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DEC 23 2013

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<p>SAVE THE DINKY, a New Jersey Nonprofit Corporation, ANNE WALDRON NEUMANN; PETER MARKS; RODNEY FISK; WALTER NEUMANN; CHRISTOPHER HEDGES; ZANIFA HOSEIN; RACHEL KOEHN; DOROTHY KOEHN and all Others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>TRUSTEES OF PRINCETON UNIVERSITY, PRINCETON UNIVERSITY and NEW JERSEY TRANSIT,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY MERCER COUNTY CHANCERY DIVISION</p> <p>DOCKET NO.: C-64-11</p> <p style="text-align: center;">Civil Action</p> <p>ORDER GRANTING SUMMARY JUDGMENT DISMISSING COUNT I OF PLAINTIFFS' SECOND AMENDED COMPLAINT</p>
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THIS MATTER having been brought before the Court by Drinker Biddle & Reath, LLP, attorneys for Defendants Trustees of Princeton University and Princeton University (hereinafter collectively "Princeton University"), and by John J. Hoffman, Acting Attorney General of New Jersey, attorney for Defendant New Jersey Transit Corporation, on defendants' motions for summary judgment on Count I of Plaintiffs' Second Amended

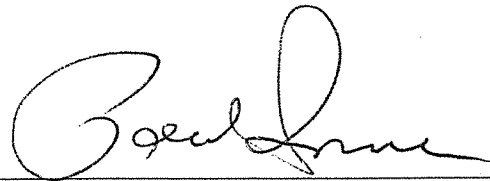
Complaint, and Jonathan I. Epstein, Esq. of Drinker Biddle & Reath, LLP appearing on behalf of Princeton University; and Kenneth M. Worton, DAG appearing on behalf of New Jersey Transit Corporation; and Philip Rosenbach, Esq. of Berman Rosenbach appearing on behalf of plaintiffs; and the Court having considered all papers filed in support of, and in opposition to, said Motions and the oral arguments of counsel (if any); and good and sufficient cause having been shown:

And for the reasons set forth by the court's Dec 23, 2013 decision

IT IS, on this 23rd day of December, 2013 ORDERED

that the Motions for Summary Judgment of Princeton University and NJ Transit Corporation on Count I of Plaintiffs' Second Amended Complaint are hereby GRANTED and Plaintiffs' Second Amended Complaint is hereby dismissed with prejudice.

A copy of this Order shall be served by counsel for Princeton University on all counsel within 7 days of its receipt hereof.



Honorable Paul Innes, P.J.Ch.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE
COMMITTEE ON OPINIONS

SAVE THE DINKY, a new
Jersey Nonprofit Corporation,
ANNE WALDRON NEUMANN,
PETER MARKS, RODNEY
FISK, WALTER NEUMANN,
CHRISTOPHER HEDGES,
ZANIFA HOSEIN, RACHEL
KOEHN, DOROTHY KOEHN
and all Others Similarly Situated,

Plaintiffs,

v.

TRUSTEES OF PRINCETON
UNIVERSITY, PRINCETON
UNIVERSITY and NEW
JERSEY TRANSIT,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER
COUNTY
DOCKET NO: C-64-11

CIVIL ACTION

CLERK OF SUPERIOR COURT
SUPERIOR COURT OF N.J.
MERCER COUNTY
DECISION RECEIVED AND FILED

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Argued: November 1, 2013

Philip Rosenbach, Esq., Berman Rosenbach, PC., attorney for plaintiff.

Jonathan I. Epstein, Esq., Drinker Biddle & Reath, LLP, attorney for Defendant,
Trustees of Princeton and Princeton University.

Kenneth M. Worton, Deputy Attorney General, attorney for Defendant, New
Jersey Transit Corporation.

Innes, Paul, P.J.Ch.

