Patrick M. Flatley
United States Bankruptcy Judge

Dated: Monday, February 27, 2017 2:38:07 PM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
CORWIN PLACE, LLC,	)	Case No. 16-bk-750
	)	
Debtor.	)	Chapter 11
	)	
IN RE:	)	
	)	
CHARLES A. CORWIN,	)	Case No. 16-bk-1038
	)	
Debtor.	)	Chapter 13
	)	
	)	
CORWIN PLACE, LLC., and CHARLES A. CORWIN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Proc. No. 16-ap-48
	)	
PREMIER BANK, INC., UNIQUE HOMES, LLC, and THE THRASHER GROUP, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

On November 4, 2016, Premier Bank, Inc. ("Premier") filed a motion to dismiss claims for breach of fiduciary duty and negligence asserted against it by Charles A. Corwin and Corwin Place, LLC (collectively, the "Plaintiffs"). Premier asserts that the Plaintiffs signed a release which waived all prior claims the Plaintiffs may have had against Premier including these, that West Virginia does not recognize fiduciary duties owed by lenders to their borrowers, that the Plaintiffs failed to allege any special duty owed from Premier to the Plaintiffs, and that Mr.

Corwin failed to allege any facts which would support any claim for him individually against Premier. On October 4, 2016, the Plaintiffs filed their complaint against Premier, Unique Homes, LLC ("Unique"), and the Thrasher Group, Inc. ("Thrasher"). Therein, the Plaintiffs assert that the Defendants caused them financial hardship and damage to their real property in conjunction with their work on the Plaintiffs' development project (the "Corwin Place Project"). The Plaintiffs assert that Premier breached its fiduciary duties owed to them by assuming control of the Corwin Place Project, hiring contractors and engineers, failing to properly monitor and manage such agents, and failing to pay to repair property damage that occurred on the Corwin Place's real property.

For the reasons set forth below, the court will deny Premier's motion to dismiss for the claims alleged by Corwin Place but will grant the motion without prejudice as to the claims alleged by Charles Corwin.

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure ("Rule") 12(b)(6), a complaint should be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b) (incorporating Rule 12(b)(6)). To survive a Rule 12(b)(6) motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). As the Fourth Circuit has explained, the plausibility standard requires a plaintiff "to articulate facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief, i.e., the 'plausibility' of 'entitlement to relief.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 557). Finally, when courts evaluate a motion to dismiss, they are to (1) construe the complaint in a light favorable to the plaintiff, (2) take factual allegations as true, and (3) draw all reasonable inferences in favor of the plaintiff. 5C Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 1357 (3d. ed. 2012) (collecting thousands of cases). The court's role in ruling on a motion to dismiss is not to weigh the evidence, but to analyze the legal feasibility of the complaint. *See Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998). In fact, the court is "limited to considering the sufficiency of allegations set forth in the complaint and the 'documents

attached or incorporated into the complaint.'" *Zak v. Chelsea Therapeutics Int'l Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015) (citing *E.I. du Pont de Nemours & Co. v. Kolon Indus Inc.,* 637 F.3d 435, 448 (4th Cir. 2011)).

Generally, "courts are limited to considering the sufficiency of allegations set forth in the complaint and the documents attached or incorporated to the complaint." *Zak v. Chelsea Therapeutics Intern., Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015) (internal citations omitted). If a document is "integral to and explicitly relied on in the complaint" and there are no questions as to the authenticity of that document, then a court may consider the document as it has effectively been incorporated to the complaint. *Phillips v. LCI Intern., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

Moreover, in adjudicating a motion to dismiss for failure to state a claim under Rule 12(b)(6), courts are to look to the sufficiency of the complaint such that they "generally cannot reach the merits of an affirmative defense." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2004). However, "in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss . . . ." *Id.*

II. BACKGROUND

For purposes of adjudicating a motion to dismiss, the facts considered herein mirror the facts alleged by the Plaintiffs in their complaint.[1] On or about April 9, 2008, Premier loaned $2,000,000 to Corwin Place for the construction and development of the Corwin Place Project. Corwin Place's indebtedness to Premier was secured by a deed of trust for the real estate to be developed. Corwin Place also provided additional collateral. Premier alleged that Corwin Place defaulted on its repayment obligations and Corwin Place admitted as much through a series of forbearance agreements executed by it and Premier. As a result of Corwin Place's default, Premier and the Plaintiffs entered into a forbearance agreement on August 21, 2013. The forbearance agreement was then amended four times: on September 29, 2014, November 21,

[1] Some of the facts contained herein are absent from the body of the complaint but contained in the forbearance agreements executed between Premier and the Plaintiffs. Such facts are included to provide a more cogent narrative, but their absence in the body of the complaint does not, on its own, justify dismissal of the complaint. Various copies of the forbearance agreements are incorporated by reference and attached as exhibits to both the complaint and Premier's motion to dismiss. There is no dispute about the validity of these documents.

