

Not Reported in A.2d, 2009 WL 2357963 (Conn.Super.)  
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UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.

Superior Court of Connecticut,  
 Judicial District of Stamford-Norwalk.  
 CERUZZI DERBY REDEVELOPMENT, LLC

v.  
 CITY OF DERBY.  
**No. X05CV085009782S.**

July 1, 2009.

Carmody & Torrance, New Haven, for Ceruzzi  
 Derby Redevelopment, LLC.

Halloran & Sage, Westport, for City of Derby.

BLAWIE, J.

Introduction

\*1 This case arises out of a dispute between the defendant City of Derby, Connecticut (Defendant or City), and a limited liability company which had entered into two contracts with the City, the plaintiff Ceruzzi Derby Redevelopment, LLC (Plaintiff). The first contract was signed in 2004 and is captioned "Preferred Development Agreement." The second contract was executed by the parties in 2005 and is captioned "Amended Preferred Development Agreement" (Contract). The 2005 Contract is the operative contract for the purposes of this litigation. The 2005 Contract was signed as a consequence of a plan of redevelopment adopted by the City to redevelop approximately 14 acres of downtown Derby. In December 2007, the Derby Board of Alderman voted to terminate the Contract with the Plaintiff. The Plaintiff alleges that the City breached the Contract unilaterally, causing the Plaintiff damages.

The Plaintiff's Revised Complaint sounds in four counts:

1) Breach of Contract;

2) Specific Performance;

3) Breach of the Duty of Good Faith and Fair Dealing; and

4) Quantum Meruit.

The parties have elected to try this case to the court. The Defendant has filed a motion to strike the second and third counts of the Revised Complaint, as well as the fourth paragraph of the Plaintiff's Claim for Relief in the Revised Complaint, which is also a request for Specific Performance as alleged in count two. The court will first set forth the legal standard applicable to motions to strike, followed by an analysis of the specific allegations in the Revised Complaint.

Legal Standard

A motion to strike is authorized under Practice Book § 10-39. The relevant portion of that section provides that a motion to strike may be filed "[w]henver any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint ... or of any one or more of the counts thereof, to state a claim upon which relief can be granted, or (2) the legal sufficiency of any prayer for relief in any such complaint ..." "The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint. The court must construe the facts in the complaint most favorably to the Plaintiff ... If facts provable in the complaint would support a cause of action, the motion to strike must be denied." Faulkner v. United Technologies Corporation, 240 Conn. 576, 580 (1997). "Thus the court assumes the truth of both the specific factual allegations and any facts fairly provable thereunder. In doing so, moreover, the court reads the allegations broadly, rather than narrowly ... Furthermore, in ruling on a motion to strike, the court is limited to the facts alleged in the complaint." Craig v. Driscoll, 262 Conn. 312, 321 (2003).

Analysis

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## Count 2: Specific Performance.

\*2 The right to specific performance turns upon whether the Plaintiff can be properly compensated at law. In other words, the Plaintiff must not only establish a breach of contract by the defendant, it must also demonstrate that such breach is not susceptible of fair and proper compensatory damages. The court will not grant specific performance if monetary damages will afford the Plaintiff an adequate remedy at law. Specific performance is also inappropriate if the court would thereby become involved in the supervision of details of performance of the contract, in this case the plan of redevelopment for the City of Derby. This plan contains numerous “project milestones,” and by way of one example, it allegedly contemplates the institution of **eminent domain** proceedings by the Defendant City against certain hold out private property owners within the area of redevelopment. Revised Complaint, Count One, ¶ 18.

A plan for redevelopment of an economically depressed urban area is by its nature an ambitious undertaking. In this case it involved the legislative creation of a special taxing district by the General Assembly, along with public and private financing, and interactions between various city, state and federal agencies. There are numerous conditions precedent for many required activities under the contract. Some of these conditions precedent, as counsel for the City argued in its motion to strike the specific performance count, are in the control of third parties who are not bound by the Contract at issue. This contention is supported by a review of the Revised Complaint itself. According to Count One, paragraph 9 of the Revised Complaint, “The [Contract] incorporated a series of milestone tasks which would lead to conceptual planning and regulatory permits and approvals necessary to move the project toward commencement of construction. These contractual milestone tasks included, but were not limited to, investigation of the environmental and subsurface conditions at the site and under the buildings located on the site, title searches and surveys, a phasing plan, permits and approvals at the federal, state and local levels and the execution of the Land Disposition Agreement.”

Executing a viable plan for economic redevelopment can prove to be a challenging exercise even for parties that enjoy a good collaborative working relation-

ship. It is simply unworkable when there has been a complete breakdown of that public-private relationship, as is evidenced in these allegations. “When deciding whether to award specific performance, the court does not consider the validity of the contract alone, but, once it has found a valid contract, takes into account other relevant interactions between the parties to determine whether a grant of specific performance would satisfy the principles of equity.” *Battalino v. Patten*, 100 Conn.App. 155, 168, cert. denied, 282 Conn. 924 (2007). The mischief likely to result from a court-enforced continuance of a relationship under such circumstances is so great that the interests of society (that is, the citizens of Derby and its environs, as distinct from the Defendant City of Derby), require that the remedy of specific performance be denied. Moreover, denial of specific performance does not deprive the Plaintiff of all remedy, and the court finds that the Plaintiff that is seeking specific performance has not completed its own performance. <sup>FN1</sup>

<sup>FN1</sup>. As counsel for the Plaintiff conceded in oral argument before this court on the motion to strike, “We didn't get very far or far enough in this Contract.” Counsel went on to say, “But, we didn't get to where we needed to go because the City fell down on its obligations ...” Even assuming, *arguendo*, that the Plaintiff's lack of progress on the plan of redevelopment was entirely attributable to the Defendant's actions or inactions, such a circumstance, coupled with the existence of numerous conditions precedent to fulfillment of the Contract and the need for continued court oversight of the project that may readily be envisioned if specific performance were to be ordered, all militate against such a remedy under the allegations in this case.

\*3 The court agrees with the general proposition set forth by the Plaintiff that, “Where the property is unique, the law permits the court to order specific performance of the Contract.” Revised Complaint, Count Two, ¶ 35. However, this Contract is an agreement between a governmental entity and a private LLC that is part and parcel of a sweeping and ambitious plan to remake the City of Derby. It is therefore no mere commercial transaction. Nor is it a simple contract for the purchase of real estate, which

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is the fact pattern in some of the cases relied upon by the Plaintiff in its opposition to the motion to strike the specific performance count. As the Plaintiff itself alleges, the City's plan of redevelopment was adopted “[p]ursuant to Connecticut General Statutes Chapter 130 (Conn. Gen. Stat § 8-126).” Revised Complaint, Count One, ¶ 3. Among other provisions in Chapter 130, a statute provides that such a redevelopment plan may only be approved if “public benefits resulting from the redevelopment plan will outweigh any private benefits.” General Statutes § 8-127(b)(6)(A).

Because millions of taxpayer dollars are at stake in the redevelopment project, this Contract is infused with the public interest,<sup>FN2</sup> and specific performance in the form of a shotgun marriage based upon the Contract between the City and the Plaintiff would not satisfy the principles of equity. This is particularly so in light of the many project milestones Plaintiff has alleged here, milestones which, if they are to be achieved at all, would require the diligent efforts of dozens of people acting on behalf of the parties to the Contract, as well as third parties not bound by that Contract. A failure to achieve any one of these milestones in the future might quickly be ascribed to a lack of good faith or a failure of effort, similar to what is already alleged here.

FN2. The first statute in Chapter 130 is the relevant statute dealing with redevelopment. It is entitled “Declaration of Public Policy,” and it provides as follows:

It is found and declared that there have existed and will continue to exist in the future in municipalities of the state substandard, unsanitary, deteriorated, deteriorating, slum or **blighted** areas which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and acci-

dent protection and other public services and facilities, and the existence of such areas constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, and retards the provision of housing accommodation; that this menace is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the acquisition of property for the purpose of eliminating substandard, unsanitary, deteriorated, deteriorating, slum or **blighted** conditions thereon or preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by municipalities acting through agencies known as redevelopment agencies as herein provided, and any assistance which may be given by any public body in connection therewith, are public uses and purposes for which public money may be expended and the power of **eminentdomain** exercised; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination. General Statutes § 8-124.

The Connecticut Judicial Branch has promulgated a series of civil jury instructions which are available on the web at <http://www.jud.ct.gov/II/civil/>. In the “Introduction to General Damages” for breaches of contract, § 4.5-1, it states, “There are no instructions for equitable forms of relief such as specific performance and rescission, because those are for the court, not the jury, to determine.” As this entire matter is being tried to the court in the absence of a jury, the court finds that the nature of the allegations in this case, *even if proven*, are insufficient to entitle the Plaintiff to this form of equitable relief. The court further finds that the Plaintiff's remedy at law is adequate.

Accordingly, the motion to strike the second count of the Revised Complaint seeking specific performance is granted. Paragraph four in the Plaintiff's Claim for Relief seeking equitable relief, including specific

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performance of the Contract and the transfer of City-owned properties in the redevelopment area to the Plaintiff, is also ordered stricken on the same grounds.

Count 3: Breach of the Duty of Good Faith and Fair Dealing.

\*4 The Defendant asserts that the third count of the Plaintiff's Revised Complaint, which alleges a breach of the duty of good faith and fair dealing, should be stricken for failing to state a legally sufficient cause of action. The Connecticut Supreme Court has stated that "[t]he concept of good faith and fair dealing is [e]ssentially ... a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended." (Internal quotation marks omitted.) *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 302 (2004). The Defendant argues that the Plaintiff has failed to allege a bad faith standard, and merely states a breach of contract claim with no allegations of malice, ill will or moral obliquity. The court is not persuaded.

While it is true that the third count of the Revised Complaint does not employ the words "bad faith," "malice," or "ill will," it does accurately recite that, "Implied in each contract made and performed in Connecticut is a duty of the parties to perform the contract in good faith and deal with each other fairly." Revised Complaint, Count Three, ¶ 34. It also goes on to allege that, "The City has breached this duty of good faith and fair dealing by its conduct." Revised Complaint, Count Three, ¶ 35. The Appellate Court recently quoted with approval the jury instruction of the trial court on this issue. "Good faith performance or enforcement of a contract emphasizing faithfulness to an agreed common purpose and consistency with the justified expectations of the other party ... Good faith and fair dealing means an attitude or state of mind denoting honesty of purpose and freedom from intention to defraud. It means being faithful to one's duty and obligation under the contract ... Good faith is defined as the opposite of bad faith. If the defendant engaged in bad faith, you must find that it did not fulfill the covenant." *Froom Development Corporation v. Developers Realty, Inc.*, 114 Conn.App. 618, 628 (2009).

While the sufficiency of the Plaintiff's allegations must await the evidence to be adduced at trial, recall

that for the purposes of this motion to strike, the court must assume the specific factual allegations of the Plaintiff's Revised Complaint to be the truth. This assumption is extended as well to any facts fairly provable thereunder. The presence of bad faith, the opposite of good faith, is therefore a permissive inference where a breach of the duty of good faith is specifically alleged. "Whether a party has acted in bad faith is a question of fact, subject to review only for clear error." *Renaissance Management Co. v. Connecticut Housing Finance Authority*, 281 Conn. 227, 240, (2007). "The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term ... To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Internal quotation marks omitted). *Id.*

\*5 Under this analysis the Plaintiff has alleged sufficient facts to withstand the motion to strike as to this count. Paragraphs 1-33 of the Breach of Contract count are incorporated by reference into the third count "as if fully recited herein." Revised Complaint, Count Three, ¶¶ 1-33. Those 33 paragraphs allege numerous steps taken or not taken by the City, milestones not met to the detriment of the Plaintiff which the court must assume to be the truth for the purposes of this motion to strike, both as to the specific factual allegations they contain, as well as any facts fairly provable thereunder. The Defendant's alleged pattern of behavior, its actions and inactions under the Contract, and alleged breaches of the duty of good faith may be said to have impeded the Plaintiff's right to receive economic benefits that it reasonably expected to receive under the Contract.

#### Conclusion

The motion to strike count two of the Revised Complaint, Specific Performance, and the motion to strike item four in the Plaintiff's Claim for Relief seeking equitable relief, are granted.

The motion to strike count three of the Revised Complaint, Breach of the Duty of Good Faith and Fair Dealing, is denied.

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