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AMEREAM LLC AND AMEREAM DEVELOPER LLC, *Plaintiffs*, v. NEW YORK FOOTBALL GIANTS, INC., NEW YORK JETS LLC, NEW MEADOWLANDS STADIUM COMPANY, LLC, GIANTS STADIUM LCC, and JETS STADIUM DEVELOPMENT LLC, *Defendants,* and NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, *Nominal Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. L-5219-13 CIVIL ACTION OPINION

Argued: September 27, 2013
Decided: September 30 , 2013

Honorable Peter E. Doyne, A.J.S.C.

Herbert J. Stern, Esq. and Joel M. Silverstein, Esq., (Stern & Kilcullen, LLC) appearing on behalf of the plaintiffs, Ameream LLC and Ameream Developer LLC (Mr. Stern, Mr. Silverstein, Gage Andretta, Esq. and A. Ross Pearlson, Esq. (Wolff & Samson P.C.), On the Brief).

Robert J. Giuffra, Jr., Esq., of the New York bar, admitted pro hac vice and Marc DeLeeuw, Esq. (Sullivan & Cromwell, LLP), William J. Heller, Esq. (Senior Vice President and General Counsel of the New York Giants), Hymie Elhai, Esq. (General Counsel of the New York Jets) and Richard Hernandez, Esq. (McCarter & English, LLP), appearing on behalf of the defendants, New York Football Giants, Inc.; New York Jets LLC; New Meadowlands Stadium Company, LLC; Giants Stadium LLC; and Jets Stadium Development LLC (William J. O'Shaughnessy, Esq. (McCarter & English, LLP) and Mr. Giuffra, On the Brief).

Fred Alworth, appearing on behalf of the New Jersey Sports and Exposition Authority (Gibbons P.C.).

Introduction

Presented is a motion to dismiss filed by counsel for the Teams, New York Football Giants, Inc. (the "Giants" when referenced individually, the "Teams" when referenced collectively), New York Jets LLC (the "Jets"), New Meadowlands Stadium Company, LLC ("New Meadowlands"), Giants Stadium LLC ("GSL"), and Jets Stadium Development LLC ("JSDL") in response to a complaint filed on behalf of Ameream LLC and Ameream Developer LLC ("Developers") against the Teams and the NJSEA ("NJSEA") as a nominal defendant. [1]

The Teams' motion to dismiss is denied.

Facts and Procedural Posture

A. Prior History

On August 9, 2012 and August 27, 2013, this court authored lengthy opinions outlining the history of this matter.[2] Those previous opinions are incorporated herewith as if set forth at length. However, a brief summary of the relevant facts is provided.

a. General Background

In 1971, the New Jersey Sports and Exposition Authority ("NJSEA") was created pursuant to N.J.S.A. 5:10-1 to 38. The NJSEA was granted broad powers to persuade athletic teams and their franchises to locate in New Jersey, including specific powers with respect to the Hackensack Meadowlands area. In 2002, the NJSEA was tasked with improving the Sports Complex located in the Meadowlands and selected Mills Corporation and Mack-Cali ("M/MC")

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[1] Henceforth, Plaintiffs in this matter will be referenced as the "Teams" and the Defendants will be referenced as the "Developers" for clarity purposes.
[2] The 2012 matter refers to New Meadowlands Stadium Co. v. Triple Five Grp., 2012 N.J. Super. Unpub. LEXIS 1920 (Ch. Div. August 9, 2012) . The 2013 matter refers to New Meadowlands Stadium Co. v. Triple Five Grp., 2013 N.J. Super. Unpub. LEXIS 2130 (Ch. Div. Aug. 26, 2013).

to construct the Xanadu Project ("Xanadu Project" or the "Project"), a proposed 4.8 million square foot entertainment, retail, hotel, and office project. M/MC was required to obtain approval from the NJSEA for a master plan of the Project pursuant to their Redevelopment Agreement. On September 8, 2004, the NJSEA board granted approval of M/MC's proposal for a 5.2 million square foot project and groundbreaking occurred shortly thereafter, on September 29, 2004.

