THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SKYWAYS MOTOR LODGE CORP.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2018-0048-TMR
	)	
DELAWARE RIVER AND BAY AUTHORITY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 21, 2019
Date Decided: May 31, 2019

A. Kimberly Hoffman, James A. Landon, Nicolas Kravitz, MORRIS JAMES LLP, Wilmington, Delaware; *Attorneys for Plaintiff*.

R. Judson Scaggs, Jr., Donna L. Culver, Barnaby Grzaslewicz, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; *Attorneys for Defendant*.

MONTGOMERY-REEVES, Vice Chancellor.

Plaintiff runs a motor lodge hotel on land it leases from defendant. Plaintiff claims that under the lease agreement, plaintiff can sublease portions of the leased land for the purpose of operating additional businesses, but plaintiff must first get defendant's approval, which defendant cannot withhold except for substantial and compelling reasons. Defendant disagrees with plaintiff's interpretation of the lease agreement and argues that plaintiff's right to construct anything on the leased land is much narrower than plaintiff's interpretation. Thus, defendant has rejected numerous proposals for commercial subleases.

Eventually, plaintiff and defendant discussed a settlement to resolve their contract-interpretation dispute. Plaintiff claims that the parties reached an oral settlement agreement. Under the terms of this purported settlement, plaintiff would surrender its interest in the lease in exchange for payment from defendant of $6,300,000. Plaintiff alleges that defendant breached that settlement agreement.

Plaintiff makes several arguments in the alternative. First, plaintiff claims that defendant breached the lease by rejecting plaintiff's proposals for commercial subleases. Second, plaintiff asserts that defendant interfered with plaintiff's right to exclusively possess the leasehold while modifying land adjacent to plaintiff's leasehold. And third, plaintiff contends that defendant repudiated the lease agreement by pursuing regulatory approval for development of the leased premises that potentially precludes plaintiff's current use of the premises.

Defendant moves to dismiss the entire complaint, arguing that plaintiff fails to state a claim under Court of Chancery Rule 12(b)(6). Regarding the oral settlement agreement, defendant argues that the parties did not reach an agreement and that even if they did, the statute of frauds prevents the enforcement of the oral settlement agreement. Regarding the lease, defendant proffers a different interpretation than plaintiff, under which defendant did not breach or repudiate the lease.

I deny defendant's motion in its entirety. First, plaintiff's allegations state reasonably conceivable claims that the parties reached an oral settlement agreement and that the part performance exception to the statute of frauds applies as to the purported oral settlement agreement. Second, plaintiff's alternative theories state reasonably conceivable claims that defendant breached the lease agreement.

I. BACKGROUND

For purposes of the Motion to Dismiss, I draw all facts from Plaintiff's First Amended Verified Complaint (the "Complaint") and the documents incorporated by reference therein.[1]

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[1] On a motion to dismiss under Rule 12(b)(6), the Court may consider a document outside the pleadings if "the document is integral to a plaintiff's claim and incorporated into the complaint" or "the document is not being relied upon to prove the truth of its contents." *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995)); *see Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013).

A. The Lease and Related Settlement

Plaintiff Skyways Motor Lodge Corp. ("Skyways") is a Delaware corporation running a motor lodge hotel on approximately seven acres of land (the "Leasehold Area") adjacent to New Castle County Airport (the "Airport").[2] Skyways leases this land from Defendant Delaware River and Bay Authority ("DRBA").[3] DRBA is a bi-state governmental agency serving Delaware and New Jersey.[4]

Skyways entered the Airport – Motor Inn Land Lease (the "Lease") with New Castle County, DRBA's predecessor-in-interest, on February 10, 1987.[5] Skyways and DRBA agreed to a series of Lease amendments in 1997, 1998, and 2001.[6] The current term of Skyways' Lease is scheduled to end on December 31, 2031 (the "Term"), and Skyways has an option to extend the Lease for fifteen years, ending

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2 Compl. ¶¶ 1-2, 7.

3 *See id.* ¶ 11.

4 *Id.* ¶ 3.

5 *Id.* ¶ 7; *id.* Ex. B. DRBA became New Castle County's sucessor-in-interest by entering into a ground lease with New Castle County on June 30, 1995. Compl. ¶ 10. This ground lease includes the Leasehold Area that Skyways leases. *Id.*

6 Compl. ¶ 12.

on December 31, 2046.[7] Skyways pays a set rent plus a percentage of gross receipts Skyways receives as rent from any sublessees.[8]

The terms of the Lease require Skyways to obtain DRBA's consent for Skyways to sublease "all or substantially all" of the Leasehold Area.[9] Skyways also requests consent from DRBA before proceeding with a sublease for less than all or substantially all of the Leasehold Area.[10] This is, in part, because New Castle County typically requires a signature from the owner, DRBA here, on zoning applications for any leasehold improvements.[11]

Under the terms of Article II, Paragraph 2(a) of the Lease, Skyways may use the leasehold "only for the construction, furnishing, operation and maintenance of a Motor Inn as a necessary public facility, and uses ancillary thereto or compatible therewith."[12] Skyways may also use the Leasehold Area for the "construction and operation of necessary related facilities, including a restaurant, cocktail lounge and

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7 *Id.* ¶ 26.

8 *Id.* ¶ 9.

9 *Id.* ¶ 13.

10 *See id.* ¶¶ 16, 18.

11 *Id.* ¶ 17.

