IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ILLINOIS

WESTMORE EQUITIES, LLC, Plaintiff, vs. CITY OF MOUNDS, *an Illinois Municipal Corporation,* Defendant/Third-Party Plaintiff, WAYMON A. BUTLER, JR. and, ROBIN L. BARKSDALE, Defendants, vs. DEVELOPMENT & MUNICIPAL INITIATIVES, LLC, KEITH J. MORAN, ERIC WHITE, and DEBORAH PROSSER-WHITE, Third-Party Defendants.	)	Case No. 15-cv-00109-JPG-DGW

MEMORANDUM AND ORDER

This matter comes before the court on Plaintiff's Motion for Summary Judgment (Doc. 86), and Defendant City of Mounds' Motion for Summary Judgment (Doc. 88). For the following reasons, Plaintiff's Motion is **GRANTED** and Defendant's Motion is **DENIED**.

Dockets.Justia.com

I. **Background.**

This controversy arises from what Westmore Equities ("Westmore"), a Missouri limited liability company in the business of developing real estate for Dollar General Corporation, contends is a breach of contract between itself and the City of Mounds, ("City") an Illinois municipal corporation located in Pulaski County, Illinois. (Doc. 1).

The contract in controversy called for Westmore to develop the property located on 764 S. Blanche, Mounds, Illinois ("Property") into a Dollar General store. In return for developing the Property, the City agreed to reimburse Westmore from Tax Increment Finance[1] ("TIF") funds, 75% of the annual TIF revenues, capped to a maximum $350 thousand, over the 23-year life of the TIF District, as prescribed by the TIF Act ("Act")(Doc.1 ¶ 44). There were multiple resolutions passed by Mounds City Council[2] as it pertained to both creating the TIF district and inducing Westmore to build the Dollar General store. One such resolution, an "Inducement Resolution," specifically stated that it was understood that Westmore would be making expenditures and redeveloping land that would not be developed by Westmore, but for the use of TIF financing.

Thereafter, on April 21, 2010, the City and Westmore entered into the Redevelopment Agreement ("Agreement"), which acknowledged that a good portion of Westmore's expenditures would be reimbursed through TIF funds, *inter alia* (Doc. 86, ¶ 1). However, the specific budget amount - as it pertains to Westmore developing the Property for Dollar General - was not presented for the City Council's approval. Instead, the mayor entered into an exclusive

---

[1] TIF calls for local taxing bodies to make a joint investment in the development or redevelopment of an area, with the intent that any short term gains be reinvested and leveraged so that all the taxing bodies will receive larger financial gains in the future. 65 Ill. Comp. Stat. Ann. 5/11-74.3-1.

[2] Among those ordinances passed, the Court notes that on April 5, 2010 there was a public hearing regarding the Mounds TIF redevelopment plan. Further on April 19, 2010, the City Council there approved the redevelopment plan, and fully understood that Westmore would be the exclusive land developer at that time. [Doc. 86].

contract with Westmore based on the prior resolutions ratified by the City. Once that Agreement was executed, Westmore invested $900 thousand in developing the Property.

The first payment request of $16,769.63 was made by Westmore to the City in July 2013 and the City paid pursuant to the Agreement. It was not until the following year, on September 2, 2014, that the City, through its agent Municipal Consulting Group, Ltd., notified Westmore that the Agreement was void. The City informed Westmore that it was legally prohibited from paying Westmore from the Special Allocation Fund because the Agreement did not receive approval from the City Council. Following the notification from the City, Westmore filed this instant action. (Doc. 1).

Westmore is asking the Court for declaratory judgment pursuant to 28 U.S.C. § 2201 that the Contract is valid and binding, or in the alternative to find that the theory of estopple applies in this matter. (Docs. 1 and 86).