b. 2005 Lawsuit

After concerns regarding the Xanadu Master Plan set forth by M/MC, the Giants concluded the proposal would severely increase traffic and parking difficulties during NFL game days. Therefore, on April 5, 2005, pursuant to Section 8.7 of their lease, the Giants filed a complaint against the NJSEA and M/MC seeking an injunction and declaratory relief to suspend the construction of the Xanadu Project. On June 22, 2006, following settlement discussions, the complaint was dismissed without prejudice.

c. Cooperation Agreement

Thereafter, on November 22, 2006, after nearly a year of negotiations, the Teams, NJSEA, and M/MC executed the Cooperation Agreement ("Cooperation Agreement" or the "Agreement"). Pursuant to the Cooperation Agreement, the Teams committed to play their home games at the Meadowlands for forty (40) years, with the possibility to extend the term to ninety-eight (98) years at a new, privately funded, $1.6 billion stadium (now named MetLife Stadium). The Agreement set forth a detailed plan for traffic and parking concerns including, among other conditions, the number of spaces available for the Teams' patrons on game days. The Teams also received a lump sum of $15 million from M/MC and agreed to waive any objections to the Xanadu Project, including those relating to traffic, parking, and ingress/egress.

Section 1 of the Cooperation Agreement provides the Teams "consent to waive any objections they may have to the development, construction, operation and exclusive development and use rights granted to Mills/Mack-Cali." (Cooperation Agreement § 1, Ex. 2 to Certification of Marc De Leeuw.) Section 1 of the Cooperation Agreement provides consent rights to the Teams as follows: "[a]ny amendments, modifications and/or waivers with respect to the Xanadu Project that would have an adverse effect on the development, use or operation of the Stadium Project Development Rights . . . shall require the prior written consent of the Stadium Related Entities." As part of Section 1, the Teams also agreed to cooperate with and support M/MC's efforts to obtain permits and other necessary approvals related to the Xanadu Project.

Section 2 of the Cooperation Agreement relates to consent to the Stadium Project. It requires M/MC to "consent and waive any objections it may have to the development, construction, operation, and use rights related to the Stadium Project" including the Giants Training Facility.

Section 3 of the Cooperation Agreement incorporates Section 8.7 of the Giants lease, and the corresponding section of the Jets lease. Pursuant to Section 3, the Teams agree Xanadu does not violate the Teams' rights under Section 8.7; enforceability of the section was limited to Sunday NFL home game days; Xanadu was deemed not to be in competition or cause scheduling conflicts with the use of the stadium as set forth in Section 8.7; and to prevail in a suit, premised upon this section, the Teams would have to demonstrate that traffic and fans ingress to and egress from the Sports Complex, as a result of the operation of the Project, were worse than experienced on average at the Sports Complex during the 2004 NFL regular season on game days. Section 3 states the "Stadium Related Entities shall not bring any action under Section 8.7, either under the Giants Lease, the Jets Lease or through its incorporation into this Agreement (an

8.7 action) with respect to the Xanadu Project only (such an 8.7 action, a 'Xanadu 8.7 Action') prior to December 31, 2009." Moreover, if no action has been taken within 90 days of the second anniversary of the latest of either (1) the first football game played in the new stadium as part of the Stadium Project; (2) the grand opening of the Xanadu Project's Entertainment and Retail Component ("ERC"); or (3) the completion of the proposed rail and transit infrastructure, such action is deemed waived. The parties were also prohibited from bringing a Xanadu 8.7 claim until the lump sum payment of $15 million dollars was returned to M/MC.

d. American Dream Proposal

M/MC faced financial difficulties and was forced to turn the project over to Colony-Dune, which also encountered financial struggles of its own and accordingly, construction of Xanadu halted in 2009. On May 3, 2011, the State of New Jersey alongside Triple Five announced a proposal to transform Xanadu into the "American Dream at Meadowlands", a "premier tourism, entertainment, and retail destination", with an anticipated opening slated for the end of 2013. On September 29, 2011, Triple Five submitted a proposal to the NJSEA to incorporate an indoor amusement park and water park ("AP/WP") to the original Xanadu Master Plan. The AP/WP would be connected to the ERC by way of a connector bridge and would only be accessible to the public through the ERC buildings. The AP/WP is the only addition to the original Xanadu Master Plan, previously approved by the Teams and the NJSEA, at least as set forth in the papers filed to date.