The present matter involves claims made by plaintiffs, Save the Dinky, Anne Waldron Neumann, Peter Marks, Rodney Fisk, Walter Neumann, Christopher Hedges, Zanifa Hosein, Rachel Koehn, and Dorothy Koehn, that defendants, Trustees of Princeton University and Princeton University (collectively "Princeton University"), and intervenor, New Jersey Transit ("NJ Transit"), lack the power and authority to move the Princeton branch terminus of the Dinky train.

The Princeton branch line of New Jersey Transit runs from Princeton Junction northwest through Princeton Township and is commonly known as the "Dinky." The Dinky Station property consists of land and improvements thereto and is also known as Block 45.01, Lots 4 and 39 on the Princeton Borough tax map and Block 10801, Lot 27, formerly known as Block 17.01 on the Princeton Township tax map. New Jersey Transit Corporation ("NJ Transit") owned the Dinky Station property from 1976 to 1984.

On October 30, 1984, NJ Transit sold the station land and buildings to Princeton University pursuant to a sales agreement. NJ Transit and Princeton University agreed that NJ Transit would retain an easement over the Dinky Station property continuing NJ Transit's use of the station property for public transportation purposes. The easement is described in Schedule B of the 1984 Sales Agreement as follows:

Grantor retains an easement over the property for public transportation purposes, including but not limited to: right-of-

way along existing tracks; a station to include a passenger waiting room, a ticket office, storage space, a mechanical area, and a bathroom; crew quarters; a railroad station platform of a minimum of 170 feet in length and a width of twelve feet; and ingress and egress to the above for Grantor's passengers, employees, contractors and agents for any and all purposes related to the use, operation, maintenance, inspection or alteration of passenger services, all in accordance with and as more specifically set forth in §15 and §17 of the Sales Agreement between parties dated October 30, 1984.

.....

The above-described easement and covenants shall terminate five (5) years after the abandonment and termination of passenger services to the property, unless passenger services are reinstated during that five year period.

[Schedule B to 1984 Sales Agreement; Goldman Cert., Exh. B.]

The easement is also included in the 1984 deed. A corrective deed for the Dinky Station property to correct the legal description was executed on April 29, 1985 and recorded on May 9, 1985. The 1985 corrective deed includes the easement.

On or about October 15, 1996, NJ Transit and Princeton University entered into an amendment to the 1984 Sales Agreement. The 1996 amendment to the 1984 Sales Agreement maintained in full force and effect all the terms of the 1984 agreement with one exception: Paragraph 15(a). The parties deleted that paragraph and replaced it with the following language:

In accordance with Paragraph 15(a) of the original Agreement between Seller and Buyer, Seller shall vacate the northern building and relocate its station related facilities to the existing southern facility upon completion and acceptance by the municipality and Seller of certain improvements which shall be provided by the Buyer at its sole cost and expense. Buyer shall renovate the southern facility so that it is in habitable condition (including any structural repairs) and in accordance with the plan attached hereto as Exhibit "A" and made a part hereof. Within thirty (30) days after receipt of a certificate of occupancy from the municipality, Seller will relocate to the southern facility. The southern facility shall contain staff restrooms, commuter waiting room, ticket office, retail area and public restrooms. The southern facility shall be constructed and maintained by Buyer in accordance with all federal, state and local code requirements including but not limited to the Americans with Disabilities Act (ADA). Buyer will keep and repair the southern facility for use by Seller at Buyer's sole cost and expense including but not limited to structural improvements, building systems, and janitorial services. Buyer will pay all utilities serving the southern facility.

Thereafter, Princeton University undertook a planned development of an arts neighborhood and transit center in the area surrounding the Dinky Station property. On October 21, 2010, the university notified NJ Transit that it was exercising its right under the agreements to have NJ Transit relocate the Dinky terminus 460 feet to the south. On March 2, 2011, the Executive Director of NJ Transit advised the university that the move "was specifically contemplated" in the 1984 Sales Agreement and that NJ Transit had no objection to the move. In furtherance of the planned relocation of the rail terminus, defendants have entered into a Construction Agreement and Temporary Access Permit which provides for the implementation

of the relocation of the rail terminus and the construction of the new rail platform, rail station, commuter parking lot and transit plaza.

