

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 12-021362 (14)

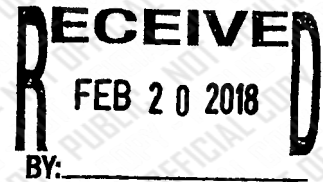
ZYSCOVICH, INC., a Florida corporation,

Plaintiff,

v.

HILLCREST COUNTRY CLUB LIMITED
PARTNERSHIP, a Delaware limited partnership,

Defendant.



**ORDER GRANTING PLAINTIFF, ZYSCOVICH, INC.'S, MOTION FOR SUMMARY
JUDGMENT ON LIABILITY AND DAMAGES ON COUNT I OF ITS COMPLAINT
AND DENYING HILLCREST COUNTRY CLUB LIMITED PARTNERSHIP'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court on October 3, 2017, on Plaintiff, ZYSCOVICH, INC.'s ("Plaintiff" or "Zyscovich"), Motion for Summary Judgment on Liability and Damages on Count I of its Complaint for Breach of Contract against Defendant, HILLCREST COUNTRY CLUB LIMITED PARTNERSHIP ("Defendant" or "Hillcrest"), and on Hillcrest's Cross-Motion for Summary Judgment. There is a dispute between the parties as to the interpretation of the subject agreement (the "Agreement"). Both parties state have asked this Court to interpret the Agreement between the parties as a matter of law. Having heard argument of counsel, having reviewed and considered the pleadings, the case file, deposition testimony, affidavits filed by both parties, supplemental authority and supplemental filings made by both parties, the Court hereby finds as follows:

1. Zyscovich sued Hillcrest for a \$1,250,000 bonus it argues it earned under the terms of the June 16, 2005 Master Plan Design and Consulting Agreement ("Agreement")¹ it entered into with Hillcrest, the owner of a nine-hole golf course in the City of Hollywood.

2. As noted in the Agreement, development of Hillcrest's golf course was "restricted by certain covenants and perhaps by applicable zoning." ¶ 2 of Agreement, pg. 1

3. Hillcrest retained Zyscovich to prepare a Master Plan to accomplish the Agreement's purpose of obtaining development rights for the golf course by obtaining "the necessary zoning and other approvals from the applicable governmental entities and neighboring landowners, condominium associations and cooperatives, etc. as appropriate." *Id.*

4. While the Agreement was negotiated by both parties, the final version of the Agreement and the bonus clause at issue in this litigation was authored by Hillcrest. *See* Deposition of Patrick Perno, pg. 54, lines 7-19; *see also*, Deposition of Bernard Zyscovich, pg. 66, lines 3-22; pg. 67, lines 5-7; and, pg. 104, lines 14-18.

5. Section VIII(C), under the Agreement's compensation section, includes the bonus clause at issue in this case.

6. The two sentences at the crux of this dispute are:

Upon approval of the removal of the restrictive covenants, approval of the City of Hollywood and any other required governmental agencies, Zyscovich will be paid a Bonus Fee in the amount of \$2,500 per unit with a cap of \$1,250,000.

("first sentence")

and

¹ See Exhibit A to Plaintiff's Motion for Summary Judgment.

The Bonus Fee shall be earned and payable upon receipt by the Owner of all approvals and permits necessary to develop the property in conformance with the Master Plan developed by Architect for the Project.

("second sentence")

7. The first sentence unambiguously provides that Zyscovich will be paid a maximum bonus of \$1,250,000 upon (1) the approval of the removal of the restrictive covenants, (2) the approval of the City of Hollywood, and (3) approvals of any other required governmental agencies. Section VIII(C) of the Agreement.

8. Hillcrest's agent, Denny St Romain, testified that Hillcrest obtained a removal of the restrictive covenant, approval of the City of Hollywood, and approvals of any other required government agencies. Deposition of Denny St. Romain, pg. 44, lines 2-15; pg. 54, lines 6-19.

9. Hillcrest's corporate representative, Patrick Perno, also testified that Zyscovich completed its obligations under the Agreement by obtaining the final approval needed from the City of Hollywood. Deposition of Patrick Perno, pg. 70, lines 11-13; pg. 97, lines 7-13.

10. The City of Hollywood issued its approval of the Zyscovich Master Plan on November 4, 2009, and Hillcrest's agent admitted that this approval gave Hillcrest the ability to develop the property in conformance with the Zyscovich Master Plan. *See* Ordinance No. 0-2009-38 (Exhibit 8 to Denny St. Romain's Deposition); *See* Deposition of Denny St. Romain, pg. 68, lines 13-17.

11. The Court finds that there is no disputed material issue of fact that Zyscovich had completed its obligations and that Hillcrest had obtained the removal of the restrictive covenant, the Approval of the City of Hollywood, and approval of any other required governmental agencies,

and Zyscovich was entitled to its bonus fee as unambiguously set forth in the first sentence of Section VIII(C).

12. Hillcrest has refused to pay the bonus, relying on the Agreement's second sentence and arguing that the "permits necessary to develop the property in conformance with the Master Plan" in the second sentence includes "building permits", and because 'building permits' were not obtained; the bonus fee had not been earned.

13. Zyscovich, on the other hand, contends the second sentence refers to those approvals and permits which would be necessary as part of the development approval process, and would not include building permits.

14. The parties agree that Zyscovich did not have any contractual duties or responsibilities beyond development approvals, and more specifically, that Zyscovich did not have any contractual duties or responsibilities to obtain any building permits for the project.

15. It is clear in reading the Agreement as a whole, that Hillcrest could decide to stop the development process when Zyscovich's services were complete at the development approval stage, and that Hillcrest was not obligated to move forward with any other future agreements for construction stage services, which would include building permits. Further, the Agreement makes no reference to "building permits" whatsoever.

16. In determining the meaning of "permits necessary for the development of the property in conformance with the Master Plan," and whether this term means or includes "building permits", the Court also looks to the overall purpose of the Agreement. The first paragraph of the Agreement describes Zyscovich's scope of services and the Agreement's overall purpose. The Agreement states that Zyscovich will develop a Master Plan for Redevelopment and obtain "the

necessary zoning and other approvals from the applicable governmental entities and neighboring landowners, condominium associations and cooperatives, etc. as appropriate.”

17. Exhibit A to the Agreement has a section within it titled, “Steps to Victory.” The Steps to Victory include the two final steps of Zyscovich’s services as: (9) get the waivers signed; and, 10) obtain city and county support for the final plan and proceed with its approval. Obtaining building permits or otherwise proceeding with construction is not identified as a Step to Victory.

18. The overall purpose of the Agreement is clear. Prepare a Master Plan for redevelopment approval, obtain waivers of the restrictive covenant from neighboring landowners, and obtain development approvals from the City of Hollywood and other applicable governmental agencies, all of which Hillcrest has admitted have been accomplished.

19. The word “earned” in the second sentence contradicts Hillcrest’s position that the second sentence includes the requirement that building permits be received as a condition precedent to Zyscovich receiving its bonus. “Earned” implies that the bonus would arise out of Zyscovich’s performance, not the happenstance of Hillcrest’s obtaining building permits pursuant to other agreements, which was within the sole discretion and control of Hillcrest. The use of the word “earned”, limits the application of this sentence to those approvals and permits that were within the contractual responsibility of Zyscovich, which both parties agree were limited to development approvals. *Webster’s Third New International Dictionary of the English Language* 714 (1986) defines “earn” as “to receive as equitable return for work done or services rendered.” *J.N. Laliotis Eng’g Const., Inc. v. Mastor*, 558 So. 2d 67, 69 (Fla. 2d DCA 1990) (using Webster’s Dictionary to define “earn” for interpretation of contract).

20. It is a well-established principle of contract interpretation that “the intention of the parties must be determined from an examination of the entire contract and not from separate phrases or paragraphs.” *Alamo Fin., L.P. v. Mazoff*, 112 So. 3d 626, 630 (Fla. 4th DCA 2013); *Deeb v. Field*, 311 So. 2d 736 (Fla. 3d DCA 1975) (“it is fundamental that in construing a contract, the intention of the parties must be determined from examination of the whole contract and not from the separate phrases or paragraphs”).

21. It is clear to this Court that in reading the Agreement as a whole, the second sentence refers to approvals and permits that would be obtained in the development approval process, not building permits that would be obtained pursuant to a later Agreement for the preparation of construction drawings for building permit purposes.

22. Moreover, if this Court were to accept Hillcrest’s argument that the second sentence includes building permits, it would render the first sentence meaningless, and would frustrate the Agreement’s purpose. This Court is not inclined, nor is it allowed, to rewrite the parties’ Agreement to eliminate the first sentence. *See e.g., Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co.*, 215 So. 2d 336, 338 (Fla. 4th DCA 1968) (“where a contract contains apparent inconsistencies they must be given such an interpretation as will reconcile them if possible”).

23. Although both parties have suggested that the second sentence should be interpreted in their favor, this does not make the second sentence ambiguous. A true ambiguity does not exist merely because a clause can be interpreted in more than one way, the alternative interpretations must be reasonable. *Smith v. Shelton*, 970 So. 2d 450 (Fla, 4th DCA 2007).

24. The court finds that the Zyscovich interpretation of the second sentence is a reasonable interpretation as it would be consistent with the terms of the agreement read as a whole, and would give meaning to the first sentence.

25. The court finds that the Hillcrest interpretation of the second sentence is unreasonable as it is inconsistent with the terms of the agreement as a whole, and would render the first sentence meaningless. The court should interpret the Agreement to give meaning to all of the contract provisions. *See e.g., City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (the rules governing contract interpretation “requires courts to read all provisions of a contract harmoniously in order to give effect to all portions thereof.”).

26. As there is only one reasonable interpretation of the second sentence, the second sentence is not ambiguous, and this court finds in favor of the Zyscovich interpretation, as a matter of law.

27. Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *see also, Volusia City v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 131 (Fla. 2000) (“[W]here the determination of the issues of a lawsuit depend upon the construction of a written instrument, and the legal effect to be drawn there from, the question at issue is essentially one of law only and determinable by entry of summary judgment.”).

28. There being no material issue of fact that Zyscovich fully complied with its obligations under the Agreement, and is entitled to its bonus fee, the Plaintiff’s Motion for Summary Judgment on Liability and Damages on Count I of its Complaint is **GRANTED**.

29. The Defendant's Cross-Motion for Summary Judgment is **DENIED**.

30. The Court reserves jurisdiction to enter such further orders consistent with this Summary Judgment.

DONE AND ORDERED in Chambers at Broward County, Florida, this 20th day of February, 2018.



CARLOS A. RODRIGUEZ
CIRCUIT COURT JUDGE

Copies furnished to:
Counsel of record