e. 2012 Litigation and Administrative Proceedings

On June 22, 2012, the Teams filed a complaint alleging the NJSEA breached the Cooperation Agreement by not seeking the Teams' written consent for this major modification pursuant to Section 1 of the Cooperation Agreement. The action also alleged the Developers

tortiously interfered with the Teams' contract with the NJSEA. On August 9, 2012, the complaint was dismissed without prejudice as to the NJSEA as not being ripe. The NJSEA was to continue with its administrative process, including a review by the Master Plan Committee ("MPC") to determine if the addition of the AP/WP should be approved. The MPC designated NJSEA Vice President and General Counsel, Ralph Marra, Esq. ("Marra"), as the hearing officer and as such he was required to submit a report and recommendations to the MPC. Both parties provided the NJSEA with documents and files relating to the Xanadu and American Dream Projects but as there was a significant disparity between the parties' experts' traffic reports, the NJSEA retained its own expert. Marra's report, issued May 16, 2012, found the addition of the AP/WP would not have an adverse effect upon the Teams' Stadium Project Development Rights ("SPDR") and, accordingly, the Teams' written consent was not required. The report was adopted by the MPC and the NJSEA, on May 17, 2012.

f. 2013 Decision in the Chancery Division Matter

On May 30, 2013, the Teams filed a two-count complaint in the Chancery Division, seeking injunctive and declaratory relief, alleging the NJSEA breached the Cooperation Agreement and the Developers tortiously interfered with the same. On July 9, 2013, the Developers and the NJSEA each filed separate motions to dismiss the Teams' complaint. Oral argument was entertained on August 23, 2013 and a decision was rendered on August 27, 2013.

The Developers' motions to dismiss the Teams' claims for breach of contract pursuant to R. 4:6-2(a) were denied as the court retains exclusive jurisdiction to determine whether the NJSEA approval of the proposed major modification breaches its contract by causing an adverse effect on the Teams' SPDR pursuant to Section 1 of the Cooperation Agreement. The Developers' motion to dismiss the Teams' demand for injunctive relief pursuant to R. 4:6-2(e)

was granted as it related to the attempt to halt construction, but denied as to operation. The Developers' motion to dismiss Teams' claim for tortious interference pursuant to R. 4:6-2(e) was denied as the pleading standard was met. The NJSEA's request for a more definite statement pursuant to R. 4:6-4(a) was denied as the Teams had, with sufficient specificity, notified their adversaries as to the alleged violations, allowing for further targeted exploration during discovery. The Developers' demand for summary judgment was denied as the NJSEA's findings are neither dispositive, nor, even if instructive, sufficient to determine whether a breach occurred or whether the Developers tortiously interfered with Teams' contract.

B. Procedural Posture and Parties' Positions

a. Developers' Complaint

On July 9, 2013, the Developers brought a five-count complaint in the Law Division, as a "companion case", against the Teams, their related entities and the NJSEA as a nominal defendant, seeking damages, declaratory relief and a trial by jury. The Developers allege the Teams have participated in an "ongoing campaign to delay, thwart, and ultimately prevent the Project from ever opening" while retaining all the benefits of the Cooperation Agreement and ignoring their reciprocal obligations. (Compl. ¶ 1.) The Developers contend the Teams realize the lack of validity of their positions, assert "bogus" objections and continue to act in bad faith to purposefully hinder the progress of the Xanadu Project. The Complaint alleges breach of the Cooperation Agreement, breach of the implied covenant of good faith and fair dealing, tortious interference with the Developers' economic advantage, civil conspiracy, and declaratory relief.

First, the Developers claim the Teams repudiated and breached the Cooperation Agreement by repeatedly objecting to a purported violation of their "consent rights" pursuant to Section 1. The Developers assert pursuant to Paragraph 1, the Teams agreed to waive any

objections relating to the development, construction, operation and rights granted to M/MC, the predecessor developer, by the NJSEA. Developers allege the Teams breached the Cooperation Agreement by: violating their duty of cooperation through continual objections to the AP/WP; claiming the AP/WP is a "new project" rather than a modification; failing to "support" and "cooperate" with the Developers' efforts to obtain permits and approvals; thwarting the Developers' efforts by failing to recognize the limitation of paragraphs 3(a) and 3(e) to Sunday NFL home games; contravening the agreement Xanadu is not deemed in "competition or [would] cause scheduling conflicts" under paragraph 3(e) by insisting AP/WP would be in direct competition and cause scheduling conflicts with Met Life Stadium; neglecting to recognize incompatibility is addressed by the 2004 NFL regular season on game day; asserting the Developers failed to provide the required parking for the AP/WP when it will have no effect on game day parking conditions; and failing to repay the $15 million lump sum as required.

Second, the Developers claim the Teams breached their implied covenant of good faith and fair dealing by negotiating and objecting in bad faith to the Project and the AP/WP. Developers allege the Teams' traffic report, submitted in conjunction with the NJSEA's review process, was based on a development of 7.5 million square feet and an anticipated count of 55 million annual visitors; however, the Developers' projection was only slated to be 2.84 million square feet. Additionally, the Developers argue the Teams' traffic model "did *not* apply accepted industry standard traffic engineering procedures" and was done in bad faith to "depict a patently false game-day traffic experience marked by gridlock and utter calamity, and to thereby further thwart the development of the Project." (Id. ¶ 99.) Furthermore, the Developers claim the Teams' critique of AP/WP as a fundamental change transforming Xanadu from a "regional shopping center" into a "premier tourism, entertainment, and retail destination" is false and done in bad

faith. (Id. ¶ 100.) The Developers assert the Teams' claims are premised on "preposterous" factual assumptions and a "concocted" traffic model.

Third, the Developers contend they have a reasonable expectation of economic benefit from the Project with which the Teams tortiously interfered. The Developers claim the Teams schemed to derail their efforts to open and profit from the Project by breaching the Cooperation Agreement. The Developers claim that they have suffered and will continue to suffer damages as a result of the "intentional, malicious, and unjustified conduct" by the Teams to ensure their "monopoly status".

Fourth, the Developers allege a civil conspiracy against the Teams for conspiring to commit torts and unlawful acts against the Developers as part of a common scheme to harm the Project. The Developers claim the Teams have participated in a malicious public relations campaign against the Project which has resulted in substantial harm to the public interest including "loss of approximately 19,000 construction and development jobs in connection with building the Project, 17,550 permanent jobs once the Project is open for business, and approximately $7.6 billion in wages from those jobs in a 20-year period that will result in significant tax revenue." (Id. ¶ 105.)

Fifth, the Developers state they have suffered damage, there is an actual controversy as stated above and therefore, pursuant to the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 et. seq. the court retains the power to resolve the controversy.

b. Motion to Dismiss, Consolidation and Opposition

On August 22, 2013, the Teams filed a motion to dismiss the Developers' complaint alleging the Developers' claims are barred by the terms of the contract and by the litigation privilege.

An order was executed, on August 23, 2013, consolidating the Chancery Division action with the Law Division action, for purposes of discovery and without a determination whether the defendants were entitled to maintain their jury demand in the Law Division action.

The Developers filed their opposition on September 5, 2013.

c. Teams' Reply and Oral Argument

The Teams' reply was received on September 11, 2013. In their reply, the Teams allege the Developers failed to provide competent evidence to demonstrate their allegations rest on grounds separate and apart from the litigation privilege. The Teams also continue to assert they did not breach the Cooperation Agreement by failing to support the AP/WP, as the major modification requires their consent pursuant to Section 1.

Oral argument was entertained on September 27, 2013.

Law

A. Failure to State a Claim – 4:6-2(e)

Rule 4:6-2(e) sets forth how a defense or objection to a claim by an adversary may be presented. "Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto." Ibid. The following are exceptions to this general rule and "may at the option of the pleader by made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed." Ibid.

