IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: PREMIER KINGS, INC., *et al.*,[1] Debtors.	(Chapter 11) Case No. 23-02871-TOM Jointly Administered
PREMIER HOLDINGS OF GEORGIA, LLC Plaintiff, v. RRG OF JACKSONVILLE, LLC Defendant.	Adversary Proceeding No. 23-02871-TOM

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, RELIEF FROM ORDER ASSUMING CONTRACT

RRG of Jacksonville, LLC ("RRG"), the defendant in this proceeding, submits this supplemental memorandum and accompanying affidavits and moves the Court to enter judgment in its favor in accordance with Rule 7012(c), or Rule 7056, of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), or, in the alternative to grant it relief from the provisions of the Sale Order assuming and assigning a contract to RRG Rule in accordance with Rule 9024. In support of its motion, RRG states the following:

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification numbers, are: Premier Kings, Inc. (3932); Premier Kings of Georgia, Inc. (9797); and Premier Kings of North Alabama, LLC (9282). The Debtors' address is 7078 Peachtree Industrial Blvd., Suite #800, Peachtree Corners, GA 30071. The Court entered an order for joint administration on October 30, 2023 [Doc. No. 84].

Introduction

The Complaint in this action alleges that RRG owes the Plaintiff Premier Holdings of Georgia, LLC ("Holdings") $38,350 and seeks a declaration that RRG is liable to Holdings under the terms of a written Development Agreement dated May 17, 2019 (the "Development Agreement"). **Holdings had no interest in the Development Agreement as of April 5, 2024, the date the Complaint was filed and has no interest presently**.

The Development Agreement recites that the Developer [the "Debtor"] contemplates securing a "bank loan" and provides that the Debtor will pay to Holdings "the Developer's [Debtor] debt service payment associated with the development of the Project." The holder of the "bank loan," First Horizon Bank, and Holdings objected to the sale of the assets to RRG free and clear of the liens of First Horizon Bank to secure the bank loan. The Court specifically overruled the objections of First Horizon Bank in the Sale Order and as to the objections of Holdings held that all "liens, claims, encumbrances and interests" of Holdings would be limited to an agreed upon disputed claim reserve of $650,000. **At the time of the filing of the Complaint in this action, the "bank loan" had been paid in full and there is no existing indebtedness between Holdings and First Horizon Bank.**

The Development Agreement was never made a part of the data room for this sale transaction or otherwise published or provided to RRG prior to January 5, 2024. The published rental rates for the property that was the subject of the Development Agreement, Port Wentworth, Georgia, omitted any reference to the Development Agreement payments. **RRG was not provided the information during the sale process necessary to understand and evaluate the**

Development Agreement[2] and was credibly led to believe that the rental rate for this location did not include any additional payments beyond the indicated $6,165 per month.

The Plaintiff Holdings has no interest in the Development Agreement. The obligations incorporated in the Development Agreement have ceased to exist. Any interest Holdings had in the property that is the subject of the Development Agreement was released by the terms of the Sale Order. RRG had no reason to assume the Development Agreement and there was no purpose served by its assumption or rejection. The Development Agreement was not an executory contract.

Facts

The Plaintiff Holdings was formed to hold real estate used in the Debtor Premier Kings of Georgia, Inc.'s ("Premier Kings") operation of various fast-food franchises. [Affidavit of Counsel, Ex. A, Deposition of Jaipal Gill (hereinafter "Gill Dep.", p. 9, l. 12-17]. As Holdings sole source of revenue was through the stores managed by Premier Kings, the bank that loaned the money to Holdings, First Horizon Bank as successor to Iberia Bank ("First Horizon"), required that Holdings create an obligation on behalf of Premier Kings to pay the debt service on the bank loan to Holdings, the obligor under the loan. Holdings then was required to assign the Development Agreement to First Horizon. [See, Loan Agreement, Aff. Counsel, Ex. B; Assignment of Development Agreement, Aff. Counsel, Ex. C; Gill Dep. p. 19, l. 13-16; p. 29, l. 20-p.30, l. 6.]. The Debtor Premier Kings paid the First Horizon debt service to Holdings through, and including during, the conduct of the bankruptcy proceedings. [Gill Dep. p. 41, l. 13-p. 43, l.19].

The Debtors and RRG entered into an Asset Purchase Agreement dated October 25, 2023, amended by the terms of the First Amendment to Asset Purchase Agreement dated December 11, 2023 [See Order dated December 13, 2023 [Docket No. 355] (the "Sale Order") at p. 208]. The

[2] RRG through an attachment to an email message dated January 5, 2024 sent to counsel and copying the responsible business persons did have a copy of the agreement prior to the execution of the Assumption Agreement.

Asset Purchase Agreement permitted RRG to accept or reject leases by sending written notice to the Debtors. RRG sent to the Debtors two (2) such notices of Designated Leases and Rejected Leases, one on December 4, 2023 and one on December 26, 2023 (the "Lease Notices"), both of which reference designation of leases and omit any reference to the Development Agreement (or any other type of contract). [Aff. Counsel, Ex. D]. The First Amendment designates leases for assumption at Schedule 1-3(a)(2) "Designated Leases for Assumption." [See Sale Order at p. 215].

On Schedule 1-3(a)(2), RRG listed:

Store Number	Store Address
26868	7304 Hwy. 21, Port Wentworth, GA

[Sale Order at p. 215]. There is no reference to the Development Agreement.

The Lease for Store 26868 makes no reference to the Development Agreement in the Lease. [Aff. Counsel, Ex E.] The Sale Order also made provision for the assumption of certain Designated Contracts as identified by RRG. The Sale Order incorporated Schedule 1-2(a) -2 which provided that the contracts being assumed by RRG were:

None

[Sale Order at p. 183].

As part of the sale process, the Debtor's outside advisors, Aurora Management Partners, Inc. ("Aurora") created a drop box that included the documents relating to the Debtors' operations. The Debtor's investment bankers, Raymond James, were then provided access to the Drop Box to prepare the data room for prospective buyers. Raymond James did not load the Development Agreement into its data room. RRG was not provided access to the Drop Box and never had access during the sale process to the Development Agreement. [Aff. Counsel Ex. F, Affidavit of Laura

Kendall, ¶¶ 7-10; Gill Dep. p. p. 30, l. 25-p. 31, l.16; Affidavit of Randy Pianin ("Aff. Pianin"), ¶¶ 9,10]

Both First Horizon Bank and Holdings filed objections to the Sale Motion. [Docket Nos. 293, 312.] First Horizon described the furniture, fixtures and equipment at the Port Wentworth store as "First Horizon's collateral" and described the operation of Holdings and its role in the debt scheme. [Docket No. 312, p. 1, pp. 3-4]. First Horizon asserted that the Debtor could not sell the FFE at the Port Wentworth store, because it did not own the FFE. Id., at pp. 5-6. Holdings in its own objections made similar assertions. The Court overruled the First Horizon objection and Holdings withdrew its objection in consideration of access to the Disputed Claim Reserve in the amount of $650,000. Sale Order, pp. 14-15. The Sale Order transferred the Port Wentworth store assets to RRG, "free and clear of any and all liens, claims, interests and encumbrances" including "contractual commitments." Sale Order, pp. 11-12.

In accordance with the terms of the Asset Purchase Agreement, the Debtor and RRG executed a written Assignment and Assumption Agreement of Lease Agreement. [Aff. Counsel. Ex. G] Paragraph 5 of the Assumption Agreement provides that:

> No Third-Party Beneficiaries. This Assignment is for the sole and exclusive benefit of the Parties and their respective successor and permitted assigns, and nothing herein is intended or shall be construed to confer upon any person other than the Parties and their respective successors and permitted assigns any rights, remedies or claims under, or by any reason of, this Assignment of any term, covenant or condition hereof.

Id. The Assumption Agreement provides that RRG is assuming "that certain Ground Lease, dated as of May 8, 2018, as amended by that certain Amendment to Ground Lease, dated August 3, 2018, and as subject to that certain Development Agreement between Premier Holdings of Georgia, LLC and Assignor, dated May 17, 2019." The Assumption Agreement does not state that the Defendant is assuming the Development Agreement.

Subsequent to the entry of the Sale Order and prior to (or on the same date) as the commencement of this proceeding, the loan to First Horizon Bank referenced in the Development Agreement was paid off. [Gill Dep. 15, l. 11-19.] Presently there is no money owed under the "bank loan" originally referenced in the Development Agreement. Id. The Plaintiff Holdings has no continued interest in the Development Agreement. [Gill Dep. p. 17, l. 17-22; Aff. Counsel Ex. I.] A review of the Development Agreement does not permit any party to determine the amounts due. [Gill Dep. p. 20, l. 22-p. 21, l. 4] The Plaintiff in the conduct of its deposition under Rule 30(b)(6) was able to identify only a promissory note in the amount of $500,000 dated March 27, 2024. [Aff Counsel, Ex. H]. Holdings is not a party to that note, which is with Mr. Gill in his personal capacity.

Argument

Applicable Standard

A motion for judgment on the pleadings is considered under the same standard as motion to dismiss under Rule 12(b)(6) and "is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." In re Blue Eagle Farming, LLC, 2019 WL 1466913, Adversary Proceeding No. 18-00230-TOM (Bankr. N. D. Ala., April 1, 2019) citing United States v. Bahr, 275 F.R.D. 339, (M.D. Ala. 2011). When matters outside the pleadings are presented, the Court may consider the motion as a motion for summary judgment. Fed. R.Civ. P. Rule 12(d). The Court has afforded the parties time to respond as provided by the Rule. [See Adv. Pro. Docket No. 31] Summary judgment is proper when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); In re Johnson, 615 B.R. 919 (Bankr. N.D. Ala. 2020); Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir.1993).

The Plaintiff Lacks Standing and has no Interest in this Action

The Plaintiff in its testimony through its Rule 30(b)(6) deposition acknowledged that it has no stake in this litigation.

> [T]he Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts but rather 'is operative only in respect to controversies which are such in the constitutional sense.... Thus the operation of the Declaratory Judgement Act is procedural only.' "

GTE Directories Pub. Corp. v. Trimen America, 67 F.3d 1563, 1567 (11th Cir.1995) quoting Wendy's Intern., Inc. v. City of Birmingham, 868 F.2d 433, 435 (11th Cir.1989). A party must show:

> (1) that they personally have suffered some actual or threatened injury as a result of the alleged conduct of the defendant; (2) that the injury fairly can be traced to the challenged action; and (3) that it is likely to be redressed by a favorable decision.

U.S. Fire Ins. v. Caulkins Indiantown Citrus, 931 F.2d 744, 747 (11th Cir.1991) (citing Valley Forge College v. Americans United, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

The Plaintiff Holdings has no interest in the Development Agreement. [Gill Dep. p. 17, l. 17-22; Aff. Counsel Ex. I.]. Even entertaining any claim of JG Coastal Properties, Inc. ("JG Coastal") leads to the same unavoidable facial invalidity of the claim. Holdings owes no money under any "bank loan" nor does JG Coastal. [Gill Dep. pp. 21-22; Aff. Counsel Ex. H.].

Holdings has commenced this action to recover what it is owed from RRG under the Development Agreement. Holdings is not owed anything as it plainly admits.

The Development Agreement is not an Executory Contract

The Development Agreement was executed on behalf of both parties, Premier Kings and Holdings, by Manraj ("Patrick") Sidhu. Its purpose was to facilitate payments from Premier Kings to Holdings to support a bank loan issued by First Horizon Bank. [See, Loan Agreement, Aff. Counsel, Ex. B; Assignment of Development Agreement, Aff. Counsel, Ex. C; Gill Dep. p. 19, l.

13-16; p. 29, l. 20-p.30, l. 6.]. In the context of the litigation over the proposed sale to RRG, the objections of First Horizon Bank and Holdings were overruled or otherwise resolved, the Court having determined that the property in which Holdings asserted an ownership interest and in which First Horizons asserted a lien was owned not by Holdings, but by the debtor Premier Kings. Sale Order, pp. 14-15. Holdings maintained a claim to the Disputed Claims Reserve in the amount of $650,000 and a right to payment from any obligations specifically assumed by a buyer, but otherwise released any and all claims. The Sale Order transferred the Port Wentworth store assets to RRG, "free and clear of any and all liens, claims, interests and encumbrances" including "*contractual commitments*." Sale Order, pp. 11-12. (emphasis added).

The Court has adopted a definition of executory contracts that eschews the "performance left on both sides" Countryman definition for the more expansive definition embodied by a functional approach. In re Walter Energy, Inc., 2015 WL 9487718 (Bankr. N.D. Ala. 2015) The Court articulated the test as follows:

> The key, it seems, to deciphering the meaning of [section 365's lease-executory contract provision] is to work backward, proceeding from an examination of the purposes of rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, the [agreement] is not [a lease or executory contract] within the meaning of the Bankruptcy Act.

Id. at *5 quoting In re General Development Corp., 84 F.3d 1364, 1375 (11th Cir.1996). In this instance, upon entry of the Sale Order, the Development Agreement became a nullity. The obligations it sought to memorialize, the obligation of the Debtor to Holdings to facilitate the repayment of Holding's lender First Horizon, were of no consequence at the time the Court determined that the property which secured those obligations was owned not by Holdings, but by the Debtor. The Debtor had no obligation to Holdings as of December 13, 2023, there was nothing to assume or reject. The Sale Order itself conveyed the assets to RRG free and clear of the claims

of the Development Agreement, in consideration of the $15,525,000 in sale consideration it paid to the bankruptcy estate. The Development Agreement was part of a loan transaction invalidated by the Court's determination that the Debtor owned the underlying collateral outright.

Under any conceivable construction of the definition of executory contract, and perhaps the functional definition favored by the Court more than any other, the Development Agreement was not an executory contract at the time of entry of the Sale Order.

Plaintiff is not an intended beneficiary of the Assignment Agreement.

It is well established that parties may seek to enforce rights under or take advantage of contracts between two parties only where the contract is intended for their direct and not incidental benefit. Beverly v. Macy, 702 F.2d 931, 940 (11th Cir. 1983) citing Ross v. Imperial Constr. Co., 572 F.2d 518, 520 (5th Cir. 1978). In the instant case, the parties specifically disclaimed the intent to benefit any third party, including the Plaintiff. Further, the Assumption Agreement in any event only purported to assume the Development Agreement to the extent the Lease was subject to the Development Agreement. The Lease exists independent of the Development Agreement and neither contract references the other. Stating that the Lease is subject to the Development Agreement does not result in the Development Agreement becoming part of the Lease, subject to assumption by the Defendant. The Defendant specifically omitted the Development Agreement from the list of Designated Leases on three occasions – in the Amendment to the APA and in each of the two Lease Notices.

The Development Agreement is Not a Lease.

In its efforts to contort the Asset Purchase Agreement into a form in which the Development Agreement is assumed, the Plaintiff ignores the fact the Development Agreement is not a lease. The Development Agreement does not reference the Lease, was executed long after

the Lease commenced and does not purport to convey to the Debtor any interest in the land. The Development Agreement is a contract. The Asset Purchase Agreement states quite clearly which contracts RRG was assuming as "None." [Sale Order at p. 183]

The Court Should Give Effect to the Intent of the Parties.

The Sale Order in appending and incorporating the terms of the Asset Purchase Agreement between the Debtor and RRG is intended to give effect to the contract between the parties. In interpreting a contract the Court looks to the intent of the parties. Garber v. Nationwide Mut. Ins. Co., 2021 WL 5811733, at *9 (N.D. Ala. Dec. 7, 2021). Neither RRG nor the Debtor had anything to gain from the assumption of the Development Agreement.

The Development Agreement provides no value to RRG and there was no reason for RRG or any other party acting in a commercially reasonable manner to assume the Development Agreement. [See, Gill Dep. at pp. 46-47] The Plaintiff does not argue or contend otherwise, it simply seeks to take advantage of what it chooses to construe as an inadvertent error in its favor in an agreement between the Debtor and RRG. The Development Agreement was not the subject of negotiations or discussion between the Debtor and RRG and indeed it was not downloaded to the data room, or otherwise made available to RRG, until after the execution of the Schedule of Leases to be assumed. [Aff. Counsel Ex. F, Affidavit of Laura Kendall, ¶¶ 7-10; Gill Dep. p. p. 30, l. 25-p. 31, l.16; Affidavit of Randy Pianin ("Aff. Pianin"), ¶¶ 9,10]. No one from Holdings ever discussed the Development Agreement with RRG. [Gill Dep. p. 25, l. 1, p. 31, l. 7-16.]. The data that was provided to RRG for this store location did not indicate the payments being made under the Development Agreement, but simply the ground lease payments, or $11,000 less per month. [Gill Dep. p. 42-43; Aff. Pianin, ¶¶ 9-10].

Looking to the intent of the parties and a commercially reasonable interpretation of the contract, there was no reason for assumption of the Development Agreement to be the intended result. Consistent with the rules of contract interpretation the Court should reject the Plaintiff's attempt to compel a nonsensical result.

The Court Should Afford RRG Relief from Assumption under Rule 9024

Rule 60(b)(1) permits a court to alter or amend a judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. Rule 60(b)(1). The goal of Rule 60(b)(1) is to correct errors of law or misapprehensions of fact. The decision to alter or amend a judgment is in the sound discretion of the trial judge. Futures Trading Comm'n v. Am. Commodities Group, 753 F.2d 862, 866 (11th Cir.1984). "Mistake" as used within Rule 60 encompasses a broad spectrum of errors consistent with the common dictionary definition of the word. Kemp v. United States, 596 U.S. 598, 142 S. Ct. 1856, 213 L.Ed. 2d 90 (2022).

A bankruptcy court has the jurisdiction and discretion to relieve a party from the mistaken assumption of a contract:

> When an innocent mistake can be rectified without harm to anyone (**loss of a windfall is not the kind of harm that a court should endeavor to avert**), it should be. Especially in a case such as this. If the mistake is not corrected, the cost will be borne not by its maker-United-but by creditors no less innocent than the airplanes' owners. A refusal to correct would serve no deterrent or punitive purpose; it would merely redistribute wealth among creditors capriciously.

In Re UAL Corp., 411 F. 3d 818, 824-825 (7th Cir. 2005) (emphasis added).

In UAL Corp., the Court was called upon to consider the actions of the debtor United Airlines in inadvertently assuming three aircraft leases which it wrongly believed no amounts were due upon. The Court noted in UAL that there was no detrimental reliance by the contract party arising out of the error and the same is true in the instant case. Id. Unlike the facts in UAL, the

contract party charged with mistake is not the original contract party, but a purchaser who was not a party to the insider Development Agreement and had no reason to be aware of its terms.

The Development Agreement does not state the amount of any payment due but instead apparently makes reference to a future and unidentified "bank loan." For this reason alone, RRG would have never assumed the agreement without knowing what payment obligations were entailed or having any ability to do so by reference to an unidentified "bank loan." [Aff. Pianin, ¶ 11.] Holdings itself acknowledged that it is not possible to determine the fee due under the Development Agreement from its terms. [Gill Dep. p. 20, l.15, p. 21, l.13.]

RRG had an established protocol for assumption or rejection [Aff. Pianin, ¶ 6, 7]. This location, even at its existing lease rate had been identified for potential restructuring, with any added cost the location would have been rejected. [Aff. Pianin, ¶ 11] RRG was operating within a compressed time frame to make decisions in this case and had no need, nor desire, to assume the Development Agreement. There is no harm to any party by, as necessary, amending the sale order, to relieve RRG of the burden of assumption. The only "harm" would be the loss of a windfall to Holdings. As the Court in UAL noted "not the sort of harm the Court should endeavor to avert." Id. at 824-825.

Conclusion

Wherefore, RRG prays that the Court enter an Order dismissing the Complaint against it, award it costs and attorneys fees and that the Court grant such other and further relief as is just.

RRG of Jacksonville, LLC

by its attorneys,

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Dated: October 4, 2024

Certificate of Service

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: October 4, 2024 */s/ Peter J. Haley*
Peter J. Haley