



STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Columbia Development, LP,

Plaintiff,

vs.

Minneapolis Park and Recreation Board,

Defendant.

**ORDER GRANTING  
SUMMARY JUDGMENT**  
Court File No. 27-CV-09-41

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum on October 5, 2009, for hearing on Cross Motions for Summary Judgment.

Scott R. Carlson, Esq. appeared on behalf of Plaintiff.

Ann E. Walther, Esq. appeared on behalf of Defendant.

Based on the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

**ORDER**

1. The Motion of Plaintiff for Summary Judgment is denied.
2. The Motion of Defendant for Summary Judgment is granted. There exist no genuine issues of material fact and Defendant is entitled to judgment as a matter of law and Plaintiff's Complaint is dismissed with prejudice.
3. The attached Memorandum is incorporated herein.

**LET JUDGMENT BE ENTERED ACCORDINGLY**

Dated:

*November 9, 2009*

*Marilyn Brown Rosenbaum*  
The Honorable Marilyn Brown Rosenbaum  
Judge of District Court

**MEMORANDUM**  
**STATEMENT OF UNDISPUTED FACTS**

The facts are not in dispute, but must be briefly stated.

Defendant Minneapolis Park and Recreation Board (“Park Board”) owns all of the park land in the City of Minneapolis and some land in surrounding cities. In 1987, through condemnation, the Park Board obtained a strip of land along the Mississippi River in downtown Minneapolis, which reduced parking for the Fuji-Ya restaurant. Pursuant to subsequent litigation, the Park Board was required to purchase the Fuji-Ya restaurant and all related property (“the Property”). In 1987, the State of Minnesota issued bonds to purchase the Property. Once the Park Board had title to the Property, it became park land, requiring any sale of the Property to be approved by the Fourth Judicial District Court. In addition, a title restriction placed on the Property in 1994 required approval of the State Commissioner of Finance for any sale of the Property for private use.

In October 2002, the Park Board, through the actions of the Park Board Commissioners (“Commissioners”), released a Request for Proposals for the Property. The Park Board received three responses, all of which proposed using the Property for housing. Plaintiff Columbia Development (“Columbia”), formerly known as Lucky Club, LLC, proposed building a condominium project on the Property (“WAVE project”). On November 17, 2004, the Commissioners authorized its staff to negotiate a purchase agreement with Columbia.

On March 17, 2005, the Park Board, as Seller, and Columbia, as Buyer, entered into a Purchase Agreement for the Property, which stated, in pertinent part:

4. **Purchase Price.** The total purchase price to be paid by Buyer for the purchase of the Property is Two Million, Five Hundred Thousand and No/100 Dollars (\$2,500,000.00) (the “**Purchase Price**”) Buyer shall pay the Purchase Price as follows:
  - a. **Construction and Lease of Parking Ramp.** Buyer shall bear the cost of constructing a parking ramp on or about the Property (“Parking Ramp”). Such ramp shall be constructed in accordance with specifications and plans to be agreed by the Seller and Buyer. The Parking Ramp shall contain between 65 and 85 parking spaces. Buyer also agrees to lease the Parking Ramp to the Seller upon the terms and conditions of the Parking Ramp Lease Agreement, a copy of which is attached hereto as Exhibit B

("Parking Ramp Lease"). The parties agree to allocate Seven Hundred Fifty Thousand and No/100 Dollars (\$750,000.00) of the Purchase Price to the Parking Ramp Lease.

b. Earnest Money. \$40,000.00 payable upon removal of the Seller contingencies set out in Section 15.

c. Cash. One Million Seven Hundred Fifty Thousand and No/100 Dollars (\$1,750,000.00) cash on the date of Closing.

7. **Closing**.

b. Buyer shall:

i. Tender the Purchase Price to Seller pursuant to the provisions of Section 4 above;

iv. Deliver an executed Parking Ramp Lease.

16. **Buyer's Contingencies**. Buyer's obligations under this Agreement are contingent upon the occurrence of the following:

d. Buyer shall have secured approval of all required governmental bodies or agencies, with jurisdiction over the Property, the necessary zoning changes and historic designation or preservation consents, if any. Seller does hereby consent and agree to any and all applications, proceedings, requests for approvals before governmental agencies or otherwise and other actions taken or to be taken by or on behalf of Buyer to secure such approvals. Buyer shall promptly endeavor to secure such approval[s]. If Buyer has not made reasonable progress to secure the governmental approvals herein described within sixty (60) days from the Effective Date, or if Buyer has not secured such governmental approvals within twenty-four (24) months of the Effective Date, Seller may terminate this Purchase Agreement by written notice to the Buyer in accordance with Section 2[1] hereof.

