1. PERFECT UNION SLT, LLC v. CITY OF SOUTH LAKE TAHOE, SC20210172

City's Motion for Summary Judgment/Adjudication

This action arises from defendant City of South Lake Tahoe's ("City") termination of a development agreement that authorized plaintiff Perfect Union SLT, LLC ("Perfect Union") to establish and operate a cannabis microbusiness. Perfect Union's First Amended Complaint ("FAC") asserts four causes of action for breach of contract, each of which seeks a different remedy: (1) declaratory relief, (2) damages, (3) specific performance, and (4) mandatory injunction. Pending is the City's motion for summary judgment or, in the alternative, motion for summary adjudication as to Perfect Union's 2nd C/A for damages based on breach of contract.

1. Standard of Review

A party moving for summary judgment bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact.[1] (Aguilar v. Atl. Richfield Co. (2001) 25 Cal.4th 826, 850.) "When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.]" (Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 1003.)

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[1] Similar to summary judgment, "[a] motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c(f)(2).)

"In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Code Civ. Proc., § 437c(c).)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (Raven H. v. Gamette (2007) 157 Cal.App.4th 1017, 1024.) "[T]he court may not weigh [one party's] evidence or inferences against [another party's] as though it were sitting as the trier of fact …." (Aguilar, supra, 25 Cal.4th at p. 856.) Rather, a court is to "determine what any evidence or inference could show or imply to a reasonable trier of fact." (Ibid.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417.)

2. Preliminary Matters

Perfect Union's Objection Numbers 1 and 2 are overruled.

The City's evidentiary objections are set forth in its response to plaintiff's Additional Undisputed Material Facts. Defendant's Objection Numbers 2 and 3 are overruled.

3. Discussion

The City moves for judgment on the grounds that (1) Perfect Union did not have a legal or equitable interest in the subject property; (2) Perfect Union deceived the City into believing it had the requisite interest; and/or (3) Perfect Union suppressed facts that materially qualified its claim to have the requisite interest. Additionally, or in the alternative, the City moves for summary adjudication against the 2nd C/A for damages

based on breach of contract because the development agreement bars both parties from recovering damages.

3.1 Whether the City is Entitled to Judgment Based Upon Rescission

The City asserts that because "Perfect Union fraudulently induced the City into entering a development agreement that violates the Development Agreement Statute (and is thus void *ab initio*), the City is entitled to rescind that agreement. Rescission is a complete defense to Perfect Union's four breach of contract claims." (City's Mem. of Points & Authorities, 7:19–21 [italics in original].) The City pleaded rescission as its 31st affirmative defense in its Amended Answer to the FAC.

The City provided the following evidence in support of the motion. City Resolution 2019-003 sets forth the Development Agreement Application guidelines for the operation of cannabis businesses in the City, including that applicants are required to "provide evidence of owner consent." The regulations state:

> **Provide Evidence of Owner Consent**: A real estate letter of intent (RELOI) to lease or buy from an authorized party, a lease, an option to lease or purchase and ownership are acceptable forms of control. Letters of interest of any kind are not acceptable. RELOIs, lease options and leases must clearly and specifically state that the RELOI, lease option or lease is for the type of establishment listed in the proposal. ...
>
> Definition of Evidence of Owner Consent/Site Control is as follows:
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> Evidence that the applicant has consent of the owner of the property to operate a Cannabis Business at the proposed location:
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> <u>Real Estate Letter of Intent</u>: A signed written, term sheet, letter of intent, or exclusive negotiating agreement between two or more parties to sell, lease, or sublease the property. This document will provide an outline of the terms

> of the proposed agreement. These terms can be further negotiated but must provide the basis for the proposed written agreement.

(City's Mot., Evid. in Support of Mot., Decl. of Susan Blankenship, Ex. 2 to Ex. A, Index 47–48 [bolding and underlining in original]; City's Separate Statement of Undisputed Material Facts ("SSUMF"), ¶ 1.)

