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Order on Motion to Dismiss (GAA-Nicholson
Partners LP)

Melvin K. Westmoreland
Superior Court of Fullton County

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220.
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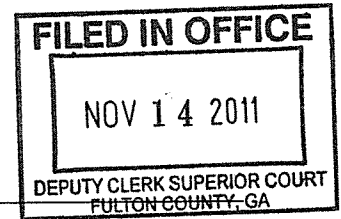
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GAA-NICHOLSON PARTNERS LP)
)
 Plaintiff,)
)
 v.)
)
 NICHOLSON ADVISORS LLC,)
 CORTLAND PARTNERS LLC, and)
 STEVEN J DEFRANCIS)
)
 Defendants.)

Civil Action File No. 2011-CV-201809



ORDER ON MOTION TO DISMISS

This matter is before the Court on Defendants’ Motion to Dismiss. After considering the motion and the briefs submitted therewith, the Court finds as follows:

I. Background

This is the fifth action¹ before this Court involving, for all intents and purposes, the same parties and their related disputes over the ownership and, in this case, alleged mismanagement of a 330-unit residential development in east Baton Rouge Parish, Louisiana, known as the Indigo Park Apartments. Plaintiff initiated this action in DeKalb County State Court on February 11, 2011. The case was transferred to this Court and assigned to Judge Long on June 17, 2011.

Plaintiff and Defendant Nicholson Advisors LLC (“Advisors”) are joint owners of GAA-Nicholson, LLC (“Property Owner”), a single purpose entity formed to acquire and to develop the Indigo Park Apartments (the “Property”). The parties originally appointed Advisors as sole-Manager of Property Owner. Plaintiff alleges that Advisors, acting through its manager,

¹ Apart from this action, this Court has presided or is currently presiding over the following related cases: Nicholson Advisors, LLC v. GAA-Nicholson Partners, LP, Case No. 2010CV191156; GAA-Nicholson Advisors, LLC v. Nicholson Advisors, LLC, et al., Case NO. 2011CV191111 (closed upon entry of Order Granting Defendant’s Cross-Motion for Summary Judgment on Jan. 27, 2011); GAA-Nicholson Advisors, LLC v. Nicholson Development Partners, LLC, Case No. 2011CV195075 (dismissed without prejudice on Feb. 18, 2011); Nicholson Development Partners, LLC v. GAA-Nicholson Advisors, LLC, Case No. 2011CV1917188.

Defendant Cortland Partners, LLC (“Cortland”), who in turn acted through its manager, Defendant Steven DeFrancis (“DeFrancis”), mismanaged the development of the Property and ultimately caused the project to be significantly over budget. Additionally, Plaintiff alleges that Defendants failed to obtain Plaintiff’s approval, as required under various contracts, prior to incurring numerous expenditures and allowed liens to be placed against the Property in violation of the Property Owner Operating Agreement.

Based on these allegations, Plaintiff has asserted the following claims against Defendants: 1) Count I—Breach of Property Owner Operating Agreement against Advisors; 2) Count II—Breach of Multi-Project Completion Agreement against Cortland; 3) Count III—Breach of the Duty of Good Faith and Fair Dealing against Cortland; 4) Count IV—Breach of Fiduciary Duty against Advisors, Cortland and DeFrancis; and 5) Attorneys’ Fees against all Defendants. Defendants have moved to dismiss the action on the basis that Plaintiff’s claims against Advisors are compulsory counterclaims, which Plaintiff was required to assert in a prior pending action. Defendants also contend that Counts II and III against Cortland fail to state a claim because the Multi-Project Completion Agreement did not bar Cortland from taking the actions at issue and because a claim for breach of the covenant of good faith and fair dealing cannot go forward without a breach of contract. Finally, Defendants argue that the breach of fiduciary duty claim must fail because it is a derivative claim of Property Owner, and Plaintiff lacks standing to bring this claim directly.

II. Standard

In reviewing a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6), the Court must determine whether plaintiffs have stated a claim upon which relief can be granted. Under this standard, the Court must analyze whether “(1) the allegations of the complaint disclose with

certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant established that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.” Stendahl v. Cobb Cty., 284 Ga. 525, 525 (2008). The Court “must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff.” Cunningham v. Gage, 301 Ga. App. 306, 307 (2009).

III. Claims Against Advisors

Advisors argue that Plaintiff’s claims against it should be dismissed as compulsory counterclaims that should have been brought in a prior action currently pending before this Court. On September 20, 2010, Advisors initiated a case styled Nicholson Advisors, LLC v. GAA-Nicholson Partners, L.P., CAFN 2010CV191156, seeking dissolution of the Property Owner and appointment of a receiver due to the parties’ dispute over the buy-sell procedure contained in the Property Owner Operating Agreement (the “Dissolution Action”). On March 9, 2011, following the initiation of the instant action in DeKalb County State Court, Advisors amended its complaint to assert claims for breach of contract and breach of fiduciary duty against Plaintiff.

“O.C.G.A. § 9-11-13(a) provides that, if a claim arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim, such claim must be asserted as a compulsory counterclaim.” Aycock v. Calk, 228 Ga. App. 172, 174 (1997). “A logical relationship between a plaintiff’s claims and a defendant’s counterclaims arises, so as to make the counterclaims compulsory counterclaims, when: (1) the same aggregate or operative facts serve as the basis for both claims, or (2) the case facts supporting the original claim activate legal

rights of the defendant that would otherwise remain dormant.” Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga.App. 780 (2009).

Looking at the Dissolution Action at the time Plaintiff initiated this case, the Court finds that the claims in this case do not fall within the factual parameters at issue in the Dissolution Action. The Dissolution Action involved the parties’ deadlock over who would be the buyer of Property Owner under the buy-sell procedure set forth in the Property Owner Operating Agreement. In contrast, the instant action involves alleged mismanagement of the Property Owner prior to the buy-sell deadlock. Accordingly, Defendants’ motion is **DENIED** with respect to claims against Advisors to the extent that Defendants contend they are compulsory counterclaims.

IV. Counts II & III

Defendants seek dismissal of the breach of contract claim against Cortland because they contend that the Multi-Project Completion Agreement (“MPCA”) does not require Cortland to take certain actions. Because the breach of contract claim fails, Defendants contend that the claim for breach of the covenant of good faith and fair dealing must likewise fail because it must rest on an independent breach of contract.

According to the Complaint, Cortland and Plaintiff entered into the MPCA with Foster & Company (“Foster”), the general contractor for the Property, to ensure that there would be sufficient funds to complete the project in light of the discovery of Foster’s precarious financial situation. The MPCA recognizes that Cortland acted as the developer of four construction projects for which Foster served as the general contractor. Section 3 of the MPCA obligates Foster to first apply funds it receives under construction contracts associated with any of the four projects to the completion of the Property. It further provides: “[i]n the event that the [funds] are

available and needed for any other purpose...., they may be used for such purpose provided that [Plaintiff] consents to such use.” Finally, the MPCA requires Cortland to co-sign all checks issued by Foster in connection with the projects.

In support of its position that the MPCA implicitly required Cortland to co-sign checks only if authorized under the terms of the MPCA, Plaintiff asks the Court to view the MPCA through the lens of the circumstances in which it was allegedly drafted—Advisors’s gross mismanagement of the project, which depleted resources intended to fund the construction and required the parties to turn to Foster to finance the completion of the project. Because Foster did not have sufficient finances, the parties entered into the MPCA. At the same time, Plaintiff and Advisors amended the Property Owner Operating Agreement, in connection with the refinance of the construction loan, to make both Plaintiff and Advisors co-Managers of Property Owner and to require Advisors to obtain the consent of Plaintiff prior to making any management decisions. In view of these circumstances, Plaintiff contends that the MPCA should be read to find an implied term that required Cortland to co-sign checks only when the checks are authorized under the MPCA.

“An implied term in an agreement exists where it is reasonable and necessary to effect the full purpose of the contract and it is so clearly within the contemplation of the parties that they deemed it unnecessary to state.” Corey v. Clear Channel Outdoor, Inc., 299 Ga. App. 487, 490 (2009). “[W]hatever may be fairly implied by the terms of an agreement is in the eyes of the law embodied in the agreement.” Id.

The stated purpose of the MPCA was to ensure that the Property was completed and that Property expenses were paid before the expenses of other developments. To effectuate this purpose, the MPCA provided that funds paid into the “Completion Account,” an account created

to hold funds paid to Foster in connection with the construction projects, be used only for Property expenses, unless Plaintiff consented to payment of an unrelated Property expense. As a further measure to ensure the proper application of the funds, the MPCA required Cortland to co-sign all checks issued from the Completion Account. Construing the MPCA as a whole, the Court finds that it is necessary to impose an implied duty on Cortland to sign checks for expenditures only as authorized under the MPCA in order to give effect to the parties' intent in entering into the MPCA. Accordingly, Defendants' motion is **DENIED** as to Count II.

Turning to Count III, because Georgia law imposes a duty of good faith and fair dealing upon each party in performing their respective duties and obligations under a contract, TechBios, Inc. v. Champagne, 301 Ga. App. 592, 595 (2009), and construing as true all allegations in Plaintiff's Complaint, Count III may proceed. As such, Defendants' motion is **DENIED** as to Count III.

V. Count IV

Defendants seek dismissal of Plaintiff's claims for breach of fiduciary duty for two reasons. First, Defendants contend that if there was an alleged breach of fiduciary duty, such claim belongs to the Property Owner, not Plaintiff. Second, Defendants argue that Plaintiff has failed to demonstrate a sufficient basis upon which to impose a fiduciary duty on Cortland or DeFrancis.

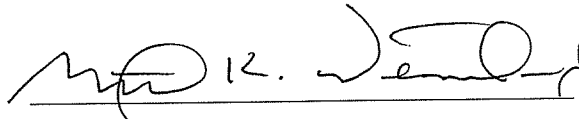
Turning to Plaintiff's standing to bring a direct claim for breach of fiduciary duty, the Property Owner Operating Agreement provides "[t]he Manager hereby agrees that it shall have a fiduciary duty to the Members in respect to [Property Owner] on the same basis under Georgia law as it would if the [Property Owner] was a partnership and the Manager was a General Partner of the partnership." Because Advisors was both the sole Manager of Property Owner and

later co-Manager, the Court finds that, pursuant to this provision, it owed a fiduciary duty to Plaintiff directly. Because Plaintiff's claim is premised on the fiduciary duty it was owed directly, it does not have to satisfy the "close corporation" and "special injury" exceptions to the rule that an action for breach of fiduciary duty must be brought as a derivative action. Defendants' motion is **DENIED** with respect to the breach of fiduciary duty claim against Advisors.

Next, with respect to the claims against Cortland and DeFrancis, Plaintiff contends that the fiduciary relationship can attach to Cortland and DeFrancis under the "subagent" theory. Under this rule "[w]here the agent is authorized to appoint a subagent, the relation of principal and agent exists between principal and the subagent. That is, the subagent may be the agent of the principal if he is in actual control of the business and the principal knows of his appointment or knows that his appointment is necessary, and the agent has authority to appoint him." Stanford v. Otto Niederer & Sons, Inc., 178 Ga. App. 56 (1986).

The Court finds it unnecessary to undergo this analysis. Rather, it is the Court's view that under the plain language of the First Amendment to the Property Owner Operating Agreement, a fiduciary duty was imposed directly on DeFrancis. Section 5.1 provides that "[t]he Management Member hereby appoints Mr. Steven DeFrancis...as [its] representatives with respect to the rights and obligations as Manager." Because Advisors had authority to appoint DeFrancis, which imposed on him the same rights and obligations as Advisors, and Plaintiff was aware of this authority, Defendant's motion is **DENIED** with respect to the breach of fiduciary duty claim against DeFrancis. In light of the fact that the Property Owner Operating Agreement does not expressly authorize Advisors to appoint Cortland, Defendants' motion is **GRANTED** as to the breach of fiduciary duty claim against Cortland.

SO ORDERED this 9th day of November, 2011.



MELVIN K. WESTMORELAND,
SENIOR JUDGE *for*
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies sent via email to:

Attorneys for Plaintiffs	Attorneys for Defendants
James M. Sherman Charles L. Gregory Margaret G. Geer Ray & Sherman, LLC One Securities Centre 3490 Piedmont Road, Suite 700 Atlanta, GA 30305 jsherman@rayandsherman.com cgregory@rayandsherman.com mgeer@rayandsherman.com	John A Christy Mark W. Forsling Robert H. Snyder Schreeder, Wheeler & Flint, LLP 1100 Peachtree Street, N.E. Suite 800 Atlanta, GA 30309-4516 jchristy@swflfp.com mforsling@swflfp.com rsnyder@swflfp.com