6-23-2021

Grady Redevelopment LLC, et al., v. The Housing Authority of the City of Atlanta, Georgia Order on Plaintiffs' and AH's Cross-Motions

Eric A. Richardson
Judge, Superior Court of Fulton County by Designation Business Court Division

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

GRADY REDEVELOPMENT, LLC; CAPITOL GATEWAY, LLC; HARRIS REDEVELOPMENT, LLC; and CARVER REDEVELOPMENT, LLC, Plaintiffs, v. THE HOUSING AUTHORITY OF THE CITY OF ATLANTA, GEORGIA, Defendant.	CIVIL ACTION NO. 2017CV294880

ORDER ON PLAINTIFFS' AND AH'S CROSS-MOTIONS

This case comes to the Court on cross-motions. Plaintiffs Grady Redevelopment, LLC, Capitol Gateway, LLC, Harris Redevelopment, LLC, and Carver Redevelopment, LLC ("Plaintiffs") filed a Motion to Enforce Settlement Agreement and for Sanctions, Attorney's Fees, and Additional Costs of Litigation ("Plaintiffs' Motion"). Defendant The Housing Authority of the City of Atlanta, Georgia ("Defendant" or "AH") submitted a Renewed Motion for Summary Judgment ("AH's Motion"). Having considered the record, the briefing, oral argument, and applicable law, the Court **DENIES** both Plaintiffs' Motion and AH's Motion for the reasons that follow.

I. BACKGROUND

This case involves the interpretation of various agreements granting Plaintiffs options to purchase parcels of real property (referred to as "Further Leverage Property" or "FLP") in and

around four separate revitalization projects developed by Plaintiffs.[1] A description of the parties and the Revitalization Amendments and Option Agreements is contained in the Court's Order on Defendants' [First] Motion for Summary Judgment entered on October 16, 2019. In that Order, the Court granted in part and denied in part Defendants' Motion for Summary Judgment. In particular, the Court ruled that Plaintiffs' breach of contract claim arising out of the Revitalization Amendments and Option Agreements survived summary judgment.

After the October 16, 2019 Order, the parties engaged in significant negotiations. On December 18, 2019, the parties executed a Settlement Agreement and Release (the "12/18/19 Settlement Agreement") that was intended to resolve all claims in this action and was contingent upon approval by the AH Board of Commissioners.[2] The Board approved the 12/18/19 Settlement Agreement with additional terms in a public meeting held on February 26, 2020.[3] Thereafter, the parties also executed a First Amendment to Settlement Agreement and Release that was executed on March 11, 2020 (the "3/11/20 Amendment").[4]

AH contends that the 3/11/20 Amendment is unenforceable because it was not signed by the Chairman of the AH Board and because its terms were not approved by the Board. Plaintiffs dispute both of these allegations. AH also contends that even if the 3/11/20 Amendment had been properly executed and approved, a July 2, 2020 letter from Jane B. Hornstein of the United States Department of Housing and Urban Development ("HUD") confirms that HUD will never approve the conveyances of the FLP on the terms agreed to by the parties in the Revitalization

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[1] The relevant agreements will be referred to in this Order as the Revitalization Amendments and Option Agreements. They are attached to the Amended Complaint, Exhibits 6-9 and 10-13, respectively. The agreements were executed contemporaneously.

[2] The 12/18/19 Settlement Agreement is Exhibit 1 to Plaintiffs' Motion.

[3] An unofficial transcript of the public meeting is in the record. See Pls' Mot., Ex. 3.

[4] The 3/11/20 Amendment is Exhibit 6 to Plaintiffs' Motion.

Amendments, Option Agreements, the 12/18/19 Settlement Agreement, and the 3/11/20 Amendment, thus invalidating all of those agreements.

In Plaintiffs' Motion, they seek to enforce the 12/18/19 Settlement Agreement as amended by the 3/11/20 Amendment (hereinafter collectively referred to as the "Integrated Settlement Agreement"). AH opposes that motion and has moved for summary judgment contending that the Integrated Settlement Agreement is unenforceable, and that the Revitalization Amendments and the Option Agreements are likewise unenforceable. Additionally, AH contends in its Motion that it has satisfied all conditions imposed by the Integrated Settlement Agreement and therefore Plaintiffs' breach of contract claim must fail.

II. ANALYSIS

The Parties agree that the standard of review applied to motions to enforce settlement agreements and to summary judgment motions are substantively the same. Anderson v. Benton, 295 Ga. App. 851, 852 (2009). Summary judgment is appropriate where there is no genuine issue of material fact, and movant is entitled to a judgment as a matter of law. O.C.G.A. § 9-11-56. The standard of review on a motion to enforce a settlement agreement is similar: "a party must show the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the [non-moving party's] case." Kolbus v. Fromm, 327 Ga. App. 431, 432 (2014) (citation omitted). As with summary judgment, all facts are viewed in favor of the non-moving party. Id.

In Georgia, settlements are deemed contracts. H&E Innovation, LLC v. Shinhan Bank Am., Inc., 343 Ga. App. 881, 881 (2017). The rules of contract construction require courts to examine the four corners of a contract and not consider parol evidence if the documents are clear on their face. O.C.G.A. § 13-2-2(1). Courts may not award specific performance on terms that

parties did not agree to: "It is the duty of the courts to construe and enforce contracts as made, and not to make them for the parties. The law will not make a contract for the parties which is different from the contract which was executed by them." Lee v. Mercury Ins. Co. of Ga., 343 Ga. App. 729, 735 (2017).

A. Plaintiffs' Motion is Denied Because AH Has Satisfied All Conditions Imposed by the Integrated Settlement Agreement.

As an initial matter, Sections 3.2, 3.4, and 10 of the Integrated Settlement Agreement make HUD's approval of the conveyance a necessary condition precedent to AH's ability to complete the transactions. They also make clear that if such HUD approval of the conveyances is not provided, AH is not in default of the Integrated Settlement Agreement. Finally, they limit AH's contractual obligations to acting in a manner expressly required by the Integrated Settlement Agreement.

It is undisputed that AH sent HUD the First Disposition Submission as required by the Integrated Settlement Agreement. HUD responded to the First Disposition Submission in a letter dated July 2, 2020. The July 2, 2020 letter acknowledged that the Settlement Agreement turned on HUD approval, but the federal agency rejected the submission.[5]

HUD wrote that it would "not approve a formal disposition application from [AH] that proposed a bifurcated (interim and final) disposition structure." (Ex. 8 to Pls.' Mot. at 2.) Nor would HUD approve a disposition from AH "to one or more holding companies unless the

[5] Specifically, HUD's letter cited the Integrated Settlement Agreement provision stating that "the failure of HUD to grant approval of one or more of the disposition requests, **or if HUD shall condition approval or conveyance on terms different than or inconsistent with the term of the Settlement Agreement**, [Integral] acknowledge[s] that HUD's decisions or actions shall not constitute a default" by AH. (Ex. 8 to Pls.' Mot. at 2 (emphasis in original).)

applications met all requirements of Section 18" of the Fair Housing Act. (Id.) The parties agree that they approved of the bifurcated approval process.[6]

Plaintiffs argue that Sections 3.2 and 3.4 of the Integrated Settlement Agreement require that AH correct any deficiencies in the disposition application identified by HUD until it is legally-compliant. However, the Parties specifically agreed to a bifurcated approval process and **only** agreed to a bifurcated approval process. The Integrated Settlement Agreement provides that AH is not in default if "HUD shall condition approval or conveyance on terms different than or inconsistent with terms of the" Integrated Settlement Agreement. Plaintiffs point to no language in the Integrated Settlement Agreement that requires AH to do anything different than the application and approval process outlined in the Integrated Settlement Agreement.

Plaintiffs' conduct further supports the conclusion that AH fulfilled its part of the bargain. Specifically, Plaintiffs (1) knew what information AH submitted to HUD and when such information was submitted; (2) never objected to the form of the submission; (3) wrote HUD in support of the submission as presented by AH; and (4) twice tried to convince HUD that the proposed disposition process was permissible. Thus, while Plaintiffs now argue that AH's position elevates process over substance (Pls.' Reply Br. at 27-28), Plaintiffs' own communications establish that the information AH provided to HUD was appropriate and consistent with the parties' "long-standing and expressly stated intent." (See August 12, 2020 letter written by

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[6] As an additional position, HUD concluded that the First Disposition Submission "would not meet the statutory and/or regulatory requirements of Section 18 or 24 CFR 970." (Ex. 8 to Pls.' Mot. at 3.) One of the reasons is that the transaction, as contemplated in the Integrated Settlement Agreement, could not demonstrate fair market value. (Ex. 8 to Pls.' Mot. at 3.) And while property dispositions below fair market value are not *per se* improper, HUD regulations require evidence of a commensurate public benefit to the community when the price is less than fair market value. (Id.) HUD determined that Plaintiffs failed to demonstrate a commensurate public benefit to the community that would justify allowing AH to convey the FLP to Plaintiffs at a price below fair market value. (Id.)

Plaintiffs' housing counsel, Orlando Cabrera of Arnall Golden Gregory, LLP. (Ex. 9 to Pls.' Mot.)) The Court agrees.

Plaintiffs' remaining arguments do not overcome the dispositive effect of HUD's rejection of Plaintiffs' proposed disposition structure. Specifically, at the hearing, Plaintiffs argued that AH breached Section 13(m) of the Integrated Settlement Agreement. That provision requires the parties to "cooperate in good faith with one another to meet the deadlines contained herein and to prepare all documents and obtain all approvals as may be necessary in order to affect the Parties' intent with respect to this Settlement Agreement." (Integrated Settlement Agreement ¶ 13(m).) Under Georgia law, parties' intent is determined by the text of the contract itself. Langley v. MP Spring Lake, LLC, 307 Ga. 321, 324 (2019). In this case, there is nothing to be resolved by a jury. Indeed, in Mr. Cabrera's letter to HUD, Plaintiffs admit that AH submitted all documents to HUD that it was required to provide under the Integrated Settlement Agreement: "Everything that [AH] proposed to HUD is based on long-standing and expressly stated intent." (Cabrera Letter at 3.)

The Court finds that AH fulfilled its contractual obligations and did not breach the Integrated Settlement Agreement. Accordingly, the Court **DENIES** Plaintiffs' Motion and need not address Plaintiffs' remaining contentions.

B. AH's Motion is Denied Because HUD's Rejection of the Conditions Imposed by the Integrated Settlement Agreement Does Not Invalidate the Revitalization Amendments and Option Agreements.

AH argues that the Revitalization Amendments and Option Agreements are "dead letters," see AH's MSJ Br. at 3, for several reasons, none of which have merit. First, AH contends that HUD's refusal to allow seller-financed conveyances for less than fair market value to 50/50 holding companies renders the Revitalization Amendments and Option Agreements unenforceable because they too are structured in this manner. AH's argument about what HUD will not approve in the future is persuasive, but not dispositive. There is nothing in the record that conclusively

establishes that in the future HUD will disapprove of a conveyance structured as referenced in the Revitalization Amendments and Option Agreements. Absent such evidence, the Court is not willing to speculate about what HUD will and will not approve in the future.

Second, AH argues that the Revitalization Amendments and Option Agreements fail because they too require the bifurcated disposition process that HUD has rejected. As an initial matter, the record is not clear that the language of the Revitalization Amendments and Option Agreements require the same bifurcated disposition process that HUD previously rejected. The only mention of HUD in the Revitalization Amendments and Option Agreements is an acknowledgment that the transfer of the FLP to an [Owner Entity] "may be subject to HUD-imposed deed restrictions … and Declarations of Trust," and the requirement in the Revitalization Amendments and Option Agreements that, "[AH] shall use its best, reasonable efforts acting in good faith to obtain any required HUD approvals and releases of the Pending HUD Restrictions." (See Revitalization Amendments, § 2(c)(i)(B) (pertaining to On-site Land) & Option Agreements, § 7.) The corollary applicable to Off-site land is materially identical. (Id., § 2(c)(ii)(C).) Again, AH's argument about what HUD will not approve in the future is persuasive, but not dispositive. The Court cannot speculate as to whether in the future HUD will approve a disposition application pursuant to the Revitalization Amendments and Option Agreements.

Third, AH contends that the merger clause in the Integrated Settlement Agreement supersedes and invalidates the Revitalization Amendments and Option Agreements, so that performance thereunder is no longer required. The merger clause reads in relevant part:

> c. *Entire Agreement.* This Settlement Agreement contains the entire agreement between the Parties regarding the settlement and compromise of the claims in the Lawsuit and supersedes any and all other prior and contemporaneous agreements and understandings between the Parties, whether oral or written regarding the settlement of the Lawsuit.
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> Integrated Settlement Agreement, § 13(c).

AH's argument assumes that the Settlement Agreement can and must be fully performed. In fact, the Integrated Settlement Agreement cannot be fully performed because of impracticability. "Impracticability of performance is a legal justification or excuse for nonperformance of a contractual obligation." Martinez v. Rocky Mt. Bank, 540 F. App'x 846, 852 (10th Cir. 2013) (quoting Central Kan. Credit Union v. Mutual Guar. Corp., 102 F.3d 1097, 1102 (10th Cir. 1996)). The dispositive principle is found in § 261 of the Restatement of Contracts, which provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981). Furthermore, the Restatement also considers the effect of governmental regulations. As § 264 of the Restatement provides:

> If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

Restatement (Second) of Contracts, § 264 (1981). In the case at bar, the disposition of the properties to Plaintiffs was fundamental to their agreement to dismiss this lawsuit and release AH from any further obligations under the Revitalization Amendments and Option Agreements. HUD's refusal to approve the disposition as outlined in the Integrated Settlement Agreement made Plaintiffs' performance impracticable. Plaintiffs are therefore discharged of their obligations under the Integrated Settlement Agreements, including their obligations to (1) dismiss the lawsuit (Integrated Settlement Agreement, § 1.a.), (2) release their claims against defendants in this lawsuit (Integrated Settlement Agreement, § 1.d.), and (3) discharge AH from their obligations under the prior Revitalization Amendments and Option Agreements. See Yi v. Li, 313 Ga. App. 273, 277

(2011) ("Even though the failure to meet such a contingency is not a condition precedent **to the existence of a valid contract**, it is reasonable to hold that the obtaining of [third party's consent] was a condition precedent to the duty of both parties to render their promised performances." (Emphasis in original, citation and punctuation omitted)).

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Enforce Settlement and for Sanctions, Attorney's Fees and Additional Costs of Litigation is hereby **DENIED**, and AH's Renewed Motion for Summary judgment is hereby **DENIED**.

SO ORDERED, this 23rd day of June, 2021.

Judge Eric A. Richardson
Superior Court of Fulton County by Designation
Business Case Division

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