The City contends that as "non-home rule[3]" municipality, it possesses a limited grant of powers and that the Inducement Resolution did not authorize the execution of the contract at issue. (Doc. 88, ¶ 3). Further, the City contends that neither estoppel nor ratification apply in this case because "[a] contract which is prohibited by law cannot be later rendered valid by estoppel or ratification." (Doc. 88, ¶ 10). The City asks the Court to deny the Plaintiff's Motion for Summary Judgment,[4] and find the Agreement between itself, and Westmore *ultra vires*, or more simply put, is beyond its authority as a "non-home rule" Illinois municipality, and therefore void.

---

[3] A "non-home rule" municipality is defined as having fewer than 25,000 people. "Non-home rule" municipalities have limited powers to contract, tax, or make other laws. Article VII, § 7 of the Illinois Constitution.

[4] The Court, at this time, does not examine the Third-party complaint lodged in this matter between the City and Development & Municipal Initiatives, LLC. (Docs. 22 and 104).

II. <u>Standard.</u>

Summary judgment must be granted "if the movant shows that this is no genuine disputes to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett,* 477, U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the most favorable light to the nonmoving party and drawing all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396.

The initial summary judgment burden of production is on the moving party to show the Court that there is no reason to have a trial. *Celotex*, 477 U.S. at 323; *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 1992). Where the non-moving party carries the burden of proof at trial, the moving party may satisfy its burden of production in one of two ways. It may present evidence that affirmatively negates an essential element of the non-moving party's case, Fed. R. Civ. P. 56 (c)(1)(A), or it may point to an absence of evidence to support an essential element of the non-moving party's case without actually submitting any evidence, Fed. R. Civ. P. 56 (c)(1)(B); *Celotex,* 477 U.S. at 322-25; *Modrowski*, 712 F.3d at 1169. Where the moving party fails to meet its strict burden, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992).

In responding to a summary judgment motion, the non-moving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material facts exists. *Celotex*, 477 U.S. at 322-26; *Anderson*, 477 U.S. at 256-57; *Modrowski*, 712 F.3d at 1168. A genuine issue of material fact is not demonstrated by the

mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson,* 477 U.S. at 252. As the Seventh Circuit Court of Appeals has repeatedly stated, "summary judgment is the 'put up or shut up' moment in the life of a case." *AA Sales & Assocs. v. Coni-Seal, Inc.*, 550 F.3d 605, 612 (7th Cir. 2008).

There is no real dispute over the relevant facts in this matter. The parties agree that a contract was executed and the contract language speaks for itself. The parties disagree, however, whether as a matter of law the contract is void and unenforceable. The Court finds that it can decide these matters based on the filings alone.

III. <u>Discussion.</u>

Though other issues were presented, the primary issue before the Court is whether, absent approval from the City council, a binding and enforceable contract existed between the City and Westmore. In order to arrive to the answer to that question, the Court must first examine the City's power to enter into said contract and the procedures involved with those powers as it relates to TIFs. Second, the Court must resolve whether it was incumbent on the mayor of the City to receive approval from the City Council before executing the Agreement with Westmore.

Pursuant to Illinois law, municipalities that are "non-home rule" units have limited powers. *Vill. Of DePue, Ill. V. Exxon Mobil Corp.,* 537 F.3d 775, 787 (7th Cir. 2008); *Hawthorne v. Vill. of Olympia Fields*, 790 N.E.2d 832, 840 (Ill. 2003). There are six basic powers given to "non-home rule" municipalities by Article VII, section 7 of the Illinois Constitution of 1970. Those powers include:

> (1) The power to make local improvements by special assessments; (2-4) the power, through referendum, to adopt, alter or repeal their forms of government and to provide for their officers, manner of selection and terms of office; and (5-6) the power to incur debt and to levy or impose additional taxes subject to certain exceptions and limitations.

Hawthorne, 790 N.E.2d at 840, *citing* IL. Const. 1970, art. VII, § 7. "Non-home rule" municipalities also enjoy additional powers "granted to them by law." *Hawthorne*, 790 N.E.2d at 840. In Illinois "non-home rule" municipalities only have powers "expressly granted, powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objects and purposes of the municipal corporation." *Pesticide Pub. Policy Found. v. Village of Wauconda,* 510 N.E.2d 858, 861 (Ill. 1987).

