

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA	:	April Term 2003
	:	
Plaintiff,	:	No. 2087
	:	
v.	:	Commerce Program
	:	
NEW EASTWICK CORPORATION and EASTWICK DEVELOPMENT JOINT VENTURE, L.P.	:	Control Nos. 102344,102318
	:	
Defendant.	:	

ORDER

AND NOW, this 23rd day of March 2005, upon consideration of the Cross-Motions for Summary Judgment of plaintiff, Redevelopment Authority of the City of Philadelphia (“RDA”), (Control No. 102318) and defendants, New Eastwick Corporation (“NEC”) and Eastwick Development Joint Venture IX, L.P. (“EDJV IX”)(Control No. 102344), the responses in opposition, the respective memoranda, all matters of record and in accordance with the contemporaneously filed Opinion, it is **ORDERED** that RDA’s Motion for Summary Judgment is **Denied**. Eastwick’s Motion for Summary Judgment is **Granted** as follows:

1. The 1961 Redevelopment Agreement between RDA, NEC and the City of Philadelphia, as amended (“Redevelopment Agreement”), is a valid, binding agreement in full force and effect;
2. RDA is in breach of the Fourth Amendment to the Redevelopment Agreement;
3. Defendants are entitled to just compensation for the land taken in connection with

the City's condemnation of the Remaining Parcels (Parcel "C" and Parcel "E-4").

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. March 23, 2005

Before the Court are the Cross-Motions for Summary Judgment of plaintiff, Redevelopment Authority of the City of Philadelphia (“RDA”) (Control No. 102318), and defendants, New Eastwick Corporation (“NEC”) and Eastwick Development Joint Venture IX, L.P. (“EDJV IX”) (Control No. 102344). For the reasons discussed, RDA’s Motion is denied and defendants’ Motion is granted.

BACKGROUND

The facts giving rise to this matter span a period of five decades. The majority of historical facts are undisputed and are discussed fully in the parties' respective submissions. For the sake of brevity, only those facts germane to the instant motions will be set forth.

This case arises out of a 1961 agreement between RDA and NEC entitled the "Agreement Between Redevelopment Authority of the City of Philadelphia and New Eastwick Corporation for Stages I, II, III, and IV of the Eastwick Redevelopment Area Also Known as Eastwick Urban Renewal Area" ("Redevelopment Agreement"). Under that Agreement, NEC was to redevelop the Eastwick Urban Renewal Area ("Eastwick") in Southwest Philadelphia. Eastwick encompasses an area of approximately 2,500 acres, which was broken into four stages for development: Stage I, Stage II, Stage III and Stage IV ("Redevelopment Area"). Under the Redevelopment Agreement, RDA was to sell 476 acres of land in the Redevelopment Area to NEC after RDA had performed basic site improvement, including filling the swampy ground and providing a basic infrastructure, such as streets, water and sewer. NEC, as the redeveloper, would then contract for the construction and redevelopment of the area.

After some initial problems with construction, NEC decided to partner with well-known homebuilders, the Korman Corporation ("Korman"). Thereafter, on January 30, 1970, NEC entered into a Joint Venture Agreement ("JVA") with Korman for the redevelopment of Stages I, II, III and IV. The stated purpose of the Joint Venture was to fulfill NEC's obligations under the Redevelopment Agreement. Exh. 11 at 4, ¶ 2. Upon entering into the JVA, Korman and NEC

created a legal entity known as “Eastwick Joint Venture” (“EJV”).¹ Exh. 7. Since the inception of the Redevelopment Agreement, NEC, in its joint venture with Korman, has developed approximately 3,000 homes and 1,100 apartment units, as well as two shopping centers housing 38 retail establishments and a 1,000 room hotel/restaurant complex serving the Philadelphia International Airport (“Airport Interplex”). Def. Mem. at 2.

The Redevelopment Agreement has been amended four times since 1961 (collectively, the “Amendments”). Most recently, in 1996, at the City’s request, NEC released its redevelopment rights to approximately 26 acres of the Redevelopment Area to facilitate a major project, the PNC Operations Center. NEC received no money for giving up these redevelopment rights, and instead obtained, *inter alia*, the contractual recommitment of RDA and the City to facilitate development of the undeveloped land in Stage III and to complete fill and site improvements on that land by May 29, 1999 (the “Fourth Amendment”).

