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Reminder To Draft Purchase And Sale Agreements With Care

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Somerville Off. Assocs. Ltd. P'ship v. Cresset Dev., LLC, 104 Mass. App. Ct. 1108 (2024).

In *Somerville Office Associates Limited Partnership v. Cresset Development, LLC*, plaintiff Somerville Office Associates ("SOA") sold two parcels of land to defendant Cresset Development ("Cresset"), an improved parcel and an unimproved parcel. After executing a purchase and sale agreement ("PSA") for the entire property for $80 million, the parties agreed to split the transaction into two staggered sales, reduce the purchase price to $65 million, and include an earnout provision in connection with potential future development.

The parties then executed two new PSAs, one concerning the improved parcel which would be sold first for $35 million (the "Improved PSA"), and the other concerning the unimproved parcel which would be sold for $30 million (the "Unimproved PSA"). The Unimproved PSA contained an earnout provision that provided for additional payments to SOA if building permits issued within a five-year period for the construction of commercial space that exceeded a certain square footage threshold. SOA valued this earnout provision at $20 million based on previously commissioned master plans (the "Original Master Plans") that were included in the sale to Cresset. Cresset retained discretion to revise and edit the Original Master Plans, but agreed to provide monthly updates to SOA and pursue municipal approval of these Plans.

Following the sale of the improved parcel, Cresset presented SOA with new master plans (the "Revised Master Plans") that changed the development plan for both parcels, reconfigured and redesigned the proposed buildings, and reduced the potential earnout to approximately $9 million. SOA agreed to amend the Unimproved PSA to incorporate the Revised Master Plans, and Cresset obtained municipal approval for them.

After purchasing the unimproved parcel, Cresset ceased providing SOA with updates on the development for several months and then unsuccessfully sought approval from SOA for a change in the earnout provision relative to buildings straddling the improved and unimproved parcels.

Contemporaneous with these efforts, Cresset and a new purchaser for the parcels, BRE-BMR Middlesex LLC (“BioMed”), developed their own set of master plans (the “Final Master Plans”) that centered most development on the improved parcel. Cresset obtained approval of the Final Master Plans, and BioMed purchased both the improved and unimproved parcels from Cresset for nearly $200 million. Both Cresset and BioMed rejected SOA’s demand for their $9 million earnout payment (which resulted in this litigation). Cresset eventually paid SOA $385,230.00 as it determined that issued building permits for the unimproved parcel had triggered the earnout provision under the Unimproved PSA

In its action against Cresset and BioMed, SOA argued that Cresset had breached its duty of good faith and fair dealing when it abandoned the Revised Master Plans for the Final Master Plans. The trial court dismissed the action for failure to state a claim. The Appeals Court affirmed holding that the Original PSA granted Cresset the sole right to change the master plans, which right survived the Original PSA’s closing and was similarly incorporated into the Unimproved PSA. After all, “[i]f the words of a contract are clear, they are dispositive as to the meaning of the contract.” Further, the Appeals Court held that the conduct of the parties in proceeding with the Revised Master Plans, which included modifications to both parcels of land, demonstrated that the master plans were never formally set. Neither the Improved nor the Unimproved PSA restricted Cresset’s rights to make further revisions to the master plans even where such changes reduced the amount of the earnout payment, and the Court held it was not at liberty to impose any restriction. There could be no failure by Cresset to the intended and agreed expectations of the parties under these circumstances.

SOA further claimed that the earnout provision, which was only included in the Unimproved PSA, applied also to the improved parcel. The Appeals Court rejected that argument. The Appeals Court held that the earnout provision unambiguously pertained only to the unimproved parcel and that SOA, a sophisticated party, had “missed a significant opportunity” to include any references to the improved parcel in the amended earnout provision. Therefore, SOA had no claim that it was owed any additional money pursuant to that provision.

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