The standard governing analysis of a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is the allegation must be examined "in depth and with liberality to

ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). At this preliminary stage of the litigation the court should not be concerned with the ability of the litigant to prove the allegation. See id. at 746. The claimant is entitled to every reasonable inference of fact and the examination of an allegation of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. See id. "Courts should grant these motions with caution and in 'the rarest instances.'" Ballinger v. Delaware River Port Auth., 311 N.J. Super. 317, 322 (App. Div. 1998) (quoting Printing Mart, 116 N.J. at 772).

A motion for dismissal for failure to state a cognizable claim pursuant to R. 4:6-2(e) should be based on the pleadings, with the court accepting as true the facts alleged. See Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Nevertheless, the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery. See Edwards v. Prudential Prop. and Casualty Co., 357 N.J. Super. 196, 202 (App. Div. 2003). "The motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself." Id.

i. Litigation Privilege

"The litigation privilege has long been embedded in New Jersey's jurisprudence." Loigman v. Twp. Comm., 185 N.J. 566, 580 (2006). The litigation privilege "is premised upon the belief that the public interest in having free access to judicial and quasi-judicial bodies without being restrained by the possibility of an ensuing law suit for damages is paramount to the public policy that an individual's reputation or business not be wrongly interfered with." Hill v.

N.J. Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 294 (App. Div. 2001). The privilege applies to bar tortious conduct other than simply defamation. Id. at 295. Therefore, "statement[s] made in the course of judicial, administrative, or legislative proceedings [are] absolutely privileged and wholly immune from liability." Erickson v. Marsh & McLennan Co., 117 N.J. 539, 563 (1990). "The absolute privilege applies to 'any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.'" Hawkins v. Harris, 141 N.J. 207, 215 (1995) (citations omitted).

The immunity of the privilege extends beyond what is said under oath on the witness stand; it encompasses all statements made in connection with a judicial proceeding. Ruberton v. Gabage, 280 N.J. Super. 125, 133 (App. Div. 1995). This includes discussions made in settlement proceedings. Hawkins, 141 N.J. at 216. Additionally, statements made during administrative proceedings may also be privileged if the proceedings are conducted in a similar manner and with the same procedural safeguards as judicial proceedings. See Rainier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 562 (1955). To determine if an administrative proceeding is privileged, the court must examine "the nature of the administrative proceeding, the function performed, and the pertinency of the allegedly defamatory statement to the issues and contentions to be resolved." Zagami, LLC v. Cottrell, 403 N.J. Super. 98, 108 (App. Div. 2008).

ii. Contract Interpretation: Dispute

As a general rule, courts should enforce a contract as the parties to that contract intended. Pacifico v. Pacifico, 190 N.J. 258, 266 (2007). "When the terms of [a] contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). When the meaning of a contract

is unclear and there is "disputed extraneous testimony, interpretation should be left to the determination of the finder of fact." Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 152 (App. Div. 1960). "The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

Analysis

Initially, it must be noted this is a Rule 4:6-2(e) application. This standard has been enunciated in the court's two prior decisions.[3] While the court may share the Teams' concerns about assertions of possible frivolity, this application needs to be addressed by Rule 4:6-2(e) and not by the standards articulated in R. 1:4-8 and N.J.S.A. 2A:15-59.1. Therefore, the claims are entitled to the indulgent reading demanded by Rule 4:6-2(e). The Teams' motion to dismiss Developers' claims based on the litigation privilege is denied pursuant to R. 4:6-2(e) as the Developers have met the indulgent pleading standard. A cause of action has been sufficiently pled, regardless of whether and how the litigation privilege applies. The Teams' motion to dismiss the Developers' claims as being barred under the Cooperation Agreement is also denied pursuant to R. 4:6-2(e) as the Developers have also met the indulgent pleading standard and, at this stage of the proceeding, it is not appropriate to make dispositive determinations of contract interpretation.