In June 1997, NEC and Korman created Eastwick Development Joint Venture IX, L.P. (“EDJV IX”), a limited partnership of NEC and a Korman entity as general partners, to be NEC’s assignee for further hotel development. Shortly thereafter, RDA, NEC and EDJV IX entered into an Assignment Agreement, which purported to assign NEC’s redevelopment rights in various parcels within Eastwick to EDJV IX, including what were identified as Parcels C and E-4. These are the only two parcels in the Airport Interplex which remain undeveloped (the “Remaining Parcels”).²

¹ The nature of NEC and Korman’s relationship is one of the subjects of dispute in the instant matter and is discussed fully, *infra*. at p. 5-6.

² The intricacies of the Assignment Agreement, including a description of each of the specific parcels is discussed fully at Def. Mem. at 29.

Initially, both RDA and the City performed in accordance with their commitments under the Fourth Amendment, which allowed for the development of five new hotels between 1997 and 1999. However, it is undisputed that, since 1999, no redevelopment has taken place on the remaining acreage. It is further undisputed that neither the City nor RDA has filled or improved the land, as required by the Fourth Amendment.

Unfortunately, since 1999, the only meaningful activity that has been undertaken has occurred in a courtroom. In March 2003, NEC brought an inverse condemnation proceeding against the City for the taking of its redevelopment rights over the Remaining Parcels.³ Subsequently, the City instituted condemnation proceedings with respect to the Remaining Parcels, in which defendants were granted permission to intervene.⁴ In April 2003, RDA filed the instant action seeking to have the Redevelopment Agreement invalidated. RDA also seeks a declaration that defendants cannot profit from the condemnation of the Remaining Parcels. Defendants thereafter instituted a counterclaim seeking a declaration, *inter alia*, confirming their interest in the Remaining Parcels.

DISCUSSION

Based on the foregoing, there are two central issues before the court: 1) whether the Redevelopment Agreement and its Amendments constitute a valid and binding agreement upon the parties, and 2) whether defendants are entitled to earn a profit from the disposition of the property within Eastwick that has not yet been redeveloped.

³ *New Eastwick Corporation v. City of Philadelphia*, March Term 2003, No 3771 (CCP Phila.). This matter is currently deferred pending the resolution of the instant matter.

⁴ *In re: Condemnation By the City of Philadelphia of Certain Property Interests in the 16.2626 Acre Area*, November Term 2003, No. 2285 (CCP Phila.). This case is still listed as active on the docket. However, it is the court's understanding that the land at issue has since been condemned.

I. The Redevelopment Agreement Is A Valid Agreement Which Is Binding Upon the Parties.

The cross-motions for summary judgment put at issue the validity of the Redevelopment Agreement. RDA seeks to have the Redevelopment Agreement invalidated, citing several grounds in support. Defendants, on the other hand, seek a declaration that the Redevelopment Agreement remains in full force and effect. Following a careful review of the parties' respective submissions and accompanying tomes of exhibits, the court finds that RDA has failed to sustain its burden and that the facts of record demonstrate that the Redevelopment Agreement remains valid and binding upon the parties.

RDA first asserts that the Redevelopment Agreement is void *ab initio* because it failed to include specific time limits for its duration. The court finds this argument be wholly unsupported by fact or law. First, any ambiguity in the Redevelopment Agreement must be interpreted against the drafter, which in this case was RDA. Rusiski v. Probonic, 511 Pa. 383, 390, 515 A.2d 507, 510 (1986). When interpreting an ambiguous contract, the court should avoid a construction which would nullify the agreement. Id. This is exactly what RDA is asking this court to do. Clearly, RDA should not be permitted to exploit an ambiguity in its own contract forty years after the fact. Moreover, even if this argument had merit at one time, the execution of the Amendments cured any alleged defect, as the last three Amendments set forth specific time limitations. *See* Exhs. 36, 54 and 58. The law will not permit RDA to invoke the original contract language to assert the contract is void under these circumstances. *See e.g.*, Commonwealth ex rel. Margiotti v. Union Traction Co., 327 Pa. 497, 521-22, 194 A. 661, 672-3 (1937).

RDA further argues that NEC breached the Redevelopment Agreement when it

“definitively and unequivocally assigned away all its rights” upon entering into the Joint Venture Agreement with Korman on January 30, 1970.⁵ The court finds this argument unpersuasive. Based upon the facts of record, it is clear that, as early as the 1970’s, RDA and its agents were in possession of information which identified the relationship between Korman and NEC. RDA’s contention that it was unaware of the specific language of the JVA is immaterial, since it is clear that RDA was aware of the result, which was no secret. The record contains a wealth of information which was undoubtedly available to RDA prior to the Amendments, in the nature of internal memoranda, press clippings, meeting minutes, etc., which material was further highlighted by the testimony of representatives of RDA itself. *See e.g.*, , Exhs. 8, 9, 14, 20, 21, 22, 24, 25, 26, 27, 28, 30, 37, 42, 44, 51, 54, 69 and 70.

Most notable is the fact that NEC repeatedly applied for permission to assign NEC’s redevelopment rights to EJV for limited portions of the Redevelopment Area on an as-needed basis. With each of these applications, EJV submitted a “Redeveloper’s Statement for Public Disclosure” and a “Redeveloper’s Statement of Qualifications and Financial Responsibility.” Exh. 22. These disclosure forms set forth the ownership and control of EJV, indicating that, “The Korman Corporation...owns the majority interest and has management control of Eastwick Joint Venture.” RDA consented to and approved such assignments on several occasions. Exh. 14, 21, 25.

⁵ The arrangement between Korman and NEC, however, began even sooner than that as part of an agreement dated July 3, 1968, which was later replaced by the January 30, 1970 JVA. Def. Exh. 7. The 1970 JVA maintained the same business relationship as set forth in the 1968 JVA, which was for the redevelopment of Stages I, II, III and IV, but also expanded the scope of the joint venture to cover development of the Industrial Stages A and C of the Redevelopment Area. Id.

RDA's own conduct belies its claims. "It is well settled that waiver may be established by conduct inconsistent with claiming the waived right or any action or failure to act evincing an intent not to claim the right." Conrail v. Foster Wheeler Env'tl. Corp., 2000 U.S. Dist. LEXIS 13477 (D. Pa., 2000) (*citing* Portland Lumber Co. v. Kiehl, 183 Pa. 414, 38 A. 998 (1898)). The parties have performed under this arrangement for over four decades and have amended and reaffirmed the Redevelopment Agreement four times. The court has found no evidence which demonstrates that RDA even raised concerns about Korman's involvement in the project until the inception of this litigation. Instead, RDA repeatedly and willingly worked with both NEC and the Kormans on the redevelopment of Eastwick. This substantial performance under the Redevelopment Agreement only bolsters defendants' claims. The doctrine of substantial performance is intended for the "protection and relief of those who have faithfully and honestly endeavored to perform their contracts...so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects." First Mortgage Co. v. Carter, 306 Pa. Super. 498, 503, 452 A.3d 835, 837 (1982). Accordingly, this court finds that, as result of its own conduct, RDA has waived its right to raise the terms of the JVA as a violation of the anti-assignment provisions in Paragraph 2.3. and 10 of the Redevelopment Agreement.⁶

RDA has also raised additional grounds on summary judgment, which this court finds equally unpersuasive. As previously stated, in 1997, RDA, NEC and EDJV IX entered into an Assignment Agreement, which purported to assign NEC's redevelopment rights in various

⁶ In light of this court's finding that RDA has waived its claims that NEC is in breach of the Redevelopment Agreement as a result of its relationship with The Korman Corporation, it declines to address the merits of this argument.

parcels included within Eastwick to EDJV IX, including what was known as Parcel “C.” RDA has also moved for summary judgment on the grounds that the Assignment Agreement did not validly assign NEC’s rights in Parcel “C” to EDJV IX. RDA claims that Noel Eisenstat, RDA Executive Director who signed the Assignment Agreement on behalf of RDA, lacked the power to approve the assignment of Parcel “C” from NEC to EDJV IX. However, as Executive Director of RDA, Mr. Eisenstat, clearly possessed apparent authority to enter in to the Assignment Agreement, and such authority also binds RDA. *See e.g. Lokay v. Lehigh Valley Cooperative Farmers*, 342 Pa. Super. 89, 97-8, 492 A.2d 405, 409 (1985).

Finally, this court rejects RDA’s argument that NEC no longer exists or that the company was taken over by Korman because RDA has failed to present sufficient evidence to support that allegation.

In summary then, this court finds the Redevelopment Agreement to be valid and binding upon the parties and, as such, enters summary judgment in favor of defendants.