12 *Id.* Ex. B art. II, § 2(a).

swimming pool, and other ancillary or compatible facilities and uses."[13] If Skyways desires to "construct and operate facilities not encompassed by [Article II, Paragraph 2(a) of the Lease]," Skyways must obtain "the prior written approval of [DRBA], which shall not be withheld or delayed except for substantial and compelling reasons."[14]

Skyways' hotel has become increasingly obsolete, and the hotel no longer generates enough revenue for Skyways to meet its lease obligations.[15] Skyways has sublet portions of the Leasehold Area in the past to generate revenue and to fulfill its obligations under the Lease, and DRBA signed the usual consents and zoning applications.[16] More recently, in an effort to fulfill its financial obligations to DRBA, Skyways proposed to DRBA several subleases for purposes such as structured parking, restaurants, a grocery store, and a gas station and convenience store.[17] DRBA rejected these proposals.[18] Without DRBA's consent to a sublease proposal, no sublessee will sublease a portion of the Leasehold Area from

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13 *Id.*

14 *Id.*

15 Compl. ¶ 28.

16 *Id.* ¶¶ 21, 30.

17 *Id.* ¶¶ 32-36.

18 *Id.* ¶ 48.

Skyways.[19] Skyways' inability to sublease portions of the Leasehold Area to other businesses diminishes its ability to generate revenue.[20]

As an alternative to pursuing DRBA's consent to various sublease proposals, Skyways and DRBA began negotiating a buyout of Skyways' Lease at the fair value of the remainder of the Term.[21] A July 25, 2017 letter from A. Kimberly Hoffman, Skyways' outside counsel, to Donald Isken, DRBA's outside counsel, reflects the parties' initial positions regarding this buyout.[22] The letter reflects that they had agreed to a buyout price of $6,300,000,[23] but they had not agreed regarding closing costs and other ancillary termination fees.[24] To release its future claims, Skyways wanted DRBA to pay total closing costs and any termination fees, allowing Skyways to pay zero out-of-pocket costs.[25] In response, Isken offered that DRBA would pay

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19 *Id.* ¶ 51.

20 *See id.* ¶ 29.

21 *Id.* ¶ 53.

22 *Id.* Ex. C.

23 Exhibit C to the Complaint lists the price as $6,300,000, but Exhibit D to the Complaint lists the price as $6,330,000. It is not clear which amount is the correct amount or whether the incorrect amount is the result of a typographical error or a miscommunication. My analysis does not rely on the precise amount of the buyout price, and I therefore need not address this discrepancy.

24 Compl. Ex. C; Compl. ¶ 54.

25 Compl. Ex. C.

$6,300,000 and its portion of a customary allocation of closing costs; in exchange Skyways would pay its portion of closing costs and release any claims against DRBA (the "Settlement" or "Settlement Agreement").[26] DRBA's board must approve the terms of the Settlement, and Isken offered to add the Settlement to the next board meeting agenda so that the board could formally vote to approve the terms of the Settlement.[27]

On September 7, 2017, Hoffman called Isken to accept his offer on behalf of Skyways.[28] Hoffman also sent Isken a form letter of intent (the "LOI") containing the Settlement's material terms on September 13, 2017.[29] On that same date, Hoffman sent Isken a Notice of Default notifying DRBA of Skyways' breach of contract claims against DRBA and preserving Skyways' claims in the event DRBA breached the Settlement.[30]

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26 Compl. ¶ 54.

27 *Id.*

28 *Id.* ¶ 56.

29 *Id.*; *see id.* Ex. D.

30 Compl. ¶ 56; *see id.* Ex. E.

On September 18, 2017, DRBA submitted the Settlement to a subcommittee of its board.[31] This subcommittee did not have authority to approve the terms of the Settlement, and DRBA's board never voted to approve or reject the Settlement.[32]

On September 19, 2017, Isken sent a letter to Hoffman responding to the Notice of Default and informing Hoffman that the Notice of Default did not demonstrate "a good faith effort on the part of Skyways towards negotiating a potential [settlement]."[33] Isken's letter did not address the September 18 subcommittee meeting.[34] On September 21, 2017, Hoffman wrote back to Isken and explained that the Notice of Default's purpose was to preserve her client's rights, and she expressed her client's desire to pursue the Settlement.[35]

Isken and Hoffman next spoke on October 2, 2017.[36] Isken "disclosed for the first time that the [Settlement] had already been referred to a DRBA subcommittee and was 'considered in September with staff,' but that no recommendation was made

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31 Compl. ¶ 57.

32 *Id.*

33 *Id.* ¶ 58; *id.* Ex. F, at 2.

34 Compl. ¶ 58; *see id.* Ex. F.

35 Compl. ¶ 59; *id.* Ex. G, at 1.

36 Compl. ¶ 60.

to forward the matter to the entire board."[37] Isken said he would update Hoffman if the DRBA board took any action at the October meeting.[38] At that meeting, the board took no action regarding the Settlement.[39] The parties did not move forward with the Settlement.[40]

In anticipation of the Settlement, Skyways did not pursue other business opportunities for subleasing the Leasehold Area.[41] Skyways claims damages from this loss of opportunity.[42] Additionally, Skyways had to place $290,000 cash into escrow to satisfy one of its banks when the Settlement did not proceed as Skyways had planned.[43]

B. DRBA's Modifications to the Airport Property

According to Skyways, the Lease requires DRBA to obtain Skyways' consent before DRBA may alter the Leasehold Area.[44] DRBA undertook certain

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37 *Id.*

38 *Id.*

39 *Id.*

40 *See id.* ¶¶ 61-62.

