IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

T&C ASSET MANAGEMENT, LLC, a Colorado limited liability company, d/b/a HREC DEVELOPMENT RESOURCES,

CASE NO: 10-031391ACE (19)

Plaintiff,

vs.

BROWARD COUNTY, a political subdivision of the State of Florida

Defendant.
_____/

ORDER ON PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on September 6, 2011, on Defendant Broward County's ("Defendant") Motion for Final Summary Judgment, and Plaintiff's, T&C Asset Management, LLC ("Plaintiff"), Cross-Motion for Partial Summary Judgment. The Court having considered same, having heard arguments of counsel and being otherwise duly advised in the premises finds and decides as follows:

Introduction

Plaintiff filed this breach of contract action against Defendant on August 2, 2010, seeking damages and declaratory relief. In its Complaint, Plaintiff seeks damages claiming that Defendant, by a vote of the Broward County Board of County Commissioners ("the County Commissioners"), approved the First Amendment to Agreement between Broward County and LMN Architects ("the First Amendment") for consulting services for the Broward County Convention Center Master Plan Proposal ("the Project"). Plaintiff claims the First Amendment includes a provision entitling it to a percentage "Advisory Fee" if a "transaction", as defined by the agreement, occurred. If a "transaction" occurred, as alleged by Plaintiff, the amount of the "Advisory Fee" would be based

upon a percentage of the hard and soft costs incurred by the developer selected by the Defendant. Until the time of a "transaction," the First Amendment provided Plaintiff would be compensated on an hourly basis. Pursuant to the First Amendment, all hourly fees paid to Plaintiff by Defendant prior to a "transaction" would be reimbursed to Defendant or deducted from the "Advisory Fee." Plaintiff claims a "transaction" occurred when (1) Defendant selected FaulknerUSA, Inc. ("FaulknerUSA") as the developer for the Project; and (2) Defendant entered into agreements with FaulknerUSA regarding the development and construction of the Project.

On October 29, 2009, Plaintiff demanded Defendant pay the "Advisory Fee" it claimed was due under the First Amendment. On November 4, 2009, Defendant refused Plaintiff's demand disputed Plaintiff's entitlement to an "Advisory Fee."

Parties' Arguments

The parties concede the issues before the court are questions of law, except for the damages asserted by the Plaintiff.

Defendant argues entitlement to summary judgment as a matter of law on two grounds. First, Defendant argues Plaintiff is not entitled to an "Advisory Fee" as a matter of law because the "Advisory Fee" was not approved by the Broward County Commission. *See* Def.'s Mot. for Final Summ. J. at 3-7. Second, Defendant posits that even if the County Commission approved an "Advisory Fee", a "transaction" did not occur because (1) a developer for the project was never selected or presented to the County Commission; and (2) Defendant did not enter into any agreement relating to the development or construction of the project. *Id.* at 3, 7-16.

In support of its Motion for Partial Summary Judgment, Plaintiff argues; (1) the terms and conditions of the First Amendment are clear and unambiguous, and entitle it to an "Advisory Fee"; and (2) a "transaction", as defined under by the First Amendment, occurred when (a) The County Commission selected FaulknerUSA as the developer of the project. (b) FaulknerUSA thereafter partially or fully funded the development costs of the project; and (c) Defendant entered into *"any*

form of agreement" relating to the current or future development of the project, namely a Letter of Intent and Site Access Agreement. *See generally* Pl.'s Mot. for Partial Summ. J. at 1-18.

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FLA. R. CIV. P. 1.510 (c). The party moving for summary judgment has the burden of showing the absence of a genuine issue of fact. All inferences must be drawn from the proof in favor of the party opposing the motion. *Liberty Mutual Insurance Co. v. Stuckey*, 220 So.2d 421 (Fla. 4th DCA 1969).

It is well settled summary judgment should be sparingly granted, and if there are issues of fact and the slightest doubt remains, summary judgment should not granted. *See Cambell v. Anheuser-Busch, Inc.*, 265 So.2d 557 (Fla. 1st DCA 1972). The burden to prove the non-existence of genuine triable issues is on the moving party, and the burden does not shift to the opposing party until the movant has successfully met his burden. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966). Doubts and inferences as to the existence or nonexistence of material facts must be resolved against the movant. *Id.* In this case both sides agree the questions before the court are questions of law.

If the moving party meets this initial burden, summary judgment is appropriate as a matter of law against the nonmoving party if they fail to make a showing sufficient to establish the existence of an essential element of that party's case. *Food Fair Stores of Florida v. Patty*, 109 So.2d 5 (Fla. 1959); *DeMesne v. Stephenson*, 498 So.2d 673 (Fla. 1st DCA 1986). The evidence presented by the nonmoving party is to be believed and all reasonable inferences are to be drawn in his favor. *Holl, supra*. On a motion for summary judgment, the Court reviews the entire record, as well as the memoranda and materials submitted by the parties in conjunction with the motion. *Humphreys v. General Motors Corp.*, 839 F. Supp 822 (N.D. Fla. 1993).

The First Amendment

It is well settled the legislative and governing body of a county has the authority to enter into contracts. *See* FLA. STAT. § 125.01 (3)(a) ("The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated, including, . . . authority to . . . enter into contractual obligations . . . ."). However, a county may only bind itself to a contractual obligation if such contract is approved and executed by a majority vote of the Board of County Commissioners after a duly noticed public meeting. FLA. STAT. § 286.011 (1).

In the current matter, the County Commission held several meetings from May 2007 through June 2007. During those meetings the County Commission discussed Plaintiff's compensation pursuant to the First Amendment. The County Commission initially approved the First Amendment on May 22, 2007, with the condition that the issue of a "transaction" or "Advisory Fee" be discussed at a later date. A review of the minutes of various board meetings of June 5, 2007, June 12, 2007, and June 19, 2007, clearly and unequivocally show the "Advisory Fee" to be paid to Plaintiff upon the occurrence of a "transaction" was approved by a majority of the Broward County Commission. *See* Def.'s Mot. for Final Summ. J., Exs. B(ii), C(ii), D(ii), and E(ii). Based upon the minutes of the meetings of the County Commission, the Court concludes the First Amendment, which agreement contains a provision entitling Plaintiff to an "Advisory Fee" upon the occurrence of a "transaction," as defined by the First Amendment, was properly approved by a majority of the Broward County Commission.

Moreover, as part of discovery in this matter, Plaintiff deposed Nicki Grossman, President of the Greater Fort Lauderdale Convention Center & Visitors Bureau for the past fifteen years, on December 2, 2010. During her deposition, Mrs. Grossman testified that it was her understanding that the County Commissioners approved the proposed compensation schedule for Plaintiff, including the "Advisory Fee." *See* Dep. of Nicki Grossman, Dec. 2, 2010, p. 35, ln. 9-18.

Further, in support of its position the County Commissioners approved the First Amendment, including the "Advisory Fee," Plaintiff submitted affidavits from Mr. Michael Geoghegan; and Mark Tobin. Sworn testimony from Mark Geoghegan, Broward County's Chief Financial Officer established and proved Defendant entered into the First Amendment and agreed to compensate Plaintiff an "Advisory Fee." *Id.* at Ex. 3, ¶¶9-10. Likewise, Mark Tobin, Plaintiff's acting President also affirmed Defendant approved the First Amendment with the "Advisory Fee" provision.

It should be noted --- Defendant Broward County did not submit **any** affidavits or sworn evidence in support of its' position that the First Amendment was not properly approved by a vote of the County Commission. Instead, Defendant argues minutes of the meetings of the County Commission prove the "Advisory Fee" provision of the First Amendment was never approved. The Court disagrees and does not find merit in Defendant's argument in this regard. The minutes of the various board meetings prove the First Amendment, with the "Advisory Fee" provision, was approved by a majority of voting members of the Broward County Commission. Def.'s Mot. for Final Summ. J., Exs. B(ii), C(ii), D(ii), and E(ii).

The Court also notes that Plaintiff provided services to the County for a period of approximately two and one-half years, during which time the Defendant benefitted from Plaintiff's services and Plaintiff operated under the belief that the First Amendment and "Advisory Fee" provision had been approved.

Transaction

The Court now turns to the issue of whether a "transaction" occurred, as that term is defined under the First Amendment, which entitles Plaintiff to an "Advisory Fee." Exhibit A-II to the First Amendment provides that: "At the time of a Transaction . . . the [Defendant] agrees to pay [Plaintiff] an . . . Advisory Fee . . . equal to 0.7% of the hard and soft costs of the Project." According to Exhibit A-II to the First Amendment, a transaction is defined as any event including a Qualifying Participant in any one or more of the following:

> (b) A development entity is selected which partially or fully funds Project development costs through any combination of financing sources;
>
> (c) The [Defendant] enters into any form of agreement relating to the current or future development or construction of the Project including without limitation: (i) the granting of an option to lease or purchase land; (ii) a right of first offer or a right of first refusal.

