PREPARED BY THE COURT

STOCKTON UNIVERSITY, Plaintiff, v. KK VENTURES-ATLANTIC CITY, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION ATLANTIC COUNTY DOCKET NO. ATL-C-47-15
KK VENTURES-ATLANTIC CITY, LLC, Plaintiff, v. STOCKTON UNIVERSITY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-1490-15 **ORDER** Dated: November 23, 2015

COURT ORDER

THIS MATTER having been brought before the Court by Stuart J. Moskovitz, Esquire for KK VENTURES-ATLANTIC CITY, LLC (hereinafter "KK Ventures") on a motion to compel access to the Showboat Casino and Hotel (hereinafter "Showboat property") filed on September 2, 2015 and with opposition being filed by Padraig P. Flanagan, Esquire, for STOCKTON UNIVERSITY (hereinafter "Stockton") and a cross-motion for attorney's fees and costs filed on September 10, 2015 by Stockton, and a hearing having been held on September 18, 2015 before the Honorable Julio L. Mendez, A.J.S.C., and the Court having reviewed the papers submitted and any opposition thereto, and heard the arguments of counsel, and the Court having set forth its findings and conclusions in a written memorandum which is incorporated herein, and for good cause having been shown;

It is on this **23th** day, **NOVEMBER 2015 ORDERED** that:

1. The Court HEREBY DENIES KK Ventures' motion to compel access to the Showboat property for purposes of providing utilities to the former Revel Hotel and Casino in accordance with Section 4(b) of the Purchase Sale Agreement.

2. The Court HEREBY DENIES Stockton's motion for attorney's fees and costs.

3. This is a final Order.

Julio L Mendez

Hon. Julio L. Mendez, A.J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

STOCKTON UNIVERSITY, Plaintiff, v. KK VENTURES-ATLANTIC CITY, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION ATLANTIC COUNTY DOCKET NO. ATL-C-47-15
KK VENTURES-ATLANTIC CITY, LLC, Plaintiff, v. STOCKTON UNIVERSITY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-1490-15 **MEMORANDUM OF DECISION** Dated: November 23, 2015

Decided: November 23, 2015

Padraig P. Flanagan, Esquire, for Stockton University

Stuart J. Moskovitz, Esquire for KK Ventures-Atlantic City, LLC

Mendez, A.J.S.C.

This matter comes before the Court by way of a motion to compel access to the Showboat Casino and Hotel (hereinafter "Showboat property") filed on September 2, 2015 by KK Ventures-Atlantic City, LLC (hereinafter "KK Ventures") and a cross-motion for attorney's fees and costs filed on September 10, 2015 by Stockton University (hereafter "Stockton"). Oral argument was held on September 18, 2015 and additional briefings were submitted by September

30, 2015 on behalf of and Stockton and KK Ventures. For the reasons set forth herein, the Court denies KK Ventures' motion to compel access to the Showboat property for the purpose of obtaining utilities for the former Revel Hotel and Casino (hereinafter "Revel") and denies Stockton's cross-motion for attorney's fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of a contract between Stockton and KK Ventures for the sale of property with a physical address of 801 Boardwalk in Atlantic City, New Jersey. The property was formerly known as the Showboat Casino and Hotel. The Showboat property was previously owned by Caesars Entertainment Operating Company, LLC and Showboat Atlantic City Propco, LLC (hereinafter collectively referred to as "Caesars"). Stockton purchased the Showboat property from Caesars on December 12, 2014 for $18 million. Stockton intended to use the property for educational purposes and create an "Island Campus" of the University.

The Showboat property is subject to two contradictive restrictive covenants. Stockton purchased the Showboat property from Caesars subject to these restrictive covenants. Unable to resolve the issue presented by the two contradictive restrictive covenants and use the property for its intended purpose, Stockton began marketing the Showboat property. Stockton attempted to sell the Showboat property to KK Ventures. KK Ventures is a corporation owned by Glen Straub. Straub recently purchased the former Revel located directly adjacent to the Showboat property. Straub was interested in acquiring the Showboat property from Stockton, in part, to obtain an alternative energy source of utilities to operate the former Revel.

Stockton and KK Ventures entered into a purchase and sale agreement (hereinafter the "PSA") on April 3, 2015 for the sale of the Showboat property. The PSA referenced these restriction covenants and gave KK Ventures the right to purchase the property in the amount of

twenty six million ($26,000,000.00) dollars during a ninety (90) day or three-month window of time, on or before July 2, 2015. In an effort to salvage its original intended use of the Showboat property, Stockton negotiated the right to cancel and terminate the PSA within ninety (90) days of the effective date of the PSA, in the event that they could resolve the issues presented by the two restrictive covenants. Prior to the required closing date, only the Seller, Stockton, could cancel the Agreement upon written notice to the Purchaser, KK Ventures, "if, and only if, Seller is unable to resolve to Purchaser's satisfaction title issues pertaining to the Use Covenant and Declaration of Restrictive Covenants." (Section 4(a))

The PSA further provided that if the closing does not occur by 1:00 pm on the ninetieth day, July 2, 2015 (the closing date), then "(i) either party may terminate this Agreement by providing notice of such termination to the other party… and (vi) neither party shall have any further rights, obligations or Liabilities whatsoever to the other party concerning the Property or otherwise…" (Section 4(a)).

Prior to the closing date Stockton was unable to resolve the title issues associated with the two restrictive covenants. Regardless, Stockton attempted to go to closing on July 2, 2015, however, KK ventures refused to close. Closing did not occur and Stockton advised KK Ventures, in writing, that same day that it was terminating the PSA. The issue which was then presented was the interpretation of the language of Section 4(a) of the PSA and whether or not Stockton properly terminated the contract and/or was required to resolve all title issues prior to closing.

On July 2, 2014 KK Ventures filed a complaint in the Law Division of Atlantic County alleging causes of action arising out of the PSA. The first three counts of the complaint were for declaratory relief and the fourth was for unjust enrichment. Counts one through three sought

declaratory relief extending the closing date of the contract based upon allegations that it was the intent of the parties that Stockton would make attempts to resolve the conflicting covenants prior to closing and that Stockton had a good faith duty to do so. Count four of the complaint was for unjust enrichment.

Following the filing of the complaint in the Law Division by KK Ventures, Stockton filed a motion to dismiss the complaint and a separate order to show cause for declaratory and injunctive relief in the Chancery Division on July 10, 2015. The order to show cause sought declaration that based upon the terms of the PSA Stockton properly terminated the contract and was relieved of any further obligations or liabilities arising thereunder, freeing them to market and sell the property to a third party. This Court held oral argument on August 7, 2015 and consolidated these matters on the record at the hearing. On August 10, 2015 the Court granted declaratory judgment in favor of Stockton holding that Stockton properly terminated the PSA under the terms contained therein and was relieved of any further obligations arising under the terms of the contract. The Court also dismissed the claims under KK Ventures' complaint under docket ATL-L1490-15 and permanently enjoined KK Ventures from filing lis pendens or otherwise interfering with Stockton's title to or right to convey the Showboat property.

On August 31, 2015, KK Ventures sent a letter to Stockton demanding access to the Showboat facility for the purpose of making the necessary connections to provide utilities to the former Revel buildings and facilities. On September 1, 2015 Stockton replied and refused such access. Thereafter, on September 2, 2015 KK Ventures filed a motion to compel access to the Showboat property for the purpose of obtaining utilities for the former Revel in accordance with the PSA. Pre-closing and post-termination obligations are addressed under Section 4 of the PSA

titled "Closing." (Section 4(a)-(b)). Section 4(b) titled "Pre-Closing and Post-Termination Obligations" provides in relevant part:

> Between the Effective Date and ninety (90) days thereafter, subject to further extension if Purchaser so requests, in its sole discretion on a month-to-month basis of successive months until Purchaser obtains alternative energy sources, Seller shall provide Purchaser with power, electricity, and hot and cold water ("Energy"), from its energy facility for use by Purchaser in and for its Revel Hotel & Casino buildings and facilities (the "Revel Facility"). ...
>
> This Section 4(b), and the obligation of Seller to provide the Energy and the rights of Purchaser to purchase the Energy, shall be an independent contractual obligation and survive the termination of this Agreement and Seller's election to not proceed to Closing as set forth in section 4(a) above.

On September 10, 2015, Stockton filed a cross-motion for attorney's fees and costs in accordance with Section 17 of the PSA which states that "[i]n the event either party files a lawsuit...in connection with this Agreement... the party that prevails in such action shall be entitled to recover...reasonable attorneys' fees and costs incurred in such action." This Court held Oral argument on September 18, 2015. The Court allowed KK Ventures and Stockton to submit supplemental briefing on this matter.

DISCUSSION

I. KK Ventures' application is not a motion for reconsideration.

R. 4:49-2 allows a party to seek reconsideration of final judgments or orders not later than twenty (20) days after service of the judgment or order on all other parties by the party obtaining it. Reconsideration is "a matter within the sound discretion of the Court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 401, 576 A.2d 957, 958 (Ch.Div. 1990). The preferred course for one unsatisfied with a judicial determination is to seek an appeal. Id. Reconsideration should be utilized only for those cases which fall into that "narrow corridor" in which either: (1) the court has based its decision upon a palpably incorrect

or irrational basis; or (2) the court did not consider, or failed to appreciate the significance of probative, competent evidence. Id.

This rule is only applicable when the court's decision is based on plainly incorrect reasoning, when the court failed to consider evidence, or when there is good reason for it to reconsider new information. See Pressler, Current N.J. Rules, comment on R. 4:49-2, (2005) (describing the holding of Cummings v. Bahr, 295 N.J. Super. 374, 384-85 (App. Div. 1996)); Town of Phillipsburg v. Block 1508, Lot 12, 380 N.J. Super. 159, 175 (App. Div. 2005). The basis to such a motion, thus, focuses upon what was before the court in the first instance. D'Atria v. D'Atria, 242 N.J. Super. 392, 401, 576 A.2d 957 (Ch. Div. 1990); Lahue v. Pio Costa, 263 N.J. Super. 575, 598, 623 A.2d 775, 789 (App. Div. 1993).

KK Ventures contends that their request is not a motion to reconsider because Stockton's obligation to provide utilities pursuant to Section 4(b) of the PSA was never before the Court on the previous complaint, order to show cause, or motion to dismiss. KK Ventures further contends that this Court considered and ruled only on the issue of whether or not there was an obligation by Stockton to extend the time period for closing rather than the issue regarding utilities. Stockton argues that KK Ventures' motion is, in essence, an untimely and improper motion to reconsider the Court's Order entered on August 10, 2015. Stockton additionally argues that KK Ventures never raised this issue in their complaint or in opposition to Stockton's motion to dismiss or order to show cause for declaratory and injunctive relief and therefore should not be entitled to raise it now after the termination of the PSA.

A motion to reconsider is in essence a motion to bring back, for further consideration, a matter previously decided. As stated above, the crux of the Court's analysis when determining if reconsideration is appropriate focuses upon what was before the Court in the first instance and

whether it is appropriate to reconsider that matter for one of the reasons set forth above. See D'Atria v. D'Atria, 242 N.J.Super. 392, 401, 576 A.2d 957 (Ch. Div. 1990); Lahue v. Pio Costa, 263 N.J. Super. 575, 598, 623 A.2d 775, 789 (App. Div. 1993). In the Order entered on August 10, 2015, the Court contemplated the interpretation of the language of Section 4(a) of the PSA and whether or not Stockton properly terminated the contract and/or was required to resolve all title issues prior to closing. The Court did not consider or decide the pre-closing and post-termination obligation of Stockton under Section 4(b) of the PSA, which under certain circumstances survives the termination of the PSA. Therefore, the Court did not dispose of an independent obligation that could have survived the termination of the PSA by merely terminating the PSA, as argued by Stockton. The issue of Stockton's surviving obligation to provide utilities to KK Ventures for the former Revel was not raised by either parties or considered by this Court. This Court holds that KK Ventures' motion to compel access to the Showboat property for the purpose of obtaining utilities for the former Revel is not a motion for reconsideration because the issue was never presented to the Court for consideration in the first instance.

II. Stockton does not have an obligation to provide energy to KK Ventures.

The issue now before this Court is whether Stockton has an independent contractual obligation to provide energy to KK Ventures in accordance with Section 4(b) of the PSA. The polestar of construction of a contract is to discover the intention of the parties. Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). "The starting point in ascertaining that intent is the language of the contract." Communications Workers v. Monmouth Co. Bd. of Soc. Serv., 96 N.J. 442, 452 (1984). Courts are generally obligated to enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying

purpose of the contract. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993); Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 586 (1986); Vasquez v. Glassboro Serv. Ass'n, Inc., 83 N.J. 86, 101 (1980). If a contract is unambiguous, it must generally be enforced as written. Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996).

This Court must first determine whether Stockton's obligation to provide energy under Section 4(b) is an independent contractual obligation which survived the termination of the PSA. In the Order entered on August 10, 2015, this Court held that Stockton properly terminated the PSA under the terms contained therein and had no further obligations arising under the terms of the contract. Stockton highlights the last sentence of Section 4(b) of the PSA and contends that an independent contractual obligation to provide energy would only survive the termination of the PSA in the event that both a "termination of the [PSA]" and "and [Stockton's] election to not proceed to Closing..." occurred. KK Ventures contends that it was not the intent of the parties for the provision to survive both the "termination of the [PSA]" and "[Stockton's] election not to proceed to Closing..." because had that been the intent the parties would have drafted the provision as, "termination this Agreement by [Stockton's] election to not proceed to Closing."

This Court has reviewed the last sentence of Section 4(b) which states that:

> This Section 4(b), and the obligation of [Stockton] to provide the Energy and the rights of [KK Ventures] to purchase the Energy, *shall be an independent contractual obligation and survive the termination of this [PSA] and [Stockton's] election to not proceed to Closing* as set forth in section 4(a) above.
>
> (emphasis added.)

The Court interprets the last sentence of Section 4(b) to mean that the obligation to provide energy is an independent contractual obligation and survives only in the event that the PSA is terminated and it is the Seller who does not proceed to closing. KK Ventures proposes an interpretation that serves as a catch-all provision that imposes onto Stockton the obligation to

provide energy under any and all circumstances of termination. If the parties intended the obligation to provide energy to survive termination without regard to how the PSA was terminated, the inclusion of "and [Stockton's] election to not proceed to Closing" would not have been necessary. Additionally, if the parties intended Stockton's obligation to provide energy to survive termination of the PSA without regard to how the PSA was terminated, then KK Ventures would have very little incentive to proceed with closing on the Showboat property. KK Ventures could have obtained energy from Stockton and, regardless as to how the PSA was terminated, would have been entitled to continual energy. KK Ventures' interpretation of the last sentence of Section 4(b) would not have given KK Ventures any real motivation to close and it would have allowed them to hold Stockton hostage for energy even if KK Ventures elected not to close. See GNOC, Corp. v. Director, Div. of Taxation, 328 N.J. Super. 467, 746 A.2d 466 (App. Div. 2000) (The interpretation of contract clauses must be that which a reasonable, intelligent person would accord to it.)

In this instance, on April 24, 2015 Stockton advised KK Ventures in writing that it was waiving its right to cancel over title issues pursuant to Section 4(a) of the PSA, and elected to proceed to closing on April 28 or April 29, 2015. Stockton was ready, willing, and able to close prior to and on the closing date of July 2, 2015. Had the circumstances been different, and Stockton elected not to proceed to closing on or before July 2, 2015, the independent contractual obligation to provide energy would have survived. However, KK Ventures elected not to proceed to closing and does not now gain the benefit of their decision when none is provided for under the terms of the PSA. Based on this Court's interpretation of the PSA, the Court holds that Stockton's independent contractual obligation to provide energy did not survive the termination of the PSA because KK Ventures ultimately elected not to proceed to closing.

Alternatively, had Stockton's independent contractual obligation to provide energy under Section 4(b) survived the termination of the PSA, this Court holds that KK Ventures' request for an extension of energy is untimely and expired, pursuant to the first sentence of Section 4(b) of the PSA. Stockton takes the position that an independent contractual obligation to provide energy never existed because KK Ventures never made a request for energy between the "Effective Date of the [PSA] and ninety (90) days thereafter", which would have been between April 3, 2015 and July 2, 2015. Then and only then could KK Ventures seek to extend its right to receive energy from Stockton and an independent contract only would have existed had KK Ventures requested energy during that prescribed time. KK Ventures argues that Stockton's independent contractual obligation to provide energy has nothing to do with the ninety (90) day period for closing and a request did not need to be made within that time period. KK Ventures takes the position that if KK Ventures requests an extension of the time period mandating supply of the energy, until it obtains alternative energy source, Stockton is obligated to provide that energy.

The Court has reviewed the first sentence of Section 4(b) which states that:

> *Between the Effective Date and ninety (90) days thereafter, subject to further extension if [KK Ventures] so requests, in its sole discretion* on a month-to-month basis of successive months until [KK Ventures] obtains alternative energy sources, *[Stockton] shall provide [KK Ventures] with* power, electricity, and hot and cold water ("*Energy*"), from its energy facility for use by Purchaser in and for its Revel Hotel & Casino buildings and facilities (the "Revel Facility"). ...
>
> (emphasis added.)

The Court interprets this provision to mean that between the "Effective Date of the Agreement and ninety (90) days thereafter", which would have been between April 3, 2015 and July 2, 2015, Stockton had an independent obligation to provide energy to KK Ventures. The language does not expressly set forth when a request for energy was to be made because the obligation was imposed immediately from the time of the effective date of the PSA until the time of closing.

The plain language of the provision indicates that "[b]etween the Effective Date and ninety (90) days thereafter…[Stockton] shall provide [KK Ventures] [energy]." Stockton was obligated to provide KK Ventures with energy during that time. Had KK Ventures requested energy between the effective date of the PSA and the closing date, Stockton would have been obligated to provide it pursuant to the independent contractual obligation that existed under Section 4(b). The request for energy was not made by KK Ventures until August 31, 2014, which was outside of the ninety (90) days provided for under the PSA.

With regard to the request for an extension of Stockton's independent obligation to provide energy, this Court interprets the provision to require KK Ventures to have made their request for an extension between the effective date of the PSA and the closing date. The clause in Section 4(b) "subject to further extension if Purchaser so requests" modifies the time period during which Stockton had an independent obligation to provide energy which was "between the effective date and ninety (90) days thereafter." This sentence would only make sense if the request for an extension was made during the initial ninety (90) days. It would not make sense for KK Ventures to be able to request energy at any point after the closing date, encumbering Stockton's ability to sell the Showboat property, had it never made a request for energy before the closing date and particularly in light of the fact that Stockton was ready, willing, and able to go to closing but KK Ventures was not.

Also in support of this interpretation, viewing Section 4 of the PSA as a whole, this Court does not find any consideration given to Stockton in return for KK Ventures' right to request, at any time and regardless of how the PSA was terminated, for an extension of Stockton's obligation to provide energy. The Court finds little merit behind KK Ventures' argument that this independent contractual obligation essentially lasts forever. The Court finds that this was not the

intent of the parties. If gaining access to the Showboat property for energy was so important to KK Ventures then they had every opportunity to buy the property within the prescribed time frame and they did not. On August 10, 2015 the Court entered an Order that Stockton has no further obligations arising under the terms of the contract and is free to market and sell the Showboat property. This Court also permanently enjoined KK Ventures from filing lis pendens or otherwise interfering with Stockton's title to or right to convey and market the Showboat property.

KK Ventures' nuanced arguments as to the interpretation of a convoluted and poorly drafted PSA contradicts the intention of the parties and reasonable circumstances surrounding the sale of the Showboat property. In conclusion, this Court holds that an independent contractual obligation to provide energy to KK Ventures existed between the effective date of the PSA and the closing date and any valid extension of Stockton's obligation thereafter was required to be made during that time period. Accordingly, any independent obligation Stockton had with regard to providing energy did not survive the termination of the PSA because Stockton elected to proceed to closing and KK Ventures did not.

III. Attorney's Fees and Costs.

Pursuant to Section 17 of the PSA, "[i]n the event either party files a lawsuit…in connection with this Agreement… the party that prevails in such action shall be entitled to recover…reasonable attorneys' fees and costs incurred in such action." On September 10, 2015 Stockton filed a motion for an award of attorneys' fees and costs. Counsel for Stockton certified that a total of 3.7 hours was expended preparing the opposition to KK Ventures' motion to compel access to the Showboat property. Although the Court appreciates Stockton's modest request for attorney's fees and costs, the Court shall deny this request in light of the substantial

attorneys' fees and costs granted in Stockton's previous motion set forth in the Court's Order entered on August 23, 2015.

CONCLUSION

Thus, for the reasons set forth in the Court's opinion, the Court denies KK Ventures' motion to compel access to the Showboat property for the purpose of obtaining utilities and denies Stockton's cross-motion for attorney's fees and costs.

Julio L Mendez

Hon. Julio L. Mendez, A.J.S.C.