41 *Id.* ¶ 61.

42 *Id.*

43 *Id.* ¶ 62.

44 *Id.* ¶ 69.

improvements to the Leasehold Area without obtaining Skyways' consent.[45] The improvements consist of a new means of ingress and egress for Airport employees and visitors (the "Driveway").[46] Skyways alleges that the Driveway reduces parking available to Skyways' patrons and guests, limits future development by Skyways, and interferes with Skyways' right to exclusive possession of the Leasehold Area.[47]

C. DRBA's Long-Term Plan for the Airport

DRBA is developing a long-term plan (the "Plan") for the Airport and has hired a consultant to assist in this effort.[48] On October 27, 2017, DRBA held a public meeting regarding the draft Plan and related proposed uses for the Airport property and the Leasehold Area.[49] The draft Plan limits the uses of the Leasehold Area to "mixed use and parking."[50] Alan Spiro, a principal of Skyways, attended the public meeting and learned that the Federal Aviation Administration (the "FAA") would require DRBA to terminate any underperforming leases upon adoption of the Plan.[51]

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45 *Id.* ¶ 68.

46 *Id.* ¶ 73.

47 *Id.* ¶¶ 71-73.

48 *Id.* ¶ 76.

49 *Id.* ¶ 78.

50 *Id.* ¶ 80.

51 *Id.* ¶ 82.

Because the details of the Plan appear to conflict with the terms of Skyways' Lease, Skyways alleges that DRBA's action, seeking FAA approval of the Plan, constitutes an anticipatory breach of the Lease.[52]

D. This Litigation

On January 19, 2018, Skyways filed its initial complaint in this matter. On May 15, 2018, Skyways filed the operative First Amended Verified Complaint. In its Complaint, Skyways seeks specific performance of the oral Settlement Agreement.[53] In the alternative, Skyways seeks damages based on DRBA's alleged breach of the implied covenant of good faith and fair dealing or promissory estoppel.[54] Also in the alternative, Skyways seeks damages based on DRBA's alleged breach of the Lease, declaratory judgment as to allowed improvements under the Lease, or injunctions related to the Lease.[55] DRBA moved to dismiss all counts of the Complaint for failure to state a claim on May 30, 2018. This Court held a hearing on the motion to dismiss on February 21, 2019.

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52 *Id.* ¶ 84.

53 *Id.* ¶¶ 85-91.

54 *Id.* ¶¶ 92-103.

55 *Id.* ¶¶ 104-18.

II. ANALYSIS

When considering a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), a court must accept all well-pled factual allegations in the complaint as true, accept even vague allegations in the complaint as well-pled if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the nonmoving party, and deny the motion unless the plaintiff could not recover "under any reasonably conceivable set of circumstances susceptible of proof."[56] These "pleading standards for purposes of a Rule 12(b)(6) motion 'are minimal,'" and the operative test is "one of 'reasonable conceivability,'" which asks "whether there is a 'possibility' of recovery."[57]

A. Claims Based on the Settlement

1. Breach of the Settlement

Skyways claims that Hoffman's acceptance on behalf of Skyways of DRBA's settlement offer during the September 7, 2017 conversation with Isken formed an

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[56] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (citing *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995); *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)) (quoting *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 227 (Del. 1982)).

[57] *In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *23-24 (Del. Ch. May 21, 2013) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011)).

oral contract.[58] According to Skyways, the Settlement is a valid and enforceable agreement between Skyways and DRBA, and DRBA breached the Settlement by failing to put the terms of the Settlement to a formal vote before its board.[59] Skyways seeks specific performance from DRBA.[60]

DRBA argues that Skyways fails to adequately allege that the Settlement is a valid and enforceable agreement.[61] First, DRBA raises the statute of frauds as a defense against the alleged oral Settlement Agreement.[62] Second, DRBA argues that subsequent writings between the parties show that the parties did not create an enforceable contract.[63]

a. The statute of frauds

Under Delaware's statute of frauds, 6 *Del. C.* § 2714, "any agreement made . . . upon any contract or sale of lands, . . . or any interest in or concerning them" must be in writing and "signed by the party to be charged therewith." Skyways argues that the statute of frauds applies only to contracts "creating or

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58 *See* Compl. ¶ 56.

59 *Id.* ¶¶ 86-87.

60 *Id.* ¶ 91.

61 Def.'s Opening Br. 14.

62 *Id.* at 16.

63 *Id.* at 17.

transferring" an interest in land.[64] Because the Settlement contemplated the "termination" of Skyways' interest, Skyways contends that the statute of frauds does not apply.[65]

Skyways' argument fails. Delaware courts have referred to the early termination of a tenant's lease interest with the tenant's consent as a surrender.[66] The concept of surrender applies here because the Settlement contemplates that Skyways would relinquish its lease rights to DRBA before the expiration of the Term.[67] Our courts have held that the surrender of a lease interest is subject to the statute of frauds.[68]

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64 Pl.'s Answering Br. 22.

65 *Id.* at 22-23.

