

FILED

APR 04 2016

PREPARED BY THE COURT

<p>CITY OF ATLANTIC CITY,</p> <p>Plaintiff,</p> <p>vs.</p> <p>MARINA DISTRICT DEVELOPMENT COMPANY, LLC, a New Jersey Limited Liability Company; and MARINA DISTRICT FINANCE COMPANY, INC., a wholly-owned Finance Subsidiary of Marina District Development Company, LLC, t/a The Borgata Hotel and Casino,</p> <p>Defendants,</p>	<p>ATLANTIC COUNTY LAW DIVISION</p> <p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-2739-15</p> <p>ORDER</p> <p>Dated: April 4, 2016</p>
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COURT ORDER

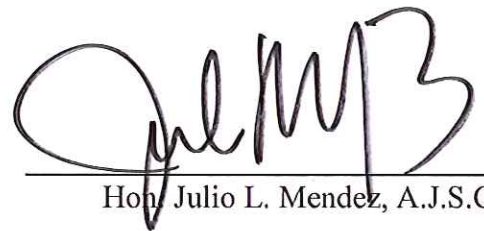
This matter having been brought before the Court by George G. Frino, Esquire, counsel for PLAINTIFF, CITY OF ATLANTIC CITY (hereinafter "CITY"), on a complaint filed on December 3, 2015 and an order to show cause filed on December 4, 2015 and opposition and cross-motion to dismiss the complaint filed on January 8, 2016 by Jack Plackter, Esquire counsel for DEFENDANTS, MARINA DISTRICT DEVELOPMENT COMPANY, LLC and MARINA DISTRICT FINANCE COMPANY, INC (hereinafter "BORGATA"), and a hearing having been held on January 19, 2016 before the Honorable Julio L. Mendez, A.J.S.C., and the Court having reviewed the papers submitted, heard the arguments of counsel, having set forth its findings and conclusions in a written memorandum incorporated herein, and for other good cause shown;

IT IS on this 4th day, **APRIL 2016**, ORDERED that:

1. In accordance with Paragraph 19 of the Settlement Agreement this Court has jurisdiction to interpret and enforce the Settlement Agreement. This Court retains jurisdiction on any issues related to the Settlement Agreement.
2. The Court HEREBY GRANTS declaratory judgment in favor of Borgata as follows:
 - a. The Court holds that the City breached a material term of the Settlement Agreement by failing to pay Borgata the Refund Amount of \$88,250,000.
 - b. The Court holds that Borgata is entitled to compel a trial of the filed tax appeals with the Tax Court contesting the 2011, 2012, 2013, and 2014 assessments of its properties (hereinafter "Filed Appeals").

- c. The Court holds that under the Settlement Agreement Borgata did not waive its right to file an application under the Freeze Act with the Tax Court.
3. The Court HEREBY DENIES the City's application for injunctive relief and vacates any restraints on Borgata from pursuing its Filed Appeals.
 4. For reasons explained more fully in the Court's opinion, the Court does not invalidate the Settlement Agreement and the remaining terms of the Settlement Agreement SHALL remain in place until otherwise invalidated.
 5. The Court HEREBY DENIES the City's application for attorney's fees and costs.
 6. For this case and the companion case under Docket Number ATL-L-2869-15, the parties SHALL continue settlement negotiations and SHALL report the progress of these negotiations to the Court on a regular basis. The next reporting date SHALL be on April 7, 2016 at 3:30 P.M. through a telephone conference.

Date: 4/04/2016



Hon. Julio L. Mendez, A.J.S.C.

FILED

APR 04 2016

**NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS**

ATLANTIC COUNTY
LAW DIVISION

CITY OF ATLANTIC CITY,

Plaintiff,

vs.

MARINA DISTRICT DEVELOPMENT
COMPANY, LLC, a New Jersey Limited
Liability Company; and MARINA
DISTRICT FINANCE COMPANY, INC., a
wholly-owned Finance Subsidiary of Marina
District Development Company, LLC, t/a The
Borgata Hotel and Casino,

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. ATL-L-2739-15

Opinion

Dated: April 4, 2016

Decided: April 4, 2016

George G. Frino, Esquire, for Plaintiff City of Atlantic City

Jack Plackter, Esquire for Defendants Marina District Development Company, LLC and
Marina District Finance Company, Inc.

Mendez, A.J.S.C.

This matter comes before the court by way of the City of Atlantic City's (hereinafter "City") verified complaint and order to show cause for declaratory and injunctive relief filed on December 3, 2015 and December 4, 2015 and by way of a cross-motion to dismiss the verified complaint pursuant to R. 4:6-2(e), filed on January 8, 2016 by Marina District Development Company, LLC and Marina District Finance Company, Inc. (hereinafter collectively referred to as "Borgata") against the City. On December 9, 2015 this court preliminarily entered temporary restraints precluding Borgata from taking further action under the parties' Settlement Agreement pending an Order from this court. On January 19, 2016 the court held oral argument.

For the reasons set forth herein, the court grants declaratory judgment in favor of Borgata. The court holds that the City breached a material term of the Settlement Agreement by failing to pay Borgata the Refund Amount totaling \$88,250,000. The court holds that the City's breach triggered Borgata's right to pursue its Filed Appeals with the Tax Court in accordance with the Settlement Agreement. The court also holds that under the Settlement Agreement Borgata did not waive its right to file an application under the Freeze Act, N.J.S.A. 54:51A-8, with the Tax Court.

The court denies the City's request for injunctive relief and removes any pending restraints on Borgata from pursuing its Filed Appeals and application under the Freeze Act with the Tax Court. In furtherance of the public interest, the court is not invalidating the Settlement Agreement at this time. The remaining terms of the Settlement Agreement will remain in place until otherwise invalidated.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of a settlement agreement between the City and Borgata regarding real estate tax assessments for several real properties in the City of Atlantic City making up the Borgata Hotel & Casino. The properties comprising the Borgata Hotel & Casino include the Borgata Hotel, Water Club Tower Hotel, Borgata casino, restaurants, bars, entertainment venues, retail store, spas, pools, parking lots and associated amenities (collectively hereinafter "Borgata Hotel & Casino"). These properties are located on the City tax map at Block 576 and Lots 1.03, 1.03E, 1.07, 1.08, 1.1, 1.11, and 1.12 (hereinafter "Properties").

On June 30, 2014 the City and Borgata entered into a settlement agreement (hereinafter "Settlement Agreement") over real estate tax assessments for Borgata's Properties for the tax years of 2011, 2012, 2013, 2014, and 2015. The City and Borgata revalued and reassessed the

Properties for these tax years and settled on a reduced tax assessment for each year. For the 2011 tax year, the parties settled on a tax assessment value of \$950,000,000 from \$2,262,392,300. For the 2012 tax year, the parties settled on a tax assessment value of \$935,949,000 from \$2,262,391,300. For the 2013 tax year, the parties settled on a tax assessment value of \$925,116,319 from \$2,262,391,300. As a result of the 2011, 2012, and 2013 tax assessment reduction, the parties agreed that Borgata was entitled to a tax refund in the amount of \$88,250,000 (hereinafter “Refund Amount”) (Agreement ¶ 3).

Borgata Tax Appeal - Settlement Summary TY 2011, 2012, and 2013			
Tax Year	Assessment Prior to Settlement Agreement	Settlement Assessment	Refund
2011	\$2,262,391,300	\$950,000,000	\$25,552,259
2012	\$2,262,391,300	\$935,949,000	\$28,704,211
2013	\$2,262,391,300	\$925,116,319	\$33,993,530
		Total 2011-2013	\$88,250,000

Settlement Table 1: Borgata Tax Appeal Settlement for the Years 2011, 2012, and 2013

For the 2014 tax year, the parties settled on a tax assessment value of \$925,000,000 from \$1,500,000,000. As a result of the 2014 tax assessment reduction, the parties agreed that Borgata was entitled to a credit against future real estate taxes in the approximate amount of \$17,850,000 (hereinafter “2014 Credit”). (Agreement ¶ 3). With respect to the 2015 tax year the parties agreed that the City Tax Assessor will file with the Atlantic County Board of Taxation (a) the 2015 certified tax list reflecting an aggregate assessment of the Properties in the amount of \$850,000,000. (Agreement ¶ 2).

Borgata Tax Appeal - Settlement Summary TY 2014, 2015			
Tax Year	Assessment Prior to Settlement Agreement	Settlement Assessment	Tax Credit
2014	\$1,500,000,000	\$925,000,000	\$17,250,000
2015	NA	\$850,000,000	NA

Settlement Table 2: Borgata Tax Appeal Settlement for the Years 2014 and 2015

Pursuant to Paragraph 4 of the Settlement Agreement, the parties agreed upon the following method of payment for the 2014 Credit:

The City would apply the 2014 Credit to Borgata's future tax liability...[by applying] \$5,000,000 of the 2014 Credit against the Borgata's 2014 3rd quarter tax payment...and apply an additional \$5,000,000 of the 2014 Credit against the 2014 4th quarter tax payment...and a similar \$5,000,000 of the 2014 Credit to be applied to all subsequent quarterly payments thereafter until the balance of the 2014 Credit is either utilized to reduce subsequent required quarterly tax payments or until the balance of the 2014 Credit together with the Refund Amount is paid to the Borgata as hereinafter provided in [Paragraph] 5...

(Agreement ¶ 4)

Pursuant to Paragraph 5 of the Settlement Agreement, the parties agreed upon the following method of payment for the Refund Amount:

The City agrees that it will bond for the Refund Amount and the amount of the balance of the 2014 Credit as soon as practicable. The City represents that it has received the following approvals and will use its best efforts to adhere to the following schedule:

....

f. The City will go out to the public markets and issue the bond financing as soon as practicable and pay Borgata the Refund Amount and the balance of the 2014 Credit.

(Agreement ¶ 5)

Pursuant to Paragraph 6 of the Settlement Agreement, Borgata retained the right to pursue other remedies or an additional payment plan in the event that the City did not pay the Refund Amount and 2014 Credit. Paragraph 6 of the Agreement provides:

In the event that the Refund Amount and the balance of the 2014 Credit are not paid to Borgata on or before December 31, 2014, then after a thirty (30) day grace period the City shall pay a monthly payment of \$150,000 per month to the Borgata until the Refund Amount and the amount of the balance of the 2014 Credit are paid to Borgata or Borgata may pursue its remedies in [Paragraph] 9.

Further:

The City shall be entitled to a credit in the amount of the cumulative \$150,000 monthly payments to Borgata to be offset against the amount of any refund or judgment due or owed to Borgata. The City's obligation to pay the monthly payment of \$150,000 shall cease upon Borgata's written election to pursue the Filed Appeals or the City's written notice of its inability to obtain bond financing for the Refund Amount.

