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SHORT FORM ORDER

COPY

INDEX No. 07-31749

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11-8-07
ADJ. DATE 6-6-08
Mot. Seq. # 001 - MD

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PIKE REALTY COMPANY, LLC,

Plaintiff,

- against -

PHILIP J. CARDINALE, TOWN OF RIVERHEAD COMMUNITY DEVELOPMENT AGENCY, TOWN OF RIVERHEAD PUBLIC PARKING DISTRICT NO. 1, and TOWN OF RIVERHEAD,

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion (#001) by the plaintiff for preliminary injunctive relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 4 - 5; Replying Affidavits and supporting papers 7 - 8; Other 9 (Exhibits); 10 (Memorandum of Law); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#001) by the plaintiff for an order awarding it a preliminary injunction restraining and enjoining the defendants from exercising a right of reverter contained in a deed and other documents executed by the parties and from making public statements with respect thereto is considered under CPLR 6311 and is denied; and it is further

ORDERED that a compliance conference is presently scheduled for **December 16, 2008**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York.

In November of 2004, the plaintiff was designated as the qualified and eligible sponsor for those portions of the Town of Riverhead's downtown urban renewal plan which were aimed at renovating, restoring and transforming the historic theater building situated on Main Street into a performing arts

center. On February 5, 2005, an Agreement of Sale setting forth the terms of the plaintiff's purchase of the theater building and the land on which it sits, was executed by the plaintiff and defendant Town of Riverhead Community Development Agency (hereinafter the "CDA"). By deed dated February 17, 2005, the CDA conveyed title to the subject premises to the plaintiff. In December of 2006, the parties executed a contract Addendum in conjunction with the Town's conveyance of an easement over town land to the plaintiff enabling it to comply with certain zoning requirements..

In both the Agreement of Sale and the deed, the CDA retained a reverter interest in the premises. The reverter clauses provide that the premises will revert to the CDA in the event, *inter alia*, the plaintiff fails to restore and improve the theater within three years from the date of closing. Similar reverter clauses were included in the December 8, 2006 Addendum to the Agreement of Sale and easement granted by the Town to the plaintiff that same day. Under each of these clauses, the plaintiff was required to complete its redevelopment of the of the theater not later than February 18, 2008. However, the plaintiff failed to fulfill its obligation to renovate the theater building and transform it into a performing arts center by February 18, 2008, as the subject premises still house the old theater building and no performing arts center operates therefrom.

By the complaint served and filed in this action, the plaintiff seeks a judgment reforming the February 5, 2005 Agreement of Sale and all subsequent documents including the February 12, 2005 deed, so that the reverter clause cannot be exercised until two years and nine months have expired from the date final permits are issued. The plaintiff also demands permanent injunctive relief prohibiting the defendants from exercising the reverter clauses and from making threats and public comments evincing an intention to exercise said reverter. Finally, the plaintiff demands damages incurred by reason of the defendants' purported breaches of the implied covenant of good faith and fair dealing and purported violations of the plaintiff's due process rights.

In support of its demands for judicial reformation of all reverter clauses, the plaintiff relies upon paragraph 18(b) of the Agreement of Sale (hereinafter "Renovation Standard Clause ") which provides the plaintiff with two years and nine months after receipt of all of the necessary municipal approvals to complete the project. The plaintiff contends that this clause, which directly conflicts with the reverter clauses would have no meaning or effect if the reverter clauses were enforceable as written. In support of its claims for damages, the plaintiff asserts that the defendants' dilatory and wrongful conduct in processing and reviewing the plaintiff's applications for municipal approvals and conveyances caused the plaintiff to default in complying with the time limitations imposed upon the completion of the project under the reverter clauses.

The defendants oppose the plaintiff's motion and deny any wrongful conduct on their part. The defendants contend, *inter alia*, that the plaintiff's failure to complete the renovation of the theater is solely attributable to the plaintiff's decision to expand the project by the construction of three floors of residential apartments and/or office space atop the renovated theater. The defendants argue that these circumstances warrant the denial of the plaintiff's motion and the dismissal of the plaintiff's complaint.

It is well established that a motion for preliminary injunction opens the record and gives the court authority to pass upon the sufficiency of the underlying claims (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). However, the court's inquiry is limited to determining whether the plaintiff has a cause of action as the court's power does not extend to an evaluation of conflicting evidence (*see* ***68 Burns Holding, Inc. v Burns Street Owners Corp.***, 18 AD3d 857, 796 NYS2d 677 [2nd Dept. 2005]).

It is also well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2nd Dept. 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see* ***Bergen-Fine v Oil Heat Institute, Inc.***, 280 AD2d 504, 720 NYS2d 378 [2nd Dept. 2001]), as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]).

A clear legal right to relief which is plain from undisputed facts must be established (*see* ***Gagnon Bus Company, Inc. v Vallo Transportation, Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2nd Dept. 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2nd Dept. 1998]) and the burden of showing an undisputed right to the injunction rests with the movant (*see* ***Doe v Poe***, 189 AD2d 132, 595 NYS2d 503 [2nd Dept 1993). Factors militating against the granting of preliminary injunctive relief include that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***White Bay Enterprises v Newsday, Inc.***, 258 AD2d 520, 685 NYS2d 257 [2nd Dept. 1999]) and that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action or effect an alteration, rather than a preservation of the *status quo* (*see* ***McIntyre v Metropolitan Life Insurance Company***, 221 AD2d 602, 634 NYS2d 180 [2nd Dept. 1995]; ***Rosa Hair Stylists, Inc. v Jaber Food Corp.***, 218 AD2d 793, 631 NYS2d 167 [2nd Dept. 1995]).

Here, the plaintiff's demands for preliminary injunctive relief are not dependent upon its claims for damages as such claims provide an adequate remedy at law and negate all entitlement to the drastic relief that a preliminary injunction affords. Nor are its demands for preliminary injunctive relief dependent upon its pleaded claims for permanent injunctive relief. Review of the instant moving papers reveals that the plaintiff's demands for a preliminary injunction are aimed principally at forestalling the defendants' exercise of their rights of reverter. Although the plaintiff also demands preliminary injunctive relief restraining the defendants from "making any threats or other public expressions evincing an intention to exercise the aforementioned reverter", these demands are wholly lacking in merit. The defendants' speech and expressions of opinion are constitutionally protected and the plaintiff failed to demonstrate any entitlement to curtailment thereof by prior restraint or otherwise *(see* ***Rose v Levine***, 37 AD3d 691, 830 NYS2d 732 [2nd Dept. 2007]; ***Rosenberg Diamond Development Corp. v Appel***, 290 AD2d 239, 735 NYS2d 528 [1st Dept. 2002]).

It is thus apparent that the plaintiff's equitable claim for reformation of the reverter clauses contained in the subject documents is the only pleaded claim upon which its demand for preliminary injunctive relief properly rests. To be entitled to the preliminary injunctive relief that is the subject of this

motion, the plaintiff must establish a likelihood of success on the merits of its reformation claim and the other elements of a successful motion for preliminary injunctive relief.

The court finds, however, that the plaintiff failed to establish a likelihood of success on the merits of its reformation claim. It is not disputed that the two year, nine months time frame that runs from receipt of all necessary municipal approvals that is set forth in the Renovation Standard Clause of the Agreement of Sale conflicts with the three year from closing time frame that is imposed upon the completion of the project by the reverter clause of said Agreement and those set forth in the deed the contract addendum and easement of December 2006. The plaintiff claims that the conflict between the reverter clauses and the Renovation Standard Clause was the result of a mutual mistake. The plaintiff argues that if the reverter clauses are not reformed so as to replace the three year from closing time frame contained therein with the more expansive time frame contained in the Renovation Standard Clause of the Agreement of Sale, said Renovation Standard Clause will be rendered meaningless and without force and effect. According to the plaintiff, such a result is repugnant to well established principles of contract law (*see e.g.* ***McCabe v Witteveen***, 34 AD3d 652, 825 NYS2d 499 [2nd Dept. 2006]).

However, the court rejects as unmeritorious, the foregoing contentions of the plaintiff. Its reliance on established rules of contract interpretation rather than on the law governing the equitable remedy of reformation and the doctrine of mutual mistake is misplaced *(see* ***Chimart Associates v Paul,*** 66 NY2d 570, 498 NYS2d 344 [1986]***; George Backer Management Corp., v Acme Quilting Co., Inc.***, 46 NY2d 211, 413 NYS2d 135 [1978]). The rules of contract interpretation cited by the plaintiff provide the successful proponent with remedies such as specific performance or damages or recision for breach of contract (*see e.g.* ***McCabe v Witteveen***, 34 AD3d 652, *supra*). They do not aid the plight of parties seeking reformation of contracts or other documents.

The remedy of reformation is properly granted only where parties have a real and existing agreement, but unknown to them, their signed writing does not accurately reflect that agreement *(see* ***O'Neil v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2nd dept. 1987]). To be entitled to reformation on the basis of mutual mistake, as is claimed herein by the plaintiff, the mistake must have existed at the time the contract was entered into, the facts about which the parties are mistaken must be material and both parties must have been mistaken as to the same fact (*see* ***Harris v Uhlendorf***, 24 NY2d 463, 301 NYS2d 53 [1969]. An instrument may not be reformed to include a provision that one party advanced but the other rejected (*see* ***Schmidt v Magnetic Head Corp.***, 97 AD2d 151, 468 NYS2d 649 [2nd Dept. 1983]). Since the purpose of reformation is to make the writing accurately reflect the agreement that the parties reached, reformation is inappropriate absent clear and convincing evidence that there had been a meeting of the minds between the contracting parties with respect to the term or terms the court is being asked to impose (*see* ***Chimart Associates v Paul,*** 66 NY2d 570, *supra*; ***Hayes v City of Yonkers***, 7 AD2d 860, 182 NYS2d 160 [2nd Dept. 1959]***Issacs v Schmuck ,*** 245 NY 77, 156 NE 621 [1927]).

Review of the record adduced on the instant motion reveals that the plaintiff failed to demonstrate that it has a cognizable claim for reformation of the subject documents. Such record is devoid of any evidence tending to establish that the plaintiff and the defendant CDA agreed that the time within which

the plaintiff had to complete its redevelopment of the site and to open it as a performing arts center was two years and nine months after its receipt of all necessary municipal approvals. Indeed, the record includes ample proof that the defendants' never agreed to any project completion date other than that set forth in the reverter clauses and that the plaintiff also agreed to the time limitations set forth in the reverter clauses.

Under these circumstances, the plaintiff's motion for a preliminary injunction is denied and the plaintiff's pleaded claims for reformation and permanent injunctive relief are dismissed. The defendants' demands for an award of the affirmative relief demanded in their counterclaim is denied, without prejudice, as procedurally improper for want of service of a notice of cross motion as required by CPLR 2215. The plaintiff's pleaded claims for recovery of damages and the counterclaim asserted by the defendants are continued herein.

Dated: 6/27/08

THOMAS F. WHELAN, J.S.C.