2014, January 23, 2015, and April 30, 2015. Despite not being obligated to Premier as a borrower, Corwin became a guarantor of Corwin Place's indebtedness through the forbearance agreement and its amendments.[2]

Under the forbearance agreement and amendments, the proceeds of any real estate sold by Corwin Place went to Premier. Moreover, the forbearance agreement and its amendments required the Plaintiffs to maintain, keep, and preserve Premier's collateral, in addition to paying or causing to be paid all taxes and assessments due. Premier also obtained, to the extent it did not already possess, the option to discharge any taxes, liens, or other encumbrances placed upon its collateral and to pay for the preservation of its collateral. Moreover, the forbearance agreement and its amendments provided that the Plaintiffs were obliged to reimburse Premier, on demand, for any such payment or expense paid or incurred by Premier. The forbearance agreement further provided that Corwin Place was to "continue to operate their respective businesses in the ordinary course" but must "provide Lender access to all property of the Obligors, and to the Obligors' books and financial records for inspection . . . ." Notably, the forbearance agreement also contains a release provision whereby the Plaintiffs agree to release all claims they may hold against Premier.[3]

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[2] Each amendment to the forbearance agreement incorporated by reference the original forbearance agreement. Thus, the terms of each amendment largely mirror the terms of the original forbearance agreement.

[3] The entirety of the release provides:
Full and Unconditional Release. For and in consideration of Lender's agreement to enter into this Agreement, and subject to the terms of this Agreement, and the Lender's compliance with the terms and conditions of this Agreement, the Obligors hereby waive and release any and all defenses or offsets, known or unknown, which otherwise might restrict, impede or affect the immediate right of the Lender to require the payment in full of the Loans or to initiate and prosecute to conclusion any collection or enforcement proceedings against the Obligors or the collateral described in the Loan Documents. In further consideration of Lender's agreement to enter into this Agreement, and subject to the terms of this Agreement and the Lender's compliance with the terms and conditions of this Agreement, the Obligors hereby release and discharge Lender, its officers, directors, shareholders, employees, agents and attorneys, and their respective heirs, shareholders, employees, agents and assigns (collectively the "Releasees"), from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extends, executions, claims and demands, whatsoever in law or equity, whether known or unknown (the "Claims"), which the Obligors, their respective successors and assigns ever had, now have, or hereafter can, shall or may have for, upon or by

During the development of the Corwin Place Project, Premier hired Thrasher as the engineering firm responsible for providing necessary engineering services for the development of residential lots on the Corwin Place Project. Thrasher and Premier then instructed Unique on how to proceed in the development of the Corwin Place Project, including how to construct a slope on the property of the Corwin Place Project. Despite the Plaintffs' objections, Premier and Thrasher instructed Unique that the slope needed to be 26 degrees. Unique then cut the slope without a survey to determine whether the final construction met these specifications. Premier then instructed Unique to construct three lots for the construction of single-family homes in violation of restrictions and covenants applicable to the underlying real property.

In March, 2015, soil failures occurred on the Corwin Place property resulting in two slips causing Dan Ryan Builders, a prospective buyer, to demand the repair of the slips before it would purchase any lots. Premier used roughly $81,000 of proceeds from prior sales to pay for the repair of the first slip. However, Premier refused to pay for or disburse funds for the Plaintiffs to pay for the second slip. The second slip has prevented Corwin Place from marketing the affected lots and has caused damage to the road that provides access to five single-family homes within the development. The second slip thus continues to cost the Plaintiffs because of an inability to sell pieces of its property it otherwise desires to sell. Notably, excavation costs associated with the Corwin Place Project increased from $210,000 to $336,000 because of the soil slips. Moreover, the slips also caused delays in the sales and development of additional lots.

III. DISCUSSION

Premier seeks to dismiss all counts brought against it based on its assertion that the Plaintiffs released any potential claims stemming from conduct occurring before the execution of the forbearance agreements. Alternatively, they argue that even the first amended forbearance agreement contained a release sufficient to justify dismissal of all claims against it. Premier also argues that the Plaintiffs fail to sufficiently plead, and West Virginia does not recognize, a fiduciary relationship owed by a lender to a borrower, and that the Plaintiffs fail to allege that

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reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Agreement, against the Releases or any holder of the Loans or the Loan Documents. This release shall survive the term of this Agreement and shall retain its full force and effect as to all matters through the date hereof regardless of what transpires in the future between or among the Obligors and the Lender. Except as expressly set forth herein, nothing in this Agreement shall modify, affect or impair any of the terms or conditions of any of the Loan Documents or any other promissory note, loan and security agreement, or other agreement among the parties.

Premier had a special relationship with the Plaintiffs sufficient to create any duties beyond contractual obligations. Finally, Premier argues that Corwin does not allege any claims individually, such that all claims brought by him should be dismissed.

In response, the Plaintiffs argue that the release is not contained in the second through fourth amendments to the forbearance agreement, that the conduct giving rise to their claims occurred after any claims were released, that the forbearance agreement was entered into for insufficient consideration, and that the release's applicability is contingent upon Premier's compliance with the entirety of the forbearance agreement. The Plaintiffs also argue that Premier owed them a fiduciary duty because it ascertained control and decision-making authority over the entirety of the Corwin Place Project. Moreover, the Plaintiffs argue that Premier and the Plaintiffs entered into a special relationship such that Premier owed them a duty which it then breached, and for which the Plaintiffs may recover under a claim for negligence. Finally, the Plaintiffs assert that Premier required Corwin's services without compensation and Corwin signed the forbearance agreement and thus became a key party, such that Corwin, individually, is entitled to recover from Premier.

A. Release

As explained above, affirmative defenses generally do not support the granting of a motion to dismiss. *Goodman v. Praxair*, 494 F.3d. 458, 464 (4th Cir. 2007). Plaintiffs are not required to negate affirmative defenses through their complaints. *Alexander v. UIP Property Management*, Case No. 14-2469, 2015 WL 1472004, *3 (D. Md. March 30, 2015). Release is an affirmative defense. Fed. R. Civ. P. 8(c)(1). Thus, granting a motion to dismiss because claims have been released by the plaintiff is only proper if "the plaintiff pleads itself out of court—that is, admits all ingredients of an impenetrable defense." *U.S. ex. rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 148 (4th Cir. 2014) (citing *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004)).

Unambiguous releases are valid and enforceable in West Virginia unless general contract law demands otherwise. *See Finch v. Inspectech, LLC*, 727 S.E.2d 823, 833-35 (W. Va. 2012) (analyzing whether an anticipatory release provision could be valid and determining that such an anticipatory release is void as against public policy). Moreover, releases are viewed as similar to compromises and settlements and are thus "highly regarded and scrupulously enforced, so long as they are legally sound." *Beraldi v. Meadowbrook Mall Co.*, 527 S.E.2d 900, 905 (W. Va.

2002) ("Compromises, settlements, and releases have different technical meanings but their effects are generally identical; thus, we use the terms synonymously.")

Moreover, terms to a contract may be incorporated by reference in West Virginia. *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., Inc.*, 413 S.E.2d 670, 673-74 (W. Va. 1991). "Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." *Logan & Kanawha Coal Co., LLc v. Detherage Coal Sales, LLC*, 514 Fed.Appx. 365, 367-78 (4th Cir. March 21, 2013) (unreported) (applying West Virginia law.).

Premier seeks to dismiss the Plaintiffs claims against it because it asserts the release incorporated into the forbearance agreement and the amendments thereto completely bar any claims arising from conduct that occurred on or before the execution of the fourth amended forbearance agreement. The Plaintiffs argue that only the original forbearance agreement and the first amendment thereto contained the release and that the forbearance agreement does not justify dismissal of their claims because it was conditioned upon Premier's compliance with all of the terms thereof.

The parties do not dispute that the terms of the release are unambiguous. The release, should it apply, bars the Plaintiffs from pursuing "all actions . . . whatsoever in law or equity, whether known or unknown . . . which the [Plaintiffs] . . . ever had, now have, or hereafter can, shall or may have . . . from the beginning of the world to the date of this agreement." Based on the cosmically broad language contained therein, there is no ambiguity as to whether the release would cover the claims set forth in this case if the conduct alleged occurred before the date of the release. However, the parties dispute what date the agreement last became effective and thus to what extent the release should be enforced.

