N (24)

AUG 24 2004

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILMINGTON HOSPITALITY, LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
v.	)	C. A. No. 03C-07-213 MMJ
NEW CASTLE COUNTY, a political subdivision of the State of Delaware,	)	
Defendant.	)	

Submitted: May 14, 2004
Decided: August 4, 2004

Upon Defendant's Motion to Dismiss
Wilmington Hospitality, LLC's Complaint

GRANTED IN PART
DENIED IN PART

MEMORANDUM OPINION

Adam Balick, Esquire, Balick & Balick, Wilmington, Delaware; John J. Yannacone (argued), Yannacone & Baldo, Attorneys for Plaintiff

Peter J. Walsh, Jr., Esquire, John M. Seaman, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware; Hamilton P. Fox, III, Esquire (argued), Gail Westover, Esquire, Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Defendant

FACTUAL AND PROCEDURAL CONTEXT

Wilmington Hospitality, LLC ("WH") filed this action on July 28, 2003 against New Castle County ("NCC"). The Complaint contains four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy.

NCC has moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Alternatively, if the Court declines to dismiss WH's Section 1983 and inverse condemnation claims, NCC requests that the Court condition WH's right to proceed in this case on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000.

For purposes of evaluating Defendant's Motion to Dismiss, the following facts are undisputed. WH is the former owner of a hotel located alongside Airport Road and I-95 in New Castle County. The principals of WH are Joseph L. Capano ("Capano") and Albert Vietri ("Vietri"). WH's predecessor submitted a Preliminary Plan to NCC for construction of a 118,805 square feet hotel. NCC approved the final Record Plan on April 11, 1990. The original architectural firm

designed a 156,000 square feet hotel - 38,000 square feet larger than the authorized Record Plan. Construction then was delayed for almost 8 years.

Following a dispute with the original firm, a second architectural firm was hired. The second firm completed the necessary drawings and filed an application for a building permit on June 5, 1998. NCC reviewed the application and issued a building permit on July 21, 1998 for a 155,480 square feet hotel.

WH invested approximately $25,000,000 to construct the hotel. On May 12, 2000, WH requested an inspection for a certificate of occupancy. NCC Department of Land Use employees visited the site. NCC found that the hotel did not conform to the Record Plan because construction exceeded the Plan by 38,000 square feet. NCC denied the request for a certificate of occupancy.

WH then applied to the NCC Board of Adjustment ("Board") for nine zoning variances that would allow the hotel to open, including: (1) increasing the maximum floor area ratio to allow use of the building as constructed; (2) allowing encroachment onto the flood plain of approximately 4,000 square feet; and (3) reducing the number of required parking spaces from 325 to 202.

The Board conducted hearings on the requested variances on July 13 and 26, 2000. The Board reviewed documents and heard testimony from representatives of WH, the architects, and the project engineer. On July 27, 2000,

the Board denied the variance requests. WH appealed the Board's decision to this Court.

On August 22, 2000, WH asked for permission to open part of the hotel consisting of 102,120 square feet. NCC responded that it would issue a certificate of occupancy if WH removed the top two floors or otherwise rendered unusable the space in excess of the Record Plan. NCC further advised WH that it would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri and their relatives did not have any interest in the hotel for a period of 20 years. WH has alleged that the conditions proposed by NCC "would clearly destroy the value of the project and be so expensive and take so long to accomplish that WH would be forced out of business and destroyed."[1] On October 14, 2000, NCC denied WH's renewed request for a certificate of occupancy.

On October 20, 2000, WH filed a complaint in the Court of Chancery, seeking to compel NCC to issue a certificate of occupancy. The presiding Vice Chancellor was appointed acting Superior Court Judge to hear appeals from the Board of License, Inspection and Review and from the Board of Adjustment. The Court of Chancery denied WH's motions for a temporary restraining order and for

---

[1]Complaint ¶ 41.

a preliminary injunction. Trial was set for November 28, 2000. The day before trial, WH notified the Court of Chancery that it was not ready to proceed. Trial was postponed indefinitely and that case remains pending.

WH's lender instituted foreclosure proceedings in this Court on December 26, 2000. WH filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on June 29, 2001. All Delaware state court matters were automatically stayed.

On September 25, 2001, a meeting was held among NCC, WH, counsel for WH, and a prospective purchaser of the hotel. The parties vehemently disagree as to what transpired during the meeting. WH contends that NCC agreed to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. By letter dated November 1, 2001, WH's attorney referred to the February 2, 2001 letter as a "commitment." By letter dated November 2, 2001, NCC took the position that the February 2nd letter contained a useful listing of outstanding building code issues, but that NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws.

On November 2, 2001, WH executed a contract to sell the hotel to a company whose principals were not related to or affiliated with WH or its

principals. The agreement of sale was approved by the bankruptcy court. WH was required to obtain a certificate of occupancy in order to close the transaction.

WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, "was done with the intent to undermine and interfere with WH's bankruptcy."[2] WH also entered into a settlement agreement with its lender. The agreement would have permitted WH to satisfy its outstanding obligations to the lender at a discount of approximately $1,500,000. Thus, WH asserts that NCC's breach of the agreement reached during the meeting was a "malicious" attempt to prevent WH from selling the property and thereby recouping some of its financial losses.[3]

On November 30, 2001, WH brought yet another action in the United States District Court for the Eastern District of Pennsylvania, alleging that the November 2, 2001 letter from NCC breached the agreement to issue a temporary certificate of occupancy. The District Court referred the question of application of the bankruptcy abstention doctrine. The United States Bankruptcy Court for the Eastern District of Pennsylvania recommended abstention. The District Court then granted NCC's motion to dismiss the District Court action.

---

[2]Complaint ¶ 48.

[3]Complaint ¶ 53.

DECISION OF NCC BOARD OF ADJUSTMENT
JULY 27, 2000

The Board of Adjustment may grant dimensional variances from County zoning requirements if the Board finds that the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific standards of the Zoning Code. WH applied for nine variances. The two main issues considered by the Board were: (1) whether WH's application demonstrated exceptional practical difficulties; and (2) whether NCC's conduct invoked the doctrine of equitable estoppel. The Board voted to deny the requested variances.[4]

Exceptional Practical Difficulty Test

In evaluating WH's application for area variance, the Board considered the factors established by the Delaware Supreme Court in *Board of Adjustment of New Castle County v. Kwik-Check.*[5] One of these factors is whether if the variance is

---

[4] In conclusion, the Board votes to deny the requested variances. The requested dimensional changes are not minimal and the harm to the applicant if the variances are denied would not be greater than the probable effect on neighboring properties, and the community at large, if the variances are granted. The granting of these variances would cause substantial detriment to the public good, and would substantially impair the intent and purpose of the zoning code.
Board of Adjustment Decision, p. 12.

[5] 389 A.2d 1289 (Del. 1978) ((1) the nature of the zone in which the property lies; (2) the (continued...)

denied, the restriction would create "exceptional practical difficulty" for WH to make permitted use of the property.[6] The Board found that the "exceptional practical difficulty" asserted by WH was a self-created hardship.[7]

The Board's analysis of the testimonial and documentary evidence was that there was nothing inherent in the property that prevented WH from complying with the zoning code.

> Mr. Capano has repeatedly acknowledged that the need for the requested variances arose because of his failure to adhere to the restrictions contained on the record plan. Moreover, the witnesses who testified on his behalf acknowledged that there was no restriction inherent in the land that would have prevented him from building the structure depicted on the record plan (i.e. 118,805 square feet). Thus, the only reason the need for the variances arose was due to the fact that the applicant built his building 39,000 square feet larger than permitted by the record plan, which, in turn, requires proportional compliance with the Unified Development Code. To approve the variances under these circumstances would, as the Court in *Weaver* feared, do nothing more than encourage builders to ignore the County's zoning restrictions, safe in the knowledge that the Board of

---

[5](...continued)
character of the immediate vicinity and the uses contained therein; (3) whether, if the restriction upon the applicant's property was removed, such removal would seriously affect such neighboring property and uses; and (4) whether, if the restriction is not removed, the restriction would create an unnecessary hardship on exceptional practical difficulty for the owner in relation to his efforts to make normal improvements on the character of that use of the property which is a permitted use under the use provisions of the ordinance.)

[6]*Id.* at 1291.

[7]WH's application is not for a use zoning variance. If it were, the self-created hardship doctrine could act as a complete bar. *See Dexter v. New Castle County Board of Adjustment,* Del. Super., C.A. No. 96A-03-033, Toliver, J. (Sept. 17, 1996).

