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United States District Court,
D. New Jersey.

COASTAL GROUP, INC. Plaintiff,
v.
WESTHOLME PARTNERS, Continental Bank, N.A., BMC Westholme Corp. the Anden Group, William A. Brandt, Jr., and Kent Kneblekamp Defendants.

No. Civ. 94-3010.

Dec. 15, 1998.

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

David W. Macgregor, Proskauer, Rose, Goetz & Mendelsohn, Clifton, NJ, Michael Stein, Pashman Stein, Hackensack, NJ, Michael S. Stein, Pashman Stein, PC, Hackensack, NJ, for Defendants.

Joseph Lloyd Buckley, Sills Cummis Epstein & Gross, PC, Newark, NJ, for Third-Party Plaintiff and Defendants.

OPINION

HAYDEN, J.

***1** Defendant Continental Bank. N.A., now known as Bank of America N.T, & S.A. (The "Bank") has moved for summary judgment as to the five remaining counts in plaintiff's Complaint pursuant to Fed.R.Civ .P. 56(c). Defendant BMC Westholme Corporation ("Banyan") has also moved for summary judgment seeking sanctions against plaintiff for refusing to dismiss it from the case voluntarily. For the reasons stated below, defendants' motions for summary judgment are granted.

I. *Background*

Plaintiff, a New Jersey corporation, is a real estate developer with projects primarily located in New Jersey. At all relevant times. Coastal Group Inc. ("CGI") was owned and controlled by its chairman John Tedesco, and its president William Greenberg. On or around January 1, 1978, CGI entered into a partnership with defendant Anden Group to form The Coastal Group ("TCG"). [FN1] 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 matters relating to construction financing. Complaint ¶ 18. CGI and Anden were each entitled to 50% of the partnership's profits and were to bear 50% of its losses.

FN1. According to the Complaint. TCG was originally formed in 1978 by CBI. James Klingbeil and Eugene Rosenfeld. Complaint ¶ 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. Complaint ¶ 18. Several years after TCG's formation. Anden acquired the partnership interests of both Klingbeil and Rosenfeld. Rosenfeld, however, remained the principal owner of Anden and was later an owner of Westholme.

In September of 1984. TCG acquired fifty-five acres of land for development in Sayreville. New Jersey ("the Winding River project"). Per the Restated Joint Venture Agreement, Anden arranged to finance the project with defendant Bank. Complaint ¶ 22. [FN2] 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. Complaint ¶ ¶ 23, 24. [FN3] Winding River was projected to make between $4 and $6 million in profits, assuming there were no extraordinary expenses. Tedesco Dep. 30. This projection was based on a completion of the project in approximately two years. Kelso Dep. 35.

FN2. The Bank was the primary construction lender on numerous projects

throughout the country owned in whole or in part by defendants Anden or Westholme, including Winding River. Between December 1988 and February 1990, the Bank made mortgage loans totaling more than $16 million to TCG to finance land acquisition, development, construction of model homes, and construction of houses at Winding River.

FN3. According to the Bank's 56.1 Statement, TCG sought governmental approvals from 1984 through early 1989.

Neither the projected profit nor two year anticipated completion deadline was met. In late June or July 1989. TCG discovered environmental contamination at the site. Greenberg Dep. 187-188. TCG undertook cleanup pursuant to a New Jersey Department of Environmental Protection Order at a cost of between $6 and $10 million. Tedesco Dep. 49, 51-52. Additionally, the Borough of Sayreville required TCG to build a sewage pumping station, which for reasons unrelated to this litigation, TCG was forced to pay for entirely. Tedesco Dep. 31-32.

In addition to these problems, in or around 1990. Anden, CGI's co-joint venturer, began to experience financial difficulties due to a depressed real estate market nationwide, Complaint ¶ 29, Tedesco Dep. 148, 34. At that time. Anden had four primary lenders for its real estate ventures. The largest holder of outstanding loan obligations in 1991 was defendant Bank. Because Anden was no longer able to meet the outstanding loan obligations to the Bank. including the loans relating to the development of Winding River, in late 1991. Anden and the Bank began discussing restructuring its debt to the Bank. [FN4]

FN4. Anden was a developer with real estate projects in many states, including Callfornia. At the time of the restructuring, Anden had approximately $200 million in loans outstanding to the Bank.

***2** According to the Complaint. [FN5] Anden's financial situation had led Continental to cease funding a working capital line of credit that had been extended to finance the Winding River project. Complaint ¶ 29. This lack of funding, according to plaintiff, caused unanticipated delays in site improvement and construction. Construction on the project proceeded through 1990 only because subcontractors continued to work without compensation for their services. Complaint ¶ 30. As a result, by the end of 1990. TCG's debt to its subcontractors reached approximately $1 million. Complaint ¶ 31.

FN5. The Court notes that plaintiff CGI did not comply with Local Civil Rule 56.1 and failed to include a statement of material facts as to which there is a genuine issue with its plaintiff's opposition papers. The Court relies on plaintiff's description of the facts in its opposition papers with great reluctance because it is completely lacking in citations to the record to support its factual claims.

According to the Complaint. Anden, with the assistance of the Bank, 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. Complaint ¶ 32. CGI and its subcontractors continued to work through 1991. Complaint ¶ 33. Because of the reduced financing, however, the construction and sale of new homes was delayed, warranty service problems arose, and litigation against CGI was instituted concerning the increasing subcontractor debt. Complaint ¶ 34. According to plaintiff, these complications "impacted" on its expectation of profits and severely damaged its reputation. *Id.*

Under the joint venture agreement. Anden secured the following bank loans for Winding River: 1) a Phase I Construction Loan dated February 6, 1990 in the principal amount of $13,496,000; 2) a Land Development Loan dated February 7, 1990 in the principal amount of $2,398,510; 3) a Model Loan dated February 8, 1990 in the principal amount of $1,023,878: and 4) a Construction Loan Additional Advance dated March 23, 1992 in the principal amount of $451,500. Simmons Aff. ¶ ¶ 2-6 and Exs. A-C and E. The borrower on these loans was TCG, not CGI, although CGI signed the loan agreements on behalf of TCG. *Id.* John Tedesco, CGI's chairman, gave personal Completion Guarantees on these loans. *Id.* at ¶ ¶ 3 and 7 and Exs. D and F. Through March of 1992, CGI relied on Anden to manage the banking

relationship with the Bank. Greenberg Dep. 279. CGI does not dispute that the Bank performed all of its obligations under these loans. *Id.* at 295-299, 305.

As noted above, in late 1991 Anden and the Bank began to discuss restructuring all of Anden's debt to the Bank. These discussions culminated in a restructuring of Anden's business debt in March of 1992, in which: 1) Anden transferred all properties on which the Bank was the primary lender to a new entity called Westholme Partners: 2) as consideration for this transfer, Anden was relieved of all of its antecedent loan obligations to the Bank, including the loans concerning Winding River; 3) Westholme undertook all of Anden's outstanding loan obligations to the Bank, including the Winding River loan, and obtained additional financing from the Bank; and 4) to relieve the new entity's debt, the Bank relieved $20 million in outstanding loan obligations in exchange for a preferred limited partner interest in Westholme. The Westholme Partnership Agreement [FN6] identifies "the Esden Partners" and "MDG Associates. Ltd." as general partners, with the Bank and BMC Westholme (Banyan) identified as limited partners.

> FN6. "The First Amended and Restated Agreement of the Limited Partnership of Westholme Partners."

***3** Winding River was one of the many properties transferred to Westholme in this transaction. Anden obtained CGI's consent in March of 1992 to transfer CGI's 50% interest in Winding River to Anden, which then transferred Winding River to Westholme. 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 afore-referenced '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." Complaint ¶ 51. Specifically, plaintiff alleges that in or about March, 1992, "numerous conversations took place between Eugene Rosenfeld (of Anden) and John Tedesco (CGI) wherein Rosenfeld relayed to Tedesco and the Bank's position that the Westholme transaction was devised with the expressed intent of allowing projects to be built out (including the payment of existing trade debt and related obligations together with customer service) and to allow joint venture partners to enjoy the economic benefits of said projects worth being burdened by Anden's unrelated debt." Plaintiff's Opposition Brief at p. 7. Plaintiff also alleges that at that same time. "William Greenberg received numerous telephone calls from Rosenfeld. Birlinger and David Cole reiterating the afore-referenced promises made to John Tedesco and requesting the execution of documents transferring CGI's interest in the Winding River project to Anden/Westholme." *Id.* p. 8. It has been stipulated by the parties that CGI did not have communications with anyone at either defendant Banyan or the Bank regarding the March 1992 restructuring of Anden's debt or CGI's transfer of its interest in Winding River prior to the time of the March 1992 transfer. Bank's 56.1 Statement. In any event, relying on statements made by Rosenfeld, CGI transferred its 50% ownership in Winding River to Anden.