In November 2005, Columbia asked the Park Board to seek District Court approval for the sale and to turn over title to the Property. On December 7, 2005, the Commissioners tabled the request, citing concerns about transferring title to the Property before the WAVE project had secured the necessary governmental approvals.

In February 2007, the Minneapolis City Council approved the Environmental Assessment Worksheet ("EAW") for the WAVE Project, which concluded that no Environmental Impact Statement was necessary. The EAW was the first government

approval Columbia pursued. Columbia needed to secure the following additional governmental approvals for the Project:

**State:**

Minnesota Pollution Control Agency:

National Pollutant Discharge Elimination System Construction

Storm Water Permit

Storm Water Pollution Prevention Plan

Department of Natural Resources:

Water Appropriation Permit

Metropolitan Council:

Metropolitan Council Environmental Services Sanitary Sewer  
Connection Construction

Metropolitan Council Environmental Services approval of  
dewatering discharge

**City of Minneapolis:**

Heritage Preservation Commission:

Approval of Demolition Permit

Certificate of Appropriateness

Land use permits

Grating/Erosion Control Plan

Stormwater Management Plan

Demolition Permit

Building Permits

Emergency Generator Fuel Storage Tank Permit

By letter dated January 31, 2007, Columbia informed the Park Board that it was “contemplating waiving the remaining contingencies contained in the Purchase Agreement” and that it desired “to proceed to close on the acquisition.”

By letter dated February 16, 2007, Columbia notified the Park Board that it scheduled a closing for March 15, 2007 and that “Buyer has the right to waive and does hereby waive the **Buyer’s Contingencies** in Section 16.d of the Purchase Agreement.” By letter also dated February 16, 2007, the Park Board responded “as there has been no approval from the Commissioner of Finance or from the Hennepin County District Court to sell the property, there is no legal authority for the Park Board to sell the land.” The Park Board added that, pursuant to paragraph 16(d) of the Purchase Agreement, if Columbia failed to secure the necessary government approvals by March 17, 2007, the Park Board could terminate the Purchase Agreement. By letter dated February 20, 2007, Columbia responded: “Having provided proper notice waiving the Buyer’s contingency referenced in your recent letter, the Buyer is in a position to close, and through that same

waiver, has eliminated the Seller's option to terminate the Purchase Agreement."

Columbia also indicated its intent to proceed with the closing on March 15, 2007.

In a series of letters, dated February 23, 2007, March 2, 2007, and March 6, 2007, the Park Board reminded Columbia of its obligation to guarantee eighty-five parking spaces for the Park Board prior to closing. In its letter of February 23, 2007, the Park Board asked:

Would you please provide me with information on how your client proposes to meet its purchase price consideration for the property which requires that your client will construct a parking ramp that will contain 85 parking spaces? Given that your client is proposing only 65 parking spots for the Park Board and it will be necessary in order to secure the Commissioner of Finance's approval for the sale of this project to have 85 parking spaces for the exclusive use of the Park Board, how does your client plan to provide the agreed on consideration at the time of closing?

Having not received a response to its February 23, 2007 letter, the Park Board wrote again March 2, 2007:

Please advise me how your client plans to meet the agreed on purchase price consideration of providing an 85-space parking ramp for the Park Board. A precondition of closing is that you provide this parking ramp. Again I would ask that you please provide me with the following information: 1.) how does your client plan to finance the ramp construction; 2.) what financing commitments does your client have for the ramp and would you provide me a copy of the commitment; 3.) what approvals does your client have for the ramp; 4.) what plans and specifications does your client propose the parties agree to for the ramp; and 5.) please provide me with the terms your client proposes for the parking ramp lease that have not yet been agreed to. It is necessary that these matters be resolved before the Park Board can proceed with requesting approval from the Commissioner of Finance and the District Court for the sale of the Property.

On March 6, 2007, having received no response to its questions regarding the parking ramp, the Park Board sent another letter:

As I've indicated in prior correspondence, your client has not provided the Park Board sufficient information that would allow the Board to understand how you propose to deliver the parking ramp at closing. As of now, there is no parking ramp lease in place. I appreciate that your client now proposes an 85-stall parking ramp that is required by law. . . . There are several material terms of the lease that have not been agreed to. First, you have not specified a time for the commencement of construction and completion of that ramp. Second, . . . while your client had proceeded

to undertake the environmental reviews necessary for the project, it has not secured any approval for its building project or the ramp.

At this point, I renew my question on how your client plans to meet its obligation to provide a constructed parking ramp at closing. My client cannot obtain the Commissioner of Finance's approval until we have a signed lease for the ramp, and my client cannot close on this property until your client has provided the 85-parking stall ramp.

....

At this point you have not provided us with any detailed plans for this parking ramp—where and how it will be constructed, what it will look like, and your client has not received the approvals necessary for the ramp to be built. Given these facts and the lack of an executed parking ramp lease, it will be impossible to seek approval from the Commissioner of Finance.

By letter dated March 8, 2007, Columbia indicated that at closing it needed to provide an executed Parking Ramp Lease, “not an already constructed parking ramp.” Columbia also stated:

In further response to your inquiries, please be advised that the Buyer has secured a commitment to provide financing in the amount of \$2.75 million which represents substantially more than the amount due from Buyer at Closing. In that regard, the Buyer is still waiting to receive the legal description and Evidence of Title which your letters of March 2 and 6, 2007, represent are being provided by the Park Board.

Over the next week, the Park Board continued to object to the closing, while Columbia maintained that it would proceed with the closing. By letter dated March 14, 2007, Columbia acknowledged receipt of a title commitment, but still requested the legal description of the Property. Columbia stated: “If Seller fails to close, and the Seller fails to initiate action today to undertake the necessary steps to extend the Closing date in Order to address its breaches of the Purchase Agreement, a lawsuit will be commenced by the Buyer.”

On March 15, 2007, representatives of Columbia appeared for closing. The Park Board did not appear and refused to close the sale. On March 16, 2007, Columbia served the Park Board with the Summons and Complaint, but did not file them with the Fourth Judicial District Court Administrator.

It is undisputed that Columbia failed to apply for, or secure, the remaining governmental approvals. On April 3, 2007, the Park Board delivered the revised legal description of the Property to Columbia. On April 22, 2007, the Park Board delivered a

second title commitment to Columbia. On May 24, 2007, Columbia submitted its objections to the title commitment, and on June 8, 2007, the Park Board responded.

By certified letter dated October 22, 2008, noting Columbia's failure to pursue any of the remaining governmental approvals, the Park Board informed Columbia that it had thirty days

to begin the formal process, pursuant to the requirements of the City or other approving agency, of obtaining each and every government approval necessary for its project on the Property. Failure to do so could result in the MPRB terminating the Purchase Agreement pursuant to its terms.

On December 2, 2008, the Park Board informed Columbia that, since it had not begun the agency approval process, the Park Board would consider the possibility of terminating the Purchase Agreement at its December 17, 2008 meeting. By letter dated December 16, 2008, Columbia stated that the Park Board could not cancel the Purchase Agreement, as it was the subject of litigation. On December 17, 2008, the Park Board voted unanimously to terminate the Purchase Agreement.

In its Complaint, filed on February 11, 2009, Plaintiff claimed: Count I—Breach of Contract—Specific Performance and Injunctive Relief; Count II—Breach of Contract—Money Damages; Count III—Breach of Implied Covenant and Duty of Good Faith and Fair Dealing; and Count IV—Declaratory Relief and Declaratory Judgment.

Columbia moves for summary judgment, seeking specific performance of the Purchase Agreement or, in the alternative, money damages. Columbia argues that it could waive the government approval contingency, since the approvals were solely for the benefit of Columbia, and that, by failing to close on the Property, the Park Board breached the Purchase Agreement.

The Park Board also moves for summary judgment, seeking dismissal of Columbia's Complaint, and denying that it breached the Purchase Agreement. The Park Board claims that Columbia could not unilaterally waive the government approval contingencies under the Purchase Agreement. The Park Board claims that Columbia's failure to obtain government approvals allows the Park Board to terminate the Purchase Agreement.

## STANDARD OF REVIEW

Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56. See *Hinrichs v. Farmers Co-op. Grain & Seed Ass'n*, 333 N.W.2d 639 (Minn. 1983); see also *Lindgren v. Sparks*, 58 N.W.2d 317 (Minn. 1953). A material fact that will preclude issuance of a summary judgment is one that “will affect the result or outcome of the case depending on its resolution.” *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976).

Summary judgment is the proper remedy where the facts in a case are not in dispute and where the decision is made on questions of law only. *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892 (Minn. 1965); *Greaton v. Enich*, 185 N.W.2d 876 (Minn. 1971). “Although summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed to afford a substitute for a trial where there are issues to be determined.” *Ahlm v. Rooney*, 143 N.W.2d 65, 68 (Minn. 1966) (citing *Sauter v. Sauter*, 70 N.W.2d 351 (Minn. 1955) and *Bustad v. Bustad*, 116 N.W.2d 552, 556 (Minn. 1962)). “[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.” *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 646 (Minn. 1954) (citing *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944)). “A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented.” *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978) (citing *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 595 (Minn. 1957)).

A party moving for summary judgment has the burden of showing that there are no genuine issues as to any material facts; “the nonmoving party has the benefit of that view of the evidence which is most favorable to him.” *Sauter*, 70 N.W.2d at 353. Where affidavits are submitted in support of a motion for summary judgment, the nonmoving party cannot simply rely on general statements in a complaint; the “adverse party must present specific facts showing a genuine issue for trial unless, of course, the facts asserted by the moving party fail to adequately negate any issue of fact raised by the pleading.” *Ahlm*, 143 N.W.2d at 68 (cited and emphasized in *First Fiduciary Corp. v. Blanco*, 276 N.W.2d 30, 32-3 (Minn. 1979)). In addition, “all inferences from circumstantial evidence

and all doubts must be resolved against the movant, without undertaking to determine credibility.” *Forsblad v. Jepson*, 195 N.W.2d 429, 430 (Minn. 1972). “[I]f any doubt exists as to the existence of a genuine issue as to a material fact, the doubt must be resolved in favor of finding that the fact issue exists.” *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). Even if the record “leads one to suspect that it is unlikely [that a party] will prevail upon trial, that fact is not a sufficient basis for refusing [that party] his day in court with respect to issues which are not shown to be sham, frivolous or so unsubstantial that it would obviously be futile to try them.” *Dempsey v. Jaroscak*, 188 N.W.2d 779, 783 (Minn. 1971) (quoting *Whisler v. Findeisen*, 160 N.W.2d 153, 155 (Minn. 1968)).

### DECISION

One party to a contract “may waive a condition precedent to his own performance of a contractual duty, when such condition precedent exists for his sole benefit and protection, and compel performance by the other party who has no interest in the performance or nonperformance of such condition.” *Miracle Constr. Co. v. Miller*, 251 Minn. 320, 326, 87 N.W.2d 665, 670 (1958). When a condition precedent or contingency is mutually beneficial, it must be waived by both parties. *Hanson v. Moeller*, 376 N.W.2d 220, 225 (Minn. App. 1985).

The Wisconsin case cited by Columbia is not applicable, since it involved a strict cash-for-land transaction. *See Godfrey Co. v. Crawford*, 126 N.W.2d 495 (Wis. 1964). In a cash-for-land transaction, any failure to obtain governmental approvals would adversely affect only the buyer and only the buyer bears any risk. The transaction at issue is not solely a cash-for-land transaction.

In addition to \$1,750,000.00 cash due at closing, the Park Board was to receive a long-term lease for eighty-five spaces dedicated to the Park Board in a parking ramp built by Columbia on the Property. From the beginning, the Park Board consistently reiterated its need for the parking spaces and its refusal to seek approval for the sale before such spaces were guaranteed. Although it is unclear whether each of the government approvals could or would impact the building of the parking ramp, certainly some could

or would. Failure to secure the governmental approvals would adversely affect the Park Board as well as Columbia.

Although Columbia brought a document entitled "Parking Ramp Lease" to the closing, it was not an effective lease, as required by the Purchase Agreement. When the subject of a lease is a building which has yet to be constructed, an attempt to lease such building implies "at most an agreement to lease, conditioned on completion of the building, which under wellsettled principles of landlord-tenant law, does not convey an interest in the property." *Railway Exp. Agency, Inc. v. Comm'r of Taxation*, 307 Minn. 245, 249, 239 N.W.2d 245, 248 (1976). "It is not possible to pass a present interest in property not in existence." *Target Stores, Inc. v. Twin Plaza Co.*, 277 Minn. 481, 493, 153 N.W.2d 832, 841 (1967). Since an unconstructed building cannot be leased, and there was no parking ramp on the Property on March 15, 2007, Columbia failed to provide an executed Parking Ramp Lease as required by Section of the Purchase Agreement.

The Park Board did not breach the Purchase Agreement by refusing to close on the Property on March 15, 2007. Since Columbia failed to obtain the necessary governmental approvals within the twenty-four month period allowed in the Purchase Agreement, the Park Board was entitled to terminate the Purchase Agreement. Columbia's attempts to unilaterally waive the governmental approval contingencies were invalid, as these contingencies were mutually beneficial. The construction of a parking structure with sufficient guaranteed spaces allocated to the Park Board was an essential term of the Purchase Agreement.

Columbia's claims for specific performance and injunctive relief, money damages, breach of implied covenant and duty of good faith and fair dealing, and declaratory relief are moot, since the Park Board was not in breach and properly terminated the Purchase Agreement.

The Motion of Defendant for Summary Judgment should be granted as a matter of law and Plaintiff's Complaint should be dismissed.

MBR