SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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CONCORD ASSOCIATES, L.P., CONCORD RESORT, LLC and CONCORD KIAMESHA LLC,

Plaintiffs,

DECISION and ORDER
Index # 1611-2011

-against-

EPT CONCORD, LLC and EPT CONCORD II, LLC, DANIEL BRIGGS, COUNTY CLERK OF SULLIVAN COUNTY,

Defendants.

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APPEARANCES: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
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Attorneys for Plaintiffs

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By: Y. David Scharf, Esq., and Kristin T. Roy, Esq.
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By: Robyn Tarnofsky, Esq.
Attorneys for Non-Party Empire Resorts, Inc.

LaBuda, J.

Plaintiffs commenced this action in Supreme Court, Sullivan County, on or about June 7, 2011, and filed an amended complaint on or about October 24, 2011 (the Supreme Court, Sullivan County action hereinafter referred to as the Sullivan action). On or about the 9th of November, 2011, Defendants served an amended verified answer. In early December, 2011, Defendants served and filed a second amended verified answer and counterclaims to the

amended verified complaint.

In the interim, on November 9, 2011, Plaintiffs moved for an order discontinuing the Sullivan action without prejudice pursuant to **CPLR R.3217(b)** and cancelling the Notice of Pendency. While Defendants were preparing the aforementioned answers and counterclaims, Plaintiffs filed an action in Supreme Court, Westchester County (Westchester action), involving the same parties, seeking money damages in connection with the same set of events and similar issues involved in the Sullivan action. Defendants opposed the motion to discontinue the Sullivan action as it related to their counterclaims, which sought a declaratory judgment and other relief. The Defendants also requested a hearing to determine the amount of costs and attorney fees to be assessed to Plaintiffs as result of what Defendants categorized as wasteful litigation maneuvers.

Plaintiffs, by motion filed January 19, 2012, moved to dismiss Defendants' three counterclaims pursuant to **CPLR R.3211(a)(4) and (7)**, or alternatively, for an order staying Defendants' counterclaims pursuant to **CPLR §2201**, pending the disposition of an action filed in Supreme Court, Westchester County, involving the same parties.

By Decision and Order dated February 8, 2012, this Court granted Plaintiffs' motion to discontinue their Sullivan action without prejudice, and denied Defendants' motion to dismiss the action as moot. The Court further elected to sever Defendants' counterclaims pursuant to **CPLR §603**. The Court denied Defendants' request for a hearing on the issue of attorneys' fees and costs.

Defendants, by motion filed February 23, 2012, moved for an order (1) converting Plaintiffs' motion to dismiss to one for summary judgment pursuant to **CPLR R.3211(c)**; (2) granting summary judgment to Defendants on their first and second counterclaims pursuant to **CPLR R.3211(c) and R.3212**; (3) denying Plaintiffs' motion to dismiss Defendants' third counterclaim; (4) denying Plaintiffs' motion to stay the counterclaims; and (5) granting such other and further relief as the Court deemed just and proper.

By Decision and Order entered May 1, 2012, Supreme Court, Westchester County (Hon. Gerald E. Loehr), stayed the Westchester action pending a decision by this Court on the parties' outstanding motions in the Sullivan action.

FACTUAL BACKGROUND

The Plaintiffs owned two large parcels of land in the Town of Thompson, County of Sullivan that were formally utilized as the Concord Hotel. Plaintiffs claim they intended to redevelop the property as a gaming facility, casino facility and resort. Plaintiffs intended to utilize one parcel as a casino and the other parcel as a resort.

