The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Arnold Alpert, Judith Elliot and James Snyder

v.

New Hampshire Motor Speedway, Inc.

No. 2017-CV-00649

ORDER

Arnold Alpert, Judith Elliot, and James Snyder (collectively "the Plaintiffs") have brought an action against New Hampshire Motor Speedway, Inc. ("NHMS") and the Town of Loudon ("Town") seeking injunctive relief based upon a 1989 Settlement Agreement ("the Agreement") executed by the Plaintiffs, the Town of Loudon, and New Hampshire Speedway, Inc. ("NHS"), the predecessor of NHMS. Both parties have moved for summary judgment. The Court held a hearing on April 2, 2018. For the reasons stated in this Order, the Plaintiffs' Motion is DENIED and NHMS's Motion is GRANTED.

I

The relevant facts are not in dispute. Prior to 1988, Keith and Rose Bryar owned certain property, known as the Bryar Motorsports Park, in Loudon, New Hampshire. (Aff. of Jennifer Lamb in Supp. of Pls.' Mot. Summ. J. [hereinafter "Lamb Aff."], Exs. 2–3.) The actual racetrack property was owned by an entity known as 106 Midway-Raceway, Inc. ("106 Midway"). (See id. at Ex 3.) The racetrack was situated on a parcel of land listed on the Loudon tax maps as Map 61, Lot 5. (Id.) The Bryars also owned a lot contiguous to that parcel, known on the Loudon tax maps as Map 61, Lot 7. (Id.)

In 1988, Robert Bahre decided to purchase the Bryar Motorsports Park from the Bryars with the intention of building a racetrack suitable for National Association of Stock Car Racing ("NASCAR") races. Mr. Bahre formed a corporation called New Hampshire Speedway, Inc. ("NHS"), to achieve that purpose. (Aff. of Wilbur Glahn in Supp. of. Pls.' Cross-Mot. Summ. J. [hereinafter "Glahn Aff."], at Ex. 12.) This would result in a significant change to the venue, which had primarily held motorcycle races and other smaller events. (Pls.' Mem. of Law in Supp. of Obj. to Def.'s Mot. Summ. J. and Pls.' Cross-Mot. Summ. J. [hereinafter "Pls.' Mem."], Ex. 1 [hereinafter "Snyder Aff."] ¶ 2.) On December 14, 1988, the Bryars (106 Midway) conveyed the property consisting of Map 61, Lot 5 and Map 61, Lot 7 to NHS. (Lamb Aff., Ex 2.)

On December 15, 1988, the Loudon Planning Board approved the proposed expansion of the track and other improvements, (see Glahn Aff., Ex. 13), as shown on the "1988 Site Plan," (see Lamb. Aff., Ex. 4.) Around this time, Mr. Bahre began referring to the racetrack as "New Hampshire International Speedway" ("NHIS"). (Verified Compl., Ex. B.) As of December 1988, the only property owned by NHS, and known as New Hampshire International Speedway, was the property shown on the 1988 Site Plan.[1]

In January 1989, James Snyder, a plaintiff in this case, and three other individuals, Susan Snyder, Laurie Webster-Booth and Erwin Lange,[2] filed a lawsuit in this Court against the Town of Loudon's Planning Board and NHS ("1989 Lawsuit").[3] (See Verified

[1] The 1988 Site Plan references only Map 61, Lot 5, the parcel of land where the racetrack is situated. It includes Map 61, Lot 7, but that parcel is not specifically identified on the 1988 Site Plan. (See Lamb Aff., Ex. 4.) There is no dispute that NHS purchased both of these parcels before the 1989 Agreement was executed.

[2] These three individuals are not parties in the present matter.

[3] Initially, the lawsuit was filed against 106 Midway but NHS was substituted as the proper defendant on February 9, 1989. (Verified Compl., Exs. C, E.)

Compl., Ex. C.) Mr. Alpert and Ms. Elliot were not parties to the 1989 Lawsuit, although they were involved in the opposition to the proposed racetrack expansion project. They formed an informal group called "Concerned Racetrack Neighbors," which aimed to mitigate the impact ongoing expansion would have on the community. (Pls.' Mem., Ex. 2 [hereinafter "Elliot Aff."] ¶ 10; Ex. 3 [hereinafter "Alpert Aff."] ¶ 3.)

The 1989 Lawsuit sought review of the Loudon Planning Board's decision to approve the 1988 Site plan and the specific expansions covered by that plan. (Verified Compl., Ex. C.) The plaintiffs in the 1989 Lawsuit alleged that the safety and enjoyment of their property would be directly affected by the site development. Id. The litigation was contentious; both Mr. Alpert and Ms. Elliot were subpoenaed for depositions and Mr. Alpert filed a motion to quash the subpoena for his deposition. (Verified Compl. ¶ 19, Ex. D.) All the parties to the 1989 Lawsuit were represented by sophisticated counsel. NHS was represented by Attorney Richard V. Wiebusch; the plaintiffs were represented by Attorney Peter Marsh; and the Town was represented by Attorney Michael Donovan. (Id. ¶ 18.) The litigation brought against the Loudon Planning Board and NHS was settled in 1989 and the parties to the 1989 Lawsuit, as well as Mr. Alpert and Ms. Elliot, entered into a written settlement agreement (the "Agreement") on May 17, 1989. (Lamb. Aff., Ex. 1 [hereinafter "Agreement"].) The Agreement provides that the parties agreed they entered into the Agreement "after consultation with counsel." Id. ¶ 14.

In 1995, NHS purchased a parcel of land from Donald and Carol Mancini, which is known on the Loudon tax maps as Map 51, Lot 18. (Lamb Aff., Exs. 5, 11.) In 1997, NHS purchased three additional parcels of land from Pike Industries, Inc. (Id. at Ex. 6.) Those parcels are known on the Loudon tax maps as Map 52, Lot 15, Map 61, Lot 6, and Map 61,

Lot 9. (Id. at Ex. 11.) The Court will refer to these four parcels as the "Post-1989 Properties."

In 2008, Speedway Motorsports, Inc. acquired the stock of NHS and renamed the corporation New Hampshire Motor Speedway, Inc. ("NHMS"). NHMS then filed a name change with the Merrimack Registry of Deeds, which now designates NHMS as owning the land previously owned by NHS in Loudon. (See Lamb. Aff., Ex. 10.)

NHMS now seeks to hold a three-day country music festival ("the Concert") on the Post-1989 Properties. Loudon's Planning Board and Zoning Board of Adjustment have approved the Concert, subject to certain conditions. (Verified Compl. ¶ 54, Ex. L.) No appeal was filed from the decisions of the Planning Board or the Zoning Board. The Plaintiffs in this case, all of whom are residents of Canterbury, New Hampshire, maintain that the Concert is prohibited by the Agreement. On December 11, 2017, the Plaintiffs initiated an action in this Court against NHMS and the Town of Loudon.

II

In ruling on cross-motions for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." N.H. Ass'n of Counties v. State, 158 N.H. 284, 287–88 (2009) (citation omitted). In order to defeat summary judgment, the nonmoving party "must put forth contradictory evidence under oath, sufficient . . . to indicate that a genuine issue of fact exists so that the party should have the opportunity to prove the fact at trial . . . ." Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (citation and quotations omitted). A fact is material if it affects the outcome of the case under the

applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002).

III

NHMS seeks to hold the Concert on the Post-1989 Properties, which NHS acquired more than five years after the Agreement's execution. This case focuses on the meaning of Paragraph 1 in the Agreement, which provides: "New Hampshire Speedway covenants that it shall not permit any musical concerts of any type or description to be held on the premises currently known as New Hampshire International Speedway ("premises") except in conjunction with racing events." (Agreement ¶ 1.) The parties disagree as to the meaning of "premises" and whether Paragraph 1 applies to property acquired after the Agreement was executed, or relates only to property owned by NHS at the time the Agreement was executed in 1989.

The interpretation of a contract is a question of law. Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 196 (2010). "When interpreting a written agreement, [courts] give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole." Appeal of the State (N.H. Transp. Appeals Bd.), 147 N.H. 426, 429 (2002). The Court will give effect to clear, unambiguous language. Id. But when parties to a contract reasonably differ as to the meaning of a clause or term, the clause or term is ambiguous. Sunapee Difference, LLC v. State, 164 N.H. 778, 790 (2013); Birch Broad., 161 N.H. at 196. "If the agreement's language is ambiguous, it must be determined what the parties, under an objective standard, mutually understood the ambiguous language to mean." Gen. Linen Servs. v. Franconia Inv. Assocs., L.P., 150 N.H. 595, 597 (2004).

Both parties maintain that the language in Paragraph 1 is unambiguous, but the parties' respective interpretations differ significantly. NHMS maintains that Paragraph 1 applies only to the property known as NHIS in 1989 and does not include after-acquired property. The Plaintiffs contend the restrictions in Paragraph 1 apply to property purchased by NHS after the Agreement was executed, including the Post-1989 Properties where NHMS seeks to hold the Concert.

The Agreement defines "premises" as "the premises *currently known as* New Hampshire International Speedway." (Agreement ¶ 1 (emphasis added).) Currently is an adverb; the applicable definition of "currently" is "at present". Webster's 3rd International Dictionary 557 (Unabridged Ed. 2002). This language therefore ties the definition of "premises" to a point in time, specifically the date the Agreement was executed, May 17, 1989. It is undisputed that there were only two parcels of land known as "New Hampshire International Speedway" on that date.

In arguing that the meaning of the term "premises" is expansive and incorporates after-acquired property that was essential to the racetrack's development, the Plaintiffs rely on Gen. Linen Servs., in which the Court held that the word premises that "premises" has two meanings, one of which can be characterized as the "business enterprise" meaning and the other as the "land" meaning. See 150 N.H. at 597–98. That case involved the interpretation of an agreement for General Linen to be the exclusive linen supplier for the defendant at the defendant's facility known as "the Lodge." Id. at 596. The agreement permitted the defendant to cancel the agreement if it installed an "'on-premise' laundry facility." Id. Fifteen months after the agreement's execution, the defendant notified General Linen that it was cancelling the agreement because it installed its own laundry

facility. Id. The laundry facility, which the defendant had leased, was a former commercial laundry center located in a shopping center approximately one-half mile from the Lodge. Id. The plaintiff General Linen brought suit for breach of the agreement, arguing the plain meaning of "on-premise" did not include the laundry facility because of where it was located. Id. The defendant argued that the word "premises" included a laundry facility owned and operated by it, regardless of the geographical location. Id. at 597. The trial court agreed with General Linen and read "on-premise" as meaning on the Lodge's premises.

The New Hampshire Supreme Court reversed the trial court after holding that the phrase "on-premise" as used in the agreement was reasonably subject to varying interpretations and was, consequently, ambiguous. The Supreme Court explained that "premises," as relevant to the agreement in that case, can be:

> [E]ither "a specified piece or tract of land with structures on it," or "the place of business of an enterprise or institution." "Premises" can identify single premises or multiple premises. For example, the word can identify the premises of a particular building, as in "this building's premises" or the premises of each building owned by a particular enterprise or institution, as in "the enterprise's premises." Therefore, the word, as used in a particular situation, must be understood in light of the circumstances, disclosures and context attendant to the situation.

Gen. Linen Servs. v. Franconia Inv. Assocs., L.P., 150 N.H. 595, 597–98 (2004) (citations omitted).

In Gen. Linen Servs., where it was unclear whether "'on-premise' laundry facility" meant the facility had to be on the Lodge property or instead could be any facility owned and operated by the defendant regardless of geographical location, but in this case, the Agreement defines the premises referred to; specifically, it refers to the property *currently* known as New Hampshire International Speedway at the time the Agreement was

executed, and, as discussed above, there were only two parcels that satisfied this definition at that time.

Aside from the fact that the Agreement's definition of "premises" is tied to a point in time, specifically May 17, 1989, there are other provisions of the Agreement that compelled the conclusion that Paragraph 1 relates only to the land owned by NHS in 1989. The first sentence of the Agreement provides:

> NOW COME James Snyder, Susan Snyder, Steven Booth, Laurie Webster-Booth, and Erwin Lange ("Plaintiffs"); New Hampshire Speedway, Inc. ("New Hampshire Speedway"); Planning Board of the Town of Loudon; and Concerned Racetrack Neighbors, an unincorporated association; and, *in settlement of all claims arising from [the 1989 Lawsuit] and all other objections to New Hampshire Speedway's proposed racetrack project*, agree and covenant . . . .

(Agreement, at 1 (emphasis added).) The 1989 Lawsuit directly followed the Planning Board's approval of the 1988 Site Plan, which involved specific expansions and improvements to be made on the two parcels of land owned by NHS at that time. The Agreement's reference to the 1989 Lawsuit seems to tie the Agreement to the land involved in the litigation. The Plaintiffs appear to argue that "premises" cannot be read to mean only the property involved in the 1989 Lawsuit because Mr. Alpert and Ms. Elliot were not parties to the litigation and their concerns, and the concerns of the Concerned Racetrack Neighbors, were not limited to the parcels of land involved in the litigation. The Court is unpersuaded. The Agreement was not only in settlement of the 1989 Lawsuit, but also resolved "all other objections to New Hampshire Speedway's proposed racetrack project." (Agreement, at 1.) There is no evidence, nor do the Plaintiffs contend that "New Hampshire Speedway's proposed racetrack project" was separate from the site development approved by the Planning Board in 1988. Both the 1989 Lawsuit and the

"proposed racetrack project" related to the development of the land that was known as New Hampshire International Speedway in 1989.

Paragraph 16 of the Agreement further suggests that the parties intended for the Agreement to resolve all claims and objections to the specific property shown on the 1988 Site Plan and not to property acquired by NHS after the Agreement was executed. In Paragraph 16, the plaintiffs to the 1989 Lawsuit and the Concerned Racetrack Neighbors agreed "to cease all opposition to *the* racetrack expansion, either by public statements or contacts with any federal, state or local agency." (Agreement ¶ 16 (emphasis added).) Use of "the" suggests the Agreement is limited to the specific expansion proposed by NHS in 1988 after it purchased the land formerly known as the Bryar Motorsports Park. If the parties intended for the Agreement to apply to all future expansions, the parties could have omitted "the" or replaced it with "any." The language in Paragraph 16, however, indicates the Agreement was intended to resolve the specific racetrack expansion at issue during that time, a project which involved the two parcels of land owned by NHS.

Finally, while neither party references it, Paragraph 7 of the Agreement suggests that the parties intended for "premises" to mean the land owned by NHS at the time the Agreement was executed and understood that the term did not included after-acquired property unless specifically stated. Paragraph 7 provides:

> New Hampshire Speedway covenants that if the land currently owned by E. J. Prescott, Inc. shown as Map 61, Lot 3, on the Town of Loudon Tax Maps is used *in conjunction with the premises*, it shall not have a means of ingress or egress on Asby Road or any other roadway other than the state highway known as Route 106.

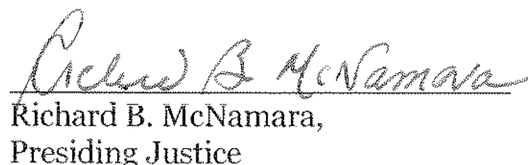
(Agreement ¶ 7 (emphasis added).) If "premises" was interpreted to mean NHS's business enterprise, one of the permissible definitions described in Gen. Linen Servs., then any

other land used in the operation of the race track would be part of the premises. In other words, if the parties intended that all land owned or used by NHS would be part of the premises, using the "business enterprise" definition of premises, then there would be no need to refer to the land owned by E. J. Prescott and provide that the Agreement will be applied if that land "is used in conjunction with the premises." Rather, the Agreement would only have to say "if the land currently owned by E. J. Prescott is used." The fact that the language says that if other land is used in conjunction with the premises compels a conclusion that the parties intended for "premises" to mean the land upon which the racetrack was situated, which at all times has been on the two parcels conveyed by the Bryars (106 Midway) to NHS in 1988.

For these reasons, the Court concludes that the term "premises," as defined in the Agreement, refers only to the land owned by NHS at the time the Agreement was executed, specifically the property known as Map 61, Lot 5 and Map 61, Lot 7 on the Loudon tax maps, and does not include the Post-1989 Properties acquired by NHS more than five years after the Agreement was executed. Therefore, Paragraph 1 of the Agreement does not preclude NHMS from holding the Concert on the Post-1989 Properties. It follows that the Plaintiffs' Motion must be DENIED and NHMS's Motion must be GRANTED.

SO ORDERED

5/16/18
DATE



Richard B. McNamara,
Presiding Justice

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NOTICE OF DECISION

File Copy

Case Name: **Arnold Alpert, Judith Elliot, and James Snyder v New Hampshire Motor Speedway, Inc. and Town of Loudon**
Case Number: **217-2017-CV-00649**

Enclosed please find a copy of the court's order of May 16, 2018 relative to:

Order

May 16, 2018

Tracy A. Uhrin
Clerk of Court

(003)

C: Steven M. Gordon, ESQ; Wilbur A. Glahn, III, ESQ; Jennifer L. Parent, ESQ; Barton L. Mayer, ESQ