VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of May, 2020.

Present: Lemons, C.J., Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Koontz, S.J.

Mid-Atlantic Arena, LLC, Appellant,

against Record No. 191020
Circuit Court No. CL18-81

City of Virginia Beach, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that the judgment below should be affirmed.

I. Factual and Procedural Background

The City of Virginia Beach entered into a development agreement with United States Management, LLC for the purpose of constructing an entertainment and sports arena in Virginia Beach. United States Management, LLC then assigned its rights under the development agreement to Mid-Atlantic Arena, LLC ("MAA"). As the developer, MAA had the responsibility of constructing the arena in accordance with a master plan, and obtaining financing for the endeavor. The City offered to lease some of its most valuable real estate for the arena, and agreed to provide $78 million in infrastructure improvements to support the arena as well as significant tax incentives.

The development agreement required MAA to obtain financing sufficient to construct the arena and fulfill all other obligations under the agreement. Through Section 4.3 of that agreement, the City retained the right to approve MAA's construction loan commitment as well as documents evidencing and securing the construction loan, which were defined as "construction loan documents." These rights were limited to four categories: "(i) funding mechanisms and reasonable assurances that any overseas lender will fully fund the Construction Loan, (ii) protections and cure rights of City and the Construction Lender in the event of a

Developer default under the Construction Loan and/or Transaction Agreements, (iii) City Credit Rating Concerns, and (iv) general consistency with the debt, equity and loan term structure outlined in Developer's proposal and pro-forma submitted to the City and the Term Sheet." The City's obligation to participate in MAA's construction loan closing was outlined under Section 5.2 of the development agreement, and the City's participation was conditioned on the City approving the final form of all construction loan documents.

In Section 5.4 of the development agreement, the parties agreed to an outside loan closing date, which established a deadline for MAA to provide the City with an executed loan commitment that met the City's requirements.[1] If MAA failed to do so, then either party could terminate the development agreement. The development agreement listed several conditions, and under Section 5.3 of the development agreement, MAA was required to satisfy these conditions prior to closing on its construction loan. In addition to obtaining the City's approval of the construction loan documents, as required under Section 5.2(g) of the development agreement, MAA represented in Section 7.2.5 of the development agreement that it would have adequate financial resources to complete construction of the arena.

MAA worked with JPMorgan Chase Bank, NA, in conjunction with Sumitomo Mitsui Banking Corp.,[2] to arrange a $180 million construction loan. Under their credit agreement, before accessing the $180 million construction loan, MAA needed to obtain $81 million in equity commitments for the project. JPMorgan sent its initial loan commitment letter to MAA in March 2017. The City reviewed this letter, and by April 5, 2017, the City confirmed that an amended version of the commitment letter satisfied its requirements under the development agreement. Following the commitment letter, MAA and JPMorgan drafted the credit agreement outlining the terms of the $180 million construction loan, which MAA forwarded to the City in June 2017 for its review pursuant to Section 4.3 of the development agreement.

MAA attempted to muster $81 million in equity contributions, but as of November 7, 2017, it had yet to accomplish that goal. In order to fill a $37 million gap in funds, MAA had

[1] After several extensions, the outside loan closing date ultimately fell on November 7, 2017.

[2] We will refer to JPMorgan Chase Bank, NA and Sumitomo Mitsui Banking Corp. collectively as JPMorgan.

reached out to its arena management company, AEG Worldwide, to obtain a commitment to provide additional capital. This contribution would be arranged through a support agreement between AEG and JPMorgan. However, AEG conditioned its additional contribution on the execution of its management agreement. As of November 7, 2017, AEG was clear that it did not agree to make any capital contributions beyond its existing $5 million commitment.

Over the course of its review of documents related to the arena project, the City learned of the support agreement, which was listed under the definition of "loan documents" in the credit agreement,[3] and requested a copy of it on August 28, 2017. MAA responded by saying it would send the support agreement to the City after MAA reviewed it themselves; however, the City did not receive a copy of the support agreement until it was turned over during discovery in this case.

The executed version of the credit agreement listed a subsequent contribution of $37 million from AEG, which would be made pursuant to the support agreement. This version specifically listed the support agreement as a "loan document." As the deadline to close on its construction loan approached, MAA altered its credit agreement with JPMorgan to reclassify missing items as post-closing conditions. The amended credit agreement allowed for 45 days to satisfy the post-closing items. This included the support agreement, which was to be dated on or before December 22, 2017 (45 days following the November 7 outside loan closing date). However, the agreement still required that these conditions be met, including obtaining $81 million in equity contributions, before the construction loan funds would be made available to MAA.

The City did not receive a copy of this version of the credit agreement until November 6, 2017, and it did not approve it. In addition to concerns regarding the loan being fully funded, the City also needed to obtain approval from the City Council in order to allow any change to AEG's cure rights following AEG's execution of the support agreement. Therefore, the City invoked its rights under Section 5.2 of the development agreement and informed MAA that it would not participate in the construction loan closing.

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[3] The "loan documents" were incorporated into the credit agreement under Section 9.06 of the credit agreement. ("This Agreement and the other Loan Documents constitute the entire contract among the parties relating to the subject matter hereof….").

Undeterred, MAA and JPMorgan continued to closing on their credit agreement and sent the City an executed copy on November 7, 2017. The City informed MAA on November 8, 2017 that MAA had not met the construction loan closing date as laid out in Section 5 of the development agreement. As such, the City exercised its right to terminate the development agreement.

MAA filed a breach of contract claim in the Virginia Beach Circuit Court. After holding a trial, the Circuit Court found in favor of the City. MAA appealed to this Court assigning error to (i) the trial court's finding that MAA and JPMorgan's closing on the credit agreement did not satisfy the terms of the development agreement, (ii) the trial court's finding that the City's refusal to participate in the closing was not a breach of the development agreement, and (iii) the trial court's use of extrinsic evidence and personal experience in making its decision.

II. Analysis

This case turns on the interpretation of the development agreement between MAA and the City. The interpretation of a contract is a question of law which this Court reviews de novo while giving deference to the trial court's factual findings. *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 358 (2006). The unambiguous language of this contract must be construed according to its plain meaning, without insertion of any exception or condition omitted by the parties. *Bridgestone/Firestone, Inc. v. Prince William Square Associates*, 250 Va. 402, 407 (1995).

MAA argues that the trial court erred in holding that the credit agreement closing between MAA and JPMorgan did not satisfy the terms of the development agreement. We disagree. The credit agreement closing did not comport with the requirements of the development agreement. In order to comply with the development agreement, MAA was required to obtain the City's approval of certain construction loan documents before closing on its construction loan, and to obtain full funding for the project as of the closing date. MAA failed to meet both of these requirements. As MAA did not obtain the City's approval of the relevant construction loan documents, the City was within its rights under the development agreement to refuse to participate in the construction loan closing and to terminate the agreement once the outside loan closing date passed.

A. "Fully Funded" Requirement

Under Section 7.2 of the development agreement, MAA represented that the arena project would be fully funded as of the date of its construction loan closing. MAA failed to fulfill this representation, because on November 7, 2017, MAA's funding for the arena construction fell $217 million short. Pursuant to Section 7.2.5 of the development agreement, MAA represented that "[a]s of the Construction Loan Closing Date, [MAA] will have adequate financial resources to perform its obligations under the Transaction Agreements[4] including the financial resources to cover the 'gap' between the amount of the Construction Loan and the amount required to construct and install the [arena] . . . ." Although MAA entered into an agreement with JPMorgan under which JPMorgan would potentially provide a $180 million loan, MAA did not have sufficient financial resources to make the capital expenditures necessary to draw on the loan. In order to access the $180 million, JPMorgan required that MAA first obtain $81 million in equity commitments for the arena. Taking stock of MAA's financial resources at the time of closing, it only had $44 million worth of capital contributions in any form. This left a $37 million gap in the funding needed to "unlock" the JPMorgan loan. MAA lacked adequate financial resources to obtain the $180 million from JPMorgan, and as a consequence, the only funds available for the project were the $44 million "on hand" – well short of the funding MAA would have obtained if it could have fulfilled its obligations under the credit agreement.

Contrary to MAA's position, it was not merely required to close on a construction loan agreement. On brief, MAA argues that it satisfied Section 7.2.5 of the development agreement because the City and JPMorgan reviewed and approved its financial information. This position ignores the fact that MAA needed a $180 million loan from JPMorgan in order to construct the arena. Whether MAA satisfied its financial disclosure requirements is not at issue in this case. In light of the valuable land offered by the City for the arena, as well as its agreement to provide infrastructure improvements and tax incentives, the City had a strong interest in ensuring the arena's construction would not stall due to a lack of funding. This interest is reflected in Section 7.2.5 of the development agreement.

[4] Under the development agreement, the Transaction Agreements comprise a group of seven documents, which includes the development agreement.

While MAA attempted to obtain an additional $37 million from AEG through the support agreement, the record is clear that AEG had no obligation to provide these funds as of the construction loan closing date. In reclassifying the support agreement execution to a post-closing matter, MAA and JPMorgan were able to come to an agreement between themselves, but this change meant the loan closing did not satisfy the requirements of the development agreement. Without securing funding from AEG (or some other investor) to fill the $37 million shortfall, MAA could not represent that it had adequate funds to construct the arena. For this reason, MAA's closing with JPMorgan failed to satisfy Section 7.2.5 of the development agreement.

B. City Approval Rights

The City retained the right to approve certain documents related to MAA's construction loan through Section 4.3 of the development agreement. Specifically, the City had the right to approve the documents ultimately evidencing and securing the construction loan, which the parties defined as "Construction Loan Documents." The document which ultimately evidenced the construction loan was the credit agreement. The credit agreement defined a subset of documents as "loan documents," which were incorporated into the credit agreement under Section 9.06 of that agreement. This group included the support agreement between AEG and JPMorgan. *Id*. The City's approval rights with respect to the construction loan documents were limited to (i) funding mechanisms, (ii) the City's cure rights, (iii) the City's credit rating concerns, and (iv) consistency with the debt, equity, and loan term structure of the proposed financing.

The City had the right to review and approve the credit agreement, as it was the document that ultimately evidenced the loan from JPMorgan. Additionally, the City had the right to review and approve the support agreement, because it affected funding mechanisms, the City's cure rights, and the debt-equity structure of the construction loan. The support agreement was incorporated into the credit agreement, and was part of the "funding mechanisms" for the credit agreement, as it would have provided the necessary funds that MAA needed to expend on the project before drawing on the loan from JPMorgan. The support agreement also required the City's review because an expansion of AEG's cure rights would have affected the City's cure rights and required approval from the City Council. Lastly, the debt-equity structure of the construction loan was also affected as the support agreement altered AEG's equity contribution.

Section 5.3 of the development agreement made the City's approval of the loan documents a condition precedent to the construction loan closing. In order to proceed to the construction loan closing in a manner consistent with the development agreement, MAA was required to satisfy the City conditions laid out in Section 5.2 of the development agreement. In particular, Section 5.2(g) of the development agreement mandated that the City approve the credit agreement and the support agreement, as they were construction loan documents under the terms of the development agreement. The City received an updated copy of the credit agreement on November 6, 2017, but did not approve it. As for the support agreement, the City never received a copy to review at all. MAA failed to obtain the City's approval of key documents prior to closing, and therefore, MAA's closing with JPMorgan did not satisfy the construction loan closing requirements set out in the development agreement. As MAA did not close on its construction loan by the outside loan closing date in satisfaction of the requirements of the development agreement, the City was within its rights to terminate the development agreement under Section 5.4 thereof.

C. City Participation in the Construction Loan Closing

As contemplated by the development agreement, the City's cooperation was required to close on the construction loan agreement. Section 5.3 lists a series of documents which would be executed by MAA and the City at the construction loan closing. However, Section 5.2 of the development agreement conditioned the City's participation in the construction loan closing on satisfaction of all City conditions laid out in that provision. As discussed above, MAA did not fulfill Section 5.2(g) of the development agreement, because it never obtained the City's approval of all construction loan documents. Therefore, the City was not required to cooperate with MAA's construction loan closing.[5]

D. Basis for the Trial Court's Ruling

Lastly, MAA takes issue with the trial court's mention of personal experience related to loan closings. Specifically, MAA argues that the trial court judge relied on extrinsic evidence consisting of his personal experience as an attorney who had been involved in residential loan

[5] MAA also claims the City breached the contract by failing to transfer land to the Virginia Beach Development Authority. Under Section 5.3 of the development agreement, however, the City was not obligated to transfer the land until the City Conditions were satisfied. They were not, and so the City was not in breach for failure to transfer the land.

closings. This argument is without merit and unsupported by the record. MAA selectively quotes from statements the trial court judge made, ignoring the overall context of his remarks. When ruling from the bench, the trial court judge offered an analogy based on his experience in residential lending, but the record is plain that the judge grounded his analysis on the language of the development agreement. Indeed, after referencing his own experience, the trial court judge stated on the record that he was not substituting his judgment for the language of the development agreement. "[W]e will not fix upon isolated statements of the trial judge taken out of the full context in which they were made, and use them as a predicate for holding the law has been misapplied." *Yarborough v. Commonwealth*, 217 Va. 971, 978 (1977).

III. Conclusion

For these reasons, we hold that the trial court properly found that MAA's closing on its construction loan did not satisfy the terms of the development agreement and that the City's refusal to participate in that closing was not a breach of the development agreement. Accordingly, we affirm the judgment of the circuit court.

This order shall be certified to the Circuit Court of the City of Virginia Beach.

A Copy,

Teste:

Clerk