DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: July 18, 2018 9:36 AM FILING ID: 96788805CBA11 CASE NUMBER: 2018CV31475
Plaintiff: EVERGREEN ALLIANCE GOLF LIMITED, L.P., d/b/a ARCIS GOLF; v. **Defendant:** CLAYTON EARLY LEARNING, AS TRUSTEE OF THE GEORGE W. CLAYTON TRUST, a Colorado Trust.	▲ COURT USE ONLY ▲
Attorneys for Defendant: Jonathan G. Pray, #36576 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Phone: 303.223.1100 Fax: 303.223.1111 Email: jpray@bhfs.com; dmeschke@bhfs.com	Case Number: 2018CV31475 Division:

DEFENDANT'S MOTION TO DISMISS

Defendant Clayton Early Learning, as Trustee of the George W. Clayton Trust ("Clayton"), moves the Court to dismiss Plaintiff's Amended Complaint pursuant to C.R.C.P. 12(b)(5). Plaintiff Arcis Golf's ("Arcis") two claims for relief are based on the premise that Clayton's discussions with the City of Denver constitute a bona fide offer that triggered Plaintiff's right of first refusal under its lease with Clayton. Because no agreement with the City of Denver can be a legal, valid, and binding obligation—and thus a "bona fide offer" as defined under the lease—unless approved pursuant to the City's Charter and Ordinances, and no agreement was approved pursuant to these mandatory provisions, Plaintiff cannot prove any set

of facts in support of its claims that would entitle it to relief. Plaintiff's claims must be dismissed.

Certificate of Compliance with Rule 121 §1-15(8): The undersigned certifies that he conferred with Plaintiff's counsel on the previously-filed motion to dismiss. Plaintiff opposes the relief requested in this Motion.

INTRODUCTION

Clayton is a Colorado nonprofit dedicated to advancing early childhood education.[1] It was established as trustee of the George W. Clayton Trust after Mr. Clayton left the majority of his estate to establish the George W. Clayton College, which has since evolved into an early learning institution. In its role as trustee of the George W. Clayton Trust, Clayton is the lessor of real property that is the Park Hill Golf Course.

Clayton's lease with the golf course operator, Plaintiff Arcis Golf, expires at the end of 2018. In anticipation of the expiration of the lease and as part of a larger discussion about the future of the property, Clayton entered into discussions with the City of Denver that would allow the City to purchase the entire property. These discussions, however, never materialized into a legal and binding contract because, around the same time, parallel discussions with Plaintiff regarding the property deteriorated. Rather than work with Clayton on a solution to the future of the property, Plaintiff insisted that Clayton and the City had an agreement that triggered Plaintiff's right of first refusal under the lease. The City subsequently withdrew from any potential agreement and never initiated its process to approve a contract to purchase the property. Plaintiff then filed this lawsuit, asserting breach of the lease, including breach of the implied

[1] More information about Clayton, its mission, and its history can be found at its website: http://www.claytonearlylearning.org/

covenant of good faith and fair dealing, and declaratory judgment regarding its right of first refusal.

Plaintiff's claims in this case are based on a faulty reading of its right of first refusal under the lease and a misunderstanding of municipal law. Because Plaintiff's right of first refusal to purchase Clayton's fee interest in the Park Hill Golf Course is triggered only when there is a "bona fide offer," which the lease specifies must "constitute a legal, valid, and binding obligation of the purchaser," Denver's City Council must first approve the offer through ordinance or resolution. This never happened, and the lease forbids Clayton from accepting an offer that is not a "bona fide offer." Therefore, Plaintiff's claims fail and must be dismissed.

STATEMENT OF FACTS[2]

Defendant Clayton and Plaintiff Arcis, through their predecessors-in-interest, entered into a lease dated December 23, 1998 (the "Lease") concerning real property known as the Park Hill Golf Course. (Am. Compl. ¶ 1, 5–7; Ex. 1 ("Lease")). The Lease has been amended by a First Amendment to Lease dated April 30, 2004, and a Second Amendment to Lease dated February 23, 2013.[3] (Am. Compl. ¶ 5; Ex. 2 ("First Amendment"); and Ex. 3 ("Second Amendment")). The current term of the Lease expires December 31, 2018. (Lease, § 4.1).

Article 24 of the Lease provides Plaintiff with a limited right of first refusal to purchase Clayton's fee interest in the Park Hill Golf Course. (Am. Compl. ¶ 8; Lease, § 24). The relevant part of the Lease states:

[2] The Defendant is treating the allegations in Plaintiff's Complaint as true solely for purposes of this Motion. *See* C.R.C.P. 12(b)(5).

[3] Although irrelevant to the parties' dispute, Clayton contends that a Third Amendment to the Lease was never signed and executed.

> 24. RIGHT OF FIRST REFUSAL. If Lessor solicits or receives a "bona fide offer" (as defined below) to purchase Lessor's fee interest in the Leased Premises from a third party, before accepting such offer, Lessor shall notify Lessee of the terms and conditions of such offer and shall identify the proposed purchaser. An offer is considered a "bona fide offer," for purposes of this Article 24, if the offer complies with the following minimum requirements: (a) the offer must be in writing and must be an offer to purchase the entire Leased Premises, and, if accepted by Lessor, must constitute a legal, valid and binding obligation of the purchaser; (b) the offer must be by a party who is unaffiliated with Lessor (i.e., is not controlled by, under common control with, or does not control any individual or entity constituting Lessor); and (c) the offer must provide for a minimum of $50,00 [sic] in cash to be deposited into escrow upon the acceptance of the offer by Lessor, which deposit may be refundable pursuant to the terms of the offer. Thereafter, Lessee (or an affiliate of Lessee, including, without limitation, National Golf Properties, Inc., a Delaware corporation ("NGP") and any partnership in which NGP is a partner) shall have a period of thirty (30) days from receipt of Lessor's written notice within which to agree to purchase Lessor's fee interest in the Leased Premises on the terms and conditions set forth in such offer. . . . During the term of this Lease, Lessor may not accept an offer which is not a bona fide offer.

(*Id.*).

After Clayton and the City of Denver began discussing a possible purchase of the Park Hill Golf Course, which included announcements of a potential purchase price of $20.5 million and other prospective terms, Clayton contacted Plaintiff about options regarding the Lease. (*See* Am. Compl. ¶¶ 9–13). Plaintiff then demanded that Clayton's interactions with the City of Denver triggered its right of first refusal and that Clayton must offer Plaintiff the Park Hill Golf Course for purchase according to the terms discussed with the City. (*Id.* ¶ 14). The City subsequently suspended any plans it had to purchase the golf course. (*Id.* ¶ 16).

STANDARD OF REVIEW

A court must grant a motion to dismiss under C.R.C.P. 12(b)(5) if it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, or if the substantive law does not support the alleged claim. *Denver Parents Ass'n v. Denver Bd. of*

Educ., 10 P.3d 662, 664 (Colo. App. 2000). In evaluating such a motion, the court "must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007). A claim must be dismissed if, accepting the allegations of the complaint as true, the plaintiff is not entitled to relief as a matter of law. *Russell v. U.S.*, 551 F.3d 1174, 1178 (10th Cir. 2008).

Although a court, in determining whether to grant a motion to dismiss, must accept the material allegations in the complaint as true, *Denver Parents Ass'n*, 10 P.3d at 664, the "Court need only accept as true plaintiff's 'well-pleaded factual contentions, not his conclusory allegations.'" *Mavrovich v. Vanderpool*, 427 F. Supp. 2d 1084, 1090 (D. Kan. 2006) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (noting that the court is not required to accept as true legal conclusions that are couched as factual allegations). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County*, 481 F. Supp. 2d 1213, 1216 (D. Colo. 2007); *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) ("All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."), *cert. denied*, 538 U.S. 999 (2003).

