IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RPRS GAMING, L.P., Plaintiff, v. HP GAMING PARTNERS L.P. and HIGH PENN GAMING, L.P., Defendants.	)	C.A. No. 6359-VCP

MEMORANDUM OPINION

Submitted: May 31, 2012
Decided: June 13, 2012

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PARSONS, Vice Chancellor.

This case involves a proposed expansion (the "Proposed Expansion") of the SugarHouse Casino in Philadelphia, Pennsylvania (the "Casino"). The parties are the general and limited partners of HSP Gaming, L.P. (the "Partnership"), a limited partnership established to build, develop, and operate the Casino. The parties disagree on the correct measure of the "Budgeted Development Costs," a defined term under the Partnership's limited partnership agreement (the "LPA"), to build the Casino and whether, based on the Budgeted Development Costs, the Proposed Expansion requires supermajority approval from the Partnership's Management Committee.[1]

Plaintiff, limited partner RPRS Gaming, L.P. ("RPRS"), brought this action seeking a declaration that (1) the Proposed Expansion requires supermajority approval from the Management Committee and (2) HP Gaming Partners L.P. (the "General Partner") is required to provide the Management Committee and Audit Committee of the Partnership with information, and access to information, demanded by Plaintiff in the Verified Complaint. Defendants, the General Partner and limited partner High Penn Gaming, L.P. ("High Penn"), have moved for partial summary judgment on the issue of whether supermajority approval of the Management Committee is required for the Proposed Expansion.

Having considered the parties' arguments, the express terms of the LPA, and the record before me at this stage, I find there are genuine issues of material fact as to the

[1] Capitalized terms not otherwise defined are given the meanings ascribed to them in the LPA.

correct measure of Budgeted Development Costs for the Project. Therefore, I deny Defendants' motion.

I. BACKGROUND

A. Facts

In December 2005, the parties formed the Partnership to bid for one of two licenses to build, develop, and operate a casino in Philadelphia (the "Project"). In conjunction with their entry into the Partnership, the parties also signed a "Consent and Acknowledgment" (the "2005 Consent and Acknowledgment") on December 28, 2005, that, among other things, estimated the costs for the Project, including Actual Development Costs and initial working capital for the first twelve months of operation, to be $472.5 million.

On December 20, 2006, the Pennsylvania Gaming Control Board (the "Gaming Board") awarded the Partnership a Category 2 slot machine license (the "License") which permitted the Partnership to build a 1,500 slot machine facility. The Partnership committed to expand the facility to 3,000 slot machines, the maximum amount permitted by law, and the Gaming Board approved the expansion (the "2006 Plan"). Although the Gaming Board awarded the License in 2006, the License did not issue until January 11, 2008, after the Partnership paid the $50 million licensing fee.

Around the same time the License issued in early 2008, the General Partner circulated to the limited partners a "SugarHouse Summary Budget" that compared the budget estimate from the 2005 Consent and Acknowledgment with then-current estimates

for the Project. According to the General Partner, the Project, under the 2006 Plan, was estimated to cost more than $725 million.

Faced with rising costs for the Project in early 2008 and an immediate need for cash to make certain real estate acquisitions, the parties agreed to have High Penn make an additional equity contribution of $80 million to the Partnership. In exchange for the investment, High Penn received Senior Preferred Partnership Interests that carry a 25% dividend for the first five years, followed by a 20% return thereafter. In relation to this equity issuance, the parties executed an "Agreement to Amend" memorializing the transaction. Under the Agreement to Amend, the parties agreed that the budget for the Project was $742 million. That figure also was contained in a draft amended LPA that was circulated among the parties by Defendants' counsel in May 2008 (the "Draft LPA"). Although the Draft LPA was never executed, it expressly stated that the Budgeted Development Costs for the Project were $742 million. The Agreement to Amend eventually was incorporated, in its entirety, into the LPA in November 2009. Nothing in the record indicates that the estimated budget of $742 million was modified or updated at that time.

