Third District Court of Appeal

State of Florida

Opinion filed July 22, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1655 & 3D18-1654
Lower Tribunal Nos. 17-17658 & 16-2102

Shoma Coral Gables, LLC, etc.,
Appellant,

vs.

Gables Investment Holdings, LLC, etc., et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, William Thomas, Judge.

White & Case LLP and Raoul G. Cantero, David P. Draigh and Zachary B. Dickens; Hall, Lamb, Hall & Leto, P.A., and Andrew C. Hall and Matthew P. Leto; Frank Silva, for appellant.

Crabtree & Auslander and John G. Crabtree, Charles M. Auslander, Brian C. Tackenberg and Emily Cabrera, for appellees.

Before EMAS, C.J., and SALTER and LOBREE, JJ.

LOBREE, J.

Shoma Coral Gables, LLC ("Shoma"), appeals the lower court's entries of judgment on the pleadings in two different actions in favor of Gables Investment Holdings, LLC (the "Investor") and Ugo Colombo ("Colombo"). The orders summarily found the Investor and Colombo entitled to relief and generally adopted the motions filed. We reverse in part, holding that the record shows that Shoma sufficiently stated causes of action for breach of contract against the Investor and Colombo and, accordingly, neither was entitled to judgment on these counts in either action. However, we affirm the trial court's entries of judgment in all other respects.

Facts and Procedural Background

Shoma originally sought to buy property for development. Catching wind of it, Colombo, the majority owner of a business adjoining the property, approached Shoma to join the purchase. Shoma and the Investor—a second business owned by Colombo—agreed to form a new limited liability company, Coral Gables Luxury Holdings, LLC (the "Company"), of which each was to be an equal owner. The Company was created through an operating agreement expressly governed by Delaware law, and was controlled by a board of two managing members, one appointed by Shoma and the other, Colombo, appointed by the Investor.

The board decided to develop the property as a luxury condominium with a garage and ground-level retail space, obtained approvals for construction, opened a sales office to promote the venture, obtained deposits from prospective buyers, and

sought construction financing. However, the board members subsequently disagreed on whether—and at what price—to sell retail and garage space to Colombo's adjoining business. Thereafter, Colombo took several actions, including closing the Company's sales office, firing all staff, taking down the Company's website, canceling broker meetings, and failing to attend scheduled presentations on the project. Since then, it has been impossible for the Company to conduct business.

As a result, Shoma filed two separate suits: one directly against the Investor and Colombo, mainly for breach of fiduciary duties, and the other derivatively and on behalf of the Company, against the Investor and Colombo, mainly for breach of contract. Colombo moved for judgment on the pleadings in the direct action, which was granted by the lower court. Based on that finding, the Investor successfully moved for the same relief in that action. Although Shoma moved for leave to amend and for rehearing, the trial court denied it. On its own, the trial court presiding over the derivative action proceedings then adopted the successful motions from the direct action, entering judgment as a matter of law in their favor therein as well.

Standards of Review

We review an order granting judgment on the pleadings de novo. Glenn v. Roberts, 95 So. 3d 271, 272 (Fla. 3d DCA 2012). The trial court's interpretation of the Company's operating agreement is also reviewed de novo. See Telemundo Media, LLC v. Mintz, 194 So. 3d 434, 435 (Fla. 3d DCA 2016). Further, we review

the trial court's denial of Shoma's motion for leave to amend for abuse of discretion. See Wayne Creasy Agency, Inc. v. Maillard, 604 So. 2d 1235, 1236 (Fla. 3d DCA 1992).

Causes of Action for Breach of Contract Against the Investor and Colombo

Because, according to its own terms, the interpretation of the Company's operating agreement is governed by Delaware substantive law, the latter controls over the merits and substance of Shoma's allegations. See State-Wide Ins. Co. v. Flaks, 233 So. 2d 400, 402 (Fla. 3d DCA 1970) ("[T]he interpretation and obligations of a contract, as determined in the state in which the contract is made, are applicable and to be observed in the enforcement thereof in another state."). However, the trial court's entry of judgment on the pleadings is governed by Florida procedural law. See Aerovias Nacionales De Colombia, S.A. v. Tellez, 596 So. 2d 1193, 1195 (Fla. 3d DCA 1992) (holding that, in suit where New York substantive law governed most issues, Florida law still "govern[ed] on procedural matters"). Under Florida law, judgment on the pleadings is improper where issues of material fact remain, or the movant is not clearly entitled to relief as a matter of law. See Cuccarini v. Rosenfeld, 76 So. 3d 328, 330 (Fla. 3d DCA 2011).

Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages. See VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). On

appeal, the Investor and Colombo challenge Shoma's allegations of breach of contract as insufficient. The record, however, shows that neither the Investor nor Colombo was clearly entitled to judgment as a matter of law on these counts, since Shoma did state causes of action for breach of contract.

In both actions, Shoma alleged that the Investor and Colombo breached duties under sections 4.1 and 4.5 of the operating agreement, which relevantly read:

> 4.1 Management/Managers
> (a) The business and affairs of the Company shall be carried out by . . . two (2) Persons, one (1) of which shall be appointed by [Investor] and one (1) . . . by Shoma . . . .
>
> (b) [. . .] The Managers *will not be liable* . . . in damages . . . for anything . . . [done or not done] *within the scope* of and authorization of this Agreement, *except* in the case of a *Bad Act* . . . .
>
> . . . .
>
> 4.5 No Liability. *Unless specifically assumed in writing, no* Member or Manager *will have any personal liability* for any obligations of the Company. The failure of the Company to observe any formality or requirement relating to the exercise of its powers or management of its business or affairs under this Agreement or the Act will not result in the imposition of personal liability on any Member or Manager. *Except as otherwise provide[d] herein*, the Managers and the Members *will not have any liability* to the Company or to any Member resulting either from any act or omission made *within the scope* of authority expressly granted to such Person under this Agreement, or from the disallowance or adjustment of any deduction or credit claimed in any income tax return of the Company or of the Members, *provided such Member or Manager shall have discharged his or its duties in good faith*, with the

> *care* a corporate officer of like position would exercise under similar circumstances, in a manner *reasonably believed to be in the best interests* of the Company.

(emphasis added). Section 4.1's plain language exempts managers from personal liability (and their respective principals, in turn) from any act or omission which they are authorized to perform or refrain from performing. That is, generally, so long as the act or omission is one falling under the contract's description of their powers and responsibilities, it will not give rise to liability. However, the clause also creates a "bad acts" exception to this general immunity, defined elsewhere in section 1.1 as encompassing "fraud, gross negligence, willful or intentional misconduct," and the like.

Despite its breadth, section 4.5's exculpatory provision also clearly limits its immunity to acts or omissions *within* the scope of authority of the actor and *if* made in *good faith*, with the *care of a comparable corporate officer* under similar circumstances, and with a *reasonable belief* that it be in the *best interests* of the company. Conversely, if fraudulent, grossly negligent, or intentionally wrongful acts are either outside the scope of the actor's authority or fail to display good faith, care, or a reasonable belief, then they entail liability. Here, the standards at issue are "good faith," "care," and "reasonable belief."

Ordinarily, "good faith," unqualified by any other term, would mean that "the actor *subjectively believes* that it is in the best interests of [the company]." Allen v.

Encore Energy Partners, L.P., 72 A.3d 93, 104 (Del. 2013) (emphasis in original).[1] However, because of its proximity to the other two standards, "care" and "reasonable belief," which appear in *appositional* clauses following it, the content of "good faith" must be understood as overlapping with these other standards and encompassing only one objective good faith standard. Compare Norton v. K-Sea Transp. Partners L.P., 67 A.3d 354, 362 (Del. 2013) ("If we take seriously our obligation to construe the agreement's 'overall scheme,' we must conclude that the parties' insertion of a free-standing, enigmatic standard of 'good faith' is consistent with [the agreement's] conceptualization of a reasonable belief that the action taken is in, or not inconsistent with, the best interests of the [business]."),[2] with Brazil v. Rickerson, 268 F. Supp. 2d 1091, 1096-97 (W.D. Mo. 2003) (interpreting "in good faith, with care corporate officer of like position would exercise under similar circumstances" as amounting to single duty of good faith),[3] and Cacace v. Meyer Mktg. (Macau Commercial

[1] "Good faith" is defined as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage," a meaning that "varies somewhat with the context." *Good Faith*, Black's Law Dictionary (9th ed. 2019).

[2] "Reasonable" is defined as "fair, proper, or moderate under the circumstances," and "reasonable belief" is defined as "[a] sensible belief that accords with or results from using the faculty of reason." *Reasonable*, Black's Law Dictionary (9th ed. 2019). "Interest" is defined as "advantage or profit of a financial nature." *Interest*, Black's Law Dictionary (9th ed. 2019).

[3] "Care" is defined as "serious attention; heed." *Care*, Black's Law Dictionary (9th ed. 2019); see also In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968

Offshore) Co., Ltd., 589 F. Supp. 2d 314, 322 n.5 (S.D. N.Y. 2008) ("Two phrases are in apposition when they're logically equivalent and in the same grammatical relation to the rest of the sentence: it's a way of explaining a word or phrase, or giving additional information about it."). The two last clauses are clearly appositional to the "good faith" clause given the fact that there are no subsequent conjunctions, especially at the beginning of the last clause.[4]

Where the terms good faith and reasonable belief qualify the performance of contractual duties, they can be enforceable as a matter of Delaware law. See Allen, 72 A.3d at 104-09 (contract requiring performance to be in good faith and with reasonable belief that it was in best interests of business); In re Kinder Morgan, Inc. Corp. Reorg. Litig., No. 10093-VCL, 2015 WL 4975270, at *5-10 (Del. Ch. Aug. 20, 2015) (contract requiring reasonable belief that performance was in best interests of company); DV Realty Advisors LLC v. Policeman's Annuity & Benefit Fund of Chicago, 75 A.3d 101, 109 (Del. 2013) (contract requiring good faith); Allen v. El

(Del. Ch. 1996) (defining care as "whether there was a real effort to be informed and exercise judgment," and noting "[w]here a director *in fact exercises a good faith effort to be informed and to exercise appropriate judgment*, he or she should be deemed to satisfy fully the duty of attention") (emphasis in original); Quadrant Structured Prods. Co., Ltd. v. Vertin, 115 A.3d 535, 549 (Del. Ch. 2015) (duty of care violated where actor fails to pursue "best interests" or act "in good faith").

[4] Thus, instead of reading "in good faith, with . . . care . . . , *and* in a manner reasonably believed," suggesting an *enumeration* of different things, it merely reads "in good faith, with . . . care . . . , in a manner reasonably believed," which signals *alternative* renditions of the same main clause referring to good faith.

Paso Pipeline GP Co., LLC, 113 A.3d 167, 178 (Del. Ch. 2014) (contract requiring acting in good faith); Ashland LLC v. The Samuel Heyman 1981 Continuing Tr. for Lazarus Heyman, No. N15C-10-176 EMD CCLD, 2017 WL 1191099, at *6-7 (Del Super. Ct. Mar. 29, 2017) (contract requiring reasonable best efforts); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 749-750 (Del. Ch. 2008) (contract requiring reasonable best efforts and good faith belief); Bae Sys. N. Am., Inc. v. Lockheed Martin Corp., No. Civ.A.20456, 2004 WL 1739522, at *6 (Del. Ch. Aug. 3, 2004) (contract requiring good faith and reasonable prudence).

Contrary to the Investor and Colombo's suggestion, such exculpatory provisions have not been found unenforceable per se. See Ross v. Institutional Longevity Assets LLC, No. 2017-0186-TMR, 2019 WL 960212, at *6 (Del. Ch. Feb. 26, 2019) (construing similar provision but finding that complaint failed to allege or explain how defendant's actions entailed breach of duty to act in good faith and not in fraudulent, grossly negligent, reckless, or intentional manner); West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, No. 2742-VCN, 2007 WL 3317551, at *11 (Del. Ch. Nov. 2, 2007) (finding that complaint failed to state a claim because the relevant provision did not expressly qualify performance with the terms "good faith" or "reasonable efforts").

As to Colombo specifically, Shoma alleged in both actions that, as a managing member of the Company, he failed to act in accordance with section 4.5 of the

agreement in attempting to sabotage the Company's business by unilaterally closing down the sales office, firing all the staff, taking down the website, missing scheduled business meetings, and failing to finalize or execute documents required for pending, conditional sales. This was in apparent contravention of *both* the standard of behavior prescribed by section 4.5 *and* the very purposes of the company itself, described in section 2.5, of "acquiring, owning, developing, leasing, operating and disposing of the Property . . . to borrow money . . . and all lawful business." Although Colombo was not a signatory to the contract, the clause's plain language recognized personal liability for managers unless they discharged the duty at issue in good faith or in the best interests of the company. This is reinforced by section 4.1, concerning managers, precluding personal liability for such agents for anything they may do "within the scope and authorization of this Agreement," but not for "bad acts," which, pursuant to section 1.1, encompass fraud, gross negligence, intentional misconduct, and the like. See Kagan v. HMC-N.Y., Inc., 94 A.D.3d 67, 71 (N.Y. App. Div. 2012) (affirming dismissal of breach of contract counts against individual managers based on identical contractual provision only because they did not specifically allege lack of good faith or reasonableness).

As to the Investor, Shoma alleged in both actions that it directed or authorized Colombo to take such actions, as well as attempted to sabotage the Company's business and defeat its interest. Shoma alleged that this was in retaliation for the

board's decision not to sell or lease part of its property to Colombo's adjoining business. Delaware courts have construed undefined terms of good faith to mean the opposite of bad faith, which, in turn, means "an action so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." DV Realty, 75 A.3d at 110. If all allegations in the complaint about the dealings and actions taken by the parties leading to the conduct complained of are taken as true, it becomes clear that abruptly closing the business's only ground sales operation and online platform, as well as canceling its scheduled meetings and transactions with brokers and buyers, neither advanced the financial interests or profits of the business nor was commercially reasonable, or exhibited serious attention and regard for the purposes of the business, but can only be explained by bad faith. Delaware courts have found allegations much less specific to be sufficient to state a claim. See Ashland, 2017 WL 1191099, at *7 (finding that, where defendants were required to use reasonable best efforts, plaintiff's allegation that they did not was sufficient to state claim and remaining issues were factual); Hexion, 965 A.2d at 749-750 (holding claim sufficiently stated where defendant's actions were designed to avoid business objective that defendant was required to make reasonable efforts to achieve); Bae Sys., 2004 WL 1739522, at *6 (holding that allegations that defendant's agent deliberately acted to enhance its position in litigation sufficiently stated claim for breach of contractually-required good faith

and reasonable prudence). Therefore, Shoma stated claims for breach of contract against the Investor and Colombo in both actions arising under sections 1.1, 4.1 and 4.5 of the operating agreement.[5]

The Investor and Colombo insist that sections 1.1, 4.1, and 4.5 cannot create liability in contract for *any* of the acts charged by the complaint, based on the language of section 4.9, which relevantly reads:

> TO THE *FULLEST EXTENT PERMITTED* BY APPLICABLE LAW, the *duties* of a Member and a Manager *are expressly limited to those set forth herein and in this Agreement*, and such Member and Manager *shall not be obligated or liable* to the Company or to the other Members as a fiduciary or in *any* other capacity. Each

[5] The Investor's contention that such claims were not stated because some of the acts complained of—closing an office, firing personnel, etc.—were otherwise expressly authorized by other sections of the agreement misses the mark. While the agreement authorizes managers to fire personnel or cease operations, it clearly does not authorize doing so *with the intent to sabotage*, or in a manner that is *contrary to good faith, care, or the best interests of the business*. Yet that is precisely what the complaint alleges that the Investor and Colombo did. Whether the Investor or Colombo, in fact, had a state of mind devoid of good faith, care, or a reasonable belief concerning the best interests of the business in acting as they did is a matter of fact that precluded judgment on the pleadings. See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP, 624 A.2d 1199, 1206 (Del. 1993) (holding that defendant's exercise of contractual right required to be reasonable was mixed question of law and fact inappropriate for judgment as matter of law). Moreover, the Investor's contention that the "lesser" allegations of missing meetings or failing to finalize sale documents cannot state a breach is also unpersuasive. See, e.g., AQSR India Private, LTD v. Bureau Veritas Holdings, Inc., No. 4021-VCS, 2009 WL 1707910, at *7 (Del. Ch. June 16, 2009) (denying judgment on pleadings where complaint alleged that defendants failed to substantially perform their obligations by refusing to participate in joint phone calls with customers or to file certain documents in timely manner).

> Member is hereby authorized to . . . rely on the limitations set forth in this Section 4.9, and to the fullest extent permitted by applicable law, each Member HEREBY *WAIVES AND RELEASES* any rights of claims of *any standard of care or duty owed* by the other Member or the Managers that is *higher than is set forth herein* . . . .

(emphasis added).

The Investor and Colombo submit that the dispositive language here is that neither "shall be . . . obligated or liable to the Company or to the other Members as a fiduciary or in any other capacity," and that Shoma has "waived" and "released" "any rights of claims of any standard of care or duty owed by the other Member or the Managers that is higher than is set forth herein." In interpreting the scope of this section, we are required to accord it its plain and ordinary meaning. Ashland LLC, 2017 WL 1191099, at *5. We must also give effect to all provisions and harmonize them consistent with the parties' objective intent. Id. Specific terms and provisions, moreover, control over more general ones. Id. Ultimately, this court may not torture the text to create ambiguity where none exists, Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992), but plain meaning and the underlying "logic" of the contract, if discernible, must control, Lillis v. AT&T Corp., 904 A.2d 325, 333 (Del. Ch. 2006).

Section 4.9 itself qualifies each grant of immunity made. Although it recognizes that Investor and Colombo are not liable as fiduciaries or else, this is to the exception of "duties . . . set forth [elsewhere] . . . in this Agreement." Sections

1.1, 4.1 and 4.5, relied on by Shoma, are part of the contract. Similarly, section 4.9's "waiver and release" is not as to any and all claims arising under other any part of the contract, but specifically as to any "standard of care or duty . . . that is higher than is set forth herein." Shoma's complaint does not invoke any standard of care *higher* than those expressly negotiated by the parties and described in sections 1.1 and 4.5 ("gross negligence," "reasonableness," "good faith," "best interests").

By "herein," section 4.9 cannot mean section 4.9 itself, but the entire contract, since this would require us to render sections 1.1, 4.1, 4.5, and 4.6 (also limiting rights to indemnification to acts and omissions "within the scope of the purposes of the Company" and not for "bad acts") as of no effect. Even if it were true that the Investor actually intended this exculpatory provision to preclude any and all liability, including liability otherwise recognized by other parts of the contract, it is not the parties' actual intent that controls, but "what a reasonable person in the position of the parties would have thought it meant." Rhone-Poulenc Basic Chems. Co., 616 A.2d at 1196. It is not sections 1.1, 4.5, and 4.6, all more specific and detailed than 4.9, that must be qualified and controlled by 4.9, but rather the latter by the former. Contrary to the Investor and Colombo's argument, section 11.5 provides that headings and titles do not control interpretation but are a matter of convenience.

We do not hold that section 4.9 gives rise to liability, but rather that its qualifying language recognizes that *other* sections of the contract *may* do so.

Sections 1.1, 4.1, and 4.5, read jointly here, do just that. As it has been eloquently put: "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." Johnson v. U.S., 529 U.S. 694, 718 (2000) (Scalia, J., dissenting). Here as well, the meaning proposed by the Investor and Colombo for section 4.9, for example, "would surely fail that test, even late in the evening." Id. Just like "telling someone, 'Though I do not cancel or annul my earlier action, I revoke it' . . . is both linguistically and conceptually absurd," id., the Investor and Colombo's interpretation would similarly force this contract to simultaneously say that, while it does not exempt the parties from acting badly—specifying when and under what standards all throughout, in the end, however, it sort of does, see O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'").

Moreover, despite appearances, this case is not controlled by Fisk Ventures, LLC v. Segal, No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008). There, the court construed the following provision:

> *Performance of Duties; no Liability of Officers.* No Member shall have any duty to any Member of the Company *except as expressly set forth herein or in other written agreements*. *No Member*, Representative, or Officer of the Company *shall be liable* to the Company or to any Member for any loss or damage sustained by the Company or to any Member, *unless* the loss or damage

> shall have been the result of *gross negligence, fraud or intentional misconduct* by the Member. . . .

Id. at *9 (emphasis added). The court in Fisk rejected the plaintiff's argument that this language created a duty for defendant to act without gross negligence or intentionally misbehave that could be breached, according to the complaint, by firing him as CEO. Id.

Two main considerations drove the court's holding. First, the Fisk plaintiff relied *only* on this language, which seems to have reappeared in identical fashion in other sections of the contract. The court reasoned that, despite its reference to a standard of conduct such as gross negligence, the provision did not intend to *create* a "code of conduct," since the language "no Manager shall have any duty . . . except as expressly set forth herein" controlled over the intent of the provision, which was blanket immunity only qualifiable by *another* section's substantive standards. In fact, however, no other section of the agreement created any additional standards. Id. at 11 ("Pursuant to this provision, the Genitrix LLC Agreement eliminates fiduciary duties to the maximum extent permitted by law by flatly stating that members have no duties other than those expressly articulated in the Agreement. *Because the Agreement does not expressly articulate fiduciary obligations, they are eliminated*.") (emphasis added). Second, the court reasoned that the provision, which is expressly *exculpatory* in nature, cannot be construed as intending to *create*

liability that is ill-defined and so broad as to provide no guidance for when or how it arises. Id.

Here, like Fisk, we are confronted with a provision that is exculpatory in nature and has almost identical language. However, unlike Fisk, Shoma does not argue that it is out of *this* provision that liability arises for Investor and Colombo's actions. It concedes that the provision operates a waiver as to all standards of conduct and duties *not expressed* in other parts of the contract. Moreover, Shoma relies on other provisions, including 1.1 and 4.5, with different and more specific language, describing standards of conduct and bad acts giving rise to liability for the parties and their agents. The standards specifically introduced by these other sections are expressed in addition to any language in section 4.9. Lastly, such additional standards, including "good faith" and "reasonableness," have been held enforceable at law by Delaware law. Compare Allen, 72 A.3d at 104-09 (contract requiring performance to be in good faith and with reasonable belief that it was in best interests of business enforceable), with Ross, 2019 WL 960212, at *6 (not enforcing similar provision's standards only because complaint failed to allege facts bringing conduct under them), and Sirazi v. Panda Exp., Inc., No. 08-C-2345, 2011

WL 6182424, at *13 (N.D. Ill. Dec. 13, 2011) (holding similar exculpatory provision enforceable because it lacked identical language and broad sweep of that in Fisk).[6]

Causes of Action for Breach of Fiduciary Duties

The Investor correctly contends that Shoma was barred from raising fiduciary duty claims, even if they clearly and independently existed. Under Delaware law, a cause of action for breach of fiduciary duty will not lie where it is dependent upon the existence of a contractual relationship between the parties, or the complaint's claims for breach of contract and breach of fiduciary duty "overlap completely and arise from the same underlying conduct or nucleus of operative facts." See Ross, 2019 WL 960212, at *6; Nemec v. Shrader, 991 A.2d 1120, 1129 (Del. 2010) ("It is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim."); Blaustein v. Lord Baltimore Capital Corp., No. 6685-VCN, 2013 WL 1810956, at *13 (Del. Ch. Apr. 30, 2013) ("[A]ny fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."). Therefore, we do not address whether fiduciary duties were created by the operating

[6] Constrained by due process considerations, we decline to reach the issue of the applicability of the business judgment rule to the acts and omissions alleged of the Investor and Colombo in the derivative action. This is because the parties have not raised it themselves and it was not meaningfully litigated below, despite the fact that it is a relevant consideration at the judgment on the pleadings stage. See Parnes v. Bally Entm'tCorp., 722 A.2d 1243, 1246 (Del. 1999).

agreement, but hold that, even if they were, claims for their breach could not legally have arisen, given the nature of the contract.[7]

Denial of Leave to Amend

Because Shoma could not state claims for breach of fiduciary duties as a matter of law, leave to amend those counts was futile, and the trial court did not abuse its discretion in denying it. See Venezia Lakes Homeowners Ass'n, Inc. v. CSX Transp., Inc., 43 So. 3d 93, 95 (Fla. 3d DCA 2010) (affirming denial of leave to amend where amendment would have been futile, given court's construction of operative contract).

Conclusion

Although the meaning of the standards of conduct at issue in the breach of contract counts were questions of law, whether the Investor and Colombo's alleged actions breached the agreement was a mixed question of fact and law. See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP, 624 A. 2d 1199,

[7] Shoma argues that Florida law, including that on alternative pleading, controls in this dispute, such that, in principle, it could plead mutually exclusive causes of action. Belz Investco Ltd. P'ship v. Groupo Immobiliano Cacabie, S.A. a/k/a GIICSA, 721 So. 2d 787, 788 (Fla. 3d DCA 1998). However, based on the authorities cited above, the Investor is correct that, where a plaintiff has (or *could have*) alleged a breach of contract claim predicated on the same nucleus of operative *facts* and seeking the same *remedy* as the fiduciary claim asserted, this undermines the legal sufficiency of the fiduciary claim's allegations *as a matter of law*. Because this is a requirement of Delaware *substantive* law, which admittedly controls here, our finding is not changed because Florida procedural law would allow otherwise.

1206 (Del. 1993). Because the operative complaints "allege[d] sufficient facts to state some cause of action" and these "do not as a matter of law entitle the defendants to a judgment, the order granting judgment on the pleadings must be reversed." Clarke v. Henderson, 74 So. 3d 112, 114 (Fla. 3d DCA 2011). We vacate the entries of judgment with regard to Shoma's breach of contract counts in the direct and derivative actions. We affirm in all other respects.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.