STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Morningstar Fellowship Church,)
)
Plaintiff,)
)
vs.)
)
York County, South Carolina,)
)
Defendant.)

ORDER FOR PARTIAL SUMMARY JUDGMENT

Case No. 2013CP4600246

This matter came before me on June 19, 2014, upon Defendant's Motion for Summary Judgment or Partial Summary Judgment. Present and representing the parties at the hearing were: Richard B. Fennell for Plaintiff; and, Daniel J. Ballou and Michael K. Kendree for Defendant. Based on the record before the Court, the applicable law, and the arguments of counsel, I make the following findings and conclusions.

FACTUAL BACKGROUND

This case arises from a development agreement entered into by Morningstar Fellowship Church ("Morningstar") and York County ("County") pursuant to S.C. Code Ann. § 6-31-10, *et seq.* (1976, as amended)(the "Development Agreement" or "Agreement"). The Development Agreement concerns, among other things, the intended completion, rehabilitation and remodeling of what was previously known as Heritage Tower ("Tower"), a 21-story condominium planned to have been part of the former PTL Ministries ("PTL") development in the Regent Park area of Fort Mill, South Carolina.

PTL began construction on the Tower in 1986, but with the dramatic collapse of its ministries and bankruptcy in 1987, all work on the Tower ceased. This left a partially constructed shell that has progressively deteriorated. It now requires major repairs and reconstruction to be rehabilitated and completed to a usable condition.

Prior to its purchase by Morningstar, the subject property was owned by Regent Carolina Corporation ("Regent"). In the summer of 2004, Regent contracted to sell property consisting of 162 acres to Coulston Enterprises, Inc. ("Coulston"). In turn, in July, 2004, Coulston agreed to sell 52 acres, including the Tower, to Morningstar for $1,600,000.00. Demolition of the Tower was made a specific contractual requirement of Morningstar's purchase from Coulston.

In its Complaint, Morningstar describes the Tower at the time of its purchase as "abandoned and derelict." Morningstar avers that PTL ". . . abandoned the property approximately twenty (20) years ago." Complaint at ¶ 5. It further alleges that although others had attempted, unsuccessfully, to use the property, it had been abandoned approximately seven years prior to the purchase from Coulston. *Id.* Morningstar did not inspect the Tower prior to purchasing the 52 acre tract. The tract also contained other significant improvements.

Further, Morningstar contracted with Coulston that it would demolish the Tower within 24 months of closing, or pay Coulston an additional $300,000.00. It also acknowledged that York County could still require the demolition of the Tower anyway. Morningstar's deed also contained a specific easement allowing Coulston to enter the property to demolish the Tower, presumably in the event Morningstar failed to do so. Coulston remained involved in the redevelopment of the property, and submitted a proposed PD Development Plan to York County on behalf of Morningstar, which was approved in January of 2005. That Plan specifically required Morningstar to demolish the Tower by January, 2007.

Notwithstanding the foregoing contractual provisions, and after acquiring the property, Morningstar announced its intention to complete construction of the Tower, and redevelop it for residential use. In pursuit of that intention, Morningstar engaged Roe Messner ("Messner"), a real estate developer specializing in church properties, to develop plans for redevelopment of the Tower. In the Fall of 2005, Messner requested that York County allow Morningstar to renovate and complete the Tower. On December 14, 2005, York County rejected that request, citing the requirements of the existing PD Development Plan.

In response, Morningstar proposed entering into a development agreement that provided a framework for either the completion or demolition of the Tower within five years, which was the stated term of the Agreement. The Agreement reflects that the County would not agree to an indefinite time frame for Morningstar to complete the Tower project, and further required specific benchmarks Morningstar was required to meet along the way. Specifically, Morningstar was required to produce evidence of satisfactory financing for the project within 180 days of site plan approval. Section IV.C.2. of the Agreement provides:

> 2. Within 180 days of County approval of the commercial site plan for the Property, should Developer or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by the Developer.

In pursuit of its plan, Morningstar engaged Power Engineering ("Power") to serve as its project engineer to handle dealings with York County, and designated Power as the entity with which the County would correspond. Gerald Lee ("Lee"), then the manager of Power's Charlotte office, was assigned by Power as project manager in early 2009, and he communicated directly with Morningstar's construction manager, Pat Selvey, concerning the site plan approval process. There were rounds of comments and changes through the spring and summer of 2009 concerning the site plan.

On August 18, 2009, Lee met with Billy Payne ("Payne"), the County's Stormwater Plans Examiner, and made some additions and corrections to the plans. Following that, Lee considered that the site plan had met all requirements for final approval. On August 24, 2009, Payne issued a "Notice of Approval" pertaining to the "Heritage Tower Project, Storm-water Management and Sediment and Erosion Control Plan." The "Notice of Approval" indicates that it was received by Power on November 23, 2009. Morningstar asserts that it had no direct knowledge of site plan approval until early 2010, through an exchange of emails and meeting between Morningstar and County representatives.

With regard to notices, the Agreement provides:

> H. Notices. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when mailed by certified or registered mail, postage prepaid, addressed as follows:
>
> To Developer:
>
> Rick Joyner, President
> Morningstar Fellowship Church
> 375 Star Light Drive
> Fort Mill, SC 29715

It is undisputed that no other document relating to official approval of the site plan was issued by the County, and no formal "notice" of the approval was sent to Joyner per the provision in the Agreement quoted above.

