SUPERIOR COURT OF NEW JERSEY

CIVIL DIVISION
ESSEX VICINAGE

Chambers of
James S. Rothschild, Jr., J.S.C.

Historic Courthouse
470 Dr. MLK Jr. Blvd
Newark, New Jersey 07102

October 15, 2014

Christopher P. Leise, Esq.
White and Williams LLP
457 Haddonfield Road, Suite 400
Cherry Hill, NJ 008002

Laura Leacy Kyler, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102

Re: Devils Arena v. Volume Services
Docket No. L-1893-13; L-9654-11

Dear Counsel:

The court has before it but one of a series of complicated claims surrounding the business dealings between Devils Arena Entertainment ("DAE") and Volume Services, Inc. d/b/a Centerplate ("Centerplate"). In its previous opinion, the court determined that the addition of Section 6.10 to the contract, an amendment addressing Additional Capital Expenditure Reimbursements, did not render moot the debate surrounding the term "Contract Life" in Section 6.7, the "Termination Fee" clause. Thus, the particular issue upon which this opinion focuses is whether the term "Contract Life" refers to (a) the originally agreed upon term of the contract, 10 years; (b) the amended term of the contract, 12 years; or (c) the actual duration of the contract, just over 6 years.

Facts and Procedural History

DAE is a Delaware Limited Liability Company that "leases and manages a multi-purpose

sports and entertainment arena, the Prudential Center, located in Newark, New Jersey." Centerplate's Stmt. of Facts ¶ 2. Centerplate is a Delaware corporation that provides "concession, catering, and restaurant services to arenas and convention centers throughout the country." Id. at ¶ 1.

In March of 2005, while the Prudential Center was under construction, DAE was seeking a concessionaire to invest in the construction of, and provide, concession services for the Prudential Center. Id. at ¶ 4. Centerplate's pleadings state that such an up-front capital investment is standard in long-term contracts for concession services. Id. at ¶ 5. Moreover, Centerplate states that "[a]s a forgivable loan, it is standard for the investment to be forgiven by the concessionaire according to an amortization buy-back schedule agreed to in the final contract. . . . Permanent improvements to real property, such as base facility and leasehold improvements, which are the most expensive investments and have the longest useful life, typically receive the greatest protection for the concessionaire and have the longest amortization buy-back schedule for the related capital investments." Centerplate's Stmt. of Facts, ¶ 5. DAE published a Request for Proposals ("RFP") seeking a concessionaire partner. The RFP included the following section:

> If the Agreement is terminated for any reason Devils Renaissance agrees to purchase . . . from the Operator all capital investment, equipment, and fixtures for a cash price equal to the cost of the original purchase thereof, net of accumulated depreciation, as described below. For the purposes of this Buy-Back clause, the Operator's Investment shall be amortized on the following straight-line, monthly basis, commencing on the effective date of the Agreement
>
> - Pre-opening expense; 36 months
> - Cash Grant; over life of Agreement
> - Leasehold Improvements; over life of agreement or 15 years, whichever is less
> - Equipment 120 months
> - Smallwares and uniforms; 36 months

Centerplate's Stmt. of Facts, ¶ 6. Thereafter, Centerplate submitted five proposals, and DAE selected "Financial Proposal – 3," which called for a 10-year contract. In regard to an amortization schedule, Financial Proposal – 3 stated:

> Investments shall be amortized and/or depreciated based on the schedule outlined in the Request for Proposal. Total investment would require industry standard buy-back provision in case of early termination. If the food and beverage services agreement expires or terminates for any reason whatsoever, with or without cause, prior to Centerplate's complete amortization of the investment, the unamortized portion of the investment will be reimbursed to Centerplate by the Owners or the successor Concessionaire.

Id. at ¶ 8. After the proposal was selected, the parties entered into negotiations. In its first draft of the Agreement, DAE replaced the term "life of agreement" with "60 Months." Id. at ¶¶ 11-13. Centerplate rejected the change, however, and "60 Months" was replaced with "Contract Life" by Centerplate's attorney. Id. "Contract Life" was approved by DAE and was included in the final draft of the Agreement.

