IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CICUIT IN AND
FOR MIAMI-DADE COUNTY,
FLORIDA

GENERAL JURISDICTION
CASE NO.: 94-12875 CA 30

99-13742 CA 30

WYNWOOD COMMUNITY ECONOMIC
DEVELOPMENT CORPORATION, INC.,
and DADE FOREIGN TRADE ZONE, INC.,
Plaintiff,

vs.

THE CITY OF MIAMI, et al.,
Defendant.
_____/

FINAL ORDER ON MOTION TO ENFORCE SETTLEMENT AND ON FORECLOSURE

This tortured case arises from a failed attempt at redevelopment in the City of Miami's Wynwood district. The parties to the case are: Wynwood Economic Development Corporation, a 501 (c) (3) non-profit acting through its president, William Rios and represented by Nancy Kilson, Esq. and Cheryl Ziegler, Esq. ("WEDC"); Dade Foreign Trade Zone, Inc., through its president Oded Meltzer and represented by Robert Stok, Esq.("DFTZ"); and the City of Miami through its representative Barbara Rodriguez and represented by assistant city attorney Charles Mays, Esq. ("City"). The Court had jurisdiction over the original case and retained jurisdiction to enforce the settlement agreement.

EXHIBIT 1

1699

Historical background:

In 1990, Wynwood was a predominately Puerto-Rican area of Miami. The neighborhood geographic boundaries are NW 15th St, Biscayne Boulevard, Interstate 95, and NW 40th Street. In the early 1990's, Leonardo Mercado, a Wynwood Puerto-Rican drug dealer, died during a take-down by City of Miami narcotics police officers. To the community, it was murder. A devastating riot ensued. Investigations into police cover-ups and indictments followed. In an attempt at urban renewal after the riots, the City of Miami deeded 12.6 acres of neighborhood land free and clear to the Wynwood Economic Development Corp., which had plans and early federal approval to build a foreign trade zone on the site.[1] The foreign trade zone was viable due to the proximity of the location to the port of Miami, the Miami International Airport, and nearby freeways and rail access. The trade zone would bring needed jobs to Wynwood.

Problems erupted with the trade zone, and WEDC and its development partner DFTZ sued the City, claiming discriminatory practices. The lawsuit was settled in February 1995 through a written settlement agreement signed by the parties, including Miami City Manager Cesar Odio and ratified by the Miami City Commission. That agreement is the basis of this phase of the litigation.

[1] OSJ was a legally-created management subsidiary created by WEDC to handle the for-profit activity of the foreign trade zone for WEDC without jeopardizing WEDC's non-profit tax status. Although a party to the agreements, its actions and interests are indistinguishable from WEDC and it had no active status in this litigation.

1704

The current dispute:

The City, WEDC, and DFTZ were all parties to the settlement agreement. In the settlement agreement the City agreed to perform a number of tasks. WEDC complains that the City has not performed its obligations under the settlement agreement and has moved to enforce the settlement agreement. DFTZ has also moved to enforce, but its case was severed for procedural reasons based on the rulings of the predecessor Judge, which are on appeal. The City seeks to foreclose a mortgage it holds on the land it deed to WEDC, and this case was consolidated with the motion to enforce settlement.

WEDC opposes foreclosure. DFTZ took confusing and seemingly inconsistent positions during the trial, both on the breach of the settlement and foreclosure, but in conclusion appears to have no opposition to foreclosure.

The salient provisions of the settlement agreement which WEDC alleges the city violated are:

II D2: The City promised to apply for "in good faith and assert diligence to secure the sum of at least $5.5 million up to $10 million in (and more if reasonably justified by the needs of the Wynwood Foreign Trade Zone ("WFTZ") project) through the HUD Section 108 Loan Program. However, in no event shall that Section 108 loan exceed Ten Million ($10,000.00.)"

II F3: The City promised to reimburse WEDC for $17,000 in architectural fees upon submission of documentation.

II A 1, 2: The City promised to clear up title issues with the deed and issue a corrected deed.

II D, II G 1, 2.
The City promised to fairly consider WEDC applications for Community Development Block Grants (CDBG) and to support the Wynwood Foreign Trade Zone.

The motion to enforce and foreclosure was the subject of an evidentiary hearing/bench trial which lasted over a six day period.

Summary of Resolution:

Based on the greater weight of the competent and credible evidence, as laid out in detail below, the Court finds that the City violated the settlement agreement and did not perform three key obligations under that agreement and that because of the City's role in the project's collapse, it would be inequitable to permit foreclosure. However, the Court denies the WEDC Motion to enforce because the remedy of specific performance is not available due to impossibility. The issue of damages is not before the court, as this is a Motion to Enforce a Settlement Agreement and damages are not available pursuant to the Court's pretrial ruling relying on Paulucci v. General Dynamics Corp., 842 So. 2d 797 (Fla. 2003); see also, W.C. Riviera Partners, LC. V. W.C.R.P., LC. 2005 WL 74525 (Fla. 2nd DCA 2005)

1702

Factual Findings:

All findings in this order are based on the greater weight of the competent and credible evidence. The burden of proof is on WEDC to prove that the city breached its settlement agreement with WEDC.

The Court finds that the evidence was conflicting with regard to the CDBG and the city's support for the trade zone. As a result, WEDC failed to meet the standard of proving violation by greater weight of the evidence and therefore the Court denies enforcement of the agreement as to those alleged violations. The Court finds the City breached the agreement on the issue of the HUD financing, architectural fees, and failure to correct the issues with the deed.

After the trade zone project originally stalled, the 1995 settlement agreement was designed to get it back on track. A three-party deal for funding was envisioned. The agreement provided that the City would apply for up to $10 million of HUD funding for the project, and the amount of the funds sought would be justified by the needs of the project. HUD had indicated during the settlement process, that it would approve a $10 million Section 108 loan. All evidence in this record established that to complete the Wynwood Foreign Trade Zone Warehouse facility as planned would have required at least the full $10 million in funding and that the $10 million sum was "justified by the needs of the project" based on review of the City's staff and the city attorney. The City was to apply for the funds. The funds would be

received by DFTZ, who leased the land from WEDC to build and run a foreign trade zone warehouse operation, and DFTZ would repay the City with the proceeds from the successful operation of the foreign trade zone. WEDC agreed to mortgage its fee simple interest in the property to secure the $10 million in funding. That was the plan.

The Federal HUD program worked as follows: every qualified city is permitted to apply for a certain amount of guaranteed funding for HUD-approved projects. The amount of funding available to a city is calculated pursuant to a poverty-based formula. The city evaluates and approves different projects and can encumber its HUD funds up to the approved limit. It works like a "tab". At any given time, a city may have a number of projects going, and may encumber only part of its available HUD funds or may use its entire allotment. The city pays back HUD from the proceeds of the projects. If a project doesn't succeed, the city still has to repay HUD the money it was loaned. The Wynwood Foreign Trade Zone was qualified and approved by HUD as an appropriate project for Section 108 funding.

In the months following the settlement agreement's ratification by the Miami City Commission, the application was prepared for the full $10 million required by the project. The city attorney presented the application to the city commission with a positive staff recommendation for $10 million in funding. The agenda packet included the $10 million application and staff recommendation for approval signed off by the city manager. At the meeting, the city manager, Cesar Odio, abruptly and unilaterally amended the recommendation to request only $5.5 million in funding. The change was not due to any alteration in the needs of the project, discussion of a

phased build out, or change in the city's obligation to WEDC or DFTZ, but rather because the manager felt that the city was over-obligated in its HUD account considering all the projects underway city-wide. In other words, Mr. Odio said that Miami's current HUD Section 108 tab at the time was too high to borrow the full $10 million, although the money was available. In response, the city attorney specifically reminded the Miami City Commission that it had promised to apply for $10 million and that the city may be breaching the settlement agreement. The commission resolved, pursuant to the manager's recommendation, to seek only $5.5 million in funding. Prior to the meeting, there had been no discussion or agreement between the parties to build or fund the project in phases. Although the lease between WEDC & DFTC contemplated phased construction, and the City was familiar with the lease, the City did not negotiate for phased financing in its Settlement Agreement, and there is no provision in the Settlement Agreement which authorized or provided for the HUD financing to be split into phases.

After the meeting, in dealing with the city's reduction in the funding application, the city worked out an oral deal with DFTZ, to which WEDC was not consulted and not a party. The verbal deal was that the project would commence, and that when the project needed the balance of the money, then the city would make available the balance of $4.5 million still outstanding on its obligation under the settlement agreement. DFTZ never agreed $5.5 was sufficient to build this project. During the delay, there were on-going tensions between the city and WEDC and Rios. Disbursement of the $5.5 million was delayed when City Commissioner J.L. Plummer complained that WEDC had not included him in Board meetings and had not

provided an audit. Neither were required of WEDC under the settlement agreement, and the City has not asserted any breach of the settlement agreement by WEDC or DFTZ.

Construction on the project finally commenced. In order to avoid the onerous requirements of the Davis-Bacon Act, DFTZ secured private financing from City National Bank in 1997, which was to be subsequently paid off and replaced by the city HUD money after the project was built. The project proceeded, received a temporary certificate of occupancy and was nearing completion of the first 150,000 square feet of a total of 390,000 square feet planned. The City National Bank loan was taken out as planned by the City's HUD money in July 1998. The first two buildings of WFTZ built by DFTZ received a temporary certificate of occupancy in June 1998. The rest of the HUD money was needed to finish those buildings and to continue the project's forward momentum. However, the City failed to provide that $4.5 million balance to the project, although it applied for 1996 and received the funds from HUD in 1998. The City failed to provide any additional finding, despite its promise of $10 million.

The failure in the HUD financing caused more delay, and dissent erupted between DFTZ and WEDC. The $4.5 million was applied for and received by the City, but the city did not distribute the funds to the project. No justification for the city's action was reflected in the record. The project's progress stopped. Ultimately, relations between WEDC and DFTZ became so poor that WEDC declared DFTZ to be in default of its lease in 2002 and locked it out of the project. WEDC acknowledge that the relationship with DFTZ is irretrievably compromised and that WEDC and DFTZ have

irreconcilable differences which make it impossible to proceed with the project together. WEDC offered an alternative developer to the City, which was rejected.

Since that time, the project has stood empty. It has been stripped of any aluminum and the windows and doors are all smashed and gone. Weeds grow to the ceiling. DFTZ's principal, Oded Meltzer, testified that he could not and would not work with WEDC and/or William Rios to restore and finish this project. Meltzer testified the project is not viable, and that if the City gave him $10 million today, he would not go forward. Mr. Meltzer, principle of DFTZ, testified he lost $4.5 million on this project. WEDC through Rios agreed it would be impossible to work with DFTZ on Meltzer.

No payments have ever been made on the City's mortgage on the WEDC Property.

Rulings of Law

Wynwood seeks to have this Court enforce the 10-year-old settlement agreement. While it complains of several actions breaching the agreement, the most important remedy it seeks is enforcement of the City's agreement to fund the full $10 million originally agreed to and justified by the needs of the project. The City of Miami asserts that specific performance at this time is impossible, and seeks to foreclosure its mortgage.

Settlement agreements are to be interpreted and governed by the law of contracts. Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985); Zimmerman v. Olympus Fidelity Trust, LLC., 847 So. 2d 1101 (Fla. 4th

DCA 2003). Specific performance is an equitable remedy, Brook v. Watchtower Bible and Tract Society of Fla., Inc; 706 So. 2d 85 (Fla. 4th 1998). Specific performance is also a harsh remedy, Rybovich Boat Works, Inc. v. Atkins, 585 So. 2d 270, 271 (Fla. 1991). The Court must evaluate whether an order granting specific performance would cause an unfair or unjust result and, if it would, specific performance may not be ordered. Rybovich Boat Works, Inc., supra at 272. A party that seeks equitable relief must come to equity with hands. Sec. of Veteran's Affair v. Tejedo, 774 So. 2d 709 (Fla 3rd 1999,2000); " The purpose of specific performance is to compel a party to do what it agreed to do pursuant to a contract," Anthony James Development, Inc. v. Balboa Street Beach Club, Inc. 875 So. 2d 696, 698 (Fla. 4th DCA 2004) "By enforcing a contract, it is assumed that the contract has continuing validity and a party so ordered to comply with its terms." Paulucci at 803.

However, in considering settlement agreements, the Court is not free to vary the terms of the agreement. Paulucci, supra at 803. Courts cannot rewrite contracts, Valencia Center, Inc v. Publix Super Markets, Inc., 464 So. 2d 1267 (Fla. 3rd DCA 1985); and the court cannot go beyond the terms of the contract in enforcing specific performance. Anthony James Development, Inc. supra at 698.

Examining the facts in this legal context, it is clear that City of Miami intentionally breached the settlement agreement by failing to apply for and disburse the $10 million in HUD funds. The minutes of the Miami City Commission, in evidence, clearly established that the City was told by its staff that $10 million was required by the project and recommended for

approval, and was told by its attorneys that its failure to fund the full amount may be a breach of the agreement.

There is absolutely no issue that the project reasonably justified $10 million, that the City knew it was justified, and that the City Manager and City Commission were advised at that moment that their actions could be considered a breach. The reasons for the decision were the unilateral extraneous interests of the City, irrespective to any requirement under the agreement. Subsequently, and without justification in the agreement, the City attempted to justify the decision by referring the construction phases described in the WEDC-DFTZ lease. If the City had wanted to afford itself the flexibility to engage in phased financing, it could have negotiated for performance benchmarks. It did not do so according to the unambiguous terms of contract. East Coast Advertising, Inc. v. Wiseheart 862 So 2d 734 (Fla 3rd DCA 2004) American Aviation, Inc. v. Aero-Flight Service, Inc, 712 So. 2d 809 (Fla. 4th DCA 1998): City of Tampa v. City of Port Tampa, 127 So. 2d 119 (Fla. 2nd DCA 1961).

Even phased, however, had the City fully and timely funded the balance on the project, it could have avoided this result. It did not timely fulfill its obligation. The City's split of the funding created several problems, which ultimately led to the collapse of the project. First, the project had $3-400,000 worth of final work to be done on the first phase when the $5.5 million ran out. Although the property had a Temporary Certificate of Occupancy, it could not begin leasing and generating income until the final Certificate of Occupancy was issued, and the last $400,000 of work had been completed, (largely bathrooms and life safety). Had the project been

funded in the original amount of $10 million specified by the settlement agreement, the work could have been completed and the foreign trade zone could have commenced operation and generating income, because there would have been no funding gap between the first phase and the second phase. Second, by splitting the funding, city employee Barbara Rodriguez testified that none of the 4.5 million "second phase" funding could be used to finish the build out of the "first phase". She also testified that because there was no third-party lender lined up on the $4.5 million phase, that the second phase would have been built as a direct federal loan and therefore would be subject to the requirements of the Davis-Bacon Act characterized by all the witnesses as expensive, increasing project cost significantly, and onerous, in terms of paperwork and documentation. In addition, Ms. Rodriguez testified that had the second phase been subject to Davis-Bacon, the first phase would have been retroactively subject to Davis Bacon requirements and the parties would have to go back and adjust the entire "first phase" to make additional payments and attempt to create retroactive Davis Bacon documentation, a Herculean task worse than the Aegean stables.

In 1997, therefore, the project had come to a critical point. The City's failure, the breach, cut off funding. The property was generating no cash flow. The Wynwood foreign trade zone project came to a standstill. As a direct result of the City's action, an already tense relationship between DFTZ and WEDC, between Meltzer and Rios, imploded. Today, the original development/private parties to the settlement agreement are completely unable to work together and build this project as contemplated in

1716

the Settlement Agreement. Since DFTZ is out, and will not come back, the City asserts the defense of impossibility to WEDC's Motion to Enforce.

The Court rejects the city's defense. "The general rule is that supervening impossibility of performance (being that which is due to something that develops after the inception of the contract) is not an excuse for non-performance of a contract... Also, a contracting party will not be relieved from his agreement to perform because of an inability that develops that could have been prevented or avoided, and a promissory *will not be permitted to take advantage of an obstacle to performance which he has created or which lay in his power to remove or avoid.*" Metropolitan Dade County v. Babcock Co., 287 So. 2d 139, 142 FNI (Fla. 3rd DCA 1973)[emphasis the Court's]. The City created the collapse of the project by its breach. Therefore, if the only actions to be evaluated were those of the City, impossibility fails as a defense and enforcement would be required.

However, the analysis must continue in examination of what DFTZ and WEDC can now do. It is abundantly clear they cannot work together. Although the City's action set this calamity in motion, both DFTZ and WEDC took subsequent affirmative actions which compromised the settlement agreement: DFTZ by failing to pay property expenses, taxes and WEDC by declaring DFTZ to be in breach of the lease and throwing DFTZ out of the project. WEDC and DFTZ have actively participated in rendering this settlement agreement's enforcement impossible. WEDC asks that the Court order the City of Miami to fund the $4.5 balance and promises it will revive the project with new development partners. No viable alternative development partners were identified, and even if they had been, $4.5

million is insufficient to renovate the current shell concrete warehouses to habitable condition and build out the balance of the project. These are practical impossibilities. Even more basic, this Court can not and will not rewrite this contract. To order the City of Miami to fund WEDC without DFTZ, and without a coherent plan to complete construction of a foreign trade zone as originally contemplated would be a complete contractual re-write. It would be inequitable, unfair, and unjust to order the taxpayers of Miami to fund a project with no apparent viability. This Court declines to do so. Under Paulucci, where a contract is determined to no longer possess continuing validity to permit specific performance, then... "a breach of contract action presupposes that the contractual relationship is at end because of a material breach by one party and damages are sought by the non-breaching party as a substitute for performance." Paulucci at 803. The City of Miami materially breached the settlement agreement by failing to fund the project as required by II D2. WEDC's remedy therefore, lies in an independent action for damages. Paulucci, supra W.C., Riviera Partners L.C., supra. Specific performance is denied as to disbursing the $10 million HUD loan.

The Court does grant specific performance of the City's promise under provision II F 3 to reimburse WEDC for $17,000 in architectural fees. The unrebutted testimony from William Rios is that the documentation was submitted repeatedly to the City. There was no evidence offered by the City that the documentation was not presented or was inadequate. Therefore, the Court grants specific performance and orders the City to pay WEDC the amount of $17,000 with in 30 days of this order. The City also failed to rebut Rios' testimony as to the continuing problems with the deed. The

Court orders that a corrected Deed, covering the title problems established in the evidence, be issued within 45 days. If issues remain as to the adequacy of the corrected deed, the parties all ordered to have the title examined by an agreed neutral agreed third party title examiner. The cost is to be split. The title examiner shall determine what if any, problems identified in the evidence remain on the title. If the title examiner determines that there are still issues originally complained-of on the title, the City of Miami shall appear before this Court within 100 days to show cause as to why it should not be charged with the entire expense of the title examiner and the Court shall consider requests for additional sanctions.

For purposed of attorneys fees, this Court finds WEDC to be prevailing party on the Motion to Enforce Settlement, due to the determination that the City of Miami breached, that impossibility is not available to it as defense, and that WEDC has recovered $17,000 and title relief.

Foreclosure

This City of Miami seeks to foreclose on the mortgage that WEDC accepted on its fee simple estate to secure the HUD financing. DFTZ's leasehold, to the extent it still exists, is also sought to be foreclosed. Foreclosure is also an equitable remedy. Singleton v. Graymar Assoc., 882 So. 2d 1004 (Fla. 2004). This mortgage was required by the Settlement Agreement, provision II D3 (a). The City's breach of the Settlement Agreement created the circumstances at the project which caused non-payment of the mortgage by DFTZ and WEDC. It was clearly always contemplated that the mortgage would be paid from the income generated by the foreign trade zone.

1713

By failing to fund the full $10 million amount at the commencement of the project and/or by failing to timely fund the $4.5 million remainder, in order that the property could be occupied, the City created the situation which has caused the undisputed mortgage default. "A party may nor recover on a contract which he himself has rendered incapable of performance by his failure to perform the promise given." Levenson v. Barnett Bank of Miami, 330 So. 2d 192 (Fla. 3rd DCA 1976). In this case, the City's intentional failure to fund this project, in breach of its promise in the settlement agreement, engineered this default. The City has unclean hands. The unclean hands doctrine applies to the equitable remedy of foreclosure, Carroll & Assoc., P.A. v. Galindo 864 So. 2d 24 (Fla. 3rd DCA 2004.) As such, foreclosure is denied.

It is therefore, ORDERED AND ADJUDGED

1. The Motion to Enforce Settlement is granted in part and denied in part:

   a. As to funding the HUD loan, the Motion is denied due to impossibility.

   b. As to the $17,000 in architectural fees, the City shall reimburse WEDC within 30 days.

   c. The City must issue a corrective deed within 45 days. If any issue is

   d. The City's foreclosure action is denied and dismissed due to unclean hands.

   e. The Court finds WEDC to be entitled to attorney's fees as prevailing party, and retrieve jurisdiction to set the amount. WEDC is directed to file its motion for attorney's fees within 30 days of this judgment.

1714

DONE AND ORDERED at Miami, Miami-Dade County, Florida this 5 day of April 2005.

94-12875(30)

Jennifer D. Bailey

JENNIFER D. BAILEY
CIRCUIT COURT JUDGE

Service List:
Cheryl Zielder,Esq.
Nancy Kilson,Esq.
Robert Stock,Esq.
Charles Mays,Esq.
Ramona Gillespie, Esq.
Barbara Rodriguez, Esq.

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2006

THE CITY OF MIAMI,

Appellant,

vs.

WYNWOOD COMMUNITY ECONOMIC
DEVELOPMENT CORP., INC.,

Appellee.

** CASE NO. 3D05-1070

** LOWER
TRIBUNAL NOS. 94-12875
99-13742

Opinion filed June 7, 2006.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Jorge L. Fernandez, City Attorney, and Henry J. Hunnefeld, Assistant City Attorney, for appellant.

McGhee & Associates; Proskauer Rose LLP (Boca Raton) and Matthew Triggs and Stephanie Reed Traband, for appellee.

Before SHEPHERD, SUAREZ, and ROTHENBERG, JJ.

SUAREZ, J.

The City of Miami (the "City") appeals the trial judge's orders on motions to enforce a settlement agreement and for

EXHIBIT 2

foreclosure. The trial court granted Wynwood Community Economic Development Corp.'s ("Wynwood") motion to enforce a settlement agreement with the City, and denied the City's motion to foreclose on the property at issue after a six day bench trial. After reviewing the entire record we find more than competent substantial evidence to support the trial judge's well reasoned and thorough order. Marrone v. Miami Nat'l Bank, 507 So. 2d 652 (Fla. 3d DCA 1987).

Affirmed.