Morningstar did not provide any form of evidence of the financial backing of the project as required by the Agreement within 180 days from August 24, 2009, and has not to date. As a result, by letter from James Baker, the County Manager, dated March 5, 2010, the County formally notified Morningstar in writing that it was in default under the Agreement for its failure to comply with Section IV.C.2. of the Agreement. Pursuant to the Agreement, the County thereafter

allowed Morningstar an opportunity to cure the asserted default well beyond the Development Agreement's 60 days cure period, and beyond 180 days from the time it had given actual notice of the site plan approval directly to the responsible Morningstar employee. Subsequently, the parties have engaged in mediation as per the Agreement, but without resolution of the dispute.

Morningstar filed this action on January, 24, 2013. In its Complaint, Morningstar asserts three causes of action: a declaratory judgment; breach of contract; and, breach of covenant of good faith and fair dealing. Each is essentially based on these particulars of breach of contract: (1) failure to give notice of site plan approval; (2) declaring a default without any basis for doing so; (3) failure to participate in the mediation process in good faith; and, (4) breach of an implied covenant of good faith and fair dealing.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn from that evidence must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997).

In ruling on the motion, the court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659 (Ct.App. 1994). Within this framework, summary judgment is appropriate when facts exist on which reasonable minds cannot differ, and it is not appropriate where further inquiry into the facts is desirable to clarify the application of law.

It is not, however, sufficient that the nonmoving party seeks to create an inference that is not reasonable, or an issue of fact that is not genuine, in order to avoid summary judgment. *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006); *see also*, *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). However, the non-moving party need only submit a mere scintilla of evidence to withstand a summary judgment motion in cases where the applicable burden of proof is a preponderance of the evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). Summary judgment is a drastic

remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

DISCUSSION

A. The Agreement.

The construction or interpretation of a written contract is a question of law for a court, where the language of the instrument is clear and unambiguous. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997); *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct.App.1992); *J.T.M. Co., Inc. v. Vane*, 283 S.C. 512, 323 S.E.2d 794 (Ct.App. 1984); *Stackhouse v. Pure Oil Co.*, 176 S.C. 318, 180 S.E. 188 (1935); *Huntley v. Sullivan*, 170 S.C. 391, 170 S.E. 664 (1933). "The court must enforce an unambiguous contract according to its terms, regardless of the contracts wisdom or folly, or the parties' failure to guard their rights carefully." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493 (Ct. App. 2004).

"To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect." *Id.*, 358 S.C. at 94, 594 S.E.2d at 493. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct.App. 2008).

The foundation of Morningstar's claim is that the County did not give Morningstar notice of the approval of the site plan for the project. All of Morningstar's claims flow from this pivotal assertion. It further asserts that notice must be in the form and manner specified in the Agreement for the giving of notice to parties. It contends that it did not know that the site plan was approved in August, 2009, and that the procedure for giving notice under the Agreement was not followed. It further contends that notice to its designated engineer-agent on the project was ineffective, because the termination-demolition clause a contractual issue, not a design or construction issue, and was therefore, beyond the scope of its engineers' agency. Thus, it asserts, the County has breached the Agreement by declaring a default.

I find and conclude that the Agreement does not require that Morningstar receive formal notice of site plan approval as specified in Article XI., § H., of the Agreement quoted herein.

While if notice is given in the manner specified in the applicable provision it is conclusively deemed to have been given and received, the language does not exclude the giving and receiving of notice by other means. In fact, the record presented reveals that the progress of the project was monitored and communicated by other means, such as emails or direct interaction between Power and the County, and Power and Morningstar, throughout the approval process.

Nevertheless, in looking into the intention of the parties, it is also relevant to consider ". . . the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts Resort Realty, Inc. v. Down'round Develoment Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). "In the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520-521, 386 S.E.2d 259, 262 (Ct.App. 1989).

Although Section IV.C.2. of the Agreement says only that the 180 days for compliance starts with approval of the site plan, it is not reasonable to suppose that no notice of such approval was required. Based on the record presented, and applying the required standard of review, I conclude that some standard of reasonable notice should be implied as part of this provision of the Agreement. It would make no sense to suppose that the County could secretly approve the site plan, then make no communication of such approval to Morningstar, or its responsible agent, and wait for the 180 days to elapse to declare a default.

By making such a conclusion, I do not intend to suggest that the notice given and relied upon by the County was not sufficient. Rather, I believe that such sufficiency is a question of fact based on the record presented. It is clear that Morningstar's engineer, Power, was designated as its representative and agent for dealing with the County on this project, and that part of Power's duties included dealing with the County on all aspects of approval of the site plan. Under the circumstances, the engineer would necessarily be the first to have knowledge of site plan approval.

Thus, I find and conclude that under the circumstances of this case and the parties' relationship, a full presentation of the facts pertaining to the reasonableness of the notice of approval of the site plan is appropriate. Such a conclusion precludes a grant of summary judgment on Morningstar's breach of contract and declaratory judgment causes of action.

B. <u>Morningstar's Third Cause of Action</u>.

Morningstar asserts a separate cause of action based upon a covenant of good faith and fair dealing. In this state, there is no separate cause of action for breach of the covenant of good faith

and fair dealing. *Rotec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004). Hence, the County is entitled to a dismissal of the third cause of action.

CONCLUSION

Based on the findings and conclusions herein, the arguments presented, the exhibits submitted for the Court's consideration, and the applicable law, it is ordered that Defendant's Motion for Summary Judgment be denied as to Plaintiff's first and second causes of action. It is further ordered that Defendant's motion be granted as to Plaintiff's third cause of action.

AND IT IS SO ORDERED.

July 16, 2014

S. Jackson Kimball
Special Circuit Court Judge
York County

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