

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

J. DANIEL LUGOSCH III and  
PETER STEINGRABER, as General  
Partners of PROVIDENCE PLACE  
GROUP and PROVIDENCE PLACE  
GROUP, LLC

v.

C.A. No. 97-492

ALEXIUS C. CONROY, PROVIDENCE  
PLACE, INC. and THE CONROY  
DEVELOPMENT COMPANY, INC.

**MEMORANDUM AND ORDER**

ERNEST C. TORRES, United States District Judge

**Background**

J. Daniel Lugosch, III, Peter Steingraber, and Providence Place Group, LLC ("Lugosch plaintiffs") have moved for partial summary judgment with respect to Count I of their complaint. They seek, *inter alia*, a declaration that:

1. Lugosch's purchase of Robert Congel's general partnership interest in Providence Place Group ("PPG" also referred to as "Pyramid") did not trigger defendant Alexius C. Conroy's right of first refusal under the terms of an October 13, 1989 agreement (the "1989 Agreement") among Lugosch, Congel and Conroy; and

2. The terms of a "financing" agreement entered into by Lugosch and Steingraber, as general partners of Providence Place Group, and Nomura Asset Capital Corporation ("Nomura") do not violate Conroy's rights under the 1989 Agreement.

For reasons set forth below, the motion is granted in part and denied in part.

### The Undisputed Facts

In 1989, Conroy, through Providence Place, Inc. ("PP"), a corporation that he controlled, acquired options to purchase two adjacent parcels of land in the city of Providence with the expectation that it could be developed into a retail shopping mall, an office tower and, perhaps, an hotel. In order to achieve that goal, Conroy and PP entered into the 1989 Agreement with PPG a/k/a Pyramid, a general partnership in which Congel and Lugosch were the general partners. The agreement required PPG to pay the sum of \$8 million to PP in exchange for which PP would assign its options to a new partnership between PP and Conroy called the Providence Place Partnership ("PPP").

The project was to be implemented in two stages. The first stage was development of the shopping mall and was denominated as the "Retail Project." The second stage was development of the office tower and was denominated the "Office Development." The 1989 Agreement provided that the Retail Project would be completed by a limited partnership to be formed between PPG, as general partner, and Conroy, as a limited partner. It further provided that the Office Development would be completed by a second limited partnership in which Conroy would be the general partner and PPG would be limited partner. PPG was to have a 90% interest in the Retail Project limited partnership (the "Retail Venture") and a 10% interest in the Office Development limited partnership (the "Office Venture"). Conversely, Conroy was to have a 10% interest in the Retail Project limited partnership and a 90% interest in the Office

Development limited partnership. Control over all decisions relating to each stage of development, including power to arrange the necessary financing, was vested in the general partner of the partnership created to complete that stage.

The agreement contemplated that the Retail Project would be completed first because the office tower was to be constructed on the buildings housing the retail portion of the project. It also provided that the options to purchase the land would be assigned to the Retail Project limited partnership which was referred to in the agreement as the Retail Venture.

As time passed, financial difficulties were encountered and Congel began losing interest in the project. As a result, in February 1997, Congel sold his general partnership interest in PPG to Lugosch. At the same time, Lugosch and Steingraber, who had previously formed a limited partnership called Providence Place Group Limited Partnership ("PPGLP") as the entity to complete the Retail Project,<sup>1</sup> entered into the "financing" agreement with Nomura.

Conroy asserts that both transactions violate the terms of the 1989 Agreement and he has communicated those claims to both Nomura and Fleet Bank, another bank that is providing a portion of the financing. As a result, both institutions have expressed their reluctance to advance funds which has prompted this action by the

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<sup>1</sup>Because of disagreements that developed, Conroy never signed the agreement creating PPGLP. Therefore, Lugosch and Steingraber reserved, for Conroy, a 10% interest to which he was entitled under the terms of the 1989 Agreement.

Lugosch plaintiffs seeking, among other things, a declaratory judgment.

The claims asserted by Conroy that are the subject of this motion for partial summary judgment are:

1. that Lugosch's purchase of Congel's interest in PPG triggered Conroy's right of first refusal under the 1989 Agreement and

2. that, for a variety of reasons, the terms of the "financing" agreement between Nomura and PPGLP violate Conroy's rights under the 1989 Agreement.

