[MS-0494-009.005.002]

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CESCO DEVELOPMENT CORPORATION, a California corporation, et al., Plaintiffs, v. CITIZENS DEVELOPMENT CORPORATION, a California corporation, et al., Defendants.	No. 3926N MEMORANDUM OF INTENDED DECISION

The above-entitled matter came on for trial in Department C of the North County Branch of the above-entitled Court on August 8, 1977. Plaintiffs Cesco Development Corporation and Conde Investment Corporation, hereinafter referred to as plaintiff, appearing with their attorney, Roscoe D. Keagy, and defendant Citizens Development Corporation, hereinafter referred to as defendant, appearing with their attorney, Clinton F. Jones.

Evidence was taken by the Court. Motions were made to strike and for judgment. Said motions were denied. Counsel for each of the

respective parties were requested to file additional briefs and said requests were granted. Counsel also requested that the proceedings of the trial be transcribed and the same was done. Said trial transcripts were filed by the Court in early January, 1979. The Court has read, studied and considered the transcripts of the trial.

Plaintiff is seeking money damages, alleging that defendant breached an agreement between the parties whereby defendant allegedly converted a golf course and its facilities into a private club with limited membership. Plaintiff alleges loss of property value due to the alleged breach.

FACTS

On June 7, 1973 plaintiff purchased certain real property in the San Marcos area. Contemporaneously with said purchase, plaintiff and defendant entered into an agreement whereby plaintiff acquired certain rights to a golf facility on behalf of themselves and future residents of said property.

On December 4, 1973 defendant caused to be written a letter which recited that defendant intended to convert the golf facilities into a private club with a membership limit of 500. A copy of said letter was made public on December 7, 1973.

On December 7, 1973 defendant listed said property with Coldwell Banker & Co., a realtor, for sale. On December 11, 1973 the plaintiff became aware of this intent to convert the golf facilities and limit membership. On December 14, 1973 plaintiff sent letters to defendant objecting to the conversion and seeking clarification of the agreement regarding the use of the golf facilities.

On December 17, 1973 defendant responded to plaintiff's letters of the 14th wherein the defendant rejected plaintiff's objections and further suggested that plaintiff purchase a block of memberships in said club.

At the close of escrow for the above purchased property, the local sewer district had imposed a sewer moratorium restricting building upon the property purchased by plaintiff. The sewer district lifted the moratorium on December 17, 1973, but decided that plaintiff would be required to build a pump station before developing the property. The decision by the sewer district to require a pump station was challenged by the plaintiff and same was not resolved until 1975.

On January 1, 1974 defendant prepared and distributed leasing and membership agreements to the people in the community of San Marcos regarding membership in the golf facilities. Soon after January 1st approximately 350 people joined the private club.

On January 16, 1974 plaintiff filed a complaint against defendant seeking:

1. Permanent and interim conjunctive relief;
2. Damages for breach of contract;
3. Damages for breach of anticipatory repudiation; and
4. Declaratory relief.

On the same date the complaint was filed a temporary restraining order was issued which restrained defendant and its agents from doing any of the following:

1. Soliciting or accepting private memberships in the golf

facilities, or

2. Converting the golf facilities to a private club with provisions or conditions of membership which would:

a. Limit the number of memberships;

b. Provide for varying fees;

c. Provide for different priorities, classifications, or discriminate in any way between members; or

d. Make any other provisions which would result in future residents or owners of the subject property having rights to membership on terms and conditions less favorable than those made applicable to other persons.

On September 16, 1974 the parties entered into a stipulation to bifurcate the trial so that the issues relative to the declaratory relief action could be heard early. Said trial was commenced on December 3, 1974; a memorandum of intended decision was filed on March 5, 1975 and the judgment and order was entered on August 22, 1975. The judgment and order in substance is as follows:

> "1. The golf course agreements entered into between Conde Investment Corporation and Citizens Development Corporation dated June 7 and July 5, 1973, Exhibits "B", "C", "H" and "I", grant plaintiffs and future residents of the subject properties, . . . rights to membership in any private golf club created at the existing golf facilities at Lake San Marcos at any time during the term of 20 years, commencing June 7, 1973.
>
> "2. The 'rights of membership' grants to plaintiffs and future residents of the subject properties the <u>absolute right to become members of the private club</u> at any time they so elect during the 20 year term.

