Cambridge Capital Real Estate Invs., LLC v Archstone Enter. LP
2014 NY Slip Op 32625(U)
October 9, 2014
Sup Ct, New York County
Docket Number: 654471/12
Judge: Marcy S. Friedman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

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CAMBRIDGE CAPITAL REAL ESTATE
INVESTMENTS, LLC,

Plaintiff,

-against-

Index No.
654471/12

ARCHSTONE ENTERPRISE LP,
ARCHSTONE ENTERPRISE GP LLC,
ARCHSTONE MULTIFAMILY JV LP,
ARCHSTONE MULTIFAMILY GP LLC,
ARCHSTONE MULTIFAMILY (GOVERNANCE) LLC,
REPE ARCHSTONE GP HOLDING LLC,
LEHMAN BROTHERS HOLDINGS INC.,
JEFFREY FITTS (in his capacity as an officer of
Lehman Brothers Holdings Inc.), and
Owen D. Thomas (in his capacity as Chairman of
Lehman Brothers Holdings Inc.),

Defendants.

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Marcy Friedman, J.:

This is an action by a minority limited partner of a fund, which invested in a real estate investment trust, against the general partner of the fund and other entities, based on the general partner's alleged conflict in the sale of the fund's assets. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7), and to stay discovery pending determination of the motion.

The material facts, as alleged in the complaint, are as follows: Plaintiff Cambridge Capital Real Estate Investments, LLC (Cambridge) is a Colorado limited liability company with its principal place of business in Colorado. (Complaint, ¶ 11.) In October 2007, plaintiff invested $20 million in exchange for an approximate 1% interest in defendant Archstone Multifamily JV, LP, a Delaware limited partnership (the Fund). (Id., ¶¶ 14, 24.) In connection

with its investment in the Fund, plaintiff entered into the Fund's Limited Partnership Agreement (Original LPA) on October 5, 2007. (Id., 24.) Defendant Fund, along with other parallel funds, owns all of the common equity interests in defendant Archstone Enterprise LP (Archstone), and is managed by defendant Archstone Multifamily GP, LLC (Fund GP), which is a Delaware limited liability company. (Id., ¶¶ 14-15.) Defendant Archstone controls the assets of Archstone-Smith Real Estate Investment Trust (REIT). (Id., ¶12.) Defendant Archstone Enterprise GP LLC is the general partner of Archstone. (Id., ¶ 13.) Defendant Archstone Multifamily (Governance), LLC (Fund GP Governance) is the sole member of the Fund GP. (Id., ¶ 16.) Defendant REPE Archstone GP Holding, LLC (REPE), a "Lehman entity,"[1] is the managing member of Fund GP Governance. (Id., ¶ 17, 39.) Defendant Lehman Brothers Holding Inc. (LBHI), through the Fund's common equity interest and through preferred ownership interests, owns nearly all of Archstone and has effective control over it. (See id., ¶¶ 38, 47.) Defendant Jeffrey Fitts is an officer of LBHI and head of its real estate division, and defendant Owen D. Thomas is the Chairman of LBHI. (Id., ¶¶ 19-20.)

At the time plaintiff acquired its interest in the Fund, the Fund, and several parallel funds, acquired and took private Archstone-Smith REIT and its operating unit, predecessor to defendant Archstone. Archstone-Smith REIT was one of the largest publicly traded multifamily REITs in the country, and had assets valued at approximately $23.7 billion. (Id., ¶ 24.) Lehman and affiliates, along with Bank of America and Barclays Bank, were sponsors of the transaction. (Id., ¶ 25.) Lehman and affiliates provided $3 billion in secured financing or 47% of the total. (See id.) On September 15, 2008, "Lehman Brothers" entered into bankruptcy. (Id., ¶ 27.) In January 2009, the sponsors committed an additional $485 million in financing to Archstone.

[1] The complaint refers to defendant Lehman Brothers Holding Inc. as "Lehman" or "LBHI." (Complaint, ¶ 18.)

(Id., ¶ 28.) On March 31, 2009, the Original LPA was amended and restated in its entirety (the Amended LPA). (Id. ¶ 30.) On December 1, 2010, the sponsors exchanged approximately $5.2 billion in debt, plus accrued interest, for preferred equity interests in Archstone. (Id., ¶ 38.) This recapitalization left Archstone with two classes of interests – the preferred interests held by the sponsors, and the common interest held by the Fund and therefore indirectly by plaintiff. (Id.) On January 20, 2012, LBHI acquired half of the other sponsors' interests in Archstone for $1.33 billion. (Id., ¶ 47.) On June 6, 2012, it purchased the remaining interests of the sponsors for an additional $1.65 billion. (Id., ¶ 47.) As a result of these transactions, LBHI and its affiliates, through preferred and common interests, own nearly all of Archstone, and exercise control over it. (See id., ¶¶ 38, 47.)

