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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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EAGLE SPE NV 1, INC.,

Plaintiff,

v.

SOUTHERN HIGHLANDS
DEVELOPMENT CORP., *et al.*,

Defendants.

Case No. 2:12-cv-00550-MMD-PAL

ORDER

(Defs.' Motion to Dismiss Second
Amended Complaint – dkt. no. 70.)

I. SUMMARY

In August 2014, the Court dismissed, without prejudice, Plaintiff Eagle SPE NV 1, Inc.'s First Amended Complaint ("FAC"), which sought a deficiency judgment against Defendants.¹ (Dkt. no. 66.) Pursuant to the Court's order dismissing the case ("Dismissal Order"), Plaintiff filed a Second Amended Complaint ("SAC") two weeks later. (Dkt. no. 67.) Defendants filed a Motion to Dismiss the SAC ("Motion"), which the Court now addresses. (Dkt. no. 70.) The Court has also reviewed Plaintiff's response (dkt. no. 81) and Defendants' reply (dkt. no. 87), as well as Plaintiff's notice of supplemental authority (dkt. nos. 88, 89) and Defendants' response to the supplemental authority (dkt. no. 92). For the reasons discussed below, the Motion is granted in part and denied in part.

¹Defendants are Southern Highlands Development Corporation; Olympia Group, L.L.C.; Olympia Land Corporation; Garry Goett, individually and as Trustee of the Goett Family Trust; Guy Inzalaco, individually and as Trustee of the Inzalaco Family Trust; and Does 1 through 10.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 The SAC's factual allegations are nearly identical to those chronicled in the
4 Dismissal Order. (See dkt. no. 66 at 2–3; dkt. no. 67 at 3–6.) As noted there, Defendants
5 Southern Highlands Development Corporation, Olympia Group, L.L.C., and Olympia
6 Land Corporation (collectively, "Borrowers") executed and delivered a promissory note
7 ("Note") with a principal amount of \$25,000,000 to Colonial Bank, N.A.,² in July 2007.
8 (Dkt. no. 67 ¶¶ 10, 16.) The Note was secured by a Deed of Trust that encumbered real
9 property in Clark County, Nevada ("Property"). (*Id.* ¶ 17.) Defendants Garry Goett and
10 Guy Inzalaco (together, "Guarantors") guaranteed payments under the Note. (*Id.* ¶ 18.)
11 The Note was amended in December 2007, September 2008, and December 2008. (*Id.*
12 ¶¶ 19-22.)

13 Colonial Bank was closed in August 2009. (*Id.* ¶¶ 23-24.) The Federal Deposit
14 Insurance Corporation ("FDIC") was named receiver to facilitate the liquidation and
15 distribution of Colonial Bank's assets. (*Id.* ¶ 24.) On August 14, 2009, the FDIC assigned
16 all its rights under the Note, Deed of Trust, and related loan documents to Branch
17 Banking and Trust Company ("BB&T"). (*Id.*)

18 The Borrowers defaulted on the loan in November 2009. (*Id.* ¶ 26.) BB&T issued
19 a written demand for payment on August 11, 2010, but neither the Borrowers nor the
20 Guarantors made the payment. (*Id.* ¶¶ 28–29.) On November 8, 2011, BB&T assigned
21 its rights under the Note, Deed of Trust, and other loan documents to Plaintiff, its wholly
22 owned subsidiary. (*Id.* ¶¶ 30-31.) A week later, on November 15, 2011, the Property was
23 sold for \$5,340,001.00. (*Id.* ¶ 32.) The sale did not cover the outstanding amount owed
24 by the Borrowers. (*Id.*) This balance remains unpaid. (*Id.* ¶ 33.)

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27 ²In December 2007, Colonial Bank, N.A., was converted from a national banking
28 association to a state-chartered bank. (Dkt. no. 67 ¶ 20.) Colonial Bank, an Alabama
corporation, became the successor to Colonial Bank, N.A.