66 *See, e.g.*, *Catawba Assocs. – Christiana LLC v. Jayaraman*, 2016 WL 4502306, at *3 (Del. Super. Aug. 26, 2016) ("[T]he JP Court held that the Property had been surrendered and that Pusan received legal possession as of December 11, 2015."); *Logan v. Barr*, 4 Del. (4 Harr.) 546, 546 (Super. 1847) ("The terms of the first act are sufficiently comprehensive to include a surrender of a lease; 'any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them.'"); *see also Surrender*, Black's Law Dictionary (10th ed. 2014) ("A tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated.").

67 *See* Compl. Ex. D, at 1 ("Proposal by [Skyways] to assign its leasehold interest . . . to [DRBA], which shall assume the same").

68 *Logan*, 4 Del. (4 Harr.) at 546 ("The terms of the first act are sufficiently comprehensive to include a surrender of a lease; 'any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them.'"); *see also Comm'rs of Lewes v. Breakwater Fisheries Co.*, 117 A. 823 (Del. Ch. 1922), *aff'd*, 128 A. 920 (Del. 1923).

Skyways also argues that the statute of frauds does not bar enforcement of the oral Settlement Agreement here because the part performance exception to the statute of frauds applies.[69] Part performance is a well-recognized exception to the statute of frauds for contracts involving interests in land.[70] "Part performance may be deemed to take a contract out of the provisions of the statute of frauds on the theory that acts of performance, even if incomplete, constitute substantial evidence that a contract actually exists."[71] "For the part performance exception to apply, however, the performance must be attributed solely to the oral agreement."[72] That is, the acts said to constitute part performance must be unequivocal and "must be of such a character that they can be naturally and reasonably accounted for in no other way than by the existence of some contract in relation to the subject matter in dispute."[73] The part performance must constitute "action that is explainable only as

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69 Pl.'s Answering Br. 23-24.

70 *E.g.*, *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *17 (Del. Ch. Apr. 21, 2015); *Lindsey v. M.A. Zeccola & Sons, Inc.*, 26 F.3d 1236, 1242 (3d Cir. 1994); *Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.*, 55 F. Supp. 2d 309, 316 (D. Del. 1999); *Aurigemma v. New Castle Care LLC*, 2006 WL 2441978, at *2 (Del. Super. Aug. 22, 2006) (quoting *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984)); *Frederick Enters., Inc. v. Sheehan*, 2015 WL 13333326, at *3 (Del. Com. Pl. Mar. 12, 2015).

71 *Quillen*, 482 A.2d at 747.

72 *Taylor v. Jones*, 2002 WL 31926612, at *4 (Del. Ch. Dec. 17, 2002).

73 *Langbord v. Wilson*, 1979 WL 175241, at *2 (Del. Ch. Oct. 30, 1979) (quoting *Rutt v. Roche*, 87 A.2d 805, 807 (Conn. 1952)).

part performance of the alleged oral contract,"[74] and not action "equally consistent" with some other scenario.[75] "Furthermore, the part performance exception . . . requires that the act of performance must be on the part of the complainant," and not the party to be charged.[76]

Skyways claims that it partially performed its obligations under the Settlement by ceasing negotiations with potential third-party purchasers of its lease interest and its lender to obtain a refinancing.[77] Skyways argues that no other scenario but the existence of the Settlement Agreement explains Skyways' actions.[78] DRBA responds that Skyways unilaterally decided to forgo the other opportunities with third-party purchasers and that Skyways' decision is not performance of any terms of the purported Settlement.[79]

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74 *E. Coast Resorts, Inc. v. Paroni*, 1990 WL 201399, at *5 (Del. Ch. Dec. 3, 1990).

75 *Langbord*, 1979 WL 175241, at *7; *see also Gebler v. Gall*, 1986 WL 11108, at *3 (Del. Ch. Sept. 4, 1986) ("The course of conduct of plaintiffs disclosed by the evidence is every bit as consistent with defendant's version of their mutual understanding as it is with a claim that they had a legal right to the property or at least to remain in the property rent-free.").

76 *Teeven v. Kearns*, 1993 WL 1626514, at *3 (Del. Super. Dec. 3, 1993); *accord Sussex Inv. Co. v. Clendaniel*, 129 A. 919, 921 (Del. Ch. 1925) ("[T]he equity which underlies the doctrine of part performance demands that the acts of performance must be by the party seeking the remedy.").

77 Pl.'s Answering Br. 24.

78 *Id.*

79 Def.'s Reply Br. 7.

Skyways asserts a reasonably conceivable connection between its decision to cease negotiations with potential third-party purchasers and the terms of the Settlement Agreement. At the motion to dismiss stage, the decision to cease other negotiations is sufficient because this act constitutes substantial evidence that the disputed contract actually exists and is explainable only as part performance of the alleged oral contract. Further, DRBA fails to offer any scenario that is an "equally consistent" explanation of Skyways' decision.[80] Thus, although the statute of frauds applies to the Settlement, Skyways' defense of part performance bars enforcement of the statute of frauds at this stage.

b. The parties' subsequent writings

DRBA argues that "[t]he words and deeds of Skyways and . . . DRBA, as reflected in the [parties' subsequent] correspondence . . . , defy any notion of an intent to be bound" by the Settlement Agreement.[81] DRBA specifically references four documents dated after September 7, 2017, the date of the purported Settlement Agreement: Skyways' LOI dated September 13, Skyways' Notice of Default dated September 13, and the parties' correspondence dated September 19 and 21.[82]

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80 *See id.* at 7-8.

81 Def.'s Opening Br. 17.

82 *Id.* at 17-20.

Whether these writings support or contradict the existence of the Settlement Agreement is fact-specific. First, DRBA notes a numerical discrepancy in the assignment fees of the Settlement ($6,300,000) and the LOI ($6,330,000).[83] Skyways attributes this discrepancy to scrivener's error.[84] Second, the LOI explicitly states that it "does not legally bind either party," and its language contemplates the parties' "further negotiations."[85] DRBA argues that the reference to "further negotiations" contradicts the existence of the oral Settlement Agreement.[86] The Complaint, however, alleges that the intent of the LOI was "to memorialize the parties' existing oral agreement" for the vote by DRBA's board.[87] Third, Skyways' Notice of Default asserts DRBA's various breaches of the Lease that the Settlement proposes to resolve and makes no mention of the Settlement.[88] The Complaint, however, alleges that the purpose of the Notice of Default was to "preserve Skyways' claims in the event Skyways breached the Settlement."[89] Fourth

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83 *Id.* at 18.

84 Pl.'s Answering Br. 17 n.3.

85 Compl. Ex. D, at 3.

86 Def.'s Opening Br. 18.

87 Compl. ¶ 56.

88 Def.'s Opening Br. 18; *see* Compl. Ex. E.

89 Compl. ¶ 56.

and finally, DRBA cites the language in Hoffman's September 21 letter.[90] In that letter, which is part of an exchange regarding the Notice of Default, Hoffman states that "DRBA and Skyways should move forward with the transaction contemplated by the [LOI]."[91]

Whether these subsequent writings "suggest the existence and contours of an oral agreement is, ultimately, a question of fact" that I am unable to resolve at this stage.[92] Dismissal of Count I based on either the statute or frauds or the parties' subsequent writings is inappropriate at this stage.[93]

2. Breach of the implied covenant of good faith and fair dealing

In the alternative to its breach of contract claim, Skyways alleges that DRBA breached the implied covenant of good faith and fair dealing by failing to put the

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90 Def.'s Opening Br. 19-20.

91 Compl. Ex. G, at 1.

92 *Grunstein v. Silva*, 2009 WL 4698541, at *9 (Del. Ch. Dec. 8, 2009).

93 Additionally, it is unclear to me whether I may consider the writings created subsequent to the Settlement Agreement. *See Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1229-30 (Del. 2018) ("'Under Delaware law, "overt manifestation of assent—not subjective intent—controls the formation of a contract."' As such, in applying this objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated to each other *up until the time that the contract was signed—i.e.*, their words and actions—including the putative contract itself." (emphasis added) (footnote omitted) (citing and quoting *Black Horse Capital, LP v. Xstelos Hldgs., Inc.*, 2014 WL 5025926, at *12 (Del. Ch. Sept. 30, 2014))).

terms of the Settlement to a formal vote of its board.[94] DRBA argues that this claim must "be dismissed because it is premised upon the same facts underlying Skyways' breach of the settlement agreement claim."[95] As support for its argument, DRBA cites *Kuroda v. SPJS Holdings, L.L.C.* for the proposition that a "breach of the implied covenant 'claim must fail because the express terms of the contract will control such a claim.'"[96]

With the limited record before me, I cannot determine whether the express terms of the purported oral Settlement Agreement include DRBA's obligation to put the terms of the Settlement to a formal vote of its board or whether the express terms merely imply this obligation.[97] Therefore, I deny DRBA's motion to dismiss Count II of the Complaint.

3. Promissory estoppel

Skyways also asserts a promissory estoppel claim as an alternative to its claims that DRBA breached the Settlement Agreement.[98] In support of this claim,

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94 Compl. ¶ 96.

95 Def.'s Opening Br. 21.

96 *Id.* (citing *Kuroda v. SPJS Hldgs, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009)).

97 Skyways sufficiently pleads that there is an oral Settlement Agreement, but the Court has insufficient information to determine all of the terms of the Settlement Agreement.

98 *Id.* ¶¶ 98-103.

Skyways alleges that DRBA's counsel promised to submit the terms of the Settlement to DRBA's board for a formal vote.[99] Skyways also claims that DRBA's counsel promised that the board would approve the agreement.[100] Relying on these promises, Skyways terminated its negotiations with potential third-party purchasers and sublessees.[101] Skyways claims damages arising from DRBA's failure to submit the Settlement to its full board for consideration.[102] Skyways alleges that its damages include placing $290,000 into escrow to satisfy its lender and losing the opportunity to sell its lease interest to a third-party acquirer.[103]

> A claim for promissory estoppel requires a plaintiff to show the following: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because

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99 *Id.* ¶ 99.

100 *Id.* DRBA disputes whether Skyways alleges this purported promise in its Complaint. The Complaint states, "DRBA made a promise, through its counsel, that it would submit the terms of the Settlement to its board and that the board would vote to approve the agreement." *Id.* Because I must draw all inferences in favor of the nonmoving party, I interpret this allegation to include the promise that the board would approve the agreement.

101 *Id.* ¶ 101.

102 *See id.* ¶¶ 58, 60-61, 100-01.

103 *Id.* ¶¶ 61-62.

> injustice can be avoided only by enforcement of the promise.[104]

Skyways satisfies the pleading standard applicable at this stage as to all four elements for promissory estoppel. First, it is reasonably conceivable that DRBA, through its counsel Isken, promised to cause its board to vote on the Settlement.[105] In fact, Isken's submission of the Settlement to the subcommittee supports Skyways' claim that DRBA, through Isken, made a promise to submit the Settlement to the board. In response, DRBA argues there can be no promissory estoppel because there was no Settlement. For the reasons I explained in section II.A.1, I have determined that Skyways states a reasonably conceivable claim that there was a Settlement.

Second, Skyways makes reasonably conceivable allegations that DRBA expected to induce Skyways' reliance on the promise. Skyways argues that "DRBA intended to induce Skyways to forgo third-party offers for its Leasehold interest."[106] DRBA responds that there was no promise.[107] But, as I have determined, there is an adequately alleged promise. With no other challenges to this element, DRBA fails

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104 *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 347-48 (Del. 2013) (citing *Chrysler Corp., (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1032 (Del. 2003)).

105 Because the promise to cause the board to vote on the Settlement is sufficient to support Skyways' claim of promissory estoppel, I do not address the promise that the board would approve the Settlement in my analysis here.

106 Pl.'s Answering Br. 27.

107 Def.'s Opening Br. 26 n.16.

to show that Skyways' promissory estoppel claim should be dismissed for insufficient allegations of DRBA's expectation to induce Skyways' reliance on the promise.

Third, Skyways adequately alleges that it reasonably relied on the purported promises. In particular, Skyways alleges that it relied on DRBA's promise when it ceased its negotiations with potential third-party purchasers and sublessees.[108] DRBA responds that Skyways' reliance was unreasonable because the approval process that DRBA must follow, as outlined by 17 *Del. C.* § 1701, requires multiple levels of approval.[109] Namely, the statute requires approval by a commission and allows the New Jersey or Delaware governor to cancel the commission's approval. Nonetheless, it is reasonably conceivable to infer, as Skyways argues,[110] that DRBA's counsel had prior approval and authority from DRBA to make a settlement offer.[111]

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108 Compl. ¶ 101.

109 *See* Def.'s Opening Br. 26.

110 Pl.'s Answering Br. 29.

111 *Id.* (citing Del. Lawyers' R. Prof'l Conduct 1.2). Skyways additionally argues that Skyways' LOI and Notice of Default evidence the parties' continuing negotiations and, thus, make Skyways' reliance unreasonable. Def.'s Opening Br. 25-26. I address above the applicability of the parties' subsequent writings to arguments at this stage of the litigation. *See* section II.A.1.b.

Fourth and finally, Skyways alleges that because it cannot resume its negotiations with potential third-party purchasers and sublessees, injustice can be avoided only with the Court's enforcement of DRBA's promise.[112] DRBA's lone response is that Skyways will not suffer any injustice because DRBA made no definite promise and Skyways' reliance was not reasonable.[113] This argument fails for the reasons I have just outlined.

Because Skyways' allegations support a reasonably conceivable claim for promissory estoppel, I deny DRBA's motion to dismiss Count III of the Complaint.

B. Claims Based on the Lease's Permitted Uses

1. Breach of the Lease

Skyways claims in Count IV of its Complaint that DRBA breached the Lease (1) by failing to approve Skyways' sublease proposals as the Lease requires or by failing to meaningfully respond at all to Skyways' sublease proposals and (2) by failing to assure Skyways that DRBA would execute the requisite consents and zoning applications related to Skyways' sublease proposals.[114] Skyways alleges these failures caused the loss of a number of business opportunities.[115] Additionally,

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112 Compl. ¶ 102.

113 Def.'s Opening Br. 26 n.17.

114 Compl. ¶¶ 105-06.

115 *Id.* ¶ 106.

Skyways requests in Count V of its Complaint that this Court order DRBA to give DRBA's reasons for rejecting the proposals or, in the absence of such reasons, give its approval.[116]

"Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff."[117]

The parties do not dispute whether the Lease is a valid and enforceable agreement. Rather, their dispute turns on its interpretation. "Delaware follows an objective theory of contracts, 'which requires a court to interpret a particular contractual term to mean "what a reasonable person in the position of the parties would have thought it meant."'"[118] Delaware courts interpret the clear and unambiguous terms of a contract according to their plain meaning.[119] If a term in a contract is reasonably susceptible to more than one interpretation, then that term is

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116 *Id.* ¶¶ 109-11.

117 *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1279 n.28 (Del. 2016) (quoting *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003)).

118 *Narayanan v. Sutherland Glob. Hldgs. Inc.*, 2016 WL 3682617, at *11 (Del. Ch. July 5, 2016) (quoting *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *10 (Del. Ch. Sept. 11, 2015)).

