[ms-0494.009.005.008]

DRAFT
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Judge Gilliam/ra

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.

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Evidence was taken by the Court and briefs were filed by the respective counsel. *1

Plaintiff is seeking money damages from defendant alleging that defendant breached an agreement between the parties wherein defendant allegedly converted a golf course and its facilities into a private club and placed a limitation on membership in said club; that due to said alleged breach by defendant plaintiffs allege property which had been purchased by them lost its value.

See comment

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FACTS

On June 7, 1973 plaintiff purchased certain real property in the San Marcos area. Contemporaneously ~~of its~~ 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 ~~and said letter was made public on December 7, 1973. The 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 ~~received by plaintiff~~ on December 7, 1973.

On December 7, 1973 ~~defendant~~ listed said property with Coldwell Banker & Co. for sale. On December ~~1~~ 11, 1973 the plaintiff became aware of this intent to convert the golf facilities and limit the 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 facility.

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

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At the time of the close of escrow for the purchase of said property the local sewer district had placed a sewer moratorium wherein building on said properties were prohibited. This sewer moratorium was lifted on December 17, 1973. However, the district decided that for plaintiff to develop said property it was necessary to build a pump station. The problem of whether or not a pump station should be built in order for plaintiff to develop said land 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 ~~possibly~~ approx 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 ~~that~~ the complaint was filed ~~by plaintiff~~ 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:

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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, see Conde's ~~Such stipulation provided for early trial on the issue of declaratory relief and~~ Said trial was ~~appealed~~ 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.

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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 non-discriminatory 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.

In January and February of 1974 plaintiff prepared a brochure which was revised approximately July of 1974. The brochure was used by plaintiff in attempting to finance the contemplated building project and the development of said lands. The brochure was also used by plaintiff in attempting to get alternative methods of financing such as joint ventures and selling of said

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property. The brochure provides "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." Plaintiff in his negotiations to sell said property always spoke or communicated positively that all residents would have the use of the golf facilities, never mentioning a limitation on membership. On January 18, 1974 plaintiff wrote a letter to Mutual Savings wherein he stated "We are moving forward in our program for the 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."

On April 24, 1974 after plaintiff became aware that they would be granted an extension to file a final map, sent a contract for the working drawings for one of the projects to the architect and in the cover letter stated, "the time element 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 Sole Engineers stating "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 and at plaintiff's request as follows:

January	363 hours
February	534 "
March	638 "
April	160 "
May	264 "

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June	202 hours
July	142 "
August	416 "
September	185 "

The evidence shows that plaintiff also made a statement that he was not strong enough financially to proceed for the project on his own and could not have done so the two previous years prior to May of 1975, and further that the delay in starting construction for the project was due to general economic conditions, sewer moratorium and the lack of financing. Plaintiff further had a partial map problem, which first appeared in March of 1974 and it was not cleared up until May of 1975.

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 is 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

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general rule of interpretation sometimes stated in the form of ~~any~~ a presumption in favor of a bilateral contract. Restatement of Contracts §31, ~~and~~ Davis v. Jacobs (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. Comment 10 insert For the foregoing reasons, the Court finds this agreement to be bilateral.

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2. Was there a breach by defendant and/or was there a repudiation ~~of~~ or anticipatory breach by defendant? The issue to be resolved here ~~was~~ is whether or not the conduct of defendant in publishing the 12/4/73 letter ~~that was written~~ on December ~~4~~ 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 ~~when~~ where the promisor expressly ~~repudiates~~ rejects the contract by an unequivocal refusal to perform ~~or, in the case of implied~~ repudiation can also be implied by his conduct where the promisor puts it out of his power to perform ~~and if~~ under the K. When ~~this~~ conduct ~~amounted to a~~ amounts to a repudiation, ~~then~~ the theory of anticipatory breach ~~would~~ comes into play. Restatement of Contracts §318; Gold ~~Mineral~~ Mining & Water Company v. Swinerton (1943) 23 Cal.2d 19.

An actual breach does not take place until time for performance has arrived, ~~and~~ in the case at bar, plaintiff never ~~committed~~ completed any buildings ~~or~~ and no residents were moved into the development area, ~~and~~ therefore, ~~none of his~~ no

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residents of the development applied to defendants for membership in the golf facilities, ~~therefore~~ and defendants never refused any of said residents admission for memberships. It is, therefore, concluded that the conduct of defendant ~~is~~ was not an actual breach of contract.

See comment 12

However, from the communications of December 4, 1973 and January 1, 1974 wherein defendant attempts to limit membership in the golf facility, his conduct ~~that~~ is inconsistent with the provisions of the agreement and would amount to a repudiation. 4. In cases where the statement of conduct of the promisor, i.e. the defendant in this case, amount to such repudiation, the injured party, i.e. plaintiff, has an election of remedies:

A. He may treat the repudiation as an anticipatory breach and exercise his remedies immediately, Daum v. Superior Court (1964) 228 Cal.App.2d 283; ~~Male~~ Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal.App.3d 1013. or,

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B. He may wait until the time to perform and exercise his remedies for 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 plaintiff's changing position, Restatement of Contracts §319. Check In the case at bar, ~~we had a~~ there was a repudiation of the agreement by defendant, ~~and~~ in response to this repudiation plaintiff continued to treat the contract as if it were in existence; ~~that is,~~ Π attempted to sell the property and attempted to further finance and develop the property, ~~and attempting to continue the development of the property.~~

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The Court is cognizant of the fact that plaintiff did file a lawsuit and, even though one cause of action did ask for

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money damages, the Court finds that this was not a change in position which would prohibit defendant from retracting ~~their~~ its repudiation~~, because of the afore-mentioned conduct of~~ plaintiff ~~in continuing~~ continued in its ~~to~~ attempt to develop said properties as if there had never been an attempted conversion by defendant. ¶ Defendant did, ~~have~~ after the declaratory relief action, withdraw its restrictions on maximum memberships, ~~and~~ the Court finds that the retraction, of the repudiation, was unequivocable and clear. ¶ 5. ~~¶~~ liable for damages In every case wherein a contract is the issue, it is essential to establish a causal connection between the breach ~~of~~ and the damages sought. Civil Code § 3300 and Southall v. Security Title Insurance + Guarantee Co., (1952) 112 Cal.App.2d 321. ¶ In the case ~~at bar~~ the Court finds that any damages ~~that~~ 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, ~~therefore~~ and judgment should, therefore, be entered ~~accordingly~~ in favor of defendant.

* insert - see comment 13

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