On November 15, 2006, the parties entered into a final Agreement. The Termination Fee provision, Section 6.7, stated:

> Upon termination of this Agreement prior to June 30, 2017 for any reason, DAE shall pay Centerplate a termination fee equal to the unamortized portion of the Capital Investment and the Base Facilities paid for by Centerplate under Sections 6.4 and 6.5, to the extent that there is any unamortized portion then remaining, if any (the "Termination Fee"). The Termination Fee shall be calculated based on the actual amount expended on each item of the Capital Investment and Base Facilities, except that no more than six hundred fifty thousand dollars ($650,000) shall be allocated to Pre-Opening Services expenses, on a straight-line basis, from July 1, 2007 or the date of expenditure, whichever occurs earlier, to the date of such termination of this Agreement, as follows:
>
> | | |
> |---|---|
> | Pre-Opening Services Expenses: | 36 Months |
> | Equipment: | 120 Months |
> | Leasehold Improvements: | Contract Life |
> | Smallwares: | 36 Months |
> | Uniforms: | 36 Months |
> | Base Facilities: | Contract Life |

Centerplate's Ex. 1, § 6.7. Under the Agreement, Centerplate was required to pay $13 million for improvements and alterations made to the Arena's "Concession Facilities" and "Base Facilities." Centerplate's Stmt. of Facts, ¶ 18. Of the $13 million investment, $4,250,000 was devoted to the costs of construction of the Base Facilities and $8,750,000 to "Capital Investments," including "Leasehold Improvements, Equipment, Smallwares, Uniforms, and Pre-Operating Expenses." Id. at ¶ 19. Leasehold Improvements include "all permanent fixtures and structural construction, additions, and attachments to the arena." Centerplate's Ex. 1, § 1.2.

The final Agreement was set to expire in its 10th year. The Agreement stated that "[t]he Term of this Agreement shall be, unless sooner terminated in accordance with the terms of this Agreement, a period commencing at the Effective Date and expiring upon the tenth anniversary date of the Commencement Date . . ." Centerplate's Ex. 1 at § 3.1.

The Prudential Center opened on October 25, 2007. Centerplate's Stmt. of Facts, ¶ 14. Nearly two years later, on October 7, 2009, the parties entered into a settlement agreement intended to resolve billing and other financial disputes that had arisen between the parties. DAE's Br., 2. It was at this time that the parties also entered into a First Amendment to the Agreement. Id. Section E.1. of the Amendment extended the Term of the contract by two years:

> 3.1 Term. The term of this Agreement shall be, unless sooner terminated in accordance with the terms of this Agreement, a period commencing at the Effective Date and expiring upon the twelfth anniversary date of the Commencement Date. For clarification purposes, the parties agree to extend the Term as defined in Section 3 of the Concessions Agreement by two (2) years, from ten (10) years to twelve (12) years, provided however that if such expiration date occurs during any time while any NHL or NBA Arena Licensee is scheduled to play regular season or playoff home games at the Arena, such expiration date shall be extended to the thirtieth (30th) date following the last day of any such scheduled games ("Term").

DAE's Ex. B, 2. Nothing in the Amendment language or in the documents before the court

indicates that additional investments in base facilities or leasehold improvements were made by Centerplate at the time the parties extended the Term.

On January 4, 2013, DAE terminated the Agreement with Centerplate. There were 78 months remaining on the extended 12-year term (and 54 months remaining on the original 10-year term). Centerplate's Stmt. of Facts, ¶ 24. Upon receipt of the termination notice, Centerplate sent DAE an invoice for the unamortized portion of its capital expenditures, which included the 78 months remaining on the amended Term. See DAE's Ex. D. According to Centerplate, at the time of termination, "Base Facilities and Leasehold Improvement costs had been amortizing for 66 months, starting on July 1, 2007. Applying the contractual straight-line amortization rate, 66/144, or just under 46%, of the costs had amortized, leaving a balance of 54% of the original costs owed by DAE as part of the Termination Fee." Centerplate's Br., 17. (Put arithmetically, the 78 unused months, divided by 144 total months, equals slightly over 54%). Centerplate asserts that including the remaining time on the extended term is the correct analysis, because Contract Life "means that Centerplate's multi-million-dollar investment in the Prudential Center Arena's Base Facilities and Leasehold Improvements was to be amortized on a straight-line basis over the intended duration of the Concession Agreement." Centerplate's Br., 2.

DAE disputed the reimbursement invoice in a letter dated February 6, 2013, noting, among other reasons, that the "Contract Life of Base Facilities which began on July 1, 2007 or the date of expenditure, ended on January 4, 2013, resulting in a full amortization and accordingly no Termination Fee due associated with the Base Facilities Costs." DAE's Ex. E, at § 1(b). The letter made an identical assertion regarding the Leasehold Improvements. Id. DAE contends that Contract Life "means the actual duration of the agreement, such that if the Agreement were terminated, the Contract Life ended, resulting in those costs being fully

amortized." Lavalette Cert. ¶ 4.

In further support of its argument that no unamortized portion of the loan exists under the "Contract Life" provisions, DAE points to Centerplate's Form 10-K, which it filed with the Securities and Exchange Commission. DAE's Br. in Opp. to Centerplate's Summ. J. Mot., 5 (hereinafter "DAE's Brief"). The relevant language in the Form 10-K is as follows:

> While our contracts are generally terminable only in limited circumstances, some of our contracts give the client the right to terminate the contract with or without cause on little or no notice. However, most of our contracts require our client to return to us an unamortized capital investment and any up-front fees, if the contract is cancelled before its scheduled termination, other than due to breach by us.

DAE's Ex. F, at 6. DAE relies on this passage to argue that "large up-front capital investments from concession providers . . . are the price of doing business with sports facilities . . . and most of Centerplate's contracts do not allow reimbursement of these capital investments in the event of a breach." DAE's Br., 5.While this may be the case for most of Centerplate's contracts, the language of Section 6.7 makes clear that the provision applies if the contract is terminated "for any reason," rather than simply "for cause."[1]

Centerplate filed a motion for partial summary judgment on November 27, 2013. On January 17, 2014, the court heard oral argument on the summary judgment motion. The court denied the motion without prejudice, allowing an additional period of limited discovery to determine the meaning of "Contract Life." Centerplate filed a renewed motion for partial

[1] The definition of "breach" is a nebulous one in the service and hospitality industry. The final Agreement defines Centerplate's breach, in pertinent part, as a "failure to perform any of its obligations under this agreement in the manner or within the time required under this Agreement, or any breach of any covenant or any misrepresentation of any representation contained in this Agreement." Centerplate's Ex. 1 at § 13.1(a). A breach is not strictly defined as it would be in, for example, a public employee contract. In a public employment contract, "for cause" is strictly defined, and the parties involved are able to better understand the risks involved in provisions that are contingent upon a "for cause" termination. The contract at issue herein is not so clear. Thus there is a high level of risk for Centerplate's $13 million investment, unless the phrase "Contract Life" is defined as 10 years. (Indeed, twice in six years, the parties contended that each other breached.)

summary judgment on July 11, 2014, arguing that "Contract Life" referred to the entirety of the extended 12-year term. DAE then filed a cross-motion for summary judgment on August 29, 2014. DAE first argued that summary judgment should be granted in its favor because the last phrase in Section 6.10, an unrelated provision that was added in the first Amendment, precluded DAE from owing Centerplate any reimbursement funds. In the alternative, DAE argued that a genuine issue of material fact exists as to the meaning of the phrase "Contract Life," because the term is not defined within the Agreement and is not present in any of Centerplate's previous agreements with other entities. DAE's Br., 9. Oral argument was heard once more on both motions on September 5, 2014, at which time the court concluded that the unrelated Section 6.10 did not preclude the application of the Termination Fee.

II. Legal Analysis

A court will grant summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J. R. 4:46-2(c). The court may consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995). "Conclusory and self-serving assertions in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009).

The interpretation of contract terms is typically a matter to be handled by a judge. "[T]he court's goal is to ascertain the 'intention of the parties to the contract as revealed by the language

used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain.'" Driscoll Const. Co., Inc. v. State Dep't. of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004) (internal citation omitted). When a contract term is ambiguous, however, the "doubtful provision should be left to the jury." Id. at 314 (internal citation omitted).

Whether a contract term is ambiguous is a matter of law. In Nester v. O'Donnell, 301 N.J. Super. 198 (App. Div. 1997), the Appellate Division had before it a contract case in which the defendants moved for summary judgment and the plaintiffs objected, arguing that a ambiguity in a signed promissory note precluded summary judgment. The plaintiffs claimed that the language of the contract indicated that they, the Nesters, had signed the document solely as accommodation makers, and that a separate entity, MDN, INC., was the only principal. The Appellate Division provided the following explanation: "Each promissory note states it is given by 'MDN, INC., herein singly referred to as the 'Borrower,' HARRY NESTER and MARY NESTER, all of which are hereby collectively referred to as the 'Undersigned,' who jointly and severally promise to pay' the amounts involved." Id. at 210.

The plaintiffs argued that because MDN, INC., is singly referred to as the borrower, and because the Nesters are referred to afterward, that the word "undersigned" did not clearly refer to both the Nesters and MDN, INC. with regard to the promise to pay. Id. The trial court rejected the plaintiffs' argument, and the Appellate Division affirmed. The Appellate Division provided the following guidance:

> "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. . . . To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their 'plain and ordinary meaning.'" . . . "A writing is interpreted as a whole and all writings forming part of the same

> transaction are interpreted together." . . . A "court should not torture the language of a contract to create ambiguity."

Id. at 210 (internal citations omitted). The Appellate Division relied on the trial judge's determination that there was "an unambiguous promise to pay, and the words ['] the undersigned['] does [sic] not create in the mind of the Court any ambiguity at all even though the note said as to . . . MDN singly referred to as borrower and then went on to mention Harry Nester and Mary Nester." Id. at 210-11.

In Schenck v. HJI Associates, 295 N.J. Super. 445 (App. Div. 1996), the plaintiff, a real estate broker, brought suit in an effort to obtain a commission on a lease entered into by the defendants. The parties were in a dispute as to whether the plaintiff's commission was contingent upon defendants' obtaining financing. Id. at 453. During negotiations, the plaintiff and defendants had met to discuss undergoing construction on the land in question. Id. at 447. During these meetings, the defendants informed the realtors "that the mortgage was in default and being foreclosed, . . . that there was no equity left in the property[,] . . . [and] that they could not pay any commission unless they obtained financing, with payments dependent upon construction draws and the payment of rent." Id. When a lease was signed, a commission agreement was also entered into, which stated that "a commission is due and payable upon the signing of the agreement." However, the Appellate Division noted that

> [P]aragraph 3 sets forth a payment schedule for the commission to be paid from money obtained from the construction draws and rent. Similarly, while paragraph 5.1 states that the owner will be in default upon insolvency and paragraph 5.3 accelerates 'all payments not yet made' upon such default, the parties knew that the owner was indeed insolvent at the time of signing the agreement. Further, paragraph 8.5 conditions the owner's ability to pay the commission upon the owner obtaining financing.

Id. at 448. An umpire was initially appointed under the Alternative Dispute Resolution Act. The

umpire decided against the plaintiff. The plaintiff thereafter moved to vacate the dismissal in the Chancery Division. Id. at 446. After hearing argument, the Chancery judge affirmed the umpire's order, and the Appellate Division affirmed. The Appellate Division noted the following in regard to contract interpretation:

> The construction of a written instrument to be adopted is the one which appears to be in accord with justice and common sense and the probable intention of the parties. It is to be interpreted as a business transaction entered into by practical men to accomplish an honest and straightforward end. The judicial interpretive function is to consider what was written, in the entire context of the circumstances under which it was written, and to accord the language a rational meaning in keeping with the expressed general purpose.

Id. at 453. In making its decision to affirm the Chancery Divison's denial, the Appellate Division described the plaintiff's argument as such:

> Plaintiff's interpretation would give the "literal sense of particular terms, isolated from the context, ascendancy over the reason and spirit of the whole of the contract . . . assessed in relation to the circumstances and the situation of the parties and the objects they were striving to attain," which is to be avoided.

Id. at 452-53 (quoting Krosnowski v. Krosnowski, 22 N.J. 376, 385 (1956).

In the case at hand, the extensive correspondence between Centerplate and DAE throughout their negotiations provides sufficient evidence to determine that the meaning of "Contract Life" is unambiguous. First, DAE used a synonymous term, "Life of Agreement," in its Request for Proposals. Thereafter, in its Financial Proposal selected by DAE, Centerplate referred to the "industry standard buy-back provision in case of early termination. . . [in which] the unamortized portion of the investment will be reimbursed to Centerplate by the Owners or the successor Concessionaire" "based on the schedule outlined in the Request for Proposal." Centerplate's Stmt. of Facts, ¶ 8. If the court were to follow DAE's interpretation of "Contract Life," there would be no need, let alone any opportunity, for Centerplate to obtain

reimbursement from the successor Concessionaire, as the agreement would have terminated and no more would be due to Centerplate at that point. Moreover, Centerplate makes reference to the Request for Proposals in the same paragraph in which it discusses payment by the successor Concessionaire. If DAE truly meant "Life of Agreement" to mean the actual term, certainly it would have addressed these issues at the time it chose Financial Proposal – 3. Such correspondence thus far leaves room for only one reasonable interpretation of "Contract Life."

As the negotiations continued, DAE attempted to replace "life of agreement" to "60 months." However, the change was rejected by Centerplate and the final Agreement included the term "Contract Life." There were no further changes made to indicate that the term would mean something different in the final Agreement than in both DAE's Request for Proposals and Centerplate's Financial Proposal – 3.

Moreover, Centerplate asserts that DAE's interpretation of "Contract Life" renders the inclusion of "Base Facilities" and "Leasehold Improvements" purposeless in Section 6.7. It notes that "[h]ad the parties not intended for Centerplate to recover the unamortized portion of its Base Facilities and Leasehold Improvement costs if the Agreement were terminated early, they would not have included the terms 'Base Facilities' and 'Leasehold Improvements' in Section 6.7." Centerplate's Reply Br., 9.

The court must agree. As noted above, the contract must be interpreted as a whole, taking into consideration "all writings forming part of the same transaction." Nester 301 N.J. Super. at 210. If these investments were to be considered fully amortized at the moment that the contract was terminated, there would be no purpose for including these investments into the amortization schedule.

In addition, the other provisions in Section 6.7 provide for an amortization schedule of 36

months for investments in "Pre-Opening Services Expenses," "Smallwares," and "Uniforms." As Centerplate points out in the Certification of Kevin McNamara, "it is . . . unreasonable to think Centerplate, or any other hospitality contractor, would protect smallwares, uniforms, and equipment for a fixed amortization period, but leave the most significant portion of its capital investments, improvements to the real property, unprotected."[2] McNamara Cert. ¶ 16. Such an interpretation would lead to "ascendancy over the reason and spirit of the whole of the contract," something which courts have declined to allow time and time again.

As stated above, an ambiguity exists in a contract if the terms are susceptible to more than one reasonable interpretation. Here, when taking into account all of the relevant documents before the court, including the RFP, the financial proposal, the drafts, and the final agreement, no confusion existed between the parties as to the meaning of either "Life of Agreement" or "Contract Life" during negotiations. Moreover, when reading the phrase within the context of the provision itself, the only reasonable interpretation would be for the amortization schedule to exist for the intended duration of the Agreement, rather than the actual duration of the Agreement. To decide otherwise would "torture" the language of the surrounding provisions.

Finally, the court finds that "Contract Life" unambiguously refers to the intended duration of the Agreement as initially negotiated between the parties: 10 years. Although the first Amendment extended the contract term to twelve years, at that time there was no increase in expenditures for leasehold improvements or base facilities. Therefore, the court concludes that the retention of the initial 10-year contract life is most equitable.

The court appreciates that there is an argument that since "Leasehold Improvements" and

[2] Although the issue is not before the court, 36 months would appear to be a fair estimate of the lifespan of smallwares, uniforms and pre-opening services expenses, as such items would generally last for approximately 3 years.

"Base Facilities" would generally be more expensive, longer lasting, and more likely to inure to the benefit of a landlord than mere "Equipment," which is to be amortized over "120 months," it would be plausible to allow Centerplate 144 months over which to amortize the "Leasehold Improvements" and "Base Facilities." That argument assumes the parties consciously decided to treat "Leasehold Improvements" and "Base Facilities" differently than "Equipment." More likely, as set out on page 2 above, the RFP set the amortization of "Equipment" as "120 months," and while there were debates and changes regarding the other costs, the parties neither debated nor changed the "120 months" for "Equipment." In sum, since the parties did not argue or debate the issue of whether "Leasehold Improvements" or "Base Facilities" should be amortized over a period of time greater than the 120 months allocated to "Equipment," the court will not grant Centerplate an additional 24 months unamortized based on that comparison.

Conclusion

For the reasons stated, Centerplate's motion for partial summary judgment is hereby GRANTED, but only to the extent that the court decrees that the correct measurement is 54/120, not 78/144, leaving Centerplate with a balance of 45%, not the 54% requested. DAE's cross-motion for partial summary judgment is hereby DENIED.

Very truly yours,

JSR:kfb

JAMES S. ROTHSCHILD, JR., JSC