

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7133

September Term, 2017

FILED ON: APRIL 17, 2018

HOWARD TOWN CENTER DEVELOPER, LLC, AND CASTLEROCK PARTNERS, LLC,
APPELLANTS

v.

HOWARD UNIVERSITY,
APPELLEE

Consolidated with 17-7163

Appeals from the United States District Court
for the District of Columbia
(No. 1:13-cv-01075)

Before: HENDERSON and KAVANAUGH, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the District Court's judgment be **AFFIRMED**.

This long-running case arises out of a dispute between a developer of certain real property and Howard University, the owner of the property. The dispute centers on \$1,475,000 in back rent that the University says it is owed by the Developer under the terms of the original Development Agreement and Ground Lease.

In an earlier round of litigation, the District Court granted summary judgment to the University. On appeal, we vacated the District Court's grant of summary judgment to the University. We concluded that the parties' Term Sheet agreement – which post-dated the original Development Agreement and Ground Lease – created a genuine issue of material fact about whether the Developer owed the University the \$1,475,000 back-rent payment. We then remanded for the District Court to determine in the first instance whether the parties' Term Sheet agreement

was “a legally enforceable contract under D.C. law and, if so, how the Term Sheet affects both the Developer’s claim that the University improperly terminated the Ground Lease and the University’s counterclaim that it is entitled to collect \$1,475,000.” *Howard Town Center Developer, LLC v. Howard University*, 788 F.3d 321, 329 (D.C. Cir. 2015).

After conducting an 8-day bench trial, the District Court made extensive findings of fact and thoroughly analyzed the relevant legal issues. The District Court correctly determined that the Term Sheet was a legally enforceable Type II preliminary agreement that obligated the parties to negotiate in good faith about the parties’ contemplated Second Amendment to the original Development Agreement and Ground Lease. *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1131 (D.C. Cir. 2015); *Stanford Hotels Corp. v. Potomac Creek Associates, L.P.*, 18 A.3d 725, 735-36 (D.C. 2011).

The District Court concluded that the Developer materially breached the Term Sheet by negotiating in bad faith. The District Court supported that determination with numerous factual findings. The District Court did not clearly err in determining that the Developer negotiated in bad faith. *See American Hospital Association v. Sullivan*, 938 F.2d 216, 222 (D.C. Cir. 1991) (finding of bad faith reviewed for clear error).

The question then became the remedy. The District Court correctly determined that the Term Sheet was an executory accord. *See District of Columbia v. Young*, 39 A.3d 36, 40 (D.C. 2012). Because the Term Sheet was an executory accord, the Developer’s breach restored the parties to their pre-Term Sheet positions. The District Court therefore correctly concluded that the University was due \$1,475,000 in back rent and that the University permissibly terminated the Ground Lease and Development Agreement after the Developer failed to make the back-rent payment.

In light of the District Court’s finding that the Developer engaged in bad faith, the District Court also did not abuse its discretion in awarding forfeiture of the Ground Lease. The District Court analyzed the relevant factors under D.C. law and did not abuse its discretion in concluding that forfeiture was warranted under the circumstances of this case. *See Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1160-61 (D.C. 1985).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1)*.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk