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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 17-2659

STARR CAPITAL PARTNERS, LLC, SMITH LEGACY PARTNERS SERIES, LLC, SMITH LEGACY PARTNERS II, LLC,505-507 COMMON STREET, LLC, and 527 COMMON STREET, LLC

vs.

TOLL BROTHERS, INC. and BELMONT RESIDENTIAL, LLC

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MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY IN JUNCTION

For the reasons stated below, Plaintiff's Motion for Preliminary in Junction is ALLOWED IN PART and DENIED IN PART, as specified in the Order below.

THE ISSUE

The case involves a plot of land next to Cushing Square, Belmont, where Trapelo Road meets Common Street. The property had been the subject of retail establishments, including a gas station. The plaintiffs (collectively, "Starr") owned it, but on March 16, 2016 sold it to Toll Brothers, Inc., which thereafter formed the single-purpose 527 Common Street, LLC (together, "Toll"). Starr retained an option to purchase the retail portion of the development for its actual cost plus 1.5%. The entire plot was demolished, and is being rebuilt with 112 residential apartments and three retail buildings.

Unsurprisingly, the gas station left behind environmental issues requiring remediation, which the parties took into consideration. Starr Paragraph 26 of the Agreement of Sale, titled "Retail Space Purchase Right," conditioned Starr's right to purchase the retail space on its monetary participation in the remediation. Specifically:

- There is a "Remediation budget" of $1,310,000 to clean up the "Existing Environmental Conditions," which Toll will pay.
- Both parties acknowledged that the actual cost could exceed the budget, and that there also may be "Unknown Conditions" that will require remediation.
- If the cost of remediating the Existing Environmental Conditions exceeds $1,441,000, Starr is to pay the excess.
- "[I]f the cost of Remediation of Existing Environmental Conditions and any Unknown Conditions exceeds ... $2,500,000 ... (the 'Upset Threshold') ... then [Starr] will pay the actual amount of all such Remediation costs in excess of the Upset Threshold as such costs are incurred and billed to [Starr] by [Toll] ... failing which [Starr] will forfeit its right to purchase the Retail Space under this Section 26."
- Each of the excess costs assume that they are not covered by insurance.

Starr expects that it will make its profit on the retail buildings. Keeping the option is first and foremost.

The Complaint, dated September 7, 2017, alleges that Toll had "drastically increased the Remediation [b]udget of $1,300,000 to $4,200,000" and it changed the scope of work which was not approved or consented to by [Starr]." The crisis triggering the present motion was a demand letter from Toll on April 2, 2018, stating that "the current costs of Remediation in excess of the Upset Threshold are Two Million Two Hundred Eleven Thousand Sixteen and 65/100 dollars ($2,211,016.65), with payment due within thirty (30) days." A nineteen-page summary and analysis states that as of January 1, 2018 Toll had been invoiced $4,711,016.65 in what it determined to be remediation costs, or an excess of $2,211,016.65 over the Upset Threshold of $2,500,000.

The project is nearing completion. Toll estimates that one of the three retail buildings will be complete and ready for leasing this fall; the second, in the spring of 2019; and the third, by the end of 2019. It expects that the availability of nearby retail establishments will be a significant draw to potential occupants of the 112 apartment units that are also going up.

Starr seeks a preliminary injunction, prohibiting Toll from demanding payment of this amount, and from allowing anyone other than Starr to exercise the option to purchase the retail units, until the case has been adjudicated and all rights of appeal exhausted.

The matter was presented to me on May 10, 2018, somewhat after the deadline established by Toll. Rather than issue a formal temporary restraining order, I told counsel that I would give them a decision as quickly as I am able; that Monday, May 14 would be a reasonable estimate; that in any event, Toll is not to change the status quo until there is a decision; and that to do so would be considered a civil contempt. I am a day late.

DISCUSSION

Under the familiar standard of Packaging Industries, Inc. v. Cheney, 380 Mass. 609, 617 (1980), the motion judge is to

> evaluate[] in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. ... Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

Both sides filed well prepared briefs with substantial exhibits, including affidavits from their environmental engineering consultants, and other documents. As I mentioned during argument, to make a reliable determination concerning the parties' relative likelihood of success in the dispute

as a whole would require an evidentiary hearing of significant duration, which neither side has requested.

Nonetheless, it bears noting that one of the significant disagreements between the parties has to do with the proper meaning of what sorts of work on soil qualify as "Remediation costs." Starr argues for a guidance document issued by the Massachusetts Department of Revenue, which states that costs are eligible for consideration as net response and removal costs – and so are eligible for tax credits – "where such costs are a direct and necessary part of attaining a permanent solution or remedy operation status and where such costs have been incurred by the taxpayer while the taxpayer owned or leased the property." Costs are not eligible for a tax break, for example, if they "are not a direct and necessary part of attaining a permanent solution or remedy operation status." Enough of Toll's invoice falls into the latter category, says Starr, that the actual remedial work has yet to pass the Remediation budget.

Toll has a different view, and one that is better anchored in the Agreement of Sale itself. The original Agreement of Sale did not have specify what work would qualify as remediation costs. The Agreement was refined with several amendments. One of these – the Second Amendment, dated September 2, 2016 – included Exhibit C, titled "Scope of Work for Remediation":

> All costs associated with the onsite, or offsite cleanup or remediation associated with the property, including but not limited to the cost, fees and requirements of MCP filings, included but not limited to the RAM plan, insurance costs, testing, the Brownfield Tax Credit filing and consultant fees, consultants, attorneys, agency satisfaction of site status, insurance and reporting.

This is undoubtedly broader than the Department of Revenue list of tax-credit-available items. Although I am not in a position, without an evidentiary hearing of some length, to make a reliable estimate of the monetary difference between the two methodologies as applied to Toll's

invoice, is at least clear that the Second Amendment to the Agreement of Sale controls, and that its application appears to yield a larger dollar number for the Remediation costs to date than Starr's method.

The balance of potential harms is somewhat easier to assess. Starr argues that Toll is better able to absorb, for the time being, whatever excess it may have incurred over and above the Upset Threshold. I take judicial notice of the fact that Toll is a nationwide homebuilder, rated in the Fortune Five Hundred (if only barely). I am willing to assume that it could carry several million dollars on its books for awhile, if need be.

Starr also says, without specifics, that it cannot afford to pay the $2,211,016.65 bill, or the others expected in the future. It is concerned that without a preliminary injunction maintaining the status quo, Davis Companies, a Boston-based real estate firm that Toll brought in as an equity partner after this litigation began, will scoop up the retail space that was optioned to Starr.

Toll responds that any harm could be remedied with money damages. It also points out that after some hard-litigated motion practice, the Court (Pierce, J.) allowed Starr's motion for a Memorandum of Lis Pendens, so Starr is protected.

The first argument does not suffice. "It is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." Greenfield Country Estates Tenants Assn., Inc. v. Deep, 423 Mass. 81, 88 (1996).

The second argument is more on point. The Memorandum of Lis Pendens may discourage all comers. If not it will require, should Starr prevail in this litigation, that the retail space be turned over to it after all avenues of appeal are exhausted..

Again, however, this is not fully satisfactory: there is at least the possibility that Toll and Davis Companies or someone else will decide to take a chance, pass title, and begin letting to would-be tenants. Undoing the results would not be easy. There are also, however, the facts that the first of the retail buildings is expected to be finished this fall, and the other two during 2019, and that their presence *vel non* are expected to have an effect on the success of the residential units.

All in all, the likelihood of success (so far as I can ascertain on conflicting information) and the balance of irreparable harm tilt in Toll's favor. I do, however, believe that it is only fair to allow Starr, if in is able and willing, to put things aright is it is able and willing.

ORDER

For the reasons he motion for preliminary injunction is therefore ALLOWED IN PART and DENIED IN PART, as follows.

(a) Toll shall accept the sum of $2,211,016.65 if tendered by Starr between now and May 31, 2018.

(b) During that period, and thereafter if Starr has made on time such payment and any future costs of remediation in excess of the Upset Threshold, Toll shall not allow anyone other than Starr to acquire title to any of the retail space.

(c) The Memorandum of Lis Pendens shall remain in place until further order of the Court.

Thomas P. Billings
Justice of the Superior Court

Dated: May 15, 2018