After the transactions were complete. Westholme continued with the development of Winding River. In July 1992, the Bank and Westholme entered into another construction loan for Phase II of Winding River, in which the Bank agreed to fund the principal amount of $9,544,259 subject to the terms and conditions of the loan documents. From August 1992 through August 1992, the Bank timely provided the "draw downs" pursuant to the terms of the Phase II Construction Loan. The draw downs were disbursed to Westholme for Westholme to pay debts associated with the construction of the project. Knebelkamp Dep. 88. 94-95. Plaintiff alleges that from late 1992 through 1993, the Bank made assurances that the outstanding job payables would be funded by the Bank. According to plaintiff, they were never paid. By the December of 1992, CGI, which until then had been paid by Westholme for its overhead (Complaint ¶ 57), ceased to do business. Buckley Cert. Exs. 13 & 20. As of January 1, 1993, all overhead expenses formerly paid by CGI were paid by CGI Group Organization Corp. Buckley Cert. Ex. 29; Greenberg Dep. 448.

***4** In June 1993, Westholme defaulted on the Winding River construction loan. Simmons Aff. ¶ 18. The Bank and Westholme entered into negotiations which resulted in the October 7, 1993 Letter Agreement between them. The Letter Agreement was designed so that the Bank could try to settle directly with the project vendors. Rosenfeld Dep. 28.

On November 8, 1993, the Bank commenced a foreclosure action in New Jersey Superior Court to

foreclose on Westholme's interest in Winding River. On that date, the court appointed a receiver to manage the Winding River project.

On April 28, 1994, plaintiff initiated this lawsuit by filing a 43 page, sixteen count Complaint in New Jersey Superior Court which was subsequently removed to federal court based on diversity jurisdiction. On October 3, 1996 the Hon. Judge Marianne Trump Barry partially granted defendants' motion under Fed.R.12(b)(6) dismissing all but the following claims: Count One (breach of contract), Count Two (to the extent it alleges promissory estoppel), Count Three (unjust enrichment), Count Four (breach of implied covenant of good faith), and Count Five. (New Jersey Fraudulent Transfer Act). These claims are the subject of the instant motion.

II. *Summary Judgment Standard*

Summary Judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Applicable substantive law determines whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Where the non-movant proffers evidence such that a reasonable jury could return a verdict in its favor, then a genuine issue involving a material fact is created and summary judgment is foreclosed. *Healey v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 (3d Cir.1988), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2449, 104 L.Ed.2d 1004 (1989).

Initially, the party pressing for summary judgment has the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party satisfies this requirement, the burden then shifts to the non-moving party to present evidence that there is a genuine issue for trial. *Id.* at 324. In this regard the non-moving party may not rest upon its allegations for denials of its pleading. Fed.R.Civ.P. 56(e), but rather must produce sufficient evidence to reasonably support a jury verdict in its favor. *Anderson v. Liberty Lobby*, 477 U.S. at 249. It is not enough that the non-movant raises "some metaphysical doubt as to material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In determining the existence of any genuine issues of material fact, it is not the function of the trial court to weigh the evidence or evaluate its credibility. *Sharrar v. Felsing*, 128 F.3d 810, 817 (3d Cir.1997). The court must draw all inferences in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, the court must accept the non-movant's version as true. *Pastore v. Bell Tel. Co. of Penna.*, 24 F.3d 508, 512 (3d Cir.1994). Factual specificity is required of a party who opposes a motion for summary judgment: that party must point to concrete evidence in the record which supports each essential element of his case. *Celotex*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the party fails to provide such evidence, then he is not entitled to a trial and the moving party is entitled to summary judgment as a matter law. Fed.R.Civ.P. 56(e).

III. *Discussion*

***5** As a preliminary matter, the Bank has objected to the Certifications relied upon by CGI in opposing this motion. Along with its opposition papers. CGI submitted Certifications of its two principals, John Tedesco and William Greenberg, and its brief in opposition cites extensively (though not to specific paragraphs) to these Certifications. However, most of the allegations contained in both Certifications are not based on the personal knowledge of the declarants, but rather are purely legal/factual arguments and interpretations of documents that neither Tedesco nor Greenberg could authenticate. For example, paragraph 2 of John Tedesco's Certification reads as follows:

> In its moving papers, Continental desperately seeks to divorce itself from its prior incestuous relationship with defendant Westholme Partners ("Westholme"). Continental attempts to portray itself solely as an innocent lender and argues that liability in this matter must instead be foisted solely upon the shoulders of its codefendant Westholme. In doing so, Continental attempts to "hide behind its loan documents" and conveniently ignores a plethora of evidence which demonstrates its pervasive involvement in the agreements at issue far beyond that associated with any traditional lender.

William Greenberg's Certification makes a startling statement:

> The purpose of this Certification is to introduce evidence which further supports the Bank's inclusion of these components as part of its representation and intent to build-out the Winding River project. It then introduces evidence which

> demonstrates that, upon the Bank's awareness that it had miscalculated Westholme's required funding, the Bank failed to honor its previously stated intent in funding these components. Finally, this Certification sets forth the Bank's day-to-day involvement in the operations of the project.
>
> Greenberg Cert. ¶ 3.

Mr. Tedesco's certification goes on for pages containing making purely legal arguments and rarely makes reference to anything Mr. Tedesco could possibly have personal knowledge of. Of the 56 paragraphs set forth in the Tedesco certification, only eleven paragraphs contain *any* allegations conceivably based on personal knowledge. Mr. Greenberg's Certification is not much better in that its stated purpose is not to tell us what Greenberg knows about the relevant facts of this case, but rather to "introduce evidence." It consists primarily of purely legal and factual arguments regarding the import of the documents attached to it. Of 33 paragraphs, only 17 contain allegations arguably based on Greenberg's personal knowledge. This is impermissible and violates of the Federal Rules of Civil Procedure and the Local Civil Rules for the District of New Jersey.

Federal Rule of Civil Procedure 56(e) provides that in a summary judgment motion, supporting and opposing affidavits should be made on personal knowledge, and shall set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Local Civil Rule 7.2(a) likewise provides:

> ***6** Affidavits shall be restricted to statements of fact within the personal knowledge of the affiant. Argument of the facts and the law shall not be contained in affidavits. Legal arguments and summations in affidavits will be disregarded by the Court and may subject the affiant to appropriate censure, sanctions or both.
>
> Local Civ.R. 7.2(a).

Courts of this district strictly and consistently enforce Rule 7.2(a) by striking all statements consisting of legal arguments. *See, Chin v. Chrysler Corp.*, Civ. No. 95-5569 (D.N.J.1997); *Scalia v. Lafavette Life Ins. Co.*, 1995 U.S.Dist. Lexis 15944 (D .N.J.1995); *Romero v. Argentinas*, 834 F.Supp. 673, 681, n. 4 (D.N.J.1993). This rule has been applied to certifications as well. *Assisted Living Assoc. of Mooretown v. Moorestown Twp.*, 996 F.Supp. 409, 443 (D.N.J.1998). Accordingly, pursuant to L.Civ.R. 7.2(a) the Court will disregard all of the portions of the Tedesco and Greenberg Certifications not based on their personal knowledge. Additionally, legal arguments raised in the Certifications but not discussed in CGI's opposition brief will likewise be disregarded.

A. *Breach of Contract (Count One)*

Turning to the substantive issues, then, plaintiff's breach of contract/estoppel claims as set forth in its opposition papers are broad and varied. Count One of the Complaint alleges that under the terms of the agreements between the parties, defendants obligated themselves to repay the trade payables incurred on the Winding River Project as well as assume all past, present and future homeowners maintenance obligations. Complaint ¶ 70. In addition, defendants obligated themselves to certain overhead expense reimbursement and profit participation payments to plaintiff. *Id.*

Essentially, CGI argues it was induced to transfer its interest in Winding River in March, 1992 because defendants, including the Bank, promised CGI:1) a 50% interest in any profits generated by Winding River; 2) a management fee for reimbursement of overhead; and 3) payment for any subcontractor and home owner warranty obligations incurred by CGI on Winding River. CGI Opposition Brief p. 8-9.

The Bank argues that summary judgment is appropriate for a host of reasons. First, plaintiff has failed to identify any written instrument that binds CGI and the Bank. None of the many documents plaintiff relies upon requires the Bank to perform on CGI's behalf. Moreover, CGI does not dispute that the Bank met all of its obligations under the loan documents. Defendant also argue with respect to the written documents, CGI has no standing as a third-party beneficiary. Further, the Bank contends that there was no oral contract between the Bank and CGI, and that even if one existed, it would be barred by the Statue of Frauds. Also, CGI is judicially estopped from arguing that it relied on the Bank's promises as consideration for the transfer of its ownership interest in Winding River because of statements made by Tedesco in other litigations.

***7** Under New Jersey law, a contract arises from an offer and acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty. *Weichert Co. Realtors v. Ryan*, 128 N.J. 527, 435 (1992) (internal citations and quotations omitted). Thus if the parties agree on the essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract. *Id.* Where

parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable. *Id.* The first issue then, is whether there are any material issues of fact as to whether a contract between the Bank and CGI exists.

