(ENDORSED)

FILED

DEC 27 2005

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY Shelley Mitchell DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SHORELINE AMPHITHEATER PARTNERS, a California Limited Partnership, By and Through Its General Partner, SHORELINE AMPHITHEATRE LIMITED, a California Corporation, and BILL GRAHAM PRESENTS, INC., a California Corporation,

Plaintiffs,

v.

CITY OF MOUNTAIN VIEW, and SHORELINE REGIONAL PARK COMMUNITY,

Defendants,

AND RELATED CROSS ACTION.

Case No. 1-03-CV000706

Order re: Motion for Summary Judgment and Summary Adjudication by Defendants City of Mountain View and Shoreline Regional Park Community and Motion for Summary Adjudication by Cross Defendants Shoreline Amphitheatre Partners and Bill Graham Presents, Inc.

The Motion for Summary Judgment and Summary Adjudication by Defendants City of Mountain View and Shoreline Regional Park Community and the Motion for Summary Adjudication by Cross Defendants Shoreline Amphitheatre Partners and Bill Graham Presents, Inc. came on for hearing before the Honorable William J. Elfving on December 15, 2005 at 9:00 a.m. in Department 2. The matters having been submitted, the Court orders as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On June 20, 1986, Shoreline Amphitheater Partners ("SAP") entered into a 35 year lease ("the Lease") with the City of Mountain View and Shoreline Regional Park Community ("City"). The Lease permitted Partnership to construct, promote and operate the Shoreline Amphitheater ("Amphitheatre") on City property, and sublease it to Bill Graham Presents ("BGP").

Prior to 2000, each car that parked at Amphitheatre was charged a parking fee at the entrance to the parking lot ("the A/B Lot"). During the 2000 concert season, BGP discontinued this practice and began adding a $4 parking fee to each ticket. City closed the A/B Lot and began requiring use of the Crittenden Lot. Disputes arose as to whether the Crittenden Lot is comparable to the A/B Lot and the $4 parking fee counts as part of Gross Receipts.

In July 2003, SAP received a draft Special Procedure Report prepared by Maze and Associates ("Maze") for the year 2000. SAP took issue with Maze's conclusion that City was due additional rent on parking charges that were collected on the ticket. On July 10, 2003, Partnership and BGP ("Plaintiffs") filed this action against City and Maze. In September 2003, Plaintiffs filed a First Amended Complaint alleging: (1) declaratory relief re: parking income; (2) tort of another (against Maze only); (3) interference with contract (against Maze only); (4) specific performance; (5) breach of contract; (6) inverse condemnation; and (7) declaratory relief re: indemnity obligations. On October 17, 2003, City filed a Cross Complaint alleging: (1) accounting; (2) breach of contract; (3) declaratory relief re: Lease termination; (4) conversion of public funds; (5) violation of the False Claims Act; (6) breach of covenant of good faith and fair dealing; (7) theft of public funds; (8) racketeering ("RICO"). In November 2003, Plaintiffs dismissed Maze, without prejudice.

DISCUSSION

The Court declines to render formal evidentiary rulings, but has disregarded all incompetent and inadmissible evidence in ruling upon this motion. [See Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1419-1420.]

I. City's Motion for Summary Judgment or Summary Adjudication

A. First Cause of Action – Declaratory Relief re: Parking Income

Plaintiffs' first cause of action seeks a declaration that parking income from concert events is excluded from "Gross Receipts" regardless of the method of collection, even if charged as part of the ticket price and whether or not separately indicated on the ticket. It also seeks a declaration that City's only right to share in parking income is pursuant to the Jaeck Letter and that Plaintiffs have properly accounted for all monies due and owing and have paid all monies due and owing on the Jaeck Letter.

City failed to meet its initial burden of showing that the first cause of action has no merit. The Lease is ambiguous as to whether the $4.00 parking fee is a "Surcharge" that may not be withheld from "Ticket Sales" absent City's approval, or whether it is excluded from "Gross Receipts." [Compare Section 3.01(a) and Section 6.08.] Resolution of this ambiguity is a triable issue of material fact. [See Alexander v. Codemasters Group Limited (2002) 104 Cal.App.4th 129, 147.] Accordingly, City's motion for summary judgment is denied and City's motion for summary adjudication of Plaintiffs' first cause of action is denied.

B. Fourth and Fifth Causes of Action – Breach of Contract

Plaintiffs' fourth cause of action seeks specific performance of City's contractual obligation to provide "proximate land" to Plaintiffs upon closure of the A/B Lot. Alternatively, Plaintiffs' fifth cause of action seeks money damages for City's breach of its contractual obligation to provide "proximate land" to Plaintiffs upon closure of the A/B Lot.

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." [Civil Code § 1644.] The word "proximate" ordinarily refers to physical closeness.

In support of its motion for summary adjudication of the fourth and fifth causes of action, City introduced competent evidence that the replacement parking lot, i.e., the Crittenden Lot is

physically closer to the Amphitheatre than the (old) A/B Lot. [See MF 22.] This evidence raises and inference that City fulfilled its obligation to provide "proximate land" to Plaintiffs upon closure of the A/B Lot and is sufficient to meet City's initial burden of proof.

In opposition, Plaintiffs introduced evidence that City expressed, in writing, its "commitment to BGP for an equivalent transfer of parking spaces and traffic circulation, for both pre-concert event loading and post concert exiting." [See Fong declaration, Exhibit M.] City also referred to the completion of the Crittenden site fill and grading project as part of being a large step forward in meeting the North Bayshore Traffic and Circulation Plan and "maintaining the current level of North Bayshore traffic circulation." [See Fong declaration, Exhibit N.]

Plaintiffs' evidence does not raise a triable issue as to the proper interpretation of "proximate" as used in Sections 6.01 and 6.03 of the Lease. At best, Plaintiffs' evidence suggests that City might have a *separate* commitment to provide for an "equivalent" transfer of parking spaces and traffic circulation. Plaintiffs cannot defeat a summary adjudication motion by presenting evidence that supports a claim not raised in the pleadings. [See Government Employees Ins. Co. v. Superior Court (2000) 79 Cal.App.4th 95, 98.] Accordingly, City's motion for summary adjudication of Plaintiffs' fourth and fifth causes of action is granted.

C. Sixth Cause of Action – Inverse Condemnation

Plaintiffs' sixth cause of action alleges that City substantially interfered with Plaintiffs' operation of the Amphitheatre by requiring Plaintiffs to vacate the A/B Lot and use the Crittenden Lot. Plaintiffs seek economic damages for inverse condemnation.

City offered only one material fact in support of its motion for summary adjudication, namely that Plaintiffs Shoreline Amphitheatre Partners and Shoreline Amphitheatre Limited are the lessees under the June 20, 1986 Lease with the City of Mountain View for the Shoreline Amphitheatre in Mountain View and Plaintiff Bill Graham Presents is the sub-lessee under the Lease. [MF 36.] City did not present any material facts concerning whether the A/B Lot was part of the property leased to Plaintiffs, whether Plaintiffs agreed that their use of the A/B Lot would be temporary, whether the Lease gave City the absolute right to close the A/B Lot, and the

manner in which City required Plaintiffs to vacate the A/B Lot. As a result, City failed to meet its initial burden of proving that sixth cause of action has no merit. Accordingly, City's motion for summary adjudication of Plaintiffs' sixth cause of action is denied.

D. Seventh Cause of Action – Declaratory Relief re: Indemnity Obligations

Plaintiffs' seventh cause of action alleges that the Lease obligates Plaintiffs to defend claims for injuries to patrons involved in accidents. [¶ 95.] City created a public safety hazard by substituting the Crittenden Lot for the A/B Lot. Plaintiffs have attempted to mitigate the hazard by employing additional personnel at their cost and expense. [¶ 96.] An actual controversy exists concerning whether Plaintiffs should be excused from any indemnity obligations arising from accidents caused by the public safety hazard at Shoreline Boulevard. [¶ 97.]

Whether City created a public safety hazard by substituting the Crittenden Lot for the A/B Lot is an abstract legal issue that is not a proper subject of declaratory relief. Further, City introduced competent evidence sufficient to raise an inference that the substitution did not create a public safety hazard. [See MF 37.] Even if the substitution created a public safety hazard, Plaintiffs would still be obligated to use due care in operating the Crittenden Lot. If a person entering or leaving the Crittenden Lot is nevertheless involved in a motor vehicle accident, there will be an issue regarding the proportionate fault, if any, of Plaintiffs and City that will have to be resolved on a case by case basis. In conclusion, City met its initial burden of proving that the seventh cause of action has no merit. [See Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, 1402.] Plaintiffs failed to raise a triable issue of material fact. Accordingly, City's motion for summary adjudication of Plaintiffs' seventh cause of action is granted.

II. SAP and BGP's Motion for Summary Adjudication

A. Fourth Cause of Action – Conversion of Public Funds

In Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, the Court of Appeal stated that "[m]oney can be the subject of an action for conversion if a specific sum capable of identification is involved." [Id. at 452.] However, it did not state that the specific sum must be

alleged in the complaint. As a practical matter, the plaintiff cannot plead the specific sum where the defendant is in sole possession of the records needed to determine that sum. In these cases, the Court believes it to be sufficient for the plaintiff to identify the nature of the money that was allegedly converted, estimate the amount, and plead the elements of conversion: (1) the plaintiff's ownership or right to possession of the money at the time of the conversion; (2) the defendant's conversion by a wrongful act; and (3) damages. [Id. at 451.]

Neither legal title nor absolute ownership of the property is necessary. A party need only allege it is entitled to immediate possession at the time of conversion. However, a mere contractual right of payment, without more, will not suffice. For example, the breach of a promise to pay rent from the proceeds of the crops raised on leased land does not give rise to a cause of action for conversion. [Id. at 452.]

In this case, City's fourth cause of action for conversion alleges facts sufficient to establish that City has a contractual right to a fixed percentage of Gross Receipts collected by Cross Defendants arising out of performances occurring at the Amphitheatre. On or before the 10th day of each month, Cross Defendants are contractually required to tender to City the specific sum due from the Gross Receipts received during the preceding calendar month. As part of a scheme to avoid the full measure of rent due under the Lease, Cross Defendants intentionally concealed and misclassified some of the Gross Receipts arising out of performances occurring at the Amphitheatre. These allegations are not sufficient to state a cause of action for conversion.

City opposes Cross Defendants' motion for summary adjudication on the ground that Cross Defendants are acting as City's agent for the purpose of collecting revenue from the Amphitheatre. Cross Defendants converted the specific sum of $109,436 in June 2005 when they withheld that amount from their future rent obligations over City's objection.

The first flaw in City's argument is its assertion that Cross Defendants are acting as City's agent when they collect revenue from the Amphitheatre. On the contrary, the allegations of the Cross Complaint and the provisions of the Lease establish that Cross Defendants have sole title to all of the revenue they collect from the Amphitheatre. City has no title to or lien upon any of the revenue but is contractually entitled to a fixed percentage as rent.

The second flaw in City's argument is its assertion that Cross Defendants are obligated to obtain City's consent before deducting any amounts from the monthly rent obligation. Under Section 3.06 of the Lease, Cross Defendants are obligated to pay rent when due without notice or demand and without abatement, reduction or setoff. However, under Section 3.02, if the annual reconciliation reflects an overpayment of rent for a Lease Year, then Cross Defendants were entitled to deduct that amount from the next rent payment due. City's evidence in opposition to Cross Defendants' motion for summary adjudication indicates that Cross Defendants deducted the sum of $109,436 pursuant to their rights under Section 3.02 of the Lease. [See Exhibits G, H, and I to Declaration of William C. Tayler.]

In conclusion, City's fourth cause of action fails to allege facts sufficient to state a cause of action for conversion of public funds. Additionally, City failed to demonstrate a reasonable possibility that it can amend the fourth cause of action to state a bona fide cause of action for conversion. [See Weil & Brown (2005) Civil Procedure Before Trial § 7:336, p. 7-94.18.] Accordingly, Cross Defendants' motion for summary adjudication of City's fourth cause of action is granted.

B. Fifth Cause of Action – Violation of False Claims Act ("FCA")

City's fifth cause of action alleges that, in violation of the FCA, Cross Defendants knowingly submitted to City false documentation and false and inaccurate records in order to reduce their rent obligations to City.

The lowest level of intentionality that satisfies the FCA is acting in reckless disregard of the truth or falsity of the information. The improper interpretation of a contract does not constitute a false claim. Something beyond mere negligence, but falling short of specific intent, must be shown for liability to attach. [See United States v. Basin Electric Power Cooperative (8th Cir. 2001) 248 F.3d 781, 792.] The reasonableness of the defendant's interpretation and performance under the contract is relevant to whether the defendant knowingly submitted a false claim. [Id. at 805.] In cases involving issues of contract interpretation, the question is whether the defendant's asserted interpretation is so plainly lacking in merit that the requisite state of

mind can be inferred. [See Commercial Contractors, Inc. v. United States (Fed. Cir. 1998) 154 F.3d 1357, 1366.]

In support of their motion for summary adjudication, Cross Defendants rely solely on the following material facts: From 1986 – 2004, their rent calculations have been audited annually by an outside auditor. [MF 14.] From 1986 – 2000, the City's auditors have audited Plaintiffs' rent calculations. [MF 15.] The City Council has approved its auditors' reports up to December 31, 1999. [MF 16.]

The foregoing material facts say nothing about Cross Defendants' interpretation of the Lease, their state of mind, or the truthfulness of the information they submitted to City. Even if the information Cross Defendants submitted to City up to Lease Year 1999 was 100% truthful, this is not a defense because the fifth cause of action concerns the information Cross Defendants submitted to City beginning with Lease Year 2000. Accordingly, Cross Defendants' motion for summary adjudication of City's fifth cause of action is denied.

C. Seventh Cause of Action – Theft of Public Funds

Subdivision (c) of Penal Code § 496 states that any person who has been injured by a violation of subdivision (a) or (b) may bring a civil action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees. In City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, the allegation that Merrill Lynch knowingly received property obtained from appellants by means of fraudulent representations was held sufficient to state a cause of action for receipt of property obtained by means of theft under Penal Code §§ 484 and 496. [Id. at 484 – 485.]

Under subdivision (a) of Penal Code § 496, it is illegal to conceal or withhold any property from the owner, knowing the property to be obtained in any manner constituting theft. Under Penal Code § 484, every person who shall "knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money ... is guilty of theft." City's seventh cause of action alleges that Cross Defendants have engaged in a continuing theft of public funds in that, on multiple occasions, they used fraud and pretense to cause City to

believe that Cross Defendants had tendered all of the rent owed under the Lease. These allegations are sufficient to state a cause of action for theft under Penal Code §§ 484 and 496.

In support of their motion for summary adjudication, Cross Defendants rely upon the material facts that, from 1986 – 2004, their rent calculations have been audited annually by an outside auditor and by City's auditors and the City Council has approved its auditors' reports up to December 31, 1999. [MFs 18 – 20.] For the reasons previously discussed in connection with City's fifth cause of action, these material facts fall short of meeting Cross Defendants' initial burden. Accordingly, Cross Defendants' motion for summary adjudication of City's seventh cause of action is denied.

D. Eighth Cause of Action – Violation of RICO

1. Existence of RICO Enterprise

Cross Defendants argue that the RICO enterprise must exist separate and distinct from the alleged racketeering activity. In support of this argument, they cited several federal court opinions. They also cited Gervase v. Superior Court (1995) 31 Cal.App.4th 1218, 1229 for the proposition that, because RICO is a federal statute, United States Supreme Court decisions are binding and intermediate federal court opinions are entitled to great weight. However, they failed to mention that, after analyzing the relevant United States Supreme Court decisions and federal court opinions, the Gervase court rejected "the suggestion that a RICO enterprise must have an existence separate and apart from the racketeering activities in which the enterprise engages." [Id. at 1236.]

Even if Gervase were not good authority, on summary adjudication, the initial burden would be on Cross Defendants to show that City cannot establish the element of the existence of a RICO enterprise separate and apart from the racketeering activities from which the enterprise engages. [See CCP § 437c(p)(2).] Cross Defendants failed to meet this initial burden. The evidence cited by Cross Defendants shows that the association-in-fact enterprise is alleged to consist of the various parties, Cross Defendants' parent corporations, and their respective agents, employees, officers, and directors. [See MF 1.] The enterprise is alleged to make decisions in

the following manner: (a) Cross Defendants calculate the amount of rent owed to City under the Lease and tender that amount with supporting documentation to City; (b) City accept Cross Defendants' rent payments; and (c) the parties engage in an annual reconciliation process to determine if there was an underpayment or overpayment. [See MF 2.] Cross Defendants are alleged to have engaged in a scheme to defraud City of revenue owed from the operation of and events at the Amphitheatre. [See MF 3.]

2. Pattern of Racketeering Activity

a. Mail and Wire Fraud

Cross Defendants acknowledge that, in response to special interrogatories, City provided a list of documents prepared by Cross Defendants that allegedly misstate and/or conceal the actual amount of rent owed under the Lease. Cross Defendants complain that City failed to provide any facts indicating specifically what the false content was and what the individual role of BGP and SAP was in perpetrating the fraud. Cross Defendants also complain that City failed to provide any facts suggesting that Cross Defendants mailed or wired the documents with the specific intent to defraud City. Cross Defendants conclude that City's discovery responses prove that City cannot establish the mail and wire fraud upon which its RICO claim is based.

In response to special interrogatories propounded by Cross Defendants, City stated that, from 1999 through the present, when calculating rental payments to City, Cross Defendants fraudulently failed to include the parking fee included on the face of each ticket, the value of barter transactions relating to the Amphitheatre, the revenue from house rentals, such as the Dali Lama, the Bridge Concert, and the KMEL Summer Jam, the value of ticket sales by ticket vendors not identified in the Lease, the gross receipts for concerts occurring at HP Pavilion, SBC Park, and Spartan Stadium, and revenues received from Cross Defendants' agreement with Ticketmaster. [See MF 4 – 8.]

City's discovery responses appear to be responsive to the special interrogatories propounded by Cross Defendants and provide sufficient information concerning the nature of the mail and wire fraud upon which City's RICO claim is based. If Cross Defendants deemed City's

responses to be nonresponsive or evasive, then their remedy was to bring a motion to compel further responses. City's responses do not contain any admission that City lacks the evidence needed to prove the elements of mail and wire fraud. As a result, Cross Defendants failed to meet their initial burden of proof.

b. Scheme to Defraud

Cross Defendants argue that City cannot establish the element of a scheme to defraud because any such scheme easily could have been discovered by City under the audit rights conferred in the Lease. However, Cross Defendants failed to present evidence that that City had easy access to all of the information that it needed to determine whether Cross Defendants were affirmatively misrepresenting Gross Receipts as part of a scheme to defraud City of rent due under the Lease. As a result, Cross Defendants failed to meet their initial burden of proof.

3. Conspiracy under 18 U.S.C. § 1962(d)

Cross Defendants also argue that City has no evidence to support its claim for conspiracy under 18 U.S.C. § 1962(d). City's eighth cause of action does not allege a claim for conspiracy and City has not requested leave to amend the Cross Complaint to allege such a claim. Accordingly, the issue is not properly before the Court.

In conclusion, Cross Defendants failed to meet their initial burden of showing that City cannot establish one or more elements of the eighth cause of action or that there is a complete defense to that cause of action. [See CCP § 437c(p)(2).] Accordingly, Cross Defendants' motion for summary adjudication of City's eighth cause of action is denied.

E. Denial of Summary Adjudication Pursuant to CCP § 437c(h)

The declaration of William C. Tayler fails to meet the requirements of CCP § 437c(h) or otherwise establish good cause for a continuance. Additionally, City's failure to specifically request a continuance is a waiver of any objection to having the summary judgment motion heard prior to resolution of the discovery issues. [See Lewinter v. Genmar Industries, Inc.

(1994) 26 Cal.App.4th 1214, 1224.] Accordingly, City's request that Cross Defendants' motion for summary adjudication be denied pursuant to CCP § 437c(h) is denied.

Date: 12/27/05

William J. Elfving
Judge of the Superior Court

IN THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA	(ENDORSED) FILED DEC 27 2005 KIRI TORRE Chief Executive Officer/Clerk Superior Court of CA County of Santa Clara BY Shelley Mitchell DEPUTY
Plaintiff: SHORELINE AMPHITHEATER PARTNERS, a California Limited Partnership, By and Through Its General Partner, SHORELINE AMPHITHEATRE LIMITED , A California Corporation, and BILL GRAHAM PRESENTS, INC., A California Corporation	
Defendant: CITY OF MOUNTAIN VIEW, SHORELINE REGIONAL PARK COMMUNITY, MAZE AND ASSOCIATES, An Accountancy Corporation, et al.	
PROOF OF SERVICE BY MAIL OF ORDER RE: Motion for Summary Judgment and Summary Adjudication by Defendants City of Mountain View and Shoreline Regional Park Community and Motion for Summary Adjudication by Cross Defendants Shoreline Amphitheatre Partners and Bill Graham Presents, Inc.	**Case Number:** 1-03-CV000706

CLERK'S CERTIFICATE OF SERVICE: I certify that I am not a party to this case and that a true copy of this document was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below and the document was mailed at SAN JOSE, CALIFORNIA on : December 27, 2005.

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