

CAUSE NO. D-1-GV-08-002532

CITY OF LAGO VISTA, TEXAS,	§	IN THE DISTRICT COURT
Plaintiff,	§	
v.	§	
	§	OF TRAVIS COUNTY, TEXAS,
WESTERN UNITED LIFE ASSURANCE	§	
COMPANY,	§	
Defendant.	§	261 st JUDICIAL DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff City of Lago Vista, Texas (herein referred to as "Plaintiff" or the "City") files this *Motion for Summary Judgment* in accordance with Rule 166a(c) of the Texas Rules of Civil Procedure, and would respectfully show the Court as follows:

I. SUMMARY OF CASE

A. Factual Background

1. On or about February 6, 2003, Plaintiff entered into a Development Set Aside Agreement (herein referred to as the "Agreement") with Marshall's Vista, Ltd. and Western United Life Assurance Company (herein referred to as "Defendant" or "WULA") regarding the development of certain property within the city limits of Lago Vista. **Exhibit A-1.**

2. The Development Set Aside Agreement required that, in the event Marshall's Vista, Ltd. failed to complete certain work defined in the Agreement (herein referred to as the "Set Aside Work") on the property in question, WULA was obligated to complete the Set Aside Work or disburse funds to a third party to have the work completed. **Exhibit A-1, ¶ 3.** Specifically, the Set Aside Work to be completed related to: Erosion/sedimentation, Street grading, Paving, Drainage Improvements,

Water Improvements, Wastewater Improvements, Water Storage Tank, Pumping for Fire Flow, and Domestic Water Pressure. **Exhibit A-1, ¶ 2.**

3. The Development Set Aside Agreement required the City to do the following: 1) accept the Agreement in lieu of any bonding requirements that the City would otherwise impose on Marshall's Vista in connection with the development project; 2) record the plat of the development project; and, 3) sign Ordinance No. 02-09-26-01 adopting the PUD zoning on the development project. **Exhibit A-1, ¶ 4.**

4. The City fully performed its obligations under the Development Set Aside Agreement. Specifically, the City accepted the Development Set Aside Agreement in lieu of the bonding requirements that the City would otherwise have imposed on Marshall's Vista in connection with the development project [**Exhibit A, ¶ 6**]; the City recorded the plat of the development project as required by the Development Set Aside Agreement [**Exhibit A, ¶ 7**]; and, the City signed Ordinance No. 02-09-26-01 which adopted the PUD zoning on the development project as required by the Development Set Aside Agreement. **Exhibit A, ¶ 8.**

5. Marshall's Vista, Ltd. failed to complete the Set Aside Work as required by the Development Set Aside Agreement because Marshall's Vista, Ltd. failed, among other things, to complete the work relating to Erosion/sedimentation, Street grading, Paving, Drainage Improvements, Water Improvements, Wastewater Improvements, Water Storage Tank, Pumping for Fire Flow, and Domestic Water Pressure. **Exhibit A, ¶ 9.** On September 2, 2005, Plaintiff notified Defendant that Marshall's Vista, Ltd. had failed to perform the necessary work and made demand upon WULA to fulfill its obligations under the Development Set Aside Agreement. **Exhibit A, ¶ 10; Exhibit A-2.**

6. WULA responded to the City's demand on September 12, 2005 by fully repudiating its obligations under the Development Set Aside Agreement and suggesting that the City look to a future owner of the property to fulfill WULA's obligations under the Development Set Aside Agreement.

Exhibit B.

7. As of the filing of this motion, WULA has failed to complete the Set Aside Work or disburse funds to a third party to have the work completed as required by the Development Set Aside Agreement. **Exhibit A, ¶ 11; Exhibit A-3.** WULA's failure to complete the Set Aside Work or disburse funds to a third party to have the work completed and its clear and unequivocal repudiation constitutes a breach of the Development Set Aside Agreement.

B. Procedural Background

8. Plaintiff City of Lago Vista, Texas sued Defendant Western United Life Assurance Company for breach of contract on October 24, 2008. **Exhibit C.**

9. On May 18, 2009, Defendant answered, generally denying Plaintiff's claim. **Exhibit D.**

II. SUMMARY OF MOTION

10. The City's *Motion for Summary Judgment* is a traditional motion for summary judgment under Rule 166a(c) of the Texas Rules of Civil Procedure on its breach of contract action.

11. A plaintiff is entitled to summary judgment on its own cause of action by establishing each element of its claim as a matter of law. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986).

12. The City moves for summary judgment on its breach of contract cause of action because each element of its claim: (a) a valid contract, (b) the right to have the work required by the Development Set Aside Agreement completed, (c) Defendant's breach of the contract, and (d)

Plaintiff's damages, can be established as a matter of law. *Harry Hines Medical Center, Ltd. v. Wilson*, 656 S.W.2d 598, 601 (Tex. App.—Dallas 1983, no writ).

III. SUMMARY JUDGMENT EVIDENCE

13. In support of Plaintiff's Motion for Summary Judgment, the City relies upon the following evidence, as well as any other evidence that may be timely filed before the hearing on the motion and any evidence the court may grant leave to file before or after the hearing:

Exhibit A: Affidavit of Bill Angelos and the exhibits thereto:

Exhibit A-1: Development Set Aside Agreement

Exhibit A-2: Letter dated September 2, 2005 from Barney L. Knight to Dale Whitney

Exhibit A-3: Engineer's Report

Exhibit B: Letter dated September 12, 2005 from Sabrina L. Streusand to Barney L. Knight

Exhibit C: Plaintiff's Original Petition

Exhibit D: Western United Life Assurance Company's Answer to City of Lago Vista, Texas' Original Petition and to James Otwell's Original Plea in Intervention

IV. ARGUMENT AND AUTHORITIES

14. The Development Set Aside Agreement executed by Marshall's Vista, LTD., Western United Life Assurance Company and the City of Lago Vista is a valid and binding contract. Because there is no genuine issue of material fact that WULA failed to abide by the terms of the contract, summary judgment in favor of the City is proper.

15. To prevail on its breach of contract claim, the City must prove that (a) a valid contract existed between the City and Defendant, (b) the City had the right to have the Set Aside Work completed by Defendant under the contract, (c) Defendant breached the contract, and (d) the City suffered damages from Defendant's breach. *Harry Hines Medical Center, Ltd. v. Wilson*, 656 S.W.2d

598, 601 (Tex. App.—Dallas 1983, no writ).

A. There Was a Valid, Enforceable Contract

16. On or about February 6, 2003, Plaintiff entered into the Development Set Aside Agreement with Marshall's Vista, Ltd. and WULA regarding the development of property within the city limits of Lago Vista. **Exhibit A, ¶ 3; Exhibit A-1.**

B. Plaintiff Has the Right to Have the Work Completed Under the Contract

17. The Development Set Aside Agreement has a definite legal interpretation and is not reasonably susceptible to more than one meaning; therefore, it is not ambiguous. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000). Because the contract is not ambiguous, the construction of the agreement is a question of law for the Court. *G.H. Bass & Co. v. Dalsan Properties-Abilene*, 885 S.W.2d 572, 576 (Tex. App. – Dallas 1994, no writ). When construing a written contract, the court must ascertain the intentions of the parties as expressed in the instrument. *Id.* The intention of the parties is evidenced by the words in the contract. *Id.*

18. The Development Set Aside Agreement required that, in the event Marshall's Vista, Ltd. failed to complete the Set Aside Work, WULA was obligated to complete the work or disburse funds to a third party to have the work completed. (**Exhibit A-1, ¶ 3.**)

19. The City fully performed its obligations under the Development Set Aside Agreement. **Exhibit A, ¶¶ 5-8.**

C. Defendant Breached the Contract

20. Marshall's Vista, Ltd. failed to complete the Set Aside Work as required by the Development Set Aside Agreement. **Exhibit A, ¶ 9.** Plaintiff notified Defendant that Marshall's

Vista, Ltd. had failed to perform the necessary work and made demand upon WULA to fulfill its obligations under the Development Set Aside Agreement. **Exhibit A, ¶ 10; Exhibit A-2.** WULA responded to the City's demand by fully repudiating its obligations under the Development Set Aside Agreement and suggesting that the City look to a future owner of the property to fulfill WULA's obligations under the Development Set Aside Agreement. **Exhibit B.** As of the filing of this motion, WULA has failed to complete the Set Aside Work as required by the Development Set Aside Agreement. **Exhibit A, ¶ 11; Exhibit A-3.** WULA's failure to complete the Set Aside Work and its clear and unequivocal repudiation constitutes a breach of the Development Set Aside Agreement.

D. Defendant's Breach Has Injured Plaintiff

21. In 2003, the cost of completing the Set Aside Work required by the Agreement was \$4,704,821.75. **Exhibit A-1.** The cost of construction of the improvements required by the Agreement is now much larger.

V. CONCLUSION AND PRAYER

22. Because the City established the existence of a valid contract, the right to have the Set Aside Work completed by Defendant, Defendant's failure to complete the work, and the City's subsequent damages, it has established every element of its claim as a matter of law and is entitled to summary judgment on its breach of contract claim. Based on the foregoing, the City respectfully requests that this Court grant summary judgment on the City's claim for breach of contract against Defendant Western United Life Assurance Company.

Respectfully Submitted,

SEDGWICK, DETERT, MORAN & ARNOLD, L.L.P.

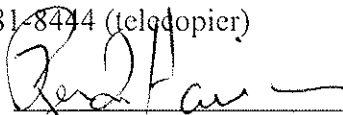
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CERTIFICATE OF SERVICE

I hereby certify by my signature below that a true and correct copy of the above and foregoing has been forwarded by certified mail, return receipt requested, on this ___ day of November, 2009, to:

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