Due to Plaintiffs' failure to meet certain financial obligations with regard to an

approximately $162,000,000.00 loan from Defendants, the parties engaged in protracted litigation in New York State Supreme Court and the U.S. District Court for the Western District of Missouri. As a resolution to said litigation, Plaintiffs and Defendants entered into a Settlement Agreement dated June 18, 2010, by which Plaintiff, Concord Resort, LLC, agreed to convey real property to Defendant, EPT Concord II. In a deed dated June 18, 2010, Concord Resort conveyed the Resort parcel (approximately 1600 acres) to EPT Concord II, which included ceratin tracts of land that are part of the Hotel/Casino Parcel and the Racetrack Parcel. A restrictive covenant was signed by EPT Concord II, which prohibited the development of a casino on the Resort parcel by EPT Concord II; said restrictive covenant would continue to run with the land unless Plaintiffs failed to fulfill certain conditions on or before December 31, 2011. Plaintiffs retained approximately 160 acres of the property.

In consideration of the transfer of the Resort property, EPT Concord II entered into a Casino Development Agreement (CDA) with Concord Associates and Concord Kiamesha on June 18, 2010. This Agreement required EPT Concord II to provide certain easements, leases and other agreements regarding the use and development of a hotel, a gaming facility, including a casino and a harness horse track, and other improvements on the Casino property and Racino tract. The CDA contained financing requirements for the construction and development of the Casino/Hotel project. In addition, Concord Kiamesha LLC and Concord Raceway Corp. signed an Amended and Restated Master Credit Agreement (MCA) by which they agreed to borrow up to $275 million dollars to fund the project in accordance with very specific funding requirements.

Both parcels in question remain undeveloped. The record indicates none of the Plaintiffs have been able to develop any of the property in question since 1999. After Defendants infused over $162 million dollars as a loan into the project, Plaintiffs failed to move forward with any development of the property. Due to continuous financing and money management issues, as well as protracted litigation, over 1700 acres in an already economically depressed and blighted area of New York State have sat idle for almost 14 years. The original Concord Hotel and other structures on the property were demolished years ago, so all that remains are two large vacant parcels.

The Defendants wish to move forward with developing their 1600 acres as a resort, with a casino and other features. In the November, 2013, election, New York voters approved full casino gambling; the Governor's office indicated that initially the state would approve four casinos. The application process, which requires interested developers to pay a one million dollar application fee, will close on June 30. 2014. Applicants expect to receive a decision on their applications in late 2014. Plaintiffs and Defendants have already filed an application for a gaming license for one of the first four casinos. It is unknown, how many, if any, gaming licences will be awarded to interests in Sullivan County.

It is Defendants' contention that Plaintiffs failed to meet the financing and other conditions as set forth in the Casino Development Agreement (CDA) and in accordance with the Master Credit Agreement (MCA). Therefore, Defendants contend the restrictive covenant on

their parcel expired on December 31, 2011.

Plaintiffs contend they timely had financing in place, and that Defendants interfered with said financing opportunity, causing Plaintiffs to lose the opportunity to obtain the funding necessary to develop their 160 acre parcel. Plaintiffs maintain the Defendants intentionally interfered with their ability to timely secure financing, because in early 2011 Defendants allegedly conspired with a third party to include a casino on the 1600 acre Resort parcel. Defendants claim their 2011 association with other entities regarding the development of a casino and resort on the Resort property was a back-up plan in the event Plaintiffs, once again, failed to meet the conditions of the contract.

PENDING MOTIONS

Plaintiffs' Motion for Dismissal of Third Counterclaim Pursuant to CPLR R.3211(a)(7)[1]

A party may move to dismiss a cause of action on the ground the pleading fails to state a cause of action. **CPLR R.3211(a)(7)**. When considering such a motion, a court "should 'accept the facts as alleged in the complaint as true, accord...every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" ***Rosenfeld v. Sayers*, 51 AD3d 998, 999 [2nd Dept. 2008], citations omitted; *see also*, *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]**. It does not matter whether the party can or will ultimately establish the allegations as set forth. ***Id.*** A court need only determine whether the allegations fit within *any* "cognizable legal theory. ***Monex Fin. Servs. v. Dynamic Currency Conversion*, 62 AD3d 675 [2nd Dept. 2009]**.

Defendants' third counterclaim asks for declaratory and injunctive relief. It alleges that the Settlement Agreement and Deed in Lieu granted to EPT Concord II transferred all rights, title and interest to the 1600-acre Resort Property. Defendants allege that the role of Master Developer runs with the land as a matter of law, that the current applicable Town Code provisions violate public policy, and therefore Defendants have the right to ask the Court to (1) declare Defendants as the Master Developer so they can control the development of the Resort Property, and (2) enjoin Plaintiffs from referring to themselves as Master Developer and having control over the vast majority of land they no longer own.

To state a cause of action for a declaratory judgment, a party must seek declaration of the legal rights of the parties; there must be an actual controversy between the parties with a stake in the outcome. ***See, Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept. 2006]**. There must be a justiciable controversy, solvable by a court, rather than some other tribunal. ***Schulz v. Silver*, 212 AD2d 293 [3rd Dept. 1995]**.

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[1]Plaintiffs made this motion pursuant to CPLR R3211(a)(7). They did not make a motion to dismiss pursuant to CPLR R3211(a)(1). Therefore, the Court will not consider, in the context of this motion only, whether the Plaintiffs have a defense to the counterclaim founded on documentary evidence.

To adequately state a cause of action for injunctive relief, a party must show there is an actionable cause. ***Shapiro v. City of New York*, 67 Misc2d 1021, 1028 [Sup. Ct. NY Co. 1971]; *see also*, *Guggenheimer v. Ginsburg*, 43 NY2d 268 [1977].** "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion to dismiss will fail. ***Guggenheimer v. Ginsburg*, 43 NY2d at 275.**

Defendants' third counterclaim embraces a cognizable claim concerning the determination of which parties are to be considered the Master Developer of the 1600 acres transferred to Defendants, and therefore which parties may identify themselves as Master Developer with ultimate control over the development of the 1600 acre Resort Property. ***Monex Fin. Servs. v. Dynamic Currency Conversion*; *Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, *supra*.** Defendants challenge not only Plaintiffs' reliance on the CDP and Town Zoning Code for continued use by Plaintiffs of the title Master Developer, but challenge the validity of the Town Zoning Code itself. Defendants claim such title and power runs with the land. After a review of the affidavits and documents submitted thus far, this Court finds that Defendants "set forth with sufficient factual specificity and fullness [essential facts] so as to identify the transaction and indicate the theory of redress...to enable the adversary to prepare....[T]he essential facts [as alleged] have not been negated beyond substantial question by the [documents] submitted...so that it might be ruled that the pleader does not have the causes of action." ***Guggenheimer v. Ginsburg*, 43 NY2d at 275.**

Therefore, Plaintiffs' motion to dismiss Defendants' third counterclaim pursuant to CPLR 3211(a)(7) is denied.

Defendants' Motion to Convert the Motion to Dismiss to a Motion for Summary Judgment

Defendants have requested an order converting Plaintiff's motion to dismiss to a motion for summary judgment. "[T]he court, after adequate notice to the parties, may treat the motion [to dismiss] as a motion for summary judgment." **CPLR §3211(c). *See Spilka v. Town of Inlet*, 8 AD3d 812 [3rd Dept. 2004].** Conversion to a motion for summary judgment is appropriate when, as in this case, the parties do not dispute the material facts. ***Id.*, at 813.**

This matter has been conferenced on the record numerous times and the Court has held oral argument on these issues on several occasions. Based on the nature of the arguments at those appearances, it is clear that the Defendants are seeking summary judgment on their first two counterclaims and that Plaintiffs are likewise treating the outstanding motions regarding Defendants' first two counterclaims as ones for summary judgment. Therefore, Defendants' request to have Plaintiffs' motion to dismiss the first two counterclaims converted to one for summary judgment converted to a motion for summary judgment is hereby granted. In addition, for the reasons discussed below, summary judgment in favor of Plaintiffs is denied.

Defendants' Motion for Summary Judgment–First and Second Counterclaims

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. ***Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].** The burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of triable fact. ***Zuckerman v City of New York*, 49 NY2d 557 [1980].** It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. ***Barr v. County of Albany*, 49 NY2d 557 [1980].** All evidence must be viewed in the light most favorable to the opponent to the motion. ***Crossland v. New York City Transit Auth.*, 68 NY2d 165 [1986].**

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . .mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. ***Zuckerman, supra* at 562.** It is incumbent upon the non-moving party to lay bare his proof in order to defeat summary judgment. ***O'Hara v Tonner*, 288 AD2d 513 [3rd Dept. 2001].** Mere conclusory assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on a motion for summary judgment as is reliance upon surmise, conjecture or speculation. ***Banco Popular North America v. Victory Taxi Management, Inc.*, 1 NY3d 381 [2004].**

Defendants have made a *prima facie* showing of their entitlement to summary judgment on the first and second counterclaims by documenting the CDA and MCA and the undisputed fact that Plaintiffs failed to (1) obtain conventional construction financing of up to $275 million in substantially the form provided by the MCA, and (2) failed to obtain any financing and failed to execute the MCA prior to December 31, 2011.

The First Counterclaim–Whether Plaintiffs' Potential Bond Offering Was the Same as a Traditional Loan

The record before the Court establishes that because Plaintiffs could not obtain traditional financing for the project, they hired an investment group to raise debt financing in the high-yield bond market. Defendants argue that although they cooperated with Plaintiffs regarding the "junk bond" financing to a certain point, Plaintiffs ultimately did not market the bonds to potential investors, thereby missing the December 31, 2011, deadline to fully execute the MCA. Defendants point out that even if Plaintiffs could have raised the money in the bond offering, the offering markedly differed from traditional construction financing pursuant to the terms of both the CDA and MCA; Defendants contend that the chance of Plaintiffs receiving necessary tax benefits was decreased, potentially resulting in a partially completed project, or a completed, but over-leveraged project on Plaintiffs' property, thereby negatively impacting Defendants' ability to market and develop their property. Defendants further argue that Plaintiffs' bond financing anticipated a substantially higher debt load than the conventional construction loan anticipated by the MCA (approximately $470 million verus $285 million) and that the debt load would have incurred a substantially higher interest rate that bank financing–requiring Plaintiffs' project to

generate higher revenues to stay afloat and increasing the chances of failure. Defendants also point out that the bond financing was not subject to certain preconditions in the MCA–conditions that were specifically negotiated into the MCA due to the Cappelli Group's previous failed attempts to initiate, let alone complete the project.

Plaintiffs, through Cappelli, conceded that his proposed project could not succeed without favorable tax treatment. The financing contemplated by the MCA met the requirements to operate a gaming facility under favorable tax rate legislation.[2] Plaintiffs' contemplated combination of bond financing and a loan did not.

From the facts and arguments presented, both orally and on submission, Defendants are entitled to summary judgment as a matter of law on their first counterclaims. This Court agrees with Defendants' argument that Plaintiffs' proposed bond financing was not in substantially the same form as anticipated or envisioned by the MCA or CDA, and therefore Defendants were under no obligation to accept such proposed bond financing, had Plaintiffs actually followed through with the offering, which they did not. As Defendants have pointed out, the CDA required that two specific entities, Concord Kiamesha and Concord Raceway, Corp., enter into a master credit agreement providing for a loan of up to $275 million in substantially the form of the MCA.[3] If those entities were able to do so, and fully execute an MCA on or before December 31, 2011, then the restrictive covenant prohibiting Defendants from owning and operating a casino on the Resort Property would run in perpetuity.

The language and intent of the CDA and MCA are clear and unambiguous–Plaintiffs could not substitute any type of financing it wished to satisfy the required conditions and conditions precedent of the CDA and MCA, and were required to obtain financing in substantially the form of the MCA. ***See generally 627 Acquisition Co., LLC v. 627 Greenwich, LLC*, 85 AD3d 645 [1st Dept. 2011]**, in which the court dismissed the plaintiff's claim because the plaintiff failed to adhere to the loan agreement requirement that any assignment had to be "in substantially the form" of an exhibit to the loan agreement. ***Id.*, at 646**. In the instant matter, the is nothing in the MCA to suggest that bond or junk bond financing, with substantially less equity than specified, was acceptable financing or could be substituted for the financing and equity negotiated into and anticipated by the CDA and MCA.

In the case at bar, Plaintiffs admitted in their amended complaint that the bond offering contained different terms than those required by the CDA. A review of the submissions and the CDA and MCA indicate that the proposed bond offering had a substantially higher debt load and rate of interest, the bond offering did not have funding preconditions as the project progressed, and the bond offering would result in a group of investors rather than a lender that could oversee

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[2] ***See* Tax Law §1612(b)(1)(ii)(G).**

[3] This Court agrees with Defendants' position that the language, "in substantially the form" of the MCA, taken in context, refers to the form and type of *financing* negotiated and anticipated by the CDA and MCA, not the document style of the MCA.

the project. The proposed financing also lowered the amount of equity the Cappelli Group would be required to maintain invested in the project to insure it would remain properly incentivized. The MCA also required that there was adequate lender oversight and involvement with the project and that the financing met the requirements of Tax Law §1612(b)(1)(ii)(G). Plaintiffs' proposed bond financing would not or potentially could not meet the requirements envisioned by the parties and therefore, as a matter of law, was not in substantially the form of the MCA. ***Id.*** Therefore, the Court finds that the proposed bond financing was not in substantially the form of the MCA and that the Defendants are entitled to summary judgment on the first counterclaim as a matter of law.

The Second Counterclaim–Expiration of the Restrictive Covenant

Courts in this state have held that "[c]ovenants restricting the use of land are strictly construed against those seeking their enforcement because these covenants are contrary to the general public policy in favor of the free and unobstructed use of real property." ***Kew Forest Neighborhood Ass'n, Inc. v. M & K Mgmt., LLC*, 12 AD3d 569, 569 [2nd Dept. 2004]**. A party seeking to enforce a restrictive covenant must prove by "clear and convincing evidence, the scope, as well as the existence, of the restriction." ***Greek Peak, Inc. v. Grodner*, 75 NY2d 981, 982 [1990]**. If there is any ambiguity in a restrictive covenant, a court must construe the covenant to limit the restriction. ***See Turner v. Ceasar*, 291 AD2d 650 [3rd Dept. 2002]**.

A condition precedent must be literally performed, and the burden to show that a covenant base no such condition has expired is very high. ***See Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc.*, 61 NY2d 106 [1984]**. An express condition must be literally performed. ***MHR Capital Partners LP v. Presstek, Inc.*, 12 NY3d 640 [2009]; *River St. Realty Corp. v N.R. Automotive, Inc.*, 94 AD3d 848 [2nd Dept. 2012]**.

The restrictive covenant in the within case forbade Defendants from developing and operating a casino on the Resort Property until December 31, 2011, if Plaintiffs failed to perform the conditions precedent of the contract (which they did), or in perpetuity, if Plaintiffs obtained financing substantially in the form of the MCA and delivered a fully executed MCA on or before December 31, 2011. It is undisputable that Plaintiffs failed to have appropriate financing in place and failed to deliver a fully executed MCA to Defendants on or before December 31, 2011. Therefore, they failed to meet an express condition and the covenant expired. ***Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard, Inc., supra*; *See also Steven Strong Dev. Corp. v. Washington Med. Assocs.*, 303 AD2d 878 [3rd Dept. 2003]**. Plaintiffs' argument that Defendants interfered with their ability to proceed with the bond offering and timely deliver a fully executed MCA on or before December 31, 2011, is unsupported by the record and therefore without merit. Plaintiffs argue that Defendants were already negotiating with a third party to build a casino on the resort Property while Plaintiffs were trying to secure financing for their project. Defendants contend their meetings with such other parties were a back-up plan in the event Plaintiffs could not obtain the financing and meet the December 31, 2011, deadline, which in fact, occurred.

Regardless, Plaintiffs have raised no triable issue of fact on this issue. ***Steven Strong Dev. Corp. v. Washington Med. Assocs.*, 303 AD2d at 881.** They failed to secure appropriate financing in substantially the form of the MCA, and then failed to deliver a fully executed MCA on or before December 31, 2011. Plaintiffs have failed to present evidence to this Court as to how Defendants' discussions with third parties of other opportunities for building a casino on the Resort Property, or even negotiating a deal with other entities to further such a plan, interfered with Plaintiffs' ability to secure financing in substantially the form of the MCA and to fully execute and deliver an MCA on or before December 31, 2011. This Court disagrees with Plaintiffs' argument that there are material issues of fact regarding whether they failed to meet the December 31, 2011, deadline; they failed to secure financing and meet the deadline. Whether Defendants interfered with their ability to obtain financing, "conspired" with other entities against their project, or took actions to cause them to fail to execute an MCA raises issues concerning possible monetary damages, which are not before this Court.[4]

Plaintiffs have offered no documentary or other evidence to raise any issue of fact precluding summary judgment. Plaintiffs' conclusory answer to the counterclaims failed to raise any triable issues of fact. They have presented no evidence to show they entered into any type of financing agreement prior to December 31, 2011, that they had and delivered a fully executed MCA prior to December 31, 2011, or that they filed for a preliminary injunction or other immediate relief seeking to extend the restrictive covenant. ***See Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC*, 70 AD3d 646 [2nd Dept. 2010]**.

The entire property formerly home to the Concord Hotel remains a derelict, undeveloped, eyesore in a blighted and poverty-stricken region. To enforce a restrictive covenant based on unsupported assertions and speculations that Defendants conspired with another party to develop a casino on the Resort Property and that said discussions somehow prevented Plaintiffs from meeting the conditions precedent of the contract would not only be unsupported by the law, but would be against public policy. The legislative intent behind the development of casino gambling in New York was to revitalize economially depressed regions of the state, specifically including the Catskills. Plaintiffs did nothing to develop the property from the time of acquisition, allowed the property to fall into a state of disrepair requiring demolition, failed to develop the property despite the infusion of significant sums of money from Defendants, defaulted on the loan by Defendants, negotiated a deed in lieu of foreclosure and settlement with very specific conditions and deadlines so the property could be developed, failed to meet the conditions and said deadlines, and then tied up the property in litigation for years. Based on the foregoing, this Court finds that Plaintiffs failed to comply with the conditions of the contract and failed to meet the unambiguous December 31, 2011, deadline to secure financing in substantially the form in the MCA and to deliver a fully executed MCA, and therefore the restrictive covenant expired on December 31, 2011, and Defendants may pursue their efforts to develop a casino on the Resort Property.

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[4]The Westchester County action, which is currently stayed pending the outcome of this litigation, includes an action for monetary damages.

Defendants' Motion for Declaratory Relief–Master Developer Status

Pursuant to local Town of Thompson zoning regulation, **ZR §250.27.2(B)(3)(a)**, an applicant for approval of a comprehensive development plan need only show it has "1,200 contiguous acres in common ownership at the time of the original application for approval of a PRD [(Planned Resort Development)] Comprehensive Development Plan, which must include at least one eighteen-hole regulation golf course..." Defendants argue that because the right to amend or apply for a PRD is based on ownership of sufficient acreage, Defendants have an absolute right to petition the Town for an amendment to the PRD and adoption of a new CDP for the Resort Property. The zoning regulations, however, also require that any application for an amendment must be made by the Master Association for the property. ***See* ZR §250.27.2(C)(1)(f)**. As Defendants point out, though, the zoning regulations fail to address landowners' rights, or what happens when a prior property owner who has obtained approval of a CDP, such as Plaintiffs in this case, can no longer meet its development plans.

