

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MURRAY, et al.

Plaintiffs,

v.

TOWN OF DEWEY BEACH, et al.

Defendant

C.A. No. 6785

DEFENDANT TOWN OF DEWEY BEACH'S RESPONSE TO DEWEY BEACH ENTERPRISES INC.'S AND RUDDERTOWNE REDEVELOPMENT, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT

COMES NOW, Defendant Town of Dewey Beach (the "Town") and responds to Defendants Dewey Beach Enterprises Inc.'s and Ruddertowne Redevelopment, Inc.'s (collectively, "DBE") Motion to Dismiss Plaintiff's First Amended Verified Complaint. In support of its Response, the Town avers as follows:

1. Plaintiffs filed the Original Complaint on August 15, 2011. (D.I. 1, Transaction I.D. 39294532) All Defendants to this action moved to dismiss the Original Complaint on various grounds, including lack of standing, lack of subject matter jurisdiction, and untimeliness under the applicable Statute of Repose. (D.I. 9, 10, 12, 13, Transaction I.D. 39797460, 39800168, 39950453, 39958146, respectively) Rather than respond to Defendants' motions to dismiss, Plaintiffs filed the First Amended Complaint. (D.I. 15, Transaction I.D. 40341422) Again, all Defendants moved to dismiss the First Amended Complaint on grounds similar to those stated in their motions to dismiss the Original Complaint. (D.I. 16, 17, 21, 23, Transaction I.D. 40636010, 40638616, 40915221, 40933534, respectively).

2. The averments in both the Original and First Amended Complaint are centered on the Mutual Agreement and Release (the "MAR") which was approved by the Commissioners of

the Town of Dewey Beach on February 26, 2011. (Exhibit 1) Specifically, the First Amended Complaint seeks a declaration from this Court that both the Commissioners' approval of the MAR and the Resolution by which the MAR was approved were *ultra vires* acts. (D.I. 15, Transaction I.D. 40341422) It also seeks a declaration that the MAR, the Resolution, and the building permit issued to DBE on July 15, 2011 are invalid. (*Id.*)

3. DBE's Brief in Support of its Motion to Dismiss contains an extremely lengthy "Statement of Facts." This section encompasses half of DBE's 39 page Brief in Support of its Motion to Dismiss the First Amended Complaint. (D.I. 23, Transaction I.D. 40933534) Much of this space is devoted to a recitation of "background" facts explaining in detail: 1) the history, dating back to the Town's drafting in 2006 and adoption in 2007 of its Comprehensive Plan, of DBE's (and its predecessor-in-interest's) efforts to redevelop the Ruddertowne property through its battle with the Town over the height, density, and proposed use of the proposed structure on the property (among other things); and, 2) how this battle culminated in five lawsuits¹ that DBE brought against the Town (the "Underlying Lawsuits"). (*Id.*) This portion of the recitation of facts, which runs from pages three (3) to ten (10) of DBE's Opening Brief, is essentially a recitation of the facts at issue in the Underlying Lawsuits. (*Id.*)

4. The Underlying Lawsuits were stayed in January 2011 as a result of settlement negotiations between DBE and the Town.² Ultimately, and pursuant to the terms of the MAR, those lawsuits were dismissed on September 19, 2011 and October 13, 2011.³ However, the terms of the MAR expressly provided that the Underlying Lawsuits would be dismissed without

¹ C.A. No. 09-507 (GMS); C.A. No. 4426-VCN; C.A. No. 5833-VCN; C.A. No. 4991-VCN; C.A. No. 5711.

² C.A. No. 09-507 (GMS) at Docket No. 51; C.A. No. 4426-VCN at Docket No. 71, Transaction I.D. 35195010; C.A. No. 5833-VCN at Docket No. 9, Transaction I.D. 35195010; C.A. No. 4991-VCN at Docket No. 37, Transaction I.D. 35195010; C.A. No. 5711 at Docket No. 9, Transaction I.D. 35195010.

³ C.A. No. 09-507 (GMS) at Docket No. 58; C.A. No. 4426-VCN at Docket No. 77, Transaction I.D. 40331988; C.A. No. 5833-VCN at Docket No. 15, Transaction I.D. 40331988; C.A. No. 4991-VCN at Docket No. 43, Transaction I.D. 40331988; C.A. No. 5711 at Docket No. 15, Transaction I.D. 40331988.

prejudice and that DBE would have the option of vacating the dismissals and reinstating the lawsuits should the Ruddertowne project be halted by virtue of a successful challenge that overturned the MAR and the MAR's resulting settlement. (Exhibit 2)

5. Many of the statements in DBE's Opening Brief relating to DBE's pre-MAR efforts to redevelop the Ruddertowne property are matters of fact that DBE and the Town disputed in the Underlying Lawsuits. Those disputes had not been resolved at the time that the Court dismissed the Underlying Lawsuits without prejudice in September and October of this year. While the background information that DBE provides may indeed be helpful to the Court in gaining insight into the history leading up to the Underlying Lawsuits and into the agreement and Resolution by which the Underlying Lawsuits were settled, it is at best only tangentially related to the subject matter of the Complaint in the instant matter. It is certainly not necessary for the Court to rely on any of this background information or on any of the factual propositions contained therein to decide whether to grant the instant Motions to Dismiss.