II. RDA Is In Breach of the Fourth Amendment to the Redevelopment Agreement, Not NEC.

RDA maintains that NEC is in breach of the Redevelopment Agreement because it has failed to develop Parcels “C” and “E-4”. However, the record clearly demonstrates that it is RDA, not NEC, which has breached its obligations under the Fourth Amendment. First, as a matter of law, NEC can not be found to be in breach because the Fourth Amendment grants NEC until 2015 to complete the work. Exh. 58. Thus, such a claim is not yet ripe. Moreover, it is undisputed that neither RDA nor the City has filled, graded or prepared those parcels, as obligated by the Redevelopment Agreement and the Fourth Amendment. Exhs. 69 at 126-7 and 70 at 48-52; *see also*, Exh. 40. It is submitted that a party to a contract cannot escape liability on

the ground that the other party has failed to perform a condition precedent, where the complaining party himself has caused that failure. “It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.” Hood v. Meininger, 377 Pa. 342, 105 A.2d 126 (1954); Howley v. Scranton Life Ins. Co., 357 Pa. 243, 248, 53 A.2d 613 (1947). Such is the situation here. The Agreement clearly establishes such work⁷ as a condition precedent to NEC’s development obligations. Exh. 58 ¶¶ 6-9, 17. Thus, this court finds that RDA, not NEC, is in breach of the Fourth Amendment.

III. Defendants Are Entitled To Participate In the Distribution of Funds In Connection With the City’s Condemnation of the Parcels In Question.

The remaining issue is whether defendants’ redevelopment rights over Parcels “C” and “E-4” entitle them to participate in the distribution of the money the City will ultimately pay for the condemnation of those parcels. RDA has demanded summary judgment on its claim that defendants are not entitled to profit from the condemnation of the property within Eastwick that has not been redeveloped. This court finds that RDA has failed to sustain its burden and that its Motion must be denied.

As a threshold matter, the Pennsylvania Supreme Court has previously found that NEC possesses equitable title to the property at issue. New Eastwick Corporation v. Philadelphia Builders Eastwick Corporation, 430 Pa. 46, 241 A.2d 766 (1968). Nothing has changed since that time which would invalidate or change that finding of our Supreme Court. Moreover, the law is well-settled that from the moment an agreement of sale of real estate is executed and delivered, it vests equitable title in the real estate in the grantee. Phoenixville, Vall. Forge &

⁷ The requirement to fill, grade and/or prepare the parcel.

Strafford Elec. R. Co.'s Appeal, 70 Pa. Super. 391, 395-396 (1918); Floyd v. Cmwlth. of Pa., Dept. of Welfare, 47 Pa. Commw. 338, 340 (1979); Central Bucks School Dist. v. Property in Warwick Township, 45 Pa. D. & C.2d 135, 138 (1968). The Redevelopment Agreement is, in essence, an agreement of sale. The parties acknowledge that pursuant to the Redevelopment Agreement RDA agreed to sell 476 acres of land in the Redevelopment Area to NEC after RDA had performed basic site improvements. Pl. Mem at 4. Thus, NEC must be considered an equitable owner of the property in question, as the Redevelopment Agreement is still in full force and effect. Petition of Butler County Commissioners Appeal of Andre, 141 Pa. Super. 597, 601, 602, 15 A.2d 504, 505-6 (1940), Phoenixville, 70 Pa. Super. at 391. Furthermore, holders of an equitable interest in land are entitled to participate in a condemnation award. Id.

This court submits that the HUD Local Public Agency Letter 437 (“LPA 437”), a HUD interpretive letter issued in 1967 which has the force of law, cited by RDA in support of its position, does not expressly stand for the proposition for which it has been cited. LPA 437 specifically prevents redevelopers from taking a profit on land subject to a redevelopment agreement by drawing down on the land and selling it before it has been developed. Def. Exh. 6. Thus, LPA 437 removes the incentive to “land bank” redevelopment property by permitting a redeveloper to profit on a sale after construction is completed but not before. The court finds LPA 437 wholly inapplicable to the situation here, in that it specifically applies to the voluntary transfer of land and is not consistent with a condemnation, nor does this court find that, under the circumstances at bar, such a result would violate public policy.

Based on the foregoing, this court finds in favor of defendants on the Cross-Motions for Summary Judgment. Defendants are entitled to just compensation for the land taken in connection with the City’s condemnation of the parcels in question.

CONCLUSION

For the reasons discussed, this court finds that:

1. RDA's Motion for Summary Judgment should be **denied**; and
2. NEC and Eastwick's Motion for Summary Judgment should be **granted** as

follows:

- a. The 1961 Redevelopment Agreement between RDA, NEC and the City of Philadelphia, as amended. (the "Redevelopment Agreement") is a valid, binding agreement in full force and effect;
- b. RDA is in breach of the Fourth Amendment to the Redevelopment Agreement;
- c. Defendants are entitled to just compensation for the land taken in connection with the City's condemnation of the Remaining Parcels.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.