

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-RE-13-03 ✓

SCOTT H. MORTON,
GARY PATNODE,
MAINE TIMBER & BEAM, INC.,
MORTON & FURBISH AGENCY, and
MARBLES STATION DEVELOPMENT
LLC,

Plaintiffs,

v.

CARLL S. BURR, III,
CARLL S. BURR, JR., INC.,
HOMESOLUTIONS PROPERTIES, LLC,
and 2010-3 SFR VENTURE LLC,

Defendants

ORDER
(Motion to Dismiss)
(Motion to Strike)

The present case stems from the breakdown of the business relationship between the members of Marbles Station Development, LLC (MSD), a Maine LLC formed to develop a subdivision in Rangeley, Maine. The members of MSD are Plaintiffs Scott H. Morton, Gary Patnode, Maine Timber & Beam, Inc. (Maine Timber), and Morton & Furbish Agency (M&F Agency) and Defendant Carll S. Burr, Jr., Inc. (Burr, Inc.), a Florida corporation. Defendant Carll S. Burr, III is the president of Burr, Inc.

Pursuant to M.R. Civ. P. 12(b)(6), Carll Burr and Burr, Inc. move to dismiss Counts II, III, and IX of the First Amended and Restated Complaint, as amended by the Amendment to First Amended and Restated Complaint, filed by the Plaintiffs. In Count II, Plaintiffs assert fraud, conversion, and violations of the Uniform fraudulent Transfers Act (UFTA), 14 M.R.S.

§§ 3571-82 (2013); and in Count III, Plaintiffs assert fraud, conversion, and UFTA violations against Burr, Inc. Count IX is styled as an action by the other members against Burr, Inc., in direct and derivative form, pursuant to the Maine LLC Act. *See* 31 M.R.S. §§ 1501-1693 (2013).

Defendants Burr and Burr, Inc. also move to strike the affidavit of Scott Morton filed by Plaintiffs with their opposition to the motion to dismiss. The affidavit elaborates on certain factual allegations within the Amended Complaint regarding property owned by MSD.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are drawn from Plaintiffs' First Amended and Restated Complaint, as amended by the Amendment to First Amended and Restated Complaint Amended Complaint.¹ As noted, Carll S. Burr, III is the president of Burr, Inc., a Florida corporation. (Amend. Compl. ¶ 6.) Burr, Inc. is one of the members of MSD; the other members of MSD are Morton, Patnode, Maine Timber, and M&F Agency. (Amend. Compl. ¶¶ 1-2.) Burr, Inc. has a 75% ownership interest in MSD. (Amend. Compl. ¶ 4.)

In 2004, Burr, Inc., Patnode, Maine Timber, and M&F Agency collectively contributed \$1,000,000 to MSD in exchange for their shares in MSD and for MSD's purchase of a 15-lot subdivision in Rangeley, Maine. (Amend. Compl. ¶ 10.) Morton contributed managerial services in exchange for his share in MSD, and Morton in fact became the manager of MSD. (Amend. Compl. ¶¶ 3, 10.) Burr, Inc. (80%), Maine Timber (10%), and MSD (10%) collectively own the 15-lot subdivision in Rangeley, Maine (the MSD property), which was to be an asset of MSD for development and sale of the resulting subdivision. (Amend. Compl. ¶¶ 7-9, 11.) At the time of the purchase, the members agreed that MSD would purchase the property, but Burr, Inc. would temporarily take title to an 80% interest in the real estate so it would take advantage of a

¹ The Amendment to First Amended and Restated Complaint that was filed on January, 30, 2014, adds several paragraphs to the First Amended and Restated Complaint. For simplicity, the Court incorporates those paragraphs into the First Amended and Restated Complaint and cites to them as one document.

like-kind transfer of the federal tax code. (Amend. Compl. ¶ 60A.) After the completion of the like-kind transfer, the members agreed that Burr, Inc. would convey its interest to MSD. (Amend. Compl. ¶ 60A.)

Defendant HomeSolutions Properties, LLC (HomeSolutions) is a Florida limited liability company with a principal place of business in New York. (Amend. Compl. ¶ 23.) Julie Burr, Carll Burr's wife, is a 50% owner of HomeSolutions.² (Amend. Compl. ¶ 24.) In June of 2008, HomeSolutions signed a master note for a line of credit in the amount of \$1,000,000 with Rockbridge Commercial Bank (Rockbridge). (Amend. Compl. Exh. 12.)³ As security for the HomeSolutions credit line, Carll Burr signed a personal guaranty in the amount of \$1,000,000 and executed a mortgage on his vacation property in Rangeley, Maine. (Amend. Compl. Exhs. 10, 12, 17.) The amount of the credit line was increased to \$2,000,000 August of 2008 and then \$3,000,000 in November of 2008 (Amend. Compl. Exhs. 13-15); Carll Burr personally guaranteed each increase in debt (Amend. Compl. Exhs. 18, 26).

At some point in 2008, Burr had Rockbridge prepare documentation for a mortgage on the MSD property to secure the HomeSolutions credit line; the mortgage documents were to be signed by the record owners of the subdivision: MSD, Maine Timber, and Burr, Inc. (Amend. Compl. ¶ 16.) The listed signatory for MSD in the documentation was Morton as the manager of MSD. (Amend. Compl. Exh. 6A.) Both Morton and Maine Timber, however, refused to sign the mortgage and related documentation. (Amend. Compl. ¶¶ 17-18.) Instead, Burr, Inc. executed the mortgage documents on February 12, 2009, on its own behalf and as the "Majority

² The other 50% owner of HomeSolutions is Denise Kummer. (Denise Kummer Aff. ¶ 1.) On January 16, 2014, the court dismissed Denise Kummer and Julie Burr from the case for lack of personal jurisdiction. See *Morton v. Burr*, 2014 WL 380895, at *5 (Me. Bus. & Consumer Ct. Jan. 16, 2014) (Nivison, J.).

³ As noted in the Court's January 16, 2014, order on the motion to dismiss, the exhibits to the complaint are not under seal.

Member” of MSD, which documents were recorded on June 26, 2009 (the 2009 mortgage).⁴ (Amend. Compl. ¶¶ 20-21; Amend. Compl. Exh. 5 at 1, 25.) Plaintiffs assert that the grant of the mortgage by MSD and Burr Inc. was unauthorized by MSD and without the consent or vote of the other MSD members. (Amend. Compl. ¶ 20.)

After HomeSolutions defaulted on the credit line, HomeSolutions, the Burrs, and two other parties signed a forbearance agreement with Rockbridge on June 16, 2009. (Amend. Compl. Exh. 16.) Rockbridge subsequently failed, and the MSD property mortgage was assigned to Defendant 2010-3 SFR Venture LLC (SFR). (Amend. Compl. ¶ 35; Amend. Compl. Exh. 22.) SFR has noticed the default and foreclosure of the mortgage on the MSD property. (Amend. Compl. ¶ 42; Amend. Compl. Exh. 20.) The amount due as of January 17, 2013, was \$3,563,130. (Amend. Compl. ¶ 43; Amend. Compl. Exh. 21.)

Plaintiffs filed suit on September 24, 2012, in Franklin County Superior Court. Plaintiffs amended their Complaint on March 13, 2013, and again on January 30, 2014. Plaintiffs assert fraud, conversion, and violations of the Uniform Fraudulent Transfer Act (UFTA), 14 M.R.S. §§ 3571-82 (2013) against both Burr (Count II) and Burr, Inc. (Count III). In addition, the other members of MSD assert: 1) a direct action against Burr, Inc. pursuant to 31 M.R.S. § 1631 (2013), and 2) a derivative action pursuant to 31 M.R.S. § 1637(3) (2013) (Count IX). The matter was approved for transfer to the Business and Consumer Court on June 11, 2013. SFR has initiated foreclosure proceedings against Carll Burr and HomeSolutions in federal district

⁴ The original master note is dated June 16, 2008; the subsequent modifications are dated August 23, 2008, November 6, 2008, and July 11, 2009. (Amend. Compl. Exhs. 12-15.) Even though the mortgage of the MSD property was not signed until February 12, 2009, from the first increase in credit in August of 2008 and onward, each amended and restated master note listed the mortgage on the MSD property as security for the loan to HomeSolutions, LLC. (Amend. Compl. Exhs. 13-15.) Each amended and restated master note also listed the mortgage on Carll Burr’s Rangeley property as security for the loan to HomeSolutions, LLC. (Amend. Compl. Exhs. 12-15.)

court. See *2010-3 SFR Venture LLC v. HomeSolutions Properties, LLC*, Docket No. 1:13-CV-00479-DBH (D. Me. Dec. 31, 2013).

The present motion was filed on February 20, 2014, and Plaintiffs filed their opposition along with the affidavit of Scott Morton on March 21, 2014. The affidavit asserts that Morton and the other MSD members invested in developing the MSD property through building roads, installing sewer and water lines, and cutting trees to open up paths to the lake. (Morton Aff. ¶ 2.) Each MSD member paid taxes and other assessments. (Morton Aff. ¶¶ 3, 6.) Morton asserts that his efforts and the efforts of the other MSD members were in “reliance on Carll Burr’s promise to convey Carll Burr Inc.’s interest in the MSD property to MSD. . . . The property was in his name temporarily as an accommodation to allow him to take advantage of “like-kind” tax rule or some similar reason.” (Morton Aff. ¶ 6.)

Defendants filed the motion to strike the affidavit on April 8, 2014. The Court heard oral argument on both motions on May 20, 2014. Attorney Ron Cullenburg argued for the Plaintiffs and Attorney Daniel Murphy argued for the Burr Defendants. Attorney Paula Chambers appeared for 2010-3 SFR Venture LLC but did not orally argue.

DISCUSSION

I. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) “tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted.” *Shaw v. S. Aroostook Cmty. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). “The complaint is viewed ‘in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle

the plaintiff to relief pursuant to some legal theory.’” *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710 (quoting *McCormick v. Crane*, 2012 ME 20, ¶ 5, 37 A.3d 295).

In other words, in evaluating the defendant’s motion, the court makes no judgment about the merits of the plaintiff’s claims, or about whether the plaintiff’s claims will or will not be successful, or even whether or not there exists evidence to support those claims. Rather, *the court looks only at the allegations contained within the four corners of the complaint* in order to determine whether, on an abstract and theoretical basis, the allegations describe a legal claim.

Lizotte v. Pierce, 2006 WL 5255566 (Me. Super. Ct. Dec. 15, 2006) (emphasis added). In only limited circumstances may the Court consider extraneous documents, i.e., “official public documents, documents that are central to the plaintiff’s claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment.” *Moody v. State Liquor & Lottery Comm’n*, 2004 ME 20, ¶ 10, 843 A.2d 43. Otherwise, the Court is limited to the four corners of the complaint to determine the sufficiency of the plaintiff’s allegations. *See Ripley v. Mercer*, 482 A.2d 850, 851 (Me. 1984). “A complaint is properly dismissed when it is beyond doubt that the plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.” *Richardson v. Winthrop Sch. Dep’t*, 2009 ME 109, ¶ 5, 983 A.2d 400 (quotation marks omitted).

II. Motion to Strike

Defendants assert that the Morton affidavit should not be considered because it improperly attempts to create an evidentiary record, rather than an evaluation of the sufficiency of the complaint itself. The Court generally agrees. Plaintiffs have had numerous opportunities to revise their complaint in order to incorporate the theories of relief upon which they intend to rely. To the extent the affidavit alleges facts not within the Plaintiffs’ First Amended and Restated Complaint or the Amendment to First Amended and Restated Complaint Amended Complaint, the Court does not consider them and grants the motion to strike.

Although the specific facts within the affidavit are not alleged in either the aforementioned pleadings, even if the Court were to consider them the outcome of this order would be no different. The affidavit is most relevant to Plaintiffs' fraud claim, but the facts within the affidavit do not cure the deficiencies within the fraud claim because Plaintiffs have still failed to allege how Defendants' representation of conveyance was fraudulent, rather than just a broken promise.

III. Motion to Dismiss

Although Plaintiffs assert most of their claims in a single count against each Defendant, the Court will separately address each cause of action asserted.

A. Fraud

A claim for fraud, or intentional misrepresentation, requires allegations that (1) the defendant made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of whether it is true or false; (4) for the purpose of inducing the plaintiff to act in reliance upon it; and (5) the plaintiff justifiably relied upon the representation as true and acted upon it to his or her damage. *See Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640. Moreover, fraud must be pleaded with particularity. *See* M.R. Civ. P. 9(b).

Plaintiffs assert that Burr and Burr, Inc. made false statements in the 2009 mortgage documents that indicated Burr, Inc. had the right to convey the mortgage to Rockbridge. (Amend. Compl. ¶¶ 69-70.) Defendants contend that Plaintiffs cannot maintain a cause of action for fraud based on statements made to a third party. Plaintiffs, however, argue that a statement to a third party can be the basis of a fraud claim, citing the Restatement (Second) of Torts:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance

communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Restatement (Second) of Torts § 533 (1977). Even presuming this provision from the Restatement is an accurate statement of the law in Maine, liability still depends upon the false statement being conveyed in some way to the plaintiff. Plaintiffs have not alleged that the statement to Rockbridge was ever conveyed to them, nor have they alleged how they relied upon that statement to their detriment. The essence of this case is the attempt by the Plaintiffs to undo the pledge of the MSD property to secure the loan to HomeSolutions, a pledge that the Plaintiffs knew of and to which they refused to consent. (Amend. Compl. ¶¶ 17-18.) Thus, even if the Plaintiffs had been the recipient of the allegedly false statement regarding ownership, they themselves knew the statement to be false—knowledge that is incompatible with a fraud claim.

In the alternative, Plaintiffs assert that Burr, Inc. made an “ongoing representation” that Burr, Inc. would convey its 80% interest in the subdivision to MSD after the like kind exchange that became a false misrepresentation when Burr and Burr, Inc. mortgaged the MSD property to Rockbridge. (Pls.’ Opp’n 3; *see* Amend. Compl. ¶ 60A.) Except in circumstances not applicable here, a statement of future performance is not actionable on a fraud theory. *See Wildes v. Pens Unltd. Co.*, 389 A.2d 837, 840 (Me. 1978). Moreover, even if the statement regarding future conveyance was actionable, the statement must be false at the time that it was made, and not just constitute a broken promise. The complaint asserts that statement was made when MSD purchased the subdivision in 2004, and makes no reference to an “ongoing representation” by Burr or Burr, Inc. Plaintiffs also fail to assert how they relied on the statement made in 2004 to their detriment. In sum, because the allegations regarding the actions of Burr and Burr, Inc. do not constitute the tort of fraudulent misrepresentation as to the Plaintiffs, the claims must be dismissed.

B. Conversion

The elements of the tort of conversion are:

(1) A showing that a person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder.

Withers v. Hackett, 1998 ME 164, ¶ 7, 714 A.2d 798. As with Plaintiffs' allegations against the Defendants that were dismissed from this matter, the allegations in the complaint regarding conversion are inartful, at best. Against both Burr and Burr, Inc., Plaintiffs assert that when Burr signed the 2009 mortgage, he converted MSD's equity in the MSD property. (Amend. Compl. ¶¶ 73(D), 75.) As noted in the Court's January 16, 2014, order, however, an interest in real property is not property that can be the subject of the tort of conversion. *See Morton v. Burr*, 2014 WL 380895, at *7 (Me. Bus. & Consumer Ct. Jan. 16, 2014) (Nivison, J.). *See also* Horton & McGehee, *Maine Civil Remedies* § 18-4 at 358 & n.15 (4th ed. 2004). Because there is no allegation that Burr or Burr, Inc. converted personal property, Plaintiffs are not entitled to relief under this theory.

C. UFTA Violations

Plaintiffs have alleged that neither Burr nor Burr, Inc. was authorized to encumber the MSD property with the 2009 mortgage and such encumbrance constitutes a fraudulent transfer. (Amend. Compl. ¶¶ 62-64, 72, 75-76.) An unauthorized transaction, however, is not synonymous with fraudulent transfer and is not necessarily a violation of UFTA. A claim of fraudulent transfer pursuant to UFTA requires a debtor-creditor relationship between the parties and, most importantly, the establishment of the creditor's right to payment. *See* 14 M.R.S. §§ 3575-76. There is no allegation that at the time the 2009 mortgage was executed Burr or Burr, Inc. had any obligation to make any payment to the Plaintiffs. Plaintiffs rely on *Cook v.*

Cook, 574 A.2d 1353 (Me. 1990), but that case is inapposite because the right to payment arose from the divorce judgment during the pendency of the foreclosure proceeding. Plaintiffs also argue that the mortgage was fraudulently conveyed because the transfer was to an “insider.” See 14 M.R.S. §§ 3572(7), 3576(2). Because, however, Plaintiffs have not alleged a right to payment or claim, it is immaterial whether the transfer was to a statutorily defined “insider” or not. Accordingly, Plaintiffs have not stated a claim pursuant to UFTA and those claims must be dismissed.

D. Direct and Derivative Action

Finally, Plaintiffs assert a direct action pursuant to 31 M.R.S. § 1631 and a derivative action pursuant to 31 M.R.S. §§ 1632, 1637 against Burr, Inc. (Amend. Compl. ¶¶ 113-115.) Neither statute affords Plaintiffs any relief.

Section 1631 permits a direct action by one member against another. The provision states:

a member may maintain a direct action against another member, a manager or the limited liability company to enforce the member’s rights and otherwise protect the member’s interests, including rights and interests under the limited liability company agreement or this chapter or arising independently of the membership relationship[, provided that the] member maintaining a direct action under this section [pleads and proves] an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

31 M.R.S. § 1631. Section 1631 does not provide an independent cause of action; it merely reiterates that a member may bring substantive claims against another member or the LLC in order to protect that member’s own interests.⁵ See *id.*

Plaintiffs also assert a derivative action, but it is clear there is no need to do so because MSD is a plaintiff in this matter. A derivative action permits a shareholder to sue on behalf of

⁵ Defendants have not argued that the Court should dismiss all the claims brought by the individual members of MSD against them.

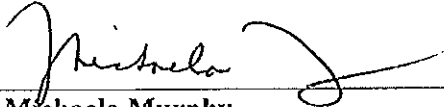
the corporation, asserting the corporations rights, when the corporation itself has refused to act, *see Voisine v. Berube*, 2011 ME 137, ¶ 4, 38 A.3d 310, whereas here, MSD has brought suit on its own behalf. Accordingly, the provisions of the LLC Act related to derivative actions have no applicability.

CONCLUSION

In sum, the Plaintiffs have failed, in both the First Amended and Restated Complaint and the Amendment to First Amended and Restated Complaint Amended Complaint, to state claims against Burr and Burr, Inc. for fraud, conversion, and violations of UFTA in Counts II and III and failed to state an independent claim for relief in Count IX. Accordingly, and based on the foregoing analysis, the Court GRANTS the motion to strike and GRANTS the motion to dismiss of Carll S. Burr, III and Carll S. Burr, Jr., Inc. and dismisses Counts II, III, and IX pursuant to M.R. Civ. P. 12(b)(6).

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 5/23/14


M. Michaela Murphy
Justice, Maine Business & Consumer Court