Conroy also claims that the purchase of Congel's interest violated the transfer restrictions and certain representations and warranties contained in what has been referred to as the "Key Partners" provisions of the 1989 Agreement. By order dated September 29, 1997, this Court, severed that issue and scheduled it for trial on October 27. Therefore, that issue is not presently before the Court.<sup>2</sup>

### Discussion

#### I. The Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file,

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<sup>2</sup>Conroy also claimed that the plan for constructing the retail portion of the project jeopardized his ability to build an office tower and, in a related action (Alexius C. Conroy, et al. v. J. Daniel Lugosch III, et al., C.A. No. 97-507-T) sought to enjoin construction pending arbitration of the issue. However, on the day scheduled for hearing on his motion for a preliminary injunction, Conroy opted not to go forward at that time and the matter was referred to arbitration.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if there is evidence sufficient to establish that a factual dispute exists and, that a trial is required in order to make a decision between the parties' two versions of the truth. Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party and must draw all reasonable inferences in that party's favor. United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992).

Since an amendment to the 1989 Agreement provides that "the Agreement . . . shall be governed by the laws of the State of New York," this Court must look to New York law in making its decision.

## II. The Right of First Refusal

Conroy's "right of first refusal" is set forth in § VII.A.1. of the 1989 Agreement. That section, which is entitled "Transfer Restrictions", provides, in relevant part:

"(ii) . . . Pyramid shall not directly or indirectly transfer its interest in the Retail Project, provided that Pyramid may assign its interest in the Retail Project to any entity controlled by the Key Partners. The foregoing prohibition shall also apply to direct or indirect transfers of ownership interests in . . . Pyramid if, as a result of such transfer . . . Pyramid . . . ceases to be a person or entity satisfying the requirements stated in . . . (ii). The foregoing shall not, however, prohibit the sale of . . . the Retail

Project, . . . by the applicable general partner,  
provided that any such sale prior to the completion of .  
. . the Retail Project . . . shall be subject to a right  
of first refusal in Conroy . . ."

(emphasis added)

Conroy contends that the right of first refusal conferred by the last sentence was applicable to Lugosch's purchase of Congel's general partnership interest in Pyramid (i.e., PPG). However, that contention is erroneous, as a matter of law.

In determining what triggers Conroy's right of first refusal, the Court must begin by examining the terms of the 1989 Agreement. If those terms are clear and unambiguous, the inquiry ends there and the terms must be applied as written. W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990). If an ambiguity exists, extrinsic evidence may be considered to ascertain the intent of the parties. Kailasanathan v. Mysorekar, 651 N.Y.S.2d 124, 125 (App. Div. 1996); Mercury Bay Boating Club Inc. v. San Diego Yacht Club, 557 N.E.2d 87, 93 (N.Y. 1990). Whether or not the provisions of an agreement are ambiguous is a question for the Court to decide. W.W.W. Assocs., Inc., 566 N.E.2d at 642; Kailasanathan, 651 N.Y.S.2d at 125.

The transfer restrictions contained in Section VII.A.1. refer to only three kinds of transactions involving Pyramid. They are:

1. A transfer of "Pyramid[']s . . . interest in the Retail Project" unless the transfer is made "to any entity controlled by the Key Partners."
2. Transfers of "ownership interests in . . . Pyramid" if the result is that Pyramid ceases to be controlled by the

"Key Partners."

3. "The sale of . . . the Retail Project" by Pyramid as "the applicable General Partner."

The manifest purpose of those prohibitions regarding the first two categories of transactions, namely, transfers of Pyramid's interest in the Retail Project and transfers of ownership interests in Pyramid, is to insure that Pyramid's "Key Partners" remain involved in the project. Indeed, Conroy himself asserts that one purpose of the 1989 Agreement was to prevent Congel and Lugosch from being replaced by less qualified individuals whose involvement might diminish the prospects for success of the project.