On April 4, 2019, Michael McKeen, the owner and lessor of the subject property, and a representative on behalf of Perfect Union executed a Binding Letter of Intent to Lease ("LOI"). (Id., Ex. 3 to Ex. A, Index 129; SSUMF, ¶ 2.) A copy of the LOI is included as Appendix A in Perfect Union's Cannabis Microbusiness Development Agreement Application ("Application"). (Id., Ex. 3 to Ex. A, Index 73, 129; SSUMF, ¶ 3.) The Application identifies Melissa Sanchez as overseeing the operations and ensuring Perfect Union's compliance with local and state regulations, and Rick Lobley as the business strategist. (Id., Ex. 3 to Ex. A, Index 84; SSUMF, ¶ 4.) Leon Abravanel and Scott Peters are identified as together owning "100% of the business (Leon and Scott each own 50%) …." (Id., Ex. 3 to Ex. A, Index 77; SSUMF, ¶ 4.)

In a letter dated April 10, 2019, the City informed Perfect Union that its Application "passed" with regard to "[e]vidence of owner consent for the cannabis business." (Id., Ex. 4 to Ex. A, Index 144–145; SSUMF, ¶ 5.) On January 14, 2020, the City Council adopted Ordinance 2020-1137, an "Ordinance approving a Development Agreement with Perfect Union SLT, LLC, related to the Development and Use of Property within the City of South Lake Tahoe as a Cannabis Microbusiness." (Id., Ex. 9 to Ex. A, Index 163–165; SSUMF, ¶ 6.) The Ordinance includes a finding that "[t]he Development Agreement is consistent with the provisions of Government Code section 65864 through 65869.5." (Id., Ex. 9 to Ex. A, Index 164; SSUMF, ¶ 6.) Government Code section 65865 provides that "[a]ny city … may enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property …." (Id., subd. (a).)

The Development Agreement entered into by Perfect Union and the City was effective as of February 13, 2020. (City's Mot., Evid. in Support of Mot., Blankenship Decl., Ex. 9 to Ex. A, Index 166–203; SSUMF, ¶¶ 7, 8.) The Agreement provides, in part:

> This Agreement is entered into on the basis of the following facts, understandings and intentions of the parties. The following recitals are a substantive part of this Agreement .... [¶] … Developer has a leasehold interest with an option to purchase in that certain real property located at 2227 James Avenue, #5, South Lake Tahoe, CA 96150 and more particularity described and depicted in Exhibits A and B attached hereto and incorporated herein (the "**Property**").

(Id., Ex. 9 to Ex. A, Index 170 [underlining and bolding in original]; SSUMF, ¶ 9.) Further, paragraphs 2.4 and 2.4.4 of the Agreement state that "Developer represents and warrants to City that, as of the Effective Date … Developer has a legal, possessory or other equitable interest in the Property." (Id., Ex. 9 to Ex. A, Index 176; SSUMF, ¶¶ 9, 10.)

On December 14, 2018, shortly before the City's adoption of the Development Agreement Application guidelines, Michael McKeen as Lessor, and Melissa Sanchez and Rick Lobley as Lessees executed a Lease Agreement for the subject property, commencing on December 15, 2018, and terminating on December 15, 2025 ("2018 Lease Agreement"). (Id., Evid. in Support of Mot., Decl. of Nicholas J. Muscolino, Ex. 5 to Ex. C, Index 379–392; SSUMF, ¶ 11.) The 2018 Lease Agreement provides that Lessees are authorized to use the subject property for any legal use, including the retail sale and delivery of cannabis pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act. (Id., Ex. 5 to Ex. C, Index 380–381.)

On April 4, 2019, the same day that the Binding LOI was executed—the agreement used in support of Perfect Union's Application to establish consent of the property owner—Michael McKeen, Melissa Sanchez, and Rick Lobley executed a Side Letter

Agreement Re Lease dated December 14, 2018 ("Side Agreement"). (Id., Ex. 1 to Ex. C, Index 340–341; SSUMF, ¶ 13.) The Side Agreement states, in part: "[W]hile for purposes of the Lessee's cannabis business license application for the [City] it was necessary to enter into a binding real estate letter of intent …, Lessor and Lessee agree that the [2018 Lease Agreement] remains in full force and effect and the [Binding LOI] has no effect on the terms of the lease. The [Binding LOI] is null and void. For the avoidance of doubt, Lessor and Lessee acknowledge and understand that the [2018 Lease Agreement] is the sole valid agreement between the parties." (Id., Ex. 1 to Ex. C, Index 340; SSUMF, ¶ 13.)

Perfect Union did not disclose the existence of the Side Agreement or the 2018 Lease Agreement to the City prior the effective date of the Development Agreement. (Id., Evid. in Support of Mot., Decl. of Heather Stroud, Ex. 4 to Ex. B, Index 315–316; SSUMF, ¶ 15.) The City claims it did not learn of the existence of the Side Agreement or the 2018 Lease Agreement until late in 2020. (SSUMF, ¶ 15.)

On March 3, 2021, the City Attorney sent Perfect Union a Notice of Breach letter, which states that Perfect Union breach paragraphs 2.4.4, 3.5, and 4.4.1 of the Development Agreement. (Id., Evid. in Support of Mot., Stroud Decl., Ex. 4 to Ex. B, Index 315–316; SSUMF ¶ 17.) Those paragraphs pertain to Perfect Union's (1) legal, possessory, or equitable interest in the subject property (para. 2.4.4); (2) the requirement to obtain all Subsequent Approvals and to be open for business within one year of the effective date of the Development Agreement (para. 3.5); and (3) payment of the Public Safety Impact Mitigation Fee of $21,500 within one year of the effective date of the Development Agreement (para. 4.4.1). (Ibid.) The letter further states that Perfect Union had "30 days from receipt of this Notice of Breach to cure the above defects under Paragraph 11.1. … Failure to cure within 30 days will result in the City exercising the remedies available under the Development Agreement including withholding of permits and termination." (Id., Ex. 4 to Ex. B, Index 316.)

On April 1, 2021, Perfect Union entered into a Memorandum of Lease with Michael McKeen, commencing April 1, 2021, and expiring December 31, 2025, which was recorded in the Official Records of El Dorado County on April 7, 2021. (Id., Ex. 5 to Ex. B, Index 322–325.)

On June 15, 2021, the City Council adopted Ordinance 2021-1155 terminating the Development Agreement with Perfect Union. (Id., Evid. in Support of Mot., Blankenship Decl., Ex. 10 to Ex. A, Index 205–206; SSUMF, ¶ 19.) The Ordinance states that the Agreement was being terminated because "Perfect Union … did not cure all of the breaches within the 30-day period provided; specifically, Perfect Union … failed to obtain all Subsequent Approvals and open for business by the end of the cure period, nor did Perfect Union … commence the cure during the cure period and diligently prosecute it to completion." (Id., Ex. 10 to Ex. A, Index 206.) The City returned to Perfect Union the funds it received pursuant the Development Agreement. (Id., Evid. in Support of Mot., Stroud Decl., Ex. B, ¶ 9; SSUMF, ¶ 20.)

Based upon the foregoing, the court finds that the City has not met its initial burden of making a prima facie showing of the nonexistence of triable issues of material fact as to the City's entitlement to rescind the Development Agreement on the basis that Perfect Union fraudulently induced the City into entering into the Agreement and/or suppressed material facts.

In the Notice of Breach letter sent to Perfect Union and dated March 3, 2021, the City acknowledges its awareness of both the Side Agreement and the 2018 Lease Agreement. Despite knowledge of Perfect Union's purported fraud and suppression of material facts, the City still gave Perfect Union 30 days to cure the three issues identified, including Perfect Union's legal, possessory, or equitable interest in the subject property. On April 1, 2021, Perfect Union executed an agreement with Michael McKeen to lease the subject property, which fell within the cure period. Further, the City's Ordinance terminating the Agreement cites Perfect Union's failure to obtain all Subsequent

Approvals and to be open for business by the end of the cure period as the basis for termination. (City's Mot., Evid. in Support of Mot., Blankenship Decl., Ex. 10 to Ex. A, Index 206, Section 2.)

Additionally, there are triable issues of material fact as to whether Perfect Union's conduct even amounted to fraud or a suppression of material facts. In a declaration executed by Michael McKeen, he explains that he insists the tenants of his properties be natural persons, but that Perfect Union had his consent to operate out of the subject property and may remain there until at least 2025, at which time there was an option to renew the lease. (Opp., Decl. of Michael McKeen, Ex. A.) Given his statements, a reasonable jury could find that Perfect Union did not intend to conceal material facts from the City.

Thus, there is a triable issue as to whether the City waived its entitlement to rescind the Agreement based on alleged fraud. (See Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 983 [stating that "the question of waiver is one of fact"].) Further, the evidence does not establish as a matter of law that Perfect Union's conduct amounted to fraud or concealment.

The City's motion for summary judgment is denied.

3.2 Motion for Summary Adjudication Against the 2nd C/A

In the alternative, the City moves for summary adjudication as to Perfect Union's 2nd C/A for damages based on breach of contract. The motion is made on the basis that the Development Agreement contractually eliminates both parties' liability for damages. The Agreement states:

> In no event shall a Party, or its boards, commissions, officers, agents or employees, be liable in damages, including without limitation, actual, consequential or punitive damages, for any Default under this Agreement. It is expressly understood and agreed that the sole legal remedy available to a

> Party for a breach or violation of this Agreement by the other Party shall be an action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Agreement by the other Party, or to terminate this Agreement. This limitation on damages shall not preclude actions by a Party to enforce payments of monies or the performance of obligations requiring an obligation of money from the other Party under the terms of this Agreement including, but not limited to, obligations to pay attorneys' fees and obligations to advance monies or reimburse monies. In connection with the foregoing provisions, each Party acknowledges, warrants and represents that it has been fully informed with respect to, and represented by counsel of such Party's choice in connection with, the rights and remedies of such Party hereunder and the waivers herein contained, and after such advice and consultation has presently and actually intended, with full knowledge of such Party's rights and remedies otherwise available at law or in equity, to waive and relinquish such rights and remedies to the extent specified herein, and to rely to the extent herein specified solely on the remedies provided for herein with respect to any breach of this Agreement by the other Party.

(City's Mot., Evid. in Support of Mot., Blankenship Decl., Ex. 9 to Ex. A, Index 187.)

The court finds that the City met its initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact as to the no-damages provision.

Now the burden shifts to Perfect Union to produce a prima facie showing of a triable issue of material fact. In this regard, Perfect Union argues that the no-damages provision is procedurally and substantively unconscionable. However, except for stating that Perfect Union spent more than $550,000 on the project on the assumption it would be

able to open for business at the subject property, Perfect Union does not cite to any evidence or caselaw in support of its unconscionability argument.

Civil Code section 1670.5 codifies unconscionability as a reason for refusing a contract's enforcement. It states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Id., subd. (a).)

" '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. ... [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Armendariz v. Found. Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114, abrogated in part on other grounds by AT & T Mobility LLC v. Concepcion (2011) 563 U.S. 333.)

" ' "Procedural unconscionability" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. [Citation.] It focuses on factors of oppression and surprise. [Citation.] The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.' [Citation.]" (Morris v. Redwood Empire Bancorp (2005) 128 Cal.App.4th 1305, 1319.)

While procedural unconscionability focuses on how the agreement was obtained and executed, "[s]ubstantive unconscionability focuses on whether the provision is overly

harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' [Citations.]" (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 88.) "Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071.) "Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (Gutierrez, supra, 114 Cal.App.4th at p. 88.) "[T]he paramount consideration in assessing [substantive] conscionability is mutuality." (Abramson v. Juniper Networks, Inc. (2004) 115 Cal.App.4th 638, 657.)

Here, the court finds as a matter of law that the no-damages provision is neither procedurally nor substantively unconscionable. Both parties were represented by counsel during negotiations over the terms of the Development Agreement. (City's Mot., Evid. in Support of Mot., Stroud Decl., Ex. B, ¶¶ 2–5 & Exs. 1, 2, 3 to Ex. B, Index 212–244, 246–278, 280–313.) The City accepted some of Perfect Union's proposed revisions to the Agreement. (Id., Ex. B, ¶ 4 & Exs. 2, 3 to Ex. B, Index 246–278, 280–313.) The no-damages provision applies equally to both parties. Further, the no-damages provision does not leave Perfect Union without a legal remedy. The Agreement provides that the sole legal remedy "shall be an action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Agreement by the other Party, or to terminate this Agreement." (Id., Blankenship Decl., Ex. 9 to Ex. A, Index 187.)

Accordingly, the court finds that Perfect Union has not produced a prima facie showing of a triable issue of material fact as to the no-damages provision. The City's motion for summary adjudication against the 2nd C/A of the FAC is granted.

TENTATIVE RULING # 1: THE CITY OF SOUTH LAKE TAHOE'S MOTION FOR SUMMARY JUDGMENT IS DENIED, AND THE CITY'S MOTION FOR SUMMARY ADJUDICATION AGAINST PERFECT UNION'S 2nd CAUSE OF ACTION IS GRANTED. NO HEARING ON THIS

MATTER WILL BE HELD (<u>LEWIS v. SUPERIOR COURT</u> (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.