119 *Id.*

ambiguous, but "[t]he parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous."[120]

Article II, Section 2(a) of the Lease limits Skyways' use of the Leasehold Area:

> The [Leasehold Area] shall be used only for the construction, furnishing, operation and maintenance of a Motor Inn as a necessary public facility, and uses ancillary thereto or compatible therewith.
>
> The construction and operation of necessary related facilities, including a restaurant, cocktail lounge and swimming pool, and other ancillary or compatible facilities and uses, will be permitted.
>
> In the event [Skyways] desires to construct and operate facilities not encompassed by this paragraph it may do so only with the prior written approval of [DRBA], which shall not be withheld or delayed except for substantial and compelling reasons.[121]

DRBA interprets this provision to give it "the right to reject construction of facilities that have nothing to do with using the Leasehold Area for the operation of a Motor Inn."[122] The first sentence, according to DRBA, limits the "use of the

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120 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

121 Compl. Ex. B art. II, § 2(a) (formatting added).

122 Def.'s Opening Br. 28.

Leasehold Area to a motor inn and ancillary and compatible uses."[123] The second sentence defines what facilities Skyways may build and operate without DRBA's approval: a restaurant, cocktail lounge, and swimming pool, and structures ancillary or compatible to only those three related facilities.[124] For example, the provision lists a swimming pool as a necessary related facility; a fence surrounding the pool would be an ancillary or compatible facility to a pool.[125] DRBA argues that the third sentence serves two purposes.[126] It defines those facilities for which Skyways must obtain DRBA's approval to construct or operate.[127] Further, it allows DRBA to withhold approval for substantial and compelling reasons.[128] DRBA argues that the defined facilities in the second sentence and the facilities mentioned in the third sentence must serve the limited uses of the first sentence.[129] None of Skyways' proposals, DRBA argues, would use the Leasehold Area for the operation of a motor

123 *Id.* at 30 (emphasis omitted).

124 *Id.* at 30-31.

125 *Id.* at 31.

126 *Id.* at 31-32.

127 *Id.* at 31.

128 *See id.* at 32.

129 *Id.* at 30.

inn or for "uses ancillary thereto or compatible therewith."[130] As such, according to DRBA's interpretation, DRBA has no obligation to accept or provide reasons for rejecting the proposals.[131]

Skyways' interpretation permits much broader uses of the Leasehold Area. Skyways asserts that the first sentence's use of "ancillary" and "compatible" permits uses beyond the operation of a motor inn.[132] Skyways analyzes the definition of "ancillary" to include "uses subordinate to the principal, or main use being conducted on a lot, but which provides services convenient to the operation of the principal use."[133] The term "compatible," according to Skyways, means "able to exist together without trouble or conflict."[134] Using this definition, Skyways

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130 *Id.* at 32-33.

131 *Id.* at 33-34. DRBA also argues that Skyways' breach of contract claim fails because each of Skyways' proposals, even if approved as to uses and facilities, would require an extension of the Lease and nothing in the Lease requires that DRBA agree to an extension. Def.'s Opening Br. 34-35. This argument, however, does not address whether the Lease requires DRBA to provide Skyways with DRBA's reasons for rejecting the proposals.

132 Pl.'s Answering Br. 33-34.

133 *Id.* at 33 (citing *Ancillary*, Black's Law Dictionary (9th ed. 2009)).

134 *Id.* at 33-34 (citing *Oxford American Dictionary* 183 (2006); *Merriam-Webster Dictionary* (2018)).

interprets the first sentence as permitting any use which does not conflict with the operation of a motor inn.[135]

Turning to the second sentence, Skyways analyzes "restaurant, cocktail lounge and swimming pool" as part of a nonrestrictive phrase separated by commas, making them examples of "necessary related facilities."[136] The second sentence then continues to include "other ancillary or compatible facilities and uses" in addition to the "necessary related facilities."[137] The second sentence's use of "and" between these phrases indicates that both are permitted.[138] Skyways contends that these are separate permitted categories, and that if the provision meant for one category to modify the other, they would be linked by a preposition.[139] For example, the first sentence uses the prepositions "thereto" and "therewith": "a necessary public facility, and uses ancillary thereto or compatible therewith."[140] Skyways also notes that the provision's second sentence utilizes the term "uses," and that "uses" in the second sentence broadens the "uses" permitted by the first sentence to include "other

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135 *Id.* at 34.

136 *Id.* at 34-35.

137 *Id.* at 35.

138 *Id.* at 35-36.

139 *Id.*

140 *Id.*

ancillary or compatible" uses.[141] Under Skyways' interpretation, any facilities or uses not encompassed by the first or second sentences must fall under the third sentence.[142] Skyways interprets the third sentence to mean that DRBA may not withhold or delay its written approval absent substantial and compelling reasons.[143] Skyways' interpretation of the plain language and grammar of the Lease provision is reasonable.

DRBA seeks dismissal on the grounds that Skyways has failed to state a reasonably conceivable claim under DRBA's interpretation of the Lease. But Skyways' interpretation is reasonable and supports a reasonably conceivable claim of a breach—*i.e.*, DRBA's refusal to allow Skyways' sublease proposals as permitted by the Lease. Thus, DRBA is not entitled to dismissal. I deny DRBA's motion to dismiss Counts IV and V.

2. Requests for injunction

In Count VI of its Complaint, Skyways requests two separate injunctions. First, Skyways requests an injunction related to DRBA's construction or modification of a road or driveway that allegedly altered the Leasehold Area.[144]

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141 *Id.* at 36.

142 *Id.*

143 *Id.* at 37.

144 Compl. ¶¶ 113-16.

Second, Skyways requests an injunction preventing DRBA from pursuing FAA approval of the Plan because the Plan will cause DRBA to violate the Lease.[145]

a. DRBA's alleged alteration of the parking lot on the Leasehold Area

Skyways claims in its Complaint that DRBA "undertook certain improvements to the Leasehold Area without obtaining Skyways' express consent" as the Lease requires.[146] The improvements (previously defined as the "Driveway") allegedly create a potentially unsafe condition on the Leasehold Area, reduce the parking available to Skyways' patrons and guests, and limit future development of the Leasehold Area.[147] Skyways alleges that the Driveway interferes with Skyways' right to exclusive possession and quiet enjoyment of the Leasehold Area because employees and visitors of the Airport use the Driveway and in doing so, trespass over the Leasehold Area.[148]

First, DRBA argues that the Lease permits DRBA to make the Driveway improvements without Skyways' consent because the Driveway improvements do not adversely affect Skyways' right of ingress and egress over Airport roadways.

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145 *Id.* ¶ 117.

146 *Id.* ¶ 68.

147 *Id.* ¶¶ 70-72.

148 *Id.* ¶ 73.

Additionally, DRBA argues that even though the Lease does not require Skyways' consent, DRBA has Skyways' consent in an email from Alan Spiro, Skyways' CEO, dated June 3, 2015.[149] Skyways disputes both of these points, asserting that the Driveway improvements require Skyways' consent and Spiro's email is insufficient to show Skyways' consent. At this stage and with the limited record before me, I cannot resolve either of these disputes. Whether Skyways' right to ingress and egress is adversely affected presents a question of fact. Also, the email from Spiro appears to be to a third party. It is not clear from the email whether the recipient is a representative of DRBA. The email is not sufficient to resolve factual questions surrounding the efficacy of the alleged consent. These factual issues alone make dismissal at this stage inappropriate.

Second, the parties dispute whether the Driveway violates Skyways' express right to quiet enjoyment under Article IX of the Lease. Factual questions exist regarding whether the Driveway encroaches upon the Leasehold Area.[150] But even if the Driveway does encroach upon the Leasehold Area, Article IX states that Skyways' right to quiet enjoyment of the Leasehold Area is subject to "conditions which may be reasonably anticipated in connection with the operation of aircraft or

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149 Def.'s Opening Br. 36-37.

150 Oral Arg. Tr. 19:20-20:11.

an airport."[151] The Lease does not define these conditions. Additionally, both parties offer reasonably conceivable explanations why the Driveway is, or is not, such a reasonably anticipated condition.[152] Although this issue is one of contract interpretation and, thus, a matter of law properly before me at this stage, I cannot determine whether the Driveway encroaches upon the Leasehold so as to violate Skyways' right to quiet enjoyment or whether the Driveway is a condition that can be reasonably anticipated in connection with the operation of the Airport based on the limited facts before me describing the Driveway.

For both of these arguments, questions of fact remain at issue, making dismissal at this stage inappropriate.

b. DRBA's alleged anticipatory breach of the Lease

Skyways claims that on October 27, 2017, it learned of and DRBA announced at a public meeting DRBA's intent to pursue FAA approval of DRBA's plan to develop the Airport and the Leasehold Area.[153] The draft Plan conflicts with Skyways' current use of the Leasehold Area for the purpose of operating a hotel.[154] According to Skyways, if DRBA adopts the Plan, DRBA will not be able to meet its

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151 Compl. Ex. B art. IX.

152 Def.'s Opening Br. 36; Pl.'s Answering Br. 39.

153 *See* Compl. ¶¶ 75-78.

154 *Id.* ¶ 82; *see also id.* ¶¶ 80-81.

obligations under the terms of the Lease.[155] Skyways characterizes DRBA's pursuit of FAA approval of the Plan as an anticipatory breach of the Lease.[156]

DRBA responds that its statements and actions in pursuit of FAA approval of the Plan do not meet the requisite threshold for repudiation.[157] The allegations in Skyways' Complaint, according to DRBA, are too conjectural and are not an explicit refusal to perform the Lease.[158] Because DRBA did not communicate to Skyways that DRBA intends to terminate the Lease or refuse to perform its obligations under the terms of the Lease, DRBA asserts that it has not repudiated the Lease.[159]

> A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions. . . . A party repudiates a contract when it takes an action that constitutes a "significant and substantial alteration of both the present and the reasonably anticipated future relations created by [the] agreement."[160]

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155 *Id.* ¶ 83.

156 *Id.* ¶ 84.

157 Def.'s Opening Br. 38-39.

158 *Id.* at 38.

159 *Id.*

160 *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004) (alteration in original) (footnotes omitted) (citing *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000)) (quoting *Bali v. Christiana Care Health Servs.*, 1998 WL 685380, at *1 (Del. Ch. Sept. 22, 1998)).

Here, Skyways alleges that DRBA publicly announced a plan that would limit any use of the Leasehold Area to "mixed use and parking," a use more limited than that contemplated by the Lease.[161] DRBA's representative stated that as part of that plan DRBA must "terminate any 'underperforming' leases."[162] DRBA is affirmatively pursuing this Plan as stated at the public meeting.[163] Thus, DRBA's alleged pursuit of FAA approval for the Plan creates a reasonably conceivable "significant and substantial alteration of both the present and the reasonably anticipated future relations created by [the Lease]." Skyways' allegations, therefore, are sufficient to support a reasonably conceivable claim for anticipatory breach against DRBA. I, therefore, deny DRBA's motion to dismiss Count VI of the Complaint.

III. CONCLUSION

For the foregoing reasons, DRBA's motion to dismiss Skyways' Complaint is DENIED.

IT IS SO ORDERED.

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161 Compl. ¶ 80.

162 *Id.* ¶ 82.

163 *See id.* ¶¶ 76, 78.