1 **B. Procedural Background**

2 In dismissing the FAC, the Court gave Plaintiff leave to amend to cure the
3 following deficiencies: (1) Plaintiff’s failure to allege whether the consideration it paid to
4 obtain the assets at issue exceeded the Property’s fair market value or actual sale price;
5 and (2) the absence of any allegation that the Guarantors and the Borrowers unfaithfully
6 performed their duties under a loan agreement. (Dkt. no. 66 at 12-13.)

7 Defendants filed the Motion on September 5, 2014, approximately two weeks
8 after Plaintiff filed the SAC. (Dkt. no. 70.) They argue that dismissal is proper because
9 the SAC does not cure the FAC’s deficiencies, as identified in the Dismissal Order.
10 Defendants further argue that Plaintiff failed to comply with the Dismissal Order because
11 the SAC does not address those deficiencies. Defendants accordingly seek dismissal
12 under Rules 12(b)(6) and 41(b) of the Federal Rules of Civil Procedure. (*Id.* at 2-3.)

13 On May 12, 2015, after the parties had fully briefed the Motion, Plaintiff filed a
14 Notice of Supplemental Authority directing the Court’s attention to *Munoz v. Branch*
15 *Banking & Trust Co.*, 348 P.3d 689 (Nev. 2015). (Dkt. nos. 88, 89.) In *Munoz*, the
16 Nevada Supreme Court held that federal law preempts a state statute at the center of
17 this case — NRS § 40.459(1)(c). 348 P.3d at 692-93. Defendants requested leave to
18 respond to the supplemental authority, which the Court granted. (Dkt. no. 90, dkt. no.
19 91.) The Court has considered this supplemental authority and the parties’ related
20 arguments in deciding the Motion.

21 **III. LEGAL STANDARD**

22 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
23 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
24 provide “a short and plain statement of the claim showing that the pleader is entitled to
25 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
26 While Rule 8 does not require detailed factual allegations, it demands more than “labels
27 and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft*
28 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “Factual

1 allegations must be enough to raise a right to relief above the speculative level.”
2 *Twombly*, 550 U.S. at 555. Thus, “[t]o survive a motion to dismiss, a complaint must
3 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
4 plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

5 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
6 apply when considering motions to dismiss. First, a district court must accept as true all
7 well-pleaded factual allegations in the complaint; however, legal conclusions are not
8 entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause
9 of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a
10 district court must consider whether the factual allegations in the complaint state a
11 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s
12 complaint alleges facts that allow a court to draw a reasonable inference that the
13 defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint fails to
14 “permit the court to infer more than the mere possibility of misconduct, the complaint has
15 alleged — but it has not ‘shown’ — ‘that the pleader is entitled to relief.’” *Id.* at 679
16 (quoting Fed. R. Civ. P. 8(a)(2)) (alteration omitted). When the claims in a complaint
17 have not crossed the line from conceivable to plausible, the complaint must be
18 dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either direct or
19 inferential allegations concerning “all the material elements necessary to sustain
20 recovery under *some* viable legal theory.” *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford*
21 *Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

22 **IV. DISCUSSION**

23 Plaintiff’s SAC mirrors the FAC, with several slight modifications. Notably, the
24 SAC adds a new claim for breach of contract against the Borrowers to the three claims
25 alleged in the FAC: (1) breach of the guarantee, (2) deficiency, and (3) breach of the
26 covenant of good faith and fair dealing. (Dkt. no. 67 at 6-7; see dkt. no. 66 at 6 (listing
27 initial claims).) Plaintiff also added an allegation that the deficiency exceeds \$75,000.
28 (See dkt. no. 67 ¶ 34; dkt. no. 66 at 12 (noting that the FAC did not allege that Plaintiff’s

1 consideration for rights to the Property exceeded the Property’s sale price or fair market
2 value).) Dismissal is proper, Defendants contend, because these changes do not solve
3 the problems the Court identified in dismissing the FAC. The Court disagrees.