(Agreement ¶ 6)

In the event that the City did not pay the Refund Amount and 2014 Credit by December 31, 2014, Paragraph 9 of the Settlement Agreement states:

Borgata has filed tax appeals with the New Jersey Tax Court (the "Filed Appeals") contesting the 2011, 2012, 2013, and 2014 assessments of the Properties. The Parties agree to request that either (i) the Tax Court postpone the scheduled June 16, 2014 trial date of the Filed Appeals or (ii) the Tax Court place the Filed Appeals on the inactive list.

Further:

If for any reasons either: (i) the 2015 assessment is not set at the amount set forth in [Paragraph] 2 of this Agreement or (ii) the Refund Amount and the balance of the 2014 Credit are not paid by the City to Borgata on or before December 31, 2014, then after the thirty (30) day grace period reference in [Paragraph] 6, Borgata shall have the right to compel a trial of the Filed Appeals. Once the Refund Amount and the balance of the 2014 Credit are paid by the City to Borgata and the 2015 assessment is set at the amount specified in [Paragraph] 2, Borgata will relinquish its right to contest the assessments and the Filed Appeals shall be dismissed with prejudice for the Properties for the 2011, 2012, 2013, 2014, and 2015 tax years.

(Agreement ¶ 9)

In the event that the parties had a dispute over the Agreement, Paragraph 19 provides that:

The Parties agree that any disputes under this Agreement shall be resolved by litigation before Superior Court of New Jersey.

(Agreement ¶ 19)

Thus far, in accordance with the Settlement Agreement, the City has lowered Borgata's tax assessment values to the agreed upon fair assessable values set forth in Paragraph 2. The City has also paid the 2014 Credit in full with interest by applying a credit of \$5,000,000 to Borgata's third and fourth tax quarters in 2014 and by applying further credits to Borgata's later tax quarters. Due to difficulties in obtaining bond financing the City has not been able to pay the Refund Amount to Borgata and, as a result, the City has been paying a monthly payment of \$150,000 to Borgata.

Due to the City's declining revenues, substantial liability for property tax refunds, and imminent cash crisis, the City has been subject to State supervision through a Memorandum of Understanding ("MOU") since November 20, 2014.¹ Currently, the City, with the assistance of the State of New Jersey, is exploring its debt financing obligation to refund the Borgata all amounts owed. At this point though, the City has made clear that it is unable to obtain bond financing.

¹ The MOU has been annually renewed by and between it and the New Jersey Division of Local Government Services of the Department of Community Affairs ("DCA"). The MOU established control over the City's finances, including but not limited to debt financing. Therefore, the DCA has total financial oversight of the City. The City is also subject to the Governor's Executive Order No. 171 whereby the Governor subjects the City to the supervision of the Local Finance Board ("Board") under the Local Government Supervision Act, N.J.S.A. 52:27BB-54 et seq. (the "Supervision Act"), and appoints an Emergency Manager for the City in the DCA. The DCA along with the Emergency Manager appointed by virtue of Executive Order No. 171 is vested control of, inter alia, a "plan for an adjustment of Atlantic City's Debt."

On November 19, 2015 Borgata elected to pursue its filed tax appeals with the Tax Court contesting the 2011, 2012, 2013, and 2014 assessments of the Properties (hereinafter “Filed Appeals”) and filed an application to enter judgments pursuant to the Freeze Act, N.J.S.A. 54:51A-8, with the Tax Court. On December 3, 2015 the City filed a complaint against the Borgata in Superior Court. Counts I and II of the complaint seek declaratory and injunctive relief. The City seeks a declaratory judgment that the City has complied with all material terms of the Settlement Agreement and that Borgata’s actions to litigate the Settlement Agreement outside of the Superior Court and pursue its Filed Appeals violates the Settlement Agreement. The City seeks temporary, preliminary, and permanent injunctive relief restraining and enjoining Borgata from taking actions to frustrate the Settlement Agreement. Count III seeks a declaratory judgment that N.J.S.A. 2B:13-3 violates the New Jersey Constitution, Article 6, §3, paragraphs 2, 3, and 4 in the event that N.J.S.A. 2B:13-3 is the jurisdictional predicate of Borgata’s Tax Court proceeding. Count IV seeks a declaratory judgment that the DCA is a real party in interest in this matter.

On December 4, 2015 the City filed a request to withdraw Count IV of their complaint seeking to interplead the DCA. Additionally, Count III has become moot, as Borgata does not seek to litigate the Settlement Agreement outside the Superior Court. Also, on December 4, 2015 the City filed an order to show cause for declaratory and injunction relief. On December 9, 2015 this court preliminarily entered temporary restraints against Borgata pending an Order from this court. Borgata withdrew its Freeze Act applications pending in Tax Court but was permitted to request the reactivation and case management of the Filed Appeals, including discovery and trial.

On January 8, 2016 Borgata filed opposition to the injunctive restraints and filed a cross-motion to dismiss the complaint pursuant to R. 4:6-2(e).² On January 13, 2016 the City filed an opposition to Borgata's cross-motion and a reply to Borgata's opposition to the City's request for injunctive relief. On January 19, 2016 the Court held oral argument.

DISCUSSION

I. Declaratory Judgment

The City seeks a declaratory judgment that the City has complied with all material terms of the Settlement Agreement and that Borgata's actions to litigate the Settlement Agreement outside of the Superior Court and pursue its Filed Appeals and Freeze Act application violate the Settlement Agreement.

Pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-50, et seq.:

A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

N.J.S.A. 2A:16-53.

Therefore, under the Act the court has the power to determine the parties' obligations, rights, and remedies under the terms of the Settlement Agreement. Since Borgata no longer seeks to litigate the Settlement Agreement outside of the Superior Court, the court is essentially tasked with

² Additionally, on December 21, 2015 Borgata filed a complaint in lieu of prerogative writ under Docket Number ATL-L-2869-15 seeking to compel the City to fulfill Borgata's Tax Court Final Judgments for the 2009 and 2010 tax years. These judgments entitled Borgata to a tax refund in the amount of \$62,558,648.56. Borgata then filed a motion for summary judgment which was heard on February 5, 2016. Under this companion case the court granted Borgata's motion however the enforcement of the judgment was held in abeyance for forty-five (45) days for the parties to engage in meaningful settlement discussions.

interpreting the Settlement Agreement and determining whether the City breached a material term of the Settlement Agreement and whether Borgata is entitled to pursue its Filed Appeals and Freeze Act application with the Tax Court.

A. The court holds that the City breached a material term of the Settlement Agreement by failing to pay Borgata the Refund Amount and, in turn, Borgata is entitled to pursue its Filed Appeals with the Tax Court.

The City contends that it is not in breach of the Settlement Agreement even though it has not paid Borgata the Refund Amount. The City reasons that it began paying Borgata a monthly payment of \$150,000 and the Settlement Agreement does not set a deadline for the Refund Amount to be paid off through this payment plan, therefore, Borgata should be prevented from pursuing its Filed Appeals and the current payment plan should remain in place. Alternatively, if the Court finds that the City has breached the Settlement Agreement by not paying the Refund Amount, the City contends that it has substantially performed all material obligations of the Settlement Agreement and the doctrine of substantial performance should prevent Borgata from pursuing its Filed Appeals. The City also raises the defenses of waiver, estoppel, and quasi-estoppel to preclude Borgata from pursuing its Filed Appeals. The City argues that Borgata waited almost a year to pursue its Filed Appeals while retaining the benefits of the Settlement Agreement and allowing Borgata to pursue its Filed Appeals would be inequitable.

Borgata contends that regardless of whether the City substantially complied with the terms of the Settlement Agreement, Borgata's conduct in pursuing the Filed Appeals is consistent with Borgata's rights and remedies under the terms of the Settlement Agreement. In response to the City's argument regarding its alleged substantial performance, Borgata contends that the City has not substantially performed under the Agreement because the City has failed to

completely pay the Refund Amount which is a material obligation under the Settlement Agreement.

The Court is first tasked with interpreting the parties' obligations, rights, and remedies under the Agreement as it pertains to the Refund Amount. The polestar of construction of a contract is to discover the intention of the parties. Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). "The starting point in ascertaining that intent is the language of the contract." Communications Workers v. Monmouth Co. Bd. of Soc. Serv., 96 N.J. 442, 452 (1984). Courts are generally obligated to enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993); Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 586 (1986); Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 101 (1980). If a contract is unambiguous, it must generally be enforced as written. Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996); Karl's Sales and Service, Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493, (App. Div. 1991), certif. denied, 127 N.J. 548 (1991) (Where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written.).

The court has no basis "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Ibid.; Brick Tp. Mun. Util. Auth. v. Diversified R.B. & T., 171 N.J. Super. 397, 402 (App. Div. 1979). Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other. James v. Federal Ins. Co., 5 N.J. 21, 24 (1950); see also Great Atlantic & Pacific Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 501 (App. Div. 2000); Loigman v. Township Committee of the Tp. of Middletown, 297 N.J.

Super. 287, 301 (App. Div. 1997).

With these principles in mind the court looks to the language of the Settlement Agreement. It is undisputed that pursuant to Paragraph 3, the parties agreed that the City is obligated to pay Borgata the Refund Amount in the amount of \$88,250,000 for the 2011, 2012, and 2013 tax assessment reductions. As to the method of payment, Paragraph 5 sets forth in pertinent part that:

The City agrees that it will bond for the Refund Amount and the amount of the balance of the 2014 Credit as soon as practicable....The City will go out to the public markets and issue the bond financing as soon as practicable and pay Borgata the Refund Amount and the balance of the 2014 Credit.

(Agreement ¶ 5)

The court recognizes that the City has made a good faith effort to obtain bond financing to pay Borgata the Refund Amount. However, the City has not yet been able to bond for the Refund Amount due to the lack of bonding power the City has been left with amidst its financial distress. The court agrees with the City in that the language used in Paragraph 5 – “as soon as practicable” – evidences both parties’ understanding that the City was subject to the conditions of the market, authorizations from the DCA, and other factors, making the success of bond financing questionable. Given the parties’ understanding of the City’s potential inability to pay the Refund Amount and 2014 Credit, the Court finds that under Paragraph 6 of the Settlement Agreement it was the intent of the parties to explicitly provide for a remedy if the City was unable to fulfill its obligation.

Paragraph 6 states in pertinent part:

In the event that the Refund Amount and the balance of the 2014 Credit are not paid to Borgata on or before December 31, 2014, then after a thirty (30) day grace period the City shall pay a monthly payment of \$150,000 per month to the Borgata until the Refund Amount and the amount of the balance of the 2014 Credit are paid to Borgata or Borgata may pursue its remedies in [Paragraph] 9.

