- Original Case 62609-2022 commenced in NYS Supreme Court, Westchester County on July 20, 2022 (and assigned to Hon. Melissa Loehr, JSC)
    - August 24, 2022, defendants file a notice of removal.
    - September 16, 2022, RC files a motion for remand
    - September 23, 2022, defendants file a motion for partial dismissal in the SDNY
    - January 9, 2023, Decision and Order remanding case to Westchester County
- Second Case 69131-2022 commenced in NYS Supreme Court, Westchester County on January 25, 2023
    - Proposed order to show cause bringing on motion for receiver, preliminary injunction, etc. filed on February 8, 2023
        - Assigned to Hon. Charles Wood, JSC, who signs proposed order and sets return date 4 weeks later, on March 8, 2023.
            - Oral argument/recusal discussion held in person on that date.
            - Court declines to enter temporary relief based on representation of short turnaround on decision.
    - March 31, 2023, defendants file a motion to dismiss the Second Case
- **On May 17, 2023, the Court issued a decision and order denying RC's motion for preliminary relief and a receiver**.
- On May 31, 2023, RC commenced a separate action against Yorktown Golf Group, et. al.
- **On June 16, 2023, the Court issued a decision and order on the Town's motion to dismiss, granting it in part, and denying it in part**.
- **On September 27, 2023, the Court (again Judge Wood) issued a decision granting Yorktown Golf Group's motion to dismiss in the separate action**.

ALL THREE OF THE SUBJECT ORDERS ABOVE HAVE BEEN DULY APPEALED, WITH THE APPEAL PERFECTION DATES UPCOMING IN THE NEXT 60-90 DAYS

- GROUNDS FOR APPEALS
  - The common ground for appeal of all these decisions is that given the procedural posture of the case (pre-answer motion practice), the Court improperly reversed the burden of proof, ignored well-pleaded factual allegations, drew inferences adverse to the allegations in the complaint, and never once limited itself to the face of the complaint or its attachments.
  - A more specific ground with respect to the decision and order on the motion to dismiss the RC/Town case and on the preliminary injunction and receiver is that the Court declared that the Town had simply terminated the concession agreement under the convenience clause, rather than allegedly for cause. The Court then declared that RC's interests were protected because the Town must someday make payment under the convenience clause. The convenience clause, however, was not even motioned by the Town until the final Notice of Termination in November 2022, and the Town has never offered to make any payment at all. Until that time, the Town had proceeded under a theory of "for cause" termination, which is what RC had challenged in the action.
  - Across the board, the Court rendered findings of fact and drew inferences favorable to the Town. This is highlighted most clearly in the RC/Yorktown ruling, which was a pre-answer motion to dismiss. That case was commenced to protect RC's payment interest Judge Wood had identified in

the RC/Yorktown case. It was pleaded narrowly for unjust enrichment and equitable trust and tortious interference with contract. Judge Wood rejected nearly all the complaint's factual allegation, cited to an attorney's affidavit in his ruling, and again seems to have ignored the applicable standard of review.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC
Petitioner-Plaintiff,

DECISION & ORDER
INDEX NO.62609/2022

for a Judgment pursuant to Article 78 of the N.Y. Civil Practice Law & Rules and RPAPL 853,

-against-

THE TOWN OF YORKTOWN, N.Y.; MATTHEW J. SLATER, in his Official Capacity as Supervisor of the Town of Yorktown, N.Y.; SERGIO ESPOSITO, in his Official Capacity as a member of the Town Board of the Town of Yorktown, N.Y; and JOHN H. LANDI, in his Official Capacity as Building Inspector for the Town of Yorktown, N.Y.
Respondents-Defendants

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC
Petitioner -Plaintiff,

INDEX NO. 69131/2022
Motion Seq Nos. 1&2

for a Judgment pursuant to Article 78 of the N.Y. Civil Practice Law & Rules and NY RPAPL 853

-against-

THE TOWN OF YORKTOWN, N.Y.; MATTHEW J. SLATER, in his Official Capacity as Supervisor of the Town of Yorktown, N.Y.; . SERGIO ESPOSITO, in his Official Capacity as a member of the Town Board of the Town of Yorktown, N.Y; and JOHN H. LANDI, in his Official Capacity as Building Inspector for the Town of Yorktown, N.Y.; and JOHN/JANE DOE, being the one or more contractors or companies awarded the contract to replace RC Recreation Development, LLC,
Respondents- Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 45-105 were read in connection with the motion by order to show cause (Seq 2) by plaintiff/petitioner RC Recreation Development, LLC ("RC") for the following relief: to appoint a Receiver to take exclusive possession of and oversee the Valley Fields Golf Course ("the golf course") during the pendency of the underlying proceeding; enter a preliminary injunction enjoining the Town of Yorktown ("the Town") from prohibiting RC from taking possession of or otherwise using or occupying the golf course, including all structures of any kind installed and/or constructed by RC, and engaging in any other conduct that would tend to affect the unamortized market value of all the structures, fixtures, and equipment at the golf course installed and/or constructed by RC; and other sought relief.

RC brings this action to hold the Town accountable for its purported wrongful termination and forcible eviction of RC from the golf course as a concessioner.

Based upon the foregoing, the motion is decided as follows:

By way of background, on September 19, 2014, the Town and RC entered into a Concession Agreement, to redevelop the golf course—a pre-existing 9-hole golf facility for public use, on town-owned parkland. The 2018 "First Amendment" to the Concession Agreement, extended the initial lease term to August 31, 2028, with two, five-year renewal terms at RC's option, which would extend the term until 2038. Changes were made to the Concession Agreement's "Termination" section 6 as follows:

> Prior to the expiration date of this License, the Town has the absolute right to terminate this License at will by providing written notice of such intention to terminate the license at least sixty (60) days prior to the commencement of the golf season on April 1 each year. In the event of a material breach of the License by the Licensee, the Town may

> immediately terminate this License if the Licensee does not cure the condition giving rise to the material breach, to the extent curable, within thirty (30) days of such written notice by the Town identifying a material breach. If the Town terminates the license without there being a material breach of this Agreement that has not been cured within thirty (30) days of the receipt of notice of such breach, or is not curable, then in such event, **the Town shall reimburse the Licensee for the unamortized portion of all fixed equipment installed by the Licensee** as part of this license and concession on a prorated basis, and reimbursement for all additional equipment not removed by Licensee. In the event of a dispute as to the value of the work rendered by the Licensee, both the Town and Licensee agree to a third-party appraiser, to be mutually chosen by the parties, to determine the value of such work prior to the termination of this agreement (NYSCEF# 72).

A Second Amendment of the Concession Agreement was executed on June 4, 2022, but there are allegations that proper approvals were not gained, perhaps deeming the Town's execution a nullity.

Wadsworth Golf Charities Foundation ("the Foundation"), had approved a $250,000 grant for the project and provided RC with $100,000, in 2016-2017. This relationship with RC was severed by Wadsworth, due to an alleged lack of communication, unskilled work and inexperienced management. Eric Wadsworth, President of the Foundation attested that: "Overall, it became clear to the Foundation that the management overseeing the project lacked experience in this type of construction. Therefore, the Foundation dissolved its relationship with RC Recreation Development and the renovation project. The Foundation has not been refunded with its $100,000.00" (NYSCEF#83).

On June 28, 2022, the Town conducted a building and safety inspection of the golf course. This inspection led to a punch list of items necessary before the golf course could be issued a final certificate of occupancy.

On July 6, 2022, a Stop Work Order was affixed to the golf's clubhouse and restaurant complex. RC purportedly set out to "cure" the alleged code violations supporting the stop work order and civil enforcement proceeding. According to RC, the Town interfered with, delayed, and impeded RC's ability to do so.

On September 7, 2022, in accordance with the termination provision of the Concession Agreement, the Town Board passed a resolution that the Town would terminate RC based upon its material breach of the parties' agreement by November 15, 2022, if RC failed to cure the violations. According to the Town, while it was only contractually obligated to give RC 30 days to cure, the Town provided approximately 120 days for RC to cure the violations, and RC did nothing to remedy the issues at the site.

On November 15, 2022 (the deadline for RC to cure the alleged violations), RC consented to a limited inspection of the subject premises, and the Town conducted an inspection of the entire golf facility. The Town claims that there have been a multitude of issues with the project, including that RC allegedly removed at least 90 trees along the fairway edge causing an environmental impact on the premises situated near wetland; in March 2020, the New York State Department of Environmental Conservation ("NYSDEC") conducted a site inspection and issued a cease and desist order, with violations and penalties of up to $37,500 per day, leading to a consent decree with NYSDEC, wherein the Town committed to pay a civil penalty of $18,650; RC allegedly repeatedly failed to meet deadlines for the completion of the golf course; there were numerous violations of the fire, building, town and state code; one of RC's employees was illegally living on the premises in a trailer, who was later arrested at the park for menacing and endangering the welfare of a child after displaying a large butcher's knife in front of an adult and

a child threatening to kill them; and The Town received a Notice of Lien for unpaid sanitation services totaling $125,000, in violation of the Concession Agreement.

These alleged violations, RC's purported failure to cure the previously noticed material breaches, and the lengthy timeline for completion of the golf course lead the Town to issue a formal Notice of Termination to RC on November 16, 2022. Additionally, the Town purported to exercise the Concession Agreement's "convenience" clause, which permits the Town to terminate the Concession Agreement at its discretion any time more than sixty (60) days prior to the next golf season. The Notice of Termination provided that RC had until November 30, 2022, to vacate the premises and remove all personal belongings and personal property.

Since RC's termination, the Town has hired a new concessionaire who will be completing the renovation of the course. It is anticipated that the golf course will be completed by Summer 2023.

RC argues that the Town failed to abide by the compensation and reimbursement provisions that are automatically triggered under the Concession Agreement in the event of such a "for convenience" termination.

This court executed an order to show cause on February 8, 2023, which set a briefing schedule, and required the parties to appear before this court on March 10, 2023, to be heard on the order to show cause, which took place[1].

1 The issue of recusal of this court was also discussed at the conference, with each counsel provided the opportunity to voice concerns on the matter. On that same date, this court issued a Recusal (NYSCEF#101) subject to remittal, which the parties had advised the court that they may wish to exercise. Ultimately, the parties stipulated to waive the appearance of impropriety, and remit this matter back to this court.

Turning first to RC's application for the appointment of a temporary receiver, CPLR 6401(a) allows the appointment of a temporary receiver of property in favor of a party with an apparent interest in it, "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed", and Subdivision (b) authorizes the temporary receiver to "hold real property ... upon such conditions and for such purposes as the court shall direct" (*HSBC Bank USA, N.A. v Rubin,* 210 AD3d 73, 80 [2d Dept 2022]).

RC contends: that it is and remains the concessionaire under the Concession Agreement; the Town wrongfully terminated the Concession Agreement; RC has invested more than $4 million dollars in reimbursable equipment, fixtures, and other sunk costs; the Town has put up no performance bond or other guarantee; and RC has no lien on real estate property.

Taking into consideration the parties' submissions, RC's application for a temporary receiver is denied. No clear evidentiary showing has been demonstrated that there is a necessity for the conservation of the premises and the need to protect a party's interests therein (*Quick v Quick,* 69 AD3d 828, 829 [2d Dept 2010]). RC failed to show "clear and convincing evidence of irreparable loss or waste to the subject premises and that a temporary receiver is needed to protect their interests" (*Board of Managers of Nob Hill Condominium Section II v Board of Managers of Nob Hill Condominium Section I,* 100 AD3d 673 [2d Dept. 2012]). The court notes that the provisional remedy of appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of Town property without an adjudication on the merits (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d at 80).

Through this litigation, RC will have its opportunity to establish proof of it rights to compensation and the value of its property through receipts and other means. As the Town points

out, that calculation is a hard cost, the value of which is already readily available to RC without the necessity of appointing a Receiver. Indeed, RC should have receipts, invoices, and bills readily available to it, outlining the value of installing any fixed equipment at the property,

In addition, as the Town claims, RC failed to prove that it has any apparent interest in the Town's property since RC was a mere licensee on the Town's property. RC never had any possessory or apparent interest in the golf course, it merely received a license to run a golf course and a restaurant.

Next, to be entitled to a preliminary injunction, the moving party must demonstrate by clear and convincing evidence, the following three elements: (1) the likelihood of success on the merits; (2) danger of irreparable harm in the absence of an injunction; and (3) a balance of the equities in favor of granting the injunction *(84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.,* 91 AD3d 702 [2d Dept 2012]). A preliminary injunction is a drastic remedy that a court should not grant unless the party seeking such relief can "establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co. v Vallo Transportation, Ltd.,* 13 AD3d 334 [2d Dept 2004]). However, "all that must be shown is the likelihood of success; conclusive proof is not required" (*Moy v Umeki,* 10 AD3d 604 [2d Dept 2004]). Thus, "while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits...to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (*Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.* 53 AD3d 612 [2d Dept 2008] quoting Milbrandt & Co. v Griffin, 1 AD3d 327, 328 [2d Dept 2003]). "Where facts are in sharp dispute, a temporary injunction will

not be granted" (*Matter of Related Props., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 590 [2d Dept 2005]). The determination of whether to grant or deny a preliminary injunction rests in the sound discretion of the trial court *(84-85 Gardens Owners Corp. v 84-12 35th Ave. Apt. Corp.*, 91 AD3d 702 [2d Dept 2012]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Kelley v Garuda,* 36 AD3d 593 (2d Dept 2007). Additionally, it must be shown that the irreparable injury to be sustained is more burdensome to that party than the harm caused through the imposition of the injunction (citation omitted), and such injury is imminent, not remote or speculative (*Copart of Connecticut, Inc. v Long Island Auto Realty, LLC,* 42 AD3d 420 [2d Dept 2007]; *Village/Town of Mount Kisco v Rene Dubos Center for Human Environments, Inc.,* 12 AD3d 501 [2d Dept 2004]).

RC argues that it is likely to succeed in overturning the Town's alleged "for cause" termination, thus leaving the Town with an obligation to compensate RC. In addition, RC argues that the Town's breaches are manifest on this record.

The Town points out again that RC, as a licensee, has no possessory interest in the subject property and any claim of ouster under RPAPL §893 will be dismissed. Further, the Town claims that "parkland cannot be leased, even for a park purpose, absent legislative approval; RC materially and repeatedly breached the Concession Agreement; the Town merely granted RC a license to operate a golf course and a restaurant; and RC's inability to accomplish the fundamental purpose of the Concession Agreement itself constitutes a material breach. The Town also points out that RC was required to comply with all applicable federal, state and local laws, rules, regulations and orders" for safety, fire, labor and public health, which it failed to do,

and plaintiff's claims will be dismissed for failure to comply with the demand for a General Municipal Law §50-h Hearing.

In light of the foregoing, RC has not established a likelihood of success on the merits, as the record appears to substantiate that there were violations on the part of RC, and the Concession Agreement contemplates the consequences if the Town terminates the Concession Agreement as hereinabove discussed.

As for the requirement of irreparable harm, RC argues it has invested millions in the golf course, club house, and restaurant. It has reshaped the fairways, installed custom bunkers with imported sand, redesigned and reconstructed tee boxes and greens, rehabilitated the dilapidated clubhouse into a state-of-the-facility, installed new fixtures and equipment, and taken the golf course from a state of utter dilapidation to the near playable state it is now.

The Town contends that RC never had a reputation in the industry as a golf course developer, and that it was formed to be a shell for this project. The Foundation also took issue with RC's workmanship, the lack of progress on the project, and inexperienced management, which led to it severing its relationship with RC. The Town continues that even if RC was terminated at will RC's economic damages are easily calculable. If terminated at will, RC is entitled to compensation for fixed equipment. Based on the foregoing, RC failed in its burden to show that it would suffer irreparable harm if this preliminary injunction was not issued.

Lastly, on Balance of Equities, RC contends that the court can see the work that has been completed, and the Court can compare the "before and after" photographs. The Court can see that until January of 2020 (when Slater became Town Supervisor), construction was proceeding

apace, and that even as late as December 2021, John Tegeder issued a report stating that things were progressing well at the golf course.

The Town argues that comparatively, a preliminary injunction will cause severe and protracted injuries to the Town. Particularly, if the Town is dispossessed of its property, the Town will remain unable to complete construction and commence operations of its golf course and restaurant, after nine years of construction of the golf course for the benefit of the public.

The court agrees that a preliminary injunction in favor of RC will likely cause damages to the Town. It cannot reasonably be argued that the balance of equities weighs more heavily toward RC. The Town has the same or greater costs for not being able to utilize its land for a golf course for its residents, and RC will have ample opportunity to prove its damages without a receiver taking control of the property.

Accordingly, based on this record, RC's application for a preliminary injunction is denied without a hearing (*Marders the Landscape Store v Barylski,* 303 AD2d 465 [2d Dept 2003] [hearing not required where movant fails to meet its burden]). Since the elements required for the issuance of a preliminary injunction were not demonstrated in RC's papers, no hearing is required (CPLR 6312(c)).

However, the court would be remiss if it did not point out that its determination of the preliminary injunction is merely that. It is not a determination of the merits of the plaintiff's underlying claim. For these reasons, it is hereby

ORDERED, that RC's motion for an appointment of a temporary receiver and a preliminary injunction is **denied.**

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
May 17, 2023

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC,
Petitioner -Plaintiff,

INDEX NO. 69131/2022
Motion Seq No. 3

for a Judgment pursuant to Article 78 of the N.Y. Civil Practice Law & Rules and NY RPAPL 853

-against-

THE TOWN OF YORKTOWN, N.Y.; MATTHEW J. SLATER, in his Official Capacity as Supervisor of the Town of Yorktown, N.Y.; SERGIO ESPOSITO, in his Official Capacity as a member of the Town Board of the Town of Yorktown, N.Y; and JOHN H. LANDI, in his Official Capacity as Building Inspector for the Town of Yorktown, N.Y.; and JOHN/JANE DOE, being the one or more contractors or companies awarded the contract to replace RC Recreation Development, LLC,
Respondents- Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 106-131 were read in connection with the motion by defendants for an order pursuant to CPLR 3211, to dismiss the second cause of action (breach of contract by anticipatory repudiation of the parties' concession agreement and breach of the implied covenant of good faith and fair dealing), third- (anticipatory repudiation of a purported Second Amended Concession Agreement), fifth- (abuse of process), sixth- (that the determination to terminate the Concession Agreement is arbitrary and irrational), eighth- (unlawful ouster), ninth- (injunctive relief, appointment of a receiver, and for an accounting) tenth- (right to free speech retaliation), eleventh- (procedural due process), and

twelfth- (unreasonable searches and seizures).

In this hybrid proceeding, the amended petition-complaint brought by RC alleges that the Town of Yorktown ("the Town"), wrongfully terminated and forcible evicted RC from the golf course as a concessioner. RC held a license to renovate an already existing golf course owned by the Town pursuant to a Concession Agreement dated September, 2014, between the Town and RC, as amended by the First Amendment To Concession Agreement dated May 24, 2018 ("the Concession Agreement"). On November 15, 2022, the Town terminated the license due to RC's purported repeated failure to perform and material breach of the license's terms, including poor workmanship, inexperienced management, and various violations of state and local codes, rendering the property unsafe and necessitating a Stop Work Order. RC purportedly failed to cure the deficiencies and did not complete the job.

Based upon the foregoing, the motion is decided as follows:

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Meehan v Cty. of Suffolk*, 144 A.D.3d 642, 643 [2d Dept 2016]).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR§3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*AMCC Corp. v New York City Sch. Const. Auth.*,

154 AD3d 673, 674 [2d Dept 2017]).

Turning to the Second Claim for Breach of Contract by Anticipatory Repudiation of Concession Agreement/Breach of the Implied Covenant of Good Faith and Fair Dealing, RC argues that the Town's breaches include:

(i) the attempt to enforce an inapplicable local tree preservation law against RC in order to slow RC's progress and gain control over the project; (ii) the attempt to rewrite history and charge RC with the moving of the water supply line when it was the Town that did so, then using that as a pretext to issue the Stop Work Order, then a failed criminal case, then a failed civil case; (iii) the unlawful directive by the Town Board to the Planning Board to take up the project for site plan approval years after construction had commenced, with no proof of any formal referral or other Town Board action; (iv) the unreasonable withholding of consent to a simple corporate assignment; and (v) repeated disparagement by Slater, Esposito, and Landi of RC and/or its agents and contractors during public meetings and in comments to the press and public.

The Second Department has held that:
"An anticipatory breach of a contract—also known as an anticipatory repudiation—can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (internal cite omitted) "[U]nder the doctrine of anticipatory repudiation, where one party repudiates its contractual obligations prior to the time designated for performance, the nonrepudiating party may immediately claim damages for total breach and be absolved from its obligations of future performance" 5d(internal cite omitted) "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal" (*Costea v Vemen Mgmt. Corp.*, 213 AD3d 634, 637 [2d Dept 2023]).

Further, a breach of the implied covenant of good faith and fair dealing occurs when "a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Aventine Inv. Mgmt. Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]).

The Notice of Termination sent by the Town to RC cites causes for termination including:

-RC has repeatedly provided the Town with projected dates for RC to commence full operation of the golf course and restaurant, which dates RC has repeatedly failed to meet;
- on July 6, 2022, and upon inspection of the work performed by RC at the Park, the Town' s Building Inspector observed numerous code violations that necessitated the issuance of a Stop Work Order, which was issued on that date;
-on September 6, 2022, the Town Board adopted a resolution finding RC in material breach of the Concession Agreement (due to the Violations and RC' s failure to commence full operation of the Park), and providing RC an opportunity to cure the material breaches
-the Town conducted an inspection of the Park on November 15, 2022, and determined that RC has failed to cure the material breaches within the time provided in the Cure Resolution.

Upon review of defendants' submissions, RC's Second claim must fail. Although the petition must be construed liberally, the factual allegations deemed to be true, and the nonmoving party must be given the benefit of all favorable inferences', RC cannot get around the fact that the Concession Agreement (First Amendment) by its very structure is terminable at will:

"6. Termination. Section 13 shall be amended and replaced in its entirety as follows:

Prior to the expiration date of this License, **the Town has the absolute right to terminate this License at will** by providing written notice of such intention to terminate the license at least sixty (60) days prior to the commencement of the golf season on April 1 each year. In the event of a material breach of the License by the Licensee, the Town may immediately terminate this License if the Licensee does not cure the condition giving rise to the material breach, to the extent curable, within thirty (30) days of such written notice by the Town identifying a material breach.
If the Town terminates the license · without there being a material breach of this Agreement that has not been cured within thirty (30) days of the receipt of notice of such breach, or is not curable, then in such event, the Town shall reimburse the Licensee for the unamortized portion of all fixed equipment installed by the Licensee as part of this license and concession on a prorated basis, and reimbursement for all additional equipment not removed by Licensee. In the event of a dispute as to the value of the work rendered by the Licensee, both the Town and the Licensee agree to a third-party appraiser, to be mutually chosen by the parties, to determine the value of such work prior to the termination of this agreement" (NYSCEF#28).

Similar to this case, courts have held that a claim of breach of the implied covenant of

good faith and fair dealing cannot be sustained when the complained of conduct is authorized by the parties' agreement (*ELBT Realty, LLC v Mineola Garden City Co., Ltd.,* 144 AD3d 1083, 1084 [2d Dept 2016]). In addition, the Notice refers that on November 15, 2022, the Town terminated the Concession Agreement due to RC' s failure to cure the previously noticed material breaches thereof (NYSCEF#19). In light of the foregoing, the plain language of the Concession Agreement makes clear that the Town's decision to terminate did not need to be accompanied by any specific justification (*ELBT Realty, LLC v. Mineola Garden City Co.*, 144 AD3d 1083, 1084, (2016). Thus, for these reasons, RC's claims of breach of the implead covenant of good faith and fair dealing and anticipatory repudiation are dismissed as matter of law.

The Third claim alleges damages arising from the anticipatory repudiation of a purported Second Amendment to the parties' Agreement. Pursuant to Town Law §64(6), town boards "[m]ay award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board." "Absent strict compliance with the formal requirements of this statute, no valid contract binding a Town may be found to exist." "Even where municipalities have accepted benefits, they will not be held liable under unauthorized agreements" (*Atalaya Asset Income Fund II, LP v HVS Tappan Beach, Inc.,* 175 AD3d 1370, 1371 [2d Dept 2019]).

As conceded by RC, the second amendment to the Agreement did not follow the formal requirements, in which the Town Board never adopted a resolution authorizing entry of the Second Amendment. RC's conclusory attacks upon Matthew Slater without more fails to state a cause of action. Specifically, RC complains that Matthew Slater in bad faith spiked the Second Amendment and pulled it from the agenda after it had been fully negotiated by his staff and

agreed to by RC including the current Town Supervisor. Slater did not get what he wanted, i.e., a firm opening date. So, he spiked the Second Amendment his staff had already proffered for execution in order to retaliate against and punish RC for not agreeing to an opening date.

In light of the foregoing, RC failed to state a cause of action for anticipatory repudiation.

The Fifth claim for Abuse of Process-RC asserts that a stop work order was issued to "leverage" negotiations of the Second Amended Concession Agreement. The Town argues that the termination of the Concession Agreement was not based on the Stop Work Order, but was based on the underlying flagrant violations themselves and the Concession Agreement's basic requirement that RC comply with the law. Based on this court's ruling herein, the Town had the right to terminate the Concession Agreement without cause, thus, the cause of action for abuse of process is dismissed.

The Sixth Claim For A Determination That Termination Was Arbitrary And Irrational, is dismissed, insofar as the First Amendment to the Concession Agreement's termination for convenience clause, as the Town had the absolute right to terminate RC whether that termination occurred due to a material breach or a termination at will.

The Eighth Claim alleges unlawful ouster-Defendants argue that RC, as a licensee, has no possessory interest in the subject property. RC cites RPAPL 853 that reflects that if a person is put out of real property in a forcible or unlawful manner, he is entitled to recover treble damages in an action therefor against the wrong doer (Real Prop. Acts. Law 853). The license outlined the limited activities that RC was permitted to undertake on the Town's property, and virtually all activities required prior Town approval (*Union Square Park Cmty. Coal., Inc. v New York City Dep't of Parks & Recreation*, 22 NY3d 648, 657 [2d Dept 2014]).

For these reasons, the court finds this claim fails to state a cause of action, and is dismissed.

Plaintiff's Ninth Claim For Injunctive Relief, Appointment of a Receiver, and an Accounting was previously denied by this court's Decision and Order in motion seqs 1 and 2. (NYSCEF#129), and thus, this claim is dismissed.

Turning to claim 10, Retaliation -as against Slater, Esposito, and Landi in their official and individual capacities for RC's exercise of free speech rights protected by Article I, Section 8 of the NYS Constitution). RC's retaliation claim is the complete loss of its concession. As a contractual counterparty and member of the public, RC has a right protected by the First Amendment to petition the Town relative to any grievances RC may have, including as to the Town's acts and/or omissions towards RC and/or the golf course, without fear of retaliation.

RC asserts that: Slater, Landi, and Esposito's unlawful conduct and retaliation was solely motivated by RC's exercise of its right to petition the government for the redress of grievances, and/or its constitutionally-protected right to bring a lawsuit; RC is entitled to a declaration that Slater, Landi, and Esposito's conduct described herein and on the public record was unlawful and unconstitutional retaliation against RC for the good-faith exercise of its free speech rights; and to an Order granting money damages in an amount to be determined at trial, as well as attorney's fees.

To succeed on a First Amendment retaliation claim, a plaintiff must prove (1) that he or she engaged in a protected activity; and (2) that the defendant engaged in retaliatory conduct that was motivated by plaintiff's protected conduct (*Gagliardi v Village of Pawling*, 18 F3d 188, 194 [2d Cir 1994]). The ultimate question is whether the defendant acted with the intent to retaliate

for the protected conduct or for some other reason (*Lancaster v. Inc. Vill. of Freeport*, 22 NY3d 30, 38 [2013]).

The Town argues that the alleged retaliation that RC cites fails to plead a sufficient cause of action, in that the Town had the right under the Concession Agreement, and in its capacity as the Town to conduct an unannounced and warrantless search of the golf course facility on July 18, 2022, relative to the stop work order that had previously been issued on July 6, 2022; and directing local law enforcement to re-open a criminal investigation adopting a Resolution calling for the issuance of an RFP to replace RC.

Defendants assert that claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant (*Wallikas v Harder,* 67 F.Supp2d 82, 83 (N.D.N.Y. 1999), and that because RC has sued the Town directly, the individual defendants, who are only sued in the official capacities, should be dismissed from the case.

Based upon the foregoing, and the nature of the complaints, as the petition indicates that the individuals are also being sued in their individual capacity, the court finds that these causes of action pass muster by the narrowest margins, and state a cause of action.

As for Action 11- Denial of Procedural Due Process – NYS Constitution- RC claims that it was entitled to but deprived of its right to be heard relative to the Stop Work Order at a meaningful time and in a meaningful manner; and that the Stop Work Order fails to comply with the minimum requirements therefore set forth in Section 15-6 of the Town Code.
At this juncture, the court finds this states a cause of action.

As for Claim 12-Search and Seizure. - Individuals do not have a reasonable expectation of privacy on public lands (*Caldarola v Cty. of Westchester*, 343 F.3d 570, 575 (2d Cir. 2003). Article I, § 12 of the New York State Constitution protects, "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," and commands that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Accord US Const. Art. I, amend. 4. Under these circumstances, RC cannot command the Town to apply for a warrant before entering upon its own land. Accordingly, this cause of action is dismissed.

Lastly, defendants argue that they were unable to conduct a 50-h hearing of RC which warrants dismissal. According to defendants, RC was served with a Demand to appear for a 50-h hearing which was scheduled for October 25, 2022. RC requested an adjournment of this hearing and defendants sent a letter to RC's counsel in an attempt to reschedule the hearing, but counsel never replied. RC also improperly attempted to supplement the Notice of Claim. Once a Notice of Claim is filed, the respondent has "the right to demand an examination of the claimant" Gen. Mun. Law § 50-h(1). Failure to comply with such a demand "generally warrants dismissal of the action." (*Colon v Martin,* 35 NY3d 75, 79 [2020]).

In opposition, RC contends that defense counsel did not even attempt to schedule RC's GML 50-h deposition. Instead, it chose to remove the proceeding to the United States District Court for the Southern District of New York, from whence it was eventually remanded back to this Court. At no time between November 3, 2022, and the present has defense counsel made even the slightest attempt to re-schedule the deposition.

Based upon these conflicting submissions, this action will not be dismissed at this juncture due to the scheduling issues of the 50-h hearing.

Notwithstanding the foregoing, nothing in this decision shall interfere with any damages that RC may be entitled to under the plain terms of the First Amendment to Concession Agreement for equipment under Section 13.

For these reasons, it is hereby

ORDERED, that Defendants' motion to dismiss the Second, Third, Fifth, Sixth, Eighth, Ninth, and Twelfth causes of action is granted and these causes of action are dismissed, and denied as to the Tenth and Eleventh causes of action, and also denied as to the scheduling of the 50-H Hearing.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
June 15, 2023

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of:
RC RECREATION DEVELOPMENT, LLC,
Plaintiff,

DECISION AND ORDER
INDEX NO. 59993/2023
Motion Seq No. 1

-against-

YORKTOWN GOLF GROUP, INC.,
ANTHONY STALLONE and CARMINE DEMEGLIO,
Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 7-25 were read in connection with the motion by defendants for an order to dismiss plaintiff RC Recreation Development LLC's ("RC") complaint pursuant to CPLR 3211 (a)(1) (barred by documentary evidence) and CPLR 3211 (a) (7) (failure to state a cause of action).

This court is familiar with the underlying facts of this matter, which are related to another case before this court entitled *RC Recreation Development, LLC v. The Town of Yorktown* Index No. 69131/2022 ("Town Action"). RC entered into a Concession Agreement dated September, 2014, with the Town of Yorktown ("the Town"), as amended by the First Amendment To Concession Agreement dated May 24, 2018 ("the Concession Agreement"), to renovate an existing nine hole golf course and restaurant located in the Town. RC was the original concessioner of the golf course project. Its term commenced on September 14, 2014, and as amended, was to have run through to and including August 31, 2038.

RC alleges that the Town wrongfully terminated and forcibly evicted RC from the golf course as a concessioner. The Town claimed that it terminated the license due to RC's purported repeated failure to perform and material breach of the license's terms, including poor workmanship, inexperienced management, and various violations of state and local codes, rendering the property unsafe and necessitating a Stop Work Order. RC purportedly failed to cure the deficiencies and did not complete the job.

In the Town Action, this court held (in pertinent part) that the Town had lawfully terminated its Concession Agreement with RC on November 15, 2022, pursuant to the Town's Notice of Termination, but that nothing in that decision interfered with any damages that RC may be entitled to under the plain terms of the First Amendment to the Concession Agreement for equipment [and fixtures] under Section 13.

Following termination of the Concession Agreement, the Town requested proposals from third parties to take over the golf course and restaurant project. Defendants ultimately entered into a Concession Agreement with the Town to finish the golf course and restaurant and operate the same.

According to defendants' attorney, defendants' success in completing and opening the golf course and restaurant in a span of a few months is a testament to their qualifications. In contrast, the fact that the RC stumbled for eight years and was never able open the golf course and restaurant shows its incompetence, for which the Town wisely terminated its Concession Agreement.

RC brought this action against defendants sounding in tortious interference with a contract, unjust enrichment, conversion, and constructive trust.

Based upon the foregoing, the motion is decided as follows:

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Meehan v Cty. of Suffolk*, 144 AD3d 642, 643 [2d Dept 2016]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*AMCC Corp. v New York City Sch. Const. Auth.,* 154 AD3d 673, 674 [2d Dept 2017]).

Generally, RC claims that defendants are currently in possession of, and appear to be operating the golf course. According to the plain language of the First Amendment to the Concession Agreement, all right, title and interest in and to legal title to all the golf course "fixtures, or improvements or alterations, including but not limited to lighting, counters, and other permanent fixtures," still lies with RC. According to RC, it holds good title to all fixtures and equipment now being used by defendants to generate income and/or profit. Given the apparent destruction of assets these defendants and/or the Town owe RC for their value, and for its investment in the golf course, at a minimum, RC asserts that it has stake in any insurance proceeds that might follow.

In divergence, defendants argue that while RC might possibly have some monetary claim against the Town, that does not give rise to a cause of action against these defendants.

Regarding the First Cause of Action- the elements of a cause of action alleging Tortious Interference with Contract are: "the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages" (*Arnone v Burke,* 211 AD3d 998, 999 [2d Dept 2022]).

The record shows that it was only after the termination of the Concession Agreement that the Town solicited bids from third parties. Defendants argue that RC's lack of a valid contract with the Town at the time defendants started negotiating with the Town is fatal to RC's cause of action for Tortious Interference with a Contract. The fact that defendants entered into a contract with the Town on February 21, 2023 is therefore completely proper and cannot constitute tortious interference with a contract.

The court agrees that there is no competent evidence that an existing contract with the Town and RC existed at the time that defendants entered the picture and became the concessioner to the golf course. Accordingly, RC's First Cause of Action must be dismissed.

As for the Second Cause of Action for Unjust Enrichment "The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" "The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Travelsavers Enterprises, Inc. v Analog Analytics, Inc.,* 149 AD3d 1003, 1007 [2d Dept 2017]).

"Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated." Thus, "a party must establish that it conferred a benefit upon the other party, and that the other party will retain that benefit without adequately compensating the first party therefor" (*Nasca v Greene,* 216 AD3d 648, 650 (2023) [internal quotations omitted].

RC argues that because defendants are "free-riding" on RC Recreation's investment, and wrongfully withholding RC Recreation's "fixtures, or improvements or alterations, they are being unjustly enriched, and have converted RC's real, personal, and business property to their own use without RC's permission or consent. RC Recreation actually owns the fixtures, equipment, and assets now present at and being controlled by defendants.

RC may have a remedy against the Town in the Town Action for RC's investments in the subject property, as at minimum there was a written Concession Agreement between them. That is not the case here, where there was no agreement, oral or written between the parties. In fact, the record fails to support any relationship between RC and defendants. Thus the parties' "connection" is just too attenuated to support a cause of action for unjust enrichment.

The Third Cause of Action for Conversion- includes the fixtures RC installed on the Town's property; the equipment it purchased and installed in the Town's property; and the improvements it made to the golf course. In order to prove Conversion a party must show (1) legal ownership or possessory right to property, and (2) defendant's dominion over, or interference with, that property interest (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Further, a party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items

(*Fiorenti v Central Emergency Physicians, PLLC,* 305 AD2d 453, [2d Dept., 2003]).

Defendants point out that at no time has RC ever specifically identified any particular fixtures or pieces of equipment in the possession of defendants that allegedly belong to RC; and that improvements to a golf course are not personal property, so they may not be the subject of a conversion cause of action. RC never had any interest in the subject property, as the property is a park and owned by the Town. It did not have a lease. Defendants continue that if RC is claiming conversion of personal property not attached to and made a part of the real property, then pursuant to the last sentence of the Notice of Termination issued by the Town, RC was bound by the following language of the Notice: RC must vacate and remove all of its belongings and personal property from the park by November 30, 2022. If RC left items after the November 30, 2022 date, then presumably the Town removed and discarded the items. Defendants are not liable for the value of any personal property removed by the Town.

Taking into consideration the parties arguments, the court finds this cause of action for Conversion fails to state a cause of action, and is dismissed.

The Fifth Cause of Action for a Constructive Trust seeking to impose a constructive trust on the Town's golf course and restaurant. Defendants argue that RC makes that claim despite the fact that it never had and could not have a property interest in the Town's park. The elements to prove for a Constructive Trust are: (a) a confidential or fiduciary relationship; (b) a promise; (c) a transfer in reliance there on; and (d) unjust enrichment flowing from the breach of the promise. (*Sanxhaku v Margetis,* 151 AD 3d 778 [2d Dept 2017]). "Most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust" (*Sharp v Kosmalski,* 40 NY2d 119, 121 [1976]).

Even in the spirit of equity, the record fails to show that there was any promise express or implied between these parties- there never was any relationship between them. Thus, RC failed to adequately plead a cause of action against defendants to impose a constructive trust, as it failed to allege the existence of a confidential or fiduciary relationship with them (*Cnty. of Nassau v Expedia, Inc.*, 120 AD3d 1178, 1181 [2d Dept 2014]).

In this matter, the court accepted the facts as alleged in the complaint as true, as we must, accord RC the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory, which they did not.

For these reasons, it is hereby

ORDERED, that defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED, that within twenty days after this Decision and Order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this Decision and Order with notice of entry, upon all parties, and file proof of service on NYSCEF within five days of service.

Case disposed. The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
September 26, 2023

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF