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Elizabeth E. Long
Fulton County Superior Court Judge

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Fulton County Superior Court
EFILEDRM
Date: 1/4/2018 5:30 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

BSL HOLDINGS, LLC, and BSL HOLDINGS, LLC Derivatively on Behalf of Trinity Lifestyles Management, LLC and Trinity Lifestyles, Plaintiffs, v. TRINITY LIFESTYLES MANAGEMENT, LLC, et al., Defendants v. R. BRADLEY BRYANT, Third-Party Defendant.	)	Civil Action File No. 2016CV278256 Bus. Case. Div. 2

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' SECOND RENEWED PARTIAL MOTION TO DISMISS

The above styled action is before this Court on Defendants' Second Renewed Partial Motion to Dismiss Plaintiffs' Second Amended Complaint ("Second Renewed Partial Motion to Dismiss"). Having considered the amended pleadings, the parties' briefs, and applicable law, the Court finds as follows:

SUMMARY OF PLEADINGS

This action was filed on Jul. 29, 2016 by Plaintiff BSL Holdings, LLC ("BSL") on its own behalf and derivatively on behalf of Trinity Lifestyles Management, LLC ("Trinity I") and Trinity Lifestyles Management II, LLC ("Trinity II") (collectively "Trinity Entities"). According to the pleadings, Trinity I was formed in 2005 by BSL and Solomon Senior Living

Holdings, LLC ("SSL") to pursue business opportunities in the senior living housing and services industry. BSL is owned by Third Party Defendant R. Bradley Bryant ("Bryant"), while SSL is owned by Defendant Alfred S. Holbrook ("Holbrook"). Trinity II is a related entity that was formed in 2006. Holbrook is the manager of Trinity I and Trinity II and handled all their legal and development needs, while Bryant served as Trinity I's President and CFO from 2005 to 2013. BSL owns 30% of Trinity I and Trinity II. Holbrook, either in his individual capacity or through SSL, owns and/or controls a majority interest in both Trinity I and Trinity II.

The Trinity Entities and their affiliates are involved in various aspects of senior living, including site selection and development, facilities ownership and leasing, and facilities management. They would work with investors or owners who would often form new entities to lease or own facilities that would subsequently contract with the Trinity Entities to manage the facilities. BSL claims that from Trinity I's inception, Holbrook, SSL and BSL agreed that with respect to any new senior living opportunity in which Trinity I invested funds or took risks, Trinity I would hold an ownership interest in all such new senior living development opportunities proportional to its contribution or, alternatively, that ownership in the entity or project would track the parties' ownership in Trinity I.

Plaintiffs allege Trinity I funded pre-closing costs and provided resources for the acquisition and development of multiple senior assisted living facility projects which were owned, operated, and/or managed under entities created for the purpose of developing, owning, or leasing those developments, including: Solomon Holdings IV Dogwood Acworth, LLC ("Solomon IV"); Solomon Holdings V - Atlanta Three, LLC ("Solomon V"); Solomon Holdings VI Birmingham ("Solomon VI"); Solomon Development Services—Acworth IL, LLC ("SDS – Acworth IL"); Solomon Development Services—Grayson, LLC ("SDS – Grayson"); Solomon

Development Services - Decatur, LLC ("SDS – Decatur"); Solomon Development Services—Sugar Hill, LLC ("SDS – Sugar Hill"); Solomon Development Services—Woodstock, LLC ("SDS – Woodstock"); and Chateau Vestavia, LLC ("Chateau Vestavia").

Plaintiffs allege that, despite forming such entities using Trinity I's funds and resources, Plaintiffs were not given any ownership interest in the entities that were created. Further, after Bryant's departure as Trinity I's CFO, Holbrook allegedly "undertook a campaign of blending the business models and activities" of Trinity I and Solomon Development Services, LLC ("Solomon"). Holbrook allegedly began conducting business formerly performed by Trinity I but in the name of Solomon and/or SSL, and he began re-characterizing business done by Trinity I as if it had been done by Solomon and/or SSL. Also, Plaintiffs contend the Trinity Entities have been loaning funds and sharing services and resources with several of the Defendant entities that are owned or controlled by Holbrook without receiving compensation or anything of value in return.

In their Second Amended Complaint, Plaintiffs asserts claims for: (1) breach of contract (by BSL against Trinity I and Holbrook); (2) breach of contract (by BSL against Trinity II and Holbrook); (3) breach of buy-out agreement (by BSL against Holbrook and SSL); (4) breach of contract (by Plaintiffs against Holbrook); (5) "intentionally left blank"; (6) "intentionally left blank"; (7) breach of fiduciary duty (by Trinity I and BSL against Holbrook); (8) "intentionally left blank"; (9) misrepresentation (by Trinity I against Holbrook); (10) unjust enrichment (by Trinity I and Trinity II against SSL, Solomon Holdings, Solomon, SDS–Acworth IL, Solomon IV, Solomon VI, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–Woodstock, SIP, and TLM); (11) money had and received (by Trinity I against SSL, Solomon Holdings, Solomon, SDS – Acworth IL, Solomon VI, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–

Woodstock, Solomon Investment Partners ("SIP"), and Trinity Life Management ("TLM"); and (12) breach of contract (by Trinity I, Trinity II, and BSL against SSL, Solomon Home Care d/b/a Trinity Care at Home ("TCH"), Solomon, Solomon Holdings, SIP, Solomon II, Solomon III, Solomon IV, Solomon V, Solomon VI, TLM, Chateau Vestavia, LLC, SDS–Acworth IL, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–Woodstock, Ariel Holdings, and Holbrook).

ANALYSIS

I. Standard on a Motion to Dismiss

> [A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (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 establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017), reconsideration denied (June 5, 2017) (citing Anderson v. Flake, 267 Ga. 498, 501, 480 S.E.2d 10, 12–13 (1997)). *See also* Wright v. Waterberg Big Game Hunting Lodge Otjahewita (PTY), Ltd., 330 Ga. App. 508, 510, 767 S.E.2d 513, 516 (2014) (citing Racette v. Bank of Am., N.A., 318 Ga. App. 171, 180, 733 S.E.2d 457, 465 (2012)) ("[T]he Georgia Civil Practice Act requires only notice pleading and, under the Act, pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory requirement of the Act. Pleadings serve only the purpose of giving notice to the opposing party of the general nature of the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief").

II. Derivative Demand

Defendants argue Counts 10-12 of the Second Amended Complaint should be dismissed because Plaintiff failed to provide the Trinity Entities with the required derivative notice with respect to those claims prior to filing suit.

"O.C.G.A. § 14–11–801 provides that a member of a limited-liability corporation may commence a derivative action if five conditions are met, one of which requires the plaintiff to make written demand on the managers or members with authority to cause the limited-liability company to sue in its own right, and requesting that the managers or members take suitable action." Pinnacle Benning LLC v. Clark Realty Capital, LLC, 314 Ga. App. 609, 615, 724 S.E.2d 894, 900 (2012) (footnote omitted). *See* O.C.G.A. § 14–11–801(2) ("A member may commence a derivative action in the right of the limited liability company to recover a judgment in its favor if…(2) The plaintiff has made written demand on those managers or those members with such authority requesting that such managers or such members take **suitable action**…") (emphasis added). This demand requirement with respect to an LLC is similar to that required to bring a derivative action on behalf of a business corporation or nonprofit corporation—all of which require a claimant to have previously made a "written demand" upon the entity (or, in the case of LLCs, its management) "to take suitable action" prior to filing suit derivatively. *See* Pinnacle Benning, LLC, 314 Ga. App. at 615. *Compare* O.C.G.A. §§ 14–11–801(2) (limited liability companies); 14-2-742 (business corporations); and 14-3-742 (nonprofit corporations).

O.C.G.A. §14–11–801 does not specify what must be included in the written demand. However, the comments to O.C.G.A. §14-2-742, regarding written demands with respect to business corporations, is instructive:

> Section 14-2-742 specifies only that the demand shall be in writing. The demand should, however, set forth the facts

> concerning share ownership and be sufficiently specific to apprise the corporation of the action so that the demand can be investigated. In keeping with the spirit of this section, the specificity of the demand should not become a new source of dilatory motions.

O.C.G.A. § 14-2-742, Comment 1, Form of Demand.

Here, on Feb. 29, 2016, BSL, through counsel, provided a "formal written demand pursuant to O.C.G.A. §14-11-801" to E. Todd Presnell ("Presnell") and Holbrook, on behalf of Trinity I and Trinity II ("Demand Letter"), demanding that they, *inter alia*:

> investigate and take action against [Holbrook] and [SSL] and others for breach of fiduciary duty and other claims arising from conduct, including, but not limited to (a) admitting new members of the Trinity Entities without [Bryant and BSL]'s knowledge or consent, (b) engaging in self-dealing to the detriment of the Trinity Entities, (c) misappropriating business opportunities belonging to the Trinity Entities, (d) using Trinity Entities [sic] funds, assets, employees to support other entities related to Mr. Holbrook but in which [Bryant and BSL] have no interest, (e) improperly allocating performance and investment risk/reward to Mr. Holbrook and entities he personally owns/controls for his own personal benefit or the benefit of his family members,...(h) deflating the value of the Trinity Entities in order to reduce and [sic] buy-out paid to [Bryant and BSL], (i) failing to protect Trinity's legal interests...(h) [sic] diluting [Bryant and BSL's] ownership in related entities...

Bryant and BSL further demand that "[Presnell and Holbrook], and any other culpable party, investigate these issues and take all action necessary to recover from Holbrook and [SSL] for all resulting damages suffered by the Trinity Entities."

The Demand Letter does not specifically name the other entities named as Defendants in this action or specify causes of action for unjust enrichment, money had and received, and breach of contract as set forth in Counts 10-12 of the Second Amended Complaint. However, those claims all arise from Plaintiffs' allegations that Holbrook, acting individually and through various entities that he owns and/or controls, have engaged in self-dealing, misappropriated

opportunities, and used the funds and assets of the Trinity Entities to benefit other entities associated with Holbrook without any value or benefit redounding to the Trinity Entities. Bryant and BSL plainly ask Presnell and Holbrook, as Manager, to "investigate and take action" against Holbrook, SSL "and others for breach of fiduciary duty and other claims arising from [such] conduct." The Court finds the Demand Letter generally sufficient to satisfy O.C.G.A. §14-11-801(2) with respect to Counts 10-12, other than with respect to the contract claim asserted against Ariel Holdings, LLC ("Ariel I") and Ariel Holdings II-54 Roswell Street, LLC ("Ariel II") as discussed in Part IV, *infra*.

III. Sufficiency of the pleadings with respect to Counts 10-12

Defendants move to dismiss Counts 10-12 for failure to state a claim. In Count 10, the Trinity Entities assert a claim of unjust enrichment against SSL, Solomon Holdings, Solomon, SDS–Acworth IL, Solomon IV, Solomon VI, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–Woodstock, SIP, and TLM. "The theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated." Smith Serv. Oil Co. v. Parker, 250 Ga. App. 270, 271, 549 S.E.2d 485, 487 (2001) (citing Cochran v. Ogletree, 244 Ga. App. 537, 538–539(1), 536 S.E.2d 194 (2000)). *See* Hutchins v. Cochran, Cherry, Givens, Smith & Sistrunk, P.C., 332 Ga. App. 139, 144, 770 S.E.2d 668, 673 (2015).

In Count 11, Trinity I asserts a claim for money had and received against SSL, Solomon Holdings, Solomon, SDS–Acworth IL, Solomon VI, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–Woodstock, SIP, and TLM. "An action for money had and received is founded upon the equitable principle that no one ought to unjustly enrich himself at the expense of another, and is maintainable in all cases where one has received money under such circumstances that in

equity and good conscience he ought not to retain it." Vernon v. Assurance Forensic Accounting, LLC, 333 Ga. App. 377, 388, 774 S.E.2d 197, 208 (2015) (citing Sentinel Offender SVCS., LLC v. Glover, 296 Ga. 315, 331, 766 S.E.2d 456, 471 (2014). *See also* Haugabook v. Crisler, 297 Ga. App. 428, 432, 677 S.E.2d 355, 359 (2009) (citing Fain v. Neal, 97 Ga. App. 497, 499, 103 S.E.2d 437 (1958)) ("[I]t is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner").

In Count 12, Trinity I, Trinity II, and BSL assert a claim for breach of contract against SSL, TCH, Solomon, Solomon Holdings, SIP, Solomon II, Solomon III, Solomon IV, Solomon V, Solomon VI, TLM, Chateau Vestavia, SDS–Acworth IL, SDS–Decatur, SDS–Grayson, SDS–Sugar Hill, SDS–Woodstock, Ariel Holdings, LLC and Holbrook. "The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complaint about the contract being broken." Layer v. Clipper Petroleum, Inc., 319 Ga. App. 410, 413, 735 S.E.2d 65, 69 (2012) (citing Canton Plaza v. Regions Bank, Inc., 315 Ga. App. 303, 306(1), 732 S.E.2d 449 (2012)). *See also* TechBios, Inc. v. Champagne, 301 Ga. App. 592, 595, 688 S.E.2d 378, 381 (2009) ("[A]ny dispute regarding the existence of an enforceable contract d[oes] not present grounds for dismissal" at the pleadings stage).

Here, Plaintiff have asserted Counts 10-12 in the alternative pursuant to O.C.G.A. §9-11-8(e), such that in the event the Court finds or through discovery the parties determine that there is no enforceable contract, the claims for unjust enrichment and/or money had and received may be pursued in the absence of an enforceable contract. Having considered the amended pleadings and except as set forth in Parts IV and V, *infra*, the Court finds Plaintiffs have sufficiently stated claims for unjust enrichment, money had and received and breach of contract against

Defendants, respectively.[1] The Court finds the issues raised in Defendants' Second Renewed Partial Motion to Dismiss are better addressed at the summary judgment stage after discovery has been conducted.

IV. Claims against Ariel Entities

In the Court's Order on Defendants' Motions to Dismiss and Motions for More Definite Statement, entered on Jan. 20, 2017, this Court dismissed Counts Five and Six of the original complaint wherein Plaintiffs asserted breach of contract claims against Ariel I and Ariel II. In the original complaint, Trinity I alleged Ariel I breached a commercial lease for property located at 48 Roswell Street ("48 Roswell Lease") and alleged Ariel II breached a commercial lease for property located at 54 Roswell Street ("54 Roswell Lease") by: failing to provide office space at the respective locations for the exclusive use of Trinity I; overestimating the square footage of both office spaces thereby inflating rent; requiring Trinity I to pay for capital improvements and landscaping for the leased spaces; and allowing other entities owned by Holbrook to operate out of those lease spaces without contributing to rent or overhead expenses. The Court dismissed those claims, finding BSL failed to submit a proper derivative demand with respect to those claims and finding they were, in any event, time barred since Trinity I leased the offices from Ariel I and Ariel II, respectively, on Jun. 1, 2010.

Notwithstanding the dismissal, in the Second Amended Complaint, Plaintiffs again make allegations against Ariel I and Ariel II based on the foregoing leases. Plaintiffs repeat many of the allegations raised in the original Complaint and further allege the parties amended both the 48 Roswell Lease and 54 Roswell Lease on Sept. 1, 2016, reducing the rent to $40,000 annually for both offices, but assert Trinity I's General Ledger continues to reflect rent accruing at the

[1] *See* Plaintiffs' Response in Opposition to Defendants' Second Renewed Partial Motion to Dismiss Plaintiffs' Second Amended Complaint, p. 6.

pre-amendment lease rate. Plaintiffs specifically assert a claim for breach of contract against Ariel I for charging Trinity I more rent than required of it.

Although a breach of contract claim based on the Sept. 1, 2016 amendments to the 48 Roswell Lease and/or 54 Roswell Lease may not be time barred, BSL nevertheless failed to make a proper demand so as to pursue the claim in this action derivatively on behalf of the Trinity Entities. The Feb. 29, 2016 Demand Letter makes no reference to what is a simple, breach of lease claim. Moreover, any breach of contract claim predicated on the Sept. 1, 2016 amendments accrued well after the Demand Letter was submitted and, indeed, after this action was initiated on Jul. 29, 2016. The Demand Letter could not serve as a demand for the managing member of the Trinity Entities to take "suitable action" with respect to a contract amendment that had not yet been agreed to. Insofar as Plaintiffs have not shown a proper derivative demand was made to pursue the claim, the breach of contract claim asserted against Ariel I and/or Ariel II based on the 48 Roswell Lease and/or 54 Roswell Lease is, again, DISMISSED.

V. Claims against Solomon – Gainesville Holdings, LLC

Solomon – Gainesville Holdings, LLC is named a Defendant in Plaintiffs' Second Amended Complaint. However, no substantive allegations are made against that entity and none of the enumerated counts are directed against it. Accordingly, Solomon – Gainesville Holdings, LLC is hereby DISMISSED from this action.

SO ORDERED this 4 day of January, 2018.

JUDGE JOHN J. GOGER, *on behalf of*
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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