

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

ANTHONY J. COSTELLO & SON
DEVELOPMENT, LLC, ANTHONY J.
COSTELLO & SON (SPENCER)
DEVELOPMENT, LLC, and GAP PARTNERS
IV, LLC, d/b/a City Gate Wine and Spirits,

Defendants.

Civil Action No. _____

COMPLAINT

Plaintiff, Costco Wholesale Corporation (“Costco”), for its complaint against defendants, alleges as follows:

PARTIES

1. Costco is a corporation incorporated in the State of Washington with its principal place of business at 999 Lake Drive, Issaquah, Washington.
2. Upon information and belief, defendant Anthony J. Costello & Son Development, LLC (“Costello”) is a limited liability company organized under the laws of the State of Nevada with a principal place of business in Rochester, New York, all members of which are citizens of a state other than Washington.
3. Upon information and belief, defendant Anthony J. Costello & Son (Spencer) Development, LLC (“Developer”) is a limited liability company organized under the laws of the State of Nevada, with a principal place of business in Rochester, New York, all members of which are citizens of a state other than Washington.

4. Upon information and belief, defendant GAP Partners IV, LLC, d/b/a City Gate Wine and Spirits (“GAP”) is a limited liability company organized under the laws of the State of New York with a principal place of business in Rochester, New York, all members of which are citizens of a state other than Washington.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because there is complete diversity between the parties and the matter in controversy, exclusive of interest and costs, exceeds \$75,000.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

BACKGROUND

7. Developer is developing a mixed-use real estate project in Rochester, New York known as CityGate (“CityGate”), and owns certain parcels of real property at CityGate, including a parcel known as Lot 6 (“Lot 6 Parcel”), which is shown on the Leasing Plan, a true and accurate copy of which is attached hereto as Exhibit A.

8. Costello is owner of certain other parcels of real property at CityGate.

9. Costco is owner of certain other parcels of real property at CityGate known collectively as Lot 2, on which it has constructed and is operating a membership warehouse club. Lot 2 also is shown on Exhibit A.

10. Costco, Costello, and Developer are parties to a Supplemental Construction, Operation and Reciprocal Easement Agreement, dated August 29, 2014, and recorded in the Monroe County Clerk’s Office in Book 11437, page 140 (the “REA”), a true and accurate copy of which is attached hereto as Exhibit B.

11. The REA governs, among other things, certain uses and restrictions for CityGate, as generally noted in Recital H on page 2 of the REA.

12. Section 5.1(n) of the REA prohibits, among other things, “any wholesale or retail establishment the primary business of which is the sale of wine, beer, spirits or other alcoholic beverages intended for off premises consumption . . . (ii) except for in the Building designated as Building ‘F’ on the Site Plan which shall in no event exceed twelve thousand (12,000) square feet.”

13. Developer has entered into a lease (the “Lease”) with GAP under which GAP intends to operate a business of selling wine, beer, spirits, and other alcoholic beverages at CityGate for off-premises consumption (referred to here as “CityGate Wine and Spirits”).

14. Upon information and belief, the premises leased by GAP under the Lease encompass a building and area on Lot 6 as shown on the Leasing Plan, a copy of which is attached hereto as Exhibit A.

15. The Lease violates Section 5.1(n) of the REA because that section prohibits the type of use contemplated by the Lease except for a location within the boundaries of Building F on the Site Plan (also shown as Lot 11 on the Leasing Plan), and the location covered by the Lease is not within such boundaries.

16. Defendants are now constructing and building out a facility for CityGate Wine and Spirits at a location that is completely outside the location authorized under the REA.

17. Defendants intend to operate CityGate Wine and Spirits at a location that is completely outside the only location authorized under the REA.

18. Plaintiff notified defendants Costello and Developer, by letter addressed to their counsel, dated October 22, 2015, that the construction and operation of the CityGate Wine and Spirits at the location outside what is permitted under the REA is improper and in violation of the REA, and that defendants should immediately cease and desist from such construction.

19. Section 10.1 of the REA provides: “If any of the Owners breaches any provision of this Agreement, then any other Owner may institute legal action against the defaulting Owner for specific performance, injunction, declaratory relief, damages, or any other remedy provided by law. All remedies herein or at law shall be cumulative and not inclusive. As used herein, any reference to rights or remedies ‘at law’ or ‘under applicable law’ shall also include any rights or remedies ‘in equity.’ ” Both Costco and Developer are defined as “Owners” under Section 1.1(aa) of the REA.

20. Section 10.2 of the REA provides: “In the event of any violation or threatened violation by any Owner, tenant, or occupant of the Project (or any portion thereof) of any of the terms, covenants, conditions, and restrictions herein contained, in addition to any other remedies provided for in this Agreement, any Owner shall have the right to enjoin such violation or threatened violation and to bring an action for declaratory relief in a court of competent jurisdiction.”

21. Section 11.3 of the REA provides: “In the event of any action between the Owners for a breach of or to enforce any provision or right hereunder, the non-prevailing Owner in such action shall pay to the prevailing Owner all costs and expenses, expressly including, but not limited to, reasonable attorneys’ fees and costs incurred by the successful Owner in connection with such action, including without limitation all fees and costs incurred on any appeal from such action or proceeding.”

**FIRST CLAIM
(Declaratory Judgment)**

22. The allegations in the foregoing paragraphs are re-alleged and incorporated as if fully set forth in this claim.

23. There is a justiciable controversy between Costco and Developer regarding the above provisions of the REA and whether the Lease, and the construction, and expected operation of CityGate Wine and Spirits violate the REA.

24. GAP is an interested party whose rights are likely to be affected by a declaration of rights under the REA.

25. Costello, as a party to the REA, also may be an interested party whose rights may be affected by a declaration of rights under the REA.

26. A declaration of rights under the REA would be effective in resolving the controversy between Costello and the Developer regarding the REA provisions set forth above.

27. By reason of the foregoing, Costco seeks a declaration that the Lease violates the REA and that the Lease must be declared null and void.

28. By reason of the foregoing, Costco also seeks a declaration that any operation of CityGate Wine and Spirits outside what is authorized by the REA violates the REA.

**SECOND CLAIM
(Breach of Contract)**

29. The allegations in paragraphs 1 through 21 are re-alleged and incorporated as if fully set forth in this claim.

30. Developer owes Costco various obligations under the REA, which Developer has breached as alleged above.

31. By reason of the foregoing, Costco has been injured and damaged.

32. Costco will suffer irreparable injury if the Lease is allowed to go into or remain in effect and CityGate Wine and Spirits is permitted to sell alcoholic beverages at the location contemplated by the Lease.

33. The damage to Costco caused by allowing Developer and GAP to proceed under the Lease, if not enjoined from doing so, substantially would outweigh any injury that might be sustained if injunctive relief were granted.

34. Costco lacks a complete remedy at law.

35. By reason of the foregoing, Costco is entitled to injunctive relief enjoining Developer and GAP from proceeding with the Lease or operating CityGate Wine and Spirits outside the location permitted by the REA.

WHEREFORE Costco demands judgment (A) on the first claim, declaring that the Lease violates the REA, that the Lease is null and void, and that any operation of CityGate Wine and Spirits outside the authorized location would violate the REA, (B) on the second claim, preliminarily and permanently enjoining Developer and GAP from proceeding under the Lease or otherwise operating CityGate Wine and Spirits outside the location authorized under the REA, (C) on the second claim, awarding Costco damages to the extent they are established following determination of the other claims, (D) awarding Costco its costs and expenses, including attorneys' fees and costs as authorized under the REA, and (E) awarding Costco any other relief, costs, and disbursements that may be appropriate.

Dated: October 28, 2015

s/ Harold A. Kurland
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