Plaintiffs have taken the position that based on the zoning regulations and the prior approvals, they can enjoin Defendants from developing the property because Plaintiffs are the Master Developer and Master Association. This Court disagrees. Plaintiffs no longer own at least 1200 contiguous acres for development and in fact, transferred the Resort Property and all rights it had to that property to Defendants as a matter of law. Pursuant to the June 18, 2010 settlement agreement between the various parties, Plaintiffs' executed a deed in lieu of foreclosure; Section 1.04–Absolute Conveyance of the agreement, states that the "conveyance of the Resort Property to [EPT Concord II] and the assignment of the Golf Course Lease pursuant to the Lease Assignment at Closing hereof, according to the terms and conditions of this Agreement, **is an absolute conveyance of all the right, title and interest in and to the Resort property**.... [Concord Resort] has no further interest...or claims in and to the resort Property or to the rents, issues or profits and other proceeds that may be derived therefrom, of any kind whatsoever."

Based on the foregoing, Plaintiffs cannot legally be the Master Developer of all of the former Concord Hotel property, as they bargained their rights away pursuant to the June 18, 2010, settlement agreement and transferred those rights pursuant to the deed in lieu of foreclosure. Therefore, Defendants' motion for an order declaring them the Master Developer of the Resort Property is hereby granted in its entirety.

Based on the foregoing, it is

ORDERED that Plaintiffs' motion to dismiss Defendants' Third Counterclaim is denied; and it is further

ORDERED that Defendants' motion for an order converting Plaintiffs' motion to dismiss Defendants' First and Second Counterclaims to a motion for summary judgment is granted; and it is further

ORDERED that Plaintiffs' motion for summary judgment on Defendants' First and Second Counterclaims is denied in its entirety; and it is further

ORDERED that Defendants' motion for summary judgment on their First and Second Counterclaims is granted in its entirety; and it is further

ORDERED that Defendants' motion for declaratory relief on their Third Counterclaim declaring them as Master Developer of the Resort Property, prohibiting Plaintiffs from claiming the status of Master Developer of the Resort Property, and terminating Plaintiffs' prior status as Master Developer of the Resort Property parcel and all of the rights and interests that run with that title, is hereby granted in its entirety.

This shall constitute the Decision and Order of this Court.

DATED: June 30, 2014
Monticello, New York

Hon. Frank J. LaBuda
Acting Justice Supreme Court

Papers Considered:

1. Order to Show Cause, by Kristin T. Roy, Esq., dated February 23, 2012;
2. Affirmation of Kristin T. Roy, Esq., dated February 15, 2012 with exhibits annexed;
3. Affidavit of Robert Drumm, dated February 15, 2012;
4. Defendants' Memorandum of Law in Support of Motion for Summary Judgment, by Kristin T. Roy, Esq., dated February 15, 2012;
5. Affirmation of Alfred E. Donnellan, Esq., dated March 29, 2012;
6. Affidavit of Richard Newby, dated March 30, 2012;
7. Affidavit of Louis R. Cappelli, dated March 29, 2012, with exhibits annexed;
8. Plaintiffs' Memorandum of Law in Opposition to Pre-Answer and Pre-Discovery motion for Partial Summary Judgment, by Alfred E. Donnellan, Esq., dated March 29, 2012;
9. Reply Memorandum of Law, by Kristin T. Roy, Esq., and Y. David Scharf, Esq., dated April 19, 2012;
10. Concord Financing Documents submitted by Plaintiffs, Confidential and Sealed;
11. Supplemental Summary of Arguments in Letter Format, by Alfred E. Donnellan, Esq., dated May 6, 2014;
12. Supplemental Summary of Arguments in letter Format, by Y. David Scharf, Esq., dated May 6, 2014, with attachment;
13. Stenographic minutes of oral argument on pending motions, dated April 10, 2014;
14. Plaintiffs' Memorandum of Law dated August 1, 2011;
15. Non-Party Empire Resorts, Inc.'s Memorandum of Law dated August 5, 2011;
16. Additional Confidential documents from Plaintiffs and Defendants submitted under seal and not specified herein to preserve confidentiality.