However, it is clear that Conroy's right of first refusal applies only to the third category of transactions, namely, "sale of . . . the Retail Project" by the Retail Project limited partnership's general partner which, the 1989 Agreement contemplated would be Pyramid. Section VII.A.1. permits that kind of a sale "provided that any such sale prior to the completion of . . . the Retail Project . . . shall be subject to a right of first refusal in Conroy. . . ." (emphasis added). The term "any such sale" to which the right of first refusal refers can be construed only as Pyramid's sale of the Retail Project and cannot be deemed to include "transfers" of Pyramid's interest in the project or "transfers" of interests in Pyramid which are the subject of separate and distinct prohibitions.<sup>3</sup>

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<sup>3</sup>Even if Conroy's right of first refusal extended to transfers of "Pyramid's" interest . . . in the Retail Project" the sale of Congel's interest in Pyramid could not be considered

Having determined that Conroy's right of first refusal applies only to "the sale of . . . the Retail Project" by Pyramid, as the Retail Project limited partnership's general partner, the only remaining question is whether Lugosch's purchase of Congel's interest in Pyramid constituted such a sale. Sections I.B.-I.D. of the 1989 Agreement define the "Retail Project" as consisting of the "approximately 900,000 square feet of retail space" and "parking for approximately 4,000 automobiles" to be constructed on the site. The agreement provides for development of the Retail Project by a limited partnership to be formed by Pyramid and Conroy (i.e., the "Retail Venture") in which Pyramid, as the general partner, would have a 90% interest and Conroy, as the limited partner, would have a 10% interest. Sections V.A. and B. and I.K. It also required Conroy, in consideration of an \$8 million payment by Pyramid, to assign his options to purchase the site to that limited partnership. In short, the agreement contemplated that ownership of the site and authority to develop the Retail Project would be vested in a limited partnership of which Pyramid was to be the general partner.

Accordingly, the sale of Congel's interest in Pyramid was not a "sale of . . . the Retail Project . . . by the applicable General Partner." Congel did not sell "the Retail Project" or even any interest in the Retail Project. What he sold was his interest in

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such a transfer. Furthermore, as already noted, whether the sale of Congel's interest violated the prohibition against certain transfers of ownership interest in Pyramid is not a question presented by this motion for summary judgment. It is the subject of the October 27, 1997, trial.

Pyramid. Moreover, Congel's sale was not a sale by "the applicable General Partner" of the Retail Project. That general partner was Pyramid. Congel was merely a general partner in Pyramid. Indeed, Pyramid retained its interest in the project. The sale by Congel simply eliminated him as one of Pyramid's general partners.

Briefly stated, Lugosch's purchase of Congel's interest in Pyramid (a/k/a PPG) did not trigger Conroy's right of first refusal because it was not a "sale of . . . the Retail Project . . . by the applicable General Partner." Therefore, the plaintiffs are entitled to partial summary judgment in the form of a declaration to that effect.

### III. The Nomura Financing

In seeking a declaration that the Nomura "financing" does not violate the 1989 Agreement, the plaintiffs cite a potpourri of violations alleged by Conroy. Some of the allegations appear to border on the frivolous. For example, Conroy asserts that the Nomura loan violates his rights because, in the event of default, Nomura may foreclose on the entire Retail Project, thereby rendering his 10% limited partnership interest worthless. (Conroy Compl. ¶ 58(c)).<sup>4</sup> That assertion seemingly rests on the false premise that a limited partnership interest vests a limited partner with an ownership interest in specific assets of the partnership as opposed to an interest in the partnership, itself. Moreover, it

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<sup>4</sup>References made to allegations contained in Conroy's complaint in the related case of Alexius C. Conroy, et al. v. J. Daniel Lugosch III, et al., C.A. No. 97-507-T, are included only for the purpose of clarifying the nature of his claims.

ignores the fact that the 1989 Agreement confers on Pyramid, as the general partner, full authority to arrange for financing necessary to complete the Retail Project (Section V.C.) and that pledging partnership assets as security is a customary requirement for obtaining financing. Under these circumstances, it is absurd to suggest that a loan requiring a mortgage on partnership assets violates the rights of a limited partner because the mortgage does not exclude a portion of the assets equal to that partner's percentage interest in the partnership.

In addition, Conroy claims that Lugosch improperly applied \$20 million of Nomura's loan to PPGLP to purchase Congel's interest in Pyramid. (Conroy Compl. ¶ 58(b)). However, although the contract of sale between Congel and Lugosch could be construed in that way, Lugosch's affidavit makes it clear that the \$20 million payment was repayment for a portion of approximately \$32 million previously advanced by Congel to PPG to enable the Retail Project to proceed and that the consideration for the transfer of Congel's partnership interest was a \$9 million promissory note from Lugosch personally. That affidavit is unchallenged.

Conroy's next claim is that the Nomura "financing" triggered his right of first refusal. As already noted, Conroy's right of first refusal is applicable only to "the sale of . . . the Retail Project . . . by the applicable general partner." Conroy contends that, because part of the consideration for the Nomura loan was the issuance of warrants allowing Nomura to purchase a "Special Limited Partnership Interest" in PPGLP, his right of first refusal was

triggered. Specifically, Conroy points out that the special interest, in effect, was a right to receive between 55% and 75% of the cash flow generated by the Retail Project which he argues casts the transaction as the sale of an equity interest rather than a financing arrangement. That argument is flawed for several reasons.

First, the right to receive warrants was only one feature of the rather complex financing arrangement between PPGLP and Nomura. The heart of the transaction was a series of loans aggregating approximately \$370 million, secured by pledges of the partnership's assets, which was to be repaid over a specified period of time together with interest. The interest rate was to be enhanced by a percentage of the cash flow generated by the Retail Project. As an alternative to the enhanced interest rate, at the anticipated time of completion, Nomura had the option to receive the aforesaid warrants. That right must be considered in the context of the entire transaction giving rise to the right rather than in isolation. Viewed in that light, it is difficult to conceive of the terms of the right of first refusal that Conroy claims is applicable. A right of first refusal is a right to purchase on the same terms offered to another purchaser. See Yudell Trust I v. API Westchester Assocs., 643 N.Y.S.2d 161, 162 (App. Div. 1996); Black's Law Dictionary 1325 (6th ed. 1990). Thus, any right of first refusal by Conroy would have to be construed as the right to receive between 55% and 75% of the cash flow generated by the Retail Project in exchange for loaning \$370 million upon the terms

and conditions specified in the Nomura loan documents. Implying such a right would be nonsensical.

More fundamentally, even if the Nomura "financing" properly is characterized as the transfer of an equity interest, a matter that the Court need not decide at this time, it would not trigger Conroy's right of first refusal. As already noted, the right of first refusal applies only to "the sale of . . . the Retail Project . . . by the applicable General Partner." A "sale" involves a transfer of title or ownership. Here, there was no transfer to Nomura of title to or ownership of the Retail Project. As previously stated, the Retail Project consisted of the retail space and parking facilities to be constructed on the site. Ownership of the Retail Project remained in PPGLP. What Nomura received was PPGLP's interest in a portion of the cash flow generated by the project which is separate and distinct from a transfer of the assets of the project itself. See 59A Am. Jur. 2d Partnership § 390 ("A transfer of a partnership interest is not a sale of specific property belonging to the partnership or an interest in specific property."); cf. McKernan v. Doniger, 555 N.Y.S.2d 517, 518 (App. Div. 1990) ("Plaintiff's interest in the partnership is an interest in personal property, not an interest in the real property owned by the partnership."). However, while such a transfer, arguably, might violate some other provision of the 1989 Agreement, it did not trigger Conroy's right of first refusal.

Conroy also claims that the Nomura mortgage interferes with

his right to proceed with the Office Development because it does not exclude the "air rights" to the space in which the office tower may be built; and, therefore, would permit Nomura to foreclose on those air rights in the event of a default by PPGLP. (Conroy Compl. ¶ 58(d)). Lugosch does not dispute the contention that the air rights should be excluded from the Nomura mortgage. Instead, he has submitted a commitment letter from Nomura agreeing to exclude them from the mortgage securing its permanent loan. That letter makes Conroy's claim with respect to the permanent loan premature at best. However, there are three stages of financing being provided by Nomura: an interim loan to allow PPGLP to pay some of its debts and to exercise the options to purchase the land, a development loan to replace the interim loan and to provide additional funds for construction, and a permanent loan to provide the long term financing for the completed project. The interim loan already has been made<sup>5</sup> and the mortgage securing it does not explicitly exclude the "air rights" for the office tower. Consequently, unless and until Nomura provides a partial release excluding the "air rights" from its mortgages, the possibility of foreclosure on those rights exists and summary judgment is inappropriate with respect to this claim.

Conroy's final claim is that the Nomura "financing" impermissibly dilutes his interest in the Retail Project limited partnership. That claim is based upon section V.B. of the 1989

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<sup>5</sup>It is not clear whether the development loan has been finalized.

Agreement which provides that: "The Conroy limited partnership interest shall not be subject to dilution at any time or for any reason."

The Lugosch plaintiffs concede that, if Nomura exercises its warrants to acquire a "Special Limited Partnership Interest in PPGLP," Conroy's share of the cash flow generated by the Retail Project will decrease from 10% to 4.5%.<sup>6</sup> However, they contend that this would not amount to a dilution of Conroy's partnership interest because, without the "financing," the Retail Venture would have failed and Conroy's interest would have been worthless.

That argument rests on the premise that determining whether an event dilutes a partnership interest turns not on a comparison of the percentage interests in the partnership before and after the event; but, rather, that it turns on the respective values of those interests. Lugosch presents no authority for that premise; but, even if the premise is valid, the record is devoid of any facts that would permit the Court to conclude, as a matter of law, that the Nomura "financing" enhanced the value of Conroy's limited partnership interest. The Lugosch plaintiffs rely on evidence that, prior to the "financing" the project was in financial trouble; a reference in Conroy's Statement of Disputed Facts that the project was heading for failure and on passages in Conroy's

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<sup>6</sup>A "Special Limited Partnership Interest" would entitle Nomura to between 55% and 75% of the cash flow which would reduce the existing partners shares pro rata. Thus, if Nomura obtained a 55% interest, Conroy's share would be decreased to 4.5%. If Nomura obtained a 75% interest, Conroy's share would be reduced to 2.5%.

memorandum of law. Those references fall far short of establishing that the Nomura "financing" enhanced Conroy's partnership interest.

It might be argued that any diminution of Conroy's partnership interest that did result from the Nomura transaction was permissible because it was merely incidental to a financing arrangement that, under the terms of the 1989 Agreement, the general partner had full authority to make. However, as previously stated, Conroy contends that the transaction with Nomura was not a "financing" arrangement. Although the Lugosch plaintiffs have provided the documentation for the Nomura transaction, it is impossible to determine, based solely on a review of those documents, whether some of the terms, including those relating to the issuance of warrants, are customary in "financings" of this nature or, alternatively, whether they require that the transactions be classified as something other than a "financing."

Consequently, summary judgment cannot be granted with respect to Conroy's claim that the "financing" violated the "anti-dilution" provisions of the 1989 Agreement.

#### **Conclusion**

The Lugosch plaintiff's motion for partial summary judgment is granted to the extent that judgement may enter with respect to Count I of the complaint declaring:

1. that, under the terms of the 1989 Agreement, Lugosch's purchase of Congel's interest in PPG did not trigger a right of first refusal by Conroy,
2. that the plaintiffs did not violate Conroy's rights under

the 1989 Agreement by giving to Nomura, as security for its loans, mortgages permitting Nomura, in the event of default, the ability to foreclose on the Retail Project,

3. that Lugosch did not improperly use Nomura loan proceeds to buy out Congel's interest in PPG (i.e., Pyramid),

4. that, under the terms of the 1989 Agreement, the Nomura "financing" did not trigger a right of first refusal by Conroy.

The motion for partial summary judgment is denied to the extent that it seeks a declaration:

1. that the Nomura "financing" did not interfere with Conroy's rights to develop the Office Project by failing to exclude the office tower "air rights" from the mortgage, and

2. that the "financing" did not violate the anti dilution provisions of Section V.B. of the 1989 Agreement.

IT IS SO ORDERED:

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Ernest C. Torres  
United States District Judge

Date: \_\_\_\_\_  
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