On November 26, 2012, LBHI announced that it had entered into an asset purchase agreement pursuant to which Archstone would sell its assets to Equity Residential (EQR) and AvalonBay Communities, Inc. (AVB) for $2.7 billion in cash, $3.8 billion in stock, and the assumption of $9.5 billion in debt (the Sale Transaction). (Id., ¶ 48.) Through this Sale Transaction, EQR acquired 60% of Archstone's assets, and AVB acquired the remaining 40%. (Id.) According to the complaint, the Sale Transaction "was signed on behalf of Lehman by defendant Jeffrey Fitts, Lehman's head of real estate, who also signed on behalf of Archstone Enterprise LP, with apparent approval from Archstone Enterprise GP LLC, its general partner, Archstone Multifamily JV LP, its sole member, Archstone Multifamily GP LLC, its general partner, Archstone Multifamily (Governance) LLC, its sole member, and REPE Archstone GP Holding LLC, its managing member." (Id., ¶ 50.)[2]

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[2] The Asset Purchase Agreement for the Sale Transaction, which was annexed as Exhibit 4 to the affirmation of Benjamin Kaufman in support of plaintiff's prior motion for a preliminary injunction, and of which this court takes notice, was signed by:

"SELLER:

Plaintiff alleges, based on statements by LBHI's chairman, defendant Owen Thomas, that Archstone "will likely distribute most of the consideration received to Lehman as the holder of its preferred equity interest and then to Lehman's creditors, leaving only relatively nominal, if any, amounts . . . to distribute to the Fund and [plaintiff]." (Id.) The consideration represented a premium of approximately 15% over the implied purchase price of LBHI's acquisition of the sponsors' interests in January 2012, and 4% over the price in June 2012. (Id., ¶ 49.)

Plaintiff allegedly became aware of the Sale Transaction on November 27, 2012, after it was publicly announced (id., ¶ 51), and filed the summons and complaint in this action on December 21, 2012 and January 4, 2013. The Sale Transaction closed on February 27, 2013. (Kaufman Aff., ¶ 12.)

The complaint alleges seven causes of action. The first is asserted against defendant Fund GP, and alleges breach of the LPA on two grounds: (i) failing to obtain plaintiff's written consent to certain amendments to the LPA; and (ii) failing to give notice to plaintiff of the Sale Transaction and, apparently also, to notify plaintiff that it had obtained approval by the "Requisite Interest of the Limited Partners." (Complaint, ¶¶ 64, 65.) The second cause of action, also against the Fund GP, is for breach of the implied covenant of good faith and fair dealing, and alleges that the sale will dispose of all of the Fund's common interest in Archstone, and the sale proceeds "will go towards satisfying Lehman's preferred interests rather than to Plaintiff and the Fund's other minority investors." (Id., ¶ 70.) The third cause of action asserts breach of fiduciary duty against the Fund GP, and the fourth claim is against all other defendants

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ARCHSTONE ENTERPRISE LP
By: Archstone Enterprise GP LLC, its general partner
By: Archstone Multifamily JV LP, its sole member
By: Archstone Multifamily GP LLC, its general partner
By: Archstone Multifamily (Governance) LLC, its sol [sic] member
By: REPE Archstone GP Holding, LLC, its managing member"

for aiding and abetting such breach, on the ground, among others, that the Fund GP agreed to enter into the Sale Transaction even though it which would only benefit LBHI's creditors. (Id., ¶ 75.) The fifth and sixth causes of action against all defendants are for conversion and fraud. The seventh seeks an accounting for the profits defendants allegedly unjustly obtained.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

Breach of Contract Claim

Statute of Limitations

As noted above, the first basis for plaintiff's breach of contract claim is defendant Fund GP's March 31, 2009 amendment of the LPA without obtaining plaintiff's consent. This claim is brought under Original LPA section 12.03, which provides , in pertinent part:

> "The General Partner shall have the right to amend or modify this Agreement without the consent of any other Partner or the Board of Advisors; *provided, however*, that this Agreement shall not be amended . . . (b) without the consent of each Partner if such amendment would . . . (ii) impair or diminish the economic benefits to such Partner under this Agreement. . . ."

Defendant argues that this claim is barred by the three year Colorado statute of limitations. Plaintiff, a Colorado corporation with its principal place of business there, concedes that the Colorado statute of limitations applies. Plaintiff argues, however, that the statute of limitations was equitably tolled.

It is well settled that "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999].) The purpose of the statute is to "prevent[] nonresidents from shopping in New York for a favorable Statute of Limitations." (Id.) Furthermore, "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." (Id. at 529.)

While plaintiff's contract claim based on the amendments to the LPA is timely under New York's six year statute of limitations, Colorado's limitation period for such a claim is three years. (Colo Rev Stat § 13-80-101[1] [a].) Under Colorado law, a breach of contract claim "accrue[s] on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence." (Id., § 13-80-108 [6]; Daugherty v Allstate Ins. Co., 55 P3d 224, 226 [Colo Ct App 2002].)

Contrary to plaintiff's contention, the determination as to when a claim accrues may be made at the pleading stage where, as here, it is clear from the undisputed facts when the breach was or should have been discovered. The Amended LPA, dated March 31, 2009 (Polkes Aff.,

Ex. 3), contains the amendments that plaintiff challenges. Plaintiff admits that it received the Amended LPA on August 12, 2009. (Merage Aff., ¶ 9.) As a sophisticated business entity, plaintiff could have discovered the relevant amendments by reading the document to determine the changes it made and its effect on plaintiff's interests. When it received the Amended LPA, it was aware or should have been aware that the amendments had been made without its consent.

Plaintiff's contentions that the equitable tolling doctrine applies, and that applicability of the doctrine is not an issue suitable for resolution at the pleading stage, are unavailing. Plaintiff fails to allege any facts to support its assertion that defendants acted to deceive or mislead it in order to conceal the existence of a claim from plaintiff. The fact that the Fund GP provided it with a copy of the Amended LPA without any explanation regarding the amendments, and plaintiff's conclusory assertion that plaintiff "was in no position to ascertain the impact of the amendments" until the Sale Transaction (P.'s Memo. In Opp. at 10), are wholly insufficient to support the equitable tolling claim. Plaintiff had the document, which was clearly labeled on the front page as the "Amended and Restated Limited Partnership Agreement." As an experienced business investor, plaintiff should have read and evaluated the document when it received it.[3]

As this action was commenced more than three years after plaintiff's receipt of the Amended LPA, the breach of contract claim based on defendants' failure to obtain the partners' authorization prior to making the changes to the original LPA is time-barred. In view of this holding, the court does not reach defendants' further contention that the amendments did not in

[3] Carsanaro v Bloodhound Tech., Inc. (65 A3d 618, 645-646 [Del Ch 2013]), on which defendants relied at the oral argument, held that "[u]nder the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." (internal quotation marks and citation omitted). Even assuming that this holding under Delaware law is applicable, plaintiff in the instant action cannot claim reasonable reliance on any act of defendant Fund GP with respect to the amendments to the LPA, as the Fund GP made the Amended LPA available to plaintiff.

fact impair economic benefits to plaintiff or otherwise require plaintiff's consent pursuant to LPA § 12.03.

Notice of and Consent to the Sale Transaction

The remaining basis for the breach of contract claim is that defendant Fund GP breached section 6.01 (e) of the Amended LPA because "Plaintiff never received proper notice of the Sale Transaction and has never received any indication from the Fund General Partner that it obtained the approval of a Requisite Interest of the Limited Partners prior to authorizing a 'Major Decision.'" (Complaint, ¶ 65.) Plaintiff contends that the Sale Transaction was a liquidation in that it involved a sale of all or substantially all of the Fund's assets, and was therefore a Major Decision, requiring limited partner approval pursuant to the Amended LPA. Defendants do not dispute that the Fund GP was required to, and did, approve the Sale Transaction.[4] Nor do they claim that the Fund GP obtained approval of a Requisite Interest of the Limited Partners. Rather, defendants dispute that the Sale Transaction was a Major Decision.

Section 1.05 (b) of the Amended LPA grants broad powers to the partnership, subject to the terms and provisions of the agreement, including section 6.01 (e), to take all actions necessary and proper for the furtherance and accomplishment of the purposes of the partnership. Section 6.01 (e) provides in pertinent part:

> "[T]he General Partner shall not have the authority to, directly or indirectly, take any action with respect to any Major Decision . . . unless approved (or deemed approved) by a Requisite Interest of the Limited Partners in accordance with the provisions of this Agreement."

Section 6.01 (g), which specifies the procedures for obtaining consent, provides:

[4] The court does not have before it on this motion the operative agreement between the Fund and Archstone, which presumably contained provisions governing approval of sale transactions by the Fund. As noted above (supra at 3, 3 n 2), however, the complaint pleads that the Sale Transaction was signed "with apparent approval" of the Fund GP and others, and the Fund GP was in fact a signatory to the asset purchase agreement for the Sale Transaction.

> "Whenever the consent of the Partners is requested with respect to any Major Decision, such consent shall be deemed to have been given by a Partner if such Partner shall not have responded to the General Partner on or before the date which is ten (10) Business Days after the date on which the General Partner shall have delivered to such Partner a written request for such consent accompanied by sufficient information with respect to the matter in question to enable such Partner to make an informed judgment with respect to the matter in question."

"Requisite Interest of the Limited Partners" is defined in Article II of the Amended LPA as "Limited Partners holding an interest in the Partnership representing, individually or in the aggregate, more than fifty percent (50%) of the total Percentage Interest represented by all of the Limited Partners," with exclusions of specified Limited Partners.

Major Decision is defined in Exhibit E to the Amended LPA as a decision to "liquidate or dissolve the Partnership other than in accordance with the terms of this Agreement." The Amended LPA does not define the terms "liquidate" or "dissolve" as used in the definition of Major Decision. The Amended LPA does define the term "Liquidation Event" as "the sale or other disposition of all or substantially all of the assets owned directly or indirectly by the Partnership . . . ." Section 11.01 (ii) also includes, among the "Events of Dissolution," "the sale by the Partnership of all or substantially all of its assets (unless the Partners shall elect to continue the existence of the Partnership pending collection of the deferred balance of any sales proceeds)."

Section 12.10 of the Amended LPA provides, and the parties do not dispute, that the agreement is to be "governed by and interpreted, construed and enforced in accordance with" Delaware law. Under Delaware law, it is well settled that "[l]ike other contracts, limited partnership agreements are to be construed in accordance with their literal terms." (Matter of Nantucket Is. Assocs. Limited Partnership Unitholders Litig., 810 A2d 351, 361 [Del Ch 2002] [quoted in Carey v Carey, 101 AD3d 787, 789 [2d Dept 2012], in applying Delaware law].)

Where the provisions establish the parties' "common meaning" and are not "fairly susceptible of different interpretations," the terms of the agreement control. (Nantucket Is. Assocs., 810 A2d at 361.)

Here, sections 6.02 (e) and (g), read together, unambiguously prohibit the general partner from making a Major Decision unless it is approved or deemed approved by the requisite percentage of the specified limited partners, and require the general partner to deliver a written request for consent where a Major Decision is at issue. Contrary to defendants' contention, the fact that LBHI and its affiliates may have held the "Requisite Interest of the Limited Partners" (i.e., more than fifty percent of the limited partners), and may therefore have been in a position to approve the Sale Transaction without plaintiff's consent, does not excuse the Fund GP's non-compliance with the requirement that consent be sought.

The court accordingly turns to whether the Sale Transaction was a Major Decision within the meaning of the Amended LPA. Under Delaware law, the inquiry into whether a sale is of substantially all of the assets of the partnership is factual in nature, and "depends upon the particular qualitative and quantitative characteristics of the transaction at issue. Thus, the transaction must be viewed in terms of its overall effect on the corporation, and there is no necessary qualifying percentage." (Nantucket Is. Assocs., 810 A2d at 369 [internal quotation marks and citation omitted] [summarizing Delaware authority]; see Oberly v Kirby, 592 A2d 445, 464 [Del 1991].) The Delaware courts "favor [] a contextual approach, focussing upon whether a transaction involves the sale 'of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation.'" (Nantucket Is. Assocs., 810 A2d at 370, quoting Gimbel v Signal Cos., Inc., 316 A2d 599, 606 [Del Ch], affd 316 A2d 619 [Del 1974].)

Here, although the Amended LPA contains a detailed statement of the purpose of the Fund and its business with respect to the Archstone properties,[5] the parties do not address the impact of this statement of purpose on the issue of whether the Sale Transaction involves a sale of substantially all of the assets of the Fund. Nor is the record factually developed as to what other assets, if any, the Fund holds. The court cannot determine on this limited record whether the sale of the entire Archstone portfolio of properties is out of the ordinary and substantially affects the purpose of the Fund and its future as a partnership, or whether Archstone's ownership of the stock of EQR and AVB, the companies to which Archstone's properties were sold, will continue the purpose of the Fund.