A. Litigation Privilege

The Teams urge the complaint should be dismissed due to the absolute and broad litigation privilege in New Jersey, which bars all of the Developers' claims because it applies to any communication in judicial or quasi-judicial proceedings, administrative proceedings,

[3] It is noteworthy the Teams' most capable counsel advised the court numerous times during previous oral argument in the Chancery Division case of the nature and burden of a R. 4:6-2(e) application.

settlement negotiations, and any matters that have a nexus to the litigation. See Hawkins v. Harris, 141 N.J. 207, 216 (1995). The Teams also argue statements made to the press cannot subject them to a tortious interference claim, even if they fall outside of the litigation privilege, as long as the statements were accurately reporting matters of public concern, citing Brodsky v. W.B. Assocs., 2008 N.J. Super. Unpub. LEXIS 168, at *25-26 (App. Div. July 30, 2008). But see, R. 1:36-3. Relying further on Brodsky, the Teams claim the only statement to the press made by John Mara, President and CEO of the Giants, cannot be a basis for a tortious interference claim as it was an accurate reporting of a matter of public knowledge.

Developers contend Brodsky is inapposite as it did not involve a motion to dismiss. Developers argue the litigation privilege does not bar any of their claims and is inapplicable to the matter at hand. The Teams have twice successfully defended their own tortious interference claims based on the administrative proceedings; therefore, the Developers urge the Teams should be judicially estopped from claiming litigation privilege at this time. Developers contend statements made during the course of judicial proceedings can be used for evidentiary purposes to determine intent.[4]

The applicability of the litigation privilege need not be determined today, as the court has already determined the complaint survives a R. 4:6-2(e) attack. Although the Teams argue the Developers' cannot provide support for their allegations separate and apart from the litigation privilege, Developers' counsel has correctly shown their causes of action can be realized by

[4] Developers' counsels' proclivity to provide citations to federal cases and cases outside of New Jersey while, of course, permissible, is far less helpful than resort to established New Jersey case law that will control the disposition. Therefore, citations to California and federal case law from the Developers' counsel are less than imposing on the question presented. Parenthetically, the litigation privilege in California is codified by statute; the litigation privilege in New Jersey is defined by established case law.

other means, albeit unspecified.[5] Accordingly, the Developers have sufficiently alleged their claims go beyond the privileged material for each cause of action brought in their complaint and therefore, the Developers have met the pleading standard necessary under R. 4:6-2(e).

B. Contract Claims Barred by Terms of the Contract

The essential dispute among the parties is an inherent disparity in interpreting the Cooperation Agreement. The Teams read the Cooperation Agreement as compelling their support of Xanadu but not the AP/WP as it constitutes a "major modification"; the Developers assert the agreement requires the Teams' support of the "Xanadu Project" including major modifications, unless they are shown to have an adverse impact on the Teams' SPDR. Importantly, included in their interpretation, the Developers claim the AP/WP is within the definition of "Xanadu Project" under the Cooperation Agreement, and as such, does not require the Teams' consent. (Developer's Opp. Br. 6.) The Teams understandably assert invocation of their contract rights cannot be the basis of any cognizable course of action.

The Teams and Developers also disagree as to the relationship between consent rights pursuant to Section 1 and a Xanadu 8.7 action pursuant to Section 3. The Teams posit Section 1 as a separate, independent action from a Xanadu 8.7 action. The Teams interpret a Xanadu 8.7 action as allowing the Teams to challenge the Project *after* it opens. The Teams support this argument by highlighting the language of the Cooperation Agreement which states under a Xanadu 8.7 action, the NJSEA is said to have no liability to the Teams. However, because the Teams brought an action against the NJSEA for breach of contract, the Teams argue, somewhat circularly, it must be an action under Section 1. The Teams allege the overlap between the issues raised in a Section 1 and a Xanadu 8.7 action does not convert their earlier claim into the latter.

[5] At oral argument, the Developers' counsel suggested the specific evidence regarding their tortious interference claim could be found on pages 39-40 of their brief, however, the review of the same was less than edifying in identifying the factual basis for their assertions.

Developers disagree, stating that nothing in the language of the Cooperation Agreement requires a Xanadu 8.7 Action to be brought only after the Project opens. (Developer's Opp. Br. 13-14.)