The Plaintiffs and Premier executed the fourth amendment to the forbearance agreement on April 30, 2015, and the amendment stated it was effective on March 30, 2015. The fourth amendment to the forbearance agreement, like the second and third before it, provided "unless otherwise stated, all terms from the Original Forbearance Agreement are incorporated by reference as if fully set forth in the body of this Agreement." The first amendment to the forbearance agreement unambiguously contained the release described above within the body of

the amendment and was signed by the parties on September 29, 2014. Thus, the parties dispute whether conduct arising between September 29, 2014 and April 30, 2015 has been released.

More importantly, however, the release is expressly conditioned upon "the Lender's compliance with the terms and conditions of this agreement." The complaint does not indicate that Premier complied with all terms of the forbearance agreement or the amendments thereto. Nor does it indicate the opposite: that Premier did not comply with such terms. However, at this stage in litigation, a complaint need not plead around an affirmative defense. The burden is on Premier to demonstrate that it did comply with all terms of the forbearance agreement in order to be able to raise release as an affirmative defense. Premier did not meet that burden, and the court believes it cannot meet the burden without factual development, such that the release does not provide grounds for dismissal.

B. Fiduciary Duty

Premier next asserts that the violation of fiduciary duty claim against it should be dismissed because West Virginia law does not recognize fiduciary obligations for debtor-creditor relationships and because the Plaintiffs fail to plead that Premier accepted a role as a fiduciary. The Plaintiffs argue, in response, that Premier established a fiduciary relationship by exercising control over the construction project insofar as it elected who to hire and which contractors were paid.

The Supreme Court of Appeals of West Virginia defines a fiduciary duty as a "duty to act for someone else's benefit while subordinating one's personal interests to that of the other person." *Elmore v. State Farm Mut. Automobile Ins. Co.*, 504 S.E.2d 893, 898 (W. Va. 1998). "As a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself create the relationship." *McKinley v. Lynch*, 51 S.E. 4, 9 (1905). Furthermore, "a fiduciary duty does not exist between a lender and a borrower as a matter of course." *Bennett v. Skyline Corp*., Case No. 14-129, 2014 WL 4996275, at *4-*5 (N.D.W. Va. Oct. 7, 2014) (citing *Knapp v. Am. Gen. Fin. Inc.*, 111 F.Supp.2d 758, 766 (S.D.W. Va. 2000)). However, a creditor may become a fiduciary of a debtor by receiving and accepting an offer of confidence sufficient to induce reasonable reliance by the debtor that such a relationship exists.

In West Virginia, courts look to whether "a lender has created a special relationship by performing extraordinary services" in order to determine whether a fiduciary relationship exists between a lender and a borrower. *McFarland v. Wells Fargo Bank, N.A.*, 19 F.Supp.3d 663, 675 (S.D.W. Va. 2014) (*rev'd on other grounds*, *Mcfarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273 (4th Cir. 2016)); *Wittenberg v. First Independent Mortg. Co.*, Case No. 10-58, 2011 WL 1357483, *18 (N.D.W. Va. April 11, 2011). The Supreme Court of Appeals has found such a special relationship when a lender inspected the borrower's property for its own purposes, but failed to disclose multiple material defects to the borrower, ultimately costing the borrower a great hardship. *Glascock v. City Nat. Bank of West Virginia*, 576 S.E.2d 540 (W. Va. 2002). In that case, the court noted that "a lender . . . creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process." *Id.* at Syl. Pt. 6, 541. Thus, "within the construction loan context, a special relationship is created only when the lender performs extraordinary services." *Bennett*, 2014 WL 4996275, at *5.

Here, the Plaintiffs plead that Premier assumed control of the day-to-day activities of Corwin Place regarding the construction of additional lots. The Plaintiffs allege that Premier elected to hire Thrasher and Unique. They also allege that Premier elected which contractors received payment for their services. They further allege that Premier was involved in the decision regarding how to construct the soil slope that ultimately led to the soil slip. Moreover, the Plaintiffs assert that they objected to the method of construction but that Premier and Thrasher proceeded in disregard of their advice. Although many of the allegations in the Plaintiffs' complaint are vague, there are enough allegations of control sufficient to establish the possibility of a fiduciary relationship between Corwin Place and Premier.

Moreover, Premier's arguments that a fiduciary relationship cannot be created in the same agreement that provided the basis for the suit and that the plain language of the forbearance agreement contradicts the allegations of control fall short of justifying dismissal. The Plaintiffs allege that Premier exercised control through various acts, and those alleged acts, not the forbearance agreement, serve as the basis for which a fiduciary relationship may have formed.

As Premier focuses its motion to dismiss only on the element of the existence of a fiduciary duty, an analysis of breach and causation is not necessary at this time. Thus, the court will deny Premier's motion to dismiss the Plaintiffs' claim for breach of fiduciary duty.

C. Negligence

Premier next seeks to dismiss the Plaintiffs' claims of negligence for a similar reason as it asserts that West Virginia law requires a special relationship that must exist separate from a contractual agreement. In response, the Plaintiffs assert that Premier actively controlled every aspect of the Corwin Place Project, thus forming a special relationship through its conduct.

In West Virginia, courts are hesitant to find that lenders owe duties to borrowers beyond the terms of contracts. *White v. AAMG Construction Lending Center*, 700 S.E.2d 791, 798 (W. Va. 2010) ("[T]he general rule holds that when a lender breaches its contract with a borrower causing economic loss . . . the borrower's primary remedy is to pursue a breach of contract action against the lender.") However, "where the lender and borrower have a 'special relationship' that extends beyond the contract, the borrower may recover tort-type damages." *Id.*

As West Virginia courts look to the same factors to determine whether a special relationship exists for purposes of determining tort liability on claims arising out of contracts as for determining whether a fiduciary relationship exists, and as the court has already found that the Plaintiffs sufficiently pleaded that a special relationship arose, the court will deny Premier's motion to dismiss the Plaintiffs' claims for negligence.

D. Corwin's Individual Claims

Finally, Premier seeks to dismiss all claims brought by Mr. Corwin, based on its assertion that it did not owe any duties to Mr. Corwin nor may he recover individually for Premier's alleged breach of any fiduciary duty or other duty of care owed to Corwin Place. In response, the Plaintiffs assert that Corwin signed the forbearance agreement and was thus damaged by Premier. The Plaintiffs further argue that Corwin's damages are separate from those claimed by Corwin Place as the complaint alleges that Corwin performed services for Premier without compensation, and was thus damaged financially.

The Plaintiffs claim that Premier breached its fiduciary duty to Corwin and Corwin Place and that it negligently injured both Plaintiffs. In so alleging, the Plaintiffs assert that Corwin was forced to provide uncompensated services, or to serve as an indentured servant, in order to develop the Corwin Place Project. Moreover, the Plaintiffs allege that Premier required Corwin to sign the forbearance agreement and later amendments and to become personally liable as a guarantor of Corwin Place. However, as discussed at length above, a lender only owes fiduciary or ordinary duties to a borrower when a special relationship exists. Notably, all of the real estate subject to development during the Corwin Place Project is owed entirely by Corwin Place.

Although Mr. Corwin may have an interest in Corwin Place, an ownership interest in an LLC does not give an individual an ownership interest in the property of that LLC. *See Mott v. Kirby*, 696 S.E.2d 304, 307 (W. Va. 2010) (quoting W. Va. Code § 31B-5-501(a) (1996), which provides that "a member of a limited liability company is not a co-owner of, and has no transferable interest in, property of a limited liability company."). As between Corwin and Premier, the complaint fails to allege any facts that would suggest such a relationship exists. Therefore, the court will grant Premier's motion to dismiss the negligence and fiduciary duty claims brought against it by Charles Corwin.

IV. CONCLUSION

For the reasons stated herein, Corwin Place has satisfactorily plead claims for breach of fiduciary duty and negligence against Premier. However, Corwin failed to plead sufficient facts to justify those same claims which he seeks to bring individually. Therefore, the court does hereby

ORDER that Premier's Motion to Dismiss (Doc. No. 8) filed November 4, 2016, is GRANTED in part and DENIED in part. For the claims brought by Corwin Place, Premier's motion is DENIED. As for the claims brought by Corwin individually, the motion is GRANTED. Thus, Counts I and II brought by Corwin are DISMISSED WITHOUT PREJUDICE.[4]

[4] Based upon the court's disposition of Premier's motion, Premier shall file its answer to the Plaintiff's complaint by Monday, March 13, 2017.