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August 8, 2013

BYFEDEX

Mark J. Lanza, Esq.
Town Counsel
Town Building
41 Cochituate Road
Wayland, MA 01778

Re: *Twenty Wayland, LLC v. Town of Wayland eta/.*
Middlesex Superior Court Docket No. MICV2011-4095-F

Dear Mark:

Pursuant to Superior Court Rule 9A, I have enclosed one original and one copy of Twenty Wayland, LLC's Opposition to Defendants' Post-Trial Motions in connection with the above-referenced matter.

t)1Jr;
Daniel P. Dain

DPD/lps

Enclosures

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

TWENTY WAYLAND, LLC

Plaintiff,

v.

TOWN OF WAYLAND and WAYLAND WASTEWATER MANAGEMENT DISTRICT COMMISSION,

Defendants.

CIVIL ACTION NO. 11-04095-F

TWENTY WAYLAND, LLC'S OPPOSITION TO DEFENDANTS' POST-TRIAL MOTIONS

The jury's unanimous verdict should be respected.

The judgment should stand.

Defendants' 33 page motion for a new trial, to amend the judgment, and for relief from judgment should be denied.

Why?

1. The Motion is Disingenuous.

Incredibly, and disingenuously, defendants argue that Twenty Wayland failed to establish that the 1999 Memorandum of Agreement was a valid contract. Wow. How about the Agreed Facts (Trial Exhibit 1)?

> 4. Effective August 30, 1999, Wayland Business Center, LLC, the Town, and the Commission entered into a Memorandum of Agreement.

> 12. The execution of the Memorandum of Agreement by the Board of Selectmen on behalfofthe Town and by the Commission was an authorized act. On June 4, 1998, the Town at a Special

> Town Meeting voted to adopt Article 5 ofthe 1998 Special Town Meeting Warrant authorizing the Town's Board of Selectmen to acquire the wastewater treatment plant and appurtenant easements for access and other purposes.
>
> 14. Since 1999, the Town and the Commission have reaffirmed their obligations under the Memorandum of Agreement on a number of occasions.

See also Agreed Facts 16-18; and the Excerpt from 2009 Annual & Special Town Meeting Warrant (Trial Exhibit 9) (Section D3 at page 54) ("Developer and Wayland hereby acknowledge and confirm that each has certain rights and obligations under an August 30, 1999 Memorandum of Agreement...").

2. The Arguments on the Merits in the Motion Have Been Waived.

If defendants believe that they were entitled to judgment as a matter of law based on the terms of the contract, principles of exhaustion of administrative remedies, or statute of limitations, then defendants should have sought a directed verdict under Rule 50. Failure to do so, Rule 50(b) instructs, waives the right to judgment notwithstanding the verdict. Having failed to reserve its rights by seeking a directed verdict on the merits, defendants should not be permitted to do an end run by raising these same arguments through the guise of a motion for a new trial or to set aside the judgment.

3. The Motion is Untimely.

Even if defendants did not waive their merit arguments under Rule 50, their motion for a new trial under Rule 59 is untimely. Rule 59(b) instructs that motions for a new trial or to alter or amend a judgment must be served not later than 10 days after the entry of judgment. Rule 6(b) provides that a court "may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them" (with

respect to Rule 59 motions, that rule provides that only the time for serving opposing affidavits may be extended by the court (Rule 59(c)). *See also* 1973 Reporter's Notes to Rule 59 ("Because a motion under Rule 59(b) affects the finality of judgment and tolls the time for taking an appeal, the 10-day limit may not be enlarged by the court. Rule 6(b)."). Twenty Wayland could not find any cases under Rule 6(b) holding otherwise. Since defendants served their motion more than 10 days after the judgment, it is untimely.

4. The Motion Does Not Meet the Standard.

It is a rare case when a court should overturn a jury verdict. Motions for new trials are generally appropriate only to prevent miscarriages of justice. *See Wojcicki v. Caragher,* 447 Mass. 200, 216 (2006). Courts should consider whether there has been "some accident, mistake, or misfortune in the conduct of the trial [such that] a new trial is necessary to prevent a failure of justice." *Davis v. Boston Elevated Railway, Co.,* 235 Mass. 482,496 (1920). Similarly, motions brought under Rule 60(b)(6) require a showing of"extraordinary circumstances" and "the operation of rule 60(b) must receive extremely meagre scope." *Bowers v. Bd. of Appeals of Marshfield,* 16 Mass. App. Ct. 29, 33 & n. 5 ("Rule 60 is to litigation what mouth-to-mouth resuscitation is to first aid; a life-saving treatment, applicable in desperate cases."). Rule 60(b) enumerates specific situations where providing relief from judgment may be appropriate, such as newly-discovered evidence or fraud

Defendants have not attempted to make any of these showings. At most, defendants argue that the jury did not understand the terms of the 1999 Memorandum of Agreement. But defendants got the jury instruction they wanted on the meaning of the contract and did not object to any instruction given by the Court. Defendants' own witness, Fred Knight, testified explicitly that defendants have not been able to perform under the contract because they oversubscribed the treatment plant. There was no miscarriage of justice in the jury's verdict.

5. The Motion Tries to Reargue Issues Already Decided.

In section IV of the Motion (pages 19 to 26), defendants try to reargue their motion to dismiss with respect to exhaustion of administrative remedies. This issue has already been decided.[1] *See* Memorandum of Decision and Order on Defendants' Motion to Dismiss Plaintiffs Sewer Charge Claims. There is no reason to revisit that ruling.

6. The Motion Relies On Evidence Not Introduced at Trial

Defendants argue, but presented no evidence at trial, that Twenty Wayland somehow failed to mitigate its damages. (Motion at 18-19) Mitigation is an affirmative defense which defendants had the burden of meeting at trial. *See Cummings Properties, LLC v. National Communications Corp.,* 449 Mass. 490, 497 (2007). They presented no evidence on the issue of mitigation at trial.

Defendants argue that other records not introduced at trial would have led the jury to calculate real estate taxes differently. (Motion at 10-11) Defendants' challenge Twenty Wayland's calculation of what it had paid in real estate taxes on the residential portion of the project. They write, "The following complete information relative to the calculation, based on public records in the Plaintiffs possession and available to the Plaintiff to present at trial, lead to the following different amount." (Motion at 10) If there were public records to show different amounts, then defendants should have presented them at trial; they did not. It is too late now.

7. The Motion is Based on a Series of False Premises.

Various arguments in Defendants' Motion are based on false premises.

[1] As a reminder, an abatement procedure does not trump a breach of contract claim. Twenty Wayland did in fact ask for an abatement, but the Commission ignored the request and refused to schedule a hearing; and the Commission has no abatement procedure anyway. These points were made during trial, during the testimony of Fred Knight and Tony DeLuca, and introduced through the Rule 30(b)(6) deposition of the Town through its designee, Fred Turkington.

Defendants' falsely argue that Twenty Wayland's claim for reimbursement of real estate taxes and interest paid during the period of delay (which continues today) was based on the premise that "the land comprising the Residential Project would have been sold in June, 2011" (Motion at 8 and 11) and that Twenty Wayland failed to establish that premise at trial. The evidence at trial established that Twenty Wayland would have started construction on the residential phase of their project in July 2011 but because of defendants' breach of contract, that commencement date has been postponed (until such time that there is capacity available to treat any wastewater to be discharged from the residential project). That period of extra time is the amount of time that Twenty Wayland is paying real estate taxes and interest.

Defondants falsely argue that 8 percent should be used to calculate the pre-judgment interest on the real estate tax portion of the damages award because this is really a claim for a tax abatement. It is not. Twenty Wayland is not arguing that the real estate taxes on the residential portion of the project should be abated, but that defendants' breach of contract extended the period oftime (two years and counting now) on which Twenty Wayland is paying real estate taxes on the residential portion of the project. As argued throughout this case and detailed in the jury's verdict, this was a breach of contract case and the 12 percent pre-judgment interest is the proper interest rate.

Defendants falsely argue that $1,858.29 for copying trial exhibits is excessive. There were 14 juror binders, plus two binders for the Court, and a binder for both plaintiff and defense counsel. There were 48 exhibits, 227 pages of agreed exhibits (including color photographs), and probably close to that in pages of disputed exhibits accepted into evidence. The $1,858.29 for copying therefore included 18 binders, more than 800 tabs, and around 7,000 pages. The copying charges were not excessive.

8. Defendants Should Not Be Given Additional Time to Comply with the Judgment.

The jury heard at trial how Twenty Wayland is being damaged each day by the delay caused by defendants – carrying costs and increasing construction costs. Defendants brought this result on themselves by oversubscribing the treatment plant; they've had long notice that this was an issue. It is time for defendants to comply with their contract.

9. The Motion Does Not Comply with Superior Court Rule 9A.

Defendants' filing ignores the requirements of Superior Court Rule 9A, including the requirement that motions be accompanied by a "separate memorandum" (Rule 9A(a)(l)), and that "[u]nless leave of court has been obtained in advance, all memoranda of law and the oppositions thereto shall not exceed 20 pages…" (Rule 9A(a)(5)). No separate motion and memorandum were served on Twenty Wayland and the Motion itself is 33 pages.

Superior Court Rule 9E requires that all post-trial motions be served and filed in accordance with the requirements of Rule 9A. A motion that does not comply with Rule 9A need not be considered by the court. *See* Mass. R. Civ. P. 9A(b)(6).

In sum, there is simply no reason to disturb a well considered jury verdict issued after two days of trial. The verdict was 14-0. This Court should leave the verdict and judgment in place.

Respectfully submitted,

TWENTY WAYLAND, LLC,

By its attorneys,

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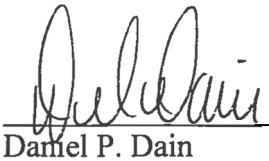
August 8, 2013

CERTIFICATE OF SERVICE

I, Daniel P. Dain, do hereby certify the foregoing was served upon all counsel of record by overnight delivery on August 8, 2013.



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