Generally speaking, "if the motion is based on failure to state a claim, a court may not consider matters outside the complaint." *Denver Parents Ass'n*, 10 P.3d at 664. However, the Court may consider materials referenced in a complaint without converting a motion to dismiss to a motion for summary judgment. *See, e.g., Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). A court also may consider outside documents subject to judicial notice, including court

documents and matters of public record. *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006); *Walker v. Van Laningham*, 148 P. 3d 391, 397–98 (Colo. App. 2006).

ARGUMENT

Plaintiff's two claims for relief rest on its mistaken assertion that the discussions between Clayton and the City of Denver resulted in a "bona fide offer" to Clayton as defined in the Lease. In the Amended Complaint, Plaintiff asserts that these discussions resulted in a purchase and sale agreement with specific terms. (*See* Am. Compl. ¶¶ 10–12). Plaintiff also contends that Clayton's and the City's actions demonstrate a clear and unequivocal manifestation of their willingness to be bound to sell and purchase the Park Hill Golf Course. (Am. Compl. ¶ 19). Even accepting these allegations as true, they do not constitute a "bona fide offer" under the Lease's terms. (*See* Lease, at § 24). An agreement between Clayton and the City cannot constitute "a legal, valid, binding obligation" of the City until approved through the City's mandatory procedures. These procedures require an ordinance or resolution before execution. No ordinance or resolution exists. Without a "bona fide offer" from the City that Clayton could accept, Plaintiff's right of first refusal was not triggered. Therefore, Clayton cannot have breached the Lease, and likewise could not have exercised any discretion it might have to notify Plaintiff about a "bona fide offer" or defeat Plaintiff's right of first refusal that could implicate the implied covenant of good faith and fair dealing. Plaintiff's claims for breach of the lease and declaratory judgment thus fail.

A. Article 24 of the Lease Specifies that Only Offers that Constitute a Legal, Valid, and Binding Obligation of the Purchaser Trigger Plaintiff's Right of First Refusal.

Article 24 specifies that Plaintiff's right of first refusal under the Lease, including the requirements that Clayton notify Plaintiff of the terms and conditions of such offer and the

identity of the purchaser, is triggered only if Clayton "solicits or receives a 'bona fide offer.'"[4] (Lease, at § 24). The Lease provides mandatory conditions for an offer to be a "bona fide offer." (*Id.*). Relevant to this dispute is the Lease's requirement that a "bona fide offer" "constitute a legal, valid, and binding obligation of the purchaser" before it triggers the right of first refusal. (*Id.* (emphasis added)). Therefore, the only type of offer that triggers Plaintiff's right of first refusal is an offer that is legally binding and valid upon the purchaser. Article 24 prohibits Clayton from accepting any offer that is not a bona fide offer. (*Id.*).

As a result, for any agreement between Clayton and the City of Denver to constitute a "bona fide offer" under the Lease's definition such that Clayton could accept the offer, the agreement must be a legally binding and valid obligation of the City. As the next section explains, any purported agreement between Clayton and the City of Denver cannot be a legally binding or valid obligation of the City.

B. An Agreement with the City of Denver Must Be Approved by Ordinance or Resolution before It Can Be Executed as a Contract and Create a Legal, Valid, and Binding Obligation.

The City of Denver's Charter and Ordinances contain mandatory procedures for contract approval. Specifically, Section 3.2.6 of the Denver Charter[5] provides that "[c]ontracts [for over $500,000] . . . shall require the approval of the City Council acting by ordinance or resolution, prior to their execution by City officials." Therefore, the City Council must pass an ordinance or

[4] Although, absent contractual language to the contrary, "once the owners evidence an intent to sell the property, the right of first refusal is activated and converted into an irrevocable option to purchase," *Peters v. Smuggler-Durant Mining Corp.*, 910 P.2d 34, 38 (Colo. App. 1995), here the Lease's express terms require more than a mere intent to sell to activate the right and instead require that there be an offer that is legally binding and valid upon the purchaser.

