

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC
Petitioner-Plaintiff,

DECISION & ORDER
INDEX NO.62609/2022

for a Judgment pursuant to Article 78 of the N.Y. Civil Practice Law & Rules and RPAPL 853,

-against-

THE TOWN OF YORKTOWN, N.Y.; MATTHEW J. SLATER, in his Official Capacity as Supervisor of the Town of Yorktown, N.Y.; SERGIO ESPOSITO, in his Official Capacity as a member of the Town Board of the Town of Yorktown, N.Y; and JOHN H. LANDI, in his Official Capacity as Building Inspector for the Town of Yorktown, N.Y.

Respondents-Defendants

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC
Petitioner -Plaintiff,

INDEX NO. 69131/2022
Motion Seq Nos. 1&2

for a Judgment pursuant to Article 78 of the N.Y. Civil Practice Law & Rules and NY RPAPL 853

-against-

THE TOWN OF YORKTOWN, N.Y.; MATTHEW J. SLATER, in his Official Capacity as Supervisor of the Town of Yorktown, N.Y.; . SERGIO ESPOSITO, in his Official Capacity as a member of the Town Board of the Town of Yorktown, N.Y; and JOHN H. LANDI, in his Official Capacity as Building Inspector for the Town of Yorktown, N.Y.; and JOHN/JANE DOE, being the one or more contractors or companies awarded the contract to replace RC Recreation Development, LLC,

Respondents- Defendants.

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WOOD, J.

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 45-105 were read in connection with the motion by order to show cause (Seq 2) by plaintiff/petitioner RC Recreation Development, LLC (“RC”) for the following relief: to appoint a Receiver to take exclusive possession of and oversee the Valley Fields Golf Course (“the golf course”) during the pendency of the underlying proceeding; enter a preliminary injunction enjoining the Town of Yorktown (“the Town”) from prohibiting RC from taking possession of or otherwise using or occupying the golf course, including all structures of any kind installed and/or constructed by RC, and engaging in any other conduct that would tend to affect the unamortized market value of all the structures, fixtures, and equipment at the golf course installed and/or constructed by RC; and other sought relief.

RC brings this action to hold the Town accountable for its purported wrongful termination and forcible eviction of RC from the golf course as a concessioner.

Based upon the foregoing, the motion is decided as follows:

By way of background, on September 19, 2014, the Town and RC entered into a Concession Agreement, to redevelop the golf course—a pre-existing 9-hole golf facility for public use, on town-owned parkland. The 2018 “First Amendment” to the Concession Agreement, extended the initial lease term to August 31, 2028, with two, five-year renewal terms at RC’s option, which would extend the term until 2038. Changes were made to the Concession Agreement’s “Termination” section 6 as follows:

Prior to the expiration date of this License, the Town has the absolute right to terminate this License at will by providing written notice of such intention to terminate the license at least sixty (60) days prior to the commencement of the golf season on April 1 each year. In the event of a material breach of the License by the Licensee, the Town may

immediately terminate this License if the Licensee does not cure the condition giving rise to the material breach, to the extent curable, within thirty (30) days of such written notice by the Town identifying a material breach. If the Town terminates the license without there being a material breach of this Agreement that has not been cured within thirty (30) days of the receipt of notice of such breach, or is not curable, then in such event, **the Town shall reimburse the Licensee for the unamortized portion of all fixed equipment installed by the Licensee** as part of this license and concession on a prorated basis, and reimbursement for all additional equipment not removed by Licensee. In the event of a dispute as to the value of the work rendered by the Licensee, both the Town and Licensee agree to a third-party appraiser, to be mutually chosen by the parties, to determine the value of such work prior to the termination of this agreement (NYSCEF# 72).

A Second Amendment of the Concession Agreement was executed on June 4, 2022, but there are allegations that proper approvals were not gained, perhaps deeming the Town's execution a nullity.

Wadsworth Golf Charities Foundation ("the Foundation"), had approved a \$250,000 grant for the project and provided RC with \$100,000, in 2016-2017. This relationship with RC was severed by Wadsworth, due to an alleged lack of communication, unskilled work and inexperienced management. Eric Wadsworth, President of the Foundation attested that: "Overall, it became clear to the Foundation that the management overseeing the project lacked experience in this type of construction. Therefore, the Foundation dissolved its relationship with RC Recreation Development and the renovation project. The Foundation has not been refunded with its \$100,000.00" (NYSCEF#83).

On June 28, 2022, the Town conducted a building and safety inspection of the golf course. This inspection led to a punch list of items necessary before the golf course could be issued a final certificate of occupancy.

On July 6, 2022, a Stop Work Order was affixed to the golf's clubhouse and restaurant complex. RC purportedly set out to "cure" the alleged code violations supporting the stop work order and civil enforcement proceeding. According to RC, the Town interfered with, delayed, and impeded RC's ability to do so.