> Adjustment would be their relief valve. In this matter, the extent of the self-created hardship is such that the Board cannot retroactively sanction the significant violations of the zoning code that have occurred. In so doing, the Board does not ignore the significant financial investment that has been made in this case. To assert, however, the size of the investment as justification for the award of a variance equates with trying to "buy" a variance. If this were sufficient, in and of itself, to meet the economic hardship factor discussed in *Kwik-Check*, it would again encourage substantial investment in projects that do not adhere to the restrictions in the zoning code on the basis that the investment could guarantee a variance.[8]

Equitable Estoppel Analysis

The Board considered the equitable estoppel standards established in *Miller v. Board of Adjustment.*[9] The party asserting the defense of equitable estoppel against enforcement of a zoning regulation must demonstrate that the party, acting in good faith, made expensive and permanent improvements in reliance on affirmative acts of a municipal corporation, and that the equities strongly favor the party asserting equitable estoppel.[10]

The Board heard extensive testimony and reviewed documentary evidence. The Board concluded:

---

[8]Board of Adjustment Decision, p. 11.

[9]521 A.2d 642 (Del. Super. 1986).

[10]*Id.* at 645-46.

> The biggest stumbling block in this case for the applicant is the good faith aspect of this analysis. It was very apparent to the Board from the outset that the developer had no intention of adhering to the square footage limitations contained on the record plan. The developer acknowledged that he had to have been aware of the square footage limitations at some point, however, this limitation never factored into his considerations for the project. The record is replete with evidence to indicate that the developer (or his agents) was repeatedly given the opportunity to discover the discrepancy between the record plan and the proposed building size. Many of these opportunities occurred prior to the time construction commenced when, by the developer's own admission, it would have been much less expensive to bring the building into compliance. Moreover, there was evidence submitted to suggest that the developer was aware of the discrepancy and took affirmative steps to conceal the discrepancy from third parties. In particular, Artesian Water letters (with the changed square footage numbers) and the representation in the HVS appraisal that the developer had communicated to it that, despite the record plan's square footage limitation of 118,805, the "correct figure" was 156,000 square feet, are illustrative of this point. Both of these representations occurred prior to the time construction commenced and would lend credence to the argument that the developer was not acting in good faith.[11]

ANALYSIS

NCC has moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted. For purposes of a motion to dismiss for failure to state a claim, all allegations in the complaint must be accepted as true. If plaintiff may recover under any reasonably

[11]Board of Adjustment Decision, p. 9.

conceivable set of circumstances, the motion to dismiss under Rule 12(b)(6) must be denied.[12]

The Complaint contains four counts demanding damages and declaratory relief: (1) pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights; (2) pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection; (3) inverse condemnation; and (4) breach of contractual obligation to issue a temporary certificate of occupancy.

Section 1983 Due Process

WH has failed to state a cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights. The evidence presented to the Court in the course of this Motion demonstrates that WH constructed a hotel at least 38,000 square feet larger than the hotel approved in the Record Plan. WH sought relief according to the procedures established in zoning variance applications. WH was not limited in its ability to present testimony and evidence to the Board. In the statutorily-granted exercise of its discretion, the Board denied WH's requests for variances. WH has failed to present any facts that could lead to the conclusion that WH was denied due process.

---

[12]*Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978).

Inverse Condemnation

It is undisputed that WH now has sold the property at issue to a third party. In order to sustain a claim for inverse condemnation, WH must show that it has been deprived by NCC of *all economic value* of the property by NCC's zoning regulations.[13] Even assuming for purposes of this decision that NCC's actions prevented WH from ever opening the hotel, the property *a fortiori* retained some economic value as clearly evidenced by the recent sale. This is not a case in which a governmental entity has capriciously deprived an individual of the ability to utilize land in a manner that presents irreparable harm to the individual. The principals of WH are sophisticated developers. The property was developed for commercial use. Accepting as true WH's claims of severe financial loses, the property still retained some economic value. Therefore, WH has failed to state a claim for inverse condemnation based upon zoning regulation.

---

[13]*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In contrast, a claim of inverse condemnation based upon physical *seizure* by a governmental entity need not allege denial of *all* economically viable use of the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Section 1983 Equal Protection

WH's claim pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection relies on the factual allegation that WH has been treated differently by NCC than others similarly situated. WH bolsters this argument with the fact that NCC advised WH that NCC would permit partial opening of the hotel, without the necessity of removing or disabling the top two floors, provided that Capano and Vietri and their relatives did not have any interest in the hotel for a period of 20 years.

