IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THOR MERRITT SQUARE, LLC and THOR MS, LLC,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 4480-VCP
BAYVIEW MALLS LLC; BV MALL HOLDINGS, LLC; BAYVIEW FINANCIAL L.P.; BAYVIEW ASSET MANAGEMENT LLC; and JOHN DOE 1-22,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: December 16, 2009
Decided: March 5, 2010

Evan O. Williford, Esquire, THE WILLIFORD FIRM LLC, Wilmington, Delaware; Joseph Lee Matalon, Esquire, Barbara R. Shweky, Esquire, MATALON ♦ SHWEKY ♦ ELMAN PLLC, New York, New York; *Attorneys for Plaintiffs*

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PARSONS, Vice Chancellor.

This matter arises out of the alleged failure of one party to a purchase and sale agreement for a shopping center to perform or pay for work required under that agreement. Two of the defendants, Bayview Malls LLC ("Bayview Malls") and BV Mall Holdings, LLC ("Holdings") sold the Merritt Square Mall to Thor Merritt Square, LLC and Thor MS, LLC (collectively, "Plaintiffs"). The purchase agreement for the mall required Bayview Malls and Holdings to perform certain work to bring one of the mall's stores into compliance with the applicable fire code. Plaintiffs allege that Bayview Malls and Holdings never performed this work, refused to pay for the work when it eventually was performed by Plaintiffs, and terminated their existence without ever paying for or making reasonable provision for payment of this work. Based on this refusal to pay, Plaintiffs commenced this action against Bayview Malls and Holdings, as well as their managers and members, and two related entities, Bayview Financial L.P. and Bayview Asset Management, LLC. The defendants then moved to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. In response to that motion, Plaintiffs withdrew six of the seven claims in their Complaint, leaving only their claim for nullification of the certificates of cancellation of Bayview Malls and Holdings. For the reasons stated in this Memorandum Opinion, I deny the defendants' motion to dismiss this remaining claim.

I. BACKGROUND[1]

A. The Parties

Plaintiffs, Thor Merritt Square, LLC and Thor MS, LLC, are both Delaware limited liability companies with offices in New York, New York.

Defendants Bayview Malls and Holdings (collectively, the "Dissolved Defendants") were both Delaware limited liability companies. On December 5, 2006, they filed certificates of cancellation of their certificates of formation with the Delaware Division of Corporations The certificates of cancellation became effective on December 6, 2006 and terminated the legal existence of Bayview Malls and Holdings as of that date.

Defendants Bayview Financial L.P. ("Financial") and Bayview Asset Management, LLC ("BAM") are Delaware limited partnerships with their principal places of business in Coral Gables, Florida.

Defendants, John Doe 1-22, are managers and members of Bayview Malls and Holdings. John Doe 1-22, collectively with the Dissolved Defendants, Financial, and BAM, are referred to herein as "Defendants."

B. Facts

On March 23, 2005, the Dissolved Defendants, as Seller, and Thor Acquisition, LLC, as Buyer, entered into a Purchase and Sale Agreement (the "PSA") for a shopping center in Florida known as the Merritt Square Mall. In April 2005, Thor Acquisition,

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[1] Unless stated otherwise, the facts recited herein come from the Complaint and are assumed to be true for purposes of the pending motion to dismiss.

LLC assigned its rights under the PSA to Plaintiffs, who then acquired the shopping center pursuant to the PSA.

A provision in the PSA made the Dissolved Defendants responsible for all costs incurred in connection with the work required to bring a JC Penney store in the shopping center into compliance with the fire code.[2] In connection with this obligation, the Dissolved Defendants deposited $242,115 into an escrow account pursuant to an April 11, 2005 escrow agreement (the "Escrow Agreement") between the Dissolved Defendants, Plaintiffs, and Chicago Title Insurance Company, the escrow agent. A provision in the Escrow Agreement required the Dissolved Defendants to begin the fire code work at the JC Penney store within fifteen days of the date of that agreement and use "good faith and diligent efforts" to complete the work.[3] This provision also states that: "[Dissolved Defendants] shall be obligated to complete and pay for the JC Penny [sic] Work whether or not the JC Penny [sic] Escrowed Money is sufficient to pay for the same."[4]

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2 Aff. of Margot F. Alicks ("Alicks Aff.") Ex. A, the PSA, § 5.2(d). The PSA is integral to Plaintiffs' claims; therefore, I may consider it in connection with Defendants' motion to dismiss. *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *2 (Del. Ch. Oct. 9, 2007) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *6-7 (Del. Ch. May 4, 2005)).

3 *Id.* Ex. B § 4.

4 *Id.*

Almost immediately after the April 2005 closing of the PSA, the Dissolved Defendants distributed virtually all of their assets to their members. Around this time, Defendants also contracted for Electronic Control Systems, Inc. ("ECS") to perform the JC Penney work, but ECS never performed the work required under the contract. Over the next six months, Plaintiffs repeatedly demanded that the Dissolved Defendants undertake the JC Penney work. Finally, in late 2005, Plaintiffs decided to undertake the work themselves.

The contract between Defendants and ECS stated that ECS would not perform asbestos abatement. Plaintiffs allege that Defendants knew relatively early in the project that the asbestos abatement would be more involved than they anticipated and that it would complicate ECS's work in bringing the JC Penney store into compliance with the fire code.[5] According to Plaintiffs, Defendants simply walked away from their obligations as to the JC Penney store. Thus, Plaintiffs allege that Defendants knew shortly after the closing of the PSA that bringing the JC Penney store into compliance with the fire code would cost far more than initially anticipated.

In March 2006, Plaintiffs contracted with ECS to perform the JC Penney work at a higher price than that provided for in the earlier contract between ECS and Defendants. Plaintiffs also hired contractors to perform extensive asbestos abatement in the JC Penney store. In total, the work necessary to bring the JC Penney store into compliance with the

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[5] Defendants deny that the PSA required them to do any asbestos abatement work.

fire code cost Plaintiffs over $1 million. Defendants have not reimbursed Plaintiffs for any part of this cost.

As previously noted, both Bayview Malls and Holdings filed certificates of cancellation of their certificates of formation with the Delaware Division of Corporations, thereby ending their legal existence, effective December 6, 2006.

On December 21, 2006, Plaintiffs wrote to Defendants to inform them that the JC Penney work was complete and that its cost exceeded the amount in escrow. Plaintiffs asked Defendants to release to Plaintiffs the escrowed funds and reimburse Plaintiffs for the additional costs incurred. On January 3, 2007, Defendants responded by requesting additional information about the work performed.

Despite this and other correspondence between Plaintiffs and Defendants, Defendants did not inform Plaintiffs of the 2006 dissolution of Bayview Malls and Holdings or the 2005 distribution of their assets until February 26, 2009.

C. Procedural History

On April 6, 2009, Plaintiffs filed their Complaint with this Court. The Complaint alleged seven claims against various combinations of Defendants for: (1) breach of the PSA; (2) breach of the Escrow Agreement; (3) nullification of the Dissolved Defendants' certificates of cancellation; (4) violation of 6 *Del. C.* § 18-804 in that Defendants failed to properly wind up and distribute the assets of the Dissolved Defendants; (5) fraud and fraudulent misrepresentation; (6) fraudulent conveyance; and (7) estoppel.

On April 27, 2009, Defendants moved to dismiss Plaintiffs' Complaint in its entirety under Court of Chancery Rule 12(b)(6). Defendants based their motion on three

primary grounds. First, Defendants averred that Delaware law does not allow for fictitious John Doe defendants, thus requiring the dismissal of claims 4 and 6 of the Complaint. Second, Defendants asserted that all claims against the Dissolved Defendants should be dismissed because under Delaware law no claim may be brought against an entity for which a certificate of cancellation has been filed. Finally, Defendants argued that claims 1, 2, and 4 must be dismissed as having been filed after the analogous statute of limitations had run.[6] Furthermore, Defendants contended that because claim 1 for breach of the PSA and claim 2 for breach of the Escrow Agreement form the basis for all the other claims in the Complaint, the Court should dismiss the entire Complaint if it finds that claims 1 and 2 are time-barred.

After the parties briefed Defendants' motion to dismiss, I heard argument on the motion on September 15, 2009. At the argument, I gave Plaintiffs permission to withdraw some or all of their claims without prejudice rather than risk dismissal pursuant to Defendants' motion.[7] In an October 2, 2009 letter, Plaintiffs withdrew claims 1 and 2

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[6] The analogous statute of limitations for breach of contract claims in Delaware is three years under 10 *Del. C.* § 8106. In addition, 6 *Del. C.* § 18-804(d) provides that a limited liability company member who receives a distribution from the limited liability company cannot be liable for the amount of the distribution after the expiration of three years from the date of the distribution.

[7] The impetus for this was Plaintiffs and Defendants' apparent agreement that Plaintiffs' breach of contract claims would not be barred under the five-year statute of limitations for contract claims under the law of Florida, the home state of all nonfictitious Defendants. Although I have noted this apparent agreement, I express no opinion on whether any of Plaintiffs' claims would, in fact, be time-barred if they are filed in Florida.

of their Complaint. On October 26, Plaintiffs expressed their intention to proceed in Delaware on only their third claim for nullification of the Dissolved Defendants' certificates of cancellation, thereby withdrawing claims 4, 5, 6, and 7, as well.[8]

On November 17, I inquired whether Defendants still intended to pursue their motion to dismiss in light of Plaintiffs' withdrawal of all but one of their claims. Defendants responded in the affirmative.

Over the next month, the parties seemed to make some progress toward resolving at least part of Plaintiffs' remaining claim. One of Plaintiffs' stated reasons for seeking revival of the Dissolved Defendants is so these entities can agree to release to Plaintiffs the funds in the escrow account. In response to a letter from Plaintiffs informing the Court that they could not obtain the funds in escrow without the written consent of the Dissolved Defendants, Defendants notified the Court that they had encouraged the escrow agent to interplead the escrowed funds in any action Plaintiffs might file in Florida and would not appear in the interpleader proceeding, but rather would let a default judgment be entered against them. Based on that representation, Defendants also requested that the Court stay this action. The parties failed to agree to a stay, however.

For the reasons stated in this Memorandum Opinion, I find that Plaintiffs have stated a claim for nullification which is ripe for decision at this time. Moreover, despite Defendants' willingness to submit to a default judgment in any interpleader action

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[8] While Plaintiffs ostensibly withdrew all but one of their claims in order to re-file certain claims in Florida, there is no indication that Plaintiffs have filed anything in Florida as of the date of this Memorandum Opinion.

involving the escrow funds, I do not believe this action should be stayed. Therefore, I deny Defendants' motion to dismiss and their alternative request for a stay of this action.

D. Parties' Contentions

Most of the arguments raised by Defendants' motion to dismiss have been mooted by Plaintiffs' withdrawal of six of the seven claims they originally asserted. Nevertheless, Defendants still contend that Plaintiffs' remaining claim for nullification should be dismissed on a number of grounds. Defendants first challenge Plaintiffs' argument that the certificates of cancellation are invalid because Defendants failed to make reasonable provision for any unmatured contract claims Plaintiffs may have had, as required by 6 *Del. C.* § 18-804(b). Specifically, Defendants contend that the Escrow Agreement constitutes such a reasonable provision, thus eliminating the basis for Plaintiffs' nullification claim. Next, Defendants assert that reviving the Dissolved Defendants would be futile because they have no assets and would file for bankruptcy immediately. Finally, Defendants contend that Plaintiffs' nullification claim should be dismissed based on the analogous statute of limitations.

Plaintiffs contest all of Defendants' assertions, arguing that their Complaint pleads sufficient facts to survive a motion to dismiss and, in any event, that certain of Defendants' arguments should not be considered because they were not made in Defendants' opening brief in support of their motion.

