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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 3

Index Number : 601024/2003
COHEN PDC, LLC,
VS.
CHESLOCK-BAKKER
SEQUENCE NUMBER : 017
SUMMARY JUDGMENT

INDEX NO. 601024/2003
MOTION DATE 1/13/10
MOTION SEQ. NO. 17
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

NYS SUPREME COURT
RECEIVED
OCT 19 2010
MOTION SUPPORT OFFICE

Dated: 10-18-10

Eileen Bransten
J.S.C.
HON. EILEEN BRANSTEN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

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COHEN PDC, LLC, a Delaware Limited Liability Company, for itself and derivatively on behalf of Pacific Design Center 1 Holdings, LLC; and COHEN BROS. REALTY CORP. OF CALIFORNIA, a California corporation,

Plaintiffs,

PACIFIC DESIGN CENTER 1, LLC; and PACIFIC DESIGN CENTER 1 HOLDINGS, LLC,

Nominal Plaintiffs,

Index No.: 601024/2003
Motion Date: 01/13/2010
Motion Sequence No.: 017

-against-

CHESLOCK-BAKKER OPPORTUNITY FUND, LP, a Delaware limited partnership; CBO-PDC 1, LLC, a Delaware Limited Liability Company, and CBO-PDC 2, LLC, a Delaware Limited Liability Company,

Defendants.

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CBO-PDC 1, LLC, a Delaware Limited Liability Company;
and CBO-PDC 2, LLC,
a Delaware Limited Liability Company,
both individually and derivatively on behalf of
Pacific Design Center 1 Holdings, LLC,

Plaintiffs, Index No.: 114718/2003

-against-

COHEN PDC, LLC, a Delaware Limited Liability
Company;
COHEN BROS. REALTY CORP. OF CALIFORNIA,
a California corporation;
and BDO SEIDMAN, LLP, a New York Registered
Limited Liability Partnership,

Defendants.
----------X
PRESENT: EILEEN BRANSTEN, J.

Action 1 plaintiffs and Action 2 defendants the Cohen parties have moved for summary judgment pursuant to CPLR 3212 against the Action 1 defendants and Action 2 plaintiffs the CBO parties. The Cohen parties seek dismissal of all of the CBO parties causes of actions in Action 2. Action 1 defendant and Action 2 plaintiff CBO parties also move for summary judgment pursuant to CPLR 3212 on their Action 2 fourth cause of action against Cohen PDC for declaratory judgment; their Action 1 first counterclaim against Cohen PDC for breach of the implied covenant of good faith and fair dealing; and their Action 1 sixth counterclaim against the Cohen parties for payment of attorneys' fees. Summary judgment

is granted to the Cohen parties on all issues except as to attorneys' fees. Summary judgment is denied to the CBO parties on all issues.

PROCEDURAL HISTORY

On August 11, 2003, under index no. 601024/2003 ("Action 1"), Cohen PDC, LLC ("Cohen PDC"), Cohen Brothers Realty Corporation of California ("Cohen Bros."), along with Pacific Design Center 1, LLC ("PDC 1") and Pacific Design Center 1 Holdings, LLC ("PDC Holdings") filed a second amended complaint against Cheslock-Bakker Opportunity Fund, L.P. ("CBO Fund"), CBO-PDC 1, LLC ("CBO 1") and CBO-PDC 2, LLC ("CBO 2").

On December 11, 2003, under index no. 114718/2003 ("Action 2 "), CBO 1 and CBO 2, along with PDC Holdings and PDC 1, filed an amended complaint against Cohen PDC, Cohen Bros., and BDO Seidman, LLP ("Seidman").

Action 1 and Action 2 pertain to the same subject matter and are joined for disposition as related actions. The CBO Fund, CBO 1 and CBO 2 are collectively referred to herein as "CBO parties." Cohen PDC and Cohen Bros. are referred to herein as the "Cohen parties." In Action 2, on May 14, 2004, the court dismissed the CBO parties' case against Seidman and compelled arbitration between the CBO parties and Seidman. On December 22, 2004, in Action 2, the court also dismissed the CBO parties' fourteenth cause of action against Cohen PDC for fraud.

In Actions 1 and 2, on July 16, 2009 the Cohen parties filed a motion for summary judgment. On August 28, 2009, the CBO parties filed their opposition to the Cohen parties' motion, and filed a separate cross-motion for partial summary judgment in the both actions. On October 16, 2009, the Cohen parties filed a reply in further support of their motion for summary judgment and their opposition to the cross-motion. On November 12, 2009, the CBO parties filed a reply in support of their cross-motion for summary judgment. Oral argument was heard on the matters on January 7, 2010. The motions were fully submitted on January 13, 2010.

FACTUAL BACKGROUND

This case involves many interrelated entities, all which have a stake in a piece of commercial real estate property in West Hollywood, California known as the Pacific Design Center ("Design Center") (Amended Complaint of CBO parties, December 11, 2003, index no. 114718/2003 ["CBO Complaint"], ¶ 1).

Cohen PDC, CBO 1, CBO 2, PDC 1 and PDC Holdings are Delaware limited liability companies (CBO Complaint, ¶ 1-8). Cohen Bros. is incorporated in California and Seidman is a limited liability partnership registered in New York (*id*). The CBO Fund is a Delaware limited partnership (*id*).

At all relevant times, PDC 1 owned the Design Center (CBO Complaint, ¶ 4). PDC Holdings is the sole member of PDC 1 (CBO Complaint, ¶ 4). As reflected in PDC

Holdings' 2002 Operating Agreement, CBO 1 and CBO 2 each owned 25% of PDC Holdings, while Cohen PDC owned 50% (Affidavit of Laurie Sayevich Horz in Opposition to Summary Judgment by the Cohen parties, August 28, 2009 ["Horz Aff. in Opp."], Ex. 7 ["2002 Operating Agreement"], § 5.1). Cohen PDC, CBO 1 and CBO 2 comprised the Executive Committee of PDC Holdings. All actions of the Executive Committee were mandated to be unanimous (2002 Operating Agreement, § 7.1-7.6).

Three agreements are relevant to the issues here. The first is the October 18, 1999 Management Agreement (Horz Aff. in Opp., Ex. 26, ["Management Agreement"]). The Management Agreement is between PDC 1 and Cohen Bros., wherein the Cohen Bros. agreed to manage PDC 1 (Management Agreement, p. 1). The CBO parties argue that they are third-party beneficiaries to this agreement and that the Cohen Bros. breached this agreement.

The second and third agreements are related. The second agreement is the 1999 Operating Agreement. The 1999 Operating Agreement is between CBO 1, CBO 2 and Cohen PDC and pertains to the operation of PDC 1 Holdings (Horz Aff. in Opp., Ex. 4, ["1999 Operating Agreement"]). The third agreement is the 2002 Operating Agreement, which replaced the 1999 Operating Agreement in August 2002 (Horz Aff. in Opp., Ex. 7, ["2002 Operating Agreement"]).

Much of the dispute at bar is based upon the 2002 Operating Agreement. In the 2002 Operating Agreement, the parties consent to New York jurisdiction if there is a dispute between the parties (2002 Operating Agreement, §14.17). However, the 2002 Operating Agreement also states that Delaware law will apply in certain arbitration proceedings between the parties (2002 Operating Agreement, §14.18), therefore reflecting the parties' desire that Delaware law be relevant. In addition, as noted above, all of the parties except Cohen Bros. and Seidman are Delaware entities. The court thus analyses the claims of the parties under both New York and Delaware law.

Around August 2002, Cohen PDC and the CBO parties began negotiating an attempt to buy each others' interest in the Design Center (CBO Complaint, ¶ 23; Affirmation of Robert J. Brener in Support of the Cohen Parties' Motion for Summary Judgment, July 16, 2009 ["Brener Aff. in Supp."], Ex. A). Both parties refused to sell to the other (CBO Complaint, ¶¶ 23-24). The CBO parties have now accused the Cohen parties of a subsequent scheme to make the CBO parties believe that the Design Center was less profitable than it actually was, thereby decreasing the amount the Cohen parties would need to pay for the CBO parties' interest (CBO Complaint, ¶ 25-26). The CBO parties contend that Cohen PDC allegedly demanded Mandatory Additional Capital Contributions, which the CBO parties refused to make (CBO Complaint, ¶ 30-41). Cohen PDC also allegedly charged legal and consulting fees to PDC Holdings that the CBO parties dispute as improper (CBO Complaint,

¶ 49-55). The CBO parties have further accused the Cohen parties of violating the 2002 Operating Agreement by making "major decisions" without Executive Committee approval, including renovation decisions, making allegedly unreasonable demands on a leasing agent and selling Design Center office space at a price the CBO parties state was under market value (CBO Complaint, ¶ 49-72).

In March 2003, under the terms of the 2002 Operating Agreement, CBO 1 served a Buy-Sell notice on both Cohen PDC and CBO 2 (CBO Complaint, ¶ 81). CBO 1's Buy-Sell notice was then delivered to Seidman, an allegedly neutral accounting firm. The CBO parties requested that the accounting firm calculate the Design Center's value and of the amount due to members who were to sell their shares (CBO Complaint, ¶ 82).

The Buy-Sell provision is found in § 8.1 of the 2002 Operating Agreement and runs for eight pages (2002 Operating Agreement, § 8.1). Section 8.1 controls when one member of PDC Holdings delivers a Sell Notice to other members (*id.*). Section 8.1 refers to § 6 of the 2002 Operating Agreement and several subsections of § 6 regarding how calculations of the Buy-Sell amount are to be made (*id.* at § 6).

Seidman issued its report and calculations to CBO 1 and CBO 2 on April 21, 2003 ["April 21st calculations"] (Complaint, ¶ 87). The CBO parties claim that Seidman did not make its calculations in accord with § 8.1 of the 2002 Operating Agreement and made numerous errors in its calculations (Complaint, ¶ 91). The CBO parties claim that Seidman's

April 21st calculations did not mention applying § 6 of the 2002 Operating Agreement, particularly § 6.4, which the CBO parties claim must be applied and was not in Seidman's calculations (CBO parties Memorandum of Law in Support of its Cross-Motion for Partial Summary Judgment ["CBO Cross-Motion"], pp. 4-5).

In March 2003, Cohen PDC commenced a federal action against the Cohen parties (CBO parties Answer and Counterclaims to Plaintiffs' Second Amneded Complaint ["CBO Counterclaims"], ¶ 233). The federal action was dismissed (CBO Counterclaims, ¶ 234). The CBO parties argue that they prevailed in that action and therefore are entitled to attorneys' fees under the terms of § 14.5 of the 2002 Operating Agreement.

On September 24, 2003, the CBO parties sold their interest in PDC Holdings to Cohen PDC for an amount determined by Seidman (Affirmation of Laurie Sayevich Horz in Support of Cross-Motion for Partial Summary Judgment, August 28, 2009 ["Horz Aff. in Support"], Ex. 1, pp. 1-2 ["Sell Agreement"]). As of that date, the CBO parties thus no longer had an interest in PDC 1 or the Design Center.

The Sell Agreement states:

> "The execution and delivery of the Documents and the closing of the sale ... are without prejudice to any and all claims and/or defenses of [all parties]...[S]uch events are also without prejudice to the right, if any, and/or ability of [the Cohen parties] to argue that any and all claims asserted against them in either Action No. 1 [601024/2003] or Action No. 2 [114718/2003] is or are moot or otherwise rendered invalid."

(Sell Agreement, p. 2, 1st enumerated paragraph).

In Action 2, the CBO parties assert the following causes of action: appointment of a receiver for Cohen PDC; declaratory judgments against Cohen PDC and Cohen Bros. regarding the calculations made by Seidman; injunction against Cohen PDC; breach of contract against Cohen PDC and Cohen Bros.; breach of fiduciary duty against Cohen PDC; fraud against Cohen parties; waste and mismanagement against Cohen PDC; breach of contract against the Cohen parties, and breach of fiduciary duty against the Cohen parties. CBO's actions against Seidman have moved to arbitration. In Action 1, the CBO parties filed seven counterclaims against the Cohen parties: a breach of the covenant of good faith and fair dealing against Cohen PDC; breach of fiduciary duty against the Cohen parties; punitive damages against the Cohen parties for reckless disregard of their fiduciary duties; return of fees, commission and wages received from PDC1 and PDC Holdings; declaratory judgment regarding the capital contributions to the PDC; attorneys' fees from the dismissed federal action; and an injunction against the Cohen parties.

The Cohen parties have moved for summary judgment dismissing the CBO parties' causes of action in both Actions. The CBO parties have moved for partial summary judgment on their fourth cause of action for declaratory judgment against Cohen PDC in Action 2; on their first counterclaim against Cohen PDC for a breach of the implied duty of good faith and fair dealing in Action 1; and on their sixth counterclaim for attorneys' fees against Cohen PDC.

STANDARDS OF LAW

1. Summary Judgment

"The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [citations and quotation marks omitted]). Once the proponent has made a prima facie showing, the opposing party bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact. The substantive law governing a case dictates what facts are material, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment (*id*).

2. Breach of Contract

To state a cause of action for breach of contract in New York, a plaintiff must allege the existence of a contract, performance by plaintiff, breach by defendants of a particular contractual provision, and damages sustained by plaintiff as a result of the breach (*Kraus v Visa Intl Serv Assn*, 304 AD2d 408, 408 [1st Dept 2003]). To state a cause of action for breach of contract in Delaware, a plaintiff "must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff. A plaintiff must properly allege each of these elements, even where the plaintiff is seeking an equitable remedy such as specific performance" (*Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 883 [Del. Ch. 2009]).

ANALYSIS

Summary judgment is granted to the Cohen parties dismissing all of the CBO parties' claims except the CBO parties' sixth counterclaim against Cohen PDC for attorneys' fees. Summary judgment is denied to both parties on the issue of attorneys' fees.

1. The CBO Parties' Undisputed Derivative Actions

The Cohen parties argue, and the CBO parties do not dispute, that the CBO parties' following claims are derivative: the first cause of action against Cohen PDC for appointment of a receiver; the second cause against Cohen PDC for declaratory judgment; the third cause against Cohen Bros. for declaratory judgment; the fifth cause against Cohen PDC for

permanent injunction; the sixth cause for declaratory judgment against Cohen PDC; the ninth cause for breach of fiduciary duty against Cohen PDC; and the eleventh cause against Cohen PDC for waste and mismanagement. The parties further do not dispute that the following CBO parties' counterclaims are derivative: the second counterclaim for breach of fiduciary duty against the Cohen parties; the third counterclaim against the Cohen parties for punitive damages for reckless disregard for their fiduciary duties; the fourth counterclaim against the Cohen parties for the return of fees, commissions and wages received from PDC 1 and PDC Holdings; the fifth counterclaim against Cohen PDC for declaratory judgment; and the seventh counterclaim against the Cohen parties for an injunction. The Cohen parties have moved for summary judgment to dismiss these claims.

The court agrees that these claims are derivative. As they are derivative, the CBO parties have no standing to assert them. Summary judgment is granted to the Cohen parties dismissing these causes of action.

To have standing in a derivative suit regarding an LLC, a plaintiff must own portions of the LLC both at the beginning of and throughout litigation. New York and Delaware share the same standards for interpreting standing in derivative claims (*Kelly v Blum*, 2010 Del Ch LEXIS 31, at *37, 2010 WL 629850, at * 9 [Del Ch Feb. 24, 2010] ["case law governing corporate derivative suits is equally applicable to suits on behalf of an LLC"]; *Tzolis v Wolff*, 10 NY3d 100, 109 [2008] [upholding the right of LLC members to sue

derivatively, and citing corporation law in upholding the right]; *Davis v CornerStone Tel. Co., LLC,* 19 Misc3d 1142A, 1142A [NY Sup Ct Albany County June 5, 2008] ["standing to pursue a derivative claim on behalf of a corporation requires status as a shareholder, and standing to pursue a derivative claim on behalf of a limited liability company requires status as a member"]; *Billings v Bridgepoint Partners, LLC*, 21 Misc3d 535, 540-541 [NY Sup Ct Erie County 2008]). In Delaware, "[t]o have standing to maintain a shareholder derivative suit, a plaintiff must be a shareholder at the time of the filing of the suit and must remain a shareholder throughout the litigation" (*Kramer v Western Pacific Indus., Inc.*, 546 A2d 348, 354 [Del 1988]). Likewise, in New York, plaintiffs who have sold their shares in a corporation do not have standing to challenge dismissal actions (*Ciullo v Orange & Rockland Utils., Inc.*, 706 NYS2d 428, 429 [1st Dept 2000]). Furthermore, New York courts have applied corporation law in determining standing under LLC law: "[i]n any event, standing to pursue a derivative claim on behalf of a corporation requires status as a shareholder, and standing to pursue a derivative claim on behalf of a limited liability company requires status as a member" (*Davis,* Misc3d at1142A; *see also Billings,* 21 Misc3d at 540-541).

Thus, in order to maintain a derivative action under New York and Delaware law, it is clear that ownership must be continuous throughout the action. When the CBO parties sold their interest in PDC Holdings on September 24, 2003, they ceased to have standing to challenge the Cohen parties' actions derivatively.

The CBO parties argue that the September 24, 2003 agreement to sell their interest in PDC Holdings did not terminate their standing. The CBO parties contend that the agreement contains express language stating that the sale did not "prejudice ... any and all claims and/or defenses of the parties" (Sell Agreement, p. 2, 1st enumerated paragraph). However, this language does not grant standing; it merely allows the CBO parties to make a claim, and conversely allows the Cohen parties to raise any defense to such a claim, including mootness or standing. In fact, the same paragraph goes on to reserve the Cohen parties' right to raise issues such as standing: "such events [i.e the sale] are also without prejudice to the right, if any, and/or ability of [the Cohen parties] to argue that any and all claims ... are moot or otherwise rendered invalid" (*id.*). Thus, the Sell Agreement does not bar the Cohen parties from raising a defense based on standing, nor does it automatically grant standing to the CBO parties.

The Cohen parties have tendered sufficient evidence to eliminate any issue of fact as to the derivative nature of the CBO parties' first, second, third, fifth, sixth, ninth and eleventh causes of action, as well as their second, third, fourth, fifth, and seventh counterclaims. The CBO parties have not produced proof showing an issue of material fact on these claims. The claims are derivative, and because the CBO parties have no ownership in PDC Holdings, the CBO parties lack standing. Summary judgment is granted to the Cohen parties on these claims and the claims are dismissed (*Kramer,* 546 A2d at 354; *Ciullo*, 706 NYS2d at 429).

2. The CBO Parties' Disputed Derivative Actions

The Cohen parties argue that all of the CBO parties' claims are derivative except for their sixth counterclaim for attorneys' fees. The CBO parties argue that the following causes of action are not derivative, but are direct claims: their fourth cause of action against Cohen PDC for declaratory judgment; their seventh cause of action against Cohen PDC for breach of contract; their eighth cause of action against Cohen Bros. for breach of contract; their tenth cause against the Cohen parties for fraud; and their first counterclaim against the Cohen PDC for breach of the covenant of good faith and fair dealing. Summary judgment is granted to the Cohen parties dismissing these issues for the reasons listed below.

A) The CBO Parties' Fourth Cause of Action for Declaratory Judgment

Summary judgment is granted to the Cohen parties and denied to the CBO parties, dismissing CBO parties' fourth cause of action for declaratory judgment against the Cohen parties. The CBO parties' fourth cause asserts no cognizable claim against the Cohen PDC.

The CBO parties' fourth cause of action is for declaratory judgment seeks a declaration: that the April 21st calculations were not done in accordance with § 8.1 of the 2002 Operating Agreement; that the CBO parties are not required to sell their membership in PDC Holdings according to the April 21st calculations; that the Buy-Sell Pro Forma Amount be recalculated in accordance with the provisions of § 8.1 of the 2002 Operating Agreement by a disinterested and court-appointed accounting or auditing firm; and that

Cohen PDC be ordered to abide by the re-calculated Buy-Sell Pro Forma Amount in electing to be either a buyer or a seller.

The Cohen parties argue that they are not the proper parties to the CBO parties' claim for declaratory judgment (Cohen PDC Parties' Memorandum in Opposition to Cross-Motion for Summary Judgment ["Cohen Opp. Cross-Motion"], pp. 8-9). The Cohen parties assert that the declaratory action is nothing more than a restatement of the CBO parties' claim against Seidman now in arbitration (*id.*).

The declaratory judgment claim involves a dispute as to how to properly calculate the value of PDC Holdings's shares based on the guidelines of the 2002 Operating Agreement (Complaint, ¶ 131). The calculation was done by Seidman, an independent accounting firm. The CBO parties point to no contractual provision that gives the Cohen parties control over Seidman or Seidman's calculation. The CBO parties have admitted that the request for the April 21st calculations came from the CBO parties themselves. The calculations were made solely by Seidman (Complaint, ¶¶ 82, 84, 87; ([Brener Affidavit in Support of the Cohen Parties' Motion for Summary Judgment, July 16, 2009 ["Brener Aff. in Supp"], Ex. S). The 2002 Operating Agreement states that the Cohen parties had the right "to rely in good faith" upon Seidman's calculations (2002 Operating Agreement, § 7.23), and there is no evidence of bad faith by the Cohen parties. The declaratory action would be properly made against Seidman.

The Cohen parties have tendered sufficient evidence to remove any issue of material doubt on this matter, and the CBO parties have not produced proof sufficient enough to require a trial on the issue. There is no showing that there is any contractual provision that would force the Cohen parties to become involved in the April 21st calculations. Summary judgment is granted in favor of the Cohen parties dismissing the CBO parties fourth cause of action for declaratory relief. Summary judgment is denied to the CBO parties on this same issue.

B) The CBO Parties' Seventh and Eighth Cause of Action for Breach of Contract

The Cohen parties next move for summary judgment dismissing the CBO parties' seventh and eight causes of action against Cohen PDC and Cohen Bros., respectively, for breach of contract. The Cohen parties have tendered sufficient evidence showing entitlement to summary judgment on these issues. The CBO parties are not third-party beneficiaries to the Management Agreement, nor did the Cohen parties breach the 2002 Operating Agreement. Summary judgment dismissing the CBO parties' seventh and eight causes of action is granted.

1) Management Agreement

Both the seventh and eight causes of action assert that the Cohen parties injured the CBO parties by breaching the Management Agreement. The CBO parties argue that they are third-party beneficiaries to the Management Agreement, and that the Cohen PDC has

breached both that agreement and the 2002 Operating Agreement, causing damage to the CBO parties. The Cohen parties argue that the CBO parties are not third-party beneficiaries to the Management Agreement. The Management Agreement is an agreement between PDC 1 and the Cohen Bros., wherein the Cohen Bros agreed to manage PDC 1 (Management Agreement, p. 1). No CBO party signed the agreement (Management Agreement, p. 27).

Third-party beneficiary law is substantially similar in New York and Delaware. Each state holds that in order to enforce a contract to which the complainant is not a party, the complainant must be an intended beneficiary. In New York "the absence of any duty of the promisee to the beneficiary has been held to negate an intention to benefit in both governmental and private contract cases" *(Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44-45 [1985] [citations and quotations omitted]). "In order for a contract to confer enforceable third-party beneficiary rights, it must appear that no one other than the third party can recover if the promisor breaches the contract or the contract language should otherwise clearly evidence an intent to permit enforcement by the third party" (*Artwear, Inc. v Hughes*, 202 AD2d 76, 82 [1st Dept 1994] [citations and quotations omitted]).

"To qualify as an intended third party beneficiary of a contract in Delaware, the Plaintiff must meet three qualifications : ... (1) the contracting parties must have intended that the third party beneficiary benefit from the contract, (2) the benefits must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (3) the intent to

benefit the third party must be a material part of the parties' purpose in entering into the contract" (*Eden v Oblates of St. Francis De Sales*, 2006 Del Super LEXIS 492, at * 25, 2006 WL 3512482, at * 8 [Del Super Ct Dec. 4, 2006] [citations, quotations, and footnotes omitted]; *see also Guardian Constr. Co. v Tetra Tech Richardson, Inc.*, 583 A2d 1378, 1386-87 [Del 1990]; *Madison Realty Co. v AG ISA*, LLC, 2001 Del Ch LEXIS 37, at * 14, 2001 WL 406268, at * 5 [Del Ch April 17, 2001]).

The CBO parties argue that they are third party beneficiaries of the Management Agreement because: all communication between the parties was to be copied to CBO 1 (Management Agreement, p. 27); all lease approval requests were to be copied to CBO 1 (Management Agreement, p. 27); and the CBO parties received legal notices directed at or sent by PDC 1 and Cohen Bros.

The facts and allegations presented by the CBO parties are insufficient to make them third-party beneficiaries to the Management Agreement. The CBO parties were not made privy to communications and legal notices and lease renewals because they were intended third-party beneficiaries. They were made privy to such matters because the CBO parties had an interest in PDC Holdings, which held control of PDC 1 (2002 Operating Agreement, § 5.1; CBO Complaint, ¶ 4). The CBO parties were kept informed of the goings on of PDC 1's relationship with Cohen Bros because the CBO parties, through PDC Holdings, owned part of PDC 1 (*id.*). The CBO parties held no individual interest in the relationship between

PDC 1 and Cohen Bros., but only a derivative interest through owning part of PDC Holdings, which held ownership of PDC1. The CBO parties have not shown that no one other than the CBO parties can recover for breach of the Management Agreement (*Artwear,* 202 AD2d at 82); clearly PDC 1 can. Nor have the CBO parties alleged that any benefit the CBO parties' received from the contract was a gift or in satisfaction of a pre-existing obligation (*Guardian Constr.,* 583 A2d at 1386-87; *Fourth Ocean,* 66 NY2d at 44-45).

The CBO parties' interest in the Management Agreement was not as a third party beneficiary (*Guardian Constr.,* 583 A2d at 1386-87; *Fourth Ocean,* 66 NY2d at 44-45; *Artwear,* 202 AD2d at 82). If the CBO parties held any stake in the Management Agreement, it was merely a derivative interest based on the CBO parties' partial ownership of PDC Holdings. Because the CBO parties sold their interest in PDC Holdings via the Sell Agreement (Horz Aff. in Supp., Ex. 1, Sell Agreement), they no longer retain standing to assert a claim based on the Management Agreement (*Kramer,* 546 A2d at 354; *Ciullo*, 706 NYS2d at 429).

The Cohen parties have tendered sufficient evidence to show that there is no issue of fact on the third-party beneficiary issue, and the CBO parties have not rebutted the Cohen parties' evidence. The CBO parties were not third-party beneficiaries to the Management Agreement.

2) The 2002 Operational Agreement

The seventh cause of action also alleges that Cohen PDC breached the 2002 Operating Agreement, thereby injuring the CBO parties. However, the CBO parties' arguments are invalid. There was no breach of contract.

The CBO parties first argue that the 2002 Operating Agreement was breached because the Cohen parties exerted pressure convincing the CBO parties to sell their interest in PDC Holdings. Even if true, Cohen parties' actions would not be breaches of contract. The CBO parties fail to point to any provision in the 2002 Operating Agreement barring the Cohen parties from exerting pressure to sell (*Kraus,* 304 AD2d at 408, *Kuroda,* 971 A2d at 883).

Next, the CBO parties contend that on October 14, 2002, Charles Cohen of Cohen PDC sent a letter to the CBO parties asking for $4.5 million to make up a disputed shortfall in PDC Holdings' account (Horz Aff. in Opp., Ex. 23 ["10/14/02 Cohen Letter"]). The CBO parties argue that when sending this letter, Cohen PDC had not fulfilled its contractual obligations to prepare Capital Budgets, Operating Budgets, or Business Plans for 2002, and, as a result, no "shortfall" could be declared (CBO Memorandum of Law in Opposition to the Cohen Parties' Motion for Summary Judgment, August 28, 2009 ["CBO Memo. in Opp."], p. 11).

The CBO parties' argument fails. In August 2002 the CBO parties signed the 2002 Operating Agreement, which replaced the 1999 Operating Agreement (2002 Operating

Agreement). Section 9.6 specifically rebuts the CBO parties' contention. Therein, the parties agree that (1) Cohen PDC had already submitted an approved Operating Budget for 2002; and (2) Cohen PDC had until 60 days before the end of 2002 to submit a Capital Budget, an Operating Budget and a Business Plan for 2003. Thus, the Cohen PDC had more that two weeks after posting the 10/14/02 Cohen Letter to submit these plans. The 2002 Operating Agreement was not violated.

Next, the CBO parties argue that there is a breach of the 2002 Operating Agreement because the Cohen parties allegedly did not deposit a shortfall amount into PDC Holdings's account. The CBO parties point to no contractual provision that this alleged act violates. In addition, CBO parties themselves have given evidence that the Cohen parties gave payment in the form of Subscription Agreements (Horz Aff. in Opp., Ex. 14), and the CBO parties fail to show how this is not a deposit or is somehow barred by the 2002 Operating Agreement. Without more than bare assertions of wrongdoing, this dispute over the alleged shortfall cannot support a claim for breach of contract (*see Marino v Vunk*, 39 AD3d 339, 340 [1st Dept 2007]: "[v]ague and conclusory allegations are insufficient to sustain a breach of contract cause of action;" *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [claim for breach of contract must state the provisions of the contract allegedly breached]; *see also Kuroda*, 971 A2d at 883).

The CBO parties next argue that the Cohen PDC breached the 2002 Operating Agreement because Cohen PDC "improperly" made capital contributions to PDC Holdings in the spring of 2003, raising the Cohen PDC's contribution percentage and "negatively" impacting the CBO parties' payout. The CBO parties point to no provision in the 2002 Operating Agreement barring such a contribution (*Sud*, 211 AD2d at 424). The Cohen PDC's actions have not been shown to have been improper under the 2002 Operating Agreement (*Kraus*, 304 AD2d at 408; *Kuroda*, 971 A2d at 883).

Next, the CBO parties argue that Cohen PDC breached the 2002 Operating Agreement because Cohen PDC purportedly executed "major decisions" without the consent of the Executive Committee. However, the CBO parties do not specify what constitutes a "major decision" under the 2002 Operating Agreement, nor how any of Cohen PDC's alleged "major decisions" violated the 2002 Operating Agreement. Such a bare bones allegation is not enough to make a claim for breach of contract (*Marino*, 39 AD3d at 340, *Kuroda*, 971 A2d at 883).

The CBO parties next argue that Cohen PDC did not make Seidman use § 6.1(c) and 6.3 of the 2002 Operating Agreement in Seidman's April 21st calculation of the amount due to CBO 1 and CBO 2 for their shares in PDC Holdings. Again, the CBO parties point to no provision of the 2002 Operating Agreement that would force Cohen PDC to make Seidman to use these provisions in calculating the sale price. Without showing a specific contractual

provision that mandated action by Cohen PDC, and without showing that Cohen PDC did not take the mandated action, the CBO parties do not make a claim for breach of contract.

Finally, the CBO parties argue that Cohen PDC breached the 2002 Operating Agreement because Seidman's audits of PDC Holdings, even if independent, would still not reveal whether Cohen PDC committed malfeasance. The CBO parties appear to be argue that Seidman's audits do not reveal malfeasance and are unreliable. Even if true, the CBO parties action on this point would lie against Seidman; no action here lies against the Cohen parties. The CBO parties have not made a prima facie claim for breach of contract.

The Cohen parties have tendered sufficient evidence to show that there is no issue of material fact as to any alleged breach of the Management Agreement or the 2002 Operating Agreement. The CBO parties have not rebutted these arguments to show that a trial is necessary on a genuine issue of material fact *(People v Grasso*, 50 AD3d at 545). The CBO parties are not third-party beneficiaries to the Management Agreement nor did the CBO parties show that the Cohen parties breached the 2002 Operating Agreement. The Cohen parties' motion for summary judgment dismissing the CBO parties' seventh and eighth causes of action is granted.

D) The CBO Parties' Tenth Cause of Action for Fraud

In their tenth cause of action, the CBO parties claim that the Cohen parties entered into a scheme to defraud the CBO parties. The Cohen parties are alleged to have

manipulated the Design Center's balance sheet so as to make the Design Center appear unattractive to the CBO parties, thus lowering the CBO parties' sale price. The CBO parties allege that: 1) the Cohen parties caused PDC Holdings to incur substantial expenses without the PDC Holdings's Executive Committee's approval; 2) the Cohen parties artificially depressed the PDC's short-term revenues by "various acts;" 3) the Cohen parties undertook "wrongful acts" to make PDC appear less profitable; and 4) and the Cohen parties committed unspecified acts designed to circumvent and nullify the 2002 Operating Agreement (Complaint ¶¶ 25-28).

In New York and Delaware the law of fraud is similar. Both states require that a plaintiff must show 1) a misrepresentation or material omission of fact; 2) that such a fact was false and known to be false by defendant; 3) that the misrepresentation or omission was made to induce the other party to rely upon it; 4) justifiable reliance; and 5) injury (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *Lord v Souder,* 748 A2d 393, 402 [Del 2000]). "However, the mere addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud. Moreover, CPLR 3016 (b) requires a cause of action sounding in fraud to state in detail, the circumstances constituting the wrong" (*Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248, 249 [1st Dept 1997] [citations and quotations marks omitted]. "A fraud claim that only restates a breach of contract claim may not be

maintained" (*Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]; *see also BAE Sys. N. Am. Inc. v Lockheed Martin Corp.*, 2004 Del Ch LEXIS 119, at *34, 2004 WL 1739522, at *8 [Del Ch Aug. 3, 2004] [quotation marks omitted] ["[o]ne cannot bootstrap a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations"]).

The CBO parties have failed to show a misrepresentation that the CBO parties justifiably relied upon in acting or not acting based thereon. In addition, the CBO parties' fraud claim is merely a restatement of the CBO parties' breach of contract claims. As such, summary judgment is granted to the Cohen parties on the CBO parties' tenth cause of action.

E) The CBO Parties First Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing

The Cohen parties also move for summary judgment to dismiss the CBO parties' first counterclaim for breach of the implied covenant of good faith and fair dealing implicit in the 2002 Operating Agreement. The CBO parties argue that even if there is no specific contractual provision that requires the Cohen parties to dictate to Seidman how to make the April 21st calculations, good faith and fair dealing required that the Cohen parties instruct Seidman to use the calculation formulas proffered by the CBO parties.

Delaware and New York treat the duty of good faith and fair dealing similarly: neither state will normally enforce terms that contradict the contractual language. "We will only

imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, ... When conducting this analysis, we must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal" (*Nemec v Shrader*, 991 A2d 1120, 1126 [Del 2010] [footnotes and quotation marks omitted]). "The implied covenant cannot contravene the parties' express agreement and cannot be used to forge a new agreement beyond the scope of the written contract. Despite these restrictions, Delaware courts apply this legal theory only in narrow circumstances" (*Chamison v Healthtrust, Inc.*, 735 A2d 912, 921 [Del Ch 1999] [footnotes omitted]). "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance....While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citations and quotation marks omitted]).

The CBO parties complain that the Seidman calculations did not follow the required formula in the 2002 Operating Agreement and that, as a result, the price at which Seidman calculated their share value was below the actual value. However, the Cohen parties were justified by the terms of the 2002 Operating Agreement "to rely in good faith" upon

Seidman's April 21st calculations (2002 Operating Agreement, § 7.23). It was not unreasonable or arbitrary for the Cohen parties to trust Seidman's calculations. What is more, the 2002 Operating Agreement directs that Seidman, and Seidman only, handle the calculations for the Buy-Sell amount; the Cohen parties are not implicated at all in this calculation (2002 Operating Agreement, § 8.1 (a)). The Cohen parties justifiable relied upon Seidman.

The Cohen parties have tendered sufficient evidence to show that no issue of material fact exists on this issue. The Cohen parties had no implied duty to challenge or control Seidman's calculations. The CBO parties have not produced sufficient evidence to require trial of on the issue of the breach of the implied covenant of good faith and fair dealing. Summary judgment is granted to the Cohen parties dismissing the CBO parties' first counterclaim for breach of the implied duty of good faith and fair dealing.

3. Attorneys' Fees

Both parties move for summary judgment on the CBO parties' sixth counterclaim against the Cohen parties for attorneys' fees. The Cohen parties seek to dismiss the claim. The CBO parties seek payment of their attorneys' fees resulting from the dismissal of the parties' federal court case. The CBO parties seek attorneys' fees under the 2002 Operating Agreement, which specified that a "prevailing party" in a dismissal received attorneys' fees

from the opposing side (2002 Operating Agreement, § 14.5). Both parties are denied summary judgment on the issue. There are genuine issues of material fact as to what the 2002 Operating Agreement requires.

"To determine whether a party has prevailed for the purpose of awarding attorneys' fees [in New York] , the court must consider the true scope of the dispute litigated and what was achieved within that scope. To be considered a prevailing party, one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof" (*Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279 [1st Dept 2007] [internal citations and quotations omitted]). "Under Delaware law, the Court generally evaluates the substance of a litigation to determine which party predominated. Thus, in the usual case, whether a party prevailed is determined by reference to substantive issues, not damages" (*World-Win Mktg. v Ganley Mgmt. Co.*, 2009 Del. Ch. LEXIS 151, at *6-7, 2009 WL 2534874, at * 2 [Del Ch Aug. 18, 2009]). "The prevailing party under Delaware law is the party that predominates in the litigation" (*id.*, 2009 Del Ch LEXIS 151 at *8, 2009 WL 2534874, at * 3 [citations and quotation marks omitted]).

The relevant portion of the 2002 Operating Agreement is as follows:

> Attorneys' Fees: In the event of any arbitration or other legal or equitable proceeding from the enforcement of any of the terms or conditions of this Agreement, or any alleged disputes, breaches, defaults, or misinterpretations in connection with any provision of this Agreement, the prevailing party in such proceeding, or the non-dismissing party where the dismissal occurs other than by reason of settlement, shall be entitled to recover its reasonable costs and expenses (including, but not limited to, reasonable attorneys' fees and costs)
>
> The "prevailing party," for purposes of this Agreement, shall be deemed to be that party who obtains substantially the relief sought, whether by dismissal, award, or judgment.

(2002 Operating Agreement, § 14.5).

Case law states that normally the CBO parties would not be able to recover attorneys' fees for the jurisdictional dismissal, since the dismissal was not substantive nor on the central claims advanced (*Sykes*, 39 AD3d at 279,; *World-Win Mktg.*, 2009 Del. Ch. LEXIS 151 at *6-7, 2009 WL 2534874 at * 2). However, the 2002 Operating Agreement muddies the waters significantly. Therein the prevailing party is the one that receives a "dismissal" of the action. This phrasing is ambiguous. The 2002 Operating Agreement does not define "dismissal." It is unclear whether contract incorporates only case law or expands the definition of dismissal to include jurisdictional dismissal. As such, there is a genuine issue of material fact, and summary judgment is denied to both parties on the issue.

Accordingly, it is

ORDERED that the Cohen parties' motion for summary judgment is GRANTED for the following causes of action and each of the following causes of action is dismissed:

1) the CBO parties' first cause of action against Cohen PDC for appointment of a receiver for Cohen PDC (index no. 601024/2003);

2) the CBO parties' second cause of action against Cohen PDC for declaratory judgment (index no. 601024/2003);

3) the CBO parties' third cause of action against Cohen Bros. for declaratory judgment (index no. 601024/2003);

4) the CBO parties' fourth cause of action against Cohen PDC for declaratory judgment (index no. 601024/2003);

5) the CBO parties' fifth cause of action against Cohen PDC for a permanent injunction (index no. 601024/2003);

6) the CBO parties' sixth cause of action against Cohen PDC for declaratory judgment (index no. 601024/2003);

7) the CBO parties' seventh cause of action against Cohen PDC for breach of contract (index no. 601024/2003);

8) the CBO parties' eighth cause of action against Cohen Bros. for breach of contract (index no. 601024/2003);

9) the CBO parties' ninth cause of action against Cohen PDC for breach of fiduciary duty (index no. 601024/2003);

10) the CBO parties' tenth cause of action against the Cohen parties for fraud (index no. 601024/2003);

11) the CBO parties' eleventh cause of action against Cohen PDC for waste and mismanagement (index no. 601024/2003);

12) the CBO parties' first counterclaim against Cohen PDC for the breach of the covenant of good faith and fair dealing (index no. 114718/2003);

13) the CBO parties' second counterclaim against the Cohen parties for breach of fiduciary duty (index no. 114718/2003);

14) the CBO parties' third counterclaim against the Cohen parties for reckless disregard and breach of their fiduciary duties (index no. 114718/2003);

15) the CBO parties fourth counterclaim against the Cohen parties for forfeiture of fees, commissions, and wages earned from PDC 1 and PDC Holdings (index no. 114718/2003);

16) the CBO parties' fifth counterclaim against Cohen PDC for declaratory judgment (index no. 114718/2003);

17) and the CBO parties' seventh counterclaim against the Cohen parties for an injunction (index no. 114718/2003); and it is further

ORDERED that the Cohen parties' motion for summary judgment on the CBO parties' sixth counterclaim for attorneys' fees (index no. 114718/2003) is DENIED.

ORDERED that the CBO parties' motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 18, 2010.

ENTER

Hon. Eileen Bransten, J.S.C.