

IN THE SUPERIOR COURT OF RABUN COUNTY

STATE OF GEORGIA

GEORGIA POWER COMPANY,

PLAINTIFF,

v.

LAPRADES MARINA, LLC,

DEFENDANT.

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CIVIL ACTION

FILE NO. 2012-CV-0192-S

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before this Court on a Motion for Summary Judgment filed by the Plaintiff asking the Court to determine that there are no genuine issues of material fact to be tried by a jury and that Plaintiff is entitled to judgment in its favor as a matter of law. The Plaintiff asks the Court to order specific performance of an alleged contract between the Plaintiff and the Defendant and/or enjoin the Defendant from maintaining unauthorized improvements in the waters of Lake Burton.

The Plaintiff filed its Motion, attachments and exhibits on May 31, 2013. The Defendant filed its response on June 8, 2013. The Plaintiff replied to Defendant's response on August 5, 2013. Oral argument was heard by this Court on August 8, 2013.

FINDINGS OF FACT

The Court hereby makes the following findings of fact:

Plaintiff Georgia Power Company ("Georgia Power") and Defendant LaPrades Marina, LLC ("LaPrades") entered into a License Agreement in September of 2006, outlining the circumstances under which LaPrades could erect improvements in the waters of and on

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shoreline of Lake Burton. Plaintiff's Motion, Exhibit A, License Agreement. The agreement was signed by both parties and recorded in the deed records of Rabun County. Plaintiff's Motion, Exhibit A, License Agreement; Exhibit C, Deposition of Peter Anzo ("Anzo Dep.") at 113:1-5, 114: 5-6. The License Agreement recites that it is being entered into "so that there will be no misunderstanding as to ownership and control of Lake Burton." Plaintiff's Motion, Exhibit A, License Agreement, Whereas Clause 6. The License Agreement requires a submittal to Georgia Power of plans and specifications for any improvements which LaPrades desires to construct in the area covered by the License Agreement, and approval by Georgia Power prior to constructions. Plaintiff's Motion, Exhibit A, License Agreement at p. 2 ¶ 3(b), (c). Although there were some discussions concerning plans which LaPrades submitted showing roofs and privacy walls on the proposed structures, the plans and specifications submitted by LaPrades to Georgia Power for approval did not include those additions on the sixteen individual boathouses to be erected along the shoreline. Plaintiff's Motion, Exhibit C, Anzo Dep. at 56:17-18, 59:25, 60:1-9, 128:12-17; Exhibit E, Deposition of Jeff Jackson ("Jackson Dep.") at 33:17-19, 54:16-21. On October 24, 2008, these plans which LaPrades submitted to Georgia Power for approval were then submitted by Georgia Power to the Federal Energy Regulatory Commission ("FERC") as contemplated by the License Agreement between LaPrades and Georgia Power, and as provided under the Federal Power Act license for Lake Burton issued to Georgia Power. Plaintiff's Motion, Exhibit F, North Georgia, Lake Burton FERC Project 2354, Application for Non-project use of Project Lands and Waters, LaPrades Marina Redevelopment (Oct. 24, 2008) ("FPA License Amendment Application"); Exhibit C, Anzo Dep. at 86:6-8. The plans LaPrades submitted to Georgia Power, showing boathouses with no roofs or privacy walls, were the only plans submitted to FERC for its approval. Plaintiff's Motion, Exhibit C, Anzo Dep. at 60:13-1; Exhibit E,

Jackson Dep. at 20:8-9, 40:1-3, 54:14-21, 64:14-25, 65:6-8, 72:6-8; Exhibit G, Affidavit of Wanda Greene, Georgia Power Company ("Greene Affidavit") at ¶ 3.

On January 15, 2009, FERC entered an Order amending Georgia Power's Federal Power Act License to include permission to build the additional boathouses, docks and structures on 1.347 acres of land as requested by LaPrades. Plaintiff's Motion, Exhibit D, FERC Order Modifying and Approving Non-Project Use of Project Lands, 126 FERC ¶ 62,031, 2009 WL 107101 (Jan. 15, 2009) ("FERC Order"). Pursuant to permission given by FERC, on August 31, 2011, Georgia Power issued a permit authorizing LaPrades to construct the first four of the boathouses as approved as "per plans submitted to FERC." Plaintiff's Motion, Exhibit E, Jackson Dep. at 41:7-10; Jackson Dep. Ex. 3. The only plans submitted to FERC were the ones showing no roof structures or privacy walls. Plaintiff's Motion, Exhibit C, Anzo Dep. at 60:13-14; Exhibit E, Jackson Dep. at 20:8-9, 40:1-3, 54:14-21, 64:14-25, 65:6-8, 72:6-8; Exhibit G, Affidavit of Wanda Greene, Georgia Power Company ("Greene Affidavit") at ¶ 3.

Under the terms of the License Agreement and the construction permit issued by Georgia Power, based on the plans submitted by LaPrades for Georgia Power and FERC approval, LaPrades began construction on the boathouses; however, it quickly became apparent that the structures as built were different from the structures as shown on the plans submitted to Georgia Power and FERC. Plaintiff's Motion, Exhibit C, Anzo Dep. at 63: 2-11; Exhibit E, Jackson Dep. at 21:11-14, 31:2-23, 46:4-12. Georgia Power photographs, attached to the Complaint and Motion, demonstrate that LaPrades placed a roof and privacy wall on the first of the four boathouses, after which Georgia Power sought relief from this Court. LaPrades had no written approval from Georgia Power or FERC for the construction of the

roofs and privacy walls on the boathouses. Plaintiff's Motion, Exhibit C, Anzo Dep. at 103:21-24, 104:1-5; Exhibit E, Jackson Dep. at 21:11-14, 43:4-8.

The 2006 License Agreement between LaPrades and Georgia Power Company provided as follows "(b) in the event licensee (LaPrades) demolishes the existing boathouses, or either of them, the licensee shall have the right to construct replacement thereof (each a "replacement boathouse" and collectively the "replacement boathouses") so long as (IV) the plans and specifications therefore have been approved, in advance by [Georgia Power] (which approval shall not be unreasonably withheld) and, if necessary, by FERC" and goes on to say "...the number, size, and location of each such additional improvement shall be subject to the prior written approval of the company and if necessary, FERC. If [Georgia Power] and FERC approve any such additional improvement, the plans and specifications therefore shall also be subject to the prior written approval of [Georgia Power] (which approval shall not be unreasonably withheld) and if necessary, FERC." Plaintiff's Motion, Exhibit A at p. 2 ¶ 3.

After LaPrades began construction on the boathouses, Georgia Power filed suit seeking an injunction and LaPrades voluntarily ceased construction on the boathouses pending the outcome of the case.

CONCLUSIONS OF LAW

The Court concludes as a matter of law that Georgia Power and LaPrades were parties to a contract, the License Agreement, for which there was good and valuable consideration given by both parties, that the parties were able to contract, and that there is a subject matter on which the contract could act (structures and, where approved, improvements within the License Area located within Lake Burton).

The Court further finds as a matter of law that the contract can be interpreted by the Court since there are no ambiguities and the intention of the parties can be readily ascertained by the Court from the terms of the contract.

The Court concludes that there is no adequate remedy at law and that the contract is clear, distinct, and definite, therefore it is appropriate for the Court to require that LaPrades specifically perform its obligations under the terms of the contract. Keappler v. Miller, 221 Ga. 144, 143 S.E.2d 647 (1965). Furthermore, the Court finds as a matter of law the terms of the License Agreement must be strictly followed and may not be varied by LaPrades. Augusta & Savannah R. Co. v. Augusta R. Co., 96 Ga. 562, 565, 23 S.E. 501 (1885). Allowing LaPrades to construct the boathouses with roofs and privacy walls without prior approval by Georgia Power would interfere with the freedom of the parties to negotiate and enter the contract. Bryan v. MBC Partners, L.P., 246 Ga. App. 549, 541 S.E.2d 123 (2000). Georgia Power has the right to insist LaPrades adhere to the terms of the contract.

Here, the contract between Georgia Power and LaPrades contains clear terms in which LaPrades agreed that construction within the License Area of Lake Burton would not be permitted without prior approval by Georgia Power, not to be unreasonably withheld, or if necessary the FERC. Pursuant to the License Agreement, LaPrades submitted plans and specifications for the construction to Georgia Power for approval. The record demonstrates that these plans were then submitted to FERC for approval. LaPrades participated in the development of the application and understood that the plans sans roofs and privacy walls were used in the submission to both Georgia Power and FERC. While LaPrades did in fact initially submit plans and specifications that included the roofs and privacy walls, these plans were replaced by plans that did not contain those features. These second plans were submitted in order to "expedite the application process" and were the plans that were

ultimately submitted to Georgia Power and FERC. Simply because LaPrades had demonstrated a willingness to construct boathouses with roofs and privacy fences by first submitting plans that contained those features does not excuse the fact that those features were not approved by Georgia Power or FERC because they were not part of the plans that were ultimately reviewed and approved. If plan approval was necessary for construction to begin then it stands to reason that LaPrades, who helped compile the necessary documents for the application, knew that the plans ultimately submitted would be the plans that would be reviewed and approved.

Because the License Agreement between LaPrades and Georgia Power requires LaPrades obtain plan approval before construction, and the Construction Permit issued by Georgia Power for LaPrades to begin construction on the four boathouses specifically referenced the plan submitted to and approved by FERC, a plan that did not contain roofs or privacy walls, Georgia Power is within its right to request that construction be enjoined from continuation because the roofs and privacy walls were never approved by either Georgia Power or FERC. Furthermore, pursuant to the License Agreement, Georgia Power is within its rights to require that LaPrades remove the roofs and privacy walls as they do not conform with the approved plan. The Court concludes that there are no disputed issues of fact which must be tried before a jury and that the Plaintiff is entitled to a judgment in its favor as a matter of law.

JUDGMENT

Having made the above findings of fact and reached the above conclusions of law, it is hereby,

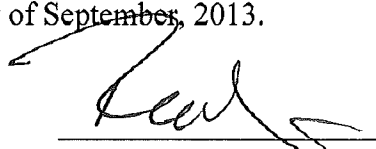
CONSIDERED, ORDERED, AND ADJUDGED as follows:

- 1) Plaintiff's Motion for Summary Judgment in its favor is hereby granted.

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- 2) The Defendant is hereby ordered to specifically perform its obligations under the terms of the License Agreement and in strict compliance therewith by removing the roof structures and privacy walls for the boathouses on which construction has begun.
- 3) The Defendant is hereby temporarily and permanently enjoined from erecting the boathouses in the License Area in Lake Burton governed by the License Agreement in any manner or way which deviates from the plans and specifications that were approved by FERC in its Order of January 15, 2009. The Defendant is also restrained and enjoined from maintaining the roof structure and privacy wall on the boathouse which is currently being built or constructed or installing roof structures or privacy walls on any of the other boathouses currently permitted by permit dated August 31, 2011.

SO ORDERED, this 11th day of September, 2013.



RUSSELL W. SMITH, JUDGE
SUPERIOR COURTS
MOUNTAIN JUDICIAL CIRCUIT