On September 7, 2022, in accordance with the termination provision of the Concession Agreement, the Town Board passed a resolution that the Town would terminate RC based upon its material breach of the parties' agreement by November 15, 2022, if RC failed to cure the violations. According to the Town, while it was only contractually obligated to give RC 30 days to cure, the Town provided approximately 120 days for RC to cure the violations, and RC did nothing to remedy the issues at the site.

On November 15, 2022 (the deadline for RC to cure the alleged violations), RC consented to a limited inspection of the subject premises, and the Town conducted an inspection of the entire golf facility. The Town claims that there have been a multitude of issues with the project, including that RC allegedly removed at least 90 trees along the fairway edge causing an environmental impact on the premises situated near wetland; in March 2020, the New York State Department of Environmental Conservation ("NYSDEC") conducted a site inspection and issued a cease and desist order, with violations and penalties of up to \$37,500 per day, leading to a consent decree with NYSDEC, wherein the Town committed to pay a civil penalty of \$18,650; RC allegedly repeatedly failed to meet deadlines for the completion of the golf course; there were numerous violations of the fire, building, town and state code; one of RC's employees was illegally living on the premises in a trailer, who was later arrested at the park for menacing and endangering the welfare of a child after displaying a large butcher's knife in front of an adult and

a child threatening to kill them; and The Town received a Notice of Lien for unpaid sanitation services totaling \$125,000, in violation of the Concession Agreement.

These alleged violations, RC's purported failure to cure the previously noticed material breaches, and the lengthy timeline for completion of the golf course lead the Town to issue a formal Notice of Termination to RC on November 16, 2022. Additionally, the Town purported to exercise the Concession Agreement's "convenience" clause, which permits the Town to terminate the Concession Agreement at its discretion any time more than sixty (60) days prior to the next golf season. The Notice of Termination provided that RC had until November 30, 2022, to vacate the premises and remove all personal belongings and personal property.

Since RC's termination, the Town has hired a new concessionaire who will be completing the renovation of the course. It is anticipated that the golf course will be completed by Summer 2023.

RC argues that the Town failed to abide by the compensation and reimbursement provisions that are automatically triggered under the Concession Agreement in the event of such a "for convenience" termination.

This court executed an order to show cause on February 8, 2023, which set a briefing schedule, and required the parties to appear before this court on March 10, 2023, to be heard on the order to show cause, which took place¹.

¹ The issue of recusal of this court was also discussed at the conference, with each counsel provided the opportunity to voice concerns on the matter. On that same date, this court issued a Recusal (NYSCEF#101) subject to remittal, which the parties had advised the court that they may wish to exercise. Ultimately, the parties stipulated to waive the appearance of impropriety, and remit this matter back to this court.

Turning first to RC's application for the appointment of a temporary receiver, CPLR 6401(a) allows the appointment of a temporary receiver of property in favor of a party with an apparent interest in it, "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed", and Subdivision (b) authorizes the temporary receiver to "hold real property ... upon such conditions and for such purposes as the court shall direct" (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 80 [2d Dept 2022]).

RC contends: that it is and remains the concessionaire under the Concession Agreement; the Town wrongfully terminated the Concession Agreement; RC has invested more than \$4 million dollars in reimbursable equipment, fixtures, and other sunk costs; the Town has put up no performance bond or other guarantee; and RC has no lien on real estate property.

Taking into consideration the parties' submissions, RC's application for a temporary receiver is denied. No clear evidentiary showing has been demonstrated that there is a necessity for the conservation of the premises and the need to protect a party's interests therein (*Quick v Quick*, 69 AD3d 828, 829 [2d Dept 2010]). RC failed to show "clear and convincing evidence of irreparable loss or waste to the subject premises and that a temporary receiver is needed to protect their interests" (*Board of Managers of Nob Hill Condominium Section II v Board of Managers of Nob Hill Condominium Section I*, 100 AD3d 673 [2d Dept. 2012]). The court notes that the provisional remedy of appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of Town property without an adjudication on the merits (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d at 80).

Through this litigation, RC will have its opportunity to establish proof of its rights to compensation and the value of its property through receipts and other means. As the Town points

out, that calculation is a hard cost, the value of which is already readily available to RC without the necessity of appointing a Receiver. Indeed, RC should have receipts, invoices, and bills readily available to it, outlining the value of installing any fixed equipment at the property,

In addition, as the Town claims, RC failed to prove that it has any apparent interest in the Town's property since RC was a mere licensee on the Town's property. RC never had any possessory or apparent interest in the golf course, it merely received a license to run a golf course and a restaurant.

Next, to be entitled to a preliminary injunction, the moving party must demonstrate by clear and convincing evidence, the following three elements: (1) the likelihood of success on the merits; (2) danger of irreparable harm in the absence of an injunction; and (3) a balance of the equities in favor of granting the injunction (*84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702 [2d Dept 2012]). A preliminary injunction is a drastic remedy that a court should not grant unless the party seeking such relief can "establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co. v Vallo Transportation, Ltd.*, 13 AD3d 334 [2d Dept 2004]). However, "all that must be shown is the likelihood of success; conclusive proof is not required" (*Moy v Umeki*, 10 AD3d 604 [2d Dept 2004]). Thus, "while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits...to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (*Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.* 53 AD3d 612 [2d Dept 2008] quoting *Milbrandt & Co. v Griffin*, 1 AD3d 327, 328 [2d Dept 2003]). "Where facts are in sharp dispute, a temporary injunction will

not be granted” (*Matter of Related Props., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 [2d Dept 2005]). The determination of whether to grant or deny a preliminary injunction rests in the sound discretion of the trial court (*84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702 [2d Dept 2012]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Kelley v Garuda*, 36 AD3d 593 (2d Dept 2007)). Additionally, it must be shown that the irreparable injury to be sustained is more burdensome to that party than the harm caused through the imposition of the injunction (citation omitted), and such injury is imminent, not remote or speculative (*Copart of Connecticut, Inc. v Long Island Auto Realty, LLC*, 42 AD3d 420 [2d Dept 2007]; *Village/Town of Mount Kisco v Rene Dubos Center for Human Environments, Inc.*, 12 AD3d 501 [2d Dept 2004]).

RC argues that it is likely to succeed in overturning the Town’s alleged “for cause” termination, thus leaving the Town with an obligation to compensate RC. In addition, RC argues that the Town’s breaches are manifest on this record.

The Town points out again that RC, as a licensee, has no possessory interest in the subject property and any claim of ouster under RPAPL §893 will be dismissed. Further, the Town claims that “parkland cannot be leased, even for a park purpose, absent legislative approval; RC materially and repeatedly breached the Concession Agreement; the Town merely granted RC a license to operate a golf course and a restaurant; and RC’s inability to accomplish the fundamental purpose of the Concession Agreement itself constitutes a material breach. The Town also points out that RC was required to comply with all applicable federal, state and local laws, rules, regulations and orders” for safety, fire, labor and public health, which it failed to do,

and plaintiff's claims will be dismissed for failure to comply with the demand for a General Municipal Law §50-h Hearing.

In light of the foregoing, RC has not established a likelihood of success on the merits, as the record appears to substantiate that there were violations on the part of RC, and the Concession Agreement contemplates the consequences if the Town terminates the Concession Agreement as hereinabove discussed.

As for the requirement of irreparable harm, RC argues it has invested millions in the golf course, club house, and restaurant. It has reshaped the fairways, installed custom bunkers with imported sand, redesigned and reconstructed tee boxes and greens, rehabilitated the dilapidated clubhouse into a state-of-the-facility, installed new fixtures and equipment, and taken the golf course from a state of utter dilapidation to the near playable state it is now.

The Town contends that RC never had a reputation in the industry as a golf course developer, and that it was formed to be a shell for this project. The Foundation also took issue with RC's workmanship, the lack of progress on the project, and inexperienced management, which led to it severing its relationship with RC. The Town continues that even if RC was terminated at will RC's economic damages are easily calculable. If terminated at will, RC is entitled to compensation for fixed equipment. Based on the foregoing, RC failed in its burden to show that it would suffer irreparable harm if this preliminary injunction was not issued.

Lastly, on Balance of Equities, RC contends that the court can see the work that has been completed, and the Court can compare the "before and after" photographs. The Court can see that until January of 2020 (when Slater became Town Supervisor), construction was proceeding

apace, and that even as late as December 2021, John Tegeder issued a report stating that things were progressing well at the golf course.

The Town argues that comparatively, a preliminary injunction will cause severe and protracted injuries to the Town. Particularly, if the Town is dispossessed of its property, the Town will remain unable to complete construction and commence operations of its golf course and restaurant, after nine years of construction of the golf course for the benefit of the public.

The court agrees that a preliminary injunction in favor of RC will likely cause damages to the Town. It cannot reasonably be argued that the balance of equities weighs more heavily toward RC. The Town has the same or greater costs for not being able to utilize its land for a golf course for its residents, and RC will have ample opportunity to prove its damages without a receiver taking control of the property.

Accordingly, based on this record, RC's application for a preliminary injunction is denied without a hearing (*Marders the Landscape Store v Barylski*, 303 AD2d 465 [2d Dept 2003] [hearing not required where movant fails to meet its burden]). Since the elements required for the issuance of a preliminary injunction were not demonstrated in RC's papers, no hearing is required (CPLR 6312(c)).

However, the court would be remiss if it did not point out that its determination of the preliminary injunction is merely that. It is not a determination of the merits of the plaintiff's underlying claim. For these reasons, it is hereby

ORDERED, that RC's motion for an appointment of a temporary receiver and a preliminary injunction is **denied**.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
May 17, 2023



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF