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Developer Can't Block Resort's Casino: NY Appeals Court

By **Matthew Perlman**

Law360, New York (July 30, 2015, 4:54 PM ET) -- A New York appeals court said Thursday that the Adelaar resort could build a casino on its upstate property because a neighboring developer hadn't met the terms of a deal that would have given it the exclusive right to build a casino in the area.

A Sullivan County Appellate Court panel upheld a decision granting summary judgment in favor of the defendant, EPT Concord LLC, a subsidiary of EPR Properties. The company had a casino development agreement with plaintiff Concord Associates that included financing requirements and a restrictive covenant prohibiting EPR from constructing a casino on its own resort property in Thompson, New York, which is currently under development.

The restrictive covenant was set to expire at the end of 2011 if Concord Associates failed to satisfy the financing requirements of their agreement, which included securing a traditional construction loan for \$275 million guaranteed by Concord Associates principal Louis R. Cappelli. Once Concord Associates realized it would not be able to obtain such a loan, it proposed issuing a \$395 million high-yield bond instead.

EPR rejected the alternative financing plan, and Concord Associates sued seeking a declaration that its bond issuance satisfied the terms of the agreement between the two companies. Meanwhile, EPR started to build its own casino. The New York Supreme Court and the appeals panel both found that the agreement had not been satisfied, and that EPR could continue to build its gaming project.

"The parties clearly intended to ensure that plaintiffs comply with the [master credit agreement's] material terms and not simply its overall objectives. This, plaintiffs failed to do," the panel's memorandum and order says.

An attorney for EPR said his client was pleased with the outcome, and that it removed any doubt about its right to build a casino in the Adelaar resort.

"We're obviously very pleased with the decision," Y. David Scharf told Law360. "Because it ends litigation and allegations that there were impediments to the development of the casino site."

Concord Associates originally owned both parcels of land, purchasing 1,600 acres in the county in 1999 with the intention of developing a resort and casino. It borrowed \$162 million for the project from EPR in 2007, securing the debt with its real estate. Concord Associates later defaulted on the loan, and most of the property was transferred to EPR's ownership.

At the time of the default, the two companies entered into the disputed agreement, where

EPR would refrain from building a casino as long as Concord's plan proceeded under the stipulated conditions.

During the Supreme Court trial, Concord Associates tried to have acting Supreme Court Justice Frank LaBuda recused because his wife is a member of the Sullivan County Legislature and had previously voiced her support of EPR's casino proposal. The judge denied the request, saying he was unaware of his wife's remarks and that her public support of the project would not impact his impartiality.

The appeals panel, in its order, wrote that Justice LaBuda should have recused himself, especially in light of the decision he wrote that said a finding in favor of Concord Associates would be "against public policy."

"These reassurances were belied by the language of the order awarding summary judgment to defendants," the panel wrote.

The panel's opinion on the judge's recusal did not impact the outcome of the case, because the Appellant court has original jurisdiction.

Concord Associates previously **lodged and lost** a \$750 million antitrust suit against EPR, on the grounds that the resort would constitute a monopoly in the region.

An attorney for Concord Associates could not be reached for comment Thursday.

Concord Associates is represented by Alfred E. Donnellan of DelBello Donnellan Weingarten Wise & Wiederkehr LLP.

EPT is represented by Kristin T. Roy and Y. David Scharf of Morrison Cohen LLP.

The case is Concord Associates LP v EPT Concord LLC, case number 519886, in the Supreme Court of the State of New York, Appellate Division, Third Judicial Department.

--Editing by John Quinn.

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