...The City's obligation to pay the monthly payment of \$150,000 shall cease upon Borgata's written election to pursue the Filed Appeals or

(emphasis added) (Agreement ¶ 6)

The language of the Settlement Agreement is clear and unambiguous. The court finds that the parties plainly agreed that the City was obligated to pay the Refund Amount, in full, by December 31, 2014. If the City failed to perform this obligation, the parties expressly agreed that either the City was obligated to pay \$150,000 per month to the Borgata until the Refund Amount and 2014 Credit are paid off or Borgata was entitled to pursue its remedies under Paragraph 9. It is undisputed that December 31, 2014 came and went and the City failed to perform its obligations by not paying Borgata the Refund Amount. At this point, the provisions of Paragraph 6 were triggered. Thereafter, the City began making payments of \$150,000 per month to Borgata. On November of 2015 Borgata notified the City that it elected to pursue its remedies under Paragraph 9, as expressly allowed for under the Settlement Agreement, and stopped accepting payments from the City.

Turning to Paragraph 9, the remedies available to Borgata in the event that both the Refund Amount and 2014 Credit was not paid in full on or before December 31, 2014, was agreed to as follows:

Borgata has filed tax appeals with the New Jersey Tax Court (the "Filed Appeals") contesting the 2011, 2012, 2013, and 2014 assessments of the Properties. ...

If for any reasons either: (i) ... or (ii) the Refund Amount and the balance of the 2014 Credit are not paid by the City to Borgata on or before December 31, 2014, then ...,

Borgata shall have the right to compel a trial of the Filed Appeals. Once the Refund Amount and the balance of the 2014 Credit are paid by the City to Borgata and the 2015 assessment is set at the amount specified in [Paragraph] 2, Borgata will relinquish its right to contest the assessments and the Filed Appeals shall be dismissed with prejudice for the Properties for the 2011, 2012, 2013, 2014, and 2015 tax years.

(emphasis added) (Agreement ¶ 9)

Paragraph 9 specifically states that “if for any reason” the Refund Amount and the 2014 Credit are not paid to Borgata by December 31, 2014 then “Borgata shall have the right to compel a trial of the Filed Appeals” (emphasis added). The court finds that the language of the Settlement Agreement expressly and unambiguously gives Borgata the right to compel a trial of the Filed Appeals in the event that the City was unable to pay both the Refund Amount and 2014 Credit under the Settlement Agreement by December 31, 2014, regardless of the reason. The court finds that the City has not paid Borgata the Refund Amount in full and it is within Borgata’s right to compel a trial of the Filed Appeals, as agreed upon by the parties in Paragraph 6 and 9.

The court is not persuaded by the City’s argument that Borgata waived this right or should be estopped from enforcing this right given Borgata’s ten-month delay in pursuing its Filed Appeals. First, the language of Paragraph 6 already builds in a thirty (30) day grace period before the City is obligated to start making its monthly payments or Borgata has the right to pursue its remedies under Paragraph 9. Second, the remaining language of Paragraph 6 goes on to state that, “[t]he City’s obligation to pay the monthly payment of \$150,000 shall cease upon Borgata’s written election to pursue the Filed Appeals...” This very language unambiguously contemplates an arrangement whereby the City is paying \$150,000 per month to Borgata for some time and thereafter Borgata decides to pursue its rights remedies under Paragraph 9. Third, both parties understood that the City would need time to obtain bond financing and, in the event that the City was unsuccessful in doing this by December 31, 2014, the parties negotiated a

payment plan that would potentially continue years after 2014 giving the City more time to obtain bond financing.

For all the forgoing reasons, the court finds that the circumstances surrounding the Settlement Agreement indicate that the parties not only expected Borgata to delay pursuing its Filed Appeals but the parties bargained for a situation that allowed Borgata the flexibility to delay its Filed Appeals for the benefit of both parties. For these reasons the court does not find merit behind the City's argument that Borgata waived its right to pursue its Filed Appeals or should be estopped from doing so. Both Borgata and the City retained benefits from the Settlement Agreement during the ten-month delay. The negotiated tax assessment value for the 2015 tax year, and previous years, was above the value estimated by Borgata and below the value estimated by the City. During this time Borgata received the benefit of an estimated lower tax assessment from that originally assessed and received some payments toward the Refund Amount. The City received the benefit of an estimated higher tax assessment than that which potentially could have been assessed and received credits towards any refunds it may ultimately owe Borgata. Paragraph 6 of the Settlement Agreement expressly states that the City "shall be entitled to a credit in the amount of the cumulative \$150,000 paid to Borgata to be offset against the amount of any refund or judgment due or owed to Borgata."

The court is also not persuaded by the City's argument that the doctrine of substantial performance should prevent Borgata from pursuing its rights and remedies under Paragraph 9. Most commonly, courts have applied the doctrine of substantial performance to cases that involve building contracts. 6 Williston on Contracts § 842 (3d ed. 1962). The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantive particulars, so

that their right to compensation may not be forfeited by reason of mere technical or unimportant omissions or defects. Amerada Hess Corp v. Quinn, 143 N.J. Super 237, 253 (Law Div. 1976) (citations omitted). Outside of the construction context, however, the doctrine of substantial performance is less clear: “we see no real or practical difference between a conclusion that a party materially breached a contract, and a conclusion that the party failed to substantially comply with its obligations under a contract. To decide otherwise would be simply to engage in linguistic games.” 49 New Jersey Practice: Business Law Deskbook, § 1.11 at 20 (2007) citing (General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296 (3d Cir. 2001)).

