United States District Court,
D. New Jersey.

COASTAL GROUP, INC., a New Jersey Corporation, Plaintiff,
v.
WESTHOLME PARTNERS, a California limited partnership; Continental Bank, N.A., a national banking association; BMC Westholme Corp., a California corporation; the Anden Group, a California limited partnership; William A. Brandt, Jr., a Court appointed receiver; and Kent Kneblekamp, Defendants.

No. Civ.A. 94-3010(MTB).

Oct. 3, 1996.

Steve M. Kalebic, Kalebic & LoFaro, P.C., Hackensack, NJ, for Plaintiff.

David W. MacGregor, Proskauer, Rose, Goetz & Mendelsohn, Clifton, NJ, Joseph Lloyd Buckley, Sills Cummis Epstein & Gross, PC, Newark, NJ, Michael Stein, Pashman Stein, Hackensack, NJ, for Defendants.

OPINION

BARRY, J.

***1** This case has come before the court on a motion filed pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss fifteen of the sixteen counts contained in the complaint filed by plaintiff, Coastal Group, Inc. ("CGI"), The motion was filed by defendant Bank of America, formerly known and named in the complaint as Continental Bank, N.A. ("Continental"), and was joined by defendants Westholme Partners, BMC Westholme Corp. ("BMC Westholme"), and the Anden Group ("Anden"). [FN1] For the reasons that follow, defendants' motion will be granted in part and denied in part.

FN1. There is no evidence of defendants Brandt and Kneblekamp ever having been served with plaintiff's complaint or having filed an appearance in this action.

I. *Statement of the Case*

The dispute currently before the court is an unfortunate by-product of the failed Winding River real estate development project located in Sayreville, New Jersey. Plaintiff, a New Jersey corporation, is a real estate developer with projects primarily located in New Jersey. At the time of the events underlying the case at bar, plaintiff and defendant Anden were the sole partners of The Coastal Group ("TCG"), a general partnership organized under the laws of the State of California. Under the terms of TCG's Restated Joint Venture Agreement, CGI was responsible for all matters involving construction at TCG's various project sites, project administration, construction accounting, marketing escrow processing, and general bookkeeping, while Anden was responsible for all joint venture matters relating to construction financing. (Pl.'s Compl. ¶ 18.) CGI and Anden were each entitled to 50% of the partnership's profits and were to bear 50% of its losses. [FN2]

FN2. TCG was originally formed in 1978 by CGI, James Klingbeil and Eugene Rosenfeld. (Pl.'s Compl. ¶ 16.) According to the Restated Joint Venture Agreement, CGI was to receive 50% of the partnership's profits and bear 50% of its losses, while Klingbeil and Rosenfeld each were to receive 25% of the profits and bear 25% of the losses. (Pl.'s Compl. ¶ 18.) Several years after TCG's formation, Anden acquired the partnership interests of both Klingbeil and Rosenfeld.

In September of 1984, TCG acquired fifty-five acres of land for development in Sayreville, New Jersey ("the Winding River project"). In accordance with the

agreed upon division of labor set out in the Restated Joint Venture Agreement, Anden arranged for the project's financing from defendant Continental. (Pl.'s Compl. ¶ 22 .) At the same time, plaintiff sought the various permits and approvals necessary to develop the property into residential and commercial lots and, in the spring of 1989, began construction. (Pl.'s Compl. ¶ ¶ 23, 24.)

According to plaintiff's complaint, by early 1990, the secured financing on Anden's various construction and development projects throughout the United States exceeded $500,000,000, half of which had been extended by Continental alone. (Pl.'s Compl, ¶ ¶ 27, 28.) It was then, in early 1990, that Anden began to experience financial difficulties on account of the depressed state of the nation's real estate market. (Pl.'s Compl. ¶ 29.) In turn, Anden's precarious financial condition led Continental to cease funding a working capital line of credit that had been extended to finance the Winding River project. *Id.* The resulting lack of funding caused unanticipated delays in site improvement and construction. According to plaintiff, construction on the project proceeded through 1990 only because the subcontractors continued to work without compensation for their services. (Pl.'s Compl. ¶ 30.) As a result, by the end of 1990, TCG's debt to its various subcontractors reached the sum of approximately $1,000,000. (Pl.'s Compl. ¶ 31.)

***2** Recognizing the need for construction to continue, Anden, with the assistance of Continental, established a "magic window" program to begin in 1991 whereby subcontractors would continue working on the project in exchange for C.O.D. payments and the promise that outstanding payables would be reduced as the project progressed toward completion. (Pl.'s Compl. ¶ 32.) In reliance on these representations, both CGI and its subcontractors continued work through 1991. (Pl.'s Compl. ¶ 33.) Because of the reduced financing, however, the construction and sale of new homes was delayed, warranty service problems arose, and litigation was instituted concerning the increasing subcontractor debt. (Pl.'s Compl. ¶ 34.) According to plaintiff, these complications "impacted" on its expectation of profits and severely damaged its reputation. *Id.*

In approximately January of 1992, it became evident to Anden's two principal creditors, Continental and Banyan Strategic Land Fund II ("Banyan"), that Anden would not be able to meet its ongoing financial obligations. (Pl.'s Compl. ¶ 36.) Thus, in order to protect themselves from the claims of Anden's other various creditors should Anden become insolvent, Banyan and Continental devised a plan to "spin off" those Anden properties in which they held a secured interest into a separate and distinct entity allegedly controlled by the two creditors. (Pl.'s Compl. ¶ 38.) This, according to plaintiff, was designed to shield Anden's assets from competing creditors while simultaneously allowing Banyan and Continental to profit from the anticipated recovery of the national real estate market. *Id.*

Accordingly, in March of 1992, Westholme Partners, in which defendants Continental and BMC Westholme were limited partners, was formed for the purpose of transferring into it those Anden properties in which Continental and Banyan held a secured interest. (Pl.'s Compl. ¶ ¶ 40-41; Greenberg Cert. Exh. A. at 1.) Plaintiff alleges that although identified as limited partners, Continental and Banyan took an active role in the day-to-day operations of Westholme Partners and effectively controlled the partnership. [FN3] (Pl.'s Compl. ¶ ¶ 43-47.) In return for the conveyances, Anden's principals were relieved of their personal obligations to Continental and Banyan, thereby avoiding potential insolvency. (Pl.'s Compl. ¶ 39.)

FN3. At this point, plaintiff's narrative diverges somewhat from the text of the Westholme Partners' partnership agreement submitted by plaintiff as an exhibit to the certification of William Greenberg. (Greenberg Cert. Exh. A.) According to the agreement, Continental, BMC Westholme and an entity known as MDG Associates Ltd. were identified as the partnership's limited partners. Contrary to plaintiff's complaint, the agreement does not name Banyan as a partner, limited or otherwise. The agreement does indicate, however, that BMC Westholme and Banyan were affiliates (Greenberg Cert. Exh. A. ¶ 1.15.), which may explain plaintiff's apparent use of the names Banyan and BMC Westholme interchangeably. *Compare,* Pl.'s Compl. ¶ ¶ 3, 13 *with* Pl.'s Compl. ¶ ¶ 43, 47.
Plaintiff's complaint is not based on the Westholme Partners' partnership agreement, nor is that agreement annexed to the pleading itself. Thus, the partnership agreement lies outside the proper scope of this court's inquiry on a motion filed pursuant to Rule 12(b)(6). Construing plaintiff's complaint liberally, however, this

> court will assume, strictly for the purpose of this motion to dismiss, that Banyan and BMC Westholme were so closely affiliated that Banyan's acts alleged in the complaint may be attributable to defendant BMC Westholme.

One of the Anden properties to be transferred to Westholme Partners was Winding River, in which plaintiff owned a 50% interest. According to the complaint, plaintiff "was induced into transferring its share of the Winding River project to Anden (who, in turn, conveyed to Westholme) on the express representation by all defendants that the outstanding subcontractor payables reflected by the aforereferenced 'magic window,' together with the remediation of then existing and future Homeowner Warranty obligations, would be funded by defendants in connection with CGI's transfer of its interest." (Pl.'s Compl. ¶ 51.) Specifically, plaintiff alleges that the agreement whereby Anden transferred the Winding River project to Westholme Partners recognized that Anden's grant was subject to Westholme Partners' assumption of the then existing trade account payables, customer deposit liabilities, accrued interest payables, and Homeowner Warranty liabilities for the project. (Pl.'s Compl. ¶ 53.) In addition, defendants agreed that plaintiff would retain all rights and interests in the development and management fees set forth in TCG's Restated Joint Venture Agreement, and that plaintiff would retain its equity interest in the project. (Pl.'s Compl. ¶ 54.) According to plaintiff, "provisions were made in the various documents exchanged between Anden, Continental, Banyan and Westholme [Partners] to insure the aforedescribed interest of CGI." (Pl.'s Compl. ¶ 52.)

***3** Following the transfer of its interest in March of 1992, plaintiff continued to oversee the management and construction of the Winding River project and was reimbursed by Continental for its costs and overhead expenses. (Pl.'s Compl. ¶ 57.) Between April of 1992 and August of 1993, Continental advanced funds to the project to enable Westholme Partners to construct and deliver an additional twenty-nine homes. (Pl.'s Compl. ¶ 58.) By August of 1993, however, the outstanding balance on the project's debts, including funds owed to subcontractors, remained approximately $1,000,000 despite plaintiff's repeated requests that Continental pay down the project's increasing debts and defaults. *Id.* According to plaintiff,

> Continental represented, on numerous occasions to CGI and directly to the Project's subcontractors, that it was responsible for paying the project debts and that monies would be forthcoming in the near future. CGI and the subcontractors continued their involvement with the project in reliance upon the continued assurances of loan officers at Continental, including Kneblekamp, that Continental would financially support the Project through its conclusion.

(Pl.'s Compl. ¶ 59.) In reliance on Continental's representations, then, plaintiff continued, throughout 1993, to develop sales at Winding River, to represent to existing homeowners that the warranty program would be honored, to contract with purchasers for the purchase of new homes, to represent to the subcontractors that they would be fully compensated, and to represent to the relevant municipalities that the project would be completed. (Pl.'s Compl. ¶ 60.)

On November 22, 1993, however, Continental instituted, without notice to plaintiff, a foreclosure proceeding on the Winding River project and had a receiver appointed with the consent of Westholme Partners. (Pl.'s Compl. ¶ 61.) According to plaintiff, the receiver has been negligent in preserving the assets of the project and has allowed the physical condition of the Winding River site to deteriorate. (Pl.'s Compl. ¶ 63.) Moreover, plaintiff alleges that the receiver has failed to address the project's existing trade payables and has neglected the homeowner warranty obligations resulting in damage to plaintiff's reputation, the loss of its good will, and a decline in the value of plaintiff's interest in the project. (Pl.'s Compl. ¶¶ 63-68.)

Accordingly, on April 28, 1994, plaintiff filed its 43-page complaint in the case at bar. [FN4] The complaint alleges sixteen separate counts against all defendants collectively for breach of contract (Count One); promissory and equitable estoppel (Count Two); unjust enrichment (Count Three); breach of the implied covenant of good faith and fair dealing (Count Four); fraudulent transfer (Count Five); constructive trust (Count Six); equitable subordination (Count Seven); breach of fiduciary duty (Count Eight); fraud and misrepresentation (Count Nine); negligent misrepresentation (Count Ten); constructive fraud (Count Eleven); interference with contractual relations and prospective economic advantage (Count Twelve); duress (Count Thirteen); violation of the New Jersey RICO statute, N.J.S.A. 2C:41-2(a) (Count Fourteen); violation of the New Jersey RICO statute, N.J.S.A. 2C:41- 2(c) (Count Fifteen); and violation of the New Jersey RICO statute, N.J.S.A. 2C:41-2(d) (Count Sixteen). In

response, defendant Continental has filed the instant motion to dismiss Counts One through Four and Six through Sixteen for their failure to state claims upon which relief can be granted and, where relevant, for plaintiff's failure to plead fraud with particularity. [FN5]

FN4. The case was originally filed in the Superior Court of New Jersey and was subsequently removed to this court on June 24, 1994. This court has subject matter jurisdiction over plaintiff's complaint pursuant to 28 U.S.C. § § 1332.

FN5. Prior to defendant Continental's motion being filed, defendants Anden, Westholme Partners, and BMC Westholme each notified plaintiff of their intent to join Continental's motion. All three, however, have relied on Continental's briefs.

II. *Discussion*

***4** When a party moves to dismiss a claim pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, that party is challenging "the sufficiency of the allegations made in the complaint." *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir.1993). In ruling on such a motion, the court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." *McDonald v. Commonwealth of Pennsylvania, Department of Public Welfare*, 62 F.3d 92, 94-95 (3d Cir.1995). The court need not, however, accept the plaintiff's legal conclusions whether alleged or implied. *Kost*, 1 F.3d at 183. Under this framework, the court may grant a defendant's motion to dismiss only if it appears that the plaintiff will be able to prove no set of facts entitling it to relief. *In re Westinghouse Securities Litigation*, 90 F.3d 696 (3d Cir.1996).

Giving the requisite consideration to the allegations contained in plaintiff's complaint, this court will address each of the challenged counts in sequence.

A. *Count One: Breach of Contract*

Defendants attack the sufficiency of the allegations contained in Count One of plaintiff's complaint on three separate grounds. First, defendants argue that plaintiff has failed to adequately allege the existence of a contract. Plaintiff's complaint, however, is replete with allegations of both written documents and oral representations in which "all defendants" represented that financing for the Winding River project would continue, that plaintiff would be reimbursed for the project's construction debts, and that certain obligations to purchasers of new homes would be assumed in return for plaintiff's transfer of its title interest in the project site to Westholme Partners and its continued work at the site. [FN6] (Pl.'s Compl. ¶ ¶ 51, 52, 53, 54, 55, 59.) Accepting all facts asserted by plaintiff as true, it is clear that plaintiff has adequately alleged the existence of multiple contracts with defendants and that, when the payments to plaintiff and funding for the project allegedly were delayed or simply not forthcoming, those contracts were breached.

FN6. Defendants are correct that several of the written contracts submitted by plaintiff are unsigned and do not necessarily support plaintiff's allegations. Nor, however, do they affirmatively disprove any of those allegations. Moreover, the collection of documents is obviously incomplete and was submitted with plaintiff's stipulation that they represent only the documents currently in plaintiff's possession. (Greenberg Cert. ¶ 3.) Thus, whether all of the alleged documents in fact exist and contain language consistent with plaintiff's allegations should be borne out through discovery. Examining the sufficiency of plaintiff's evidence, however, is not appropriate on a motion to dismiss the complaint for failing to state a claim upon which relief can be granted.

Defendants next attack the sufficiency of Count One by arguing that, if a contract was entered into, it was oral and, therefore, would be unenforceable under the statute of frauds. An affirmative defense grounded in the statute of frauds properly may be raised in the context of a motion to dismiss. *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir.1994). That motion may be granted, however, only if it is clear from the face of the complaint or the documents attached thereto that the statute of frauds presents an insurmountable bar to plaintiff's cause of action. Here, that conclusion is far from certain.

First, assuming that the statute of frauds applies, plaintiff has alleged the existence of "various documents exchanged between Anden, Continental, Banyan and Westholme [Partners] to insure the

aforedescribed interest of CGI." (Pl.'s Compl. ¶ 52.) In response, defendants have failed to offer any documents memorializing the transfer of plaintiff's interest in the Winding River project, thus preventing this court from determining, at this time, whether the alleged contracts in fact are devoid of the language alleged by plaintiff.

***5** Second, based solely on the allegations contained in plaintiff's complaint, it cannot be said with certainty that the alleged contracts were within New Jersey's statute of frauds and, thus, required to be in writing. [FN7] In this connection, defendants' argument that plaintiff's contract claims are barred by N.J.S.A. 25:1-5(f) and (g) is tenuous at best. Those provisions require that certain contracts for the loaning of money or the extending of credit in an amount in excess of $100,000 must be in writing. Nowhere in the complaint, however, does plaintiff suggest that its claims in any way relate to loans advanced from defendants. [FN8]

FN7. Although many of the documents submitted by plaintiff contain choice-of-law provisions indicating that California law will govern the various agreements, this court will assume for the purpose of this motion to dismiss, as the parties have done, that plaintiff's numerous causes of action are governed by New Jersey law.

FN8. If, as defendants argue, the transactions at the heart of the case at bar should properly be characterized as a complex restructuring of the loans made to TCG, defendants will have every opportunity to develop and present their theory as this case progresses.

Rather, plaintiff is asserting that, in return for the transfer of its interest in the Winding River project, defendants promised to make certain payments to plaintiff which they, in the end, failed to provide. Thus, the only provisions of New Jersey's statute of frauds that could apply to the case at bar are those relating to contracts for the transfer of an interest in real estate. *See* N.J.S.A. 25:1-11, 25:1-13. Although this court is aware of no reported cases in which New Jersey courts have interpreted N.J.S.A. 25:1- 13(b), which became effective January 5, 1996, that section appears to have amended the statute of frauds to render enforceable an oral agreement for the transfer of an interest in real estate that can be proved by clear and convincing evidence. [FN9] N.J.S.A. 25:1-13(b).

FN9. Plaintiff argues that even those provisions pertaining to contracts for the transfer of an interest in real estate are irrelevant because neither plaintiff nor defendants disputes the validity or enforceability of the transfer. Thus, according to plaintiff, because neither party is attempting to enforce a transfer of an interest in real estate, the statute of frauds does not apply. (Pl.'s Mem. of Law at 13.) It is certainly a credible reading of the complaint that many of the promises on which plaintiff is now suing were made in written and oral agreements wholly independent from any contract memorializing the transfer of plaintiff's interest in the Winding River project, If that proves to be the case, it may turn out that defendants' invocation of the statute of frauds is entirely misplaced.

Finally, defendant Continental, presumably joined here by defendant BMC Westholme, argues that, as a limited partner of Westholme Partners, it cannot be held liable for the partnerships' alleged obligations to plaintiff. (Defs.' Reply Br. at 7 n. 6.) As a general matter, New Jersey's Uniform Limited Partnership Law shields a limited partner from the obligations of the partnership. N.J.S.A. 42:2A-27(a). However, the law also expressly provides that a limited partner will lose its protected status and become liable for the partnership's obligations if it "takes part in the control of the business." *Id.* Because, on a motion to dismiss, the court's inquiry is limited to examining the sufficiency of the complaint and because the complaint states repeatedly that Westholme's limited partners "transgressed their role as limited partners by actively participating in the day-to-day affairs of the Westholme Partnership," (Pl.'s Compl. ¶ 45), this court cannot say at this juncture that plaintiff will be unable to prove a set of facts which would expose defendants Continental and BMC Westholme to liability for the partnership's obligations.

While Count One of plaintiff's complaint is not a model of precision, it is sufficient to state a claim for breach of contract. Accordingly, defendants' motion to dismiss Count One of plaintiff's complaint will be denied.

B. *Count Two: Promissory and Equitable Estoppel*

1. *Promissory Estoppel*

In order to state a claim under the doctrine of promissory estoppel, a plaintiff must allege "(1) a clear and definite promise, (2) made with the expectation that the promisee will rely thereon, (3) and which the promisee reasonably does, (4) resulting in a definite and substantial detriment incurred in that reliance." *Fairken Assoc. v. Hutchin*, 223 N.J.Super. 274, 279-80, 538 A.2d 465 (Law Div.1987). In support of their motion to dismiss, defendants argue that plaintiff has failed to allege that clear and definite promises were made and that its reliance on the alleged promises was both reasonable and detrimental. With respect to the clarity and definiteness of the promises, plaintiff's complaint is more than adequate in alleging that defendants promised to

> ***6** assume any and all outstanding trade payables of the project, as well as further assume obligation for all past, present and future homeowner maintenance under the applicable terms and conditions of the existing homeowner warranty program. In addition, defendants represented that plaintiff would be receiving an overhead reimbursement and profit participation out of its continued involvement in the development of the project.

(Pl.'s Compl. ¶ 74.)

Because this case comes before the court on a motion to dismiss, defendants' reliance on *Malaker Corp. v. First Jersey National Bank*, 163 N.J.Super. 463, 395 A.2d 222 (App.Div.1978) is misplaced. There, the court entered judgment n.o.v. for the defendant because, *at trial*, a clear and definite promise was not *"evidentially established."* *Id.* at 480, 395 A.2d 222. Here, the sufficiency of plaintiff's evidence is not at issue. Rather, because on a motion to dismiss, this court may examine only the sufficiency of the allegations contained in plaintiff's complaint, this court must conclude that sufficiently clear and definite promises have unquestionably been alleged.

Next, defendants argue that plaintiff's reliance was neither reasonable nor detrimental. First, defendants argue that, because Anden and TCG had been experiencing financial difficulties, plaintiff's reliance on defendants' assurances of payment was unreasonable as a matter of law. The question of Anden's financial condition is irrelevant, however, to the reasonableness of plaintiff's reliance on the defendants' alleged promises. According to the complaint, once Anden could not meet its loan obligations to Continental and Banyan, defendant Westholme Partners replaced Anden as the party responsible for securing the financing for the Winding River project. Thus, contrary to defendants' assertion, it was not unreasonable as a matter of law for plaintiff to assume that, with a new and better financed owner, the project would begin meeting its debts and plaintiff would be compensated for its work.

Second, defendants argue that plaintiff's reliance was not detrimental because plaintiff actually benefitted from being relieved of its obligations under the TCG's agreements. This may, in fact, be true. Much of plaintiff's complaint, however, focuses on the events following the transfer, and alleges that plaintiff was induced to continue working at the site on account of defendants' promises of payment. Having alleged that it was induced to perform work for which it was never paid, plaintiff has alleged detrimental reliance, and has stated a claim under the doctrine of promissory estoppel.

2. *Equitable Estoppel*

To state a claim under the doctrine of equitable estoppel, a plaintiff must allege (1) a misrepresentation of material fact, known to the party sought to be estopped but unknown to the plaintiff, (2) made with the intention or expectation that it will be relied upon, (3) and upon which the plaintiff reasonably relied, (4) to its detriment. *Quigley, Inc. v. Miller Family Farms*, 266 N.J.Super. 283, 296, 629 A.2d 110 (App.Div.1993). Thus, while promissory estoppel requires a plaintiff to allege a promise of *future* performance, equitable estoppel requires a plaintiff to allege a misrepresentation of a material fact *currently existing* or having existed *in the past.* In the case at bar, plaintiff simply has failed to allege any misrepresentation of fact, as distinct from defendants' promises to pay plaintiff and certain of plaintiff's creditors in the future. [FN10] Accordingly, defendants' motion to dismiss Count Two of plaintiff's complaint will be granted only with respect to that portion sounding in equitable estoppel.

> FN10. In addition to misrepresentations, claims grounded in equitable estoppel can be premised on a defendant's alleged conduct, silence, or omissions. *Fairken Assoc.*, 223 N.J.Super. at 280, 538 A.2d 465. Thus, plaintiff claims to have alleged conduct on

the part of defendant Continental sufficient to state a claim under an equitable estoppel theory. (Pl.'s Br. at 14-15.) The conduct to which plaintiff draws this court's attention, however, is Continental's consenting to the transfer of plaintiff's assets, its taking an ownership interest in Westholme Partners, and its directing of the day-to-day affairs of the partnership. (Pl.'s Br. at 15.) This conduct, which can be reduced to Continental's acquiring, owning and managing the project site, is insufficient to state a claim under the doctrine of equitable estoppel. It is wholly devoid of any implied assurances of payment to plaintiff, thus rendering plaintiff's alleged reliance on it unreasonable as a matter of law. The only forthright reading of plaintiff's complaint suggests that plaintiff was induced to transfer its ownership interest and to continue working on the project, not because Continental acquired, owned and managed the site, but because defendants promised that they would compensate plaintiff for its work, continue to fund the project, and assume certain debts and obligations owed to subcontractors and the purchasers of new homes. As such, plaintiff's complaint states a claim for promissory, not equitable, estoppel.

C. *Count Three: Unjust Enrichment*

***7** A claim under the quasi-contractual theory of unjust enrichment has only two required elements: "(1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable." *Wanaque Borough Sewerage Auth. v. West Milford*, 144 N.J. 564, 575, 677 A.2d 747 (1996) (internal citations omitted). The doctrine rests "on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do." *St. Paul Fire and Marine Ins. Co. v. Indemnity Ins. Co. of North America*, 32 N.J. 17, 22, 158 A.2d 825 (1960), quoting 17 C.J.S. *Contracts* § 6, p. 324.

Defendants argue that Count Three of plaintiff's complaint must fail because plaintiff has not alleged a benefit retained by defendants for which plaintiff was not compensated. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 16.) Plaintiff's complaint, however, explicitly alleges that its work on the project substantially increased the site's value. (Pl.'s Compl. ¶ 80.) Further, although plaintiff conceded in its complaint that, for a time following the transfer, defendants honored their commitment to reimburse plaintiff for its costs and overhead expenses (Pl.'s Compl. ¶ 57), plaintiff also alleges that other debts and obligations which defendants allegedly promised to assume went unpaid (Pl.'s Compl. ¶ ¶ 51, 54, 59, 60). Thus, plaintiff has alleged that defendants received the benefit of plaintiff's work at plaintiff's expense. Accordingly, defendants' motion to dismiss Count Three of plaintiff's complaint will be denied. [FN11]

FN11. Contrary to defendants' assertion, the fact that Continental, in the end, foreclosed on the Winding River project, does not prove beyond question that defendants derived and retained no benefit from plaintiff's work. (Defs.' Reply Br. at 13.)

D. *Count Four: Breach of the Implied Covenant of Good Faith and Fair Dealing*

"[E]very contract imposes on each party the duty of good faith and fair dealing in its performance and its enforcement." *Pickett v. Lloyd's and Peerless Ins. Agency, Inc.*, 131 N.J. 457, 467, 621 A.2d 445 (1993). The implied covenant thus ensures that "neither party to a contract shall injure the right of the other to receive the fruits of the agreement." *Onderdonk v. The Presbyterian Homes of New Jersey*, 85 N.J. 171, 182, 425 A.2d 1057 (1981). In the case at bar, defendants' only argument posited to support their motion to dismiss Count Four of plaintiff's complaint is that no contract was ever formed between plaintiff and Continental and, therefore, no implied covenant could exist. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 17-18.) As this court concluded in part I.A. above, however, defendants have not demonstrated that there is no set of facts on which plaintiff could prove the existence of the various contracts alleged. Accordingly, because this court will deny defendants' motion to dismiss Count One of plaintiff's complaint, it correspondingly must deny defendants' motion with respect to Count Four as well.

E. *Count Seven: Equitable Subordination* [FN12]

FN12. Defendants have not moved to

dismiss Count Five of plaintiff's complaint, and plaintiff has voluntarily dismissed Count Six.

***8** Plaintiff's assertion of a cause of action for equitable subordination is entirely misplaced. Equitable subordination is a *remedy* most frequently applied in bankruptcy actions where, because of a particular claimant-creditor's inequitable conduct which injured the debtor or gave the creditor an unfair advantage, that creditor's claims should, in equity, be subordinated to the claims of more deserving creditors. *See In re* *Matter of Mobile Steel Co.*, 563 F.2d 692 (5th Cir.1977). Plaintiff has cited not a single New Jersey case in which a court applied the doctrine outside of the bankruptcy context or as an affirmative cause of action. Indeed, the only case that plaintiff has cited for the proposition that equitable subordination may be applied outside of bankruptcy proceedings involved, unlike the case at bar, a court-appointed receiver seeking to have the court subordinate a particular creditor's claims to those of other, more deserving, creditors. *S.E.C. v. American Bd. of Trade*, 719 F.Supp. 186, 195-96 (S.D.N.Y.1989).

Thus, even if this court were to find the doctrine applicable outside of the bankruptcy context, its application here would be both inappropriate and illogical. Defendants are not creditors that have filed claims against plaintiff's assets. Thus, defendants have made no claims to be subordinated, and there exist no other creditor's claims to which defendants' claims, if they existed, could be subordinated. Plaintiff's invocation of equitable subordination simply makes no sense. Accordingly, Count Seven of plaintiff's complaint, sounding in equitable subordination, will be dismissed for failing to state a claim upon which relief can be granted.

F. *Count Eight: Breach of Fiduciary Duty*

Count Eight of plaintiff's complaint alleges that the defendants, presumably Continental and BMC Westholme, exceeded the proper scope of their role as lenders and, by assuming day-to-day control of Westholme Partners, became "*de facto* 'partner[s]' with plaintiff in the completion of the project." [FN13] (Pl.'s Compl. ¶ 102.) As such, plaintiff claims that defendants owed TCG a fiduciary duty to act in the best interests of the partnership. Plaintiff is correct that, as a general matter, " 'each partner stands in a fiduciary relationship to every other partner" ' and that "[t]he relationship is 'one of trust and confidence, calling for the utmost good faith, permitting of no secret advantages or benefits." ' *Heller v. Hartz Mountain Industries*, 270 N.J.Super. 143, 150-51, 636 A.2d 599 (Law Div.1993) (quoting *Neustadter v. United Exposition Serv. Co.*, 14 N.J.Super. 484, 493, 82 A.2d 476 (Ch.Div.1951); *Stark v. Reingold*, 18 N.J. 251, 261, 113 A.2d 679 (1955)).

FN13. Because Count Eight addresses only the defendants in their role as lenders, this court will assume that the allegations contained in Count Eight are made only against defendants Continental and BMC Westholme.

While it cannot be contested that partners stand in a fiduciary relationship to one another, plaintiff has not pled facts sufficient to permit the inference that either it or TCG was, at any time, in partnership with defendants Continental or BMC Westholme. To the contrary, plaintiff alleges that it conveyed its proprietary interest in the project to Westholme and that at no time were plaintiff, Continental and BMC Westholme co-owners or joint venturers. Rather, once plaintiff transferred its interest to Westholme, it assumed the role of a contractor, to whom defendants owed no heightened duty of loyalty.

***9** Moreover, assuming that defendants Continental and BMC Westholme came to exercise control over the day-to-day operations of Westholme Partners as alleged, that fact would alter only the relationships of the general and limited partners vis-a-vis each other by subjecting the limited partners to liability for the partnership's obligations. It could not, as a matter of law, transform a contractor with which the partnership happened to do business into a partner that is owed a fiduciary duty. Accordingly, Count Eight of plaintiff's complaint will be dismissed.

G. *Count Nine: Fraud*

Count Nine alleges that defendants made certain promises of future payments, knowing such representations to be false, in order to fraudulently induce plaintiff to transfer its interest in the Winding River project and to continue its work at the site. (Pl.'s Compl. ¶ ¶ 108-13.) The common law tort of fraud requires allegations of (1) a material representation of a presently existing or past fact (2) made with knowledge of its falsity (3) with the intent to induce reliance, (4) upon which plaintiff justifiably

relied, and (5) was thereby damaged. *Van Dam Egg Co. v. Allendale Farms, Inc.*, 199 N.J.Super. 452, 456-57, 489 A.2d 1209 (App.Div.1985) (citing *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624-25, 432 A.2d 521 (1981). An alleged fraud cannot be predicated solely on a promise of future performance that, in the end, goes unfulfilled. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1186 (3d Cir.1993) (applying New Jersey law).

Under New Jersey law, however, "[a] promise to pay in the future is fraudulent if there is no present intent ever to do so"--the theory being that, in making such a promise, the defendant misrepresented the *fact* of its then-existing intent *not* to fulfill its promise. *Van Dam Egg Co.*, 199 N.J.Super. at 457, 489 A.2d 1209. Under such a theory, a plaintiff must show more than a defendant's lack of intent to perform at the time of breach. *See Lightning Lube, Inc.*, 4 F.3d at 1186. Rather, the plaintiff must show "that *at the time the promise to perform was made*, the promisor did not intend to fulfill the promise." *Id.* (emphasis in original). *See also Capano v. Borough of Stone Harbor*, 530 F.Supp. 1254, 1264 (D.N.J.1982) ("the defendant must have no intention at the time he makes the statement of fulfilling the promise"). This final requirement ensures the proper temporal focus of the allegations. Without it, every claim for breach of contract would also state a corresponding claim for common law fraud that automatically would survive a motion to dismiss.

Aside from plaintiff's conclusory allegation that defendants knew their representations to be false (Pl.'s Compl. ¶ 111), plaintiff has alleged no facts which could justify the inference that, at the time the promises were made, defendants had no intention of fulfilling them. Indeed, such an inference would be affirmatively contradicted by the facts alleged. According to plaintiff, following the transfer of CGI's proprietary interest to Westholme, defendants honored their commitments to plaintiff for over a year by reimbursing plaintiff's construction costs and overhead and by advancing adequate funds for the construction and delivery of twenty-nine new homes at the Winding River site. (Pl.'s Compl. ¶ ¶ 57, 58.)

***10** Contrary to plaintiff's argument, then, the facts alleged suggest that, at the time the promises were made (and for at least a year thereafter), defendants had every intention of fulfilling the promises that induced plaintiff to convey its interest in the project and to continue work at the site. Thus, inferring defendants' fraudulent intent would not only be wholly unsupported by plaintiff's allegations, but would require a trier of fact to draw a conclusion that would be affirmatively contradicted by the facts alleged in the complaint. *Compare In re Westinghouse Securities Litigation*, 90 F.3d 696, 711 (3d Cir.1996) (reversing district court's 12(b)(6) dismissal of plaintiffs' fraud count where plaintiff had alleged arbitrary conduct on the part of the defendant which, absent a fraudulent motive, would have been otherwise inexplicable). Having failed to allege any facts from which a misrepresentation could be inferred, Count Nine of plaintiff's complaint will be dismissed for its failure to state a claim upon which relief can be granted. [FN14]

FN14. For the same reason, Count Ten (alleging negligent misrepresentation) and Count Eleven (sounding in constructive fraud), both of which require a defendant to have made a misrepresentation of fact, will likewise be dismissed. Similarly, plaintiff's RICO claims, Counts Fourteen, Fifteen and Sixteen, must also be dismissed. In order to properly plead each of the RICO counts, plaintiff is required to allege facts permitting the inference that defendants committed or conspired to commit two acts of racketeering activity as defined in N.J.S.A. 2C:41-1a. According to plaintiff's complaint, the activity alleged for all three RICO counts is defendants' alleged mail and wire fraud. (Pl.'s Compl. ¶ 140.) As discussed above, however, plaintiff has failed to allege facts suggesting that defendants engaged in fraudulent activity toward plaintiff. For the same reasons, plaintiff has failed to allege facts permitting an inference that defendants engaged in or conspired to engage in a pattern of racketeering activity. Accordingly, Counts Fourteen, Fifteen and Sixteen of plaintiff's complaint will be dismissed.

H. *Count Twelve: Interference with Contractual Relations and Prospective Economic Advantage*

To state a claim for tortious interference, a complaint first must allege facts giving rise to the plaintiff's reasonable expectation of economic advantage. *Printing Mart v. Sharp Electronics Corp.*, 116 N.J. 739, 751, 563 A.2d 31 (1989). Second, "the complaint must allege facts claiming that the interference was done intentionally and with 'malice,' " meaning that "the harm was inflicted intentionally

and without justification or excuse." *Id.* Third, "the complaint must allege facts leading to the conclusion that the interference caused the loss of the prospective gain." *Id.* Finally, "the complaint must allege that the injury caused damage." *Id.* at 751-52, 563 A.2d 31.

Here, plaintiff claims that defendant Continental tortiously interfered with both the TCG joint venture agreement and with the development contract between plaintiff and Westholme. [FN15] (Pl.'s Compl. ¶ ¶ 124-28.) Turning first to the contract between plaintiff and Westholme, plaintiff's claim cannot stand because Continental, a partner in the Westholme entity, cannot, as a matter of law, be found to have interfered with an economic relationship to which it was, itself, a party. *Id.* at 752, 563 A.2d 31 ("it is 'fundamental' to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship"). "Where a person interferes with the performance of his or her own contract, the liability is governed by principles of contract law." *Id.* at 753, 563 A.2d 31.

> FN15. The complaint alleges tortious interference only against defendant Continental.

With respect to plaintiff's joint venture agreement with Anden, it cannot be seriously disputed that plaintiff's complaint satisfies the first element of a tortious interference claim. Plaintiff "was in the pursuit of business" and, therefore, had a reasonable expectation of economic advantage. *See id.* at 751, 563 A.2d 31. Plaintiff's complaint fails to satisfy the second element of the *Printing Mart* formulation, however, in that it does not allege *"facts* ... [demonstrating] that the harm was inflicted intentionally and without justification or excuse." *Id.* As discussed in the preceding section, plaintiff has failed to allege any facts whatsoever that would permit an inference that, at the time defendants induced plaintiff to terminate its joint ownership with Anden and to convey its interest in the Winding River project to Westholme, defendants did not intend to follow through on their promises to plaintiff. Similarly, the complaint is bereft of any facts suggesting that, in approaching both plaintiff and Anden in early 1992, Continental was acting with malice, i.e., intentionally to harm plaintiff, without justification or excuse. Both plaintiff and Anden freely accepted the lenders' proposition and voluntarily transferred their joint title interest to Westholme. The fact that, by the fall of 1993, defendants may not have fully honored their promises sheds no light on whether Continental was acting with malice in 1992. Accordingly, Count Twelve, sounding in tortious interference, will be dismissed.

I. *Count Thirteen: Duress*

***11** Count Thirteen alleges that "the course of conduct undertaken by defendants in coercing the fraudulent transfer of the property in question and subsequently coercing the breach of [Westholme's] contractual obligation to plaintiff constitutes the exercise of economic duress." (Pl.'s Compl. ¶ 131.) "Although New Jersey courts recognize economic duress as a defense or a basis for contract recision, the courts do not yet recognize economic duress as an affirmative tort action in New Jersey." *National Amusements, Inc. v. New Jersey Turnpike Authority*, 261 N.J.Super. 468, 479, 619 A.2d 262 (Law Div.1992). Conceding this fact, plaintiff argues that, because New Jersey courts have not conclusively foreclosed the possibility that such a cause of action could be recognized in the future, the door for doing so remains open. Thus, according to plaintiff, this court should follow the lead of other states, such as Texas and Delaware, and recognize an affirmative cause of action for economic duress. (Pl.'s Mem. of Law at 31.)

For over half a century, it has been a cornerstone of the law of federal jurisdiction that a federal court sitting in diversity must apply the law of the state in which it sits, in the same manner in which the courts of that state would apply that law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). When the state's highest court has not addressed an issue facing a federal court, however, it is proper for the federal court to predict what the state court would do if it were forced to determine the issue. *See McKenna v. Pacific Rail Service*, 32 F.3d 820, 826-27 (3d Cir.1994). Thus, plaintiff urges that "it is clear that, under the appropriate circumstances, New Jersey Courts would entertain economic duress as a viable affirmative cause of action." (Pl.'s Mem. of Law at 31.)

This is not a case, however, in which this court must predict what the New Jersey Supreme Court would do if faced with an affirmative claim for economic duress. As the cases cited by plaintiff reveal, New Jersey law does not currently recognize economic

duress as an affirmative cause of action. *Glenfed Financial Corp. v. Penick Corp.*, 276 N.J.Super. 163, 173, 647 A.2d 852 (App.Div.1994); *National Amusements, Inc.*, 261 N.J.Super. at 479, 619 A.2d 262 (Law Div.1992). Thus, because the cause of action simply does not presently exist, this court, applying New Jersey law, has no choice but to dismiss Count Thirteen of plaintiff's complaint.

III. Conclusion

For the reasons stated above, defendants' motion to dismiss fifteen of the sixteen counts contained in plaintiff's complaint will be denied with respect to Count One, that portion of Count Two sounding in promissory estoppel, Count Three and Count Four. The motion will also be denied as moot with respect to Count Six, plaintiff having voluntarily dismissed that count. Defendants' motion will be granted, however, with respect to that portion of Count Two sounding in equitable estoppel as well as Counts Seven through Sixteen. An appropriate order shall issue.

ORDER

***12** This case having come before the court on defendants' motion to dismiss fifteen of the sixteen counts contained in plaintiff's complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure; and the court having reviewed the parties' submission without oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure; and consistent with this court's opinion of even date;

IT IS on this 3rd day of October, 1996

ORDERED that defendants' motion to dismiss plaintiff's complaint be and hereby is denied with respect to Count One, that portion of Count Two sounding in promissory estoppel, Count Three and Count Four; and it is further

ORDERED that defendants' motion to dismiss plaintiff's complaint be and hereby is denied as moot with respect to Count Six, plaintiff having voluntarily dismissed that count; and it is further

ORDERED that defendants' motion to dismiss plaintiff's complaint be and hereby is granted as to that portion of Count Two sounding in equitable estoppel as well as Counts Seven through Sixteen.

1996 WL 33545605 (D.N.J.)

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