

July 22, 2015

Our File No.: 13.2604

VIA FACSIMILE AND EMAIL

City Solicitor
City of Toronto, Legal Services
Metro Hall, 26th Floor
Station 1260 55 John Street
Toronto, ON M5V 3C6
Attention: Christopher Henderson

Berkow, Cohen LLP
141 Adelaide Street West
Suite 400
Toronto, ON M5H 3L5
Attention: Jack B. Berkow

Dear Sirs:

Re: 2-90 Lisgar Street, City of Toronto

Enclosed please find the Reply of the Plaintiff being served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,

Goodmans LLP



Mark Dunn
MSD/en

Encl.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Toronto Media Arts Cluster

Plaintiff

- and -

Edge on Triangle Park Inc. and the City of Toronto

Defendants

REPLY

Overview

1. The Plaintiff, Toronto Media Arts Cluster (“TMAC”) denies all of the allegations in the Statement of Defence (the “Urbancorp Defence”) of Edge on Triangle Park Inc. (“Urbancorp”) and the Statement of Defence (the “City Defence”) of the City of Toronto (the “City”), except for paragraphs explicitly admitted below and paragraphs that admit allegations in the Statement of Claim.

2. All capitalized terms not defined below have the meaning ascribed to them in the Statement of Claim.

3. Both the Defendants rest their case on the allegation that it was not possible for Urbancorp to convey the Space to TMAC by May 3, 2015, as it promised to do. There is no suggestion that this alleged impossibility was caused by anything TMAC did or failed to do.

Instead, both Defendants assert that, through no fault of its own, TMAC lost its right to purchase the arts and culture space (the “Space”) that it had invested \$800,000.00 in, and worked for four years on, because Urbancorp did not fulfill its pre-closing obligations by May 3, 2015.

4. The Defendants’ interpretation is not correct. As is set out in the Statement of Claim, TMAC’s rights were not, and could not be, terminated by Urbancorp’s delays. In any event, Urbancorp and the City both failed to work diligently and in good faith to complete the sale transaction (the “Transaction”) contemplated by the Agreement of Purchase and Sale dated March 31, 2014 (the “APS”) between TMAC, Urbancorp and the City.

5. The City has also sought to colour the proceedings with an attack on TMAC’s alleged “financial and operational” problems. The City’s allegations are legally irrelevant. TMAC’s right to purchase the Space was not conditional on the City’s continuing faith in its abilities. The City’s allegations are also untrue. At all material times TMAC has been ready, willing and able to complete the purchase contemplated by the APS (the “Transaction”) and successfully operate the Space.

Reply to the City Defence

6. At paragraphs 14 and 15 of the City Defence, the City asserts that it granted TMAC two extensions to the deadline to enter into an Agreement of Purchase and Sale. This is not correct. Urbancorp had an obligation pursuant to its section 37 agreement with the City to enter into the APS by December 31, 2012. TMAC was not a party to the section 37 agreement and had no such obligation. In any event, delays in negotiating the APS were the result of Urbancorp’s failure to promptly pay invoices from TMAC’s legal counsel and consultants (which it had promised to pay and ultimately did pay) and delay in delivering reports that were

required. When it granted the extensions, the City communicated its frustration with Urbancorp's delays to TMAC. Until service of the City Defence, the City had never asserted that delays in executing the APS were caused by TMAC.

7. At paragraphs 19-25 of the City Defence, the City makes various assertions about TMAC's alleged "financial and operational problems". As noted above, these allegations are legally irrelevant and were included in the City Defence in an attempt to diminish TMAC in the eyes of the public and colour these proceedings. Even if proven, the paragraphs would not provide a defence to this action. TMAC reserves its right to strike these paragraphs from the City Defence on this basis.

8. In any event, the City's allegations are untrue and reflect the City's ongoing failure to obtain, and base its decisions on, complete and accurate information about TMAC and its plans for the Space.

9. At paragraph 19 of the City Defence, the City asserts that it received "numerous" communications indicating that TMAC would be unable to operate the Space. No specific communications are referenced in the City Defence and, in fact, none exist. TMAC *never* told the City that it could not successfully operate the Space.

10. At paragraph 19(a) the City alleges that TMAC did not have the funds to pay closing costs associated with the Space. This is false. On May 3, 2015, TMAC tendered all of its closing deliveries including a cheque to pay all closing costs that TMAC was responsible for. Urbancorp refused to accept the tender.

11. TMAC denies that it owed \$100,000 to various creditors as alleged at paragraph 19(b) of the City Defence. As described in the Statement of Claim, the closing of the Transaction was delayed to long after the parties had initially anticipated because of factors entirely outside of TMAC's control and within Urbancorp's control. Urbancorp agreed to pay the additional consultant costs caused by this delay but did not honour that agreement. As the City knows, Urbancorp's default is the only reason that TMAC owed any money to its consultants. It is also the only reason that TMAC instructed some of its consultants to stop work as alleged at paragraph 19(d) of the City Defence.

12. The allegation at paragraph 19(c) of the City Defence that TMAC had a fundraising deficit of \$200,000 is simply untrue. TMAC did not have a fundraising deficit and did not tell the City that it did.

13. Similarly, TMAC specifically denies the allegation at paragraph 19(e) that TMAC did not have a governance model or that it told the City that it did not have a governance model.

14. The allegations at paragraphs 19(f)(g) and (h) that TMAC's Board of Directors was deadlocked, that it lacked a chair for its Board of Directors, that it could not add new directors and that in-fighting among constituent organizations resulted in deliberate attempts to delay the preparation of a business plan are similarly untrue. Not only *could* TMAC appoint new directors, it *did* appoint new directors, as described below.

15. In March 2015, TMAC formally welcomed two exciting, community supported not for profit media arts organizations, Bento Miso and Dames Making Games. These new organizations each appointed a representative to TMAC's Board of Directors. Henry Faber

became the chair of TMAC's Board of Directors, contrary to the City's allegation that TMAC lacked a board chair.

16. Furthermore, with the addition of new members, TMAC was able to secure up to \$2.5 million in donor funding to support closing and the first year of operating expenses, including existing provincial and federal support. As described in the Statement of Claim, these funds are to be paid on closing of the Transaction.

17. Two member organizations resigned from TMAC on March 26, 2015. These membership changes did not affect TMAC's ability to fulfill its obligations under the APS and have nothing to do with the matters in issue. To the contrary, the APS specifically permitted changes to TMAC's membership. The City admitted in its letter dated May 1, 2015 that TMAC's membership changes were "irrelevant" to the present dispute.

18. TMAC does not know what communications these now-former member organizations had with the City, or whether these organizations said that *they* no longer wanted to participate in the acquisition of the Space. However, any such communication did not bind TMAC and was made at a time when the City knew, or should have known, that the relevant organizations had no authority to speak for TMAC.

19. Contrary to the allegation at paragraph 20 of the City Defence, TMAC did not ask the City to review any documents relating to its financial and operational plans. TMAC provided a business plan that was approved by the City in 2011 and had no further obligation to provide documentation to the City. TMAC provided further documents to the City only in response to its specific demands and in a good faith attempt to work collaboratively with the City.

20. For example, on April 1, 2015, Alex Williams of TMAC spoke by phone with Councillor Bailao to confirm that TMAC was ready, willing and able to close the Transaction. In response, Counsellor Bailao demanded TMAC's governance, sustainability, capital and operating funding, mortgage, price per sq foot, and plan for attracting new members and stated that the Transaction would not be allowed to close until the City was satisfied with the documentation provided. TMAC provided these documents, despite having no obligation to do so. The City never provided meaningful response to, or comments on, these documents. The issues and concerns now relied on by the City to justify its conduct were not raised with TMAC.

21. At paragraph 24 of the City Defence, the City asserts that it reviewed the documents provided by TMAC in accordance with criteria established by the United Nations and various other organizations. TMAC learned about the criteria allegedly applied by the City for the first time in the City Defence. The City never communicated to TMAC that it would use the listed criteria to evaluate TMAC or its business plan. Nor has the City ever explained how TMAC failed to satisfy the criteria allegedly used to evaluate it.

22. At paragraph 25 of the City Defence, the City pleads that City staff identified various potential issues with the documents that TMAC provided. None of these concerns were raised with TMAC at the time. Moreover, the issues that the City claims to have discovered did not exist or are irrelevant to TMAC's ability to operate the space. For example:

- (a) At paragraph 25(a), the City asserts that TMAC's own projections showed a shortfall of "at least \$800,000 each year". This is simply untrue. The relevant projection showed an \$800,000 operating deficit as a *worst case* scenario for TMAC's first year of operation if it received *no* revenue from renting member

and non-member space or any significant income. Even in this scenario, there would be no shortfall because TMAC had sufficient funding available to pay the operating deficit if the worst-case scenario occurred.

- (b) At paragraph 25(b) of the City Defence, the City asserts that TMAC has no significant financial resources. This is belied by TMAC's investment of more than \$800,000 in the Space to date and the funding available to TMAC upon taking possession of the Space, as described above.
- (c) At paragraph 25(d) of the City Defence, the City asserts that TMAC failed to meet the requirements for a federal grant. This is unfounded.
- (d) At paragraph 25(j) of the City Defence, the City asserts that TMAC planned operational uses inconsistent with the Land Use Agreement. Again, this allegation has no basis in fact and any concerns the City had were not raised with TMAC at any time. Nor can speculation about the possibility of future breaches of the Land Use Agreement justify the City's breach of its obligations.

23. A number of the other alleged issues that the City claims to have uncovered in April 2015 were, in fact, well known to the City since long before it entered into the APS. For example, the City makes various allegations about TMAC's alleged lack of experience and assets. TMAC's level of experience, and its assets, were greater in May 2015 (when the City purported to terminate the APS) than in 2011 (when the City and Urbancorp entered into the APS).

24. In all, the City's attack on TMAC is irrelevant, misconceived and factually incorrect. It should be disregarded in its entirety.

25. At paragraph 35 of the City Defence, the City asserts (without elaboration) that TMAC suffered no damages because it is a bare trustee for the funds that it received. The City has not provided any legally cognizable basis for this position and none exists.

26. Lastly, TMAC specifically and vehemently denies the allegation that the City's conduct was justified as a "good faith attempt to support the City's objective of ensuring that the Space could be successfully operated for the benefit of the Community." The City knew, or should have known, that its actions would have the exact opposite effect. If Urbancorp and the City had fulfilled their obligations then TMAC would already be operating the Space and providing a benefit to the community. Instead, the Space sits vacant with no prospect of the community receiving the promised benefit, or any benefit, from it in the foreseeable future. The City knew, or ought to have known, that its actions would delay operation of the Space for months or years and proceeded despite this knowledge.

Reply to the Urbancorp Defence

27. Urbancorp seeks throughout the Urbancorp Defence to characterize its own obligations as "true conditions precedent" that, if unfulfilled, justified termination of the APS. Urbancorp asserts, in effect, that if it failed to complete its obligations under the APS by May 3, 2015, these obligations would simply disappear. This interpretation is contradicted by the plain words of the APS and is entirely inconsistent with the intention of the parties when it was signed.

28. TMAC specifically denies Urbancorp's allegation that it used "reasonable best efforts", or any efforts, to complete the Transaction prior to May 3, 2015. In fact, Urbancorp advised TMAC that it was not prepared to even *discuss* completion of the Transaction unless and until the City granted it permission to do so. Urbancorp then proceeded to ignore correspondence and phone calls from TMAC and its counsel until the last business day before the outside closing date set out in the APS. Urbancorp's statement, and its subsequent silence, are inconsistent with its duties under the APS and its present position.

July 22, 2015

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Toronto Media Arts Cluster

- and -

Edge on Triangle Park Inc. and the
City of Toronto

Court File No. 15-529094

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

REPLY

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