Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut Hous. LLC
2018 NY Slip Op 30544(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 653945/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WALNUT HOUSING ASSOCIATES 2003 L.P. et al., Index No.: 653945/2013

DECISION & ORDER

Plaintiffs,

-against-

MCAP WALNUT HOUSING LLC, et al.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 016 and 017 are consolidated for disposition.

Plaintiffs Walnut Housing Associates 2003 L.P. (Partnership), BFIM Special Limited Partner, Inc. (SLP), MMA Walnut Park Plaza, L.P. (ILP) (with SLP, Limited Partners), and BF Walnut Park, LLC (BFIM GP) move, pursuant to CPLR 3212, for partial summary judgment for (a) breach of contract against MCAP Walnut Housing LLC (MCAP GP) (Cause of Action V); (b) breach of fiduciary duty against Municipal Capital Appreciation Partners II, L.P. (MCAP II) and Richard G. Corey (Cause of Action II); (c) declaratory judgment declaring the validity of plaintiffs' removal of MCAP GP as general partner of the Partnership (Cause of Action I); (d) indemnification of plaintiffs by MCAP GP (Cause of Action IX); (e) breach of contract against MCAP II (Cause of Action VI); and (f) MCAP GP's counterclaim for ILP's breach of contract (First Counterclaim). Seq. 016. Defendants oppose. Defendants MCAP GP, MCAP II, and Corey move, pursuant to CPLR 3212, for summary judgment on all of plaintiffs' claims. Seq. 017. Plaintiffs oppose. For the reasons discussed below, plaintiffs' motion is granted in part and denied in part, and defendants' motion is denied.

I. Procedural History & Factual Background

The court assumes familiarity with its previous decisions in this action, including a decision on plaintiffs' motion for a preliminary injunction dated January 15, 2014 (Dkt. 46, PI Order),[1] and a decision on defendants' motion to dismiss dated November 26, 2014 (Dkt. 277, MTD Order), modified by the Appellate Division, First Department, *Walnut Housing Assocs. 2003 L.P v MCAP Walnut Housing LLC*, 136 AD3d 403 (1st Dept 2016).[2]

The parties submitted a joint statement of undisputed facts. Dkt. 410 (JS). The facts discussed below are undisputed unless otherwise noted.

This case arises from an investment by Boston Financial Investment Management, L.P. (BFIM)[3] in a low-income housing project in Philadelphia, Pennsylvania known as Walnut Park Plaza (the Project), which is managed by entities affiliated with Corey. A Delaware limited partnership (the Partnership), governed by a partnership agreement dated October 6, 2006 (Dkt. 411, the Partnership Agreement), structures the investment relationship. The Partnership's wholly-owned subsidiary, Walnut Park Plaza LLC (Project Owner), owns the Project. The Partnership initially consisted of ILP (controlled by BFIM) as investor limited partner, SLP (also controlled by BFIM) as special limited partner, and MCAP GP (controlled by Corey) as general partner. ILP contributed nearly $15 million in capital and has been projected to receive nearly $15 million in low income housing tax credits to date. As former general partner, MCAP GP

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[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

[2] Motions for summary judgment in a related case before this court, *MMA Meadows at Green Tree, LLC v Millrun Apartments, LLC*, Index No. 653943/2013 (*MMA Meadows*), have been decided in a separate memorandum decision and order.

[3] BFIM and William Haynsworth were defendants on two counterclaims that have since been dismissed. Dkt. 378 (order).

managed the Partnership, Project Owner, and the Project. BFIM GP (controlled by BFIM) replaced MCAP GP as general partner for the pendency of this action, pursuant to court order. PI Order at 9. The parties agree that the Partnership Agreement is valid and binding. JS ¶ 3.

Corey also controls MCAP II, who is MCAP GP's managing member and an investor in the Project through interest bearing loans. MCAP II is a private equity fund in which Corey owns a financial interest. Dkt. 561 at 5-6 (Corey 10/20/2015 Dep. 12:18-13:3). MCAP II guaranteed MCAP GP's "due and punctual performance" under the Partnership Agreement to ILP under an agreement dated September 29, 2006. JS ¶ 13; Dkt. 413 (Guaranty). The Guaranty is subject to ILP "not being in material default of its obligation under the Partnership Agreement." Dkt. 413 at 4. Project Owner entered into a promissory note dated February 28, 2009, payable to MCAP II in the amount of $8,882,235 (the MCAP II Note). JS ¶¶ 17, 23.

Under the Partnership Agreement, MCAP GP made thirty-seven representations and warranties to ILP that were "true as of Investment Closing, will be true on the due date for payment of each Installment and at all times hereafter." Dkt. 411 at 45. The warranties most pertinent to the instant motions relate to Partnership litigation, default under Partnership agreements (e.g., loans), and title to the Project. *Id.* at 45-46.

Section 6.1(B) of the Partnership Agreement states that the general partner has no authority to obtain, increase, refinance or materially modify any "Mortgage Loan"[4] to the Partnership "without the Consent of the Investor Limited Partner." *Id.* at 38-39. Section 9.2 of the Partnership Agreement likewise prohibits the Partnership from increasing, modifying, obtaining, or refinancing any such loan "without the Consent of the Investor Limited Partner,

[4] While "Mortgage Loan" is narrowly defined as loans pre-dating the Partnership Agreement, "Mortgage" is more broadly defined as any loan secured by the Project. *Id.* at 19.

which Consent shall not be unreasonably withheld." *Id.* at 65. "Consent of the Investor Limited Partner" is defined as "the prior written consent or approval of the Investor Limited Partner, … such consent not to be unreasonably withheld or delayed." *Id.* at 11.

In October 2011, Corey and BFIM began discussing $4 million in bridge financing for the Partnership (the AFAH Loan) to be obtained from the American Foundation for Affordable Housing, Inc. (AFAH). Corey insisted the Partnership needed the loan to cover repairs. Dkt. 343 at 3 (10/13/2011 Corey email); Dkt. 344 at 2 (10/20/2011 Corey email to William Haynsworth at BFIM); Dkt. 345 at 4-5 (11/2/2011 Corey email to Melissa Curran at BFIM). He assured BFIM that funds not used for repairs would be applied to the MCAP II Note, which had been in default since July 26, 2009. Dkt. 345 at 2 (11/9/2011 Corey email to Haynsworth); JS ¶¶ 18-19.

Before ILP's consent was finalized, Project Owner executed a $4 million note payable to AFAH and granted AFAH a right of first refusal on the Project in exchange for the AFAH Loan. Dkt. 414 (AFAH Note); Dkt. 415 at 19-26 (First Refusal Agreement). AFAH agreed to forbear from exercising any right or remedy under the AFAH Note that would cause the ILP to lose its tax credits. Dkt. 414 (AFAH Note) at 6. The AFAH Note stated that the purpose of the loan was "to rehabilitate and pay other obligations incurred by" the Project. Dkt. 415 at 13 (AFAH Note).

Meantime, the parties exchanged drafts of a letter agreement evidencing ILP's consent to the AFAH Loan and the First Refusal Agreement (AFAH Consent). BFIM's first proposed draft specified that the AFAH Loan funds would be used for certain electrical improvements and roof repairs, reducing payables (including the MCAP II Note) and mortgage application costs. *See* Dkt. 466 (11/17/2011 Haynsworth email to Corey) at 2. Corey returned a draft omitting the allocations on letterhead of his employer, MCAP Advisers LLC. See Dkt. 467 (11/21/2011

Corey email to Haynsworth) at 2. The drafts that followed also did not mention allocations. Dkts. 468-471.

On November 28, 2011, MCAP GP, Project Owner, and ILP signed the final version of the AFAH Consent, which was silent on how the AFAH Loan funds would be used. Dkt. 415 at 2-4. Project Owner assigned the AFAH Note to the Partnership. Dkt. 415 at 7-10 (Assignment of Promissory Note). Corey used the $4 million proceeds from the AFAH Loan to pay MCAP II the following amounts: (1) interest of $2,796,417 on the MCAP II Note, (2) $693,660 of principal on the MCAP II Note, and (3) $509,923 of "GP operating and temporary loans." JS ¶¶ 21-22. The interest payment cured the MCAP II Note default, bringing it current. JS ¶ 18.[5]

Two months later, Corey told BFIM that the Partnership had received a $1.5 million "soft loan commitment" from the City of Philadelphia for electrical repairs, and discussed the progress of other Partnership initiatives regarding loans and funding from other sources. Dkt. 474 (1/27/2012 emails between Corey and Curran) at 1-2. An email postscript stated, among other information, that "[t]he AFAH loans have brought the existing note current." Dkt. 474 at 2. Thanking Corey for the update, Melissa Curran told him that "[t]his all sounds like great news." Dkt. 474 at 1. Haynsworth similarly responded "[a]ll good news. Things are certainly looking up." Dkt. 475 (1/27/2012 emails between Corey and Haynsworth) at 1.

Several months later, Corey and BFIM discussed consolidating the AFAH Note and the MCAP II Note and procuring another loan (PRA Loan). The Project Owner issued a new $12,188,574 note (Dkt. 416, Consolidated Note), dated April 1, 2012, superseding the AFAH

[5] When BFIM later confronted Corey, he spoke only to the use of the funds to pay the accrued MCAP II Note default interest, but did not address payment of principal and GP operating and temporary loans in lieu of repairs. He also expressed "regret" for any "lack of clarity on the use of the AFAH proceeds." Dkt. 444 (Curran Exs.) at 190 (5/14/2012 Corey letter to Haynsworth).

and MCAP II Notes, and giving MCAP II sole rights to interest and principal due on both prior notes. AFAH and MCAP II separately arranged for payments to AFAH. *See* Dkt. 438 (Early Exs.) at 729-34 (Participation Agreement). The Consolidated Note included a lender agreement to protect ILP's tax credits. Dkt. 416 (Consolidated Note) at 7. A mortgage on the Project securing the Consolidated Note contained a similar forbearance clause. *See* Dkt. 97 (Mortgage) at 32. The mortgage document further covered "present and future advances" made by MCAP II to or for the benefit of Mortgagor, with the lien of future advances relating back to the date of the Mortgage, and termed itself an "Open-End Mortgage" that "shall secure future advances and shall have lien priority." Dkt. 97 at 34.

ILP consented to the Consolidated Note, Mortgage, and PRA Loan, agreeing:

> [T]he Investor Limited Partner ... ***hereby consents to and authorizes the Partnership to consent to and authorize Walnut Park Plaza LLC***, a Delaware limited liability company (the "Project Owner"), ***to execute and deliver*** that certain Amended and Restated Promissory Note dated as of April 1, 2012 in the principal amount of $12,188,574.00 made by Project Owner in favor of [MCAP II] and in the form annexed hereto as Exhibit A (the "MCAP Note") and ***that certain Open-End Mortgage and Security Agreement dated as of April 1, 2012 given by Project Owner to MCAP [II] as security for the MCAP Note in the form annexed hereto as Exhibit B (the "MCAP Mortgage")***. The foregoing consent of the Investor Limited Partner to the execution and delivery of the MCAP Note and the MCAP Mortgage by the Project Owner is expressly conditioned on the agreement of the Project Owner, the Partnership and the Partnership's General Partner that notwithstanding anything to the contrary contained in the MCAP Note and/or the MCAP Mortgage and the Partnership Agreement, ***the Consent of the Investor Limited Partner*** (as defined in the Partnership Agreement), ***shall be required in connection with any proposed amendment to the MCAP Note and/or the MCAP Mortgage, and that any amendment to the MCAP Note and/or the MCAP Mortgage that has not been consented to by the Investor Limited Partner shall be deemed automatically void and of no force or effect.***

Dkt. 536 (Mortgage Consent) at 1 (emphasis added).

MCAP GP, on whose behalf Corey executed the consent, agreed:

> By signing below, the Project Owner, the Partnership and ***the Partnership's General Partner acknowledge and agree that notwithstanding anything to the contrary contained in*** the Project Owner's limited liability company agreement, the Partnership Agreement, the PRA Loan Documents, the MCAP Note, ***the MCAP Mortgage***, and any documents executed by the Project Owner and/or the Partnership in connection therewith: (i) the PRA Loan Documents, ***the MCAP Note and the MCAP Mortgage shall be deemed to be "Project Documents" for all purposes under the Partnership Agreement***, (ii) the Consent of the Investor Limited Partner shall be required in connection with any proposed amendment to the MCAP Note and/or the MCAP Mortgage ... and (vi) ***the Investor Limited Partner has not waived any of its rights under the Partnership Agreement or the Guaranty (as defined in the Partnership Agreement)***.

Dkt. 536 (Mortgage Consent) at 2.

In an effort to replace Partnership debt held by MCAP II with lower interest, permanent financing from another source, Corey submitted a preliminary loan application on behalf of the Partnership to a Citibank, N.A. affiliate ("Citibank"). Citibank provided a term sheet on or around July 24, 2012. JS ¶ 24; Dkt. 437 (Early Exs.) at 737-48 (preliminary application and proposed term sheet). The terms did not include a forbearance clause to protect ILP's tax credits.

In September 2012, BFIM stated that a prerequisite to ILP's consent to the Citibank loan would be a $2 million escrow (Section 8 Escrow), to be used for debt service payments if the Philadelphia Housing Authority (PHA) terminated the Project Owner's Housing Assistance Payment (HAP) contract for Section 8 subsidies. On October 2, 2012, BFIM gave Corey an attorney opinion letter supporting this position. Dkt. 439 (Gladstone Exs.) at 13-14, 16 (10/3/2012 Haynsworth email to Corey attaching McDermott opinion letter). BFIM explained to Corey that termination of the HAP contract would endanger the Partnership's ability to pay debt

service on the proposed Citibank loan. Dkt. 439 (Gladstone Exs.) at 19-20 (11/27/2012 email from John O'Neill to Joseph Donley).[6]

On January 11, 2013, defendants offered to secure ILP's tax credits by pre-payment or escrow of debt service through December 31, 2021 (the remainder of the tax credit compliance period) for the proposed Citibank loan. Dkt. 439 (Gladstone Exs.) at 28-29 (1/11/2013 Joseph Donley letter to John O'Neill). Michael Gladstone, BFIM's General Counsel averred that BFIM communicated its approval of this arrangement on January 16, 2013. Dkt. 439 (Gladstone Affidavit) ¶ 42.[7] On January 17, 2013, Corey told Citibank the parties had reached "conceptual agreement" on the Citibank loan and "would like to move forward quickly." *See* Dkt. 516 (Corey email to Citibank) at 1. However, on March 26, 2013, defendants newly proposed an arrangement that would prevent foreclosure only through 2017, five years short of the tax credit compliance period. Dkt. 439 (Gladstone Exs.) at 43-44 (3/26/2013 Donley email to O'Neill).

The Partnership, in the interim, fell behind on its financial obligations under Corey's stewardship. When the Limited Partners received the Partnership's 2012 audited financial

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[6] BFIM's general counsel explained that the Section 8 Escrow would provide a financial cushion for debt service in the event of termination of Section 8 subsidies, staving off foreclosure while the poorest tenants (Section 8 rental assistance recipients) are evicted in favor of tenants who can afford to pay unsubsidized rents at the rate allowed by the federal low-income housing tax credits (LIHTC) program. Dkt. 439 (Gladstone Aff.) ¶¶ 23-24. The escrow would also make up the difference between the LIHTC rents and the higher (subsidized) Section 8 rents. *Id.*

[7] Defendants intimate that Gladstone's affidavit testimony is "double hearsay", but do not dispute that plaintiffs communicated their acceptance of defendants' proposal. *See Costello*, 99 AD2d 227 ("[F]acts appearing in the movant's papers, which the opposing party does not controvert, may be deemed to be admitted."). Regardless, an affidavit by a person having knowledge of the facts is admissible on summary judgment. CPLR 3212(b). Defendants do not argue that Gladstone lacked personal knowledge of the facts. To the extent plaintiffs seek to prove that BFIM communicated ILP's approval of the loan terms to defendants, Gladstone's testimony is not hearsay. By contrast, defendants' use of Corey's own email to prove that BFIM made further demands is hearsay. Dkt. 501 (Defs.' Opp. Br.) at 11-12 n.5 (citing Dkt. 516).

statement (2012 Audit) in April 2013, it showed: (1) $1,467,027 of construction payables to McDonald Building Company ("McDonald") remained outstanding on a $1,443,253 contract for roof work (Roof Contract) and a $1,679,914 contract for electrical work; (2) debt service had not been paid on the Consolidated Note for several months, therefore, the Mortgage was in default; and (3) MCAP II had loaned an additional $699,641 under the Consolidated Note and Mortgage to pay for Project repairs. JS ¶¶ 25-26; Dkt. 443 (Curran Affidavit) ¶ 34; Dkt. 444 (Curran Exs.) at 153, 155, 158-59 (2012 Audit).

In May 2013, McDonald filed a mechanics lien (McDonald Lien) against the Project in the Philadelphia Court of Common Pleas and amended the claim in June 2013 (Amended Lien). JS ¶¶ 27-28; Dkt. 417 (Complaint Upon Mechanics Lien Claim). The Amended Lien alleged that Project Owner had paid McDonald only $387,553 of the $1,443,253 owed for the Roof Contract, which was completed in March 2013. Dkt. 417 at 42-43.[8]

Through late June 2013, discussions regarding the Citibank loan continued, and BFIM renewed its requests for a Section 8 Escrow. Dkt. 444 (Curran Exs.) at 233-38 (6/24/2013 O'Neill email to Donley); Dkt. 439 (Gladstone Exs.) at 46-48 (O'Neill email to Donley). Gladstone testified by affidavit that defendants cancelled a scheduled July 9 call to discuss the Citibank loan. Dkt. 439 (Gladstone Aff.) ¶¶ 47-48. On July 17, 2013, Corey, on behalf of MCAP II, noticed the default on the Consolidated Note, stating that debt service payments had not been paid since February 2013, and that the default interest rate would apply going forward. Dkt. 98 (Notice of Default) at 2. On July 29, 2013, Corey and MCAP II accelerated the maturity date of

[8] McDonald initiated suit against the Partnership (McDonald Action) by filing a Complaint Upon Mechanics Lien Claim against Project Owner in the Philadelphia Court of Common Pleas in April 2016. JS ¶¶ 27-28; Dkt. 417 (Complaint Upon Mechanics Lien Claim). The Complaint Upon Mechanics Lien Claim alleged that, after a further $200,000 had been paid to McDonald, a balance of $855,699.67, plus interest, remained on the Amended Claim. *Id.* at 5.

the Consolidated Note, stating that all unpaid principal, accrued interest, late charges, and attorneys' fees were fully due and payable. Dkt. 99 (Notice of Acceleration) at 2.

On October 9, 2013, SLP sent MCAP GP (then sole general partner) a letter removing MCAP GP as general partner. Dkt. 412 (Notice of Removal). The Notice of Removal complained that Partnership revenues had not been properly applied to expenses, citing the McDonald Lien, Notice of Default, and Notice of Acceleration as examples. SLP contended that MCAP GP's acts as general partner constituted "at minimum, gross negligence and breach of fiduciary duty" and a Material Default under Section 7.7B(v) of the Partnership Agreement, and demanded that MCAP GP turn over Partnership books and records. MCAP GP contested the removal, stating via letter that MCAP GP had exercised appropriate business judgment considering the Partnership's "deteriorating financial condition" and ILP's "unreasonable refusal" to consent to the Citibank loan. Dkt. 103 at 2. On October 15, 2013, SLP identified additional contractual breaches by MCAP GP. Dkt. 102 (Second Removal Letter).

In May 2014, AFAH sued plaintiffs under the Consolidated Note. *See* Dkt. 532 (Complaint, *American Foundation for Affordable Housing, Inc. v Walnut Park Plaza LLC*, Case ID: 140502255, Court of Common Pleas, Philadelphia County, Pennsylvania (filed May 19, 2014) (AFAH Action)). This case was commenced by summons and complaint on November 13, 2013. In January 2014, this court granted plaintiffs' motion for a preliminary injunction,[9] ordering MCAP GP's removal, substituting plaintiff BFIM GP as general partner, and enjoining defendants from, *inter alia*, interfering with BFIM GP's management of the Partnership or acting

[9] This court had previously granted plaintiffs' motion for a temporary restraining order pending decision on plaintiffs' motion for a preliminary injunction. Dkt. 16 (TRO Order). The TRO Order made BFIM GP an additional general partner with managerial rights, authority and voting rights of 51% in accordance with §6.3(C) of the Partnership Agreement. Dkt. 16 at 1.

on behalf of the Partnership or any entity controlled by the Partnership. Dkt. 46 (PI Order). Shortly thereafter, Corey filed an affidavit affirming that he, MCAP II, and MCAP GP had complied with the PI Order. Dkt. 49. BFIM GP currently is the sole general partner of Partnership.

On April 22, 2014, plaintiffs filed the Amended Complaint (AC, Dkt. 169), asserting eleven causes of action.[10] Defendants previously moved to dismiss all causes of action asserted against them. Dkt. 192. The court denied the motion in nearly all respects, but dismissed Cause of Action X for an accounting as duplicative. Dkt. 277 (MTD Order). On February 2, 2016, the Appellate Division dismissed Causes of Action II and IV as against MCAP GP; III as against MCAP II; V as against MCAP II and Corey; VI as against Corey; and VIII in its entirety. The Appellate Division affirmed the MTD Order as to the remaining counts. *Walnut Housing Assocs. 2003 L.P v MCAP Walnut Housing LLC*, 136 AD3d 403 (1st Dept 2016).

The following causes of action remain, numbered as in the AC: (I) declaratory judgment validating MCAP GP's removal as general partner of the Partnership; (II) breach of fiduciary duty against MCAP II and Corey; (III) aiding and abetting breach of fiduciary duty against Corey; (IV) gross negligence against MCAP II and Corey; (V) breach of the Partnership Agreement against MCAP GP; (VI) breach of Guaranty against MCAP II; (VII) constructive fraud and (IX) indemnification against all defendants. Defendants' answer asserts, *inter alia*, a

[10] The AC and the parties' briefs refer to plaintiffs' causes of action as "counts" and labels them by Roman numeral. The AC asserts: (I) declaratory judgment against defendants; (II) breach of fiduciary duty against defendants; (III) aiding and abetting breach of fiduciary duty against MCAP II and Corey; (IV) gross negligence against defendants; (V) breach of the Partnership Agreement against defendants; (VI) breach of Guaranty against MCAP II and Corey; (VII) constructive fraud against defendants; (VIII) unjust enrichment against defendants; (IX) indemnification against defendants; (X) an accounting against the MCAP GP and MCAP II; and (XI) unjust enrichment against third party American Foundation for Affordable Housing. Count XI was dismissed by this court on January 13, 2015. Dkt. 284.

breach of the Partnership Agreement by MCAP GP against ILP for failure to consent to the Citibank Loan (First Counterclaim). Dkt. 315 ¶¶ 33-38.[11]

II. Discussion

A. Legal Standard – Summary Judgment

Summary judgment may be granted only in the absence of any triable issue of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The movant bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." CPLR 3212(b). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The evidence submitted on the motion must be examined in the light most favorable to the parties opposing summary judgment. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

Once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). Failure to contradict facts is an admission. *Costello Assocs., Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate an acceptable excuse for his failure to offer admissible evidence. *Id.*

[11] MCAP GP also asserts a declaratory judgment counterclaim for loan amounts allegedly owed.

Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Upon the completion of the court's examination of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Defendants' First Counterclaim for ILP's Breach of Contract

Plaintiffs seek summary judgment on defendants' claim that ILP unreasonably withheld consent to the Citibank loan in breach of the Partnership Agreement. Plaintiffs argue that the Section 8 Escrow demand was reasonable. Defendants aver that reasonableness is a question of fact, but they do not identify any material issues of fact.[12]

As noted, the Partnership's financing at the time of the Section 8 Escrow demand, including the Consolidated Note, protected ILP's tax credits, the sole reason for its investment. The proposed Citibank loan contained no such assurance. Indeed, were the Partnership to default, Citibank could foreclose, causing forfeiture of ILP's tax credits.[13] Defendants admit that ILP's ***primary objective*** was to obtain tax credits and operating losses, and that ILP, after investing approximately $15 million, had successfully obtained approximately $15 million in tax credits and approximately $5 million in tax savings from operating losses. Defendants gloss over the

[12] Defendants cite inapposite case law regarding commercial reasonableness under the UCC for sale of collateral. *See Addessi v Wilmington Tr. Co.*, 530 A2d 1128 (Del. 1987); *First Bank & Trust Co. of Ithaca, N.Y. v Mitchell*, 123 Misc2d 386, 394 (Sup. Ct. Tompkins County 1984).

[13] The Partnership's thirty-year indenture with the Pennsylvania Housing Finance Agency (PHFA) did not alleviate this risk. The Indenture terminates on the date of acquisition by a bona fide foreclosure. Dkt. 520 (Indenture) at 3.

Citibank loan's risk to the tax credits and fail to make any showing that BFIM's concerns were unfounded. Instead, defendants argue "fairness" to MCAP II, alleging that (1) MCAP II had made less money on the investment in the Project than did BFIM; (2) a representative of BFIM, William Haynsworth, had told Corey that they would approve an "institutional loan on standard terms" several years earlier; (3) Haynsworth admitted that Corey was surprised by the escrow demand; (4) individuals at BFIM deemed the escrow demand "aggressive";[14] (5) the escrow demand was not justified by the minimal risk; (6) ILP refused to defer the issue to arbitration or a lawsuit; and (7) ILP refused to consent to withdrawals for capital improvements.[15] None of these arguments materially bear on ILP's reasonableness.

MCAP II's return on its investment has no bearing on ILP's reasonableness in protecting its investment. It is undisputed that the loan put ILP's tax credits at risk. Moreover, Haynsworth's prior statements regarding institutional financing are irrelevant. The Partnership agreement specifically bars oral modifications. *See* Dkt. 411 (Partnership Agreement) at 83. Haynsworth's statements did not waive ILP's right to reasonably withhold its consent.[16] Then too, Haynsworth's statements three years prior to negotiating the Citibank loan are insufficient to

[14] Defendants argue that the spreadsheet BFIM offered to justify the escrow amount had an error, but fail to describe the nature of the error or provide any evidentiary support as to how the alleged error affected the request's reasonableness.

[15] Defendants contend that ILP conditioned consent on allegedly nonexistent capital plans, but again provide no evidentiary support that the request was unreasonable or that they did not understand ILP's request. To the contrary, ILP appropriately invoked MCAP II's prior promises to allocate other funds to pay for repairs and improvements when MCAP II later sought Citibank funds—borrowed with interest and secured by the Project—to perform the same work. Dkt. 439 (Gladstone Aff.) at 19-20 (11/27/2012 O'Neill email to Donley).

[16] Defendants do not argue that Haynsworth orally contracted on BFIM's behalf; their fraud claim on a similar theory was already dismissed. *See* Dkt. 531 (9/3/2015 Oral Arg. Tr.) at 19-22.

create a triable issue of fact that in 2012, ILP's escrow demand was unreasonable. Corey's surprise at BFIM's request for a Section 8 Escrow, did not make it unreasonable.

Nor did the fact that individuals at BFIM termed the Section 8 Escrow "aggressive" create a triable issue of fact as to its reasonableness. Defendants cite an email by Haynsworth describing the calculations supporting a $2 million Section 8 Escrow as "somewhat aggressive"; it discusses the possibility of $1.225 million as an "fall back." Dkt. 511 (9/27/2012 Haynsworth email) at 1. This is not evidence that ILP unreasonably insisted on $2 million.

While defendants emphasize the remote nature of the risk that plaintiffs sought to mitigate, they do not dispute the existence of that risk or that mitigation of such a risk, ***despite*** its remote nature, is industry standard. Dkt. 439 (Gladstone Aff.) ¶ 24; Dkt. 442 (Smith Expert Rpt.) at 9. Compliance with an industry standard is not unreasonable.

Additionally, ILP's refusal to contract itself into arbitration or a lawsuit, with accompanying risk and expenditures, is not unreasonable. Finally, ILP's refusal to consent to withdrawals from escrow for capital improvements was reasonable since it would affect availability of funds for their intended purpose. The record supports ILP's assertion to defendants that it had expected capital improvements to have been funded from the proceeds of two prior loans, including the AFAH loan. *See* Dkt. 439 (Gladstone Aff.) at 19-20 (11/27/2012 O'Neill email to Donley). Defendants leave ILP's concern unaddressed, thereby, raising no triable issue of fact as to reasonableness. Summary judgment is granted as to the First Counterclaim.

C. Breach of Fiduciary Duty against MCAP II and Corey (Cause of Action II) and Aiding and Abetting Breach of Fiduciary Duty against Corey (Cause of Action III)

Plaintiffs move for partial summary judgment on Cause of Action II, which alleges that Corey and MCAP II breached fiduciary duties to the Partnership by: (1) using AFAH Loan proceeds to pay $693,660 of MCAP II Note principal and $509,923 in operating expense loans (the Accelerated Payments) rather than pay for Project repairs, as they had stated; (2) intentionally defaulting on the Consolidated Note; (3) intentionally causing McDonald to file the mechanic's lien; and (4) paying AFAH in lieu of paying McDonald. MCAP II and Corey move for summary judgment on Causes of Action II and III (aiding and abetting). Plaintiffs are entitled to summary judgment on all four assertions.

Under New York law, elements of a claim for breach of fiduciary duty require "(1) the existence of a fiduciary duty; (2) breach of that duty; (3) and a showing that the breach was a substantial factor in causing an identifiable loss." *People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (2008).[17] Pursuant to the "internal affairs" doctrine, Delaware law defines the scope of duties that MCAP II and Corey owed to the Partnership in controlling MCAP GP. *See Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422, 422 (1st Dept 2014). Under Delaware law, "the general partner of a limited partnership owes direct fiduciary duties to the partnership ...." *Wallace v Wood*, 752 A2d 1175, 1180 (Del Ch 1999); *see Lake Treasure Holdings, Ltd. v Foundry Hill HP LLC*, 2014 WL 5192719, at *10 (Del Ch 2014). "Officers, affiliates and parents

[17] Damages are not an element of breach of fiduciary duty under Delaware law. *Beard Research, Inc. v Kates*, 8 A3d 573, 601 (Del Ch 2010), *aff'd sub nom. ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 (Del 2010). The parties do not address this discrepancy; defendants contend, and plaintiffs do not dispute, that Cause of Action II requires actual damages.

of a general partner[] may owe fiduciary duties to limited partners if those entities control the partnership's property." *Wallace*, 752 A.2d at 1178 (emphasis removed).

As MCAP GP affiliates that controlled Partnership property, MCAP II and Corey owed fiduciary duties to the Partnership in the disposition of that property. *See Wallace v Wood*, 752 A2d at 1178; *MMA Meadows at Green Tree, LLC v Millrun Apartments, LLC*, 130 AD3d 529, 531 (1st Dept. 2015); *Walnut Housing*, 136 AD3d at 405. MCAP II and Corey's duty of loyalty included a duty to refrain from using MCAP GP's control over the Partnership's assets to advantage MCAP II and Corey at the Partnership's expense. *See Wallace*, 752 A2d at 1180. MCAP II and Corey's fiduciary duties also included "a duty of care to the partnership … in the conduct … of the partnership business or affairs" to "refrain[] from engaging in grossly negligent or reckless conduct, [or] intentional misconduct." 6 Del. C. §§ 15-404(c); *see also In re Boston Celtics Ltd. P'ship Shareholders Litig.*, No. C.A. 16511, 1999 WL 641902, at *4 (Del Ch Aug. 6, 1999) ("[T]he directors of a corporate General Partner who control the partnership … have the fiduciary duty to manage the partnership in the partnership's interests ….").

Defendants argue that Corey and MCAP II had no obligation to subordinate the interests of the Partnership's creditors—namely, MCAP II, AFAH, and McDonald—to the interests of the Partnership and the limited partners due to the Partnership's alleged insolvency. Setting aside any issues of fact in proving the Partnership's insolvency and its cause, defendants fail to support their proposition with any apposite case law. As discussed in the related decision in *MMA Meadows*, the *Gheewalla* case cited by defendants held creditors could assert only derivative, not direct, claims against the directors for breach of fiduciary duties owed ***to the insolvent corporation***. *N. Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 101-02 (Del 2007). Despite insolvency, directors still "have a fiduciary duty to exercise their business

judgment in the best interest of the insolvent corporation." *Id.* at 103. Defendants cite no authority excusing a breach of duty owed to an insolvent corporate entity.

Defendants admit the Accelerated Payments were made from AFAH loan proceeds, proceeds which were supposed to be used to repair and upkeep the Project. *See* JS ¶¶ 21-22. They do not dispute Corey and MCAP II's role, nor do they dispute that the Accelerated Payments were made for MCAP II's benefit against Partnership interests.[18] The Accelerated Payments, accordingly, breached MCAP II and Corey's fiduciary duty of loyalty to refrain from controlling Partnership funds and the Project to advantage MCAP II and Corey at the Partnership's expense. *See Wallace*, 752 A2d at 1180.

Defendants, further, do not dispute Corey's role in filing the McDonald Lien. Plaintiffs present evidence that Corey caused another private equity fund he managed, MCAP IV, to enter a side agreement with McDonald to "loan" bill payments in exchange for McDonald pursing judgment on liens against the Project, the proceeds of which McDonald would use to repay the "loan". *See* Dkt. 438 (Early Exs.) at 777 (11/16/2012 Corey letter to McDonald); *id.* at 810 (1/11/2013 emails between Corey and McDonald). Despite defendants' attempted spin—that this undisputed arrangement simply preserved "a positive relationship" with MCAP affiliates—Corey clearly harmed the Partnership by instructing McDonald to file the lien, thereby breaching his fiduciary duty of care[19] in conducting Partnership affairs, which included procurement of and

[18] Defendants' argument that "bringing the MCAP II Note current facilitated the pursuit of permanent financing" and "ended the further accumulation of default interest" is irrelevant, since the Accelerated Payments, not the payment of presently due interest on the MCAP II Note, breached their fiduciary duties to the Partnership.

[19] That Corey did so to advantage MCAP IV (by repayment of the "loan") at the Partnership's expense also breached his fiduciary duty of loyalty. *See Wallace*, 752 A2d at 1180.

payment for construction services. *See* 6 Del. C. §§ 15-404(c); *In re Boston Celtics Ltd. P'ship Shareholders Litig.*, No. C.A. 16511, 1999 WL 641902, at *4 (Del Ch Aug. 6, 1999).

In addition, MCAP II and Corey breached their fiduciary duty to the Partnership by paying the Consolidated Note debt service from Partnership funds rather than paying McDonald. Plaintiffs present evidence that MCAP II paid AFAH out of Partnership funds—even after the Notice of Default—because MCAP II had effectively guaranteed the payments to AFAH. *See* Dkt. 564 (Johnson 10/27/2015 Dep.) 100:17-101:15. MCAP II and Corey do not dispute that they caused the Partnership to pay MCAP II on the Consolidated Note instead of paying McDonald, that those payments furthered MCAP II's interests[20] rather than Partnership's, and that defendants knew nonpayment of the debts to McDonald was riskier to the Partnership than nonpayment of the Consolidated Note. The AFAH payments, accordingly, breached MCAP II and Corey's fiduciary duty of loyalty not to use MCAP GP's control over Partnership funds to advantage themselves at the Partnership's expense. *See Wallace*, 752 A2d at 1180.

Moreover, MCAP II's notice of default and acceleration breached Corey and MCAP II's fiduciary duties.[21] In June 2012, one of Corey's associates at MCAP Advisers LLC,[22] CFO Jay Johnson, represented to ILP that MCAP II would "keep the loan current by additional advances." Dkt. 444 (Curran Exs.) at 193 (June 7, 2012 email from Jay Johnson to Melissa Curran (an asset

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[20] Defendants congratulate themselves for MCAP II foregoing debt service payments after the declared default, but do not deny the benefit to MCAP II in making payments to AFAH.

[21] Just because they managed MCAP GP, MCAP II and Corey did not waive their rights to also advance MCAP II's interests as a creditor. *See* Del. C. § 15-404 ("A partner may lend money to … the partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner."). These qualified rights did not, however, absolve them of their fiduciary duties.

[22] Plaintiffs aver, and defendants do not contest, that MCAP Advisers LLC has "ultimately controlled" MCAP II since 2011. *See* Dkt. 446 at 10 n. 6.

manager at BFIM) and Corey).[23] Defendants do not dispute that MCAP II, thus, was bound to make advances to keep the Consolidated Note current, or that Corey caused MCAP II to renege. By refusing to enforce MCAP II's promise—a Partnership asset—to make advances to cover Consolidated Note debt service, and by acting in MCAP II's interest in doing so, MCAP II and Corey breached their fiduciary duties of care and loyalty to the Partnership.

Plaintiffs allege the Partnership suffered $1,203,583 (the Accelerated Payments' amount) in damages due to the breaches of fiduciary duty. Defendants argue that plaintiffs suffered no damages on this or any claim in the case. Defendants base their argument on the opinion of plaintiffs' expert, Joseph B. Nelson, that had the AFAH loans not been used to make the Accelerated Payments, the July 2013 default would have been delayed until late 2014. According to defendants' logic, since the Partnership would have eventually defaulted on the Consolidated Note, plaintiffs suffered no damages. Defendants also argue that the Partnership suffered only unrealized losses, in the form of interest that has not been paid.[24]

The court disagrees. While issues of material fact remain as to the ***amount*** of damages resulting from the breaches—indeed, plaintiffs have not demonstrated the Partnership was damaged in the full amount of the Accelerated Payments—Corey's and MCAP II's breaches of fiduciary duty were a substantial factor in an identifiable Partnership loss: being prematurely deprived of funds, which at minimum comprises direct damages of the time value of the money

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[23] Plaintiffs assert MCAP II thereby induced ILP's consent to the Consolidated Note, and that this representation comprised a binding promise by MCAP II to make advances and to refrain from declaring a default on the Consolidated Note. Dkt. 446 (Pls. Br.) at 25.

[24] Defendants point to BFIM's recoupment of its initial investment amounts, mainly through tax credits. Defendants cite no authority for the proposition that the relative success of one investor in a corporate entity absolves the less successful investor of responsibility for harming the entity and other participants to whom they owed fiduciary duties.

(i.e. lost interest).[25] Likewise, the breaches harmed the Partnership in the amount of its legal fees and costs incurred in defending against the McDonald Lien and AFAH Actions.[26] *See Ramada Inns, Inc. v Dow Jones & Co.*, 543 A2d 313, 331 (Del. Super. Ct. 1987). The court grants plaintiff summary judgment on Cause of Action II as to liability only, and denies defendants' motion for summary judgment as to Causes of Action II and III.[27]

D. Breach of Contract against MCAP GP (Cause of Action V)

Plaintiffs move for summary judgment on Cause of Action V, which alleges that MCAP GP breached the Partnership Agreement by (1) misapplying Partnership funds to prematurely repay $509,923 of Operating Expense Loans in violation of § 6.9 and Article 10; (2) increasing the amount of the Consolidated Note without ILP's consent as required by § 6.1(B)(vii); (3) violating the warranties in § 6.5(iii) by ceasing to pay and causing a default on the Consolidated Note; (4) violating the warranties in § 6.5(ii) and (xiv) as a result of the McDonald Lien; and (5) contesting its removal as GP and refusing to turn over books and records in violation of § 7.7.

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[25] The court does not reach the issue of whether default interest on the Consolidated Note reflects actual damages ripe for recovery. A third-party (AFAH) presently claims default interest on the Consolidated Note from the Partnership in the AFAH Action. Plaintiffs cite to a treatise describing that direct damages may include "unrealized or paper losses" and to an unpublished Ninth Circuit case, *Gilbert v EMG Advisors, Inc.*, 172 F.3d 876, 1999 WL 160382 (9th Cir. 1999), likewise discussing computation of direct damages for as-yet unrealized losses in the value of unsold securities. Neither cited authority applies to default interest on the Consolidated Note, representing amounts claimed by a third party that remain unpaid and that might never be paid. Defendants fail to apply the authority they cite in *MMA Meadows* to the present facts. The court will not separately consider it here.

[26] Plaintiffs' reasonable attorneys' fees and costs incurred in the McDonald and AFAH actions are also recoverable under § 6.6(E) of the Partnership Agreement, discussed below with respect to Count IX, and may not be double-recovered.

[27] Defendants' argument as to Cause of Action III is limited to the idea that creditor rights overrode Corey's duties to the Partnership, and fails for the same reasons as Cause of Action II.

Defendants' oppose plaintiffs' motion, arguing: (1) MCAP GP repaid $509,923 of "GP operating and temporary loans" from the AFAH proceeds in accordance with § 10.5(E) of the Partnership Agreement; (2) ILP consented to increase the amount of the Consolidated Note; (3) plaintiffs caused the breached warranties by failing to consent to the Citibank loan; (4) MCAP GP did not breach § 6.5(ii) because the AFAH and McDonald actions were filed only after MCAP GP's removal; and (5) MCAP properly contested the October 9, 2013 removal notice. Defendants additionally argue in favor of their own summary judgment motion, contending that plaintiffs cannot show that damages resulted from the alleged breaches.

"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." *Interim Healthcare, Inc. v Spherion Corp.*, 884 A2d 513, 548 (Del Super Ct 2005), *aff'd*, 886 A2d 1278 (Del 2005). "Even if compensatory damages cannot be or have not been demonstrated, the breach of a-contractual obligation often warrants an award of nominal damages." *Ivize of Milwaukee, LLC v Compex Litig. Support, LLC*, C.A. No. 3158-VCL, 2009 WL 1111179, at *12 (Del Ch Apr. 27, 2009); *see also Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 (1993) (nominal damages always available in breach of contract action). As the parties agree that the Partnership Agreement is valid and enforceable, to prevail on its motion as to each contractual obligation, plaintiffs must demonstrate that MCAP GP committed a breach and that the breach damaged plaintiffs.[28] As

[28] Defendants argue broadly that the Partnership and limited partners cannot maintain a breach of contract cause of action because they have not established that they performed their obligations under the Partnership Agreement. Performance is not an element of breach of contract under Delaware law. As discussed herein, while a material breach by one party may excuse performance by the other, defendants have failed to raise an issue of material fact as to a material breach by SLP, ILP, or the Partnership.

discussed below, plaintiffs meet their prima facie burden, which defendants fail to rebut, on each alleged breach in plaintiffs' motion.

i. Applying AFAH Loan Proceeds to GP Operating and Temporary Loans

Plaintiffs move for summary judgment on their claim that Walnut GP's allocation of AFAH loan funds breached § 6.9(A) and Article X of the Partnership Agreement. The parties stipulated that Corey, on behalf of MCAP GP, used $509,923 of AFAH Loan proceeds to repay "GP operating and temporary loans." JS ¶ 22. Plaintiffs argue that the amount reflected "Operating Expense Loans" defined in the Partnership Agreement, that MCAP GP should not have repaid them from AFAH loan proceeds pursuant to Section 6.9A and Article 10 of the Partnership Agreement, and that the Partnership was damaged by $509,923.

The Partnership Agreement defines "Operating Expense Loan" as "a loan to the Partnership pursuant to Section 6.9A … which is repayable without interest and only as provided in Article X." Dkt. 411 at 19. Section 6.9(A) of the Partnership Agreement, which sets forth the general partners' obligations to provide for "Operating Expenses"[29] of the Partnership, states that "[a]mounts furnished to fund Operating Expenses incurred on or after the Refinancing Date shall constitute Operating Expense Loans." Dkt. 411 at 52. Section 6.9(A) states that "Operating

[29] "Operating Expenses" are defined, depending on whether or not the "Development Obligation Date" previously elapsed (which the parties have not briefed), as uncapitalized "operating expenses of the Project … which are allocable … to apartment units for which all requisite approvals for occupancy have been obtained" including "real estate taxes[,] required debt service[,] mortgage insurance premiums [for] the Mortgage Loans (to the extent such operating expenses are not funded out of Designated Proceeds)" or alternatively, "all the costs and expenses of any type incurred incidental to the ownership and operation of the Project," including "taxes, capital improvements … mortgage and bond insurance premiums[,] … cost of operations, debt service, maintenance and repairs, and the funding of any reserves required to be maintained by any Lender or Governmental Agency or pursuant to this Agreement." Dkt. 411 at 19. The definition excludes repayment of Operating Expense Loans under Section 6.9A and distributions or payments to Partners pursuant to Article X. *Id.*

Expense Loans shall not bear interest and be [sic] repayable only as provided in Article X." *Id.* Article X, in turn, states that "payment of any outstanding Operating Expense Loans" may be made only from "Cash Flow" (defined as "the excess of Cash Receipts over Operating Expenses," Dkt. 411 at 10) or "Capital Transaction Proceeds", within a specified priority hierarchy. Dkt. 411 at 65-67. The definition of "Capital Transaction" and "Cash Receipts" specifically exclude loan proceeds. Dkt. 411 at 10.

Defendants merely speculate that the "GP operating and temporary loans" might have been used for "Development Costs" pursuant to § 10.5(E) of the Partnership Agreement. Dkt. 501 at 20-21, citing Dkt. 411 (Partnership Agreement) at 72 ("[F]unds of the Partnership constituting Designated Proceeds shall be applied to pay Development Costs … ."). Such speculation is insufficient to rebut plaintiffs' prima facie case. *See Zuckerman*, 49 NY2d at 562.

As discussed above with respect to Cause of Action II, issues of fact remain as to the amount, but not the existence, of damages caused by the Accelerated Payments (including the GP operating and temporary loans). Summary judgment on liability is granted to plaintiffs on MCAP GP's breach of § 6.9A and Article 10 of the Partnership Agreement.

ii. Increase on Consolidated Note Without ILP's Consent

Plaintiffs allege that MCAP GP increased the amount of the Consolidated Note by $699,641 without ILP's consent in breach of § 6.1(B)(vii) of the Partnership Agreement. Defendants argue MCAP GP did not need ILP's consent for the admitted increase because of the previously executed Mortgage Consent. Section 6.1(B)(vii) of the Partnership Agreement states:

> ***The General Partners shall not have any authority to do any of the following acts without the Consent of the Investor Limited Partner*** and any Requisite Approvals: … (vi) ***to*** obtain, ***increase***, refinance or materially modify ***any Mortgage Loan*** after

> Investment Closing[30] except as otherwise contemplated in this Agreement, or to sell or convey the Property or any substantial portion thereof, except as provided in Article IX ....

Dkt. 411 at 38-39 (footnotes and emphasis added). Article IX, § 9.2 of the Partnership Agreement also requires "Consent of the Investor Limited Partner" to increase, modify, obtain, or refinance any loan secured by the Project. Dkt. 411 (Partnership Agreement) at 65. Consent of the Investor Limited Partner is defined as "the prior written consent or approval of the Investor Limited Partner, ... such consent not to be unreasonably withheld or delayed." *Id.* at 11.

Defendants argue that by consenting to the "open-end" Mortgage, ILP consented to "future advances" from MCAP II to the Partnership, including the $699,641 at issue. Section 6.7 (titled "Future Advances") of the Mortgage states, in relevant part:

> (a) The indebtedness secured hereby is to be advanced in connection with the construction of certain improvements upon the Mortgaged Premises. It is understood and agreed that ***this Mortgage covers present and future advances***, in the aggregate amount of the obligation secured hereby, made by Mortgagee to or for the benefit of Mortgagor and that the lien of such future advances shall relate back to the date of this Mortgage.
>
> (b) This Mortgage shall constitute an "Open-End Mortgage" as such term is defined in 42 Pa.C.S. §8 1 43(f), and ***shall secure future advances and shall have lien priority*** in accordance with the provisions of 42 Pa. C. S. § §814 3 and 8144. ...

Dkt. 97 (Mortgage) at 34 (emphasis added). Section 6.7 is a "relation back" clause entitling the mortgagee (MCAP II) to lien priority and security for "future advances" to the mortgagor (Project Owner). It does not specify the amount or timing of any such "future advances". The Consolidated Note sets forth the Project Owner's principal indebtedness to MCAP II as $12,188,574; "or so much ***thereof*** as may be advanced by [MCAP II] from time to time

[30] *See* Dkt. 411 at 17 (defining "Investment Closing" as the date of delivery of the Partnership Agreement).

hereunder." *See* Dkt. 416 (emphasis added). As the Partnership Agreement requires ILP's consent to increase the amount of a mortgage loan, the terms of the written Mortgage Consent govern whether ILP gave prospective consent to any such "future advances" by way of consenting to Mortgage and Consolidated Note.

The Mortgage Consent does not authorize "future advances". Under its terms, ILP "consent[ed] to and authorize[d] the Partnership to consent to and authorize [Project Owner] to execute and deliver" the Consolidated Note "in the principal amount of $12,188,574.00 made by Project Owner in favor of [MCAP II] … and that certain [Mortgage] given by Project Owner to MCAP [II] as security for the [Consolidated] Note." Dkt. 536 (Mortgage Consent) at 1. ILP's consent was ***not*** to an open-ended loan, but instead to security for the Consolidated Note. The Mortgage Consent additionally stated "the Consent of the Investor Limited Partner …, shall be required in connection with any ***proposed amendment to the [Consolidated] Note*** …." Far from consenting to "future advances" irrespective of the amount, the Mortgage Consent expressly stated the Consolidated Note could not be amended without ILP's consent.[31] Besides, the Mortgage Consent states that "the Investor Limited Partner has not waived any of its rights under the Partnership Agreement." Dkt. 536 (Mortgage Consent) at 1. Consequently, ILP did not waive its right to reasonably refuse consent to increase the amount of any mortgage loan. Put differently, while ILP consented to Project Owner executing an open-end mortgage that would

[31] Defendants did not attempt to amend the Consolidated Note when they advanced additional funds under the Mortgage—indeed, they had no authority to do so. *See* Dkt. 536 (Mortgage Consent) at 1 ("The foregoing consent … is expressly conditioned on the agreement of the Project Owner, the Partnership and the Partnership's General Partner … that ***any amendment to the MCAP Note and/or the MCAP Mortgage that has not been consented to by the Investor Limited Partner shall be deemed automatically void and of no force or effect.***").

relate back and secure any future advances ***made under the mortgage***, it did not consent to the Partnership's acceptance of such advances.[32]

Plaintiffs allege that the improper increase damaged the Partnership in the amount of $699,641, plus any accrued interest. No triable issue of fact prevents a finding that the improper advances in breach of § 6.1(B)(vii) damaged the Partnership at least by way of a decline in the net value of its assets due to the increase in indebtedness secured by the Project, but triable issues of fact remain as to the amount. Hence, summary judgment on liability is granted to the Partnership on MCAP GP's breach of § 6.1(B)(vii) of the Partnership Agreement.

iii. Default on the Consolidated Note

Plaintiffs also move for partial summary judgment on MCAP GP's breach of the Partnership Agreement due to the default on the Consolidated Note.[33] In § 6.5(iii), MCAP GP continually warranted to ILP that "[n]o default by … the Partnership, in any material respect has occurred or is continuing … under any of the Project Documents." Dkt. 411 (Partnership Agreement) at 45-46. The Mortgage Consent defined the Consolidated Note as a "Project Document" under the Partnership Agreement. Dkt. 536 (Mortgage Consent) at 2. MCAP II declared a default on the Consolidated Note on July 17, 2013. Dkt. 98 (Notice of Default).

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[32] Defendants argue that plaintiffs present a Catch-22: MCAP II promised funds for Project repairs, but was prohibited from doing so. This is misleading at best. Defendants could have performed their general partner (and guarantor) obligations, for example, making interest-free, unsecured Operating Expense Loans through MCAP GP pursuant to § 6.9(A) of the Partnership Agreement, or by seeking ILP's consent to a secured, interest-bearing advance.

[33] While plaintiffs also argue for breach of § 6.5(ii), the AFAH Action was not "pending before any court" until after MCAP GP was removed as general partner, arguably after the life of MCAP GP's warranty. Dkt. 411 (Partnership Agreement) at 45. The heading to the relevant portion of plaintiffs' opening brief identifies §§ 6.5(xvi) and (xvii) as breached, but provides no argument. The court makes no ruling on those subsections.

Defendants do not dispute that the default on the Consolidated Note was a "default by … the Partnership, in a[] material respect" under a "Project Document" within the meaning of § 6.5(iii). Instead, they argue plaintiffs caused the default by refusing to approve the Citibank loan.[34] Material breach by one party to a contract excuses the counterparty's performance. *See Grace v Nappa*, 46 NY2d 560, 567 (1979); *accord BioLife Sols., Inc. v Endocare, Inc.*, 838 A2d 268, 278 (Del Ch 2003). As discussed above, however, ILP did not unreasonably withhold consent to the Citibank loan.

Similarly, as with MCAP GP's other breaches of the Partnership Agreement, there is no triable issue of fact that plaintiffs accrued damages from the default on the Consolidated Note, but triable issues remain as to the amount of such damages.[35] Summary judgment as to liability is granted to ILP on MCAP GP's breach of contract due to the default on the Consolidated Note, with damages to be determined at trial.

iv. Breach of Warranties Due to McDonald Lien

Plaintiffs move for summary judgment alleging that the filing of the McDonald Lien breached MCAP GP's warranties set forth in §§ 6.5(ii) and (xiv) of the Partnership Agreement. Section 6.5(xiv) warrants that, with certain exemptions not relevant here, "[t]he Partnership owns

[34] Defendants invoke the frustration or prevention doctrine articulated in *ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484 (2006), but the cited doctrine relates to a claim for specific performance, not damages for breach of contract. Typically, to obtain specific performance from a defendant, one must show plaintiff was "ready, willing and able to fulfill its contractual obligations"; the doctrine excuses that requirement if defendant frustrated plaintiff's ability to do so by causing failure of a condition precedent to plaintiff's performance. *Id.* at 490-91.

[35] As MCAP GP made the warranty of § 6.5(iii) to ILP, ILP is entitled to an award of damages reflecting at least the decline in value of their ownership interest resulting from this breach.

the fee simple interest in the Property and has good and marketable title thereto, free and clear of any liens, charges or encumbrances." Dkt. 411 (Partnership Agreement) at 46.[36]

Defendants do not dispute that the McDonald Lien breached § 6.5(xiv), but argue that BFIM GP breached the Partnership Agreement by failing to pay McDonald after taking over as general partner. Defendants fail to identify a material breach ***by ILP*** that would prevent ILP's recovery on this claim or provide any argument as to why BFIM GP's purported breach should be attributed to ILP.

Nor do they claim that ILP has not accrued damages due to the McDonald Lien. At a minimum, ILP has suffered a reduction in the value of its ownership interest in the Partnership caused by the cloud on title and legal fees resulting from the pending McDonald Action,[37] which is still ongoing.[38] As triable issues of fact remain as to the amount of ILP's damages caused by this breach, summary judgment to ILP on MCAP GP's breach of contract due to the McDonald Lien as to liability only, with damages to be determined at trial.

v. Contesting Removal and Refusing to Surrender Books and Records

Plaintiffs move for summary judgment on MCAP GP's breach of the Partnership Agreement by its refusal to surrender books and records upon removal. Defendants oppose, alleging they properly contested removal. Partnership Agreement § 7.7(L) states as follows:

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[36] Section 6.5(ii) states "[n]o litigation or proceeding against the Partnership, any General Partner, Guarantor or the Developer, nor any other litigation or proceeding directly affecting the Project, is pending before any court, administrative agency or other Governmental Agency which would, if adversely determined, have a material adverse effect on the Partnership." Dkt. 411 (Partnership Agreement) at 45-46. The court does not reach § 6.5(ii) because the McDonald Lien—which led to the filing of the McDonald Action—breached § 6.5(xiv).

[37] ILP may not double recover any amounts recouped by the Partnership on the indemnification claims discussed below.

[38] Plaintiffs prevailed on summary judgment in the McDonald Action, but McDonald has filed a notice of appeal. *See* Dkt. 572 (letter from plaintiffs attaching decision and notice of appeal).

> L. In the event that a General Partner is removed pursuant to the provisions of this Section 7.7, voluntarily Retires in violation of this Agreement or involuntarily Retires, such removed or Retired General Partner ***shall immediately deliver to the Special Limited Partner all books, records, tax and financial information*** relating to the Partnership and the Property that are in the possession or under the control of such General Partner or any of its Affiliates. Such General Partner agrees that ***if it fails to comply*** with the provisions of this Section 7.7L, ***the Limited Partners may enforce such provisions by specific performance***, and no portion of the Withdrawal Purchase Price shall be payable unless the provisions of this Section are ***fully and promptly complied with***.

Dkt. 411 at 60 (emphasis added).

The Partnership Agreement gives SLP "the right to remove and replace the General Partner in accordance with the provisions of this Section 7.7 if a Material Default occurs and is not cured within the time period set forth in this Section 7.7." Dkt. 411 at 56. "Material Default" is defined to include:

> (i) a material breach by any General Partner (or any of its Affiliates) of any of its representations or warranties contained herein or in the performance of any of its obligations under this Agreement or any Related Agreement which continues for thirty (30) days after the occurrence thereof, and which could have a material adverse impact upon the Partnership, the Investor Limited Partner or the Project; ...
>
> (ii) ... a material breach by the Partnership or any General Partner under any Project Document or other material agreement or document affecting the Partnership or the Project which has or may have a material adverse effect on the Partnership, the Investor Limited Partner or the Project and which continues for thirty (30) days after the occurrence thereof; ...
>
> (v) gross negligence, fraud, willful misconduct, misappropriation of Partnership funds, or a breach of fiduciary duty by a General Partner or any Affiliate of a General Partner providing services to or in connection with the Partnership or the Project.

Dkt. 411 (Partnership Agreement) at 56-57.

The thirty-day grace period is extended to 90 days while the general partner is working in good faith to cure the default. *Id.* Section 7.7(C) of the Partnership Agreement describes the removal procedure as follows:

> C. In the event that the Special Limited Partner determines to remove any General Partner pursuant to the provisions of this Section 7.7, the Special Limited Partner ***shall notify the General Partner in writing of the Material Default that is the cause for the removal of the General Partner*** ... . If the General Partner fails to cure within the specified time period, or if no cure right is afforded under the terms hereof, the removal of the General Partner shall be deemed to be effective as of the expiration of any applicable cure period described above; otherwise, such removal shall be effective upon the conclusion of the applicable cure period without a cure of such Material Default reasonably acceptable to the Investor Limited Partner. ***The General Partner shall have no right to cure any Material Default described in clause (v) of Section 7.7B above***. ...

Dkt. 411 (Partnership Agreement) at 57 (emphasis added). [39]

Defendants assert that (1) plaintiffs' first notice of removal asserted only fraud and gross negligence; (2) MCAP GP rightfully contested that removal because the allegations of fraud and gross negligence are unfounded; and (3) plaintiffs' failure to retract the initial notice of removal made any future notices inoperative. These arguments fail.

The October 9, 2013 letter removal notice asserted gross negligence and breach of fiduciary duty, not fraud:

> Partnership revenues are not being properly applied to Partnership expenses. This is, at minimum, gross negligence and breach of fiduciary duty in your capacity as a General Partner and, in accordance with Section 7.7B(v) of the Partnership Agreement, constitutes a Material Default under the terms of thereof ...

[39] The omitted portions of Section 7.7(C) specify time periods ranging from 20 to 60 business days to cure a Material Default.

Dkt. 412 at 2. The letter cites the Notice of Default, Notice of Acceleration, and the McDonald Lien as proof that revenues were not being properly applied to expenses. As discussed above, MCAP GP improperly used AFAH loan funds to repay the operating loans to its own managing member, MCAP II, in contravention of the Partnership Agreement. In so doing, defendants admit that MCAP GP acted in MCAP II's interest—not the Partnership's. *See* Dkt. 501 (Defs.' Opp. Br.) at 23 ("MCAP GP properly addressed the interests of the Partnership's largest creditor, MCAP II."). Prioritizing MCAP II over the Partnership's interest in paying for repairs and satisfying interest-bearing debts[40] breached MCAP GP's fiduciary duties to the Partnership.[41] The October 9th letter, thus, was a valid removal.

As the October 9th removal was immediately effective, with no allotted grace period to cure,[42] MCAP GP breached the contract by failing to "immediately deliver to the Special Limited Partner all books, records, tax and financial information" in accordance with Section 7.7(L). MCAP GP had no contractual right to contest a proper removal, even for a good faith (but incorrect) belief of improper removal. On the contrary, § 7.7(M) of the Partnership Agreement expressly awards to the prevailing party costs and expenses to enforce or contest a

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[40] Defendants do not refute plaintiffs' expert's conclusion the AFAH loan funds would have been available to pay debt service and stave off default on the interest-bearing Consolidated Note.

[41] MCAP II and Corey likewise breached their fiduciary duties in providing services to the Partnership as per § 7.7(B)(v). This finding is not at odds with the Appellate Division's determination that MCAP II and Corey were not "Designated Affiliates" because they were not alleged to have provided services ***on behalf of*** the Partnership. *See Walnut Housing Associates 2003 L.P. v MCAP Walnut Housing LLC*, 136 AD3d 403, 404 (1st Dept 2016), citing *MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 (1st Dept 2015).

[42] Assuming, arguendo, that the October 9 notice was invalid, SLP notified defendants on October 15, 2013, of numerous additional grounds for removal, including the breaches of contract discussed above. Dkt. 438 (Early Exs.) at 871-74 (letter). Those breaches, of which MCAP GP was duly notified, harmed the Partnership, and MCAP GP does not claim to have cured them within any allotted grace period. They too permitted removal.

removal. *See* Dkt. 411 (Partnership Agreement) at 60 ("M. If a General Partner fails to comply … the non-prevailing party shall pay any costs and expenses incurred by the other party in enforcing their rights in this Section 7.7 …."). Nor does section 7.7 exempt MCAP GP from damages it caused by contesting its proper removal. MCAP GP is therefore liable for plaintiffs' costs and expenses (including reasonable attorneys' fees) caused thereby, including costs and expenses incurred in moving for a TRO, preliminary injunction, and summary judgment on plaintiffs' declaratory judgment claim and plaintiffs' breach of contract claim as to Partnership Agreement § 7.7. Summary judgment is therefore granted as to MCAP GP's breach of the Partnership Agreement for contesting removal, and reasonable attorneys' fees and other resultant costs will be determined at trial or inquest.

E. Declaratory Judgment of Validity of MCAP GP's Removal as General Partner (Cause of Action I)

Plaintiffs' motion for summary judgment on Cause of Action I, which seeks to confirm MCAP GP's removal as general partner, is granted.[43] As discussed above, MCAP GP's removal as general partner by the court was valid and operative on October 9, 2013 due to MCAP GP's breach of its fiduciary duty.[44]

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[43] Fees and costs accruing to plaintiffs under § 7.7(M) in connection with its declaratory judgment claim are addressed in conjunction with MCAP GP's breach of contract, *supra.*

[44] Defendants argue that summary judgment cannot be granted because plaintiffs failed, in accordance with § 7.7(D) of the Partnership Agreement, to pay the general partner's "Withdrawal Purchase Price", purportedly including principal and interest on the Consolidated Note. This argument is wrong. The "Withdrawal Purchase Price" payment is not a prerequisite to removal, but instead an obligation payable (to the extent any amount is due) only ***after*** removal, (Dkt. 411 (Partnership Agreement) at 58-59). In addition: the fees in § 7.7(D) are for "***services performed***," (Dkt. 411 at 58); the cost of any "Adverse Consequences" caused by MCAP GP's malfeasance prior to its removal are deducted from the "Withdrawal Purchase Price," (Dkt. 411 at 57-58); and Defendants forfeited their right to the "Withdrawal Purchase Price" by failing to "fully and promptly" comply with the provisions of § 7.7L upon receipt of the October 9, 2013 Notice of Removal, (Dkt. 411 at 60). Indeed, plaintiffs were forced to sue for relief.

F. Liability Under and Breach of the Guaranty as to MCAP II (Cause of Action VI)

Plaintiffs move for summary judgment on Cause of Action VI. They allege that MCAP II breached and is liable to ILP under the Guaranty for damages caused by MCAP GP's breach of the Partnership Agreement. They argue no material issue of fact exists as to this breach.

Defendants also move for summary judgment on the Guaranty claim, alleging that MCAP II is excused from performing under the Guaranty. Specifically, they contend that MCAP II's Guaranty obligations were subject to ILP "not being in material default of its obligations under the Partnership Agreement" (Dkt. 413 [Guaranty] at 4) and that ILP breached the agreement by unreasonably withholding consent to the Citibank loan. As discussed above, ILP did not unreasonably withhold consent to this loan.

Defendants further assert that ILP was in material default by failing to repay the Consolidated Note upon BFIM GP becoming general partner. Section 4.7 of the Partnership Agreement, states, in relevant part:

> Each General Partner and Limited Partner shall be bound by the terms of this Agreement and the Project Documents. Any incoming General Partner and Limited Partner, as a condition of receiving any Interest, shall agree to be bound by this Agreement and the Project Documents ***to the same extent and on the same terms as the other General Partners and Limited Partners, respectively.***

Dkt. 411 at 29 (emphasis added). Defendants provide no explanation of how § 4.7 obligated ILP to repay or to cause the Partnership to repay the Consolidated Note, to which no limited or general partner was a signatory. Partnership Agreement § 4.5, moreover, states that "[n]o Limited Partner shall be liable for any debts, liabilities, contracts, or obligations of the Partnership." Dkt. 411 at 28. Defendants do not explain how ILP became obligated to pay the

Note by way of BFIM's control over BFIM GP.[45] The Guaranty was contingent on ILP's performance of its ***own*** obligations under the Partnership Agreement, not on the performance of any general partner or the Partnership itself. Defendants fail to raise any triable issue of fact as to ILP's material default.[46]

In addition to guaranteeing MCAP GP's "due and punctual performance" under the Partnership Agreement, MCAP II also covenanted with ILP to (1) maintain an aggregate net worth of not less than $5,000,000; (2) maintain liquid assets of not less than $1,000,000; and (3) provide financial statements on a yearly basis and upon reasonable request. Dkt. 413 (Guaranty) at 2. On the record presented by plaintiffs, MCAP II failed to maintain the minimum liquid net worth and to furnish requested financial information, including for the year 2015. *See* JS ¶¶ 14-16; Dkt. 440 (Nelson Expert Rpt.) at 40-42. Defendants present no evidence to the contrary. Plaintiffs do not argue for actual damages, but do argue that they are entitled to nominal damages for MCAP II's breach. The court agrees;[47] the amount of nominal damages are a trial issue.

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[45] Indeed, the Appellate Division held that MCAP II and Corey could not be liable for breaching the Partnership Agreement, despite controlling MCAP GP. *See Walnut*, 136 AD3d 403 at 404.

[46] As the court finds that MCAP II has not created an issue of triable fact as to ILP's performance under the Partnership Agreement, the court need not reach the issue of whether the "unconditional" nature of the Guaranty, *see* Dkt. 413 (Guaranty) at 2-3, made MCAP II's performance under the Guaranty mandatory regardless of whether ILP was "in material default of its obligations under the Partnership Agreement." *Id.* at 4.

[47] At minimum, MCAP II's impunity in failing to maintain the contracted-for liquidity and financial transparency harmed plaintiffs' negotiating position with defendants and plaintiffs' perceived and actual prospect of recovery on any future legal claims. "Nominal damages are not given as an equivalent for the wrong, but rather merely in recognition of a technical injury and by way of declaring the rights of the plaintiff." *USH Ventures v Glob. Telesystems Grp., Inc.*, 796 A2d 7, 23 (Del Super Ct 2000) (quotation marks omitted); *Ivize of Milwaukee, LLC v Compex Litig. Support, LLC*, C.A. No. 3158-VCL, 2009 WL 1111179, at *12 (Del Ch Apr. 27, 2009). Further, the Guaranty, by its terms, was made "[t]o induce the Investor Limited Partner to

MCAP GP also breached the Partnership Agreement, as discussed above with respect to Cause of Action V. MCAP II, as guarantor, was responsible for any damage to ILP caused by MCAP GP's breaches of the Partnership Agreement. Summary judgment on liability is granted to plaintiffs on Cause of Action VI. Defendants' motion for summary judgment on Cause of Action VI is denied.

G. MCAP GP's Liability to Indemnify Plaintiffs (Cause of Action IX)

Plaintiffs request summary judgment in favor of the Partnership on MCAP GP's obligation to indemnify plaintiffs for legal fees, costs, liabilities, or other losses incurred due to the McDonald Lien and the AFAH Action. They also request ILP's and SLP's legal fees and costs incurred due to the instant action. Defendants oppose, arguing against indemnification for the instant "first-party" action. Defendants further argue that the McDonald and AFAH Actions were filed after MCAP GP was replaced as general partner and due to plaintiffs' own actions.

"Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs." *Mahani v Edix Media Grp., Inc.*, 935 A2d 242, 245 (Del. 2007). A fee-shifting provision in a contract is an exception. *Id.* Absent specific language, a prevailing party is not entitled to attorneys' fees in a first-party action under an indemnification provision. *See Oliver B. Cannon & Son, Inc. v Dorr-Oliver, Inc.*, 394 A2d 1160, 1165 (Del. 1978) (reading indemnity clause as "a kind commonly found in construction contracts and is intended to protect the general contractor (and owner) from suits brought by third parties who are injured by acts of the subcontractor"); *DRR, L.L.C. v Sears, Roebuck & Co.*, 949 F. Supp. 1132,

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acquire an interest in the Partnership." It is eminently fair to declare and recognize that MCAP II breached its promise to provide ILP with bargained-for contractual entitlements as to liquidity and transparency, although the harm may be difficult or impossible to quantify.

1143 (D Del 1996) (holding that indemnification clause of "a kind commonly found in real estate sales contracts" did not provide attorneys' fees in first-party action); *Senior Hous. Capital, LLC v SHP Senior Hous. Fund*, LLC, C.A. No. 4586-CS, 2013 WL 1955012, at *45 (Del Ch May 13, 2013). In fact, "indemnity agreements are presumed ***not*** to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent." *TranSched Sys. Ltd. v Versyss Transit Sols.*, LLC, C.A. No. 07C-08-286WCC, 2012 WL 1415466, at *2 (Del Super Ct Mar. 29, 2012).

Section 6.6(E) of the Partnership Agreement sets forth MCAP GP's contractual responsibility to indemnify the Partnership, ILP, and SLP:

> ***The General Partners shall defend, indemnify and hold harmless the Partnership and the Limited Partners from any*** liability, loss, damage, ***fees, costs and expenses***, judgments or amounts paid in settlement ***incurred by reason of any demands, claims, suits, actions or proceedings arising out of the General Partners'*** or any Designated Affiliate's ***negligence, misconduct, fraud, breach of fiduciary duty or breach of this Agreement***, including without limitation any breach by any General Partner or any Designated Affiliate of any representation, warranty, covenant or agreement set forth in Section 6.5 or elsewhere in this Agreement, ***including all reasonable legal fees and costs incurred in defending against any claim or liability or protecting itself or the Partnership from, or lessening the effect of, any such breach.*** ...

Dkt. 411 at 50 (emphasis added). Section 6.6(F) conditions MCAP GP's responsibility to indemnify ILP (but ***not*** the Partnership itself) on two prerequisites:

> (i) The General Partner shall have received written notice of any demand of the Investor Limited Partner for payment or any potential claim which could give rise to an obligation for indemnification within ninety (90) business days of the Investor Limited Partner's receipt thereof; and
>
> (ii) The General Partner shall be given the opportunity to defend (with counsel approved by the Special Limited Partner, which approval shall not be unreasonably withheld, conditioned or delayed) any claim or action

> which may give rise to the liability for which indemnification may be sought.

Dkt. 411 at 51 (emphasis added).

Under Delaware law and Partnership Agreement § 6.6(E), defendants are not required to indemnify plaintiffs in the present action. The section is written as a general indemnification provision, of a kind commonly found in various contracts and designed to indemnify plaintiffs for claims by or against third parties resulting from the indemnitor's breach of contract or other bad behavior, rather than to shift fees in an action brought between the parties to the contract. In keeping with this interpretation, § 6.6(F) gives the general partner, in subsection (i), the right to written notice of demands and claims to be indemnified, and in subsection (ii), the opportunity to defend claims and actions for which indemnification may be required. Subsection 6.6(F)(i)'s notice requirement would be redundant in a first-party action. Likewise, the opportunity to defend in subsection 6.6(F)(ii) would be nonsensical in a first-party action. As at least one plausible reading of section 6.6 applies only to third party actions, plaintiffs are not entitled to an award of attorneys' fees under § 6.6(E). *See DRR, L.L.C. v Sears, Roebuck & Co.*, 949 F Supp 1132, 1143 (D Del 1996) (holding that attorney's fees clause stating that counsel for indemnitee shall be selected by indemnitee and not indemnitor "strongly indicates the indemnification provision did not contemplate" first party actions).

By contrast, § 7.7(M) of the Partnership Agreement shifts fees in actions brought to enforce removal of a general partner. *See* Dkt. 411 (Partnership Agreement) at 60 (awarding fees to a "prevailing party" from a "non-prevailing party"). Fee-shifting language in one section and failure to include such language in another section "indicates a lack of intent to create a clear and unequivocal agreement to shift fees in first-party actions." *Deere & Co. v Exelon Gen.*

Acquisitions, LLC, No. CVN13C07330, 2016 WL 6879525, at *2 (Del Super Ct Nov. 22, 2016). This failure further militates against applying § 6.6(E)'s indemnification clause to this action.

Defendants do not argue against indemnification in the AFAH and McDonald third party actions against the Partnership under § 6.6. Instead, they contend that the timing of the AFAH and McDonald Actions absolves them of liability, and that BFIM and BFIM GP are responsible. The Partnership Agreement, however, obligates MCAP GP to indemnify the Partnership for "claims, suits, actions or proceedings ***arising out of*** the General Partners' or any Designated Affiliate's negligence, misconduct, fraud, breach of fiduciary duty or breach of this Agreement." While the complaint on the lien was filed in 2016, after MCAP GP's removal as general partner, it arose as a result of MCAP GP's breach of § 6.5(xiv) of the Partnership Agreement on May 1, 2013, when the McDonald Lien was filed. Similarly, the AFAH Action was filed after MCAP GP's removal. It arose from MCAP GP's breach of § 6.5(iii) of the Partnership Agreement no later than the conveyance of the July 17, 2013 Notice of Default. Accordingly, MCAP GP must indemnify the Partnership for reasonable attorneys' fees and expenses incurred in the McDonald and AFAH Actions. Summary judgment is granted to plaintiffs on Cause of Action IX only as to their reasonable attorneys' fees and costs expended in the McDonald and AFAH Actions and for amounts recoverable under § 7.7(L) of the Partnership Agreement, as discussed above.

H. Constructive Fraud as to Defendants (Cause of Action VII)

Defendants move for summary judgment on Cause of Action VII for constructive fraud. Plaintiffs allege that Corey fraudulently induced plaintiffs to consent to the AFAH loan by misrepresenting that he intended to use the AFAH Loan to fund certain repairs to the Project. Defendants argue that the fraud claim fails because: the claim is really a contract claim in disguise; Corey's representations as to the use of the AFAH Loan funds are inadmissible parol

evidence not reasonably relied upon by ILP; and ILP ratified Corey's use of the AFAH Loan proceeds. Triable issues of material fact preclude summary judgment on this cause of action.

"The elements of a cause of action for fraud require 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).[48] "A false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties." *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 (1995). However, "fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed." *HSH Nordbank AG v UBS AG*, 95 AD3d 185 (1st Dept 2012). "A claim for constructive fraud has the elements of fraud, except that the party making the misrepresentation must be a fiduciary and the plaintiff need not prove the fiduciary's actual knowledge that the representation was false." *Del Vecchio v Nassau County*, 118 AD2d 615, 618 (2d Dept 1986); *see also In re Wayport, Inc. Litig.*, 76 A3d 296, 327 (Del Ch 2013). Finally, "[r]atification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it." *Allen v Riese Org., Inc.*, 106 AD3d 514, 517 (1st Dept 2013).

Plaintiffs base their fraud allegations on Corey's emails stating that the AFAH Loan was to be used to cover Project repairs. The subject of the retroactive consent—the AFAH Note—stated that the purpose of the loan was "to rehabilitate and pay other obligations incurred by" the Project. Dkt. 415 at 13 (AFAH Note). Corey, however, used ***all*** of the AFAH Loan proceeds to pay MCAP II.

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[48] The parties do not address whether Delaware, Pennsylvania, or New York law applies to the tort claims and fail to identify any pertinent differences between the laws of each state.

Plaintiffs' constructive fraud claims are distinct from contract claims. Then too, Defendants admit that the AFAH Consent did not specify allocation of the AFAH Loan funds, and Corey's statements of how he intended to use the AFAH Loan funds were therefore collateral to the contract. *See HSH Nordbank*, 95 AD3d at 185. Plaintiffs do not merely allege that defendants broke a promise to use the AFAH Loan funds for repairs, but claim that Corey induced their AFAH Consent by misrepresenting his intent to use the funds for repairs.[49] The silence of the AFAH Consent on the loan funds' use does not bar plaintiffs from using Corey's statements on that very subject to prove fraudulent inducement.[50] This is not a case where, as defendants argue, the written agreement ***contradicted or negated*** the oral representations. *See Daily News, L.P. v Rockwell Int'l Corp.*, 256 AD2d 13, 14 (1st Dept 1998); *Chapter 7 Tr. Constantino Flores v Strauss Water Ltd.*, C.A. No. 11141-VCS, 2016 WL 5243950, at *7 (Del Ch Sept. 22, 2016); *Superior Tech. Res., Inc. v Lawson Software, Inc.*, 17 Misc 3d 1137(A), 2007 WL 4291575, at *10 (Sup Ct Erie County 2007). Nor is this a case where "misrepresentations were made [regarding contract] terms but the falsity of those representations was revealed by the time the deal was executed." *Braddock v Braddock*, 60 AD3d 84, 92–93 (1st Dept 2009). While Corey's removal of the usage restrictions from BFIM's drafts of the AFAH Consent may ***affect*** ILP's reasonable reliance on the representations as to intended use, it is not dispositive. That the parties discussed other potential sources of funding for certain repairs also is not dispositive.

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[49] In the Delaware cases cited in defendants' opening brief, there was no promise made that was collateral to the contract. *BAE Sys. N. Am. Inc. v Lockheed Martin Corp.*, C.A. No. 20456, 2004 WL 1739522, at *8 (Del Ch Aug. 3, 2004); *Diamond Elec., Inc. v Del. Solid Waste Auth.*, C.A. No. 1395-K, 1999 WL 160161, at *7 (Del Ch Mar. 15, 1999).

[50] The parol evidence rule is inapplicable to fraud claims unless the contract contains a specific disclaimer of reliance on extrinsic statements— a disclaimer which is absent from the AFAH Consent. *See Magi Commc'ns, Inc. v Jac-Lue Assocs.*, 65 AD2d 727, 728 (1st Dept 1978).

Defendants' ratification theory, like plaintiffs' fraud claim, is primarily based on terse emails by BFIM employees vaguely conveying approval. *See* Dkt. 474 (1/27/2012 emails between Corey and Curran) at 1 ("[T]his all sounds like great news."); Dkt. 475 (January 27, 2012 emails between Corey and Haynsworth) at 1 ("All good news. Things are certainly looking up."). Ratification requires knowledge of all material facts. *See Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 233 (4th Dept 1982); *accord Frank v Wilson & Co.*, 27 Del Ch 292, 305 (1943). Defendants present no evidence that BFIM had complete knowledge of Corey's allocation of funds to repayment of the MCAP II Note (including principal not yet due and owing) and operating expense loans, and of Corey's failure to use any of the funds for previously discussed repairs. Nor do Curran and Haynsworth's positive words clearly and unequivocally apply to the sentence, "[t]he AFAH loans have brought the existing note current" among others in a post-script.[51] *See Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 233 (4th Dept 1982) ("The act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.").

Nonetheless, Defendants argue that BFIM ratified defendants' use of prior AFAH Loan proceeds by later executing the Mortgage Consent with "full knowledge" of AFAH Loan proceeds' allocation. Defendants fail to explain how BFIM's consent to subsequent loans ratified misuse of AFAH Loan funds, or was anything other than an attempt to salvage the situation. *See*

[51] Indeed, the post-script also indicated additional tax credits were unlikely. *See* Dkt. 474 at 2. Surely that was not good or great news to BFIM, who would have benefitted from the tax credits.

Braddock, 60 AD3d at 95.[52] The Mortgage Consent does not negate defendants' alleged fraud. Defendants' summary judgment motion on constructive fraud is denied.[53]

I. Defendants' Motion for Summary Judgment: Lack of Damages

Defendants move for summary judgment on all of plaintiffs' pending claims arguing lack of damages. Plaintiffs suffered real or nominal damages on the claims to the extent discussed above, in an amount to be proved at trial. Defendants do not raise issues with respect to liability for aiding and abetting breach of fiduciary duty (Cause of Action III) and gross negligence (Cause of Action IV).[54] Damages incurred by these Causes of Action, if liability is proven, are likely commensurate with Cause of Action II. Accordingly, it is

ORDERED that plaintiffs' motion (Seq. 016) for partial summary judgment is granted as to Causes of Action I, II, V, and VI; and it is further

ORDERED that plaintiffs' motion (Seq. 016) is granted in part as to Cause of Action IX; and it is further

ORDERED that defendants' motion (Seq. 017) for summary judgment is denied in its entirety; and it is further

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[52] Defendants attempt to distinguish *Braddock*'s ratification holding by referring to its discussion of reasonable reliance. Dkt. 534 (Defs.' Reply Br.) at 13 n.4 (citing *Braddock*, 60 AD3d at 92-93). Setting aside the irrelevance of reasonable reliance to the ratification issue, defendants ignore MCAP II and Corey's fiduciary duties to plaintiffs as justifying plaintiffs' reliance. *see Braddock*, 60 AD3d at 88-89 (discussing familial relationship between the parties as source of fiduciary duties).

[53] Defendants do not address damages for the claimed fraud, and failed to proffer a prima facie case for summary judgment on plaintiffs' fraud allegations as to the Mortgage Consent until the reply brief. Thus, the court declines to rule on these issues.

[54] Defendants provides no separate argument on Cause of Action IV. As discussed as to Cause of Action II, MCAP II and Corey owed a duty of care as to MCAP GP's disposition of Partnership assets and affairs.

ORDERED that summary judgment is granted to plaintiffs on defendants' First Counterclaim for breach of contract and that the First Counterclaim is dismissed.

Dated: March 28, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.