4 **A. Deficiency-Related Claims**

5 Section 40.455(1) of the Nevada Revised Statutes allows creditors to obtain
6 deficiency judgments where “there is a deficiency of the proceeds of [a] sale and a
7 balance remaining due to the judgment creditor or the beneficiary of the deed of trust.”
8 NRS § 40.455(1), *amended by* 2015 Nev. Stat., Ch. 518, Sec. 8 (Westlaw). As the Court
9 discussed at length in the Dismissal Order, however, Nevada law limits the amount that
10 a creditor can recover on a deficiency judgment to the least of three amounts: (1) the
11 difference between the amount of debt and the fair market value of a property at the time
12 of sale; (2) the difference between the amount of debt and the actual sale price of a
13 property; and (3) an amount that applies specifically to successor creditors, as previously
14 defined by NRS § 40.459(1)(c) (“Subsection (1)(c)”).³ (See *dk. no. 66 at 6–7.*)

15 At issue in Defendants’ first motion to dismiss was whether Subsection (1)(c)
16 applied to Plaintiff. At the time of the Property’s sale in November 2011, Subsection
17 (1)(c) read:

18 If the person seeking the judgment acquired the right to obtain the
19 judgment from a person who previously held that right, [a deficiency
20 judgment could be limited to] the amount by which the amount of the
21 consideration paid for that right exceeds the fair market value of the
property sold at the time of sale or the amount for which the property was
actually sold, whichever is greater.

22 2011 Nev. Stat. 1743. Defendants argued — and the Court agreed — that the FAC
23 failed to assert a deficiency that complied with Subsection (1)(c). (See *dk. no. 66 at 6-7,*
24 12.) Plaintiff raised objections to Subsection (1)(c)’s applicability and constitutionality,
25 which the Court rejected. (*Id.* at 7-12.)

26 ³Section 40.459 was amended and reorganized in May 2015. See 2015 Nev.
27 Stat., Ch. 149, Sec. 1 (Westlaw) (codified as amended at NRS § 40.459). Subsection
28 (1)(c) now appears in NRS § 40.459(3)(c), which limits a successor creditor’s recovery
after obtaining a deficiency judgment on a “property upon which the debtor, guarantor or
surety maintains his or her principal residence.” NRS § 40.459(3)(c).

1 Defendants now contend that the SAC remains deficient because Plaintiff has not
2 alleged that the consideration it paid for rights associated with the Property exceeded
3 the Property's fair market value or actual sale price. (Dkt. no. 87 at 5-8.) Plaintiff
4 disagrees, arguing that the SAC adequately states a claim, even assuming that
5 Subsection (1)(c) applies.⁴ (Dkt. no. 81 at 11–13.) Indeed, the SAC states: “[a]s set forth
6 in NRS 40.459, there is a deficiency balance remaining due to Plaintiff under the Note
7 that exceeds \$75,000.00.” (Dkt. no. 67 ¶ 34.) Although Plaintiff fails to identify
8 Subsection (1)(c) specifically, this allegation suggests that the amount of Plaintiff's
9 consideration exceeds the Property's fair market value and its actual sale price. In light
10 of the SAC's other allegations about Plaintiff's acquisition of rights related to the
11 Property, the Court finds that Plaintiff has “state[d] a claim upon which relief can be
12 granted.” Fed. R. Civ. P. 12(b)(6). The Court will therefore deny the Motion with regard to
13 Plaintiff's deficiency claim.

14 **B. Breach of the Covenant of Good Faith and Fair Dealing Claim**

15 Defendants further argue that Plaintiff failed to address defects in its claim for
16 breach of the covenant of good faith and fair dealing, which the Court had identified in
17 the Dismissal Order. (Dkt. no. 70 at 14-17.) As noted in the Dismissal Order, the FAC
18 failed to allege that Defendants breached this duty “by performing in a manner unfaithful
19 to the purpose of the contract,” one of the essential elements of the claim. (Dkt. no. 66 at
20 13 (citing *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995)).) Rather, Plaintiff alleged that
21 Defendants failed to perform at all, claiming that “[s]ubsequent to the execution of the
22 Note and the Guarantee, the Borrowers and the Guarantors have acted unfaithfully to
23 the purpose of the Note and the Guarantee by failing to comply with the terms and
24 obligations of the Note and the Guarantee.” (Dkt. no. 14 ¶ 48.)

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26 ⁴The Court notes that Plaintiff raised further arguments about the applicability and
27 constitutionality of Subsection (1)(c) in its response brief. (See dkt. no. 81 at 13-28.) The
28 Court need not reach these arguments to resolve the Motion because the Court finds
that the SAC adequately alleges a deficiency, even assuming that Subsection (1)(c)
applies.

1 Defendants insist that the SAC is infected by the same infirmity. The SAC states:
2 “Defendants breached their duty of performing in a . . . manner unfaithful [sic] to the
3 purpose of the contracts by, among other things, failing to repay money to Plaintiff.” (Dkt.
4 no. 67 ¶ 47.) The SAC further asserts that “Plaintiff’s justified expectations were denied”
5 because Defendants acted “in a manner unfaithful to the purpose of the contracts.” (*Id.*
6 ¶ 48.) Even setting aside the fact that these allegations are conclusory, the SAC asserts
7 — just as the FAC did — that Defendants failed to perform a duty under the contracts,
8 not that they performed their duty in a manner unfaithful to the contracts’ purpose.
9 Because Plaintiff failed to cure this deficiency, the Court will dismiss this claim.

10 **C. New Breach of Contract Claim**

11 Finally, Defendants urge the Court to dismiss Plaintiff’s breach of contract claim
12 against the Borrowers, which Plaintiff asserted for the first time in the SAC. (Dkt. no. 70
13 at 13-14.) Defendants point out that the Dismissal Order gave Plaintiff leave to amend
14 only specific, identified deficiencies in the FAC. (*Id.* at 13; *see* dkt. no. 66 at 14 (giving
15 Plaintiff leave “to cure the noted deficiencies”).) Defendants also emphasize that the
16 deadline for amending pleadings was June 18, 2014. (*See* dkt. no. 71 at 3.)

17 Courts, however, “should freely give leave [to amend] when justice so requires.”
18 Fed. R. Civ. P. 15(a)(2). Defendants have not argued that they would be prejudiced by
19 Plaintiff’s assertion of a breach of contract claim against the Borrowers. Rather, as
20 Defendants contend, the breach of contract claim mirrors Plaintiff’s deficiency claim,
21 such that Plaintiff’s delay in asserting the claim does not appear to be prejudicial to
22 Defendants. (*See* dkt. no. 70 at 13–14.) Nor is the Court persuaded by Defendants’
23 argument that the breach of contract claim is duplicative of the deficiency claim. (*See id.*)
24 Defendants have not cited any authority suggesting that Plaintiff should be barred from
25 asserting the breach of contract claim as an alternative theory for recovery. (*See id.*)
26 Accordingly, the Court declines to dismiss the breach of contract claim.

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D. Leave to Amend


Plaintiff requests additional leave to amend to cure any deficiencies in the SAC. (Dkt. no. 81 at 28.) Although courts “should freely give” leave to amend, Fed. R. Civ. P. 15(a)(2), Plaintiff had ample opportunity to amend its complaint and failed to resolve the deficiency in its claim for breach of the covenant of good faith and fair dealing. (See dkt. no. 66 at 12-13 (identifying this deficiency and giving Plaintiff leave to amend).) In light of Plaintiff’s failure to correct its claim for breach of the covenant of good faith and fair dealing, it appears to the Court that allowing further amendment of this claim would be futile. The Court therefore dismisses Plaintiff’s claim for breach of the covenant of good faith and fair dealing with prejudice.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motion.

It is ordered that Defendants’ Motion to Dismiss Second Amended Complaint (dkt. no. 70) is granted in part and denied in part. Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing is dismissed with prejudice. Plaintiff may proceed with its remaining claims.

DATED THIS 24th day of September 2015.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE