

SCANNED

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

THF CLARKSBURG DEVELOPMENT TWO,
LIMITED LIABILITY COMPANY

Plaintiff,

v.

CIVIL ACTION NO. 15-c-404-2

Judge *Beckell*

IIAAMM, LLC

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

AND SPECIFIC PERFORMANCE

FILED OCT 15TH
CIRCUIT COURT
2015 OCT -9 P 3:31

Comes now, the Plaintiff THF Clarksburg Development Two, Limited Liability Company ("Plaintiff"), by counsel Benjamin L. Bailey, Marc R. Weintraub and Jiayin Liao, of the law firm of Bailey & Glasser, LLP, and hereby files its Complaint for Declaratory Judgment and Specific Performance against the Defendant IIAAMM, LLC ("Defendant"). In support of its Complaint, Plaintiff represents as follows:

Nature of Civil Action

1. This is an action for declaratory relief brought pursuant to the West Virginia Uniform Declaratory Judgment Act, W. Va. Code § 55-13-1, *et seq.* and Rule 57 of the West Virginia Rules of Civil Procedure. This action also seeks specific performance against Defendant as a result of Defendant's breach of contract.

Parties

2. Plaintiff THF Clarksburg Development Two, Limited Liability Company is a Missouri limited liability company with its principal place of business in Missouri.

3. Defendant IIAAMM, LLC is a West Virginia limited liability company with its principal place of business, as filed with the Secretary of State, at 2041 Natalie Drive, Bridgeport, West Virginia 26330.

Jurisdiction and Venue

4. This Court has jurisdiction to determine questions of actual controversy between the parties pursuant to the West Virginia Declaratory Judgment Act, W. Va. Code § 55-13-1, *et seq.*, and Rule 57 of the West Virginia Rules of Civil Procedure.

5. Venue in this Court is proper under W. Va. Code § 56-1-1 because (i) the allegations and counts below arise from acts and omissions relating to real property located in Harrison County, West Virginia, and (ii) Defendant has its principal place of business in Harrison County, West Virginia.

Factual Allegations

6. On February 15, 2012, Plaintiff conveyed by deed (the "Deed") to Defendant real property (the "Property") located in the City of Clarksburg, Clark District, Harrison County, West Virginia, containing 2.51 acres, more or less, which deed was recorded on March 6, 2012 in the public records of Harrison County, West Virginia in Deed Book No. 1484 at page 1065.

7. On or about the same date the Deed was executed and delivered, Plaintiff and Defendant entered into the Supplemental Agreement (the "Agreement"), which was recorded on May 9, 2012 in the public records of Harrison County, West Virginia in Agreement Book No. 1491 at page 143.

8. Section 3 of the Agreement, referring to Plaintiff as Developer and Defendant as Owner, provides that for a period of ten (10) years and without Plaintiff's prior written consent the Property shall only be used as a restaurant or office ("permitted use"). If Defendant ceases

operating a permitted use on the Property for more than nine (9) months, then Plaintiff shall have the right (the "option"), but not the obligation, to repurchase the Property. If Plaintiff exercises the option, the repurchase price shall be determined in the following manner: (i) within five (5) days of Plaintiff's exercise of its option, each of Plaintiff and Defendant shall promptly designate an appraiser to determine the repurchase price. If either party fails to designate an appraiser within ten (10) days after the option is exercised, the decision of the other party's appraiser shall be binding upon both parties. If the two appraisers cannot agree on a value within fifteen (15) days, they shall appoint a third appraiser within an additional five (5) days and a majority of the appraisers shall decide the repurchase price. If the appraisers cannot agree on a valuation within fifteen (15) days of the date the third appraiser is appointed, either party may refer the matter to Arbitration in the City of Clarksburg pursuant to the then existing rules of the American Arbitration Association. The decision by appraisal or arbitration, as the case may be, shall be final and binding upon all parties and judgment upon the award shall be entered in any court with jurisdiction. Closing of the repurchase shall be within sixty (60) days of the final determination of the repurchase price.

9. For a period of at least nine (9) months, the Property was not used as a restaurant or office, triggering Plaintiff's repurchase option. Plaintiff, by letter dated July 8, 2015, notified Defendant that Plaintiff was thereby exercising its option to repurchase the Property. In the letter, Plaintiff designated Jonathan Cavendish of Realcorp, Inc. as its appraiser and asked that Defendant notify Plaintiff its choice of appraiser within five (5) days. Despite the express provisions of Section 3 of the Agreement and Plaintiff's letter, Defendant has not appointed any appraiser up to this day.

10. By virtue of Plaintiff's exercise of the option, Defendant became obligated to convey the Property to Plaintiff unless Plaintiff, pursuant to express authorization under Section 3 of the Agreement, later decides not to repurchase the Property.

Count I - Claim for Declaratory Relief

11. Plaintiff restates and incorporates by reference all the allegations contained in the previous paragraphs.

12. Under Section 3 of the Agreement, Defendant may only use the Property as a restaurant or office.

13. If the Property is not used for a restaurant or office for a period of more than nine (9) months, Plaintiff may exercise its option to repurchase the Property.

14. The Property was not used for a restaurant or office for a period of more than nine (9) months, triggering Plaintiff's repurchase option.

15. Plaintiff exercised its option to repurchase the Property and appointed Jonathan Cavendish as its appraiser.

16. Defendant has not appointed an appraiser up to this day.

17. As a result of Defendant's failure to appoint an appraiser, the repurchase price shall be determined by Jonathan Cavendish alone and his decision will be binding upon both Plaintiff and Defendant.

18. An actual and justiciable controversy exists between the parties as to the rights and responsibilities of the parties under the Agreement.

WHEREFORE, Plaintiff respectfully requests the following:

(A) Judgment declaring the Property was not used as permitted under the Agreement for a period of more than nine (9) months.

- (B) Judgment declaring Plaintiff may, and did, exercise its repurchase option under the Agreement and has timely appointed Jonathan Cavendish as its appraiser.
- (C) Judgment declaring Defendant has failed to timely appoint an appraiser and as a result Jonathan Cavendish has become the sole appraiser to determine the repurchase price and such determination shall be binding upon both Plaintiff and Defendant.
- (D) Plaintiff be awarded costs of this proceeding and attorneys' fees pursuant to W. Va. Code § 55-13-10.
- (E) Such other and further relief as the Court deems just and proper.

Count II – Specific Performance

19. Plaintiff restates and incorporates by reference all the allegations contained in the previous paragraphs.

20. The Agreement is validly entered into by Plaintiff and Defendant and legally enforceable. The consideration Plaintiff is to pay to repurchase the Property under the Agreement is adequate and the Agreement is just and reasonable with respect to Defendant.

21. Plaintiff has duly exercised its option to repurchase the Property from Defendant pursuant to the Agreement.

22. Plaintiff has at all relevant times performed all of the conditions of the Agreement on its part to be performed to this date.

23. Plaintiff has at all times been, and continues to be, ready, willing and able to perform its obligations under the Agreement, including the payment of the repurchase price.

24. Defendant has refused to comply with its obligations under the Agreement and has not up to this date conveyed the Property to Plaintiff.

25. Plaintiff has no adequate remedy at law to enforce the provisions of the Agreement other than specific performance of the Agreement.

26. Plaintiff is entitled to specific performance of the terms, conditions and provisions of the Agreement by court decree, among other things, ordering Defendant to convey the Property to Plaintiff at the appraisal price determined by Plaintiff's appraiser.

Count III - Damages

27 Plaintiff restates and incorporates by reference all the allegations contained in the previous paragraphs

28. Plaintiff is entitled to damages incidental to Defendant's breach of the Agreement and a decree of specific performance, caused by the delay of Defendant in conveying the Property to Plaintiff in that Plaintiff was deprived of, among other things, fair rental value of the Property during the period of the delay.

WHEREFORE, Plaintiff respectfully requests the following:

- (A) Defendant be enjoined to specifically perform the Agreement, and, in particular, to convey the Property to Plaintiff in the manner required by Section 3 of the Agreement at the appraisal price determined by Plaintiff's appraiser.
- (B) Defendant be enjoined from conveying or encumbering the Property so as to defeat the rights of Plaintiff.
- (C) Plaintiff be awarded a judgment against Defendant for monetary damages suffered by Plaintiff by reason of refusing to close and in delaying the closing occasioned by Defendant.
- (D) Plaintiff be awarded costs of this proceeding and attorneys' fees.

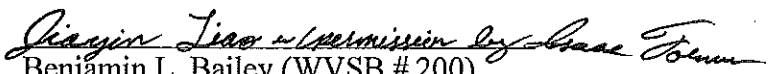
(E) Such other and further relief as the Court deems just and proper.

Plaintiff demands a jury trial.

Respectfully submitted,

**THE CLARKSBURG DEVELOPMENT TWO,
LIMITED LIABILITY COMPANY**

By Counsel


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