Finally, the court rejects defendants' contention that the complaint does not adequately plead damages. In support of this contention, defendants cite summary allegations that plaintiff "has suffered damages to its property." (Complaint, ¶¶ 72, 82.) They also contend that plaintiff cannot maintain a claim for damages based on a "hoped-for" but unrealized return. (Ds.' Reply Memo. at 2.) Defendants ignore that the complaint makes more particularized allegations which base plaintiff's damage claim on the sale of the assets of Archstone. These allegations include that the sale was made with the Fund GP's approval, and that the consideration for the sale – cash, stock of EQR and AVB, and assumption of debt – will likely be distributed to LHBI and/or affiliates which hold preferred interests in Archstone and then to LBHI's creditors, rather than to the Fund (and thereby its investors, including plaintiff), which holds only a common equity

[5] Section 1.05 (a) of the Amended LPA provides that one of the purposes of the partnership shall be to "(i) acquire, own, hold, operate, manage, lease, license, improve, develop, renovate, repair, alter, finance, refinance, encumber, sell, exchange or otherwise deal with and dispose of the Partnership's interest in the Subsidiaries and its indirect interest in the Purchased Assets." The Purchased Assets are defined as "(i) the Properties, partnership interests, membership interests, stock and/or other ownership interests in and to various entities and (ii) certain rights of Archstone-Smith Trust and Archstone in and to various development agreements and other assets. . . ." Section 1.05 (a) sets forth additional purposes of the partnership, including "(ii) to acquire additional real property assets . . . [and] (iii) lend money secured by direct or indirect interests in real property assets. . . ."

interest in Archstone. (Complaint, ¶ 48 [Archstone "will likely distribute most of the consideration received to Lehman as the holder of its preferred equity and then to Lehman's creditors, leaving only relatively nominal, if any, amounts left over to distribute to the Fund and [plaintiff]"].) This pleading of damages is adequate. Dismissal of the breach of contract claim with regard to the Sale Transaction will therefore be denied.

Breach of the Covenant of Good Faith

Under Delaware law, "[t]o state a claim for breach of an implied covenant of good faith and fair dealing, a plaintiff must identify a specific implied contractual obligation." (Moore Bus. Forms, Inc. v Cordant Holdings Corp., 1995 WL 662685, * 8 [Del Ch 1995].) However, "courts will not readily imply a contractual obligation where the contract expressly addresses the subject of the alleged wrong." (Id. [internal quotation marks and citation omitted]; Overdrive, Inc. v Baker & Taylor, Inc., 2011 WL 2448209, * 8 [Del Ch 2011] [same].) The implied covenant requires a contracting party to "refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." (QVT Fund LP v Eurohypo Capital Funding LLC I, 2011 WL 2672092, *13 [Del Ch 2011] [internal quotation marks and citation omitted].) The implied covenant "comes into play, however, only where a contract is silent as to the issue in dispute." (Id. at * 14.)

Here, plaintiff alleges that the Sale Transaction was a breach of an express contract, the Amended LPA. As discussed above, that agreement contains provisions regarding the Fund GP's power and authority to sell assets, and the circumstances under which it must obtain the consent of the limited partners. Thus, the contract expressly addresses the issue in dispute – that is, whether the Sale Transaction was an ordinary sale of assets within the Fund GP's sole and exclusive authority, or whether it required limited partner approval. Moreover, plaintiff's

conclusory assertion that the Fund GP had an obligation "to engage in transactions that would benefit all of the limited partners" (P.'s. Memo. In Opp. at 14) or its "[g]eneral allegations of bad faith conduct" are plainly insufficient to support a claim of a breach of the implied covenant. (See Kuroda v SPJS Holdings, LLC, 971 A2d 872, 888 [Del Ch 2009].) The second cause of action for breach of the implied covenant will accordingly be dismissed.

Breach of Fiduciary Duty and Aiding and Abetting the Breach

In pleading the breach of fiduciary duty claim, plaintiff alleges that the Fund GP, as a fiduciary of the limited partners, breached its duty by failing to notify plaintiff of changes to the structure and management of the partnership, failing to engage in "a reasonable alternative analysis" to protect the Fund's assets, and "agree[ing] to enter into the Sale Transaction for the benefit of Lehman Brothers' creditors, even though this would eliminate any value for Plaintiff and other minority partners and would be contrary to the Fund's stated investment objectives." (Complaint, ¶ 75.)

As discussed above, the complaint also alleges, and defendants do not dispute, that the Fund GP approved the sale; that the Fund held only a common equity interest in Archstone, while LBHI and/or certain affiliates separately held all of the preferred equity interests in Archstone; and that the sale was undertaken for the benefit of the preferred equity holders so that they could pay off LBHI's creditors. (See id., ¶¶ 53-59.) Giving the complaint the benefit of all reasonable inferences, the complaint alleges that LBHI or its affiliates controlled both the Fund and Archstone, and that, in approving the sale, the Fund GP had a conflict of interest and acted for the benefit of LBHI entities that held the preferred equity interests. (See also P.'s Memo. at 10.)

Delaware Revised Uniform Limited Partnership Act (DRULPA) § 17-1101 (d) provides that a partner's common law fiduciary duties to other partners or the partnership "may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing." (See Gerber v EPE Holdings, LLC, 2013 WL 209658, *6 [Del Ch 2013], rearg denied 2013 WL 2367883 [court will look for guidance to "traditional notions of fiduciary duties" only if partners have not expressly made provisions in their partnership agreement] [internal quotation marks and citations omitted]; Lonergan v EPE Holdings, LLC, 5 A3d 1008, 1020 [Del Ch 2010] [holding that limited partnership agreement "establishe[d] a contractual standard of review that supplants fiduciary duty analysis"].)

Section 6.02 (a) of the parties' Amended LPA provides in pertinent part:

> "No Partner shall have any liability to the Partnership, to any other Partner . . . for any loss suffered by the Partnership or any other Partner . . . which arises out of any action or inaction of such Partner, except to the extent constituting gross negligence, willful misconduct or fraud."

Thus, the Amended LPA exculpates the Fund GP from liability for loss to the partnership or the limited partners absent gross negligence, willful misconduct, or fraud. (See Venhill LP v Hillman, 2008 WL 2270488, *22-24 [Del Ch 2008]; Cincinnati Bell Cellular Sys. Co. v Ameritech Mobile Phone Serv. of Cincinatti, 1996 WL 506906 at *14 [Del Ch 1996], affd on opn below 692 A2d 411 [Del 1997].)

The gross negligence standard under Delaware law has been described as:

> "a higher level of negligence representing an extreme departure from the ordinary standard of care. Gross negligence refers to a decision so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion. Under the law of entities, gross negligence involves a devil-may-care attitude or indifference to duty amounting to recklessness. In order to prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was recklessly uninformed or acted outside the bounds of reason."

(Metropolitan Life Ins. Co. v Tremont Gp. Holdings, Inc., 2012 WL 6632681 [Del Ch 2012] [internal quotation marks and citations omitted]; see also Cincinnati Bell Cellular Sys. Co.,1996 WL 506906, at * 14.)

As discussed above, the complaint alleges a conflict of interest on the part of the Fund GP, and resulting receipt by LBHI or its affiliates of a unique benefit as a result of the Sale Transaction. (See New Jersey Carpenters Pension Fund v Infogroup, Inc., 2011 WL 4825888, * 10 [Del Ch 2011] [holding that director was materially interested in transaction where, as a result of a merger, he received the benefit of "liquidity" that was not equally shared by other shareholders].) The complaint also alleges that the Fund GP did not undertake an alternative analysis in connection with approval of the Sale Transaction. (Venhill LP, 2008 WL 2270488 at * 24 [in determining whether general partner was liable for breach of fiduciary duty under clause that exculpated conduct except willful misconduct or acts taken with gross negligence or in bad faith, court considered, among other factors, general partner's failure to conduct market check before making loans to corporation of which he was CEO].) The court holds that these allegations are sufficient to plead a claim of breach of fiduciary duty.[6] A factual record must be developed in order to enable the court to determine the applicability of the exculpatory provision. (See Anglo Am. Sec. Fund v S.R. Global Intl. Fund, 829 A2d 143, 157 [Del Ch 2003].)[7]

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[6] In so holding, the court rejects defendants' argument that it is "contrary to common sense and economic reality" that the Fund GP would have breached a fiduciary duty to plaintiff, because "affiliates of Lehman owned nearly all of the equity in the Fund" and their interests were aligned with those of plaintiff. (Ds.' Memo. In Support at 18.) This argument ignores that the complaint pleads a conflict between the owners of the Fund, which held common equity interests, and the LBHI entities, which held preferred equity interests, in Archstone.

[7] Plaintiff contends that the "entire fairness" standard applies in determining whether the Fund GP is liable for breach of fiduciary duty. It is well settled that "[w]hen a corporation with a controlling stockholder is sold to a third party, the entire fairness standard applies if the controlling stockholder receives a benefit not shared with the minority." (Matter of Primedia, Inc. Shareholders Litig., 67 A3d 455, 486 [Del Ch 2013].) In view of the above disposition, the court need not determine on this motion to dismiss whether this standard also applies to sale of assets of an entity in which a limited partnership holds an interest, where there is a claim, as here, that the limited

As the cause of action for breach of fiduciary duty is stated, the court turns to the aiding and abetting cause of action. The elements of a claim for aiding and abetting a breach of fiduciary duty are (1) a fiduciary relationship, (2) breach of a fiduciary duty, (3) knowing participation in the fiduciary's breach, and (4) damages as a proximate result of the breach. (Malpiede v Townson, 780 A2d 1075, 1096 [Del 2001]; Matter of Santa Fe Pacific Corp. Shareholder Litig., 669 A2d 59, 72 [Del 1995].) The plaintiff must allege more than conclusory assertions that a defendant "had knowledge of the [defendants'] fiduciary duties and knowingly and substantially participated and assisted in the [defendants'] breaches. . . ." (Id. at 72; Matter of NYMEX Shareholder Litig., 2009 WL 3206051, * 12 [Del Ch 2009] [same].)

The aiding and abetting cause of action must be dismissed as to the individual defendants. The sole allegation against defendant Fitts is that he signed the asset purchase agreement in connection with the Sale Transaction on behalf of LBHI. (Complaint, ¶ 50.) The sole allegation as to defendant Thomas is based on a statement he made in an LBHI press release that the sale was a positive outcome for LBHI's creditors. (Id., ¶ 54.) These conclusory allegations are plainly insufficient to state a claim of knowing participation in a breach of fiduciary duty.

The court reaches a different conclusion as to the aiding and abetting claim against the entity defendants. As a threshold matter, defendants contend that this claim is barred by section 6.02 (a) of the Amended LPA, which provides:

> "In no event shall any Affiliate of any Partner or any direct or indirect officers, directors, partners, members, managers, shareholders, employees, representatives

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partnership was controlled by entities (here, LBHI and/or affiliates) that controlled the entity, Archstone, whose assets were sold. (Complaint, ¶¶ 2, 48). The court notes, however, that there is authority that it is at least "useful to apply the entire fairness standard initially to examine the transactions" that a general partner caused the limited partnership to enter into, in order to determine whether the general partner is liable under an exculpatory clause for acting in bad faith or with gross negligence. (See Venhill, 2008 WL 2270488 at * 24.)

> or agents of any Partner or any such Affiliate have any liability under this Agreement or otherwise to the Partnership, any Partner or any other Person . . . for any loss suffered by the Partnership, any Partner or such other Person."

Section 12.20 similarly provides that "no Affiliate of any Partner, or any direct or indirect partner, shareholder, Partner, manager, owner, officer, director, trustee, agent, or employee in or of any Partner or any Affiliate of any Partner . . . shall be personally liable in any manner or to any extent under or in connection with this Agreement. . . ." The term "Affiliate" is defined to mean: "with reference to a Person, any other Person that, directly or indirectly, through one or more intermediaries, Controls, is Controlled by or is under common Control with such Person."

Defendant acknowledges that each of the entity defendants is an "Affiliate" of one or more "Partners" as defined in the Amended LPA. (Ds.' Memo. In Support at 19.) Defendants fail, however, to cite any legal authority that the broad exculpatory provisions of the Amended LPA are enforceable to bar liability of the entity defendants for the conduct alleged. Indeed, in their reply, defendants do not respond in any respect to plaintiff's assertion that the exculpatory provisions are not effective to relieve defendants from intentional torts. (See Ds.' Reply at 13.) The court accordingly declines on this briefing to dismiss the aiding and abetting claim based on the exculpatory provisions.

Defendants also seek dismissal of the aiding and abetting claim on the ground that the allegations as to their participation in the Fund GP's breach of fiduciary duty are conclusory. In support of this contention, defendants cite the allegations that "[d]efendants knew the Fund General Partner had no authority to approve the sale of Archstone without breaching the fiduciary duties of loyalty and care that it owed to the Fund's other partners," and that they "knowingly aided and abetted and otherwise participated in" the breaches. (Complaint, ¶¶ 79, 81.) Such conclusory assertions are, as defendants' correctly argue, insufficient to plead a cause

of action for aiding and abetting. However, the complaint also alleges more particularized allegations as to the common control of the Fund GP and the entity defendants and as to their collective authorization of the Sale Transaction. (See supra at 13.) These allegations are sufficient to support a reasonable inference as to the entity defendants' knowing participation in the Fund GP's alleged breach of fiduciary duty. (See Nantucket Is. Assocs., 810 A2d at 375-376 [holding that knowledge of general partner about challenged transaction could be "fairly imputed" to defendant, for purposes of aiding and abetting claim, because defendant was the instrumentality through which the general partner's parent carried out the transaction]; see also Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486 [2008].) The aiding and abetting claim will accordingly stand against the entity defendants.

Conversion

The fifth cause of action for conversion alleges that plaintiff "possessed a right of ownership over the property that the Defendants exercised dominion and control over." (Complaint, ¶¶ 84-85.) In particular, plaintiff alleges that defendants' approval of the Archstone sale constitutes conversion (among other wrongs). (Id., ¶ 10.)

In order to assert a conversion claim, a plaintiff must allege the defendant's wrongful exercise of dominion over plaintiff's property, in denial of, or inconsistent with, the plaintiff's right in it. (Drug, Inc. v Hunt, 35 Del 339, 168 A 87, 93 [Del 1933]; Nikolouzakis v Exinda Corp., 2012 WL 3239853, * 10 [Del Ch 2012].) Under DRULPA § 17-701 "[a] partnership interest is personal property. A partner has no interest in specific limited partnership property." This section "has been interpreted to preclude the attempt to equate ownership interests in a partnership with ownership of partnership property." (Matter of Marriott Hotel Props. II L.P. Unitholders Litig., 2000 WL 128875, * 15 [Del Ch 2000]; see also DDR Constr. Servs., Inc. v

Siemens Indus., Inc., 770 F Supp 2d 627 [SD NY 2011] reconsideration denied 2012 WL 4711677 [same, applying Delaware law].) Plaintiff, which owns a limited partnership interest in the Fund, may not bring a conversion claim because it does not have an ownership interest in the partnership's property. The conversion claim will therefore be dismissed.

Fraud

The sixth cause of action for fraud is based primarily on the allegation that plaintiff invested in the Fund because LBHI "promis[ed] in the offering memorandum 'investor net returns of 13.5% - 14.0% over a 7-10 year hold'" and that "[o]nly five years later, [LBHI] is selling Archstone to benefit its creditors to the detriment of its limited partners contrary to the representations and promises it made to Plaintiff." (Complaint, ¶ 88.)

For the reasons stated above, this claim will not be dismissed under the exculpatory provisions to which either defendant GP Fund or the defendant entities are subject.

The pleading of the fraud claim is, however, insufficient. To state a claim for fraud under Delaware law, a plaintiff must plead (1) a material misrepresentation of a fact, (2) defendant's knowledge of its falsity, or reckless indifference to the truth, intentional concealment of material facts, or silence where there is a duty to speak, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages. (Gaffin v Teledyne, Inc., 611 A2d 467, 472 [Del 1992]; Stephenson v Capano Dev., Inc, 462 A2d 1069, 1074 [Del 1983].) To state a fraud claim under New York law, the plaintiff must similarly allege "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].)

In addition, the statements alleged are not specific misrepresentations of existing facts, but rather are general statements about hoped for performance, and are more in the nature of an

expression of opinion or expectation. (Vichi v Koninklijke Philips Electronics, N.V., 85 A3d 725, 775 [Del Ch 2014] [To establish a misrepresentation forming the basis of a fraud claim, "the plaintiff generally cannot rely, for example, on puffery, expressions of mere opinion, or representations that are obviously false"]; Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 179 [fraud claim cannot be based on "nonactionable opinion" or "puffery"].) Plaintiff's complaint also wholly fails to allege facts supporting defendants' intent to defraud or reckless indifference. (See Bean v Fursa Capital Partners, LP, 2013 WL 755792, * 3 [Del Ch 2013]; HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289, * 13 [Sup Ct, NY County 2014] [and authorities cited therein].) The fraud claim will therefore be dismissed.

Accounting

Finally, dismissal will be denied with respect to the seventh cause of action for an accounting. Although this cause of action seeks only a remedy – the accounting – it will stand, as the fiduciary duty cause of action also stands.

It is hereby ORDERED that the defendants' motion to dismiss is granted only to the following extent: The first cause of action for breach of contract is dismissed with prejudice to the extent based on the amendment of the limited partnership agreement; the second cause of action for breach of the implied covenant, the fifth cause of action for conversion, and the sixth cause of action for fraud are dismissed with prejudice; the fourth cause of action for aiding and abetting breach of fiduciary duty is dismissed with prejudice only as to individual defendants Fitts and Owens; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that the remaining causes of action are severed and shall continue; and it is further

ORDERED that the remaining defendants shall serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 248, 60 Centre St, on December 4, 2014, at 2:30 p.m.

Dated: October 9, 2014

ENTER:

J.S.C.