

111 W. 57th Inv. LLC v 111 W57 Mezz Inv. LLC

2022 NY Slip Op 34258(U)

December 15, 2022

Supreme Court, New York County

Docket Number: Index No. 655031/2017

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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111 WEST 57TH INVESTMENT LLC, ON BEHALF OF ITSELF AND DERIVATIVELY ON BEHALF OF 111 WEST 57TH PARTNERS LLC AND 111 WEST 57TH MEZZ 1 LLC,

Plaintiffs,

- v -

111 W57 MEZZ INVESTOR LLC, SPRUCE CAPITAL PARTNERS LLC, JOSHUA CRANE, ROBERT SCHWARTZ, ATLANTIC 57 LLC, 57 MADISON LLC, ARTHUR BECKER, JOHN DOE ENTITY, ACREFI MORTGAGE LENDING, LLC, APOLLO CREDIT OPPORTUNITY FUND III AIV I LP, AGRE DEBT 1, APOLLO COMMERCIAL REAL ESTATE FINANCE, INC., APOLLO GLOBAL MANAGEMENT, INC., AMERICAN GENERAL LIFE INSURANCE COMPANY, VARIABLE ANNUITY LIFE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AIG PROPERTY CASUALTY COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, AIG ASSET MANAGEMENT (U.S.), LLC, 111 WEST 57TH PARTNERS LLC, 111 WEST 57TH MEZZ 1 LLC,

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 385, 401, 408, 409, 410, 419, 420, 421

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 383, 402, 405

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 403, 406, 419, 420, 421

were read on this motion to

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 010) 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 384, 404, 407, 419, 420, 421

were read on this motion to

DISMISS

In the summer of 2017, Plaintiff 111 West 57th Investment LLC's ("Plaintiff" or "Investment") approximately \$65 million investment in a joint venture to develop a luxury residential tower on 57th street in Manhattan was wiped out through a strict foreclosure. Plaintiff alleges in this action that the sponsors of the project, non-parties 111 West 57th Sponsor LLC, Michael Stern, and Kevin Maloney (collectively, "Sponsor"), engaged in a "backroom deal" with certain investors, (defendants Spruce¹ and Atlantic²) and the project's lenders (defendants Apollo³ and AIG⁴) to deprive Plaintiff of their equity investment, while "carrying over" Sponsor's and Atlantic's investment in the project or otherwise benefitting at Plaintiff's expense.

All defendants now move to dismiss the Second Amended Complaint's claims for breach of the implied covenant of good faith and faith dealing under the Pledge Agreement (count II against Apollo), tortious interference with contract (counts III, IV, and V against Spruce, Apollo,

¹ 111 W57th Mezz Investor LLC, Spruce Capital Partners LLC, Joshua Crane, and Robert Schwartz (collectively, "Spruce").

² Atlantic 57 LLC ("Atlantic"), 57 Madison LLC ("57 Madison"), and Arthur Becker ("Becker" collectively, "Atlantic").

³ ACREFI Mortgage Lending, LLC, Apollo Credit Opportunity Fund III AIV I LP, AGRE Debt 1 – 111 W 57, LLC, Apollo Commercial Real Estate Finance, Inc., and Apollo Global Management (collectively, "Apollo").

⁴ American General Life Insurance Co., Variable Annuity Life Insurance Co., National Union Fire Insurance Co. of Pittsburgh, PA, AIG Property Casualty Co., The United States Life Insurance Co. in the City of New York, and AIG Asset Management (U.S.), LLC (collectively, "AIG").

and AIG), and unjust enrichment (count VI against Atlantic). For the reasons stated below, the defendants' motions are **granted in part and denied in part**.

BACKGROUND

The Joint Venture was formed in 2013 by non-party Ambase Corporation (“AmBase”) and Sponsor to develop real property at 105–111 West 57th Street, New York, New York 10019 (the “Property”) into luxury condominiums. To facilitate the Joint Venture, Investment, a subsidiary of AmBase, joined with Sponsor, and Defendant Atlantic 57 LLC (“Atlantic”), an entity owned by Defendant Arthur Becker (“Becker”), to form Nominal Defendant 111 West 57th Partners LLC (“Company”). Investment’s, Sponsor’s, and Atlantic’s rights and obligations with respect to Company are governed by an Amended and Restated Limited Liability Company Agreement dated December 17, 2013 (the “JVA”) (*see* NYSCEF 255).

A. The Construction Loan

In June 2015, the Joint Venture obtained a \$725 million Construction Loan to finance the completion of the Project (SAC ¶ 53). Part of the Construction Loan was a \$400 million non-recourse mortgage loan from AIG entities to the owner of the Property, 111 West 57th Property Owner LLC (“Mortgage Borrower”), which was secured by a mortgage on the Property (SAC ¶ 55). The other half of the Construction Loan was a \$325 million mezzanine loan (the “Original Mezzanine Loan”) from Apollo entities to 111 West 57th Holdings, LLC (“Senior Mezzanine Borrower”), the owner and manager of Mortgage Borrower and a wholly owned subsidiary of Nominal Defendant 111 West 57th Mezz 1 LLC (“Borrower” or “Junior Mezzanine Borrower”) (*id.*). This non-recourse loan was secured by the Borrower’s primary asset—its equity interest in the Mortgage Borrower (*id.*).

By January 2017, the Construction Loan was out of balance and Apollo and AIG issued notices demanding that Senior Mezzanine Borrower pay Borrower's Shortfall Contribution (SAC ¶¶ 61–62). Sponsor protested the calculations and Apollo withdrew the notice, and then issued a reduced second notice (SAC ¶ 63). According to Plaintiff, Sponsor refused to invest additional funds to correct the out-of-balance condition, despite Investment being ready to do so (SAC ¶ 65).

After the deadline to pay the Borrower's Shortfall Contribution had passed, Sponsor caused Original Mezzanine Borrower to negotiate a Forbearance Agreement, dated March 3, 2017, with Apollo (SAC ¶ 66). In connection with the forbearance, the Original Mezzanine Loan was split into a senior mezzanine loan in the principal amount of \$300 million ("Senior Mezzanine Loan") and a junior mezzanine loan in the principal amount of \$25 million ("Junior Mezzanine Loan"), which was secured by the Junior Mezzanine Borrower's principal asset—its 100% membership interest in the Senior Mezzanine Borrower, which in turn owned a 100% membership interest in the Mortgage Borrower (the "Collateral") (SAC ¶ 56, 66–68). This transaction is reflected in the Pledge and Security Agreement dated March 28, 2017, between the Borrower and Apollo ("Pledge Agreement") (NYSCEF 222). In connection with the split, the parties also amended the Mortgage Loan, and the lenders entered into an Amended and Restated Intercreditor Agreement ("ICA") dated as of March 28, 2017 (SAC ¶ 69).

The ICA provided that, among other things, the junior mezzanine lender was prohibited from foreclosing unless the new owner of the Collateral could satisfy high net worth and liquidity requirements. It also required a foreclosing lender to locate a new developer within sixty days of a foreclosure, and to recommence construction under a new construction manager within thirty days of foreclosure. The ICA included a list of presumptively acceptable

developers and construction managers (which did not include Stern or Maloney or their affiliates), and provided that a choice outside that list would require lender approval (SAC ¶ 87; NYSCEF 198 § 5(a) [“ICA”]).

B. The Alleged “Backroom Deal”

According to Plaintiff, during the forbearance period, Apollo, AIG, Stern, and Maloney negotiated a secretive “backroom deal” with defendants Joshua Crane and Robert Schwartz to bring their entity, Spruce Capital Partners LLC, into the Project and to extinguish Plaintiff’s equity (SAC ¶ 71).

Plaintiff submits that Stern first approached Crane and Schwartz in the summer of 2016 (SAC ¶ 72). Shortly after the Second Borrower’s Shortfall Contribution Notice, Stern emailed Crane and Schwartz confirming that it “looks like we have a deal.” (NYSCEF 172). A few days later, on February 13, 2017, Stern, Crane, and an attorney who was then representing Company and Borrower in its negotiations with Apollo and AIG, scheduled a meeting to discuss what Stern called “our internal deal” (SAC ¶ 73). Thereafter, Stern and Crane worked with Apollo to create financial models under which the equity owners of the Project should expect a cash flow of \$617 million after repayment of the debt—an equity multiple of over 4X on the \$130 million in equity invested to date (SAC ¶ 75). Over the next month, Spruce Capital Partners examined the model and financial and construction information shared by Stern, Maloney, and a broker (SAC ¶ 76).

On May 18, 2017, Spruce Capital, Crane, and Schwartz formed 111W57 Mezz Investor LLC (“Junior Mezzanine Lender” or “Spruce”). Spruce and Apollo performed due diligence, recruited investors, and shared financial models that assumed Spruce would be an equity owner in the Project, not a lender (SAC ¶¶ 79–82). Apollo developed a model in May 2017 that

showed all of the investors' \$135 million in equity being wiped out "post foreclosure" and a new equity owner having \$60 million in equity. Cash flow to equity was projected to be \$604 million (SAC ¶ 82). This purportedly confused potential investors who asked whether they were buying debt or equity (SAC ¶ 83). Spruce reassured prospective investors that it would be able to convert its debt into equity by means of a strict foreclosure, with Crane representing to one potential investor that a foreclosure sale—in which Spruce would simply get its money back instead of earning several multiples on its investment—was a "low probability" (SAC ¶ 84; NYSCEF 175).

On June 28, 2017, Apollo assigned the Junior Mezzanine Loan and the Pledge Agreement to Spruce, making Spruce the Junior Mezzanine Lender. Spruce acquired the Junior Mezzanine Loan at par (SAC ¶ 100). The assignment required AIG's approval (SAC ¶ 87). To get around the hurdles posed by the ICA, including the liquidity and construction requirements, AIG, Apollo, and Spruce negotiated and ultimately executed the First Amendment to the Amended and Restated Intercreditor Agreement ("ICA Amendment") as well as a Funding Arrangement Agreement ("FAA") (SAC ¶¶ 88–90).

The agreements also loosened the net worth and liquidity requirements for owners of the Collateral (NYSCEF 197 § 3(a) [ICA Amendment]); permitted Spruce to cure the out of balance condition by taking out a new junior mezzanine loan from an Apollo affiliate (ICA Amendment § 4, 5), and AIG pre-approved the necessary modifications to the loan documents; the Funding Arrangement Agreement that would provide for continued funding of the property's development through August 2017, despite the loan being out of balance (NYSCEF 177 [FAA]); required Spruce to continue construction of the project by "Construction Manager" (ICA Amendment § 7), which Plaintiff alleges was defined in a separate loan agreement to mean

“111 Construction Manager LLC,” a Stern and Maloney affiliate; and permitted Spruce to transfer a non-controlling interest in the Collateral to 111 Construction Manager LLC (ICA Amendment § 5(a)).

C. Strict Foreclosure

On June 30, 2017, the day after the expiration of the forbearance period, Spruce delivered to Junior Mezzanine Borrower a notice of an Event of Default. Spruce called for the Junior Mezzanine Borrower to immediately pay the full outstanding principal balance of the Junior Mezzanine Loan. This payment was not made. On July 7, 2017, Spruce sent Junior Mezzanine Borrower a proposal of strict foreclosure pursuant to UCC § 9-620(a). Plaintiff objected to Spruce’s notice, invoking the “Major Decision” provision of the JVA, and demanding that Stern and Maloney object. Stern and Maloney disagreed and declined to assert an objection (*id.* ¶¶ 99-101).

In an effort to stop the strict foreclosure, Plaintiff filed this action to challenge the proposed strict foreclosure by Spruce (*id.* ¶¶ 112). A temporary restraining order was granted, but the preliminary injunction was later denied, as the Court (Bransten, J.) determined that Plaintiffs did not have standing to challenge the strict foreclosure (NYSCEF 76). Thereafter, Spruce foreclosed on the junior mezzanine loan, which eliminated Plaintiff’s equity interest in the Property (*id.* ¶ 115). Spruce now owned that equity subject to superior existing loans, including Apollo’s senior mezzanine loan (*id.* ¶ 120). According to Plaintiff, “on May 7, 2018, Madison Realty Capital—by way of various affiliates—invested \$90 million in a transaction that brought Stern and Maloney back into the ownership structure” (*id.* ¶ 128).

Procedural History

This litigation began in 2017 as an emergency bid to prevent the strict foreclosure from happening. After an appeal in which the First Department held that the intervening foreclosure mooted Plaintiff's claim for prospective relief, Plaintiff amended its complaint to seek damages on a variety of legal theories and the imposition of a constructive trust over the Collateral. The Court (Sherwood, J.) granted in part and denied in part Defendant's motion to dismiss the amended complaint.

On appeal, the First Department held that the complaint stated a viable derivative claim that Defendant (Spruce) breached the duty of good faith and fair dealing implied in the Pledge Agreement by "bribing" Stern and Maloney to cause Borrower to consent to the strict foreclosure (*see 111 W. 57th Inv. LLC v 111w57 Mezz Inv. LLC*, 192 AD3d 618 [1st Dept 2021]).⁵ The First Department dismissed Plaintiffs' other claims, including a claim for aiding and abetting a breach of fiduciary duty, on the ground that the Joint Venture Agreement waived all fiduciary duties and all that remained were contractual duties. Plaintiffs' motion for reargument was denied on August 26, 2021 (*see* NYSCEF 509).

In 2018, Plaintiff and its affiliates also commenced an action against Apollo Lenders and ARI for tortious interference with the equity put right in the JVA and aiding and abetting Sponsor's breach of fiduciary duty in connection with the strict foreclosure (*AmBase Corp., et al. v ACREFI Mortg. Lending, LLC*, Index No. 653251/2018 [Sup Ct, NY County] [Sherwood, J.]). The Court dismissed the complaint, holding, as relevant here, that Plaintiff had not adequately alleged that Apollo Lenders and ARI substantially assisted the breach. Plaintiff appealed Justice Sherwood's decision, but later withdrew the appeal with prejudice.

⁵ This claim remains in the Second Amended Complaint as Count I (NYSCEF 254). Spruce did not move to dismiss this cause of action in this motion.

On September 30, 2021, Plaintiff was granted leave to amend its complaint in this action to add additional claims against Spruce, and to add the Apollo, AIG, and Atlantic Defendants (*see* NYSCEF 252).

On May 9, 2022, this Court dismissed several of Plaintiff's claims in the related case, *Ambase Corp., et al v 111 West 57th Sponsor LLC, et al* (Sup Ct, NY County, May 9, 2022, index No. 652301/2016).

DISCUSSION

I. Tortious Interference with Contract (Against Spruce, Apollo, and AIG)

A. Tortious interference with contract based on breach of §7.2(a) and §8.5 of JVA.

Plaintiff's claim against Spruce, Apollo, and AIG for tortious interference with contract based on Sponsor's alleged breach of §7.2(a) and §8.5 of the Amended and Restated Limited Liability Company Agreement dated December 17, 2013 (the "JVA") (*see* NYSCEF 255) fails as a matter of law. In the related action, this Court already ruled that Sponsor did not breach those sections of the JVA (*see Ambase Corp. v 111 W. 57th Sponsor LLC*, 2022 NY Slip Op 31503[U] [Sup Ct, NY County 2022]). In the absence of an underlying breach of contract, Plaintiff cannot prevail on their claim for tortious interference (*Marks v Smith*, 65 AD3d 911, 916 [1st Dept 2009]).

B. Tortious interference with contract based on breach of implied covenant.

Plaintiff next claims that these Defendants are liable for tortious interference with Sponsor's alleged breach of the JVA's implied covenant of good faith and fair dealing (the "Amended Tortious Interference Claim").

As an initial matter, the parties dispute whether such a claim is cognizable under New York law.⁶ Several appellate decisions appear to accept the potential viability of such claims, albeit without addressing the question expressly (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 595 [2012]; *Zuckerwise v Sorceron Inc.*, 289 AD2d 114, 115 [1st Dept 2001]; *Poughkeepsie Sav. Bank v R & G Sloane Mfg. Co., Inc.*, 84 AD2d 212, 217 [2d Dept 1981]). The court in *RCGLV Maspeth LLC v Maspeth Properties L.L.C.*, 26 Misc 3d 1241(A) [Sup Ct, King’s County 2010] did address the question directly and rejected the argument that “no cause of action exists for tortious interference of an implied duty of good faith and fair dealing.”⁷ In response, Defendants cite *Schinella v Soyer* (19-CV-8931 (NSR), 2021 WL 4255055, at *6 [SDNY 2021] [applying New York law]), in which the court noted that it was “not aware of any cause of action for tortious interference with the implied covenant of good faith and fair dealing” but went on to say, “[i]n any event, Plaintiff did not assert any breach of the implied covenant of

⁶ Although Plaintiff’s tortious interference claims in the Second Amended Complaint do not explicitly reference any alleged breach of the JVA’s implied covenant of good faith and fair dealing, it became clear during the briefing of these motions and at oral argument that Plaintiff does in fact intend to assert such a claim, without the need to add any additional factual allegations. Rather than forcing Plaintiff to seek leave to amend simply to add the words “implied covenant of good faith and fair dealing” to these claims, which inevitably would have led to yet another round of motions to dismiss, the Court authorized additional briefing to address whether the factual allegations in the Second Amended Complaint (on which Plaintiff agreed to stand for these purposes) gave rise to viable claims for tortious interference based on an alleged underlying breach of the implied covenant of good faith and fair dealing. The parties submitted briefing after oral argument (NYSCEF 419, 421).

⁷ Moreover, federal courts and other states appear to recognize this cause of action (*see Vista Outdoor Inc. v Reeves Family Tr.*, 725 Fed Appx 17, 22–23 [2d Cir 2018] [affirming district court’s finding that defendant tortiously interfered with the implied covenant of good faith and fair dealing] [applying New York law]; *NAMA Holdings, LLC v Related WMC LLC*, CV 7934-VCL, 2014 WL 6436647, at *27 [Del Ch 2014] [holding that defendant tortiously interfered with the implied covenant]).

good faith and fair dealing in her Complaint, and accordingly such a hypothetical claim is not properly before the Court.”

Although the New York case law is sparse, the Court agrees with Plaintiff that such a claim could be viable, assuming all other elements of the cause of action are adequately pleaded and proven. The implied covenant is as much a part of the contract as any other term. That said, the fact that the alleged underlying breach in such a case cannot be tied to specific language in the agreement could present difficult problems of pleading and proving, among other things, “defendant’s knowledge of the contract and the specific terms of the contract” and “defendant’s intentional and improper procuring of a breach of that contract” (*Epic Sports Intern., Inc. v Frost*, 2013 NY Slip Op 33482[U] [Sup Ct, NY County 2013]).

Nevertheless, the Court finds that Plaintiff fails to state a viable claim for relief in this case. Here, Spruce, Apollo, and AIG are all creditors who have a right “to protect its own legal or financial stake in the breaching party’s business” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007] [noting that the economic interest defense has been applied where defendant was the breaching party’s creditor]). “The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other” (*Foster v Churchill*, 87 NY2d 744, 750 [1996]). “Although economic interest is cast as a defense, courts routinely dismiss tortious interference claims at the pleading stage when it is evident, on the face of the complaint, that the doctrine applies” (*Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, 72 Misc 3d 1218(A) [Sup Ct, NY County 2021]).

Contrary to Plaintiff’s argument, malice, fraud, or illegal means go beyond allegations of intentional, bad faith acts (*Audax Credit*, 72 Misc 3d 1218(A) [“[E]ven bad faith, without more,

does not satisfy the malice requirement”]). Indeed, the economic interest defense acknowledges that “[p]rocurring the breach of a contract in the exercise of an equal or superior right is acting with just cause or excuse, and is justification for what would otherwise be an actionable wrong” (*Felsen v Sol Cafe Mfg. Corp.*, 24 NY2d 682, 687 [1969]). Although Plaintiff cites NY Penal Law § 180.03 for the proposition that commercial bribery is illegal, Plaintiff has not brought any causes of action alleging commercial bribery, nor has Plaintiff attempted to demonstrate the elements of such a claim. Thus, while Spruce, AIG, and Apollo may have acted to the detriment of Plaintiff or the company, Plaintiff has failed to allege that such actions were motivated by malice, fraud, or illegal means. Accordingly, Plaintiff’s claim against Spruce, AIG, and Apollo for tortious interference with the Sponsor’s alleged breach of the implied covenant is dismissed.

II. Unjust Enrichment (Against Atlantic).

Plaintiff’s unjust enrichment claim against Atlantic is dismissed as the JVA is an enforceable written contract governing the rights and obligations among Investment (Plaintiff), Sponsor, and Atlantic with respect to the Company (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [Unjust enrichment is a claim ordinarily reserved for circumstances where no actual agreement between the parties exists]).

Even if Plaintiff’s claim is not precluded by the JVA, Plaintiff has failed to state a claim for unjust enrichment as Plaintiff fails to allege some type of direct dealings or an actual, substantive relationship between Plaintiff and each of the respective Atlantic Defendants (beyond the JVA) (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517 [2012]). Likewise, Plaintiff’s bare legal conclusions “that it is against equity and good conscience [for the Atlantic Defendants] to retain an unidentified benefit is insufficient to adequately allege that an asserted enrichment was unjust” (*FoxStone Group, LLC v Calvary Pentecostal Church, Inc.*, 173

AD3d 978, 981 [2d Dept 2019]). Accordingly, the sixth cause of action for unjust enrichment must be dismissed.

III. Breach of the Implied Covenant Under the Pledge Agreement (Against Apollo)

As an initial matter, Apollo argues that Justice Sherwood’s decision in *Ambase Corp. v Acrefi Mortg. Lending, LLC* (2019 NY Slip Op 33148[U] [Sup Ct, NY County 2019] [the “Apollo Litigation”]) precludes Plaintiff from asserting that Apollo breached the implied covenant of good faith and fair dealing under the Pledge Agreement. The Court disagrees. Even assuming that prior decision covered the same subject matter as the claim asserted by Plaintiff in this case, Justice Sherwood’s decision granting a motion to dismiss was not on a decision on the merits of the claims that has preclusive effect here (*People ex rel. Spitzer v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008]; *Jamal v Caroline Garden Tenants Corp.*, 173 AD3d 843, 844–45 [2d Dept 2019]). Putting aside that the decision does not expressly dismiss the claims with prejudice (CPLR 5013 [“A judgment dismissing a cause of action before the close of the proponent’s evidence is not a dismissal on the merits unless it specifies otherwise”]), the language used indicates that the determination was based on insufficiency of the pleadings. Specifically, Justice Sherwood identified that Defendant has the right to modify the intercreditor agreement—which is a separate agreement from the Pledge Agreement—but notes that its rights cannot be exercised “solely for personal gain in such a way as to deprive the other party of the fruits of the contract” (*id.* at 11 [quoting *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003]]). Justice Sherwood concluded this analysis by stating this type of allegation “is not alleged here,” indicating that plaintiff had failed to allege that Apollo Defendants had acted malevolently (*see id.*). Contrary to the position that Apollo seems to advocate, Justice Sherwood’s decision did not hold that even if Plaintiff’s had alleged that the

Apollo Defendants *had* acted malevolently, as they do here, that claim would be precluded.

Accordingly, *res judicata* and collateral estoppel do not apply.

Based on the allegations set forth in the complaint, the Court finds that Plaintiff has stated a viable claim against Apollo for breach of the implied covenant under the Pledge Agreement. Plaintiff alleges that Apollo's assignment to Junior Mezzanine Lender was undertaken in bad faith as an integral part of the "backroom deal" that the First Department has already found—in connection with claims asserted against Junior Mezzanine Lender (a Spruce Defendant)—may constitute a breach of the implied covenant of good faith and fair dealing (*see 111 W. 57th Inv. LLC*, 192 AD3d at 621–22).

Plaintiff's second cause of action against the Apollo Defendants survives for the same reasons. Although Apollo had the right to assign the Pledge Agreement, Plaintiff alleges that Apollo's assignment to Spruce was part of a broader bad faith plan to wipe out Borrower's equity in the Project. Borrower enjoyed a statutory right to insist on a foreclosure auction at which it would receive surplus of the purchase price over the amount of the outstanding debt. According to Plaintiff, based on the financial models Apollo provided, insisting on the auction was the only rational course of action for Borrower. Thus, according to Plaintiff, Spruce and Apollo could have only been confident that a foreclosure auction was a "low probability"—as Spruce represented to prospective investors (NYSCEF 175)—if they had Stern's and Maloney's assurances that they would not cause Borrower to exercise its right to insist on an auction (SAC ¶85). Further, Plaintiff alleges that to carry out this "backroom deal," Apollo had to agree to sell the Junior Mezzanine Loan to Spruce—which Apollo sold to Spruce "at par"—and this assignment required amending the ICA between Apollo and AIG to get over the hurdles posed by the ICA, including the liquidity and construction requirements, as well as entering into the

Funding Arrangement Agreement whereby Apollo agreed to continue to fund advances, notwithstanding the out of balance condition, through the end of August 2017. Thus, according to Plaintiff, Apollo did not simply assign the junior mezzanine loan, but rather engaged in a broader scheme to ensure that strict foreclosure by the junior \$25 million tranche of a \$725 million debt stack was a likelihood and that Borrower's equity would be extinguished. Whether Plaintiff can establish those facts, of course, is not a question that can be answered on a motion to dismiss.

Plaintiff has sufficiently alleged facts, that if true, could demonstrate that the Apollo Defendants exercised its discretion under the Pledge Agreement in bad faith to the detriment of the company (*Legend Autorama, Ltd. v Audi of Am., Inc.*, 100 AD3d 714, 716 [2d Dept 2012]; *Lehman Bros. Intern. (Europe) v AG Fin. Products, Inc.*, 38 Misc 3d 1233(A) [Sup Ct, NY County 2013]). Therefore, the motion to dismiss the second cause of action for breach of the implied covenant of good faith and fair dealing under the Pledge Agreement is denied.

Accordingly, it is

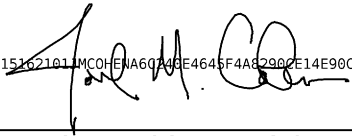
ORDERED that Spruce's motion to dismiss (Motion 007) is **granted**, and the claim for Tortious Interference with Contract (Count III) and the Amended Tortious Interference Claim are dismissed with prejudice; it is further

ORDERED that Atlantic's motion to dismiss (Motion 008) is **granted**, and the claim for Unjust Enrichment (Count VI) is dismissed with prejudice; it is further

ORDERED that Apollo's motion to dismiss (Motion 009) is **granted in part**, and the claim for tortious interference with contract (Count V) and the Amended Tortious Interference Claim are dismissed with prejudice; the motion is denied with respect to the claim for Breach of the Implied Covenant under the Pledge Agreement (Count II); and it is further

ORDERED that AIG’s motion to dismiss (Motion 010) is **granted**, and the claim for Tortious Interference with Contract (Count IV) and the Amended Tortious Interference Claim are dismissed with prejudice.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

12/15/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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