II. ANALYSIS

A court will not grant a motion to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted unless it can determine with

reasonable certainty that the nonmoving party could not prevail on any set of facts reasonably inferable from the pleadings and any documents incorporated therein or integral to the Complaint.[9] "The court must assume the truthfulness of the well-pleaded allegations and must afford the nonmoving party the benefit of all reasonable inferences."[10] While a court will grant a plaintiff all reasonable inferences that may be drawn from the Complaint, it is not "required to accept every strained interpretation of the allegations proposed by the plaintiff."[11]

Defendants urge this Court to dismiss Plaintiffs' nullification claim because it is based on a single, erroneous premise—namely, that the Dissolved Defendants failed to make reasonable provision to pay Plaintiffs' unmatured contractual claims, as required under 6 *Del. C.* § 18-804(b). That Section states in pertinent part: "A limited liability company which has dissolved: (1) Shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company." Defendants assert that they have made

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9 *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (citing *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)); *Addy v. Piedmonte*, 2009 WL 707641, at *6 (Del. Ch. Mar. 18, 2009); *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *2 (Del. Ch. Oct. 9, 2007).

10 *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *6 (Del. Ch. Dec. 23, 2008) (quoting *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006)) (internal quotations omitted).

11 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

the requisite reasonable provision to account for Plaintiffs' claims and, therefore, the nullification claim must be dismissed.

In making their assertion, Defendants contend that the Escrow Agreement constitutes a reasonable provision to account for Plaintiffs' claims because it was entered into "for the purpose of ensuring sufficient funds to cover the Dissolved Defendants' obligations under the PSA."[12] Defendants further argue that Plaintiffs' charge that the escrow account is unreasonably low stems from an unwarranted over-estimation of the damages likely to be owed for the JC Penney work. According to Defendants, the PSA did not require them to pay for any asbestos abatement and, thus, the $242,115 in escrow is sufficient meet their obligations under the PSA. Defendants further argue that because Plaintiffs did not inform Defendants of the exact cost of the JC Penney work until December 21, 2006, roughly two weeks after the Dissolved Defendants filed their certificates of cancellation, the nullification claim must fail because "[t]he Delaware Limited Liability Company Act cannot be read to require that an entity make 'reasonable provision' for claims that the entity cannot anticipate until weeks after it has already dissolved."[13]

None of Defendants' arguments are persuasive. In their Complaint, Plaintiffs allege that: Defendants were "responsible for all costs incurred in connection with the work required to bring the JC Penney store in the shopping center in compliance with the

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[12] Defs.' Opening Br. ("DOB") 15.

[13] Defs.' Letter to the Court, filed Nov. 18, 2009.

fire code";[14] this work cost over $1 million;[15] and the Dissolved Defendants knew before their dissolution became final that the cost of the work "would far exceed initial estimates and the amount in escrow."[16] The Delaware LLC Act requires that a dissolving LLC make reasonable provision for the payment of unmatured contractual claims before filing its certificate of cancellation.[17] In analyzing Defendants' motion to dismiss, I assume the truthfulness of the allegations in the Complaint. Those allegations, if true, would support an inference that Defendants failed to make reasonable provision for unmatured claims related to the JC Penney work before they filed the Dissolved Defendants' certificates of cancellation. At best, Defendants' assertions to the contrary merely demonstrate the existence of genuine issues of material fact as to whether the escrow account satisfies the statutory requirement that the Dissolved Defendants make reasonable provision for the payment of their debts. The controversies over the reasonableness of the escrow account, the scope of the JC Penney work, and when Defendants became aware of the cost of that work all involve issues of fact. Such issues cannot be determined on a motion to dismiss. Thus, I conclude that Plaintiffs have pleaded sufficient facts to state a claim for

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14 Compl. ¶ 13.

15 *Id.* ¶ 24.

16 *Id.* ¶ 23.

17 6 *Del. C.* § 18-804. The Dissolved Defendants obligation to make "reasonable provision" also extends to "claims that have not been made known to the limited liability company or that have not arisen but that, based on facts known to the limited liability company, are likely to arise or to become known to the limited liability company within 10 years after the date of dissolution." *Id.* § 18-804(b)(3).

nullification. Whether that claim has any merit must await further development of the factual record.[18]

Defendants next argue that it would be futile to revive the Dissolved Defendants through nullification of their certificates of cancellation because, if revived, the Dissolved Defendants have no assets and would file for bankruptcy immediately. As Plaintiffs point out, however, Defendants did not raise this defense until oral argument;[19] it did not appear in either of Defendants' briefs, let alone their opening brief. "Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion."[20] The failure to raise a legal issue in an opening brief generally constitutes a waiver of the ability to raise that issue in connection

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[18] In their opening brief, Defendants also contend that the Dissolved Defendants lack the capacity to be sued because under 6 *Del. C.* § 18-803(b) suit generally may be brought against a limited liability company only until its certificate of cancellation becomes effective. DOB 14-15. Plaintiffs' suit, however, seeks nullification of the Dissolved Defendants' certificates of cancellation. Under very similar circumstances, this court has held that § 18-803(b) does not require dismissal of a complaint that seeks nullification on the ground that an LLC failed to wind up in compliance with the LLC Act. *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 138-39 (Del. Ch. Apr. 30, 2004). Also, Plaintiffs have named as additional Defendants Financial and BAM, existing companies that are affiliated with the Dissolved Defendants and allegedly constitute their alter egos. This fact further supports Plaintiffs' right to pursue nullification of the Dissolved Defendants' certificates of cancellation in this action.

[19] Tr. 15.

[20] *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (citing Ct. Ch. R. 7(b) & 171).

with a matter under submission to the court.[21] Thus, courts routinely have refused to consider arguments made in reply briefs that go beyond responding to arguments raised in a preceding answering brief.[22] Here, Defendants' argument regarding the futility of reviving the Dissolved Defendants due to their lack of assets was raised for the first time two months after Defendants filed their reply brief. Accordingly, based on its belated assertion, I find that Defendants have waived this argument for purposes of the pending motion to dismiss.[23]

Defendants also contend that the analogous statute of limitations provides grounds to dismiss the nullification claim. Defendants have not argued that the nullification claim itself is barred by the analogous statute of limitations. Instead, Defendants assert that it is pointless to revive the Dissolved Defendants solely to face time-barred claims. The accuracy of Defendants' assertion that Plaintiffs' underlying claims are time-barred, however, is far from clear. Plaintiffs withdrew every claim Defendants contended was

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[21] *See Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003); *In re Asbestos Litig.*, 2007 WL 2410879, at *4 (Del. Super. Aug. 27, 2007) (citing *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

[22] *In re Asbestos Litig.*, 2007 WL 2410879, at *4; *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 4896227, at *6 (Del. Ch. Dec. 18, 2009); *Carlson v. Hallinan*, 2006 WL 1510759, at *1 (Del. Ch. May 22, 2006).

[23] Additionally, I note that, even if Defendants had timely raised their futility argument, it would not have supported dismissal of the nullification claim. Were the Dissolved Defendants to file for bankruptcy, the requested nullification still would facilitate, for example, Plaintiffs' ability to pursue their related efforts to pierce the corporate veil of the Dissolved Defendants.

time-barred for the apparent purpose of preserving their ability to re-file them in Florida, where, at least according to the parties' previous arguments, the claims would not be time-barred. Thus, at this preliminary stage of the litigation, Defendants have not shown that Plaintiffs' nullification claim is barred by the analogous statute of limitations.

Finally, Defendants assert that the nullification claim is mooted by their pledge to submit to a default judgment in an interpleader action regarding the funds in escrow. Plaintiffs, however, seek to nullify the Dissolved Defendants' certificates of cancellation for reasons that go beyond simply obtaining the escrowed funds, including pursuing claims in Florida against the Dissolved Defendants for breach of contract and those companies' members and managers for failure to properly wind up the affairs of the Dissolved Defendants. As such, even if the aspect of their claim pertaining to the escrow account were moot, Plaintiffs still assert a legitimate and ripe basis for seeking nullification. Thus, Defendants' mootness argument must fail.[24]

III. CONCLUSION

For the foregoing reasons, I deny in its entirety Defendants' motion to dismiss Plaintiffs' claim for nullification of the certificates of cancellation of Defendants Bayview Malls and Holdings and their motion to stay this action.

IT IS SO ORDERED.

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[24] Defendants' commitment to refrain from defending an interpleader action presumably does mean, however, that this Court will not need to take any further action as to the escrowed funds.