THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

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Case Name: **The Sunapee Difference, LLC v. The State of New Hampshire**
Case Number: **217-2007-EQ-00458**

Enclosed please find a copy of the court's order of July 08, 2014 relative to:

ORDER

July 10, 2014

William S. McGraw
Clerk of Court

(629)

C: James E. Higgins, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

The Sunapee Difference, LLC

v.

The State of New Hampshire

No. 07-CV-458

ORDER

This case involves a dispute over the leasehold area of the Mount Sunapee Ski Area. The plaintiff, The Sunapee Difference, LLC ("Sunapee"), brought this action against the defendant, the State of New Hampshire, asserting claims for breach of contract, equitable estoppel, promissory estoppel, breach of an implied covenant of good faith and fair dealing, reformation, and inverse condemnation. The court heard the merits of the plaintiff's claims on April 21, 2014; April 22, 2014; April 23, 2014; April 24, 2014; and April 25, 2014. Because the plaintiff has sustained its burden of proving the elements of its reformation claim, the lease is reformed to reflect the parties' true intention regarding the leasehold area—that the northern and western boundaries are coterminous with the state park boundary.

In 1996, the legislature authorized the New Hampshire Department of Resources and Economic Development ("DRED") to draft an agreement to lease the ski area in the Mount Sunapee State Park. Following this draft, the legislature authorized the commissioner of DRED to develop a request for proposals ("RFP") for "a lease, concession agreement, or management contract" for the Mount Sunapee Ski Area. Laws 1997, ch. 119. The defendant released a draft RFP in October 1997, which gave prospective operators, interested parties, and the public an op-

portunity to comment. Representatives from Okemo Mountain Resort, Inc. ("Okemo")[1] attended both a public hearing on the RFP as well as a mandatory informational meeting for operators that were considering submitting a proposal. The principals of Okemo and subsequently Sunapee were Tim and Diane Mueller and Donald MacAskill. Okemo is a sophisticated company with experience in negotiating, purchasing real estate, and executing contracts.

On January 15, 1998, the state issued the final RFP, requiring that proposals be submitted by April 1, 1998. Exh. C. The RFP included a partial map of Mount Sunapee State Park, which showed the existing ski area. The leasehold area was depicted as a shaded area; however, the map did not demarcate the state park boundaries. Exh. BB. The state concedes that the shaded map depicts an approximation of the leasehold boundaries. Sunapee believed the leased premises extended to the park's northern and western boundaries.

On March 18, 1998, MacAskill wrote to Robb Thomson, then commissioner of DRED, and requested greater detail with respect to the lands that would be included in the RFP, including the exact boundaries of the leasehold. Commissioner Thomson does not recall whether he responded to the letter nor does he recall whether anyone from the state responded to it.

Sunapee submitted its proposal on or about March 26, 1998. Exh. 17. The state selected Sunapee as the successful bidder. The parties understood that they would have to negotiate a lease and operating agreement. On April 23, 1998, Commissioner Thomson invited the Sunapee principals to his home in Orford, New Hampshire. Attending were Commissioner Thomson, Mueller, MacAskill and Attorney Michael Walls from the attorney general's office. The parties discussed the leasehold area, as well as the possibility of expansion onto land outside the leasehold area. The parties agreed that the eastern boundary of the leasehold area would not be coter-

[1] After the lease was executed, Okemo assigned all of its right, title, and interest in the lease to Sunapee, which has the same principals as Okemo. As a result, and for ease of reference, the court shall treat Sunapee as having been the party in interest and will use the name "Sunapee" in this order to refer to Okemo as well as Sunapee.

minous with the state park boundary. The parties have differing recollections about the discussions of the western boundary. Commissioner Thomson testified that, based on the existing shaded map, it was unclear whether the western boundary of the leasehold area would be coterminous with the state park. Both Mueller and MacAskill testified that the parties explicitly agreed the leasehold area would be coterminous with the state park boundary in the west. The parties nonetheless agreed that DRED would complete a metes and bounds survey of the leased premises that would reflect their agreement.

On April 24, 1998, MacAskill wrote to Commissioner Thomson, memorializing his understanding of agreements reached at the previous day's meeting. MacAskill included an understanding that DRED would undertake the completion of a metes and bounds survey of the leased premises. Commissioner Thomson and Mueller signed the lease on April 30, 1998; however, when the lease was signed, both men knew that the leased property description and map of leased premises had not been completed.