As the City contends, it is indeed a "non-home rule" municipality, and is therefore limited from other larger cities in what it may or may not do. However, the City is not *completely* lacking authority to enter into a contract as there are exceptions, such as the TIF Act ("Act"). The Act is an avenue by which the Illinois code grants additional power to "non-home rule" municipality through statute. 65 ILCS 5/11-74.4-4(a) instructs that a municipality may "by ordinance introduced in the governing body of the municipality" within the time limit prescribed by law, "… approve redevelopment plans and redevelopment projects, and designate redevelopment project areas pursuant to notice and hearing required by this Act [TIF]." Therefore, the City had authority to contract pursuant to the Act.

The City erroneously relies on this Court's prior decision in *Columbia Crossing, L.L.C. v. City of Columbia, Ill.*, when it contends that the contract between it and Westmore is invalid. In *Columbia*, the city council there agreed to "reasonably cooperate in good faith," to help the developer with redevelopment costs, grants, TIF mechanisms, special service taxes, *inter alia*. *Columbia Crossing, L.L.C. v. City of Columbia, Ill.,* 07-CV-636-JPG, 2008 WL 2875251, at *2 (S.D. Ill. July 24, 2008).

In *Columbia*, the city authorized the mayor to engage in all of the activities *infra* on his/her own. Many of the promises made there were predicated on the ability of the city to successfully undertake multiple items that were both within and *outside* of the Act. This Court held there that such a broad, layered, and complicated agreement could not be enforced absent support by the city's council. Unlike the case at bar, the city in *Columbia* was not operating under the Act alone, it was also relying on a broad range of commitments, including rezoning, that went well beyond the Act. While *Columbia* bears some resemblance to this instant case, it is distinctly different than what took place here. Westmore and the City operated exclusively under the TIF Act and there is nothing within the record that suggests the City acted outside the bounds of the limited powers enumerated in 65 ILCS 5/11-74.4-4. To the contrary:

- On September 8, 2009, the City Council voted to deed one-half acre ... to Westmore for a Dollar General Store. Thereafter, on September 24, 2009 the City hired an outside firm to assist the City in setting up a TIF District, following discussions between Westmore and the City. (Doc. 86, ¶ ¶ 8 and 9).

- On November 2, 2009, the City Council passed Resolution No. 2009-01-4, that provided for a feasibility study on the designation of areas as redevelopment project areas as set forth in the Act. That same day, an Inducement Resolution 2009-02-R, was approved as it pertained to creating the TIF District. (Doc. 86, ¶ ¶ 15 and 16).

- On December 21, 2009, the City council voted to approve the building permit application by Westmore. The same day, the City Council also voted to continue with its TIF Redevelopment plan, with the understanding that Westmore would be reimbursed for its efforts through TIF Funds. (Doc. 86, ¶ ¶ 17 and 18).

- On January 4, 2010, the City Council voted to accept the TIF Redevelopment Plan. On the same date, the City Council set a public hearing date for the TIF Redevelopment Plan. (Doc. 86, ¶ ¶ 19 and 20).

- On January 19, 2010, the City Council passed Resolution 2010-02, called the Westmore Inducement Resolution, which as the name suggests, *induced* Westmore to develop the property in Mounds for the Dollar General with the understanding that TIF funds would cover a significant portion of their building costs. (Doc. 86, ¶ 21).

- In or about March 2010, there was a public hearing on the TIF District. Subsequently in late March it was understood that Westmore would be reimbursed by TIF funds, up to 75% of annual TIF revenues. (Doc. 86, ¶ 26).

- On April 19, 2010, the City Council adopted the TIF Redevelopment Plan and Project in a TIF Ordinance, CO-2010-02. The Redevelopment Plan provided a ceiling for the amount of money that would be allocated to the entire project. The plan did not require that the City executives come back to the City Council for individual approval for line item expenditures that could, or would, potentially incur under the plan.[5] (Doc. 86, ¶ ¶ 27-29).

