MMA Meadows at Green Tree, LLC v Millrun Apts., LLC
2014 NY Slip Op 33033(U)
November 26, 2014
Supreme Court, New York County
Docket Number: 653943/2013
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---X

MMA MEADOWS AT GREEN TREE, LLC, and BFIM SPECIAL LIMITED PARTNER, INC., Derivatively on Behalf of MCAP ROBERSON APARTMENTS L.P., and MMA MEADOWS AT GREEN TREE, LLC in its Individual Capacity,

Plaintiffs,

-against-

MILLRUN APARTMENTS, LLC, MUNICIPAL CAPITAL APPRECIATION PARTNERS II, L.P., MUNICIPAL CAPITAL APPRECIATION PARTNERS III, L.P., RICHARD G. COREY, and MCAP II DEVELOPER LLC,

Defendants,

-and-

MCAP ROBERSON APARTMENTS L.P.,

Nominal Party.

---X

Index No.: 653943/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Defendant Municipal Capital Appreciation Partners III, L.P. (MCAP III) moves to dismiss the claims in the Amended Complaint (the AC) asserted against it (Counts IV & VII). Seq. 004. The other defendants, Millrun Apartments, LLC (Millrun), Municipal Capital Appreciation Partners II, L.P. (MCAP II), MCAP II Developer LLC (the Developer), and Richard G. Corey, who are represented by separate counsel, also move to dismiss the following claims in the AC: (1) the only claim asserted against the Developer (Count VII); (2) all claims against Corey (Counts I through XIII); (3) all claims against MCAP II (Counts I through X, XII, XIII, and XIV) except one breach of contract claim (Count XI); and (4) all claims against Millrun (Counts I, IV, V, VI, IX, and X) except breaches of contract (Counts III, VII, and XII,

and XIII). Seq. 005. These defendants also move, pursuant to CPLR 7503, to stay Counts VII and X. Defendants' motions are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the AC.

This action allegedly involves fraud and self-dealing by Corey, who, it is claimed, through his various funds and management companies, intentionally caused a partnership invested in a housing complex to default on its debt and, thereby, benefited at the expense of the other investors.[1] The company at issue here, MCAP Roberson Apartments L.P. (the Partnership), is a Delaware limited partnership that owns an affordable housing project in Clarksville, Indiana (the Project). AC ¶¶ 13, 32. Plaintiffs, MMA Meadows at Green Tree, LLC (MMA) and BFIM Special Limited Partner (collectively, plaintiffs or the Limited Partners), are limited partners in the Partnership. ¶ 4. Defendant Millrun is the general partner. ¶ 3. MCAP

[1] This action was referred to this Justice by the Trial Support Office as related to another case with similar allegations, styled *Walnut Housing Assocs. 2003 L.P. v MCAP Walnut Housing LLC*, Index No. 653945/2013 (*Walnut*). *Walnut* was commenced by the same plaintiffs' counsel; Corey is being represented by the same defense counsel. The court takes judicial notice of its order in *Walnut*, dated January 15, 2014, which granted an injunction removing Corey as the General Partner of another housing complex due to similar allegations of fraud. *See* Index No. 653945/2013, Dkt. 46. Additionally, a motion to dismiss in Walnut is *sub judice* and is being decided in conjunction with the instant motions. As discussed in the decision on that motion, the actions involve similar allegations and virtually identical disputed contractual provisions. In both cases, the parties proffer similar arguments regarding plaintiffs' ability to maintain claims other than breach of contract against the contracting party. The instant decision sets forth the court's reasons for not dismissing many of the claims. It should be noted that *Walnut* does not implicate Indiana law (only the laws of Delaware and New York), but, as the discussion below makes clear, Delaware law is not materially different in a way that would warrant different rulings in *Walnut*.

II, a private equity fund, is Millrun's sole member. *Id.* Corey controls Millrun, MCAP II, and all of the other defendants discussed below. *Id.*[2]

The Partnership is governed by an Amended and Restated Agreement of Limited Partnership executed on June 13, 2006 (the Partnership Agreement). AC ¶ 2; *see* Dkt. 77. The Partnership Agreement is governed by Indiana law, but provides that disputes arising thereunder or from any of the related agreements or transactions (discussed below) shall be adjudicated in a New York court. *See* Dkt. 77 at 73-74. In conjunction with the execution of the Partnership Agreement, Corey executed a Guaranty Agreement (the Guaranty) in which, *inter alia*, MCAP II promised it would maintain an aggregate net worth of at least $5 million, maintain liquid assets of at least $1 million, and provide MMA with annual financial statements demonstrating compliance with these monetary thresholds. AC ¶ 154; *see* Dkt. 81.

The dispute in this action arises from a renovation and refinancing of the Project. The renovation occurred pursuant to a Development Agreement between the Partnership and the Developer. ¶ 112. It was funded with capital investments from the Limited Partners and a loan from the Town of Clarksville, Indiana (the Town). The Town loaned money to the Project in order to promote affordable housing. The Limited Partners invested in the Project to obtain a tax advantage since the Project was eligible for federal tax credits to induce private investment. ¶ 42. The Project, in fact, was awarded $5.3 million of tax credits. ¶ 41.

Under section 5.1 of the Partnership Agreement, MMA agreed to make three capital contributions to the Partnership totaling $5.3 million in exchange for 99.99% of the Project's tax credits. ¶¶ 39, 40, 44. Additionally, the Partnership received an $8.5 million loan from the

[2] A chart setting forth the parties' relationship can be found at Dkt. 76. Corey does not dispute that he controls all of the defendants. In connection with the foreclosure litigation discussed below, he wrote: "[t]he general partner of Roberson ... is controlled by [MCAP II]. MCAP II and MCAP III are ultimately managed by the same individuals, primarily me." *See* Dkt. 83 at 2.

[* 4]

Town, backed by the issuance of $6.5 million of Series A Bonds and $2 million of Series B Bonds, which were issued pursuant to a Loan and Financing Agreement dated November 1, 2007 (the Loan Agreement). ¶ 45; *see* Dkt. 79. The Series A Bonds are held by MCAP III and the Series B Bonds are held by MCAP II. ¶¶ 46-47. The bonds are administered by a Trustee (originally BONY, now Wells Fargo) pursuant to a Trust Indenture dated November 1, 2007 (the Indenture). ¶¶ 51-52; *see* Dkt. 80. The Trustee, however, is authorized to and, indeed, does act exclusively at Corey's direction. ¶ 50. The Trustee holds corresponding notes (Series A and B Notes) to secure payment on the bonds. *Id.* The Series A Note is secured by a senior mortgage lien on the Project. ¶ 54.

MMA made its first two capital contribution installment payments and does not assert a claim relating to those payments. However, MMA alleges it was fraudulently induced to make a third payment totaling $1,150,434. ¶ 98. On February 20, 2009, Corey demanded that MMA make its third payment and certified that, pursuant to section 5.1(A) of the partnership Agreement, the Debt Service Converge Ratio (the DSC Ratio) precondition for such payment being due was satisfied. ¶¶ 88, 93. Satisfaction of the DSC Ratio meant that the Partnership had enough cash to cover 111% of its debt for the prior three months (November 2008 through January 2009). ¶¶ 89-90, 94. MMA alleges that the DSC Ratio was based on false data Corey gave to the Partnership's auditor. ¶ 96. Specifically, based on the data set forth in Corey's budget reports, it appeared that the DSC Ratio was 118% in November 2008, 121% in December 2008, and 131% in January 2009. ¶ 103. A subsequent review of the Partnership's financials revealed that the DSC Ratio was never close to that amount for three consecutive months (e.g., the ratio was 73% in 2008 and 53% in 2009) and was also well below that amount in 2010-2012.

¶¶ 104-05. Based on Corey's false representation, MMA made its third installment payment in March 2009. ¶ 98.

Shortly thereafter, plaintiffs allege, Corey began stealing the Partnership's money by transferring it to his other companies. ¶ 109. He did so, purportedly, pursuant to the discussed contracts and his authority as general partner. The AC sets forth the alleged improper transfers [*see* ¶¶110-30], but the court will not discuss most of them as their propriety is not challenged on this motion to dismiss. Corey's counsel concedes that the express terms of the contracts will ultimately govern whether such payments were proper. *See* Dkt. 73 at 7. As discussed below, plaintiffs are not limited to seeking recovery of such funds via their breach of contract claims. Rather, they are legally entitled to maintain quasi-contract and tort claims as well as veil piercing theories of liability.

The allegations of Corey's wrongdoing, however, go further. On July 1, 2009, Corey chose not to make the monthly payment on the Series A Note, even though plaintiffs allege the Partnership had sufficient funds to do so. Corey immediately caused default interest of 18% to begin accruing (the default interest was payable by the Partnership to Corey's private equity fund, MCAP III). ¶ 141. On July 3, 2009, the Trustee, acting at the direction of MCAP III (i.e., Corey), declared the Series A Note in default, accelerated payment thereunder, and sent written notice to the Partnership ("**Attn: Richard Corey**") and MCAP II ("**Attn: Richard Corey**").[3] ¶¶ 55-56; *see* Dkt. 69 & 70. MMA found out about the default on July 13, 2009, not from Corey, but from one of its own affiliates. ¶ 131.

MMA immediately sought to rectify Corey's decision to cause a default. On July 17, 2009, MMA wired $39,618.12 to Corey. ¶ 132. Then, on July 20, 2009, MMA requested that

[3] Corey did something similar in *Walnut*. *See* Index No. 653945/2013, Dkt. 46 at 6 ("Corey sent the default letter as lender, to himself as borrower, from and to the same address").

Corey release approximately $72,000 of Partnership reserves which, with MMA's wire transfer, could be used to make the Series A Note monthly payments due on July 1 and August 1, 2009. *Id.* On July 31, 2009, Corey confirmed that a total of $208,197.52 was wired by the Partnership to the Trustee. ¶ 135. Corey, however, refused to waive the default because *$362* of default interest was supposedly not paid. ¶ 137. On September 16, 2009, Corey informed MMA that the September 2009 monthly payment was made. ¶ 138.

In a letter dated November 12, 2009, Corey informed MMA that the Trustee had filed (at Corey's direction) a lawsuit in Indiana state court for breach of and foreclosure on the Series A Note (the Foreclosure Action). ¶¶ 54, 57; *see* Dkt. 83. In that letter, Corey informed MMA that he "does not believe [the Partnership] has a good faith defense to the default alleged in the Foreclosure [Action]. Accordingly, Millrun [i.e., **Corey**] does not intend to contest [the] allegations of default on behalf of [the Partnership]." [emphasis added] Dkt. 83 at 3. However, "out of an abundance of caution" Corey purported to tender the defense of the Foreclosure Action to MMA. *Id.* MMA responded in a letter dated November 23, 2009, in which it took the position that Corey, acting as general partner, had a duty to defend the Foreclosure Action. ¶ 58. Corey did not respond to MMA's letter. ¶ 60. Nor did he correspond with MMA regarding the Foreclosure Action until four years later when, on September 10, 2013, Corey sent MMA a Notice of Sheriff's Sale, dated August 9, 2013, indicating that the Sheriff intended to sell the Project on October 3, 2013. ¶ 61.

Upon receipt of this notice, the Limited Partners looked into the Foreclosure Action and found out that Corey had hired an attorney to "defend" the case. ¶ 62. However, that attorney simply filed an answer on January 20, 2010, in which he admitted that the Partnership missed

payments on the Series A Note, effectively conceding the validity of the default. *Id.* No affirmative defenses were asserted. *Id.* Nothing was filed in the Foreclosure Action for the next three years until, in May 2013, the Trustee moved for summary judgment. ¶ 63. The attorney hired by Corey did not oppose the motion. ¶ 64. The motion, therefore, was granted on default in July 2013. ¶ 65. The judgment entered totaled over $10 million. ¶ 66.

Upon receiving notice of the Sheriff's Sale, MMA immediately moved to intervene and vacate the judgment. ¶ 67. In an order dated December 20, 2013, the Indiana court granted MMA's motion. *Id.* The Indiana court held that MMA "demonstrated a probability that it may have substantive defenses ... including ... the adequacy of notice of default and acceleration ... MMA's tender and [Corey's] acceptance of sufficient funds to cure the claimed default, and ... the propriety of the application of partnership funds by [the Trustee] at the direction of [Corey]." *See* Dkt. 66 at 384-85. The Indiana court further noted that the judgment was vacated due to the "extraordinary circumstances of [Corey's] potential fraud and/or misconduct." *Id.* at 385. On December 30, 2013, MMA filed an answer to the complaint in the Foreclosure Action and asserted four affirmative defenses and two counterclaims. *See* Dkt. 84.

Plaintiffs commenced the instant action on November 13, 2013. They filed a 14-count[4] AC on April 22, 2014. *See* Dkt. 48. Counts I through IX are asserted derivatively by plaintiffs on behalf of the Partnership and are numbered here as in the AC: (I) breach of fiduciary duty against Millrun, MCAP II, and Corey; (II) aiding and abetting breach of fiduciary duty against MCAP II and Corey; (III) breach of contract (the Partnership Agreement) against Millrun, MCAP II, and Corey; (IV) breach of contract (the Loan Agreement and the Indenture) against Millrun, MCAP II, and Corey; (V) constructive fraud against Millrun, MCAP II, and Corey; (VI)

[4] The court refers to the causes of action as "counts" and labels them by Roman numeral to be consistent with how they are set forth in the AC and the parties' briefs.

[* 8]

gross negligence against Millrun, MCAP II, and Corey; (VII) unjust enrichment against MCAP II, Corey, MCAP III, and the Developer; (VIII) indemnification against Millrun, MCAP II, and Corey; and (IX) an accounting against Millrun, MCAP II, and Corey. Counts X through XIV are asserted directly by MMA: (X) fraud against Millrun, MCAP II, and Corey; (XI) breach of contract (the Guaranty) against MCAP II and Corey; (XII) breach of contract (the Partnership Agreement) against Millrun, MCAP II, and Corey; (XIII) indemnification against Millrun, MCAP II, and Corey; and (XIV) an accounting against MCAP II.

In addition to all of the alleged malfeasance described above, plaintiffs allege that Corey refuses to provide plaintiffs access to the Partnership's records and refuses to comply with MCAP II's financial reporting obligations under the Guarantee. AC ¶¶ 150, 156. Plaintiffs allege, upon information and belief, that MCAP II may be liquidating its assets. ¶ 172. Plaintiffs are concerned because under section 6.7(A) of the Partnership Agreement, Millrun and its Designated Affiliates (which, as discussed below, is defined in section 6.7(B) to seemingly include Corey and the other defendant companies) may be liable to the Partnership for losses caused by their bad faith, negligence, breach of fiduciary duty, misconduct, and/or breach of the Partisanship Agreement. ¶¶ 83-84; *see* Dkt. 77 at 44. Further, section 6.6(E) provides that Millrun must indemnify the Partnership and the Limited Partners for losses caused by such enumerated bad acts. ¶ 85; *see* Dkt. 77 at 43.

Finally, while the instant motions were being briefed, in an order dated July 16, 2014, the Indiana court stayed all non-discovery proceedings in the Foreclosure Action, recognizing that "[f]urther litigation of the [Foreclosure Action] prior to resolution of the litigation in New York

[this lawsuit] would be ... inefficient [] and a waste of the resources of the Court and the parties." *See* Dkt. 97.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The overarching argument made by defendants is that the comprehensive contracts, discussed earlier, govern the sophisticated parties' rights. Hence, defendants argue, quasi

contract and tort claims do not lie and seek dismissal of all claims except the breach of contract claims as against the contracting parties.

Ordinarily, defendants would be correct. But Corey's actions and the relationship between the parties, particularly between the defendant entities controlled by Corey, is anything but ordinary. While defendants' briefs narrowly focus on the strict language of the contracts, they wholly ignore the gravamen of plaintiffs' claim – that Corey, either though express or good faith breaches of contract or breaches of his fiduciary duties as general partner, wrongfully diverted money from the Partnership and caused an unjustifiable default on the Series A Note.

A. Breach of Contract Claims[5]

Defendants correctly argue that under all potentially applicable law (Indiana, Delaware, and New York), breach of contract claims can only be maintained by and asserted against parties bound by the contract. *See Winkler v V.G. Reed & Sons, Inc.*, 619 NE2d 597, 599 (Ind Ct App 1993); *Solow v Aspect Resources*, LLC, 2004 WL 2694916, at *4 (Del Ch 2004); *Southern Wine & Spirits of Am., Inc. v Impact Envt'l Eng'g, PLLC*, 104 AD3d 613, 614 (1st Dept 2013).[6]

[5] As a threshold issue, defendants contend that Count IV (breach of the Indenture) should be dismissed in favor of the Foreclosure Action or for failure to add the Trustee as a necessary party. Neither of these arguments have merit. The Foreclosure Action is far more limited in scope than the instant action and, in any event, the Indiana court expressly ruled that this litigation should proceed. Second, the Trustee is not a necessary party because its rights are not implicated. The Trustee acts at Corey's direction. It is Corey's and the defendants' rights that are implicated, not the Trustee's. The Trustee, a large bank, is presumably indifferent to the outcome of this litigation and will follow whatever outcome this court directs. If the Trustee, which clearly knows of this litigation, believes its rights are implicated, it can move for leave to intervene.

[6] Indian, Delaware, and New York have substantially similar rules for interpreting contracts. *See City of Jeffersonville v Envt'l Mgmt. Corp.*, 954 NE2d 1000, 1008 (Ind Ct App 1993); *In re IBP, Inc. Shareholders Lit.*, 789 A2d 14, 54 (Del Ch 2001); *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002).

[* 11]

Plaintiffs do not contest this point. Rather, plaintiffs assert two bases for holding all of the defendants liable for all of the alleged breaches of contract.

First, with respect to the most important contract, the Partnership Agreement, which is governed by Indiana law, section 6.7(A) provides that "Designated Affiliates" of Millrun may be held liable for extreme bad acts such as breach of fiduciary duty or misconduct.[7] Designated Affiliate is defined in section 6.7(B) as anyone who performs:

> services on behalf of the Partnership, within the scope of authority of the General Partners who: (i) directly or indirectly controls, is controlled by, or is under common control with any General Partner, (ii) owns or controls 10% or more of the outstanding voting securities of any General Partner, (iii) is an officer, director, partner, member or trustee of any General Partner, or (iv) if any General Partner is an officer, director, partner, member or trustee, of any Entity for which such General Partner acts in any such capacity.

Dkt. 77 at 44.

Defendants dispute the notion that a Designated Affiliate can be held liable under section 6.7(A) based on the fact that this section is written from the perspective of limiting liability, rather than creating it. This section limits liability to serious wrongs, such as breach of fiduciary duty. However, section 6.7(A) expressly contemplates liability for such bad acts extending to both General Partners and Designated Affiliates, regardless of which entity nominally committed the wrongdoing. That the Partnership Agreement anticipates that bad acts committed by Corey

[7] Section 6.7(A) provides that:

> Except as set forth in Section 6.6 [governing indemnification], no General Partner or Designated Affiliate (as defined in Section 6.7B) shall be liable ... to the Partnership or to any Limited Partner for any loss suffered by the Partnership which arises out of any action or inaction of such General Partner or Designated Affiliate(i) if such General Partner or Designated Affiliate, in good faith, determined that such course of conduct was in the best interests of the Partnership and (ii) such course of conduct did not constitute negligence, a breach of fiduciary duty or misconduct, on the part of the General Partner or Designated Affiliate or breach of this Agreement.

would likely be committed though his companies is unremarkable, as it is undisputed that Corey controls and acts on behalf of all of defendants and directed all of the challenged transactions initiated by the Partnership, MCAP II, MCAP III, the Developer, and the Trustee. Additionally, and contrary to defendants' position, it is legally irrelevant that the Designated Affiliates are not signatories to the Partnership Agreement. *Trustcorp Mortg. Co. v Metro Mortg. Co.*, 867 NE2d 203 (Ind Ct App 2007) (contract will be interpreted according to intent of parties at time contract made and court will examine language used to express parties' rights and duties, reading contract as whole to leave no words or terms ineffective or meaningless); *see Ellington v EMI Music, Inc.*, 2014 NY Slip Op 07197 (NY Ct App Oct. 23, 2014) (contract which is clear and unambiguous must be read as intended to bind affiliates existing at time); *see also MicroStrategy Inc. v Acacia Research Corp.*, 2010 WL 5550455, at *12 (Del Ch 2010) (contract providing for affiliate liability applies even to affiliates that did not yet exist when the contract was executed). Nonetheless, even if section 6.7(A) was ambiguous as to affiliate liability, the question of fact as to that section's meaning would preclude dismissal.

Next, plaintiffs' second basis for extending liability for the alleged breaches of contract onto all defendants – alter ego liability – also precludes dismissal, regardless of the meaning of section 6.7(A). Alter ego liability would result in all defendants being liable for breach of all of the subject contracts, even the contracts that do not extend liability to affiliates.

It is well established that, in all applicable jurisdictions, courts are reluctant to disregard the corporate form absent fraud or significant unfairness. *See Smith v McLeod Distributing, Inc.*, 744 NE2d 459, 462 (Ind Ct App 2000); *Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 (Del Ch 2003); *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012).

[* 13]

The standard for piercing the corporate veil and the relevant factors to be considered are similar across these jurisdictions.[8] *See id.* Simply put, a plaintiff must prove that "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another andthat the misuse of the corporate form would constitute a fraud or promote injustice." *Massey v Conseco Servs., L.L.C.*, 879 NE2d 605, 609 (Ind Ct App 2008), quoting *Aronson v Price*, 644 NE2d 864 (Ind 1994). Indiana courts, like most, "refuse to recognize corporations as separate entities where the facts establish that **several corporations are acting as the same entity**." *Massey*, 879 NE2d at 609 (emphasis added).

The AC is replete with facts giving rise to a strong inference that, not only does Corey completely dominate and control all of the defendant companies,[9] his execution of the challenged transactions on behalf and for the benefit of each of them was carried out for the precise purpose of defrauding plaintiffs. Aside from the bad acts discussed earlier, Corey's ability to cause the Partnership to make payments to the Developer and to MCAP II out of the order of priority provided for by the governing contracts – malfeasance where scienter is obvious – is a clear indication of Corey's unfettered ability to allocate the parties' funds as he sees fit. The abuse of such power, as discussed below, is also a breach of fiduciary duty.

[8] It should be noted that Delaware, unlike Indiana and New York, does not require a showing of fraud to maintain an alter ego claim. *See eCommerce Indus., Inc. v MWA Intelligence, Inc.*, 2013 WL 5621678, at *28 n.214 (Del Ch 2014), quoting *Geyer v Ingersoll Publ'ns Co.*, 621 A2d 784, 793 (Del Ch 1992); *see Acciai Speciali Terni USA, Inc. v Momene*, 202 FSupp2d 203, 207 (SDNY 2002) (under Delaware law, "[t]here is no requirement of fraud under the alter ego theory"). Rather, a showing that a corporation "is in fact a mere instrumentality or alter ego of its owner" is sufficient. *See Acciai*, 202 FSupp2d at 207. Nonetheless, here, as in *Walnut*, the allegations of how Corey disregarded corporate formalities to defraud plaintiffs would suffice to satisfy the fraud prong.

[9] Though MCAP II and MCAP III are investment funds allegedly not owned by Corey, the alter ego allegations with respect to those funds is that Corey breached his duties to the Limited Partners by wrongly making payments or defaulting on the Partnerships' debt owed to those funds so that the funds (and Corey, via the fees he generated as manager) would profit.

Thus, Corey's practical disregard for formalities (aside from nominal adherence, i.e., by mailing himself a default letter) and the terms of the governing contracts is evident from the allegations, which Corey will have every right to contest. Ultimately, the question of which defendant entities may be held liable for each of the alleged breaches is a fact intensive inquiry requiring discovery. For these reasons, the alter ego claims survive dismissal.

B. Tort & Quasi Contract-Claims

Plaintiffs assert claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, constructive fraud, and gross negligence. Defendants seek dismissal of these claims based on the well-established rule that tort and quasi-contract claims arising from matters expressly governed by written contracts are improperly duplicative unless a duty independent of the contracts is alleged. *See Grunstein v Silva*, 2009 WL 4698541, at *6 (Del Ch 2009); *Greg Allen Const. Co., Inc. v Estelle*, 798 NE2d 171, 173 (Ind 2003); *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987).

First, plaintiffs have validly pleaded fiduciary duty claims. Delaware law imparts fiduciary duties onto general partners of a limited partnership,[10] and section 6.4(h) of the Partnership Agreement (among various other sections) expressly provides that such fiduciary duties "shall not be contract[ed] away." *See* Dkt. 77 at 36. Although plaintiffs' fiduciary duty claims share "a common nucleus of operative facts" with the breach of contract claims, plaintiffs may still maintain fiduciary duty claims because the scope of such claims is broader than mere non-compliance with the contracts. *See Grunstein*, 2009 WL 4698541, at *6-7, citing *Schuss v Penfield Partners, L.P.*, 2008 WL 2433842, at *10 (Del Ch 2008). Not only do plaintiffs allege

[10] *See Wallace v Wood*, 752 A2d 1175, 1180 (Del Ch 1999) ("Unquestionably, the general partner of a limited partnership owes direct fiduciary duties to the partnership and to its limited partners"); *see Lake Treasure Holdings, Ltd. v Foundry Hill GP LLC*, 2014 WL 5192179, at *10 (Del Ch 2014).

that Corey failed to follow the express terms of the contracts, for instance, pertaining to how the Partnership's debt should be paid, the allegations go much further. For example, plaintiffs allege that Corey decided to cause the Partnership to default on the Series A Note, not because the Partnership lacked the requisite funds to make the monthly payment, but because Corey wanted to make more money by charging the 18% default interest rate. This is an allegation of self-dealing, a classic breach of the duty of loyalty, since Corey is alleged to have made the decision about payment of the Partnership's debts based on what would maximize his own fund's profit rather than what would be best for the Partnership. Indeed, Corey's alleged bad faith is best exemplified by his refusal to allow the default, which he caused, to be cured without being paid all (i.e., the supposed shortfall of $362) the accrued default interest. As noted earlier, the Indiana court found this, among another things, to be reason to suspect that the default was the product of fraud.

Next, plaintiffs' aiding and abetting breach of fiduciary duty claims are properly pleaded. "[T]he four elements of an aiding and abetting claim [are] (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty ... (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." *In re Del Monte Foods Co. S'holders Lit.*, 25 A3d 813, 836 (Del Ch 2011), quoting *Malpiede v Townson*, 780 A2d 1075, 1098 (Del 2001).[11] The critical element is "knowing participation." *Del Monte*, 25 A3d at 836.

[11] While the Indiana Supreme Court has not yet recognized an independent cause of action for aiding and abetting breach of fiduciary duty, Indiana nonetheless permits the imposition of liability onto third parties for aiding and abetting torts, a rule that effectively permits the assertion of breach of fiduciary duty claims against third parties. *See DiMaggio v Rosario*, 950 NE2d 1272, 1275-76 (Ind 2011); *see also Abrams v McGuireWoods LLP*, 2014 WL 3721950, at *5 (ND Ind 2014). New York, in contrast, permits an independent claim for aiding and abetting. *See Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 101-02 (1st Dept 2006). Aiding and abetting, therefore, is a valid basis for liability, regardless if it is an independent cause of action.

Here, as Corey acted on behalf and controls all of the defendants, knowing participation is indisputable.

As for plaintiffs' fraud claims, the parties agree that New York's CPLR 3016(b) is the governing pleading standard. "CPLR 3016(b) provides that where a cause of action or defense is based upon fraud, 'the circumstances constituting the wrong shall be stated in detail.'" *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). This standard is "met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Id.* at 492. The parties' briefs, however, are unclear as to what law substantively governs plaintiffs' fraud claim, since, for the most part, they focus on the particularity issue, not failure to state a claim.[12]

The AC contains sufficient particularity. The fraud claims, which are based on the misrepresentations concerning the DSC Ratio, are pled with sufficient detail for defendants to understand the nature of the claim – that MMA would not have made its third installment payment but for the DSC Ratio misrepresentations. This claim encompasses all the elements of fraud: "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).[13] As to plaintiffs claim of constructive fraud, scienter

[12] Defendants also argue that the fraud claim should be stayed, pursuant to CPLR 7503, because section 5.5(C) of the Partnership Agreement requires arbitration of this claim. *See* Dkt. 77 at 29-31. Defendants are wrong. Section 5.5 only concerns a default by a limited partner for failure to make an installment payment, and subsection (C) is a limited dispute resolution clause for adjudicating whether such an installment payment should have been made. This arbitration clause does not require arbitration of a subsequent claim that an installment payment should never have been made, nor does the clause encompass tort claims. Rather, this is a limited arbitration clause in order to compel an installment payment. It does not apply to the parties' other disputes under the Partnership Agreement.

[13] The elements are essentially the same in Indiana and Delaware. *See Snyder v Smith*, 7 FSupp3d 842, 878 (SD Ind 2014); *Black Horse Capital, LP v Xstelos Holdings, Inc.*, 2014 WL 5025926, at *21 (Del Ch 2014).

need not be alleged where, as here, the parties have a fiduciary relationship. *See Levin v Kitsis*, 82 AD3d 1051, 1054 (2d Dept 2011).[14]

Finally, defendants seek dismissal of plaintiffs' unjust enrichment claim because the validity of Corey's distribution of Partnership assets is governed by written contracts. Under Indiana, Delaware, and New York law, to state a claim for unjust enrichment, the plaintiff must allege that the defendant was unjustly enrichment at plaintiff's expense and that it would be inequitable to allow defendants to keep the disputed funds. *Zoeller v E. Chicago Second Century, Inc.*, 904 NE2d 213, 220 (Ind 2009); *Nemec v Shrader*, 991 A2d 2210 (Del 2010); *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011). An unjust enrichment claim is viable here because a plaintiff may seek to recover payments made in breach of a contract where the receipt of such funds do not itself constitute a breach of contract against the receiving party. *See Imbert v LCM Interest Holding LLC*, 2013 WL 1934563, at *8 n.40 (Del Ch 2013) ("Proof of wrongful action is not a necessary element of a claim for unjust enrichment in either Delaware or New York"); *see also Lau v Lazar*, 2014 WL 5178662, at *5 (Sup Ct, NY County 2014) (collecting cases permitting unjust enrichment claim "against a non-contracting party for wrongfully obtaining contractual proceeds due under the contract").

The alleged improper allocation of Partnership funds (e.g., payments to MCAP II that were not in accord with the payment priority of the Notes) may be recouped via an unjust enrichment claim. Unjust enrichment is precisely the proper cause of action to recover such payments wrongfully paid under a contract. Defendants, nevertheless, are correct that the ultimate determination of the validity of the challenged payments turns on the express language

[14] Indiana and Delaware also recognize constructive fraud claims. *See Am. Comm. Lines LLC v Lubrizol Corp.*, 2014 WL 1317302, at *7 (SD Ind 2014); *Zerby v Allied Signal Inc.*, 2001 WL 112052, at *6 (Del Super 2001).

[* 18]

of the governing contracts. In other words, whether Corey had express authority or discretion as General Partner to make these payments or declare a default will determine whether the funds were received unjustly. General notions of equity, in contrast, are not a back door to rewriting the contract. An unjust enrichment claim can be used to recoup funds from a non-breaching party, but only where their receipt of such funds was a product of an actual breach of contract.

Of course, the question of whether Corey violated the subject contracts is beyond the scope of the instant motion. Additionally, whether certain defendants were actually enriched is best resolved after complete financial disclosure is made so plaintiffs can be certain where Corey transferred the Partnership's money.

C. Accounting Claims

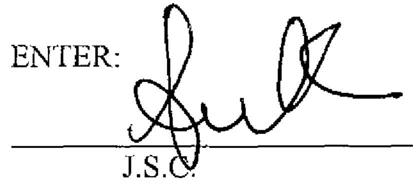
The accounting claims are dismissed as duplicative and unnecessary. The Partnership Agreement expressly provides plaintiffs with the right to the Partnership's financial records. Moreover, to the extent that defendants argue that any of the Partnership's records are not required to be disclosed under the strict terms of the Partnership Agreement, plaintiffs' tort claims entitle them to discovery of all the Partnership's financial records from 2006 to the present and an explanation from Corey for every transfer of money made under the discussed contracts. A preliminary conference will be held at the time set forth below, before which the parties are directed to meet and confer regarding the scope of discovery. Accordingly, it is

ORDERED defendants' motions to dismiss are denied, except to the extent that the accounting causes of action (Counts IX & XIV) are dismissed as duplicative; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on December 9, 2014 at 10:30 in the forenoon.

Dated: November 26, 2014

ENTER:



J.S.C.