1. *Documentary Evidence of Contract*

To establish the existence of a contract between it and the Bank, CGI apparently relies on many documents and oral representations it claims it relied upon when it transferred its ownership interest in Winding River to Anden. First the Court will consider the documentary evidence.

In answers to interrogatories and deposition testimony, plaintiff points to several documents as proof of a contract between the Bank and CGI: 1) Reimbursement Agreement (Tedesco Cert. Ex. 21); 2) Development Agreement (Tedesco Cert. Ex. 21); 3) Agreement of Undertaking (Tedesco Cert. Ex. 19); 4) Assumption, Release and Consent Agreement (Buckley Cert. Ex. 21); 5) Correspondence dated March 23, 1992 from Continental Bank to TCG (Simmons Cert. Ex. E); 6) Correspondence dated October 7, 1993 from Continental Bank to Eugene Rosenfeld (Tedesco Cert. Ex. 24); 7) Master Transfer, Release, and Consent Agreement (Buckley Cert. Ex. 23). *See* Plaintiff's Response to interrogatory No. 4. Buckley Cert. Ex. 41.

In its opposition brief CGI points to the following additional documents: [FN7] 1) February 20, 1992 Memorandum from L. David Cole of Anden to Bank and Anden representatives (Tedesco Cert. Ex. 13); 2) Handwritten notes of C. Spittel of the Bank (Tedesco Cert. Ex. 14); 3) March 17, 1992 Bank Letter to Rosenfeld (Tedesco Cert. Ex. 15); 4) Westholme Business Plan (Greenberg Cert. Ex. 2); and 5) Document entitled Newco Covenants (Tedesco Cert. Ex. 20).

> FN7. The Court notes that the stricken portions of the Tedesco and Greenberg Certifications contain extensive discussions about documents appended to the Certifications. Many of these documents are not addressed in CGI's Brief in Opposition. Unless a document is discussed in plaintiff's opposition brief or is appropriately discussed in the Certification through first-hand testimony, the document will be disregarded. To hold otherwise would undermine the Court's decision not to consider legal/factual arguments improperly raised in the Certifications. This also applies to references in CGI's Brief to the legal arguments made via the Certifications.

The Court has reviewed each of these documents and finds that none of them either viewed individually or collectively evidences a binding contract between CGI and the Bank. None of these documents is signed by both CGI and the Bank. More importantly, not one of the documents contains an offer on the part of the Bank and acceptance on the part of CGI. Finally, none of these documents reflects an agreement for the Bank to do anything on behalf of CGI. Plaintiff has failed to submit any document evidencing a written contract between it and the Bank, and so summary judgment as to a breach of a written contract with the Bank is appropriate.

2. *Oral Contract*

As noted above, plaintiff asserts that in return for the transfer of its interest in Winding River, the Bank promised to make certain payments to plaintiff which in the end, the Bank failed to provide. CGI argues that these promises are not only evidenced in the documents cited above, but also in oral representations made by the Bank to CGI representatives.

***8** Defendants argue that there is no evidence of any direct communications with any Bank personnel to CGI prior to the consummation of the March restructuring. Further, any representations made by Bank employees after the transaction cannot, as a matter of law, support the existence of a contract.

In John Tedesco's deposition, he testified that he could not recall any discussions with Bank employees prior to the transfer of Winding River to Anden. Tedesco Dep. 152. It appears however, that CGI is no longer contending that the Bank make representations directly prior to the transaction. Rather the claim is that the Bank induced CGI through Eugene Rosenfeld, Anden's president, and that the contract that was formed was later evidenced by statements made by Kent Kneblekamp, a Bank loan officer and in various documents.

a) *Pre-Transaction Statements*

It appears that plaintiff has conceded that there were no direct communications between Bank officers and CGI prior to the March 27, 1992 transfer. *See* CGI

Opposition Brief p. 15-18; Bank's 56.1 Statement. Instead, plaintiff relies on oral communications between CGI and Mr. Rosenfeld, who was president of ESR Corp. a general partner of Esden Partners which is the general partner of Westholme and Anden. Rosenfeld Aff. ¶ 1. However, the evidence put forth by plaintiff is insufficient as a matter of law to establish a definite enforceable contract. Even if there were evidence to support such a contract, there is no evidence that Rosenfeld had the authority to act on behalf of the Bank.

One of the few permissible statements from John Tedesco's Certification appears in paragraph 30, where Tedesco states:

> Continental's afore-referenced stated intent was the subject matter of numerous conversations between myself and Anden's principal (Eugene Rosenfeld) through the early part of 1992. Rosenfeld relayed to me on a number of occasions that it was Continental's position and intention in creating Westholme for the express intent of allowing projects to be built-out and to allow joint venture partners to enjoy the economic benefits of said projects without being burdened by Anden's unrelated debt.... Thus, based on these representations and Continental's stated intent, as of March 1992. I was under the impression that the Winding River project would be immediately funded in all respects.

In his deposition, Tedesco was not specific as to what was actually said by Rosenfeld during the "numerous conversations." Mr. Tedesco testified as follows:

> Q. What else do you remember Mr. Rosenfeld telling you prior to March 27, 1992 concerning the restructuring other than what you've testified to today?
>
> A. Well, the thing I remember the most, and we went through this every time, was this was what was going to put it back on track so that we'd be able to move forward. And that was consistently said by Rosenfeld, by Berlinger, by Eisner. Not the other guys, they did not know. And I agreed and I believed it. I believed it because Continental had always done it before, and I believed it because Rosenfeld had always done it before.

***9** Tedesco Dep. 146-147. He further testified:

> Q. As best you can recall, what is it that Mr. Rosenfeld said that the bank would do other than what you've testified to?
>
> A. I think I testified a number of times that his understanding from the bank was that they were going to help him with a working capital line to recapitalize his company, which in effect would recapitalize The Coastal Group, the joint venture, and fund, on a construction loan basis, to go forward with the Winding River project.

Tedesco Dep. 152-153, 430-431. CGI's other principal. William Greenberg, states in his deposition that Rosenfeld was "not specific" in his discussions with Greenberg regarding further funding. Greenberg Dep. 549.

Rosenfeld's testimony does not contradict these general statements about the proposed transaction. In his Affidavit, Rosenfeld declared:

> During my discussions with Mr. Tedesco prior to such transfer, I was not authorized by the Bank to act as its agent or to make promises on the Bank's behalf to The Coastal Group, CGI or Mr. Tedesco. While I told Mr. Tedesco that the Bank was aware that CGI would retain the right to receive 50% of the profit, if any, from Winding River, I did not tell Mr. Tedesco or anyone at CGI that the Bank was making any promises to The Coastal Group, CGI or Mr. Tedesco concerning: (I) CGI retaining a 50% profit participation in Winding River; (ii) paying CGI a development or management fee (and/or being paid for overhead reimbursement); (iii) paying for CGI's subcontractor/vendor obligations incurred at Winding River; or (iv) paying for CGI's homeowner warranty obligations.

Rosenfeld Aff. ¶ 10.

These accounts of conversations between Rosenfeld and CGI merely establish that the Bank intended to build-out the Winding River project, and that a new entity was being created to facilitate this. But the conversations do not establish a binding enforceable contract between CGI and the Bank.

It is hornbook law that a contract requires an offer, an acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty. *Weichert*, 128 N.J. at 435, 608 A.2d 280. Here these requirements are clearly not met. First, there is no evidence that Rosenfeld presented an offer to CGI on behalf of the Bank. Second, there is no evidence that CGI accepted an offer *from the Bank.* Most importantly, there are no definite terms to this alleged agreement. What CGI had to do is known: it was to transfer its interest to Anden at least in part in exchange for debt forgiveness. But what were the Bank's obligations? Plaintiff contends that the Bank was obligated to ensure that CGI retained a 50% profit participation in Winding River: to pay CGI a development or management fee (and/or be paid for overhead reimbursement; and most importantly, to pay for

CGI's subcontractor/vendor obligations and homeowner warranty obligations. Not only is there no evidence in the record that Rosenfeld used specific words and assurances to establish such obligations, but there is no allegation, there is no allegation on the part of plaintiff as to how the Bank was supposed to meet these obligations, i.e., were the trade payables supposed to be funded through Westholme or directly to CGI from the Bank? The record is devoid of evidence of a mutual intent to be bound by a contract. *See International Minerals and Mining Corp. v. Citicorp N.A.*, 736 F.Supp. 587 (D.N.J.1990), and the conversations plaintiff points to do not, as a matter of law, form the basis of an enforceable contract.

***10** But even if the conversations between Rosenfeld and Tedesco were sufficient to create a contract, there is no evidence that Rosenfeld was an agent of the Bank and that he acted with the authority to bind it to a contract with CGI.