- On April 21, 2010 then Mayor Butler and Westmore executed a signed Redevelopment Agreement.[6] (Doc. 86, ¶ 32).

Each of these hearings were public and before the City Council, as it pertained to using and creating TIF funds and a TIF district. The record does not show a scintilla of evidence remotely suggesting that in any of these resolutions, the City Council expected to further approve line item expenditures that would incur as a result of Westmore developing the Property into a Dollar General store. Further, the City did not make promises to help make the Dollar General a *possibility*; instead it took affirmative actions to induce Westmore to begin developing the Property. This was not a promise to make a promise; this was as clear an inducement as there could be. There were, by all accounts, no questions as to the validity of the agreement, the area the Property would be located, and what would be used to offset Westmore's expense in doing so.

65 ILCS 5/11-74.4-4, and its subsections, instructs that a municipality may, by ordinance, approve TIF plans and projects and thereafter, designate project areas. It further provides that a municipality may also enter into all contracts with developer necessary or incident to the

[5] The Court does not recite each *undisputed* resolution passed by the City Council; however, the record reveals multiple ordinances *unambiguously* passed in order to both create a TIF District, as well as to induce Westmore to develop and build a Dollar General in Mounds.

[6] The Agreement provided a "Project Description" that *unambiguously* memorized that Westmore was pursuing and proceeding with plans for construction for a Dollar General Store, which is consistent with the TIF Redevelopment Plan.

implantation and furtherance of its redevelopment plan and project. 5 ILCS 5/11-74.4-4(c) goes on to say:

> [...] within a redevelopment project area, acquired by purchase, donation, lease of eminent domain; own, convey, lease, mortgage or dispose of land and other property, real or personal, or rights or interest therein, and grant or acquire property, real or personal, or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto, all in the manner and at such price the municipality determines is reasonably necessary to achieve the objectives of the redevelopment plan and project.

The Court adopts, after reviewing 65 ILCS 5/11-74.4-4, and its subsections, that a property not owned by a municipality, but that is within a redevelopment area that is essential, or incidental, to the "implantation and furtherance of its redevelopment plan and project," does not require a separate ordinance prior to an agreement regarding development of the property. The Court finds that the second sentence of subsection 4(c) would be a waste of words, with no meaning, otherwise. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 640 (7th Cir. 2016) ("It is a cardinal principle of statutory construction that a statue ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

Once the TIF Redevelopment Plan was approved through ordinance on April 19, 2017, the Court finds that the City had the right to enter into the Agreement with Westmore without *another* ordinance approving that specific action.

The City also argues that prior to creating a liability for a municipality, pursuant to 65 ILCS 5/3.1-40-40, such a liability must be approved by the city council. As discussed above, the Court has found that the city council did approve the creation of the liability through the various resolutions previously discussed. The Court also finds that 65 ILCS 5/3.1-40-40 does not apply as a bar from the city entering into a contract with Westmore as it would be exempted by the Act.

Now, turning to whether Butler, as the City mayor, could actually enter the agreement on behalf of the City to make the Agreement binding. The City contends that Butler could not enter the agreement without expressed Council approval and that approval was not secured prior to, or any time after, signing the Agreement. The City argues that without an express delegation of power from the City Council to the Mayor, the power to contract rests *solely* with the City Council.

In support of its argument, the City cites *U.S. Neurosurgical, Inc. v. City of Chicago*, 572 F.3d 325 (7th Cir. 2009). In *U.S. Neurosurgical*, the Plaintiff wanted recovery of costs relating to additional work that exceeded the agreed upon amount for performance under the written contract. The chief procurement officer ("CPO") in *U.S. Neurosurgical* approved work to be done by a contractor that was beyond what was originally contracted. However, the CPO was not the person with the authority to enter into any contract, including a verbal agreement, on behalf of the City of Chicago.

Here, the City contends that such a contract between itself and Westmore would require council approval, or else the mayor would be able to enter into any contract he or she would like, without any governance. The Court rejects this argument. Unlike the CPO in *U.S. Neurosurgical*, the mayor of the City was one of the *authorized* persons to enter into such an agreement on behalf of the City.

The Seventh Circuit has instructed that "corporate authorities may execute contracts." *Id.* at 330. The Illinois Municipal Code, 65 ILCS 5/2-3-8, define corporate authorities as "(a) the mayor and aldermen or similar body when the reference is to cities, (b) the president and trustees or similar body when the reference is to villages or incorporated towns, and (c) the council when the reference is to municipalities under the commission form of municipal government." 65 Ill.

Comp. Stat. Ann. 5/1-1-2. According to the undisputed material facts, "The City of Mounds is a City organized under Article 7 of the Illinois Constitution." (Doc. 89, pg 2). Therefore, the mayor is corporate authority authorized to execute contracts.

Further, the Act provides that a municipality may enter into "all contracts with ... developers, tenants . . . and others necessary or incidental to the implantation and furtherance of its redevelopment plan and project." 65 ILCS 5/11-74-4(b). When you look to the Illinois Municipal Code and TIF Act together, it becomes clear that Butler, then the City mayor, had the express right to enter into any necessary contracts needed to effectuate the Redevelopment Plan, which had been approved on April 19, 2010 by the City council.

To the extent that the contract created a liability for the City, the TIF Act allows for the municipality, by way of its corporate officer, to enter into such a contact with no further requirement for council approval to vote on the contract, which was expressly agreed to through an ordinance. It was not as if the City was *blindsided* by this agreement. Through multiple ordinances and regulations, the City did its best to get Westmore to bring the Dollar General to Mounds. There was no secret where Westmore would be recovering most of its costs from, not to the City, nor to the City council.

Finally, the Court finds that Westmore has established that the contract is binding under the theory of estopple. In order for equitable estopple to apply to municipalities, the party bringing the action must show:

1) An affirmative act by either the municipality itself or an official with express authority to bind the municipality; and

2) Reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position.

Patrick Eng'g Inc. v. City of Naperville, 976 N.E.2d 318, 327 (Ill. 2012).

Here, the City council did everything in its power, and did it publically, to induce through affirmative actions to persuade Westmore to build the Dollar General store. Doubtless, after the many resolutions, conversations, and ordinances passed by the City, Westmore acted in reliance on the executed agreement and expended $900,000.00 towards expenses in development of the Property. Having entered into a binding contract, the City, at first, did its part by acting as though the agreement was in effect, paying in accordance with the terms of the contract, and the Redevelopment agreement, for the 2014 fiscal year. Nothing in the record suggested that the Redevelopment Agreement, the council's intentions regarding Westmore and the Dollar General store, costs, or how those costs would be partially paid, were kept from the City, its citizens, or its council.

Further, on December 15, 2014, the City reported to the State that in the 2014 fiscal year, the City paid Westmore the amount of $16,769.63 from the Special TIF Fund in accordance with the Act. In that same report to the State, the City identified Westmore as the only project to be paid under the TIF Act. There is nothing within the record that remotely suggests that the City council was blindsided by its commitment to Westmore.

IV. Conclusion.

The Court concludes that the Agreement between Westmore and the City is binding. Having concluded the agreement to be binding, the Court does not need to discuss the further issues, or alternative arguments.

The Court **GRANTS** Westmore's Motion for Summary Judgment (Doc. 86) and **DENIES** the City's Motion for Summary Judgment (Doc. 88). The Clerk of Court is **DIRECTED** to enter judgment in favor of Westmore and against the City of Mounds.

Having resolved the claim over which this court has original jurisdiction based on diversity, the Court declines to exercise supplemental jurisdiction over the third-party claims where no diversity exists. 28 U.S.C. § 1367(c). The Third-Party Complaint is **DISMISSED** without prejudice and all pending motions are moot.

IT IS SO ORDERED.

DATED: 7/18/2017

s/J. Phil Gilbert
J. PHIL GILBERT
U.S. DISTRICT JUDGE