Curiously, for the first time the Developers are apparently suggesting a new theory as to how the Cooperation Agreement should be interpreted by suggesting a correlation between the consent rights pursuant to Section 1 and a Xanadu 8.7 action pursuant to Section 3. Developers contend the Teams' claims under Section 1 are, in actuality, a Xanadu 8.7 action as all of the SPDR which the Teams claim would be adversely effected by the AP/WP are rights under Section 8.7. (Developer's Opp. Br. 16.) In fact, the Developers contend the 2012 and 2013 lawsuits were both Xanadu 8.7 actions. (Compl. ¶ 97.) The Developers argue "Section 8.7 rights are the Teams' ***only*** Stadium Project Development Rights regarding the AP/WP's effects on traffic, parking, ingress, egress, and competition." (Developer's Opp. Br. 11.) Regardless of whether the Teams cited Section 8.7, Developers allege the Teams' claims under Section 1 are "wholly based and dependent on the incorporation of Section 8.7 into the Cooperation Agreement." Id. (emphasis omitted). The Developers allege claims under adverse effects pursuant to Section 1 are not always Xanadu 8.7 actions, "only to the extent a paragraph 1 claim is based on alleged 'adverse effects' on rights under Section 8.7, it is a Xanadu 8.7 action." (Id. at 14.) In response, the Teams boldly assert the court has already determined Section 1 and Section 3 are separate rights. (Teams' Reply Br. at 18.)

The interpretation being urged by the Developers is presented now for the first time, and as such, is one that has not yet been ruled upon. Although the court made no prior decision with this regard, Section 8.7 and Section 1 were presented previously as independent rights, a position which appears to be supported by a first blush reading of the Cooperation Agreement. The Teams understandably suggest the Developers' interpretation is false, convoluted, and

contrary to the plain reading of the language of the Cooperation Agreement. It is also asserted the Developers' new interpretation of the relationship between Section 1 and Section 3 is contrary to the intent of the parties. It is not immediately apparent the Developers can prevail on this offered interpretation which preliminarily appears not to be compellingly logical. However, the court need not decide this matter as before it is a R. 4:6-2(e) motion.

The Developers contend that according to the Cooperation Agreement, the "Xanadu Project" encompasses any and all modifications. (Developers' Opp. Br. at 3). Under this interpretation, there is concern how one would consent to what is not yet known. The Teams contend if the Cooperation Agreement was read as the Developers wish, the Teams would be obliged to support every modification or amendment, essentially omitting any consent rights pursuant to Section 1. The Developers allege, and this court agrees, that it is required to accept, for purposes of this motion, the AP/WP would not have an adverse effect on the Teams' SPDR. The Developers' interpretation of the Cooperation Agreement, including arguing major modifications fall within the meaning of "Xanadu Project", presents sufficient evidence to survive a motion to dismiss for failure to state a claim. To date, the record does not suggest the Developers have put forth a compelling theory as to the meaning and interpretation of the contract, however, as this is a R. 4:6-2(e) motion, the Developers have met the standard necessary to demonstrate a sufficient breach of contract action based on their interpretation of the Cooperation Agreement.

Conclusion

As has been noted, the Teams' motion to dismiss must be denied as the Developers have alleged sufficient proofs to meet the generous and indulgent pleading standard afforded under R. 4:6-2(e). However, if and when this becomes a R. 4:46 motion, the result may well be different.

Although the court has reservations about the cogency of the Teams' tortious inference claim, it has even greater reservations about the cogency of the Developers' theory in conjunction with its filed complaint, or even the wisdom of such an action. At least at first blush, whether the court agrees or disagrees with the Teams' contentions concerning adverse effects on its SPDR, little has seemingly been presented in the Developer's affirmative action other than colorful phrases and inflammatory language to demonstrate the Teams have acted other than in good faith. That, though, should not be confused with the merits of the Teams' claims but only to suggest the parties might be better served concentrating upon the issues that will be presented for final disposition, most notably, whether the AP/WP will have an adverse effect on the Teams' SPDR.

The Teams' motion to dismiss is denied. As the Teams filed their motions to dismiss in lieu of an answer pursuant to R. 4:6-2, they shall file their answers within ten (10) days of the date of this opinion. The Developers' counsel is directed to submit an order in conformity with this decision.