"3. Defendant and its successors in interest have no right to limit the number of members of the private golf club, or enact other restrictions, which will limit or preclude the right of plaintiffs and future residents of the subject properties to become members of the private club at any time they so elect during the 20 year term.

"4. The existing golf facilities may be converted into a private club by defendant or its successors in interest, only if the rules and regulations of such club specifically and irrevocably provide the right of plaintiffs and future residents of the subject properties to become members of the private club at any time they so elect during the 20 year term. The defendant may, from time to time, enact reasonable terms and conditions of membership which shall be equally applicable to all members or potential members, including plaintiffs and future residents of the subject properties, provided, however, that such terms and conditions shall be nondiscriminatory as applied to plaintiffs and future residents of the subject properties as compared to members or potential members, and shall not conflict with or limit the rights to membership as described in said agreements." (Emphasis added)

On July 1, 1975 defendants removed the limitation as to the maximum number of memberships the club could acquire.

Plaintiff in his negotiations to sell the real property or attempt to obtain financing for further development always spoke or communicated positively that all residents would have the use of the golf facilities. No limitation of memberships was ever mentioned. On January 18, 1974 plaintiff sent a letter to Mutual Savings wherein plaintiff stated: "We are moving forward in our program for development of the property and have every confidence that we will be able to do so. We anticipate being able to record a final map and start construction in July."

In January and February of 1974 plaintiff prepared a brochure

that was again revised in approximately July of 1974, which provided that, ". . .each purchaser of Lake San Marcos shall acquire the use of all facilities available for the residents of Lake San Marcos, including the country club and the golf course." The brochure was used by plaintiff in an attempt to finance its contemplated building project on said real property and also, in the alternative, to sell the property.

Plaintiffs became aware that they would be granted an extension to file a final map and on April 24, 1974 plaintiff sent a contract for the working drawings for one of the projects to the architect. The contract was accompanied by a cover letter wherein plaintiff stated: ". . .the time limit is most vital to us and we shall appreciate your doing everything possible to expedite the job," On July 9, 1974 plaintiff sent a letter to the soil engineers stating: ". . . the work must be completed as soon as possible."

During the first nine months of 1974, that is, January through September, Rick Engineering did work for plaintiff at its request as follows:

January	363 hours
February	534 hours
March	638 hours
April	160 hours
May	264 hours
June	202 hours
July	142 hours
August	416 hours

September 185 hours

The evidence shows that plaintiff experienced numerous problems in 1974 and 1975 which made it difficult to proceed on the project. Plaintiff had a partial map problem which first appeared in March of 1974 and said problem was not cleared up until May of 1975. Plaintiff made statements that his financial situation was not strong enough to proceed with the development for the two years prior to 1975 and that further delay in construction was due to lack of financing, the sewer moratorium, the pump station and the general economic conditions.

The issues to be resolved by the Court are as follows:

1. Was the agreement bilateral or unilateral?

2. Was there a breach by defendant?

3. Was there a repudiation or anticipatory breach by defendant?

4. If there was a repudiation, what did plaintiff elect to do?

5. Is the conduct of defendant actionable, that is, is he liable for damages?

1. Was the agreement bilateral or unilateral? A unilateral contract is one in which a promise is given in exchange for an act, forbearance or thing. A bilateral contract is one in which there are mutual promises, a promise being given in consideration for another promise. Most contracts are bilateral and there is a general rule of interpretation sometimes stated in the form of a presumption in favor of a bilateral contract. Restatement of Contracts §31;

Davis v. Jacoby (1934) 1 Cal.2d 370. The rationale set forth for the interpretation of the bilateral contract is that both parties to the contract should immediately and truly be protected.

In this case the parties negotiated and included in the contract for the purchase of the real property a golf course agreement. Plaintiff promised to defendant that it could convert its facility and enacted reasonable terms and conditions of membership during the 20 year period contracted for in return for the defendant's promise not to restrict plaintiff or future residents of the development from membership in the facilities. (See Declaratory Relief Judgment and Order of August 24, 1975.)

For the foregoing reasons, the Court finds this agreement to be bilateral.

2 and 3. Was there a breach by defendant and/or was there a repudiation or anticipatory breach by defendant? The issue to be resolved here is whether or not the conduct of defendant in publishing the December 4, 1973 letter on December 7, 1973, and in sending out the licenses on January 1, 1974 amounted to a breach of contract or a repudiation of the contract.

> "A breach of contract is a non-performance of any contractual duty of immediate performance. A breach may be total or partial and may take place by failure to perform acts promised by prevention, hindrance or by repudiation." (Restatement of Contracts §312.)

Repudiation is where the promisor expressly rejects the contract by an unequivocal refusal to perform. Repudiation can also be implied where the promisor, by his conduct, puts it out of his

power to perform under the contract. When conduct amounts to a repudiation, the theory of anticipatory breach comes into play. Restatement of Contracts §318; Gold Mining & Water Company v. Swinerton (1943) 23 Cal.2d 19.

An actual breach does not take place until time for performance has arrived. In the case at bar plaintiff never completed any buildings and no residents were moved into the development area. Therefore, no residents of the development applied to defendants for membership in the golf facilities, and defendants never refused any of said residents admission for memberships. It is, therefore, concluded that the conduct of defendant was not an actual breach of contract.

However, the communications of December 4, 1973 and January 1, 1974 wherein defendant limited the memberships in the golf facilities are acts by defendant inconsistent with the provisions of the subject agreement. Such statements and conduct repudiated the contract in that it placed defendant in a position that it could not perform its duties under the contract. The Court, therefore, finds that there was a repudiation on the contract.

4. What did plaintiff elect to do in light of the repudiation by the defendant? In the cases where the statement or conduct of the promisor, herein defendant, amounts to a repudiation, the injured party has the choice of treating such as an anticipatory breach and exercising his remedies immediately; (Daum v. Superior Court (1964) 228 Cal.App.2d 283; Mayo v. Pacific Project Consultants, Inc., (1969) 1 Cal.App.3d 1013) or waiting until the time for performance under

the contract and exercising remedies for an actual breach (Guerrieri v. Severini (1958) 51 Cal.2d 12; Brewer v. Simpson (1963) 53 Cal.2d 567). A repudiating party may retract his repudiation at any time prior to the other party's change of position. (Restatement of Contracts §319.)

In the case at bar, there was a repudiation of the agreement by defendant. In response to this repudiation plaintiff continued to treat the contract as if it were in existence; plaintiff attempted to sell the property and attempted to further finance and develop the property.

The Court is cognizant of the fact that plaintiff did file a lawsuit and, even though one cause of action did ask for money damages, the Court finds that this was not a change in position which would prohibit defendant from retracting its repudiation. Plaintiff continued in its attempt to develop said properties as if there had never been an attempted conversion by defendant. Therefore, plaintiff did not conclusively elect to treat defendant's conduct as an anticipatory breach. Defendant did, after the declaratory relief action, withdraw its restrictions on maximum memberships. The Court finds that the retraction of the repudiation was unequivocable and clear.

5. Is plaintiff liable for damages? In every case wherein a contract is the issue, it is essential to establish a causal connection between the breach and the damages sought. (Civil Code §3300; Southall v. Security Title Insurance & Guarantee Co., (1952) 112 Cal.App.2d 321.)

In this case the Court finds that any damages which plaintiff may have suffered in not being able to proceed timely with the

development of said properties was occasioned by the sewer moratorium, the pump station problem, the partial and final map problem, and the economic difficulties that existed at the time; that is, difficulty in obtaining financing and the lack of a strong financial position on the part of plaintiff.

For the foregoing reasons, the Court finds that plaintiff should take nothing by its cause of action, and judgment should, therefore, be entered in favor of defendant.

Dated: MAY -2 1980

EARL B. GILLIAM

JUDGE OF THE SUPERIOR COURT

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