In essence, the court must determine whether the City’s failure to pay the Refund Amount to Borgata is a material breach of the Settlement Agreement. Thus far, in accordance with the Settlement Agreement, the City has lowered Borgata’s tax assessment values to the agreed upon fair assessable values set forth in Paragraph 2, paid the 2014 Credit in full with interest, and has made monthly payments of \$150,000 to Borgata for about ten-months until Borgata elected to pursue its Filed Appeals. The court recognizes that the City has fulfilled a portion of its obligations under the Settlement Agreement and has made a good faith effort to obtain the necessary bond financing to fulfill the remaining portion of its obligations. However, the court finds that the City’s obligation to pay the Refund Amount by December 31, 2014 is a material one. The Refund Amount included three out of the five tax years the parties negotiated for. The City’s failure to tender a payment of about \$88 million dollars is not a “mere technical or unimportant omission or defect,” it is a material one which encompasses a significant aspect of the Settlement Agreement.

Ultimately, Borgata’s conduct in pursuing the Filed Appeals is consistent with its rights and remedies under the terms of the Settlement Agreement as explained above. It is a

“fundamental principle” that “[t]he settlement of litigation ranks high in our public policy.” Jennings v. Reed, 381 N.J. Super 217, 226 (App. Div. 2005). The goal of this policy is the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. Id. at 227. And thus, courts “strain to give effect to the terms of a settlement wherever possible.” Dep’t of Public Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985).

Borgata understood the financial position of the City and the City’s potential inability to obtain bond financing to pay the Refund Amount and 2014 Credit. Understanding this, Borgata expressly held onto the opportunity to pursue its Filed Appeals. This is evidenced by the language in Paragraph 9 where Borgata agreed to relinquish its right to contest the assessments and dismiss the Filed Appeals with prejudice only once the Refund Amount and the balance of the 2014 Credit was paid and the 2015 assessment was set at the amount specified in Paragraph 2. This is also evidenced by the language in Paragraph 9 where the parties agreed to request that either the Tax Court postpone the trial date of the Filed Appeals or the Tax Court place the Filed Appeals on the inactive list. The parties never agreed to dismiss the Filed Appeals or completely eliminate Borgata’s right to pursue the Filed Appeals. To the contrary, as explained above, the bargained for Settlement Agreement expressly gave Borgata the right to compel a trial of the Filed Appeals in the event that the City was unable to pay the Refund Amount and 2014 Credit by December 31, 2014, regardless of the reason. Ignoring this language in the Settlement Agreement would essentially rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently. Brick Tp. Mun. Util. Auth. v. Diversified R.B. & T., 171 N.J. Super. 397, 402 (App. Div. 1979); James v. Federal Ins. Co., 5 N.J. 21, 24 (1950) (Nor may the courts remake a better contract for the parties than they

themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.)

For all the forgoing reasons the court holds that the City breached the Settlement Agreement by failing to pay Borgata the Refund Amount of \$88,250,000. This breach triggered Borgata's right under the Settlement Agreement to pursue its Filed Appeals in Tax Court.

B. The court holds that under the Settlement Agreement Borgata did not waive its right to file an application under the Freeze Act, N.J.S.A. 54:51A-8, with the Tax Court.

The City argues that under the Settlement Agreement Borgata agreed to a settled tax assessment value for the 2011 and 2012 tax years which constituted a waiver of Borgata's right to file an application under the Freeze Act. In support of this position the City cites Murnick v. Asbury Park City for the proposition that Borgata's conduct is in conflict with the Legislative purpose of the Freeze Act and should be prohibited. Murnick v. Asbury Park City, 5 N.J. Tax 406, 413 aff'd sub nom. Murnick v. City of Asbury Park, 193 N.J. Super. 1 (App. Div. 1983) and aff'd in part, rev'd in part sub nom. Murnick v. City of Asbury Park, 95 N.J. 452 (1984).

The court is of the view that Murnick does not support the City's argument and is distinguishable from the circumstances before the court now. In Murnick the plaintiffs litigated tax appeals for the years of 1977, 1978, and 1979 in a consolidated proceeding. Murnick, 5 N.J. Tax at 407 (App. Div. 1983). The defendants then filed an appeal after which the Appellate Court affirmed the 1977 judgment but reversed the judgments for the 1978 and 1979 tax years. Id. at 408. The plaintiffs then filed a notice of appeal to the New Jersey Supreme Court from the part of the Appellate Division decision dealing with the 1978 and 1979 tax years. Id. at 409. The plaintiffs then moved for a motion for judgment pursuant to the Freeze Act fixing the assessment

of the subject property for the 1978 and 1979 tax years at the same amount as the judgment for the 1977 tax year. Id.

The court in Murnick held that the plaintiffs were not entitled to such relief. Id. at 414. The court reasoned that the Freeze Act was not meant to be a vehicle for taxpayers to obtain lower assessments, but is a remedy to remove the necessity of yearly litigation by taxpayers in the face of unjustified annual increases in assessment. Id. at 414 (emphasis added). Since the very litigation the Freeze Act sought to prevent already took place in the consolidated proceeding, the court found that the plaintiffs' motion would not relieve them from that burden and thus was inconsistent with the purpose of the Freeze Act. See Id.

The circumstances presented here are distinguishable from that of Murnick. Unlike the plaintiff in Murnick Borgata has not litigated the tax years for which its Freeze Act application would affect – the 2011 and 2012 tax years. This court finds that Borgata's Freeze Act application is consistent with the Legislative purpose of the Freeze Act in that it would remove the necessity for both parties to litigate the 2011 and 2012 tax years. The circumstances in Murnick does not even contemplate the arrangement presented here, whereby a taxpayer and municipality agreed to settle tax assessment values for certain tax years, the municipality breached the agreement, and thereafter the taxpayer sought to asserts its rights and remedies under the agreement and law. For these reasons, the court is not persuaded by the City's use of Murnick and relies on the Settlement Agreement to determine whether Borgata waived its right to file a Freeze Act application.

A waiver involves the intentional relinquishment of a known right and must be evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based. Scibek v. Longette, 339 N.J. Super. 72 (App. Div. 2001) (citing Country Chevrolet v.

North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div.1983)). It must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them. Shebar v. Sanyo Business Sys. Corp., 111 N.J. 276, 291 (1988). However, “the intention to waive need not be stated expressly but may be spelled out from a state of facts exhibiting full knowledge of the circumstances producing a right and continuing indifference to exercise of that right.” Merchants Indem. Corp. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff’d, 37 N.J. 114 (1962). Therefore, “waiver ‘presupposes full knowledge of the right and an intentional surrender’ ” County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998) (citations omitted).

Looking at the Settlement Agreement the court agrees with Borgata and finds that the terms of the Settlement Agreement and circumstances surrounding the Settlement Agreement do not support the conclusion that Borgata impliedly or expressly waived its rights to file an application under the Freeze Act. The Settlement Agreement is completely silent on Borgata’s rights to file an application under the Freeze Act therefore no express waiver occurred. Although the intention to waive need not be express, the court does not find that Borgata impliedly waived its rights either. As stated, a waiver requires an intentional relinquishment of a known right. Under the Freeze Act “[w]here a judgment not subject to further appeal has been rendered by the Tax Court involving real property, the judgment shall be conclusive and binding ..., for the assessment year and for the two assessment years succeeding the assessment year covered by the final judgment.” N.J.S.A. 54:51A-8 (emphasis added).

Due to the City’s appeals to the Appellate and Supreme Court, Borgata’s tax court judgments for the 2009 and 2010 tax years only became final on October 22, 2015. This was far after the parties entered into the Settlement Agreement on June 30, 2014. Borgata could not have

intentionally waived a right it was unsure it yet had. To the contrary, the language of the Settlement Agreement evidences that Borgata's intention was to hold onto any and all of its remedies at law related to pursuing its Filed Appeals. Looking at Paragraph 9 Borgata only agreed to relinquish its right to contest the assessments and dismiss the Filed Appeals only once the City fulfilled its obligations under the Settlement Agreement. Under Paragraph 9 the parties never agreed to dismiss the Filed Appeals or completely eliminate Borgata's right to pursue the Filed Appeals. Based on the terms of the Settlement Agreement the court finds that it was the parties' intention to allow Borgata to retain any and all of its possible remedies at law related to pursuing its Filed Appeals. Those remedies and any challenges to those remedies, including any other challenge the City may have against Borgata's application under the Freeze Act, falls within the jurisdiction of the Tax Court and is for the Tax Court to ultimately decide on. This court's limited holding is that under the Settlement Agreement Borgata did not waive its right to file an application under the Freeze Act.

II. Injunctive Relief

The City seeks injunctive relief preventing Borgata from taking any further action under the Settlement Agreement. The party seeking injunctive relief must prove the following factors by clear and convincing evidence:

- 1) A reasonable probability of success on the merits;
- 2) The movant has no adequate remedy at law and that the irreparable injury to be suffered in the absence of injunctive relief is substantial and imminent;
- 3) The public interest will not be harmed;
- 4) A balancing of the equities and hardships favors injunctive relief.

Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) citing (Crowe v. De Gioia, 90 N.J. 126, 132–34 (1982))

The courts generally take a less rigid view of the Crowe factors if a stay is designed to preserve the status quo and issued in furtherance of the public interest. See Id. By the same token, in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant. Yakus v. United States, 321 U.S. 414, 440 (1944). The issuance of an interlocutory injunction must be squarely based on an appropriate exercise of sound judicial discretion, which—when limited to preserving the status quo during the suit's pendency—may permit the court to place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy. Waste Mgmt., supra, 399 N.J. Super. at 520 (internal citations omitted).

The court finds that the City has failed to provide clear and convincing evidence of its success on the merits. Explained above, the court declared that the City was obligated to pay the Refund Amount, in full, by December 31, 2014 and if the City failed to perform this obligation, the parties expressly agreed that the City was obligated to pay \$150,000 per month to Borgata until the Refund Amount is paid off in full or Borgata was entitled to pursue its remedies under Paragraph 9. To this date the City has not yet paid the Refund Amount in the amount of \$88,250,000. Under Paragraph 9 Borgata expressly has the right, for any reason, to compel a trial of the Filed Appeals in the event that the City was unable to pay both the Refund Amount and 2014 Credit. The court did not find that the City substantially performed its material obligations under the Settlement Agreement and did not find grounds for the City's defenses of waiver and estoppel. For these reasons the Court finds that the City has not proven a reasonable probability of success of the merits by clear and convincing evidence.

The analysis of the irreparable harm prong is more complex in the context of this case as it involves questions about the importance of the preservation of the status quo and furtherance of a public interest. “Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.” Crowe, supra at 132-33. The crux of the City’s argument is that the public interest at stake should be given great weight due to the potential negative impact on the City and citizens of Atlantic City if the status quo is not maintained. The City supports this position by asserting that the City relies on real estate taxes to fund essential municipal services such as police, fire protection, municipal service, local schools and county governments. Allowing Borgata to litigate its Filed Appeals could potentially impact the fund from which these municipal services are provided. Already, as is, the City is running out of operating cash and the City argues that greater hardships will befall the City if Borgata is able to pursue its remedies under the Settlement Agreement.

The court recognizes the precarious financial position that the City is currently entangled in. The City has made clear, and no one disputes, that the City is currently under financial distress. The court has already ruled that Borgata has the right to pursue its Filed Appeals and the court is of the opinion that pursuing that remedy under the Settlement Agreement will not cause imminent and irreparable harm to the City. Under the companion matter, enforcement of Borgata’s final judgments for the 2009 and 2010 tax appeals was only recently before the Court – five to six years after Borgata initiated the trial for those appeals. The process of appealing taxes takes time; Borgata must still continue through a structured legal process through the Tax Court. The City will be participating in this process, is free to contest the assessments at issue, and may even seek higher tax assessed values put forth by Borgata. This is not a situation where Borgata would be automatically entitled to enforce the collection of any refund it may potentially

receive for those tax years. It could take years before Borgata is in a position to collect any refund it may be entitled to.

It is also important to keep in mind that the court is not invalidating the Settlement Agreement at this time. The court finds that it is in the public interest to keep the remaining structure of the Settlement Agreement in place. Any sort of injunctive relief 'must be administered with sound discretion and always upon the considerations of justice, equity, and morality evolved by the given case.' New Jersey State Bar Ass'n v. N. New Jersey Mortgage Associates, 22 N.J. 184, 194 (1956) (citing Canda Realty Co. v. Carteret, 136 N.J.Eq. 550, 556 (Ch.1945).) At this time, the Court is only relieving the City of its obligation to make monthly payments of \$150,000 to Borgata and giving Borgata the limited right to pursue its Filed Appeals, as provided for under the Settlement Agreement. The parties have been and continue to be open to negotiations for a global resolution of the all the tax years. The court finds that maintaining the remainder of the Settlement Agreement provides stability and structure for an outcome that benefits both parties.

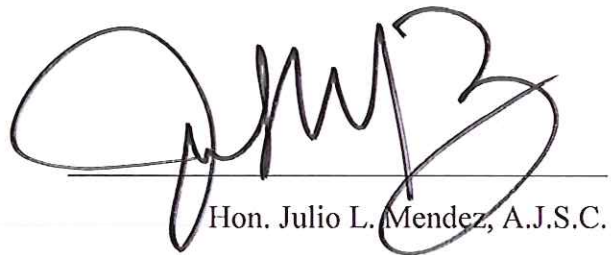
Under the companion case the City, the State of New Jersey, and Borgata are engaged in ongoing settlement discussions and partially maintaining the remaining aspects of the Settlement Agreement benefits that process. In weighing the equities and justice, the court finds that this determination is in the public interest because it both protects Borgata's right to pursue the Filed Appeals without any further delay and at the same time maintains the status quo. The Settlement Agreement will be invalidated when either the Tax Court reaches a determination of the Filed Appeals altering the assessments in the Settlement Agreement, the parties reach a new agreement, or the parties make an application to this Court to invalidate the Settlement Agreement

The Court has been cognizant of the public interest involved and was willing to delay the ruling on this matter to allow for settlement discussions regarding this matter and the companion matter under Docket Number ATL-L-2869-15. Indeed this Court has delayed the disposition of this matter but is now issuing this ruling upon Borgata's requests to move forward with its rights and remedies under the Settlement Agreement. Although a public interest is involved here the Court cannot simply ignore Borgata's rights under the bargained for Settlement Agreement. In weighing the equities, the Court takes into account that the City substantially over assessed the real estate value of Borgata's Properties for years and has received an overpayment of taxes during that time. A substantial amount of money is owed to Borgata under the Settlement Agreement and companion case. It has long been the rule in New Jersey that "court[s] cannot relieve municipalities from hard bargains[.]" City of Newark v. N. Jersey Dist. Water Supply Comm'n, 106 N.J. Super. 88, 103 (Ch. Div.1968), aff'd o.b., 54 N.J. 258 (1969). It has been emphasized that "[m]unicipal contracts stand on the same footing as contracts between natural persons and courts will not inquire into the reasonableness of the terms of such contracts in the absence of bad faith, fraud or capricious action." Id. (citation omitted).

Going forward the Tax Court shall continue to retain jurisdiction on the Filed Appeals and applications under the Freeze Act. This court shall retain jurisdiction over matters arising from the Settlement Agreement. Pursuant to Paragraph 19 "[t]he Parties agree that any disputes arising under this [Settlement] Agreement shall be resolved by litigation before the Superior Court of New Jersey." This provision gives this court jurisdiction over matters arising under the Settlement Agreement such as its interpretation, enforcement, and invalidation.

For the forgoing reasons the Court finds that the City's request for injunctive relief should be denied, any pending restraints on Borgata from pursuing its Filed Appeals should be removed, and the remaining terms of the Settlement Agreement should remain in place until the Settlement Agreement is otherwise invalidated.

Date: 4/04/2016



Hon. Julio L. Mendez, A.J.S.C.