Following the financial crisis of 2008 and the economic downturn that followed, the Partnership was forced to revamp the 2006 Plan and scale back the size of the Project. In April 2009, the Partnership petitioned the Gaming Board to approve a modified plan for the Project (the "2009 Plan") under which the Casino would be built in two stages, with the Partnership first constructing an interim gaming facility (the "Interim Facility") and then expanding that facility once credit markets improved to complete the full Casino

contemplated under the 2009 Plan (the "Modified Facility"). The total cost for the 2009 Plan was estimated to be $474 million.

The Gaming Board approved the 2009 Plan in September 2009 and construction of the Interim Facility began shortly thereafter. After the Partnership's purchase of additional land and the passage of a new law legalizing table games, the 2009 Plan was amended to include those changes. As with the original 2009 Plan, the amended 2009 Plan contemplated the construction of the Casino in two phases.[2] On September 23, 2010, the Interim Facility opened for business.

After the Interim Facility opened, the parties began planning the completion of the Modified Facility. Instead of pursuing the second stage expansion approved under the 2009 Plan, however, on March 2, 2011, the General Partner presented the Partnership with a different plan, the Proposed Expansion. Among other things, the Proposed Expansion included more table games, fewer slot machines, less parking, and fewer overall gaming positions. Under the Proposed Expansion, the completion of the Modified Facility was projected to cost an additional $141.8 million beyond the $395 million spent to build the Interim Facility, for an estimated total project cost of approximately $537 million.

Plaintiff objected to the Proposed Expansion and, on April 8, 2011, filed this action seeking a declaration that the Proposed Expansion required supermajority approval from the Management Committee. According to Plaintiff, Section 9.3.2 of the LPA

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[2] For purposes of simplicity, because both plans are similar and were approved by the Partnership and the Gaming Board, I refer to the 2009 Plan and the amended 2009 Plan, collectively, as the "2009 Plan."

requires supermajority approval from the Management Committee for any modifications to the "Construction Plans" for the Casino that would cause the total project costs to fall outside the approved range of 85% to 133% of the Budgeted Development Costs of the Project. Asserting that the Budgeted Development Costs for the Project are $742 million, as contained in the Agreement to Amend, Plaintiff claims that the Proposed Expansion requires supermajority approval because the total estimated cost of the Project under the Proposed Expansion, $537 million, is less than 85% of the Budgeted Development Costs of $742 million.

B. Parties' Contentions

Defendants raise four independent arguments in favor of their motion for partial summary judgment. First, Defendants contend that Budgeted Development Costs for the Project are either $472.5 million, as established under the 2005 Consent and Acknowledgment, or $474 million, as approved under the 2009 Plan. On that premise, Defendants assert that the estimated total project costs of $537 million are less than 133% of the alleged Budgeted Development Costs and, therefore, supermajority approval of the Proposed Expansion is not required.

Second, Defendants aver that, notwithstanding the amount of the Budgeted Development Costs, the Proposed Expansion does not materially decrease the scope of the Licensed Facility approved under the 2009 Plan and, therefore, falls under an exception to supermajority approval under Section 9.2.3(k) of the LPA. That section provides that Construction Plans or modifications thereof do not require supermajority

approval where "no material decrease to the scope of the Licensed Facility will result therefrom."