The Capital Budget Overview Committee approved the lease on May 14, 1998. At some point after this date in May of 1998, the lease boundary map was completed. The map included a metes and bounds description. Exh. 21-A. Ron Duddy, who created the lease boundary, testified that he used the shaped map as a template to create the final plan. In so doing, he drew a lease boundary for the western portion of the leasehold area that was not coterminous with the state park line. These documents were appended to the lease.

DRED submitted the lease to Governor and Executive Council for approval. On June 10, 1998, the Governor and Council approved the lease. The lease became effective July 1, 1998. The lease was then recorded in both Sullivan and Merrimack Counties. *See* Exh. 21-A and Exh. 21-B. The lease recorded in Merrimack County included both the property description and the

map of the leased premises showing the state park boundary. The lease recorded in Sullivan County included the property description but did not contain a map of the leased premises.

On January 25, 1999, the New Hampshire Natural Heritage Inventory published a report locating "Old Growth Forests" within the Sunapee leasehold area and, in particular, adjacent to the eastern portion of the lease, which has been referred to as the east bowl area. Exh. M. Sunapee had originally included plans to expand into the east bowl area when it submitted its response to the RFP. Upon review of the old growth forest study, the state was not receptive to any expansion efforts by Sunapee into the east bowl area and Sunapee agreed to refrain from any east bowl development. This decision meant that the only viable option for expansion lay in the western portion of the leasehold area.

On September 12, 2000, Sunapee entered into a purchase and sale agreement with Thomas and Nancy Pasquerella for the purchase of roughly 96 acres in Goshen, New Hampshire ("Pasquerella Property")—land that abuts the western boundary of the state park. Exh. D. Sunapee also entered into option contracts with various landowners who owned land adjacent to the state park boundary. When Sunapee entered into the purchase and sale agreement for the Pasquerella property, Mueller believed the Pasquerella Property abutted the leasehold area; however, in the course of due diligence, representatives of Sunapee discovered that the Pasquerella Property did not abut the leasehold area but did abut the state park boundary. Effectively, a "buffer zone" existed between the current leasehold area and the Pasquerella Property.

Upon learning this information, Jay Gamble, working for Sunapee, contacted Richard MacLeod, then director of Parks, to discuss the discovery. Gamble stated that MacLeod told him that the buffer zone was a mistake and that the problem would be rectified. In response, Sunapee's attorney, George Nostrand, contacted Attorney Michael Walls. Walls indicated that he be-

lieved that the boundary discrepancy was a mistake and said that the lines should be redrawn. Between January and April of 2001, Attorney Nostrand and Attorney Walls engaged in negotiations on behalf of their respective clients.

In April of 2001, Attorney Walls informed Attorney Nostrand that George Bald, who was then commissioner of DRED, would not take action on an amended lease without a public hearing. Mueller and Gamble met with Commissioner Bald and MacLeod at DRED headquarters in Concord to discuss the leasehold boundary adjustment. According to Sunapee, both Commissioner Bald and MacLeod suggested including the boundary issue in an overall request for expansion into the western portion of the leasehold area, commonly called "west bowl expansion." On August 1, 2001, DRED held a public hearing. During this time, various abutting landowners approached Sunapee about selling their parcels. Sunapee agreed to options with these individuals, pending final plans for approval of the west bowl expansion.

On February 27, 2002, Commissioner Bald announced that he would recommend the leasehold expansion to the Governor and Council if Sunapee met three conditions: (1) Sunapee must incorporate its west bowl expansions plans into a Master Development Plan ("MDP"); (2) Sunapee must incorporate local involvement; and (3) Sunapee must donate 100 acres to the State to expand the park. Sunapee agreed and eventually completed these conditions. Commissioner Bald never recommended the west bowl expansion to Governor and Council; he had resigned from his position as commissioner of DRED before Sunapee completed the conditions. Nevertheless, in light of Commissioner Bald's assurances, Sunapee exercised the various purchase options on property that abutted the state park to the west.

In May of 2004, Sean O'Kane became the commissioner of DRED. On June 1, 2004, Sunapee submitted its revised MDP, which covered operations, facilities, site improvements and

strategic plans for the ski area as required by the lease. Additionally, the revised MDP contained details of its expansion plans to the west of the state park boundary. On August 26, 2004, at a public hearing on the MDP, a spokesperson for gubernatorial candidate John Lynch read a statement in opposition to the proposed expansion. On May 2, 2005, Commissioner O'Kane recommended to Governor John Lynch that the revised MDP be conditionally approved. Exh. 38, 39. Governor Lynch declined to bring the amendment before the Executive Council.

The instant action followed. The plaintiff asserts claims for breach of contract, equitable estoppel, promissory estoppel, breach of an implied covenant of good faith and fair dealing, reformation, and inverse condemnation. In prior orders, the trial court granted summary judgment in favor of the defendant, partially granted the defendant's motion to dismiss, and further ruled that the plaintiff lacked standing to bring its reformation claim. Sunapee appealed. *See Sunapee Difference, LLC v. State*, 164 N.H. 778 (2013). The New Hampshire Supreme Court reversed and remanded. The court held that: (1) the plaintiff retained the right to sue for reformation upon assignment of lease; (2) the plaintiff had standing; (3) the Governor was not required to submit proposed amendments of lease to the Executive Council; (4) the lease did not contain an implied right to expand the boundary of leasehold; (5) the commissioner of DRED was permitted to expand the boundary; (6) genuine issues of material fact precluded summary judgment on the equitable estoppel claim; and (7) genuine issues of material fact precluded summary judgment on reformation. *Id.* The instant five-day trial followed.

The plaintiff's claim for reformation is dispositive. The plaintiff alleges that state officials represented to it that the leasehold's northern and western boundaries would be coterminous with the state park boundaries and promised to provide a boundary map and written description. According to the plaintiff, the map and description that was produced after the lease was execut-

ed did not match what had been represented and agreed upon. The plaintiff also asserts that state officials promised to correct the error but failed to do so.

"The plaintiff's burden of proof in a reformation action is a heavy one." *Sommers v. Sommers*, 143 N.H. 686, 690 (1999) (quotation omitted). "Courts are not in the business of re-writing contracts to bail out parties who have failed to prudently construct their business transactions." *Kilnwood on Kanasatka Condominium Unit Ass'n, Inc. v. Smith*, 163 N.H. 751, 753 (2012). "Reformation of an instrument for mutual mistake of fact requires that the party seeking reformation demonstrate by clear and convincing evidence that (1) there was an actual agreement between the parties, (2) there was an agreement to put the agreement in writing, and (3) there is a variance between the prior agreement and the writing." *Sommers*, 143 N.H. at 689–90. While parol evidence is generally not considered to vary a contract or a written agreement, "it may establish that the writing itself does not reflect the actual agreement reached by the parties." *Id.* at 690.

Here, the plaintiff has sustained its burden of proving by clear and convincing evidence the elements of reformation. Commissioner Thomson had the authority to negotiate the terms of the lease, which necessarily included the ability to negotiate the leasehold boundary. There was a mutual mistake between the parties with respect to the boundaries. At the April 23, 1998 meeting between Mueller, MacAskill, Commissioner Thomson and Attorney Walls, the parties discussed the terms of the lease and focused much of their discussion on potential eastward expansion. For example, Sunapee inquired about what the state intended Sunapee's responsibility to be with respect to the state park beach and campground. The state clearly communicated that those facilities would not be included in the leasehold—the lease was for the ski area. Thus, there is no dispute that the parties came away with an understanding that the eastern leasehold boundary would

not be coterminous with the state park line. The record does support a finding, however, that the parties agreed that the northern and western boundaries would be coterminous with the state park boundary. Specifically, the Sunapee representatives testified to their clear understanding that the leasehold would be coterminous with state park boundaries on the northern and western side—there was no discussion whatsoever of a buffer. The state evidence corroborates this understanding. Former Commissioner Thomson made the stunning admission that he did not know the location of the northern and western state park boundary when discussing the "shaded" map of the leasehold on April 23, 1998. As discussed below, Attorney Walls recollection of a coterminous northern and western boundary is reflected in his subsequent discussions with Attorney Nostrand. Notwithstanding this agreement, the metes and bounds survey drawn by the state established a northern and western leasehold boundary that was not coterminous with the state park line.

The finding of mutual mistake is further supported by subsequent events. After learning that the Pasquerella Property did not abut the leasehold area, Jay Gamble contacted Richard MacLeod to discuss this issue. Gamble stated that MacLeod informed him that the buffer between the western leasehold boundary and the western state park boundary was a mistake, which would be rectified. When Attorney Nostrand contacted Attorney Walls in 2000 regarding the discrepancy with the final metes and bounds survey, Attorney Walls agreed that it was a mistake and suggested the lease be amended to correct it. This evidence further bolsters the finding that the parties had an agreement, that agreement was to be reduced to writing, and that the final writing failed to reflect the parties' true intent.

The plaintiff has proven by clear and convincing evidence that the parties agreed that the northern and western boundaries would be coterminous with the state park boundary and that

they agreed to put it in writing. There is a variance between the parties' agreement and the writing because the state did not draw the metes and bounds survey to conform to the parties' intentions. As a result, the plaintiff has sustained its burden of proving the elements of its reformation claim. Accordingly, the northern and western leasehold boundary is coterminous with the northern and western state park boundary.

The plaintiff also asserts a claim for estoppel. A party asserting a claim for estoppel must prove four elements:

> first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

A.J. Cameron Sod Farm v. Continental Ins. Co., 142 N.H. 275, 281 (1997). The reliance of the party claiming estoppel must have been reasonable. *City of Concord v. Tompkins*, 124 N.H. 463, 468 (1984).

Here, the plaintiff has failed to meet its burden in proving its claim for equitable estoppel. The court's analysis the plaintiff's reformation claim is dispositive of the first element. As discussed above in the context of mutual mistake, there is no evidence to support a finding that the defendant concealed material facts with knowledge of those facts. *See A.J. Cameron Sod Farm*, 142 N.H. at 281. Thus, the plaintiff's claim for equitable estoppel fails.

Finally, the plaintiff brings a claim of inverse condemnation. In response, the defendant argues that an inverse condemnation claim, based on the existing facts, cannot be brought as an alternative to a breach of contract claim.[2] "Inverse condemnation occurs when a governmental

[2] Before trial, the defendant submitted a motion to dismiss this claim. The court agreed to consider the defendant's motion to dismiss after evidence was complete and deferred ruling on this motion until that time. The defendant now renews its motion.

body takes property in fact but does not formally exercise the power of eminent domain. Inverse condemnation may be effected through either physical act or regulation." *Allianz Global Risks U.S. Ins. Co. v. State*, 161 N.H. 121, 124 (2010) (quotation and citation omitted).

As a threshold matter, the state argues that is unclear whether an individual, under similar facts, can bring an inverse condemnation claim as an alternative to a breach of contract claim. While New Hampshire has not had occasion to address this issue, courts in other jurisdictions have analyzed analogous claims under varying theories. *See, e.g., Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428, 428, 438 (2009) ("Ordinarily, the Government's interference with contractual rights arising under a contract with the Government will give rise to a breach of contract action, rather than a taking claim."); *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 738 (2008) ("when a contract between a private party and the Government creates the property right subject to a Fifth Amendment claim, the proper remedy for infringement lies in contract, not taking"), *aff'd*, 550 F.3d 1135 (Fed. Cir. 2008); *Carl v. State*, 665 S.E.2d 787, 796, 797 (N.C. Ct. App. 2008) (because a claim under North Carolina Constitution "is available only in the absence of an adequate state remedy," plaintiffs' taking claim should have been dismissed where their breach of contract claims would "vindicate the same rights" (quotations omitted)); *State v. Holland*, 221 S.W.2d 639, 643 (Tex. 2007) ("The State, in acting within a color of right to take or withhold property in a contractual situation, is acting akin to a private citizen and not under any sovereign powers").

Nevertheless, the court declines the state's invitation to address this issue. Even assuming *arguendo* that an individual could bring an inverse condemnation claim under the facts of the present action, the plaintiff's claim nonetheless fails. The plaintiff's claim for inverse condemnation alleges that the defendant has deprived the plaintiff of its property rights to the extent its

leasehold is not coterminous with the state park's northern and western boundaries. The court, however, has reformed the current leasehold area so that the northern and western boundaries are coterminous with the state park boundary. Given this ruling, the plaintiff's inverse condemnation argument has been rendered moot.

Based on the foregoing, the court finds and rules that the plaintiff has sustained its burden of proving the elements of its reformation claim by clear and convincing evidence. As a result, the lease is reformed to reflect the parties' true intention regarding the leasehold area—the northern and western boundaries are coterminous with the state park boundary. The plaintiff has failed to meet its burden of proving its claims for equitable estoppel and inverse condemnation.

This order constitutes the court's findings of fact and conclusions of law. Any of the parties' requests for findings and rulings not granted herein, either expressly or by necessary implication, are hereby denied or determined to be unnecessary for resolution of this matter in light of the court's decision. *See Harrington v. Town of Warner*, 152 N.H. 74, 85–86 (2005); *see also Geiss v. Bourassa*, 140 N.H. 629, 632–33 (1996).

So ORDERED.

Larry M. Smukler

Date: July 8, 2014

LARRY M. SMUKLER
PRESIDING JUSTICE