

“LORD & TAYLOR, LLC V. WHITE FLINT, LP-A CAUTIONARY TALE FOR REDEVELOPMENT PROJECTS”

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Introduction

Every once in a while, a jury reaches a verdict which strikes fear in the hearts of many. These judgments often fall in one of two categories – either the damage award is startlingly high or the basis for awarding any damages appears to defy logic. A recent Maryland district court jury verdict that is currently under review by the U.S. Court of Appeals for the Fourth Circuit may qualify under both categories. The suit involved an anchor tenant of a shopping mall filing suit against the mall’s owners for initiating redevelopment efforts to survive decreasing public interest in malls. Despite the owners’ plan being uniformly commended by the public and local government, the anchor tenant possessed certain rights against large scale alterations under a reciprocal easement agreement. The anchor tenant sued for approximately \$66 million after the redevelopment process commenced without the tenant’s permission in writing. A six-person jury ultimately found in favor of the anchor tenant for \$31 million. Both sides have appealed to the Fourth Circuit – the mall asserting that the anchor tenant will ultimately see increased profits due to the redevelopment and the anchor tenant seeking to recover the full \$66 million it sought in the district court.

Background on White Flint Mall

White Flint, LP (“White Flint”) is the owner of White Flint Mall, formerly a regional shopping mall located in Montgomery County, Maryland.

On September 2, 1975, White Flint entered into a Construction Operation and Reciprocal Easement Agreement (“REA”) with Lord & Taylor (through a predecessor in interest) and Bloomingdale’s (through a predecessor in interest). The REA called for White Flint to construct and operate a shopping mall and for Lord & Taylor and Bloomingdale’s to construct and operate retail departments stores in the shopping mall pursuant to subleases with White Flint. In relevant part, the REA also prohibited White Flint from altering, modifying or changing the architectural design or the appearance, or changing the number of floors, size or location of the buildings within the mall, or changing the size, location or arrangement of the mall. White Flint was also required to operate a “first class high fashion regional shopping center.”

Lord & Taylor’s sublease provided for an initial term of 35 years and granted Lord & Taylor three 15-year renewal options. In 2006, Lord & Taylor exercised its first and second renewal options, extending the lease expiration date to February 2042.

In the last decade or two, White Flint Mall began to see a major reduction in its customer base. Lord & Taylor’s sales also fell significantly. In a purported attempt to maintain a “first class shopping center,” White Flint proposed a massive overhaul to the design of the mall. White Flint introduced designs for a new open-air, mixed-use facility. The redevelopment would include approximately 5.2 million square feet of retail shops, offices, restaurants, apartments, condominium units, and public and private open space spread over White Flint’s 45 acres.

White Flint communicated with Montgomery County regarding the proposed redevelopment. The County incorporated its plans into the White Flint Sector Plan (Montgomery County’s master plan to redevelop the surrounding area). The White Flint Sector Plan was approved in March 2010.

In November 2011, White Flint held a public meeting to discuss the proposed redevelopment plans. In February 2012, White Flint filed an application for approval of the sketch plan for the new White Flint Mall. The sketch plan specifically incorporated Lord & Taylor's current space, and would surround the space with a mix of residential and retail development.

On March 9, 2012, Lord & Taylor sent White Flint a one-paragraph letter maintaining that the redevelopment plan violated covenants in the REA. The letter read: "Please be advised that the proposed plan is in clear violation of the [REA]. Please take note that we do not consent to the plan and will fully and vigorously defend our rights in regard to this matter."

On October 25, 2012, White Flint's sketch design was approved by the Montgomery County Planning Board. After receiving approval, White Flint commenced the redevelopment process. White Flint demolished the Bloomingdale's store, began buying tenants out of their leases and marketed the new redevelopment to potential retailers. White Flint also entered into contracts with architects, consultants, contractors and other vendors. White Flint purportedly spent approximately \$13,000,000 on the pre-development and re-development process and had entered into contracts for another \$24,000,000.

On May 30, 2013, Lord & Taylor, through counsel, sent a letter to White Flint requesting confirmation that no development inconsistent with the REA and Lord & Taylor's sublease would take place and requesting a revised redevelopment plan that remedies all defaults under the REA. White Flint did not respond to Lord & Taylor's letter.

Lord & Taylor's Complaint

Lord & Taylor filed suit in the U.S. District Court for Maryland on July 1, 2013. Lord & Taylor sought a declaratory judgment holding that White Flint cannot redevelop the mall in any way that is inconsistent with the REA and that White Flint is required to adhere to the REA, including that it must operate a first class shopping center. Lord & Taylor also sought specific performance of the REA and a preliminary injunction forbidding any violations of the REA. Lord & Taylor later added a claim for breach of the REA and sought lost profit damages of \$31 million plus \$35.4 million to compensate it for the cost to upgrade its building to match the new surroundings.

White Flint's Answer and Counterclaims

White Flint answered with a number of affirmative defenses, including laches, impossibility of performance, waiver, estoppel, unclean hands, and statute of limitations. White Flint also alleged counterclaims for breach of the implied covenant of good faith and fair dealing, in that Lord & Taylor had allegedly waited until the redevelopment was well underway before taking any action to stop the process. White Flint further alleged tortious interference with prospective economic advantage on similar grounds.

Lord & Taylor's Request for Injunctive Relief

On September 5, 2013, White Flint filed a Motion for Partial Summary Judgment as to Lord & Taylor's request for injunctive relief. Therein, White Flint argued in relevant part that Lord & Taylor's alleged harm is fully compensable by money damages and that Lord & Taylor has not suffered other injuries that would provide a basis for injunctive relief. At oral argument on December 20, 2013, Lord & Taylor suggested that it would be satisfied with a more limited, negative injunction that simply prohibited White Flint from moving ahead with the destruction of the mall and its adjacent parking areas.

U.S. District Court Judge Roger W. Titus resolved Lord & Taylor's request for injunction in favor of White Flint as a matter of law. Lord & Taylor appealed the ruling to the Fourth Court of Appeals, but Judge Titus's opinion was upheld.

In essence, the courts found that injunctive relief would be infeasible based on the circumstances. Both the district court and appellate court recognized that the redevelopment process had commenced long ago, substantial demolition and redevelopment steps had taken place, and the mall was mostly vacant by the time Lord & Taylor filed its complaint. By issuing a negative injunction to maintain the status quo, the court would "freeze in place a vacant and partially demolished mall, tantamount to a judicially mandated blight on the area. That outcome would serve neither party to the dispute, let alone the interests of the general public."

Jury Trial and Aftermath

After a two-week trial, a six-person jury was asked to decide just three questions:

1. Do you find that [Lord & Taylor has] proven by a preponderance of the evidence that [White Flint] violated [its] rights under the [REA] in one or more of the ways described in the Court's instructions?
2. Do you find that [White Flint] has proven by a preponderance of the evidence any one or more of the following defenses to [Lord & Taylor's] claims: {1} impossibility of performance due to changed circumstances, {2} waiver, or {3} estoppel?
3. What amount of damages, if any, do you award to [Lord & Taylor]?

The jury responded "Yes" to Question 1 and "No" to Question 2. The jury proceeded to award \$31 million to Lord & Taylor.

White Flint filed its Notice of Appeal on August 31, 2015. It submitted its initial Appellate Brief on November 9, 2015. Therein, White Flint argued in part that the district court erred by failing to allow the jury to consider the potential future profits of Lord & Taylor at a redeveloped mall site.

Lord & Taylor had sought to submit its demand for \$35.4 million to upgrade its store but had been precluded by the district court from submitting it to the jury. Lord & Taylor therefore filed a Notice of Cross-Appeal on September 10, 2015. Lord & Taylor submitted its initial Cross-Appellate Brief on December 23, 2015.

The parties completed appellate briefing on February 17, 2016, and as of the submission of this article, await either a ruling or the scheduling of oral argument. The Fourth Circuit will likely take up the case during its fall term, which begins in September.

At this time, other than the Lord & Taylor store, the White Flint Mall has been torn down in its entirety.

Practice Tips and Conclusion

Unlike other contracts, a party to an REA generally can enforce its rights under the agreement without any evidence of damages suffered as a consequence of the breach. Thus, the primary lesson to be taken from the Lord & Taylor proceedings should be that, when dealing with an REA, always get a waiver of rights in writing before taking any potentially violative action. This rule applies even if the proposed action appears on its face to benefit all parties to the REA. This rule also applies even if the other party to the REA provides an oral waiver of its rights or does not object immediately upon learning of a proposal that violates the REA. To prevent what could be an incredibly costly lawsuit and immense damages award, assume permission has not been granted unless it is provided in writing.