Third, Defendants assert that Plaintiff is estopped from blocking the Proposed Expansion because it already approved the Interim Facility knowing that the Statement of Conditions provided by the Gaming Board in connection with the 2009 Plan requires the Partnership to complete the Modified Facility "as soon as practicable." Specifically, Defendants argue that, "even if RPRS possessed a contractual right to block the proposed expansion . . . [it] is estopped from invoking that purported right here" because Defendants relied on RPRS's approval of building the Interim Facility and would be prejudiced if RPRS were allowed to impair the Partnership's ability to comply with its License and complete the Modified Facility.[3]

Finally, Defendants claim that, in any case, RPRS cannot block the Proposed Expansion because to do so would be unreasonable and violate Section 9.4.5(f), which provides that "[n]o approval or consent to a Management Decision or a Major Decision will be unreasonably withheld or delayed" with the exception of certain decisions listed under Section 9.3.2. None of the matters at issue here are within the listed exceptions. Defendants aver that the actual reason RPRS is withholding its consent is to coerce the other partners into retiring some of the Senior Preferred Partnership Interests issued to High Penn. Defendants further contend that such a basis for withholding Plaintiff's consent for the completion of the Project is unreasonable.

[3] Defs.' Opening Br. 24.

RPRS contests all of these bases for partial summary judgment, arguing that, at the very least, Defendants' arguments raise genuine issues of fact as to the correct measure of Budgeted Development Costs, the scope of the Casino, and the reasonableness of Plaintiff's decision to withhold its consent for the Proposed Expansion. Thus, Plaintiff argues that there is no basis for summary judgment here.

II. ANALYSIS

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[5] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[6] Thus, the Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[7]

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4 *Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

5 *GMC Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

6 *Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

7 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

A. There Are Genuine Issues of Fact Regarding the Correct Measure of Budgeted Development Costs

Under the LPA, management of the Partnership is delegated to the discretion of the General Partner, with the exception of certain actions that require approval by the Management Committee. The Management Committee is composed of six members appointed by the partners. Although most decisions by the Management Committee require only majority approval (four of six members), certain "Major Decisions" under Section 9.3.2 of the LPA require "supermajority" approval (five of six members). Because RPRS controls two of the six seats on the Management Committee, supermajority approval effectively provides RPRS with veto power over Major Decisions.

Relevant to this action, Section 9.3.2(e) of the LPA states that any expansion of the Casino involving expenditures of greater than $1 million per annum is a Major Decision that requires supermajority approval unless it is categorized as part of the "Construction Plans" for the Casino. "Construction Plans" are defined under Section 9.2.2(b) as "a comprehensive construction plan for the acquisition of the Property, as well as the design, development, construction, and opening of the Licensed Facility (including any Temporary Licensed Facility)."[8] Section 9.2.2(b) further requires that, in connection

[8] The LPA defines "Licensed Facility" as a "slot machine operation and related facilities," including "any related restaurant, entertainment, retail and other facilities and amenities, to be designed, developed and constructed by the Partnership on or in connection with the Property, and all furniture, furnishings, machinery, equipment, and other tangible personal property located therein and used in connection therewith." LPA at 1, Section 1.1.87.

with the Construction Plans, the General Partner provide "[w]ithin a reasonable period following the Award Date . . . the Management Committee with its then current estimate of the Actual Development Costs and initial working capital to commence and sustain anticipated operation of the Licensed Facility during the twelve (12) months immediately following the Operation Date." These estimates of Actual Development Costs and initial working capital are referred to under Section 9.2.2(b) as "Budgeted Development Costs." Under Sections 9.3.2(j) and (k), any modification to Construction Plans that results in total project costs within an approved range of 85% to 133% of Budgeted Development Costs does not require supermajority approval.

RPRS claims that because the Proposed Expansion anticipates expansion costs of $141.8 million, supermajority approval is required unless the Proposed Expansion qualifies as a modification to the Construction Plans that results in total project costs within the approved range of 85% to 133% of Budgeted Development Costs. If, as Plaintiff alleges, the Budgeted Development Costs are $742 million, there is no dispute that supermajority approval would be required for the Proposed Expansion because the total project costs under the Proposed Expansion would be approximately $537 million, less than 85% of $742 million.

