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

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WALNUT HOUSING ASSOCIATES 2003 L.P., BF WALNUT PARK, LLC, as General Partner, BFIM SPECIAL LIMITED PARTNER, INC. and MMA WALNUT PARK PLAZA, L.P., Derivatively on behalf of WALNUT HOUSING ASSOCIATES 2003 L.P., and WALNUT PARK PLAZA, L.P., in its Individual Capacity

Plaintiffs,

-against-

MCAP WALNUT HOUSING LLC, MUNICIPAL CAPITAL APPRECIATION PARTNERS II, L.P., RICHARD G. COREY, and AMERICAN FOUNDATION FOR AFFORDABLE HOUSING, INC.,

Defendants.

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Index No.: 653945/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants MCAP Walnut Housing LLC (the Old General Partner), Municipal Capital Appreciation Partners II, L.P. (MCAP II), and Richard G. Corey (collectively, the MCAP Defendants) move, pursuant to CPLR 3211, to dismiss the following claims in the Amended Complaint (the AC): (1) all claims against MCAP II; (2) all claims against Corey; and (3) all non-contract claims against the Old General Partner. The MCAP Defendants' motion is granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

The court assumes familiarity with its order dated January 15, 2014 (the January Order) (Dkt. 46),[1] which sets forth plaintiffs' allegations and the contracts governing the parties' rights. In short, this lawsuit concerns fraud Corey allegedly committed as the general partner of an

[1] All defined terms have the same meaning as in the January Order.

affordable housing facility in Philadelphia.[2] In the January Order, the court determined that plaintiffs established a likelihood of success on the merits of their fraud claims. The court, therefore, issued a preliminary injunction removing the Old General Partner.

Plaintiffs filed the AC on April 22, 2014. *See* Dkt. 169. The AC contains 11 causes of action: (1) declaratory judgment against the MCAP Defendants; (2) breach of fiduciary duty against the MCAP Defendants; (3) aiding and abetting breach of fiduciary duty against MCAP II and Corey; (4) gross negligence against the MCAP Defendants; (5) breach of the Partnership Agreement against the MCAP Defendants; (6) breach of the Guaranty (discussed below) against MCAP II and Corey; (7) constructive fraud against the MCAP Defendants; (8) unjust enrichment against MCAP II and Corey; (9) indemnification against the MCAP Defendants; (10) an accounting against the Old General Partner and MCAP II; and (11) unjust enrichment against AFAH.[3] The allegations against the MCAP Defendants are substantially the same as in the original complaint. The court, therefore, limits its discussion to the provisions of the subject contracts at issue on this motion that were not discussed in the January Order.

Plaintiffs seek to hold MCAP II and Corey liable for breach of the Partnership Agreement, even though they are not parties to that contract. Plaintiffs rely on section 6.7,[4]

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[2] The parties and their affiliates also are litigating another case before this court, styled *MMA Meadows at Green Tree, LLC v Millrun Apartments, LLC*, Index No. 653943/2013 (*MMA*). *MMA* involves similar allegations of fraud in connection with another affordable housing facility in Indiana.

[3] The AC added the American Foundation for Affordable Housing (AFAH) as a defendant. The AFAH Loan was discussed in the January Order. AFAH's motion to dismiss is currently scheduled to be argued on January 13, 2015.

[4] Section 6.7 is virtually identical to the same numbered section in the Partnership Agreement at issue in *MMA*, where the parties make similar arguments with respect to the contracts.

which governs "Liability of General Partners to Limited Partners." *See* Dkt. 195 at 51. 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 [unless the challenged action was not taken in good faith and was negligent, a breach of fiduciary duty, misconduct, or a breach of the Partnership Agreement].

Section 6.7(B) defines Designated Affiliate 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.

Additionally, as he did in *MMA*, Corey executed a Guarantee Agreement (the Guarantee) in which MCAP II (1) unconditionally guaranteed the Old General Partner's performance under the Partnership Agreement and (2) agreed to maintain an aggregate net worth of at least $5 million and liquid assets of at least $1 million. The Guarantee Agreement further obligates MCAP II to provide financial disclosures evidencing its compliance with these liquidity requirements. Plaintiffs allege MCAP II has not done so.

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 MCAP Defendants argue that, even if Corey committed the alleged wrongdoing, plaintiffs remedy lies exclusively in claims for breach of the governing contracts and only against the contracting parties. This argument fails for the reasons set forth in the contemporaneously issued decision in *MMA*, which involves the same parties, virtually identical contracts, and similar allegations, although, here, governed by Delaware law. In short, MCAP II and Corey may be liable as affiliates under the Partnership Agreement and, even if they are not, plaintiffs have stated a claim against them for breach of contract by alleging, pursuant to the Delaware law cited in the *MMA* decision, that defendants are alter egos. To be sure, MCAP II, a private equity fund, is (according to Corey) mostly owned by non-party investors. Nonetheless, the allegations of Corey's complete domination and control and use of all the corporate defendants to defraud plaintiffs is a sufficient predicate to pierce the corporate veil. While there

is nothing wrong with managing a complex real estate investment through SPVs – indeed, this is a common business practice – the SPV manager is not immunized from defrauding the limited partners simply because he does so under the guise of the corporate form.

Likewise, as in *MMA*, plaintiffs have validly pleaded causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive fraud, and unjust enrichment. However, as in *MMA*, the accounting claims are dismissed as duplicative. Plaintiffs are entitled to all of the records that would be sought in an accounting under the governing contracts and, independent of the contracts, such records are clearly discoverable as they are relevant to the fraud allegations. Accordingly, it is

ORDERED that the MCAP Defendants' motion to dismiss is denied, except to the extent that the accounting cause of action (Count X) is dismissed as duplicative.

Dated: November 26, 2014

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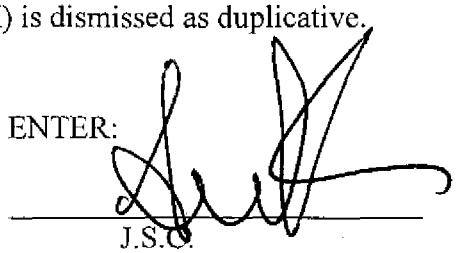

J.S.C.