[LDS-04414.012.001.006] Fax Coast Bd Tours
477 4801
Janie

March 19, 1980

To: Judge Gillian
From: Cindy Muckey
Re: Cesco Development Corp. v. Citizens Development Corp., #3926N

The following are suggested changes or additions to the memorandum of intended decision:

1. On page one, the court might want to expand on the statement of the case to reflect that motions for judgment and to strike were denied on Feb 28, 1978, and further briefs accepted. Otherwise, the delay from Aug 8, 1977 for a decision appears unduly long.

2. page 1 ¶ 3 - Plaintiff is suking money damages alleging that defendant breached an agreement between the parties by defendant allegedly converting a golf course and its facilities into a private club with limited membership. Plaintiff alleges loss of property value due to the alleged breach.

3. page 2 - note pencil changes on draft - There appears to be a conflict of dates regarding when π became aware of Δ intent to convert golf facilities - see ¶ 2 & 3 - perhaps the court could state: There was conflicting evidence submitted regarding the exact date plaintiff was made aware of defendants' intent to convert the golf facilities and limit membership. Said date being either Dec. 7, 1973

on Dec. 11, 1973.

4. p3 ¶ 1 – At the close of escrow for the above purchased property, the local sewer district had imposed a sewer moratorium restricting building upon the purchased property. The sewer district lifted the moratorium on Dec. 17, 1973, but decided that π would be required to build a pump station before developing the property. This requirement decision was challenged by π and not resolved until 1975.

5. Query: Was the TRO mentioned on p3 ¶ 4 ever changed into a prelim. inj.? If so, perhaps that fact shd. be mentioned.

6. p4 ¶ 1 – 1st sentence – On September 16, 1974 the parties entered into a stipulation to bifurcate the trial so the issue of declaratory relief could be heard early. Said trial ... etc.

7. p5 bottom A through p6:

π 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 use of the golf facilities. No limitation on membership was ever mentioned. On Jan 18, 1974 π sent a letter to Mutual Savings wherein it was 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." (citation)

In Jan. and Feb of 1974 π prepared a brochure, ~~which~~ that was again revised in approx. 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." (need citation) The brochure was used by π in an attempt to finance ~~its~~ its contemplated building project on the subject real property, ~~and~~ also, in the alternative, to sell the property.

8. p6 - 1st ¶ - After π became aware that it would be granted an extension to file a final map, it sent on April 24, 1974 a contract for drawings on one of its projects to the architect. The contract was accompanied by a cover letter which stated: "... the time element is most vital to us and we shall appreciate your doing everything possible to expedite the job." (citation) (note: if "the" in quote is 1st word of sentence & capitalized in orig. letter, above would be: ...stated: "[t]he time element – etc) On July 9, 1974 π sent a letter to the soil engineers stating "... work must be completed as soon as possible." (citation) (same note applies re [w]ork as above)

9. p7 - 1st ¶. The evidence shows that π experienced numerous problems in 1974 and 1975 which made it difficult to proceed on the project. π had a partial map problem which appeared in March of 1974, but was not cleared up until May of 1975. π also made statements that its financial situation was not strong enough to proceed with development for two years prior to 1945 and continuing, and that further delay in construction was due to lack of financing, the sewer moratorium, the pump station, and general economic conditions.

10. Re: 1st issue p 7-8 - Fed Court should clarify this section and add in facts of case; ie. "Was the golf facilities agreement bilateral or

unilateral? * insert: In this case, the parties negotiated and included in their contract of purchase of real property a golf course agreement. π promised Δ that it could convert its facilities and enact reasonable terms and conditions of membership during the 20 year period contracted for in return for Δ's promise not to restrict π and future residents of the development from membership in the facilities. Rights and duties under said contract were determined by the Aug 22, 1975 Declaratory Relief Judgment & Order.

11. p8 - see penciled changes on draft

12. p9 - see penciled changes on draft
p9 - 1st full ¶ - However, the communications of Dec 4, '73 and Jan 1, '74 wherein Δ limited membership in the golf facility, are acts by Δ inconsistent with the provisions of the subject agreement. Such statements and conduct repudiated the contract in that it placed Δ in a position where it could not perform its duties under the contract. The court, therefore, finds that there was a repudiation of the contract.

4. What did the π elect to do when faced with a repudiation?

In cases where the statement or conduct of the promisor 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 285; Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013) or waiting until the time to perform under the contract and exercise remedies for actual breach. Guerrieri v. Severini (1958) 51 Cal 2d 12; Brewer v. Simpson (1963) 53 Cal. 2d 567. A party may retract his repudiation at any time prior to the other party's change of position under the contract. Restatement of Contracts §319.

Next π - see pencilled changes on p. 9

13. p. 10 - see pencilled changes on draft
* insert - Therefore, π did not conclusively elect to treat Δ's conduct as an anticipatory breach.

14. The citations listed for Restatement of Contracts should be designated as either Restatement 1st or 2nd?

15. If I can be of further assistance, please let me know. (3209) I concur with your conclusion.