Pl.'s Mot. for Partial Summ. J., Ex. 1.

Following the approval of the First Amendment by the County Commission, Plaintiff sent Requests for Letters of Intent ("RLI") to its database of "qualified principals, investors, developers and hotel companies." *Id.*, Ex. 2, ¶10. In response to this request, responsive RLI packages, including a proposal by FaulknerUSA, were submitted to the Defendant. The Defendant chose a Selection Committee to organize and rank the various proposals.

On November 5, 2007, the Defendant advised FaulknerUSA its proposal had been selected and soon thereafter began further negotiations. *See id.*, Ex. 9. This fact is also confirmed by the affidavit of Mark F. Schultz, President of FaulknerUSA, which affidavit was submitted by Plaintiff. *Id.*, Ex. 4, ¶3. Mr. Schultz affirmed that his company was selected by the Defendant as the developer for the hotel convention center project. *Id.*, Ex. 4, ¶¶4-5. Mr. Schultz further affirmed that a "transaction" occurred because "FaulknerUSA partially funded the Project pre-development costs through a $3,000,000.00 deposit under the financially-binding portions of the Letter of Intent." *Id.*, Ex. 4, ¶7. This fact is further supported by affidavits of Mark Tobin and Mark Geoghegan. *See id.* Exs. 2, 3.

Defendant argues there is a distinction between "pre-development" and "development costs." Specifically, Defendant claims that a "transaction," as defined by the First Amendment, only occurs when "[a] development entity is selected which partially or fully funds Project *development costs* . . . ." Def.'s Mot. for Final Summ. J. at 13 (emphasis added). However, the Court does not find there to be a distinction between pre-development costs and development costs. It is uncontroverted that

FaulknerUSA deposited with the Defendant $3M, which deposit was to be utilized by FaulknerUSA to further the overall development of the Project.

In addition, Mark Schultz affirmed that FaulknerUSA entered into "any form of contract relating to the current or future development of the Project." Pl.'s Mot. for Partial Summ. J., Ex. 4. This affirmation is confirmed by the Letter of Intent and Site Access Agreement, entered into between Broward County and FaulknerUSA. *Id.* Exs. 10, 11.

It is important to note that the "any form of contract" language does not require the agreement entered into between the parties to be a final agreement concerning the development or construction of the Project. Based on the clear language of Exhibit II-A to the First Amendment, a "transaction" occurs where "[t]he [Defendant] enters into *any form of agreement* relating to the *current or future development or construction of the Project* . . . ." *Id.* Ex. 1 (emphasis added). Therefore, the Letter of Intent and Site Access Agreement are *"any form of agreement"* as defined by the contract and would trigger Plaintiff's contractual right to an "Advisory Fee."

Lastly, the Court notes the Defendant filed an Amended Counterclaim seeking repayment of the fees it paid to Plaintiff prior to the "transaction." The Court finds that Defendant's Amended Counterclaim was improperly plead as such, and should have been plead as an affirmative defense. *See* FLA. R. CIV. P. 1.110 (d) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation."). Therefore, the Court will construe Defendant's Amended Counterclaim as an affirmative defense. Because the Court has determined that the First Amendment, with the "Advisory Fee" provision was approved by a majority of the County Commissioners, it is the determination of the Court that the "Advisory Fee" due to Plaintiff is to be "set-off" by the amount Plaintiff has already received as compensation from Defendant. The exact amount of the "set-off" will be determined at a subsequent hearing.

It is hereby **ORDERED AND ADJUDGED**:

1. Plaintiff's Cross-Motion for Partial Summary Judgment be, and the same is, hereby **GRANTED.**
2. Defendant's Motion for Final Summary Judgment is **DENIED.**
3. As a result of this order, the parties are hereby ordered to meet, within (30) days, to attempt to reach an agreement as to the final amount of damages subject to a final judgment. The parties shall attempt to agree or stipulate to any set-off amounts, damages due etc..., if possible to alleviate the necessity of further hearings on damages. If the parties are unable to agree to an amount subject to final judgment the Plaintiff may request additional hearing time with the court.
4. The court commends all counsel for their well written briefs, proposed orders and professional argument in this case.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 27th day of September, 2011.

JACK TUTER
SEP 27 2011
A TRUE COPY

JACK TUTER
CIRCUIT COURT JUDGE

Copies furnished to:

Glenn J. Waldman, Esq.
Tony Rodriguez, Esq.