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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Chapter 11**
	§	
ERICKSON RETIREMENT	§	**Case No. 09-37010 – SGJ**
COMMUNITIES, LLC.	§	
	§	
Debtors	§	**JOINTLY ADMINISTERED**

OBJECTION TO MOTION TO COMPEL HARRIS COUNTY TO COMPLY WITH AMENDED ORDER GRANTING MOTION OF ADMINISTRATOR, PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, FOR APPROVAL OF SETTLEMENT

NOW COMES, Harris County Tax Assessor-Collector and files this objection to *Motion to Compel Harris County to Comply with Amended Order Granting Motion of Administrator, Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, for*

Approval of Settlement ("**Motion to Compel**"), stating as grounds therefore the following:

BACKGROUND

In Texas, an appraisal district is established in each county. The appraisal district is responsible for appraising property for ad valorem tax purposes. Tex. Tax Code § 6.01. Contrary to the perception of the administrative agent, PNC Bank, National Association ("**PNC Bank**"), the appraisal district does not assess taxes, does not compute taxes, nor does it collect taxes.

In Texas, the county assessor-collector assesses and collects taxes on property in the county for the county. Tex. Tax Code § 6.23. The county assessor-collector does not appraise property as that is under the purview of the appraisal district as set forth above. Accordingly, the appraisal district and the county assessor-collector are two different governmental entities performing separate statutory functions.

Past perfunctory motions and proposed orders filed by PNC Bank in the instant case have often obfuscated the separate and distinct functions of the Harris County Appraisal District ("**HCAD**")[1] and the Tax Assessor-Collector for Harris County ("**Harris County**")[2]. The latest such motion, this Motion to Compel, demonstrates PNC Bank's unwillingness to differentiate between HCAD and Harris County or its ignorance of the statutory framework regarding ad valorem taxes. Given the level of sophistication of PNC Bank and its counsel, Harris County would assume it is the former – an unwillingness to differentiate between the two governmental entities.

[1] A party to those motions and orders.
[2] A party not involved in those negotiations, agreements and orders.

PROCEDURAL HISTORY

On or about October 19, 2009, Houston Campus, L.P. ("**Houston Campus**") filed a voluntary petition for relief. This case is jointly administered under the main case of Erickson Retirement Communities, LLC ("**Debtors**").

On October 28, 2009, Harris County filed a secured proof of claim in the Houston Campus case in the amount of $32,176.97 for 2009 personal property ad valorem taxes. On December 2, 2009, Harris County filed its first amended secured proof of claim in the amount of $68,903.93 for additional 2009 personal property tax accounts. On April 19, 2010, Harris County filed its second amended secured proof of claim in the amount of $2,022,777.68 to include 2009 real property taxes and an omitted improvement account for 2007 and 2008.

On April 2, 2010, the Debtor filed its Motion for Determination of Tax Liability ("**Motion to Determine Tax**").[3] (Docket No. 1211). The Motion to Determine Tax sought, *inter alia*, to lower the values, and ultimately lower the taxes, on certain properties located within Harris County, Texas.

OBJECTION

As accurately reflected in paragraph four of the Motion to Compel, PNC Bank and the Debtors entered into a Stipulation and Order Concerning Tax Overpayments (the "**Tax Stipulation and Order**"). Docket No. 1438. Because the Tax Stipulation and Order addressed ad valorem taxes and refunds of payments made "under protest", it is important to clarify that the stipulation was only between PNC Bank and the Debtors. Harris County was neither a party nor signatory to the stipulation.

[3] The Motion to Determine Tax was amended on April 9, 2010 (Docket No. 1287) and May 28, 2010 (Docket No. 1471). The two Amended Motions to Determine Tax seek the same relief from Harris County as the original motion.

In paragraph five of the Motion to Compel, PNC Bank correctly asserts that Houston Campus did resolve their dispute over the value; **however the settlement was with Harris County Appraisal District and not Harris County.** Docket number 1852 is the Motion of Plan Administrator, Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, For Approval of Settlement ("**Settlement Motion**"). If PNC Bank had read the Settlement Motion more thoroughly, it would have noticed that the Settlement Motion sought approval of a Settlement Agreement ("**Settlement Agreement**") between the Debtors and HCAD. At the bottom of page two, the Settlement Motion states:

> Specifically, and as set forth more fully below, the proposed Settlement is an agreement between HCP ER6, LP, Houston Campus, LP, and the Harris County Appraisal District (collectively the "Parties") to resolve the 2007, 2008 and 2009 ad valorem real property taxes assessed by Harris County, Texas against Debtor Houston Campus, LP.

Throughout the Settlement Motion, the Debtors referred to Harris County when discussing valuation, and reductions thereof, which is solely an appraisal district issue. The Debtors also referred to Harris County when discussing the assessment of tax. This is the exact obfuscation of functions discussed at the onset of this objection.[4] To put it bluntly, HCAD, and not Harris County, is the party bound by the Settlement Agreement. In fact, every exhibit attached to the Settlement Motion addresses the value agreed upon by the Debtors and HCAD. In any exhibit where a signature for approval was required,

[4] There are no doubt, many business entities that have PNC in their corporate name. Among these are PNC Financial Services Group, PNC Mortgage, PNC Global Investment Servicing, etc. If a binding and legal agreement was entered into by one of these PNC aliases, would this bind PNC Bank? Of course not, which is why it is ludicrous for PNC Bank to bring this Motion to Compel against Harris County when Harris County was not a party to the Settlement Agreement.

the persons signing the agreement were representatives of the Debtors, counsel for the Debtors, representatives of HCAD and counsel for HCAD.

Nowhere in the Settlement Motion and the exhibits attached thereto, is an agreement between Harris County regarding the amount of tax due and/or refunds. The Settlement Motion does make a conclusory statement that due to the value reductions, the Debtors would be due a refund in the amount of $572,789.31 ("**Refund Amount**"). Harris County did not provide this number and most certainly did not agree to the Refund Amount. HCAD did not provide the Refund Amount since they are not statutorily charged with the power to assess and collect taxes. When the undersigned counsel asked counsel for the Debtors and PNC Bank how they arrived at the Refund Amount, they were unable to provide an explanation of who calculated the amount or how it was obtained. The only possible explanation is that the Debtors came up with the Refund Amount without having it vetted with Harris County or its counsel.

On October 14, 2011, an Order was entered approving the Settlement Agreement by and between the Debtors and HCAD, thereby reducing the values on the properties identified in the Motion to Determine Tax. Docket No. 1804. Nowhere in the Order does it state that Harris County agreed to the amount of taxes and the amount of refund. In fact, Harris County is not even mentioned in the order.

Interestingly, an Amended Order was surreptitiously uploaded on November 3, 2011 and approved by this Court on November 4, 2011. Docket no. 1852. The Amended Order is substantially different than the previous Order in that it added six additional, substantive paragraphs. **Without notice to Harris County and without its agreement**, the additional paragraphs state that the taxes owed to Harris County are allowed in certain

amounts for certain years and that Harris County was to refund $580,651.99 ("**Amended Refund Amount**"). Harris County, its representatives and its undersigned counsel never agreed to any allowed amounts and did not provide the Amended Refund Amount.

Harris County does stipulate that it issued two refund checks in the amounts of $331,782.39 and $53,311.65. To date, these refund checks have not been negotiated and have not been returned to Harris County.

Prior to the filing of the Motion to Compel, the undersigned counsel and counsel for the Debtors and PNC Bank exchanged many emails and phone calls regarding the correct amount that should be refunded as a result of the Settlement Agreement with HCAD. Pursuant to these discussions, Harris County thoroughly reviewed how payments were applied to the pre-petition taxes paid by the Debtors. As a result of this review, Harris County moved a significant amount of money from penalties and reapplied to base tax and interest. Accordingly, Harris County has determined that an additional $135,083.03 needs to be refunded. This is, however, $60,474.92 less than the incorrect Amended Refund Amount. Harris County asserts that it should not be compelled to pay the Amended Refund Amount since it was not a party to the Settlement Agreement and did not provide the Amended Refund Amount. Harris County stands ready and willing to refund the amount of $520,177.07.[5]

[5] Harris County has requested the return of the two refund checks. Once Harris County receives the refund checks, it will reissue a refund check to PNC Bank in the amount of $520,177.05.

ARGUMENTS AND AUTHORITIES

Settlement agreements are governed by state contract law[6] and therefore must meet the necessary elements to effectuate a valid contract. In Texas, a valid contract requires (i) an offer; (ii) acceptance; (iii) a meeting of the minds; (iv) each party's consent to the terms; and (v) execution and delivery of the contract with the intent that it be mutual and binding. *Tyler v. Citi-Residential Lending Inc*., 812 F.Supp.2d 784, 787 (N.D. Tex. 2011). All five elements must be present in order for a valid and binding contract to exist.

PNC Bank cannot establish that a valid and binding contract is in effect with Harris County because none of the five elements are present There were no negotiations between the Debtors and Harris County so therefore there was no offer, and certainly no acceptance. The offer and acceptance is by and between the Debtors and HCAD. A "meeting of the minds" and consent to the terms, whether written or verbal, is definitely lacking. Lastly, there is nothing, verbal or written, evidencing Harris County's consent to the Settlement Agreement. Since Harris County is a non-party to the Settlement Agreement, it should not be bound by the agreement and subsequent order, especially when the agreement dictates amounts that could only be calculated by Harris County.[7]

CONCLUSION

Harris County asserts that it should not be compelled to pay the Amended Refund Amount since it was not a party to the Settlement Agreement and did not provide the

[6] *See Lee v. Hunt*, 631 F.2d 1171, 1173-74 (5th Cir. 1980) ("Although federal courts possess the inherent power to enforce agreements entered into in settlement of litigation, the construction and enforcement of settlement agreements is governed by principles of state law applicable to contracts generally").

[7] *See In re Reichmann Petroleum Corp*., 434 B.R. 790, 796 (Bankr. S.D. Tex 2010) ("regardless of what a settlement agreement states, a party cannot release property, money or claims it does not own").

Amended Refund Amount. Harris County further asserts that it should not be compelled to pay any interest or damages alleged by PNC Bank. If any party should pay damages, it should be PNC Bank for surreptitiously uploading an order that was neither noticed to, or agreed by, Harris County. Harris County does stand ready and willing to refund the amount of $520,177.07.

WHEREFORE, PREMISES CONSIDERED, Harris County respectfully requests the Court to deny PNC Bank's Motion to Compel, that it make a finding that the correct refund amount is $520,177.07 and that it grant Harris County, such other and further relief, at law or in equity, as is just.

Dated: April 8, 2014

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
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ERICKSON RETIREMENT	§	**Case No. 09-37010 – sg11**
COMMUNITIES, LLC.	§	
	§	
Debtor	§	**JOINTLY ADMINISTERED**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Harris County's *Motion to Compel Harris County to Comply with Amended Order Granting Motion of Administrator, Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, for Approval of Settlement* was served upon the entities listed below via electronic means, if available, otherwise by United States Mail, first class, postage fully prepaid, on this the 8th day of April, 2014:

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