NJ Transit has continued to operate the Dinky since the sale of the Dinky Station property to Princeton University. Princeton University has allowed the public to access the Dinky Station property in order to utilize NJ Transit rail services. Defendants state that any use of the Dinky Station property by the plaintiffs has been as members of the general public with the permission of NJ Transit and Princeton University.

Plaintiffs filed a three-count complaint on October 4, 2011. On January 19, 2012, plaintiffs filed an amended complaint which added Christopher Hedges, Zanifa Hosein, Rachel Koehn, and Dorothy Koehn as plaintiffs. On September 14, 2013, plaintiffs filed a second amended complaint. In Count One of the complaint, plaintiffs seek declaratory judgment that the proposed relocation is contrary to the 1984 Sales Agreement. In Count Two, plaintiffs seek declaratory judgment that the 1984 Sales Agreement created a public transportation easement for the use and benefit of the public and plaintiffs to enter and exit the Dinky at the existing terminus. And, in Count Three, plaintiffs seek declaratory judgment that plaintiffs and the public have a prescriptive easement to enter and exit the Dinky at the existing terminus.

On August 10, 2012, this court granted partial summary judgment in favor of defendants and dismissed Count Three of plaintiffs' amended complaint.

On May 3, 2013, defendants filed a motion for summary judgment on Counts One and Two of plaintiffs' amended complaint. On May 28, 2013, plaintiffs' filed a cross-motion for summary judgment on Counts One and Two of their amended complaint. On June 3, 2013, defendants filed a reply brief in further support of their motion for summary judgment and in opposition to plaintiffs' cross-motion for summary judgment. On June 20, 2013 this court denied defendants' motion to dismiss the complaint based on lack of standing of plaintiffs, granted defendants' motion to dismiss Count Two of the complaint, and denied plaintiffs' cross-motion for summary judgment.

On August 23, 2013, plaintiffs presented to the court a request for an order to show cause seeking temporary restraints. By order dated September 4, 2013, this court denied the request for temporary restraints and scheduled the hearing on plaintiffs' application for a preliminary injunction for October 18, 2013.

On September 20, 2013, defendants filed this motion for summary judgment dismissing Count One of the complaint. Plaintiffs filed a response to the motion on October 8, 2013. Defendants filed a reply on October 21, 2013. The court conducted oral argument on November 1, 2013.

A motion for summary judgment may be granted when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-29 (1995), citing R. 4:46-2. A genuine issue as to any material fact exists only when “if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.” R. 4:46-2(c). Summary judgment should be granted when the evidence is “so one-sided that one party must prevail as a matter of law.” Brill, supra, 142 N.J. at 533.

When a motion for summary judgment is made and supported as provided in this rule, the nonmoving party “may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.” R. 4:46-5. However, the opposing party must present more than a scintilla of evidence. Brill, supra, 142 N.J. at 533. Therefore, the nonmoving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment, but must produce evidence that demonstrates a genuine issue of material fact.

The sole issue raised by plaintiffs in Count One of the amended complaint is whether the 1984 Sales Agreement prohibits Princeton University and NJ Transit from relocating the rail terminus of the Dinky line beyond the reservation of 170 feet of platform space established in the 1984 agreement, but still within the Dinky Station property. The court shall limit its scope of review of defendants' motion for summary judgment to this issue.

When the terms of a contract are clear, the terms of such contract are to be enforced as written. County of Morris v. Fauver, 153 N.J. 80, 103 (1998). If a court finds “the terms . . . are clear and unambiguous, there is no room for construction and the court must enforce those terms as written,” Watson v. City of East Orange, 175 N.J. 442, 447 (2003), giving them “their plain, ordinary meaning.” Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 270 (2008). Courts enforce contracts in accordance with their terms. Maglies v. Estate of Guy, 193 N.J. 108 (2007).

It is undisputed by the parties that the 1984 Sales Agreement governs Princeton University and NJ Transit's actions with respect to the Dinky Station property. Furthermore, there is no dispute that the agreement was amended in 1996 after a previous move of the station facilities.

By the terms of the 1984 agreement, NJ Transit conveyed the Dinky station property to Princeton University subject to an easement retained by NJ Transit.

(Defendants' Exh. A, "Sales Agreement;" Defendants' Exh. B, "Deed" dated December 5, 1984; and Defendants' Exh. C, "Deed" dated April 29, 1985). By the language of that easement and by express reservation of rights in the 1984 Sales Agreement, NJ Transit has the sole power "to expand, reduce, terminate or alter the type of passenger-related services within or serving the station parcel, if in its opinion, conditions warrant." (Defendants' Exh. A, "Sales Agreement," Paragraph 17(c)). The easement expressly reserves the right of NJ Transit to approve any alterations to the improvements located or constructed in the station property.

On or about October 15, 1996, NJ Transit and Princeton University entered into the amendment to the 1984 Sales Agreement. The 1996 agreement replaced Paragraph 15(a) of the 1984 Sales Agreement with a new provision that approved the relocation of the passenger facilities from the north building to the south building. In Count One of their complaint, plaintiffs completely ignore the existence of the 1996 amendment to the 1984 Sales Agreement.

Princeton University has no authority to act unilaterally in effectuating an alteration to the improvements under the 1984 Sales Agreement or the 1996 Agreement. Princeton University has no right to alter the service to the Dinky in any way without the express approval of NJ Transit. By so structuring the agreements, NJ Transit did not delegate its authority to alter the easement to Princeton University. Rather, it simply granted Princeton University the right to

propose any such alteration. Upon approval of NJ Transit, Princeton University has the authority to move the existing terminus of the rail line within the Dinky Station Property, given that any move allows for a minimum reservation of platform space.

Princeton University made plans to improve the Dinky Station property. Those plans included the relocation of NJ Transit's station and service sites, all within the easement and station property. The plans were submitted to NJ Transit for approval. (Defendants' Exh. E). Not only did NJ Transit not object to the plans, but in the letter from James Weinstein to Robert K. Durkee dated March 25, 2011, it authorized the alterations pursuant to the terms of the 1984 Sales Agreement. (Defendants' Exh. F). By approving the plans, NJ Transit exercised its discretion it retained in the easement to alter the passenger related services located in the station property. If NJ Transit were to have an objection, its denial of the plans would prevent any alteration to the services within the station property. Since the plans were approved, NJ Transit granted Princeton University authority to move the terminus of the rail line to reflect the amount of space on the newly proposed platform. The plans include a move of the terminus, so in performing its work in connection with the property, Princeton University will be acting with the authority and permission of NJ Transit. These actions were in compliance with the 1984 Sales Agreement as amended by the 1996 agreement.

A plain reading of the 1984 agreement and its 1996 amendment indicates that the proposed relocation is not contrary to the agreements. A number of Paragraphs of the 1984 Sales Agreement authorize the university to relocate the station:

15. Improvements

(d) Terminus of the Rail Line. Buyer has the right to move the existing terminus of the rail line southward coincident with the location of the minimum reservation of platform space. This relocation, which will include moving the bumper block, rail removal, cutting and resecuring the catenary and signal relocation, must be done by Seller, its agents, or its designee, at the sole expense of Buyer.

(e) Consultation on plans for Improvements. Buyer agrees to consult with Seller on plans for improvements to the station-related facilities for Seller's use prior to submitting application for site plan approval. All plans and specifications for improvements and/or alterations to the property used by Seller, whether related to initial improvements or otherwise, shall be submitted to Seller for approval, which approval shall not be unreasonably withheld.

Plaintiffs argue that Paragraph 15(a) of the agreement is a clearly delineated right to move the station to a specifically designated location. When read in conjunction with Paragraph 15(e), specifically the words “[a]ll plans and specifications for improvements and/or alterations to the property used by Seller, whether related to initial improvements or otherwise,” it is clear that the agreement contemplates that the university has the authority to move the station to a location

other than the one designated in Paragraph 15(a), subject to the approval of NJ Transit.

Additionally, by letter dated March 25, 2011, NJ Transit confirmed the right of Princeton University to have the Dinky terminus moved south and also consented to the proposed move. (Cert. of Richard S. Goldman in Support of Defendants' Motion for Summary Judgment, Exh. F.) In that letter, James Weinstein, Executive Director of NJ Transit, states that "NJ Transit has no objection to . . . proposal" and that the move was "specifically contemplated in the October 30, 1984 agreement of sale between NJ Transit and the University for the station property." Mr. Weinstein goes on to state that "Section 15(d) of the agreement speaks directly to the University's right to move the terminus of the rail line southward as long as NJ Transit's reservation of rights for a 170 foot platform is preserved . . ." and "NJ Transit agrees with the University that the 1984 agreement allows the University to move the Dinky station to the south . . . nothing in the agreement prohibits such a move." Furthermore, Richard S. Goldman, counsel for defendants, certified that on June 6, 2011, he was present at the Princeton Borough Council meeting at which NJ Transit officials appeared and testified on the record that Princeton University had the right to move the Dinky station 460 feet southward under the terms of the agreement. (Cert. of Richard S. Goldman in Support of Defendants' Motion for Summary Judgment.)

In opposition to this motion, plaintiff argues that this action constitutes an unlawful delegation of authority amounting to the abandonment of the Dinky station as well as the unlawful delegation of authority to make decisions regarding the termination of public passenger railway service. As stated above, the terms of the 1984 agreement as amended by the 1996 agreement do not delegate any such unilateral authority to Princeton University.

NJ Transit retains the sole authority “to expand, reduce, terminate or alter the type of passenger-related services within or serving the station parcel, if in its opinion, conditions warrant.” (Defendants’ Exh. A, “Sales Agreement,” Paragraph 17(c)). Princeton University has no unilateral rights in this regard. Therefore, there has been no delegation of NJ Transit’s authority to Princeton University.

Plaintiff also argues that this move constitutes an abandonment of an easement. That claim is unsupported by the facts presented to the court. Princeton University’s plans propose moving the train station a mere 460 feet. The station will remain on the Dinky Station property. Therefore, the agreements remain in effect and the easement continues in full force. While it is certainly true that Princeton University will construct improvements to the station property, those improvements are pursuant to the plans approved by NJ Transit in accordance with its rights retained in the easement. There has been no abandonment of the easement.

The balance of plaintiffs' arguments center around their position that the relocation of the station constitutes termination of passenger railway service from the site, and, therefore, requires state and federal regulatory approval. These arguments are without merit. There is no termination or abandonment of passenger train service, just a relocation of the station by 460 feet. Further, Count One of the complaint seeks declaratory judgment as to the terms and conditions of the 1984 Sales Agreement. Plaintiffs never raised the issue of the need for federal or state regulatory approval in its pleading. This is not to say plaintiffs are foreclosed from pursuing such a position in an appropriate action. Plaintiffs having failed to do so in this declaratory action, this court will not address these arguments now in response to defendants' motion for summary judgment.

This court finds that the terms of the agreements are facially clear. Under the terms of the 1984 Sales Agreement as amended by the 1996 Agreement, Princeton University is permitted to propose, and NJ Transit is permitted to approve, a plan to relocate the train station and rail terminus 460 feet south within the Dinky Station property. Therefore, the court grants defendants' motion for summary judgment dismissing Count One of plaintiffs' amended complaint.