It is well settled that the actions of an agent bind a principal as against third persons when the agent is vested actual or apparent authority which the principal knowingly permits the agent to assume, or which the principal holds the agent out to the public as possessing. *Tannenbaum & Milask, Inc. v. Mazzola*, 309 N.J.Super. 88, 93, 706 A.2d 780 (App.Div.1998) (citations omitted). When the party relying upon such apparent authority presents evidence which would justify a finding in his favor, he is entitled to have the question submitted to a jury. *Id.*

Here, instead of arguing that Rosenfeld had apparent authority to act on behalf of the Bank, plaintiff urges the Court to consider the following facts and/or documents as evidence that Rosenfeld was in fact, acting as the Bank's agent: [FN8] 1) the Bank knew that Anden needed to obtain CGI's consent in order to transfer Winding River (Tedesco Cert. Ex. 13); 2) the Bank allowed its letter of intent to be disseminated to various parties including CGI (Tedesco Ex. 15); 3) the Bank knew that Rosenfeld would be communicating with CGI regarding the transfer of Winding River; and 4) the Bank discussed future funding for Winding River with Mr. Rosenfeld. From these facts, plaintiff urges the Court to infer that since the Bank knew all of these things, they knew that Rosenfeld would be making representations on its behalf to CGI. This leap is one the Court is unwilling to make.

FN8. "Equally deficient is Continental's claim that it did not envision, much less authorize Eugene Rosenfeld making representations to John Tedesco as to the stated intend behind the creation of Westholme or its affect upon the Winding River Development." CGI Opposition Brief, p. 17.

The fact that the Bank permitted Rosenfeld to disclose the substance of the transaction to various parties, including CGI, simply does not lead to the conclusion that the Bank intended for Rosenfeld to enter into a contract with a third party on its behalf. Moreover, the tenuous inference plaintiff urges is belied by the testimony of both Rosenfeld and a Bank representative. As quoted above, Rosenfeld swore that he had no authorization to act as an agent for the Bank Rosenfeld Aff. ¶ 10. Moreover, Ann Walton Skoronski, a vice president in the Bank's real estate department, also swore that Eugene Rosenfeld was not authorized to act as agent for the Bank in any discussions he may have had with CGI. Skoronski Aff. ¶ 2. Plaintiff has not alleged any facts to suggest that Rosenfeld either had actual authority to act as the Bank's agent or that he did or said anything suggesting that he held himself out as an agent of the Bank. The deposition testimony of plaintiff's witnesses does not indicate that specific representations were made on behalf of the bank or that Rosenfeld cloaked himself with the Bank's authority. Since there is no evidence that Rosenfeld had the actual or apparent authority to bind the Bank. as a matter of law the Bank cannot be held liable for any statements Rosenfeld made to CGI prior to the March 27 transaction.

b) *Post-Transaction Statements*

***11** Plaintiff also alleges that Bank loan officer Kent Kneblekamp made promises to William Greenberg and CGI with respect to the funding of the outstanding trade payables. [FN9] CGI also alleges that Kneblekamp repeated assurances to a subcontractor Mapp construction that the Bank intended to fund the outstanding payables . [FN10] Assuming that these allegations are true and that during the summer of 1992 and later. Kneblekamp told CGI that the Bank intended to fund the trade payables, such a contract would fail for lack of consideration. [FN11]

FN9. Greenberg states, "Throughout this

> time frame, Kent directly represented to me on numerous occasions that it was the Bank's intent to fund all required items for the timely completion of the project, including the payment of the afore-referenced outstanding trade payables. In fact, Kent and I specifically discussed the various agreements that have been made with the subcontractors on the project to deal with their outstanding bills. Kent continuously represented that these individuals would be paid in order to keep them on the project and complete its construction." Greenberg Cert. ¶ 25.

FN10. During his deposition, Kneblekamp denied making such assurances on behalf of the Bank.

FN11. Several letters attached to the Greenberg Certification indicate that Greenberg wrote to Kneblekamp in October of 1992, February 1993 and May 1993 regarding the payment of the subcontractors. These communications establish that by late 1992, the Bank was discussing the problem of outstanding trade payables with Greenberg and others at CGI.

It is fundamental contract law that a contract must be supported by consideration. *See, Boberly v. Nationwide Mut. Ins.Co.*, 547 F.Supp. 959, 980 (D.N.J.1981) (to be enforceable, contract must be supported by consideration). "Consideration involves a detriment incurred by the promisee or a benefit received by the promisor, at the promisor's request." Id. (citing *Novack v. Cities Service Oil Co.*, 149 N.J.Super. 542, 549, 374 A.2d 89 (Law Div.1977), *aff'd per curiam* 159 N.J.Super. 400, 388 A.2d 264 (App.Div.1978). Here, Kneblekamp's assurances were made "during the summer of 1992," several months after CGI transferred its interest in Winding River to Anden. Plaintiff has failed to state any other consideration for the promises from the Bank to pay the trade payables. Since, by the summer of 1992 CGI had nothing to offer the Bank in exchange for the promises, there can be no contract. Thus any oral promises by the bank that occurred after the March 27, 1992 transaction do not support an enforceable contract as a matter of law.

c) Statute of Frauds

Assuming an oral contract existed between the Bank and CGI, it would be barred by the Statute of Frauds. Plaintiff has alleged that the unfulfilled promises by the Bank were made to induce CGI to transfer its interest in Winding River. Tedesco Dep. 431-432. [FN12] At the time of the transfer, the New Jersey Statute of Frauds provided in relevant part:

> FN12. In her October 3, 1996 Opinion, Judge Barry construed plaintiff's contract claim involving what was due CGI in return for transfer it its interest in Winding River. See Oct. 3, 1996 Opinion at p. 12.

> No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:
>
> * * *
>
> d. A contract for the sale of real estate, or any interest in or concerning the same....

N.J.S.A. 25:1-5.

Under New Jersey law, then, a transfer of an interest in real estate must be in writing and signed by the party to be charged. See *Metrobank v. National Com. Bank*, 262 N.J.Super. 133, 139-140, 620 A.2d 433 (App.Div.); *Cauco v. Galante*, 6 N.J. 128, 137, 77 A.2d 793 (1951). Any contract required to be in writing by the Statute of Frauds may not be validly modified by subsequent oral agreements. *Dworman v. Mayor and Board of Aldermen*, 370 F.Supp. 1056, 1066 (D.N.J.1974); *Willow Brook Recreational Ctr., Inc. v. Selle*, 96 N.J.Super. 358, 364, 233 A.2d 77 (App.Div.1967), *cert. denied*, 51 N.J. 187, 238 A.2d 473 (1968).

***12** As noted by Judge Barry in her October 3, 1996 Opinion, New Jersey's Statute of Frauds was amended on January 1, 1996 and the provision cited above was replaced by *N.J.S.A.* 25:1-13, which allows an oral agreement to be proven by clear and convincing evidence. However, as defendants argue, the legislature did not expressly indicate that the amendment was to apply retroactively by its terms or intend that the amendment should apply to an alleged oral agreement made in 1992, for which a Complaint was filed in 1994-- two years prior to the "one year" rule. *See Tiedemann v. Cozine*, 297 N.J.Super. 579,

688 A.2d 1056 (App.Div.1997) (applying Statute of Frauds as it existed at the time of the oral contract). Generally, courts have found that changes to the statutes of frauds should not be deemed retroactive. *See also, D.C. v. F.R.*, 286 N.J.Super. 589, 603, 670 A.2d 51 (App.Div.1996) ("A venerable principle of statutory construction posits that statutes should not be given retrospective application unless such an intention is manifested by the Legislature in clear terms") (citation omitted). Accordingly, applying the Statute of Frauds as it existed at the time of the alleged oral agreement, plaintiff's claims are barred.

Plaintiff now argues however, that the "contract" at issue is *not* one involving the transfer of property itself, but rather involves "the separate contractual representation made by Continental Bank to fund (1) the Phase II Construction Loan. 2) the payment of outstanding trade payables, and 3) CGI's ongoing overhead reimbursement." CGI Opposition Brief, p. 25. Thus, plaintiff argues, the statute does not apply.

If the plaintiff's current characterization of the alleged contract is correct, it is still barred by the Statute of Frauds provision that mandates that "[a] contract, promise, undertaking or commitment to loan money ... in an amount greater than $100,000 ... made by a person engaged in the business of lending ..." be in writing and signed by the party to be charged. *N.J.S.A.* 25:1-5(f). *See National Community Bank of New Jersey v. G.L.T. Industries, Inc.*, 276 N.J.Super. 1, 647 A.2d 157 (App.Div.1994). The Phase II Construction loan alone was for $9,544,258. Thus, whether the dispute centers on the transfer of Winding River or on the Bank's "failure to fund" the project, the Statute of Frauds requires the agreement to be in writing.

3. *Failure to Fund Claim*

As noted above, CGI's opposition papers also characterize the Bank's alleged breach of contract as one in which they "failed to fund." They also appear to claim they were injured by a delay in implementing the Phase II Construction Loan, which in their view was to occur "immediately" after the March 1992 transaction. This claim based on the delay in funding stems from CGI's reliance on the Westholme Business Plan which, according to plaintiff, provided for the immediate funding of the Phase II Construction Loan. See CGI Opposition Brief p. 21-22. To the extent that plaintiff's breach of contract claim has evolved into a "failure to fund" claim, it must fail for a number of reasons.

***13** First, CGI was not the borrower on the Phase II Loan or any other Winding River Loan and so CGI lacks standing to protest about any perceived lack of funding. Second even if CGI were the borrower, the Bank did provide funding for the Phase II in July 1992. Knebelkamp Aff. Ex. A. CGI was not involved in the negotiation of the Phase II loan and Tedesco could not recall having discussions about it with the Bank. Tedesco Dep. 161. Moreover, it is undisputed that from August 1992 through August 1993, the Bank fulfilled its obligations under the terms of the Phase II Loan to Westholme for Westholme to pay project debts. [FN13] Knebelkamp Aff. ¶ 5; Dep. 88, 94-95. Neither Tedesco nor Greenberg could point to any provision in the Phase II loan breached by the Bank. Tedesco Dep. 309-312; Greenberg Dep. 589-590, 957.

FN13. The Court is perplexed by plaintiff's reliance on the Westholme Business Plan in the delay aspect of the failure to fund claim. First, it appears from the face of the cover page on the Business Plan that it was received by Greenberg and Tedesco from Anden on April 27, 1992--one month *after* the transfer of the Winding River. Second, on the cover page. McClellan of Anden states "[t]hese are the projections used in negotiating the recent reorganization of Anden relating to Continental Bank projects." How these projections, used in negotiations to which CGI was not a party could give rise to a contractual obligation to CGI on the part of the Bank to execute loans meeting CGI's definition of "immediately" is beyond the stretch of this Court's imagination.

Because CGI was not the borrower, it can not have a cognizable cause of action with respect to the Westholme loans. *See e.g.*, *Howard Savings Bank v. Lefcon Partnership*, 209 A.D.2d 473, 475-476, 618 N.Y.S.2d 910, 913-914 (N.Y.App.Div.1994) (affirming summary judgment for lender where, a non-party to a loan agreement asserted that the Bank knew that the loan would be insufficient to complete the project); *Clardy Mfg. Co. V. Marine Midland Business Loans Inc.*, 88 F.3d 347 (5th Cir.1995) (holding claim that Bank promised commitment letter to be issued within a few days was not actionable); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212 (7th Cir.1997). In short, even if the Bank failed to meet its obligations under the post March

1992 loan agreements, CGI could not state a cause of action for breach of contract because it was not a party to any of the agreements. [FN14]

FN14. Having found no contract, the Court need not address the issue of judicial estoppel.

4. *Third-Party Beneficiary Status*

Although not alleged in the Complaint, plaintiff also appears to argue that it is a third-party beneficiary to the contracts between the Bank and Westholme. Even if one accepts plaintiff's allegations and draws all reasonable inferences in its favor, CGI has still failed to assert facts necessary to support its legal theory.

Under New Jersey law, [FN15] to qualify as a third-party beneficiary the claimant must show that the contract was "made for the benefit of [that] third party within the intent and contemplation of the contracting parties." *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Assoc.*, 610 F.2d 164, 170 (3d Cir.1980) (citing *Gold Mills, Inc. v. Orbit Processing Corp.*, 121 N.J.Super. 370, 373, 297 A.2d 203 (Law Div.1972)). A third-party who merely stands to benefit from a contract is no more than an incidental beneficiary who incurs no contractual right to enforce the contract. *See In re National Molding Co.*, 230 F.2d 69, 72 (3d Cir.1956); Restatement (Second) of Contracts S 315 at 477 (1979),

FN15. Defendants note that some of the Agreements at issue are governed by California law. However, plaintiff does not identify which particular agreements entitle it to third-party beneficiary status, but rather, urges the Court to view the circumstances and documents in their totality. Additionally, CGI does not argue for third-party beneficiary status under California law, but contends that under the circumstances, New Jersey's requirement that the third party beneficiary set forth an explicit indication by the parties intended to be bound has been met, Accordingly, the Court will address this issue applying New Jersey law.

Under New Jersey law, "the intention of the parties to recognize a right of performance in the third party is the critical factor that governs the characterization of the beneficiary...." *Berel Co. v. Sencit F/G McKinley Assoc.*, 710 F.Supp. 530, 537 (D.N.J.1989); *see also Air Master Sales Co. v. Northbridge Park Co-op .*, 748 F.Supp. 1110, 1117 (D.N.J.1990) (noting New Jersey courts' reluctance to find third-party beneficiaries without an explicit indication that the party is intended to have a direct claim under the contract to enforce that benefit); *Brooklawn v. Brooklawn Housing Corp.*, 124 N.J.L. 73, 77, 11 A.2d 83 (1940) ("real test" is whether the contracting parties intended a third party to receive a benefit enforceable in court). Foreseeability of a prospective benefit to a third party is not enough to establish a third party's rights. As the United States Court of Appeals for the Seventh Circuit explained, interpreting New Jersey law:

> ***14** In order to establish third-party beneficiary status, a plaintiff must show more than that the contracting parties acted against a backdrop of knowledge that the plaintiff would derive benefit from the agreement. The plaintiff must show the benefit to the plaintiff was a consequence the parties affirmatively sought; in other words, the benefit to plaintiff must have been, to some extent, a motivating factor in the parties' decision to enter the contract.

Corrugated Paper Products v. Longview Fibre Co., 868 F.2d 908, 912 (7th Cir.1989)

Here, plaintiff has failed to allege any facts sufficient to establish that the Bank and Westholme intended CGI to be the beneficiary of the various agreements between them. In fact, the little evidence provided in this record on the subject establishes just the opposite. In its papers. CGI appears to rely on the October Letter Agreement between Eugene Rosenfeld and the Bank as evidencing promises to CGI. Tedesco Cert. Ex. 24. This agreement provides in relevant part:

> 19. *No Third Parties.* This Agreement is made for the sole benefit of you and Lender and Lender's nominee(s), and no other person or persons shall have any rights or remedies under or by reason of this letter, nor shall Lender owe any duty whatsoever to any third party....

Even if the October Letter Agreement reflected promises to CGI, the agreement contains the express intent to deny any potential third party from seeking a remedy under the contract. It is well settled that where "two contracting parties expressly provide that some third party who will be benefitted by performance shall have no legally enforceable right,

the courts should effectuate the expressed intent by denying the third party any direct remedy." 4 Corbin on Contracts § 777. Thus, with respect to the agreements plaintiff relies on that contain similar provisions, plaintiff cannot claim third-party beneficiary status.

The record is absolutely devoid of any evidence that in other agreements, the Bank and Westholme/Anden intended CGI to be a third party beneficiary. It is clear that CGI merely stood to benefit from the Bank's continued financing of Winding River, evidence that is insufficient as a matter of law to establish third party beneficiary status. *See In re National Molding Co.*, 230 F.2d 69, 72 (3d Cir.1956)

The Court has found only one document submitted to it that specifically addresses CGI as a third party beneficiary. "The Agreement of Undertaking" is an unsigned agreement "by and between Westholme Partners ... and the Anden Group ... *for the benefit of* Coastal Group Inc." But since the Bank is not a party to this agreement, the agreement cannot be enforced against the Bank. [FN16] What is to be noted is that the document, dated May 1992 (three months after the Westholme transaction), contemplates some of the very terms (i.e., plaintiff maintaining the same financial interest in Winding River as it had prior to the transfer) CGI now seeks to enforce against the Bank. This document indicates that both Westholme and Anden were the proper parties to make such promises to CGI with respect to its ongoing role in the project, and also that these parties (including CGI) were aware of the necessity of an express provision for CGI as a third-party beneficiary in a written agreement. There is no evidence to suggest that Westholme, Rosenfeld ever considered including such a provision in any of the agreements they entered into with the Bank, or vice versa.

> FN16. In fact, during his deposition, Bank loan officer Kent Knebelkamp was shown the Agreement and testified that he had no knowledge of it and did not have any conversations with anyone at the Bank regarding CGI either retaining its equity in the project or its ongoing monthly reimbursement. Kneblekamp Dep. 65.

***15** Thus, even where the agreements CGI relies upon contain no express bar of third party beneficiaries, plaintiff still does not have standing to bring an action under such a contract, Merely resting on allegations in the Complaint and relying on beliefs will not suffice to withstand a motion for summary judgment. Plaintiff's beliefs about the Bank's intent and what "real" motivations were behind the transactions, appear throughout its papers, but are unsupported by facts. Notwithstanding a voluminous amount of discovery, plaintiff has failed to support with any evidence of record that the parties intended CGI to be a third-party beneficiary under the agreements between the Bank and the other defendants. Absent such proof, plaintiff has no standing to claim third party beneficiary rights under a contract and summary judgment is appropriate on this issue.

5. *Derivative Liability*

The Bank contends that as a limited partner of Westholme, it cannot be held liable for the partnership's alleged obligations to plaintiff. In response, plaintiff cites lender liability cases and argues that the Bank, as a lender, is liable for Westholme's obligations under either an alter ego or agency theory. CGI also contends that the "unusual circumstances" present here (the Bank participating in the creation of Westholme) further support its claim that the Bank should be derivatively liable to CGI.

1. *Liability as Limited Partner*

New Jersey's Uniform Limited Partnership Act provides in part:

> Except as provided in subsection d., a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of, and reliance on, his participation and control.

N.J.S.A. 42:2A-27. N.J.S.A. 42:2A-27(b) further provides that a limited partner does not forfeit his limited liability solely by engaging in certain activities for the benefit of the partnership, including consulting with or advising a general partner or by acting as a surety or guarantor. *See Mt. Vernon Sav. & Loan Assoc. v. Partridge Assocs.*, 679 F.Supp. 522, 528 (D.Md.1987) (granting summary judgment and holding that involvement by limited partner in day to day activities and giving advice does not create

personal liability where limited partner never "exercised at least an equal voice in making partnership decisions so, in effect, to be a general partner"). A limited partner may provide additional funds to the partnership without being liable as a general partner. *See* e.g., *In re Astroline Communications Co.*, 188 B.R. 98 (Bankr.D.Conn.1995), *aff'd*, 111 F.3d 123 (2d Cir.1997) (limited partner who loaned money to membership not considered general partner.) In short, for the Court to impose liability upon a limited partner, plaintiff would have to establish that the Bank acted as a general partner, exercising direct control of the entity on a day to day basis. But there are no facts in this record to support such a claim.

***16** CGI apparently relies on First Amended and Restated Agreement of Limited Partnership of Westholme Partners ("Westholme LPA") as a source to establish the Bank's control over Westholme. Based on the Court's review of this document, there is nothing in it that gives the Bank the power to act as a general partner. In the agreement, the Bank is a non-voting preferred limited partner without control over Westholme's operations. Simmons Aff. Ex. I. Under Section 10, certain major decisions could be made only with the approval of the Management Committee. The only specific changes requiring the approval of limited partners were changing the business scope, permitting the withdrawal of a partner, sale of all or substantially all partnership assets, voluntary dissolution, liquidation or replacement of Managing General Partner.

This agreement does not establish that the Bank was anything other than a limited partner of Westhoime. Moreover, as discussed more fully below, plaintiff has failed to submit any facts to support a finding that the Bank exercised day to day control over Westholme or made decisions regarding Westholme's operations, and in fact the evidence suggests just the opposite. Bob McClellan, the former vice-president of ESR (a general partner of Edsen, which is the general partner of Westholme and Anden), testified that the Bank did not exercise control over Westholme. McClellan Dep. P. 47-48. He stated that "at all relevant times (i.e., from March, 1992 through the appointment of a receiver in the fall of 1993) Edsen continued to act as managing general partner and was in complete control of the day to day operations of Westholme." McClellan Aff. ¶ 9. Further. "[t]he Bank did not have a veto power over any of the decisions I made or, to the best of my knowledge, other Westholme employees made. During that time, Edsen Partners continued to make all key decisions, as set forth in the Westholme partnership agreement." McClellan Aff. ¶ 10. Although the Bank as lender required Westholme to provide it with financial data, there is no legal authority to support the proposition that requiring such information is the equivalent of acting as a general partner.

2. *Lender Liability*

Plaintiff also argues citing lender liability cases to the effect that the Bank is liable to it under the "instrumentality" or "alter ego" theory. For a lender to be liable for the obligations of a debtor, a plaintiff must establish two elements: 1) that the dominant corporation must have controlled the subservient corporation, and 2) that the dominant corporation must have proximately caused harm through misuse of this control. *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F.2d 1098, 1103 (5th Cir.1973), *reh'g denied*, 490 F.2d 916 (5th Cir.1974). In *Krivo*, in sustaining a directed verdict in favor of a lender, the Fifth Circuit expressed the standard as follows:

> An examination of the "instrumentality" cases involving creditor-debtor relationships demonstrates that courts require a strong showing that the creditor assumed actual, participatory, total control of the debtor. Merely taking an active part in the management of the debtor corporation does not automatically constitute control, as used in the "instrumentality" doctrine, by the creditor corporation.

***17** *Krivo*, 483 F.2d at 1105. Other courts have held that lender liability is predicated on "an unmistakable showing that the subservient corporation in reality has no separate, independent existence of its own and was being used to further the purposes of the dominant corporation," *National Westminster Bank USA v. Century Healthcare Corp.*, 885 F.Supp. 601, 603 (S.D.N.Y.1995). Suggestions by a major lender for a defaulted debtor, even when coupled with a threat of the exercise of its legal rights if the debtor does not comply, are both commonplace and completely proper. *See In re Prima Co.*, 98 F.2d 952, 965 (7th Cir.1938), *cert . denied*, 305 U.S. 658, 59 S.Ct. 358, 83 L.Ed. 426 (1939) ("No doubt the debtor, because of its inability to meet its maturing obligations, acquiesced in Harris' recommendations [to install new management], but this we think is not sufficient to constitute domination of its will").

A lender can suggest the course the debtor ought to follow. Unless the creditor has become, in effect, the alter ego of the debtor, he will not be held to an

ethical duty in excess of the morals of the market place. *In re Teltronics Services, Inc.*, 29 B.R. 139, 171 (Bankr.E.D.N.Y.1983). In *Bhatla v. U.S. Capital Corp.*, 990 F.2d 780, 788, the Third Circuit affirmed summary judgment, stating "[w]e are unwilling to hold that merely because a lender requires security and approval of aspects of construction, the lender thereby takes 'control' of the project. To do so would wreak havoc on the lending industry...." Indeed, it is only in "rare instances" where a court will find a lender to have improperly dominated a debtor's business. *National Westminster.*, 885 F.Supp. at 608 (citing *In re Teltronics Services, Inc.*, 29 B.R. 139 (Bankr.E.D.N.Y.1983)).

Here, the unrefuted evidence indicates that the Bank did not assume actual, participatory, total control over Westholme. As noted above, the Westholme LPA does not provide for the Bank's control over Westholme. Eugene Rosenfeld swore that at all relevant times, the general partners were Westholme, Esden and MDG Associates, with Edsen as managing general partner, and that the Bank was never a general partner, but rather was a preferred limited partner. Rosenfeld Aff. ¶ 12. Westholme partner Bob McClellan also testified that the Bank did not exercise control over the day to day operations at Westholme. McClellan Dep. P. 47-48; McClellan Aff. ¶ ¶ 9, 10. Lynn Simmons, a Bank vice president swore "[t]he Bank's only involvement with the Winding River project has been as a lender. It has never constructed any new homes at Winding River, acted as a prime contractor to do so, held itself out to any person as a builder or seller of new homes, transferred any land for the purpose of building new homes, or contracted with any general contractor or subcontractor for the construction of new homes for sale." Simmons Aff. ¶ 23.

It is also unrefuted that the Bank had the right to observer status at Westholme committee meetings. But it could not (and never did) vote to select any member of that committee. Simmons Aff. ¶ ¶ 14-17 and Ex. I; Glicksberg Tr. 24-25. Rosenfeld stated that Edsen was in control of Westholme even at the time Westholme settled with the Bank in late 1993. Rosenfeld Aff. ¶ 14. The record evidence, including documents and testimony by those with personal knowledge, supports a finding that the Bank's role fell short of the direct, participatory control required to find a lender derivatively liable.

***18** Plaintiff's opposition papers assert several "facts" to support its theory that the Bank was actually operating Westholme. None of the "facts" alleged in the brief, however, are supported by citations to record evidence. Even if plaintiff's version of the Bank's conduct was supported by evidence, it would be insufficient to rise to one of the "rare instances" where a strong showing has been made that *total* control was assumed by the lender. First, CGI contends that the "unusual circumstances" of the Bank's participation in the creation of Westholme are sufficient to establish total control. But CGI has failed to cite any legal authority to support the conclusion that the manner in which the debtor was created (or the lender's participation therein), has any legal significance under the instrumentality doctrine. Moreover, CGI fails to acknowledge that this new entity, while possibly inspired by the Bank, was run by partners who were independent of the Bank and stood to gain from Westholme's success. What has been crucial to the decisions of courts making this inquiry has been an analysis of the extent of control the lender exercised over the dominated company.

Aside from Westholme's creation. CGI urges the court to consider the following aspects of the Bank's direct participation in Winding River's affairs:

(a) participating in the revision of marketing budgets;
(b) reviewing job payables and determining which subcontractors to pay;
(c) directly contacting subcontractors on the site in order to induce their continued participation through the use of funding promises;
(d) requiring that all job-related checks be sent through Continental's Chicago office for approval;
(e) participating in pricing decisions.

CGI Opposition Brief, 34.

As a preliminary matter, plaintiff exaggerates one of the "facts" listed above. CGI claims that the bank directly contacted subcontractors on the site in order to induce their continued participation through the use of funding promises. Plaintiff has only provided evidence of only one subcontractor-- Mapp--that communicated directly with the Bank. Moreover, the evidence suggests that the Bank did not contact Mapp. Rather, at Greenberg's suggestion. Mapp contacted the Bank, which never promised that it would pay Mapp any monies. Bank Moving Brief, 33-34 n. 18: Greenberg Dep. 101; Buckley Cert. Ex. 46 at 16.

These activities illustrate the fact that the Bank exercised some degree of participation in the Winding River project, but they do not establish total control so that Westholme had in reality no separate,

independent existence of its own. *National Westminster*, 885 F.Supp. at 603. Westholme was irrefutably run by general partners unaffiliated with the Bank, who have testified that the Bank never controlled their decisions. Moreover. Winding River was but one of many projects undertaken by Westholme, and there is no evidence that the Bank directly participated in all of the other development projects and thereby exercised total control over Westholme. [FN17]

FN17. In support of its opposition, CGI submits the Certification of Rick Barber, a partner in an unrelated Anden joint venture in Florida, wherein he recites similar claims of the Bank's control over Westholme made in an unrelated litigation. Even if this testimony were admissible, it merely establishes that similar claims have been made in another litigation, but does not provide any additional evidence of the Bank's exercise of control.

***19** CGI's reliance on *In re Kentucky Wagon Mfg. Co.*, 3 F.Supp. 958 (W.D.Ky.1932), *aff'd*, 71 F.2d 802 (6th Cir.), in support of its motion is similarly unavailing. In that case, the National Bank of Kentucky purchased the assets of a company and formed a new corporation. *Id.* at 803. After forming this company, the bank president designated the new company's directors, one of whom was a bank vice president and another who was employed by the bank as the new company's president with a salary fixed by the bank. Three of four directors of the company were also bank directors and they "always faithfully carried out the orders and directions from the bank." *Id.* New directors were always designated by the bank. *Id.* The bank president testified that there was no question that the bank owned the new company from its formation. Accordingly, the court held that the bank owned the plant, and that the bank's officers and agents operated it.

Here the situation here is quite different. The Bank did not select any directors or vote on the Westholme management committee, bank employees were not directors or employees of Westholme, and plaintiff has proffered no testimony from any Bank or Westholme employees to the effect that the Bank controlled Westholme. The Bank's possible limited participation in one of Westholme's many real estate projects is insufficient to render it liable to CGI under an instrumentality theory. Since there was no improper control over the Westholme entity, the second prong--harm to a third party--need not be addressed. Summary judgment is appropriate. [FN18]

FN18. Citing factually distinguishable cases in support, CGI also contends that some courts have been receptive to finding liability of lenders based upon agency theories. The cases cited by plaintiff do not involve banks and need not be addressed herein.

B. *Breach of Implied Covenant of Good Faith and Fair Dealing (Count Four)*

As noted above, the Court has found that plaintiff has failed to raise a material issue of fact as to the existence of a legally enforceable contract between it and the Bank. Absent evidence of a contract, as a matter of law, there can be no breach of an implied covenant of good faith. *Fregara v. Jet Aviation Business Jets*, 764 F.Supp. 940, 954 (D.N.J.1991) ("In the absence of a contract, there is no implied covenant of good faith and fair dealing") (*citing Nove v. Hoffman La Roche, Inc.*, 238 N.J.Super. 430, 433, 570 A.2d 12 (App.Div.), certif. denied, 122 N.J. 146, 584 A.2d 218 (1990)). Accordingly, summary judgment as to Count Four is granted.

C. *Promissory Estoppel (Count Two)*

To state a claim for 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. 247, 279-9 (Law Div.1987). Summary judgment is appropriate to dismiss a promissory estoppel claim where plaintiff has failed to adduce evidence supporting all four prongs and instead relies solely on conclusory allegations. *Pitak v. Bell Atlantic Network Sves.*, Inc., 928 F.Supp. 1354, 1367 (D.N.J.1996). As discussed above, plaintiff has failed to establish a clear and definite promise.

***20** None of the documents or testimony submitted to the Court establishes a clear and definite promise on the part of the Bank to CGI. In *Malaker Corp. v. First Jersey Nat'l Bank*, 163 N.J.Super. 463, 395 A.2d 222 (App.Div.1978), *certif. denied*, 79 N.J. 488, 401 A.2d 243 (1979), plaintiff sued a bank for breach

of a promise to loan it funds. The Appellate Division found there was insufficient evidence of a promise on which to impose liability because "[a]t best, one could imply a promise of a loan of some indefinite amount guaranteed by [unspecified] additional collateral." *Id.* at 480, 395 A.2d 222. Thus, the Court concluded there was no "clear and definite promise" and the first essential element of a promissory estoppel was not met. *Id. See LaChance v. Baybank Norfolk,* 1994 WL 878761 (Mass.Sup.1994) at * 9 (granting summary judgment on alleged $25 million promise made by bank to finance an entire development because its essential terms--how the loan would be secured, the manner and timing disbursements and interest payments, the parties' obligations in the event of a default--"are incomplete and vague").

Plaintiff's opposition papers do not specifically address which promises it is relying on in asserting its promissory estoppel claim. "As set forth therein [earlier portions of the brief], there were direct representations by Continental Bank as to the specific funding components upon which CGI now relies." CGI Opposition Brief p.38. Plaintiff appears to rely on the pre-March 1992 transaction discussions with Eugene Rosenfeld of Anden and the post-transaction representations of Bank representatives regarding the payment of outstanding trade payables. With respect to the Tedesco/Rosenfeld discussions, no promise has been established. As discussed earlier, John Tedesco admitted that the Bank did not have any direct communication with CGI regarding the Westholme transaction prior March 1992. He testified that Eugene Rosenfeld assured him that the Bank intended to fund the Winding River project. [FN19] These communications reflect representations made by the Bank to Rosenfeld and Anden, not CGI. They do not reflect a clear and definite promise by the Bank to CGI. There can be no promissory estoppel because the promise was not made to CGI and because the Bank did in fact provide the funding it promised in the Phase II Loan documents. Absent a clear and definite promise from the Bank to plaintiff, a claim for promissory estoppel cannot lie.

> FN19. Tedesco's testimony regarding the oral promises is as follows:
> "Continental's afore-referenced stated intent was the subject matter of numerous conversations between myself and Anden's principal (Eugene Rosenfeld) through the early part of 1992. Rosenfeld relayed to me on a number of occasions that it was Continental's position and intention in creating Westholme for the express intent of allowing projects to be built-out and to allow joint venture partners to enjoy the economic benefits of said projects without being burdened by Anden's unrelated debt.... Thus, based on these representations and Continental's stated intent, as of March 1992. I was under the impression that the Winding River project would be immediately funded in all respects." Tedesco Cert. ¶ 30. "Well, the thing I remember the most, and we went through this every time, was this was what was going to put it back on track so that we'd be able to move forward. And that was consistently said by Rosenfeld, by Berlinger, by Eisner. Not the other guys, they did not know. And I agreed and I believed it. I believe it because Continental had always done it before, and I believed it because Rosenfeld had always done it before." Tedesco Dep. 146-147. "I think I testified a number of times that his understanding from the bank was that they were going to help him with a working capital line to recapitalize his company, which in effect would recapitalize The Coastal Group, the joint venture, and fund, on a construction loan basis, to go forward with the Winding River project." Tedesco Dep. 152-153, 430-431.

With respect to the post-March 1992 representations by the Bank to CGI representatives, there are no clear and indefinite promises sufficient to state an estoppel claim. William Greenberg of CGI claims that Knebelkamp, the Bank loan officer, promised that the Bank would fund the payment of project obligations. But this promise is not clear and definite. For example, it lacks the following significant terms: 1) which subcontractors would be paid; 2) over what time period; 3) how the payments would be made (directly by the Bank, through funding of the loan, as reimbursement for monies laid out by CGI); 4) what information needed to be provided to the Bank in order for the Bank to evaluate what monies were owed; and 5) whether the Phase II Construction Loan would be modified. In short, the discussions between Kneblekamp and CGI did not reflect a clear and definite promise on the part of the Bank to CGI. Plaintiff's promissory estoppel claim must be dismissed.

D. *Unjust Enrichment (Count Three)*

***21** In Count Three of the Complaint. CGI alleges that "in reliance on the aforedescribed representations by defendants, plaintiff was induced to continue performing work on the Winding River Project, which substantially enhanced the value of same. In refusing to acknowledge their obligations to recompense plaintiff for this work, defendants have been unjustly enriched in having received the benefit of plaintiff's labor." Complaint ¶ 80.

There are two elements of a claim for unjust enrichment: 1) that the defendant received a benefit; and 2) an injustice would result if the defendant retained the benefit without paying for it. *Associates Commercial Corp. v. Wallia*, 211 N.J.Super. 231, 243, 511 A.2d 709 (App.Div.1986); *Callano v. Oakwood Park Homes Corp.*, 91 N.J.Super. 105, 108, 219 A.2d 332 (App.Div.1966). Unjust enrichment is an equitable theory of relief used by the courts to impose obligations under law to bring about justice between the parties. *Van Orman v. American Ins. Co.*, 680 F.2d 301, 311 (3d Cir.1982). To prevail here, CGI must show that the Bank received a benefit from CGI and that the retention of that benefit without payment would be unjust, Plaintiff has failed to establish any genuine issue of material fact on either the "unjust" or the "enrichment" elements.

