa 2007 pricing using a commercially unreasonable formula, depriving AHA of the land needed to meet its low-income housing mission and contravening federal regulations.

(6) Defendants would be unjustly enriched if the contracts are enforced as Defendants demand; and

(7) specific performance is not an available remedy for Defendants.[2]

In Counterclaims, the Developer Entities (specifically Grady LLC, Capitol LLC, Harris LLC, and Carver LLC) argue the Amendments and Option Agreements are enforceable; the Option Agreements allow the Developer Entities to purchase real estate in and around the redeveloped properties; and, because the Option Agreements supersede the Revitalization Agreements, the Developer Entities have the sole discretion whether to incorporate affordable housing units. The Developer Entities assert a counterclaim that includes five counts: (1) breach of contract for refusing to accept the Developer Entities' Exercise Notices and repudiating AHA's obligations under the Amendments and Option Agreements; (2) request for a writ of mandamus to require CEO Buell to submit the contemplated conveyances to AHA's Board, recommend that the Board accept the contemplated conveyances, and participate in the appraisal process as set forth in the Amendments and Option Agreements; (3) specific performance to compel AHA to take the necessary steps to sell the Further Leverage Properties to the entities designated by the Developer Entities; (4) promissory estoppel; and (5) attorney's fees and expenses.

Defendants have moved to dismiss Plaintiff's complaint, asserting the complaint is not appropriate for declaratory judgment. Additionally, the Developer Entities have moved to add a counterclaim defendant to the case, Catherine Buell, in her official capacity as President and CEO of The Housing Authority of the City of Atlanta, Georgia. The Developer Entities contend this addition is necessary to "obtain complete relief" as asserted in their counterclaim. Finally, AHA has moved to dismiss the Developer Entities' counterclaim for failure to state a claim.

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[2] AHA claims that the provisions sought to be enforced are unenforceable, subject to unsatisfied conditions precedent, and/or are not ripe, are too vague, contingent, remote, or indefinite to be specifically performed.

ANALYSIS

A. Standard on a Motion to Dismiss

A motion to dismiss brought under O.C.G.A. §9-11-12(b)(6) for failure to state a claim upon which relief may be granted should not be sustained unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought…

Austin v. Clark, 294 Ga. 773, 774–75 (2014) (citing Anderson v. Flake, 267 Ga. 498, 501(2) (1997)); Abramyan v. State, 301 Ga. 308, 309 (2017), reconsideration denied (June 5, 2017). "When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in his favor even though unfavorable constructions are possible." Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152 (1995) (citing Time Ins. Co. v. Fulton–DeKalb Hosp. Auth., 211 Ga. App. 34, 35 (1993)).

B. Defendants' Motion to Dismiss

The purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. "Declaratory judgment relief looks to the future. 'The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.'" A & H Sod, Inc. v. Johnson, 279 Ga. App. 252, 253 (2006). Thus, "a party seeking declaratory judgment must show facts or circumstances whereby it is in a position of uncertainty or insecurity because of a dispute *and of having to take some future action* which is properly incident to its alleged right, and which future action without direction from the court might

reasonably jeopardize its interest." Pinnacle Benning LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 613 (2012) (citation and punctuation omitted; emphasis in original); Jahncke Service, Inc. v. Department of Transp., 134 Ga. App. 106, 108 (1975) ("[W]here the courts have found that rights have accrued, the plaintiffs seeking the declaration of their rights had already denied the claim or had otherwise taken a firm position as to their rights or liabilities. Those plaintiffs were not 'walking in the dark'…but had affirmatively acted").

Here, AHA's arguable position of uncertainty is whether the parties' agreements are enforceable. If the Amendments and Option Agreements are enforceable, AHA will be bound to proceed with the sale of the properties as described therein. However, AHA has already repudiated the agreements by: refusing the Developer Entities' Exercise Notice, including refusing to "submit the contemplated conveyances of a parcel to its Board []…with a recommendation by AHA staff to consummate such conveyance [] within two months following exercise by [the] Developer of its purchase rights under the Option Agreement."; voting against moving forward with the appraisal process under the Option Agreements; refuting the Developer Entities' Default Notices; and refusing to take the necessary actions to effectuate the property transfers contemplated in the parties' agreements. AHA is no longer in a position of uncertainty because it has already taken a firm position with respect to the agreements, and now seeks judicial approval of those actions retrospectively.

In essence, AHA merely seeks to test its defenses to the enforcement of the Amendments and Option Agreements, but such is not the purpose of the Declaratory Judgment Act. Drawdy v. Direct Gen. Ins. Co., 277 Ga. 107, 109 (2003) ("Declaratory judgment is not available to a party merely to test the viability of its defenses"). However, since AHA has already taken a firm position as to its rights and liabilities, it is no longer in a position of uncertainty. Given the

foregoing, Defendants' Motion to Dismiss is hereby GRANTED and AHA's claims for declaratory relief are DISMISSED.[3]

C. Developer Entities' Motion to Add Counterclaim Defendant

"The right to the extraordinary writ of mandamus exists only upon meeting a two[-]prong test: (1) the applicant must demonstrate a clear legal right to the relief sought, and (2) there must be no other adequate remedy." Tyner v. Zant, 255 Ga. 405, 405 (1986) (citing Carnes v. Crawford, 246 Ga. 677, 678 (1980)). *See* O.C.G.A. §9-6-20 *et seq.* As summarized by the Supreme Court of Georgia:

> Mandamus is an extraordinary remedy to compel a public officer to perform a required duty when there is no other adequate legal remedy. It is a discretionary remedy that courts may grant only when the petitioner has a clear legal right to the relief sought or the public official has committed a gross abuse of discretion. In general, mandamus relief is not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act.

R.A.F. v. Robinson, 286 Ga. 644, 646 (2010) (citations omitted). Importantly, mandamus is meant to combat "improper government inaction—the failure of a public official to perform a clear duty." Bland Farms LLC v. Ga. Dept. of Ag., 281 Ga. 192, 193 (2006); Bibb Cty. v. Monroe Cty., 294 Ga. 730, 734 (2014).

Here, Defendants seek to add Ms. Buell so that she can be compelled to make the recommendation to the AHA Board that it approve the Developer Entities' proposed conveyances and participate in the appraisal process, as set forth in the Amendments and Option Agreements. Without the cooperation of AHA's CEO, the sale cannot be consummated as contemplated in the agreements and, as alleged in the counterclaim, no remedy at law would adequately compensate for this. Further, assuming (without deciding) that the Developer Entities

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[3] As a result of this dismissal, no remaining claims implicate Integral Development, LLC and it is therefore no longer a party to this action.

prevail on their claims, they would have a right to the relief sought as the recommendation and sale would be a clear legal duty that Ms. Buell would be failing to perform—an appropriate application of mandamus relief. *See* O.C.G.A. § 9-6-23 ("A private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest"). Therefore, Defendants' Motion to Add Counterclaim Defendant is hereby GRANTED.

D. AHA's Motion to Dismiss Counterclaim

1. *Count I: Breach of contract*

"The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." SAWS at Seven Hills, LLC v. Forestar Realty, Inc., 342 Ga. App. 780, 784 (2017).

Here, the Developer Entities allege that AHA breached a contractual duty by failing to appoint its appraiser, thereby frustrating their ability to comply with the preconditions that AHA now argues are unmet. They further assert that AHA absolutely has refused to comply with its contractual obligations. The Developer Entities have sufficiently stated a claim for breach of contract. Whether conditions precedent have not been met, as AHA alleges, or whether AHA has refused to comply with its obligations thereby making satisfaction of the conditions precedent impossible, as the Developer Entities assert, cannot be resolved by the pleadings and is better addressed after discovery. Thus, the Motion to Dismiss is DENIED as to Count I of the counterclaim.

2. *Count II: Request for writ of mandamus (Catherine Buell)*

As discussed in Part B, *supra*, mandamus is meant to combat "the failure of a public official to perform a clear duty" (Bland Farms LLC, 281 Ga. at 193; Bibb Cty., 294 Ga. at 734).

O.C.G.A. §9-6-23 specifically provides that "[a] private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest." Georgia courts have long recognized the right of private individuals to use mandamus to enforce contractual rights against public officials. *See, e.g.,* Leonard v. House, 15 Ga. 473, 473 (1854) (holding a private individual could seek mandamus to compel payment under a contract with Talbot County to build a bridge); Chambers v. Fulford, 268 Ga. 892 (1998) (affirming grant of mandamus where board of tax assessors sought to compel county board of commissioners to appropriate funds necessary to fulfill terms of tax appraiser's employment contract which had been approved by former board of commissioners).

As noted above, here, assuming the agreements at issue are enforceable, without the cooperation of AHA's CEO the subject land conveyances cannot be consummated as contemplated in the agreements. Evidence could be introduced within the framework of the pleadings to establish that no remedy at law would adequately compensate for this. Construing the pleadings in the light most favor to the Developer Entities and resolving all doubts in their favor even though unfavorable constructions are possible, they have at least stated a claim for mandamus relief. Accordingly, AHA's Motion to Dismiss is DENIED as to Count II of the counterclaim.

3. ***Count III: Specific Performance***

Pursuant to O.C.G.A. §23-2-130, "[s]pecific performance of a contract, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance." An action seeking specific performance seeks equitable relief. Lemke v. S. Farm Bureau Life Ins. Co., 182 Ga. App. 700, 700, 356 S.E.2d 739, 740 (1987); Cochran v. Teasley, 239 Ga. 289, 291, 236 S.E.2d 635, 637 (1977).

AHA urges there is no cause of action for the remedy of "specific performance" without an underlying contractual breach and, as such, the claim is duplicative and should be dismissed. As clearly acknowledged by the Developer Entities, they "are seeking damages and specific performance as remedies for the AHA's serial breaches of the agreements."[4] Further, the Revitalization Agreements contain a provision which expressly authorizes a "Non-Breaching Party" to seek specific performance "in addition to any other right or remedy available" upon a material breach of the agreement. Insofar as under the relevant authorities and the parties' agreements, specific performance is a remedy which may be available upon a breach of the parties' agreements and the Developer Entities, here, have asserted a separate cause of action for breach of contract, the Court hereby DISMISSES Count III of the counterclaim as an independent cause of action. Nevertheless, the Court finds the Developer Entities may still pursue specific performance as a remedy for their breach of contract claim, if the agreements are ultimately found to be enforceable and breach of the agreements and the unavailability of an adequate remedy at law are established.

4. *Count IV: Promissory estoppel*

To prevail on a promissory estoppel claim, a claimant must show that (1) the opposing party made certain promises, (2) the opposing party should have expected that the claimant would rely on such promises, (3) the claimant did in fact rely on such promises to the claimant's detriment, and (4) injustice can be avoided only by enforcement of the promise. Canterbury Forest Assn. v. Collins, 243 Ga. App. 425, 428(2) (2000) (citing Sparra v. Deutsche Bank Nat. Tr. Co., 336 Ga. App. 418, 421 (2016)).

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[4] Counterclaim Plaintiffs' Response in Opposition to the Housing Authority of the City of Atlanta, Georgia's Motion to Dismiss Defendants' Counterclaims, p. 10.

In their counterclaim, the Developer Entities allege that, in the event the written agreements are found to be unenforceable, they should be entitled to recover under a theory of promissory estoppel because they undertook the HUD required components of the revitalization projects in reliance upon the promised right to engage in market rate development thereafter.[5] Having considered the pleadings, the Court finds the Developer Entities have sufficiently pled their promissory estoppel claim. Further, although they have separately asserted a claim for breach of contract, under Georgia's Civil Practice Act the Developer Entities are entitled to plead promissory estoppel in the alternative. *See* O.C.G.A. §9-2-4 ("A plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them"). *See also* Rental Equip. Grp., LLC v. MACI, LLC, 263 Ga. App. 155, 587 S.E.2d 364 (2003) (holding issue of whether promise to buy business was enforceable was for the jury in sellers' action for breach of contract and promissory estoppel). Thus, the Motion to Dismiss is DENIED as to Count IV.

5. *Count V: Attorneys' Fees and Expenses*

"The general rule is that 'an award of attorney fees and expenses of litigation are not available to the prevailing party unless authorized by statute or contract.'" Singh v. Sterling United, Inc., 326 Ga. App. 504, 512, 756 S.E.2d 728, 736 (2014) (citing Cary v. Guiragossian, 270 Ga. 192, 195(4), 508 S.E.2d 403 (1998)).

In Count V, the Developer Entities assert a claim for their "attorneys' fees and expenses", alleging that "[i]n breaching its obligations under the Amendments and Option Agreements, AHA has acted in bad faith, has been stubbornly litigious, or has caused the Developer Entities

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[5] Counterclaim, ¶¶ 56-64.

unnecessary trouble and expense."[6] This allegation tracks the language of O.C.G.A. §13-6-11 which provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the **plaintiff** has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

(Emphasis added).

By its express terms, O.C.G.A. §13-6-11 is a remedy available to plaintiffs. "[A] plaintiff-in-counterclaim cannot recover attorney's fees under O.C.G.A. §13-6-11 unless he asserts a counterclaim which is an independent claim that arose separately from or after the plaintiff's claim." Byers v. McGuire Properties, Inc., 285 Ga. 530, 540 (2009). Insofar as AHA initiated this action and the Developer Entities' counterclaim arose from that complaint and the allegations therein, such that they are compulsory counterclaims, expenses of litigation are unavailable to the Developer Entities. Accordingly, Count V of the counterclaim is hereby DISMISSED.

E. Plaintiff's Motion to Extend the 90-Day Stay of Discovery

Plaintiff AHA asks the Court to extend the stay of discovery under O.C.G.A. §9-11-12(j)(1) due to the pending motions in this matter. Given the Court's rulings above and having considered the record, the Court orders that discovery as to the remaining claims shall commence upon entry of this order and Plaintiffs shall respond to any outstanding written discovery within fifteen (15) days of the entry of this order, if it has not done so already. Counsel for the parties are directed to confer regarding case management deadlines and submit a proposed case management order to the Court. Plaintiff's motion is otherwise DENIED AS MOOT.

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[6] Counterclaim, ¶67.

SO ORDERED this 30 day of April, 2018.

JUDGE JOHN J. GOGER, *on behalf of*
ALICE BONNER, SENIOR JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

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