Relying on the plain language of Section 9.2.2(b), RPRS avers that because an estimate of Budgeted Development Costs must be made by the General Partner within a reasonable period *following* the Award Date, which is defined as the date the License actually issued, the earliest time the General Partner could have provided Budgeted Development Costs estimates would have been after the issuance of the License on

January 11, 2008. Therefore, according to Plaintiff, the $472.5 million estimate provided in the 2005 Consent and Acknowledgment could not be Budgeted Development Costs. Instead, because the General Partner provided the $742 million budget estimate shortly after the issuance of the License, which estimate was memorialized in the Agreement to Amend and later incorporated into the LPA, RPRS contends that this estimate constitutes the Budgeted Development Costs. Furthermore, because there is nothing in the LPA that requires Budgeted Development Costs to be estimated more than once, Plaintiff argues that the Budgeted Development Costs were permanently set at $742 million in 2008 and could not be altered by the later budget estimate of $474 million in the 2009 Plan.

In opposition, Defendants posit two different possibilities for establishing Budgeted Development Costs. First, Defendants argue that Budgeted Development Costs were set at $472.5 million in the 2005 Consent and Acknowledgment, which is the only document executed by the Partnership that breaks down projected costs into Actual Development Costs and twelve-month initial working capital projections as specified in Section 9.2.2(b). Alternatively, Defendants claim that, even if Budgeted Development Costs could be updated beyond the 2005 figure, the most recent Budgeted Development Costs set by the Partnership would have been the estimate contained in the 2009 Plan, which proposed a budget of $474 million for the Project and was approved by RPRS, the Partnership, and the Gaming Board. According to Defendants, the $474 million figure must be Budgeted Development Costs because it corresponds to the actual costs of the Project, whereas the $742 million figure has no connection to the current, approved plans for the Casino.

As an initial matter, I agree with Plaintiff that the plain language of Section 9.2.2(b) requires the General Partner to estimate Budgeted Development Costs following the Award Date. Therefore, because the Award Date is January 11, 2008, it would be contrary to the express language of Section 9.2.2(b) to consider the estimate in the 2005 Consent and Acknowledgment, in and of itself, to be Budgeted Development Costs.[9]

The dispute as to whether $742 million or $474 million is the correct figure for Budgeted Development Costs, however, presents genuine questions of material fact that cannot be resolved on summary judgment. At first glance, it would appear that the $474 million estimate contained in the 2009 Plan was intended to be Budgeted Development Costs. The estimate was provided for the Construction Plans that were, in fact, adopted by the Partnership and approved by the Gaming Board. Furthermore, $474 million remains a relatively approximate estimate of the total project costs and it appears reasonable to infer that the parties understood that number to be a "then current" estimate of the actual cost of completing the Modified Facility. The $742 million estimate, on the other hand, has no connection to the current Construction Plans and was made at a time when a dramatically different and larger Casino was contemplated.

At the same time, it is not unreasonable to infer that the Budgeted Development Costs, as defined in the LPA, were $742 million. The $474 million estimate was

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[9] Defendants also appear to argue that the parties effectively ratified the use of the 2005 Consent and Acknowledgement as reflecting the Budgeted Development Costs through correspondence and other actions in and around December 2009. *See* Defs.' Reply Br. 24-26. RPRS disputes this argument. From the facts of record at this preliminary stage, it is not clear whether there was, in fact, such a ratification. Hence, this issue cannot be resolved on summary judgment.

provided more than a year after the license was issued and the LPA is ambiguous as to what constitutes a "reasonable period" following the Award Date. Moreover, the 2009 Plan never refers to the $474 million as "Budgeted Development Costs" and the estimate is not broken down into Actual Development Costs and twelve-month initial working capital. Indeed, although it was never executed, the only Partnership document that referred to a specific figure as "Budgeted Development Costs" was the Draft LPA, which referred to the $742 million estimate as such.

Most important, however, is the fact that the parties incorporated the Agreement to Amend, which also contained the $742 million budget estimate, into the LPA in November 2009, after the adoption and approval of the 2009 Plan. The Agreement to Amend was incorporated in its entirety without any apparent effort to modify or disclaim the $742 million budget estimate it mentioned. Although this may have been an oversight on the part of the Partnership, it at least creates an ambiguity as to whether the Partnership intended to keep the $742 million as estimated Budgeted Development Costs after the adoption of the 2009 Plan. That is, one possible inference from the facts presented, although not the only one, is that the Partnership purposefully adopted the $742 million budget figure by incorporating the Agreement to Amend into the LPA without modification. That budget estimate, which may have been intended to be an estimate of Budgeted Development Costs, was never explicitly disclaimed or modified by the Partnership. Therefore, one reasonably could infer that it continues to be a valid part of the LPA and, in fact, represents the Budgeted Development Costs for the Project.

B. There Are Genuine Issues of Fact Regarding Defendants' Remaining Bases for Summary Judgment

As for Defendants' remaining arguments in favor of summary judgment, all involve questions of fact that cannot be resolved on the current record.

1. The Scope of the Licensed Facility

Defendants claim that the Proposed Expansion does not require supermajority approval because it does not materially decrease the scope of the Licensed Facility. But, resolution of that defense inevitably will require factual determinations regarding what the "scope" of the facility is and what constitutes a "material" decrease. The Proposed Expansion calls for the installation of more table games, fewer gaming positions, fewer slot machines, and less parking. "Material" and "scope" are not defined terms under the LPA. Therefore, the Court cannot determine, as a matter of law at this stage, whether any or all of the proposed changes materially decrease the scope of the Casino as it was contemplated under the 2009 Plan.[10] For example, it may be reasonable to infer, as RPRS suggests, that the installation of 17% fewer gaming positions and 33% fewer slot machines materially decreases the scope of the Casino. Although Defendants counter that the Casino can generate more revenue with fewer gaming positions because of the inclusion of more table games, that assertion implicitly assumes that "scope" relates only to projected revenue. On the current record, it is unclear whether that conclusion is

[10] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) ("[S]ummary judgment may not be granted under Rule 56 unless there are no material issues of fact and the moving party initially bears the burden of showing that none are present.") (internal citations omitted).

warranted. Moreover, even if "scope" was related only to projected revenue, whether the Proposed Expansion would generate the same or more revenue than the second stage Modified Facility approved under the 2009 Plan involves determinations of fact that cannot be made on summary judgment. Finally, although Defendants confidently assert that the Gaming Board will approve the Proposed Expansion as within the scope of the Licensed Facility, no such approval has been issued. For all of these reasons, Defendants are not entitled to summary judgment on their defense that the Proposed Expansion does not materially decrease the scope of the Casino.

2. Equitable Estoppel

Similarly, Defendants' affirmative defense of equitable estoppel also requires determinations of fact that cannot be resolved at this stage. Equitable estoppel requires a showing that the party claiming estoppel: "(1) lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (2) reasonably relied on the conduct of the party against whom estoppel is claimed; and (3) suffered a prejudicial change of position as a result of their reliance."[11] The standards for proving a defense of equitable estoppel are "stringent" and the doctrine "is applied cautiously and only to

[11] *Reserves Dev. LLC v. Severn Savs. Bank*, 2007 WL 4054231, at *14 (Del. Ch. Nov. 9, 2007).

prevent manifest injustice."[12] Defendants have the ultimate burden of proof on this defense.[13]

Here, Defendants aver that RPRS's approval of building the Interim Facility, while knowing that the Gaming Board required subsequent expansion when practicable, estops it from obstructing construction of the expanded facility because Defendants reasonably relied on Plaintiff's approval in constructing the Interim Facility. Essentially, Defendants argue that because RPRS approved the 2009 Plan and the Partnership proceeded to complete the first phase of that plan, *i.e.*, the Interim Facility, RPRS cannot withhold its approval of any modification that Defendants consider necessary to complete the second phase or Modified Facility, even if the modification was not contemplated in the 2009 Plan. The Partnership is required to complete the Project "as soon as practicable" under the Statement of Conditions provided by the Gaming Board when it approved the 2009 Plan. Thus, according to Defendants, Plaintiff's "effort to block the expansion prejudices defendants by impairing the Partnership's ability to comply with the conditions of its license . . . thereby jeopardizing defendants' investment."[14]

I find Defendants' argument unavailing for at least two reasons. First, as to reasonable reliance, I do not find it reasonable for Defendants to have relied on RPRS's

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12 *Pilot Point Owners Ass'n v. Bonk*, 2010 WL 3959570, at *1 (Del. Ch. Oct. 7, 2010).

13 *See id.* ("Now that the case has proceeded to trial, the burden of proof to establish an equitable estoppel defense by 'clear and convincing evidence' . . . shifts to the defendant.").

14 Defs.' Reply Br. 24.

approval of the first step Interim Facility of the 2009 Plan as meaning that Plaintiff would be required to accept any modification to the Construction Plans the General Partner deemed necessary to complete the Modified Facility. The Partnership still may complete the Modified Facility in the manner approved under the 2009 Plan without approval from Plaintiff and would not be at risk of violating the conditions of the License.[15] RPRS has an express right under the LPA to vote on any modification to the 2009 Plan that would result in total project costs outside of the approved range of Budgeted Development Costs for the Project and nothing in the record suggests Plaintiff conceded that contractual right by approving the 2009 Plan.[16] Therefore, Defendants have failed to prove either the reasonable reliance or the prejudicial change of position elements of their estoppel defense sufficiently to qualify for summary judgment.

3. Unreasonable Withholding of Approval

Finally, Defendants' claim that RPRS's approval of the Proposed Expansion cannot reasonably be withheld under Section 9.4.5(f) of the LPA cannot be resolved on summary judgment. Section 9.4.5(f) states that "[n]o approval or consent to [certain] Management Decision[s] [including those at issue here] will be unreasonably withheld or delayed . . . ."[17] Whether RPRS's actions are "unreasonable," however, is a question of

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15 *See* Tr. at 43.

16 To the contrary, the parties dispute the extent to which RPRS preserved, explicitly or otherwise, its right to claim that a modification of the 2009 Plan would require supermajority approval. Pl.'s Ans. Br. 43-44.

17 Section 9.4.5(f) further provides that approval or consent may be withheld in the "sole and absolute discretion" of the member with respect to certain Major

fact and it is at least reasonable to infer that Plaintiff's objection to the Proposed Expansion, which admittedly deviates from the 2009 Plan originally approved by RPRS, is reasonable.[18] As discussed *supra*, the Proposed Expansion contemplates a Modified Facility that will have fewer gaming positions, fewer slot machines, and less parking. Although the inclusion of more table games may, as a business matter, justify these other reductions, Plaintiff may have legitimate business reasons for objecting to these new plans. At the very least, it cannot be said on the current record that Plaintiff's refusal to approve the Proposed Expansion is patently unreasonable.

III. CONCLUSION

For all the reasons stated in this Memorandum Opinion, I deny Defendants' motion for partial summary judgment on the issue of whether supermajority approval is required for the Proposed Expansion.

IT IS SO ORDERED.

Decisions listed under Section 9.3.2. Sections 9.3.2(e) and (k), however, are not listed under those exceptions.

[18] RPRS raised a threshold issue of ripeness by arguing that it voted against the Proposed Expansion on February 6, 2012 because the supermajority approval issue had not been resolved. According to RPRS, therefore, it has not voted yet on the merits of the Proposed Expansion. Although this argument appears hypertechnical, I need not address it further based on my conclusion that, in any event, the existence of genuine issues of material fact as to the reasonableness of Plaintiff's actions preclude summary judgment on this defense.