During oral argument on the Motion, counsel for WH was asked by the Court whether it could provide the identity of similarly situated landowners or developers who received different treatment by NCC. WH informed the Court that additional discovery would be needed to obtain that information. At this stage in the proceedings, it is appropriate to permit additional discovery on this claim. Such discovery shall be limited to the identity of similarly situated land owners and their dealings with NCC and the Board in the context of seeking area variances for property constructed not in accordance with the terms of an approved record plan.

Breach of Contract

WH has asserted that during the meeting held on September 25, 2001, NCC entered into an agreement to issue a temporary certificate of occupancy if WH complied with the terms of a letter from NCC dated February 2, 2001. NCC subsequently referred to the February 2, 2001 letter as a "commitment." Shortly thereafter, NCC described the letter as a useful listing of outstanding building code issues. NCC takes the position that no contract was made during the September 25, 2001 meeting, thus NCC would not issue a certificate of occupancy until the construction was in full compliance with all applicable laws. WH claims that NCC's refusal to issue a certificate of occupancy, as agreed during the September 25, 2001 meeting, was done with the intent to undermine and interfere with WH's ability to sell the property, resulting in monetary damages.

Accepting the breach of contract allegations in the complaint as true, the complaint presents a reasonably conceivable set of circumstances under which WH may recover for breach of contract. Therefore, the parties may proceed with discovery directly relating to the events that occurred during the September 25, 2001 meeting.

Other Pending Actions

NCC has requested that the Court condition WH's right to proceed in this case on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000. This Court is without authority to award attorneys' fees in connection with an action pending in another court under these circumstances. The Court declines to interfere with the Court of Chancery's discretion to assess whether an award of attorneys' fees is appropriate and to determine the reasonableness of any requested fees.

WH has declined to pursue either the action filed in this Court to appeal the Board's decision, or the litigation initiated in the Court of Chancery. It is well-settled that all claims arising from a common nucleus of operative facts ought to be brought in the same court at the same time, whenever possible.[14] WH's claims involve the same common nucleus of operative facts in both the pending Chancery Court action and the appeal of the Board of Adjustment report still open in this Court.

Because the Superior Court has jurisdiction to hear the claims remaining in this action, I do not intend to burden the Court of Chancery by directing WH to exhaust its requests for relief in that Court before proceeding with this action. In

---

[14]*Deriger v. Tallman,* 773 A.2d 1005, 1017 (Del. Ch. 2000).

the interest of judicial economy, however, WH is instructed to elect either: (1) to provide a draft order for consolidation of this action with its appeal of the report of the Board of Adjustment; or (2) to provide a draft order dismissing that appeal, with prejudice.

CONCLUSION

WH has failed to state a cause of action under 42 U.S.C. § 1983 based upon deprivation of due process rights. Therefore, NCC's Motion to Dismiss Count 1 of the Complaint is hereby **GRANTED.**

Even accepting as true WH's factual allegations regarding its claim for inverse condemnation, WH has failed to state a cause of action. Therefore, NCC's Motion to Dismiss Count 3 of the Complaint is hereby **GRANTED.**

Accepting as true the allegations set forth in WH's claim for relief pursuant to 42 U.S.C. § 1983 for deprivation of property without equal protection, WH has stated a cause of action. Therefore, NCC's Motion to Dismiss Count 2 of the Complaint is hereby **DENIED.** The parties may conduct additional discovery on this claim, limited to the identity of similarly situated land owners, and to their dealings with NCC and the Board in the context of seeking area variances for property constructed not in accordance with the terms of an approved record plan.

Accepting the breach of contract allegations in the Complaint as true, WH has presented a reasonably conceivable set of circumstances under which WH may recover. Therefore, NCC's Motion to Dismiss Count 4 of the Complaint is hereby **DENIED**. The parties may proceed with discovery limited to the events that occurred during the September 25, 2001 meeting.

WH's right to proceed in this case is not conditioned on payment of NCC's costs and attorneys' fees in the pending Court of Chancery action filed in the year 2000.

IT IS SO ORDERED.

The Honorable Mary M. Johnston