6. By way of example and not of limitation, while explaining the Town's current Comprehensive Development Plan, DBE states, "the phrase 'bulk standards' includes building height." (D.I. 23 at 5, Transaction I.D. 40933534) DBE makes similar statements regarding "bulk standards" and building height on pages six (6) and seven (7) of its Statement of Facts section. (*Id.* at 6) The Statement of Facts goes on to state that: (1) 'the Town Comp Plan specifically provided that Ruddertowne would be shaped for future development by a Town appointed "working group," also known as the "Ruddertowne Architectural Committee" or "RAC"' (*Id.*); (2) the RAC was charged by the Town Commissioners with saving Ruddertowne and its long standing commercial uses from being demolished and replaced with new townhomes (*Id.*); and, (3) "[t]he RAC members were appointed by the Dewey Beach Town Commission"

(*Id.* at 6, n. 4). These and other factual propositions were not only disputed in the Underlying Litigation, but indeed were at the very heart of the matters to be decided in those lawsuits. Should the without-prejudice dismissals of the Underlying Lawsuits be vacated and the Underlying Litigation be reinstated, these facts will remain disputed between DBE and the Town.

7. The Town has filed the instant Response to DBE's Opening Brief because it wishes to reserve its right to dispute and litigate many of the facts set forth in the Opening Brief in the event that the without-prejudice dismissals of the Underlying Lawsuits are vacated. The Town further wishes to avoid being collaterally estopped from litigating these issues in the future if they are included in a recitation of background facts in a potential order or opinion that issues in the instant litigation. *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1991) (enumerating test for application of collateral estoppel as requiring (1) question of fact essential to judgment, (2) that is litigated, (3) and determined, (4) by a valid and final judgment).

8. Litigation of the Underlying Lawsuits has proven to be extremely fact intensive. Many of the facts recited in DBE's Opening Brief remained in dispute and unresolved at the time that the Underlying Lawsuits were stayed and ultimately dismissed without prejudice. Importantly, the Town continues to dispute many of these facts. The Town respectfully submits that these facts are not necessary to consideration of the subject matter of DBE's pending Motion to Dismiss, i.e. the Court's lack of subject matter jurisdiction to consider Plaintiff's Amended Complaint, the untimeliness under 10 Del. C. §8126 of Plaintiff's claims, and the fact that Plaintiffs possessed an adequate remedy at law.

9. For these reasons, the Town respectfully requests that this Court reserve making findings of fact on the background facts set forth at pages three (3) through ten (10) of DBE's

Opening Brief. The Town also respectfully submits that, in the interest of judicial economy, the Court and the parties are best left to maintain the status quo in the Underlying Lawsuits and to litigate the disputed background facts not in the instant matter, but only in the Underlying Lawsuits if and when the without-prejudice dismissals of the Underlying Lawsuits are vacated and active litigation of those cases resumes. Alternatively, the Town invites the Court to strike portions of DBE's Statement of Facts under Chancery Rule 12(f) as impertinent to this lawsuit.

10. The Town reaffirms its adoption of DBE's Motion to Dismiss for lack of subject matter jurisdiction, untimeliness under 10 Del. C. §8126 of Plaintiffs' claims, and Plaintiffs' possession of an adequate remedy of law as set forth at pages 24 to 38 of DBE's Opening Brief in support of its Motion to Dismiss Plaintiff's Amended Complaint. However, as indicated above, the Town does not adopt the Statement of Facts contained in DBE's brief, and more specifically, respectfully requests that the Court disregard the recitation of facts relating to the Underlying Lawsuits.

WHEREFORE, Defendant Town of Dewey Beach respectfully requests that this Honorable Court reserve making findings of fact relating to the drafting and passage of the Dewey Beach Comprehensive Plan and to the redevelopment of Ruddertowne prior to the settlement of the Underlying Lawsuits. Alternatively, the Town requests that the Court strike any portions of DBE's Brief in Support of Its Motion to Dismiss the First Amended Complaint that address these facts.

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