[5] The Denver City Charter and Municipal Code can be accessed through this link: https://library.municode.com/co/denver/codes/code_of_ordinances.

resolution approving a proposed contract, such as the one Plaintiff alleged existed between Clayton and the City, before city officials can execute it.

Denver ordinances and resolutions have specific procedures for passage. As to ordinances, Section 3.3.5(F) of the Denver Charter provides:

> *Procedures for passage by Council*. *No ordinance shall be passed except by bill.* The title of each bill, when the bill is introduced, shall be read aloud before the Council. No bill shall be passed until after the expiration of five calendar days from and after the introduction of same, nor until one publication of the title and a description of the bill shall have been made. . . . *No ordinance shall take effect until sufficient notice thereof has been published by authority of Council in an official publication*. The procedures for passage of a resolution shall be as provided for in the rules of the Council or by ordinance.

(Emphasis added). In addition, Section 3.3.5(G) requires that "[e]very ordinance passed by the Council shall be presented to the Mayor within forty-eight hours thereafter" for approval. Once signed by the Mayor or passed over the Mayor's veto, the effective date of the ordinance is "after final passage and final publication or on the date specified in the ordinance." Charter, § 3.3.5(J). Therefore, ordinances must be passed as a bill and are not effective until they are officially published.

Similarly, the City's code requires that the City follow compulsory procedures before resolutions are passed. Section 13-11.5 of the Denver Municipal Code specifies that once introduced, a resolution must be approved by at least seven members of the City Council. *See* Denver Mun. Code, § 13-11.5(e). The resolution is then signed and dated by the council's president and attested by the clerk. *Id.*

Plaintiff has not alleged that any agreement between Clayton and the City of Denver went through the required procedures and was passed by ordinance or resolution. In fact, Plaintiff cannot do so. This Court can take judicial notice that no such ordinance or resolution can be

found in the Denver Charter and Municipal Code or in the Denver City Council's records.[6] *See Tal*, 453 F.3d at 1265 n.24; *Walker*, 148 P. 3d at 397–98. In fact, Plaintiff admits in its Amended Complaint that the City did not go through the approval process as to any purported agreement with Clayton. (*See* Am. Compl. ¶ 26).

A city must follow its mandatory procedures regarding contract execution for the contract to be legally binding and valid. It is a basic principle of municipal law that "[c]ontracts executed by municipal corporations are void when there is a failure to comply with the mandatory provisions of the applicable statutes or charters." *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515 (Colo. App. 1998) (citing 10 E. McQuillin, *Municipal Corporations* § 29.02 (3d ed. 1990)). Municipal contracts must be entered into in the mode provided for by statute or charter, and "a contract not made in conformity with the charter or statute is invalid." 10 E. McQuillin, *Municipal Corporations* § 29.02.

As a result, even if any agreement between Clayton and the City of Denver constituted an offer and a willingness to be bound by the terms, such an offer, without passage as an ordinance or resolution through the proper procedures, is void and incapable of "constitut[ing] a legal, valid, and binding obligation." The alleged agreement thus fails to meet the requirements of a "bona fide offer" under the Lease.

C. Plaintiff's Claims Must Be Dismissed Because No "Bona Fide Offer' Existed between Clayton and the City of Denver.

Plaintiff has alleged only one potential offer that it contends triggered Article 24's right of first refusal—the alleged agreement between Clayton and the City of Denver. (*See* Am. Compl. ¶¶ 9–12, 17–18, 23, 25, 28–29). For the reasons described above, any such agreement

[6] An online version of the Denver City Council's records, which contain all bills and resolutions passed after August 29, 2016, can be found at https://denver.legistar.com/Legislation.aspx.

cannot be a "bona fide offer" as defined by the Lease. Absent a "bona fide offer" that Clayton may accept under the terms of the Lease, there is no need for Plaintiff to be notified to prevent the right from extinguishing and Plaintiff's right of first refusal remains dormant. Unless or until the City of Denver approves a contract through the required municipal procedures and it is subsequently offered to Clayton, no right of first refusal has been triggered and Plaintiff has suffered no injury.[7] Any purported agreement between Clayton and the City fell short of this requirement. *See Peters*, 910 P.2d at 38 ("The right of first refusal ripens into an option upon the happening of a contingency: the decision of the obligated party to accept a third-party's offer for the property.").

The Amended Complaint therefore fails to sufficiently allege facts supporting Plaintiff's claims that Clayton breached the Lease for failure to honor the right of first refusal; that Plaintiff is entitled to a declaratory judgment because a "bona fide offer" existed, triggered its right of refusal, and resulted in Clayton violating the Lease for denying this right; and that specific performance under Article 24 of the Lease is required. These claims must be dismissed.

D. Without a "Bona Fide Offer," Clayton lacked the requisite discretion needed to breach the implied covenant of good faith and fair dealing as to the right of first refusal.

Plaintiff asserts as part of its breach of contract claim that Clayton breached the implied covenant of good faith and fair dealing by not providing Plaintiff notice of its discussions with the City of Denver and in refusing to recognize Plaintiff's right of first refusal. (*See* Am. Compl. ¶¶ 24–25, 28–32).

[7] By contrast, in prematurely contending that its right of first refusal was triggered, Plaintiff may have committed tortious interference with Clayton's prospective business advantage or prospective contractual relations with the City of Denver. *See* Restatement (Second) of Torts §§ 766B, 767; *Harris Group, Inc. v. Robinson*, 209 P.3d 1188 (Colo. App. 2009).

Although the implied covenant of good faith and fair dealing is contained within every contract in Colorado, it may be relied upon only "'when the manner of performance under a specific contract term allows for discretion on the part of either party.'" *New Design Constr. Co. v. Hamon Contractors, Inc*., 215 P.3d 1172, 1181 (Colo. App. 2008) (quoting *City of Golden v. Parker*, 138 P.3d 285, 292 (Colo. 2006)). "Discretion in performance occurs 'when the parties, at formation, defer a decision regarding performance terms of the contract' leaving one party with the power to set or control the terms of performance after formation." *Id*. (quoting *Parker*, 138 P.3d at 292).

Because any discretion that Clayton may possess with respect to notice and recognition of Plaintiff's right of first refusal occurs only if there is a "bona fide offer" under the Lease, and, as explained above, no "bona fide offer" ever existed, this portion of Plaintiff's breach of contract claim fails. Clayton cannot have breached the implied covenant when the City of Denver did not provide an offer that constituted "a legal, valid and binding obligation" of the City. In short, there was no event that could possibly provide Clayton with the requisite discretion.

Plaintiff also asserts as part of its claim for breach of the implied covenant of good faith and fair dealing that Clayton undertook efforts and attempted to defeat or divest Plaintiff of its right of first refusal. (*See* Am. Compl. ¶¶ 25, 30). Again, however, because there was no "bona fide offer" triggering Plaintiff's right of first refusal, Clayton lacked any discretion as to the right and Plaintiff has suffered no injury. The only way Clayton could possibly have had discretion to avoid or defeat the right of first refusal is if the right was triggered in the first place.

Therefore, for the same reason as Plaintiff's breach of contract claim, Plaintiff's breach of the implied covenant of good faith and fair dealing must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff's Amended Complaint must be dismissed in its entirety.

DATED this 18th day of July, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Original signature on file at offices of Brownstein Hyatt Farber Schreck pursuant to C.R.C.P. 121 § 1-26

By: *s/Jonathan G. Pray*
Jonathan G. Pray, #36576
David B. Meschke, #47728

Counsel for Defendant Clayton Early Learning, as Trustee of the George W. Clayton Trust

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of July, 2018, a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS** was filed with the Court and served via Colorado Courts E-filing System on all he following counsel of record:

s/Penny G. Lalonde
Penny G. Lalonde, Paralegal

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