

Georgia State University College of Law
Reading Room

Georgia Business Court Opinions

11-23-2011

Order on Cross-Motion for Summary Judgment
(NICHOLSON ADVISORS LCC)

Elizabeth E. Long
Superior Court of Fulton County

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>

Institutional Repository Citation

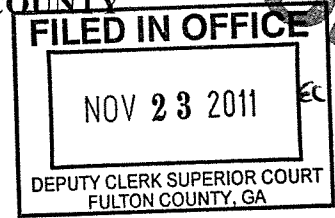
Long, Elizabeth E., "Order on Cross-Motion for Summary Judgment (NICHOLSON ADVISORS LCC)" (2011). *Georgia Business Court Opinions*. 190.
<https://readingroom.law.gsu.edu/businesscourt/190>

This Court Order is brought to you for free and open access by Reading Room. It has been accepted for inclusion in Georgia Business Court Opinions by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

BUSK

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



NICHOLSON ADVISORS, LLC)

Plaintiff,)

v.)

GAA-NICHOLSON PARTNERS, LP,)

Defendant.)

Civil Action File No. 2010-CV-191156

BUS 2

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on the parties' cross-motions for summary judgment each filed on November 8, 2011. Upon consideration of the briefs submitted on the motions and the record of the case, the Court finds as follows:

Plaintiff Nicholson Advisors, LLC ("Company") and Defendant GAA-Nicholson Partners, LP ("Partners") are joint owners of GAA-Nicholson, LLC ("Property Owner"), a single purpose entity formed to acquire and develop a 330-unit residential development in east Baton Rouge Parish, Louisiana, known as the Indigo Park Apartments ("Property").

On July 16, 2010, Partners initiated the buy-sell procedure pursuant to Section 13.4 of the Property Owner's Operating Agreement ("Buy-Sell Procedure"). The Buy-Sell Procedure provides that upon notice (the "Buy-Sell Notice") of any member of Property Owner (the "Buy-Sell Movant"), the other member (the "Buy-Sell Respondent") has the right to elect within 30 days to purchase all of the membership interest of the Buy-Sell Movant. Otherwise, the Buy-Sell Movant will become the purchaser in the transaction, and the Buy-Sell Respondent must sell all of its membership interest to the Buy-Sell Movant. The Property Owner's Operating Agreement provides that the buy-sell transaction shall close ninety days following the delivery of the Buy-Sell Notice or such other date as to which the parties may agree.

On August 11, 2010, Company notified Partners that it was invoking its right to purchase all of Partners' membership interest in Property Owner (the "Buy-Sell Decision"). On August 17, 2010, Partners responded to Company's notice with a letter refusing to accept the Buy-Sell Decision on the grounds that Company does not have authority to invoke its rights under the Buy-Sell Procedure. On September 20, 2010, GAA-Nicholson Advisors, LLC, an owner of Partners and an owner of Company, initiated a lawsuit against Company and its manager, Cortland Partners, LLC, seeking a declaration from the Court that the Buy-Sell Decision is a "Major Decision" under Company's Operating Agreement requiring unanimous consent of all Company's members. In the Order on GAA-Nicholson Advisors, LLC's Motion for Partial Summary Judgment entered on January 27, 2011 ("Order"), this Court ruled that the Buy-Sell Decision was not a "Major Decision" to require the consent of all Company's members. Therefore, under the Court's ruling, Company qualified as the Buy-Sell Purchaser under the Property Owner's Buy-Sell Procedure.

On September 20, 2010, the same day that that the above-reference lawsuit was initiated, Company initiated this case seeking to dissolve Property Owner and to appoint a receiver to manage Property Owner. However, following the Court's ruling that Company qualified as the Buy-Sell Purchaser under the Property Owner's Operating Agreement, the parties now seek the Court's help to calculate the purchase price (the "Buy-Sell Price"). Specifically, both parties have filed motions for summary judgment requesting the Court's guidance with respect to the following issues: 1) The proper date on which to base the calculation of the Buy-Sell Price (the "Closing Date");¹ 2) The extent to which Property Owner is required to pay UDC Residential, LLC ("UDC") a financing fee past the Closing Date; 3) Whether funds reserved by UDC Global,

¹ As the Court understands the issues, the determination of the Closing Date will necessarily resolve the dispute over the proper manner of calculating certain fees and preferred interest owed to Partners on its initial capital contribution.

LLC, for Property Owner's taxes are properly treated as distributions; and 4) Whether Company has to satisfy the mortgage on the Property when it buys Partners' interest in Property Owner.

1. Closing Date

The parties have asked the Court for a determination as to when the closing of the Buy-Sell Transaction should have occurred for purposes of calculating the purchase price. The Property Owner's Operating Agreement provides that the buy-sell transaction shall close ninety days following the delivery of the Buy-Sell Notice or such other date as to which the parties may agree. Company argues that under the plain terms of the Operating Agreement, the Closing Date should be considered October 16, 2010, ninety days from the delivery of the Buy-Sell Notice on July 16, 2010. In contrast, Partners contends that the Closing Date should be considered December 15, 2011, or 30 days from the date of the instant order, the date upon which the parties recently agreed that the closing must occur following months of protracted negotiations and the pursuit of related litigation.

The Court finds that the plain language of the Property Owner's Operating Agreement supports Company's position that the Buy-Sell Transaction is intended to close ninety days from the date of the Buy-Sell Notice, which in this case would be October 16, 2010. The Court acknowledges that the parties' various disputes over the identity of the Buy-Sell Purchaser and the proper calculation of the Buy-Sell Price have confounded the standard application of the Buy-Sell Procedure under the Operating Agreement. Nevertheless, the Operating Agreement is clear that the parties conclude the process within ninety days unless otherwise agreed, and it stands to reason that the Operating Agreement should not be construed in a manner to permit the parties to frustrate the intent behind the proscribed closing time-frame by perpetuating conflicts and dragging out the process through litigation. Moreover, by settling on an actual closing date

of December 15, 2011, or 30 days from the date of this Order, the Court does not agree that this evidences an intent of the parties to extend the Buy-Sell closing time-frame beyond ninety days. Rather, the Court finds that the parties merely chose a date to stop fighting over their various issues, in contrast with an agreement to extend the standard Buy-Sell time-frame as proscribed under the Operating Agreement. For the foregoing reasons, the Court **GRANTS** summary judgment in favor of Company on the issue of the date upon which to calculate the Buy-Sell Price.

2. Financing Fee Owed to UDC

Turning to the issue of the financing fee paid to UDC, the Court finds that the plain language of the Operating Agreement requires Property Owner to pay annually to UDC a financing fee equal to one percent of the outstanding amount of the \$35 million construction loan. Under the Operating Agreement, the Court's determination of the appropriate Closing Date, October 16, 2010, has no effect on Property Owner's obligation to pay this fee, which is owed so long as the construction loan is outstanding. Accordingly, the Court **GRANTS** summary judgment in favor of Partners on the issue and finds that Property Owner owes UDC the financing fee for so long as the loan is outstanding or until the Operating Agreement is otherwise amended.

3. Proper Treatment of Amounts Held in Escrow for Taxes

The parties next dispute the proper treatment of \$340,000, which Company contends was improperly wired directly to UDC from Property Owner. Apparently, Partners withdrew money from Property Owner over the course of 2010 to cover Property Owner's anticipated 2010 tax liability. Company argues that this amount should be treated as a distribution in light of the fact that Partners failed to abide by certain formalities required to escrow anticipated tax funds under

the Operating Agreement. However, uncontroverted evidence establishes that the entire amount was transferred back to Property Owner, with \$312,000 used to pay 2010 property taxes for Property Owner and \$28,000 retained by Property Owner. Accordingly, the Court finds no merit to Company's position. Summary judgment is **GRANTED** in favor of Partners on this issue.

4. Satisfaction of Mortgage

Partners urges the Court to require Company to satisfy the \$35 million construction loan secured by the Property at the closing of the Buy-Sell Transaction. As Partners concedes, the Operating Agreement does not obligate Company to pay the loan prior to closing the Buy-Sell Transaction. Nevertheless, Partners contends that the Court should exercise its equitable power to impose such a requirement and declare Partners the Buy-Sell Purchaser if Company is unable to close. As support, Partners points to a requirement in the loan documents that the lender must consent to any transfers of ownership in Property Owner. According to a letter dated October 6, 2011, the lender advised the parties that it did not consent to the transfer of Partners' ownership interest in Property Owner to Company.

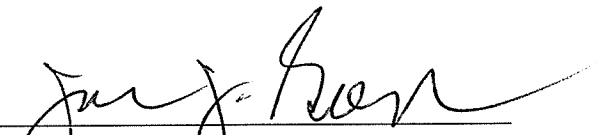
The Court finds that the satisfaction of the mortgage is not required under the Operating Agreement in order to close the Buy-Sell Transaction. Moreover, whether or not the transaction amounts to a default under the loan documents is of no consequence to Partners, who will have no interest in the Property or the Property Owner and therefore, no chance of suffering consequences due to a default of Property Owner once Company closes the transaction to purchase Partners' interest in Property Owner. Accordingly, summary judgment is **GRANTED** in favor of Company on this issue.

5. Cost Overruns

Prior to filing their motions for summary judgment, the parties stipulated to a discrete list of issues for the Court's consideration. In its motion, Partners added an additional topic related to a dispute over a cost overrun fee paid to UDC in March, 2010. The Court declines to address this topic, which was not included in the list previously submitted by the parties.

Pursuant to the parties' statements during the telephonic conference on October 25, 2011, the parties waive the right to appeal, so this Order stands as the final adjudication of the matters addressed herein.

SO ORDERED this 22 day of November, 2011.


John J. Goger, JUDGE for
Elizabeth E. Long, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies sent via email to:

John A Christy Mark W. Forsling Robert H. Snyder Schreeder, Wheeler & Flint, LLP 1100 Peachtree Street, N.E. Suite 800 Atlanta, GA 30309-4516 jchristy@swflfp.com mforsling@swflfp.com rsnyder@swflfp.com	Charles L. Gregory James Sherman Margaret G. Geer Ray & Sherman, LLC One Securities Centre 3490 Piedmont Road, Suite 700 Atlanta, GA 30305 cgregory@rayandsherman.com jsherman@rayandsherman.com mgeer@rayandsherman.com
--	---