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Order on Plaintiff's Motion For Partial Summary Judgment (GAA NICHOLSON ADVISORS, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
JAN 27 2011
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

GAA NICHOLSON ADVISORS, LLC	)	
Plaintiff,	)	
v.	)	**Civil Action File No. 2010-CV-191111**
CORTLAND PARTNERS, LLC, and NICHOLSON ADVISORS, LLC	)	
Defendants.	)	

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On January 24, 2011, counsel appeared before the Court to present oral argument on Plaintiff's motion for summary judgment on Count I of its Complaint. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

This case involves a dispute among several interrelated entities over a 330-unit residential development in East Baton Rouge Parish, Louisiana, known as the Indigo Park Apartments.

The Parties

GAA-Nicholson, LLC ("Property Owner") is a single purpose entity formed to acquire and develop the Indigo Park Apartments. Defendant Nicholson Advisors, LLC ("Company") and GAA-Nicholson Partners, LP ("Partners") are the sole members and managers of the Property Owner. The Company is owned by Plaintiff GAA Nicholson Advisors, LLC ("Plaintiff") and Nicholson Development Partners, LLC ("Development"), but managed by Defendant Cortland Partners, LLC ("Manager").

The Parties' Connections

To fully appreciate the context of the instant dispute, it is crucial to understand the parties' relationships to each other. Plaintiff is a member of Company, as well as the sole general partner of Partners. Manager manages Company and owns a 70% interest in Development. The operating agreement of Company ("Company's Operating Agreement") and the operating agreement of Property Owner ("Property Owner's Operating Agreement") were both executed on September 8, 2006 and amended on February 21, 2008. Mr. J. David DeShong, a member and the manager of Plaintiff, executed both Company's Operating Agreement and Property Owner's Operating Agreement. Mr. Steven J. DeFrancis, the manager of Manager, executed both Company's Operating Agreement and Property Owner's Operating Agreement.

The Dispute

On July 16, 2010, Partners, acting by and through its general partner, Plaintiff, initiated the buy-sell procedure pursuant to Section 13.4 of Property Owner's Operating Agreement (the "Buy-Sell Procedure"). The Buy-Sell Procedure provides that upon 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.

On August 11, 2010, Company, acting by and through Manager, notified Partners that it was invoking its right to purchase all of Partner's membership interest in Property Owner (the "Buy-Sell Decision"). On August 17, 2010, Partners, acting by and through Plaintiff, 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, Plaintiff filed its Complaint against Company and Manager seeking: 1) a declaration from the Court that the Buy-Sell Decision is a "Major Decision" pursuant to Section 5.2 of Company's Operating Agreement requiring unanimous consent of all of Company's members, 2) equitable relief to enjoin Manager from consummating the purchase of Partner's membership interest in Property Owner, and 3) damages for Manager's alleged breach of its fiduciary duties to Plaintiff.

Plaintiff moved for partial summary judgment on Count I of its Complaint. In support of its motion for summary judgment, Plaintiff relies on Section 5.2 of Company's Operating Agreement to argue that the Buy-Sell Decision constitutes a "Major Decision" which requires the consent of Plaintiff, as well as Development. Section 5.2 of Company's Operating Agreement states that Manager is not authorized to take any action that is defined as a "Major Decision" without the unanimous consent of the members ("Major Decision"). Section 5.2 specifically identifies twenty events that constitute a "Major Decision," including the following actions:

> 5.2(a) Execution of any contract with or payment of any amount to a Member (of the Company or [Property Owner]) or any Affiliate of a Member (of the Company or [Property Owner])...
>
> 5.2(g) A decision to merge or consolidate the Company or [Property Owner] with or into another entity or to invest in or acquire an interest in any other entity or to cause [Property Owner] to invest in or acquire an interest in any other entity.

Plaintiff argues that the consummation of the Buy-Sell Decision would implicate both provisions. First, the purchase by Company of Partner's membership interest would result in the execution of a contract with a member of Property Owner, thereby triggering Section 5.2(a). Second, by acting as the purchaser, Company would acquire an interest in Property Owner, which Plaintiff argues is "any other entity" under Section 5.2(g).

Summary Judgment Standard

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).

Legal Authority

The construction of the terms of a written contract is generally a matter of law for the trial court. OCGA § 13-2-1; Auldridge v. Rivers, 263 Ga. App. 396, 398 (2003). The cardinal rule of contract construction is to ascertain the intent of the parties. Mountain Aire Realty, Inc. v. Birdie White Enterprises, Inc., 265 Ga. App. 366, 368 (2004). "If the terms of the contract are clear and unambiguous, the court simply enforces the contract according to its clear terms... if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity." Fix v. McAllister, 273 Ga.App. 463, 466 (2005). The Georgia Supreme Court has explained:

> The fundamental rule, the rule which swallows up almost all others in construing a contract, is to give it that meaning which will best carry into effect the intent of the parties. This is the object of the rules of interpretation, to discover the true intent of the parties, and in doing this we are to consider the language of the parties' agreement with the surrounding circumstances. In construing contracts, courts should look to the substantial purpose which apparently influenced the minds of the parties, rather than at the details of making such purpose effectual. Furthermore, a contract should be given a reasonable construction that will uphold the agreement rather than a construction that will render the agreement meaningless and ineffective.

McLendon v. Priest, 259 Ga. 59, 60 (1989) (citations omitted).

The Court finds Plaintiff's argument that the Buy-Sell Decision is one of the actions listed under the Major Decision provision not convincing and contrary to the intent of the parties. The Buy-Sell Provision contained in Property Owner's Operating Agreement and the Major Decision provision contained in Company's Operating Agreement were negotiated at the same time by the same individuals, albeit while acting on behalf of different, related entities.

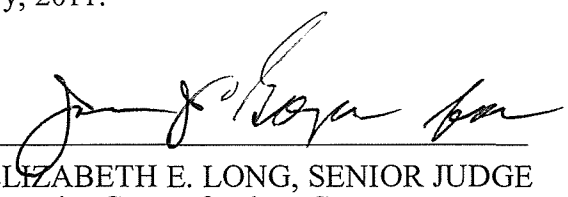
Considering the totality of the circumstances, the Court finds it hard to conceive that Plaintiff, acting on behalf of Partners, could invoke the Buy-Sell Procedure under Property Owner's Operating Agreement and then turn around and prevent Manager, acting on behalf of Company, from exercising its judgment of whether to buy or sell by contending that that decision was subject to the consent of the same party which invoked the Buy-Sell Procedure initially. To be clear, the Court does not dispute that the Buy-Sell Decision is a major decision. But to give effect to the underlying purpose of the Buy-Sell Procedure, it necessarily follows that the Buy-Sell Decision cannot, at the same time, qualify as a Major Decision.

Further, had the parties actually intended that the Buy-Sell Decision would be a Major Decision, they could have easily added the Buy-Sell Decision to the list of the twenty specific actions included in the definition of a "Major Decision" under Company's Operating Agreement. The Court is unwilling to construe Section 5.2(a) or Section 5.2(g) of the Major Decision provision in such a manner as to render the remedy provided for under the Buy-Sell Provision totally ineffective, particularly in view of the failure of the parties to include it specifically within the twenty Major Decisions. See IH Riverdale, LLC v. McChesney Capital Partners, LLC, 292 Ga. App. 841, 845 (2008).

Conclusion

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is hereby **DENIED**. Accordingly, as the parties conceded at the hearing on January 24, 2011, Defendants' Cross-Motion for Summary Judgment is hereby **GRANTED** in its entirety.

SO ORDERED this 27th day of January, 2011.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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