To establish that the Bank's enrichment was "unjust," CGI must establish that plaintiff reasonably expected payment from the Bank and that "there must be an objective expectation by defendant to pay plaintiff." *Kravco*, 209 N.J.Super. at 377, 507 A.2d 754. As part of this lawsuit, plaintiff has alleged that it had an agreement with Westholme pursuant to which CGI was bound to perform at Winding River after March, 1992. See Development Agreement: Buckley Cert. Exs. 36 & 41. [FN20] If CGI had an agreement with Westholme to manage the Winding River project and be compensated for it, it cannot also seek relief from the Bank on an unjust enrichment claim. [FN21] A plaintiff cannot seek relief from one defendant where it was already bound to perform for another. *Insulation Contracting & Supply v. Kravco, Inc.*, 209 N.J.Super. 367, 377, 507 A.2d 754 (App.Div.1986). In *Kravco*, the plaintiff subcontractor attempted to recover against the owner of the property and others, alleging that they received an unjust benefit from work performed by plaintiff. Plaintiff however, was already under an obligation to perform pursuant to a contract with another subcontractor. The Appellate Division affirmed summary judgment on plaintiff's unjust enrichment claim because "a plaintiff is not entitled to use the legal fiction of quasi-contract to substitute one promisor or debtor for another." *Id. See* § 110 of the Restatement, Restitution (1937) ("A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person"); *SC Holdings, Inc. v. A.A.A. Realty Co.*, 935 F.Supp. 1354, 1373 (D.N.J.1996) ("Restitution of a benefit conferred is not available if that benefit is a result of performing one's duty"). To the extent that any of the agreements plaintiff has described throughout its papers are enforceable, they are enforceable against Westholme and/or Anden. The plaintiff's self-proclaimed obligation to perform on behalf of these entities precludes an unjust enrichment claim against the Bank based upon those same duties.

FN20. Buckley Ex. 36 is the "Development Agreement" discussed earlier. It is an unsigned agreement between Westholme and CGI which purports to engage CGI in the day-to-day management of Winding River. Ex. 41 is a copy of CGI's Responses to Interrogatories identifying the Development Agreement as support for its claims.

FN21. Indeed, the documents relied upon by CGI that address CGI and its post-transaction role in Winding River (i.e., the Agreement of Undertaking, the Development Agreement), although unsigned, all point to Anden and Westholme, and not the Bank, as the appropriate parties to have entered into any agreements with CGI.

***22** Moreover, CGI's unjust enrichment claim must fail because it has not established an objective expectation by the Bank. There is no evidence to suggest that the Bank reasonably believed that CGI would perform post-transaction work on Winding River and that CGI believed it would be paid by the Bank for it. It is undisputed that Westholme made payments for overhead to CGI from March 1992 until CGI ceased doing business in December of 1992. The only payments made by the Bank at that time were to Westholme under the Phase II Construction Loan. Accordingly, there is no evidence of an expectation by the Bank that CGI was continuing to perform

work on Winding River and expecting the Bank to pay for it. Summary judgment as to Court Three is appropriate.

E. *New Jersey Fraudulent Transfer Act (Count Five)*

Count Five of plaintiff's Complaint alleges that Anden's transfer of properties to Westholme in March of 1992 was a fraudulent transfer under the New Jersey Uniform Fraudulent Transfer Act ("UFTA"), *N.J.S.A.* 25:2-10, *et seq.* The Bank argues that summary judgment should be granted because plaintiff does not have standing to bring such a claim, and in any event, there is no evidence that the transaction was done with the intent to defraud or that the parties to the transaction did not receive reasonably equivalent value. The Court agrees. [FN22]

FN22. The Court also notes that CGI did not address this claim in its opposition papers.

In a leading New Jersey case, the Appellate Division detailed the UFTA's history and purpose. *Flood v. Caro Corp.*, 272 N.J.Super. 398, 640 A.2d 306 (App.Div.1994):

> In 1988, New Jersey adopted the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 to 34, to replace the Uniform Fraudulent Conveyance Law, which had been in effect since 1919. New Jersey's version of the Act is substantially the same as the uniform statute. In the years since it was promulgated by the Commissioners on Uniform State Laws in 1984, the Act has been adopted in at least twenty-nine states. The Act modernizes the law respecting the rights and remedies of creditors in cases of transfers of assets by debtors the design or effect of which is to prevent or impede satisfaction of claims out of the debtor's assets, or to prefer favored claimants. A prime purpose of the Act is to align state law on fraudulent transfers with the federal Bankruptcy Act, and the Uniform Commercial Code-Secured Transactions. Another goal is to make uniform the law among the states that adopt the Act.

Id. at 403-04, 640 A.2d 306 (citations and footnotes omitted).

Furthermore, the court noted:

> A creditor who is entitled to a remedy under the Act has a range of protective possibilities. If the creditor has a judgment against the debtor, application may be made in the action for a court order permitting execution on the asset transferred or its proceeds. Such an application necessitates proceedings suitable to determine the rights of the parties, including possibly innocent transferees for value, perhaps requiring a plenary trial to determine disputed material facts. Any creditor, with or without a judgment, may prosecute a suit (1) to avoid the transfer to the extent necessary to satisfy the claim. (2) to attach or otherwise provisionally secure the asset transferred. (3)(a) to enjoin further disposition of the asset transferred or other property, or (3)(b) to appoint a receiver.

***23** *Id.* at 405, 640 A.2d 306; *see* generally Richard E. Cherin, Fraudulent Transfers Redefined Under New Act, 122 N.J.L.J. 1362 (1988) (discussing the differences between the UFCA and the newly enacted UFTA).

The first problem with plaintiff's claim is that it has no standing to bring it under the Act. Only a creditor of the debtor has standing to make a claim for fraudulent transfer. *See Flood*, 272 N.J.Super. at 403, 640 A.2d 306; *U.S. v. Jones*, 877 F.Supp. 907, 914 (D.N.J.), aff'd, 74 F.3d 1228 (3d Cir.1995) (under the New Jersey Fraudulent Conveyance Act--now superseded by the New Jersey Fraudulent Transfer Act--plaintiff must be a creditor at the time the property was transferred). The Act defines a creditor as a person who has a claim--i.e., "a right to payment. whether or not the right is reduced to a judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." *N.J.S.A.* 25:2-21. There is no evidence that in March of 1992, CGI was a creditor of Anden. In fact, Anden was owed millions of dollars contributed in loans and advances to TCG. Moreover. Greenberg testified that he did not know whether Anden owed CGI any monies as of the time of the March 1992 transaction. Greenberg Dep. 407. Therefore, without any evidence that it was a creditor of Anden. CGI lacks standing to bring an action under the Act.

Even if it plaintiff could bring the claim, it would fail because CGI has conceded that Anden did not have any fraudulent intent in seeking to transfer Winding River to Westholme. The Act describes a fraudulent transfer as one where the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay or defraud the creditor. *N.J.S.A.* 15:2-25(a). John Tedesco testified as follows:

> Q. Was Gene Rosenfeld, in working with the lenders to restructure trying to cheat creditors of the Anden Group?

A. Absolutely not.
Q. Was Mr. Rosenfeld in your view doing the restructuring to try to make a go of his business?
A. Yes.

Tedesco Dep. 144. William Greenberg likewise conceded that Rosenfeld did not defraud CGI. characterizing the transaction as one where Rosenfeld was "used by the Bank." Greenberg Dep. 548-551, 554. There is no evidence in the record that Rosenfeld or anyone else at Anden attempted to defraud the creditors in executing the March 1992 transaction.

CGI also argues that the Anden/Westholme transfer was fraudulent under N.J.S.A. 25:2-25(b), which describes fraudulent transfers as those where the debtor made the transfer "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was engaged or was about to engage in a business or a transaction for which the debtor's remaining assets were unreasonably small in relation to the business transaction: or the debtor intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they become due." Hence, "payment of reasonably equivalent value by the transferee or obligee is a complete defense under the UFTA...." Cherin. "Fraudulent Transfers Redefined Under New Act." 122 N.J .L.J. 10 (Nov. 24, 1988).

***24** In this case, Anden transferred to Westholme at least $191.8 million in property and was relieved of $208 million in liabilities. Buckley Cert. Exs. 45. 23-24. [FN23] With respect to the Winding River component of the transaction. Anden transferred to Westholme $4.2 million in assets and was relieved of liabilities allocated to the Winding River project of $4.9 million in secured notes and an additional approximately $829.000 in net project liabilities. A contemporaneous valuation of the assets transferred conducted by Price Waterhouse states that the entire transaction, as well as the Winding River transfer, took place in consideration for reasonably equivalent value. Buckley Cert. Ex. 45. William Greenberg could not even identify the consideration given by Westholme to Anden, much less set forth how this consideration was not a reasonably equivalent value for the transfer. Greenberg Dep. 583.

FN23. This does not describe the entire transaction, but is sufficient for the purposes of determining reasonably equivalent value.

Summary judgment is available where, as here, the factual record demonstrates that a reasonably equivalent value was obtained by the debtor. *In re Phar-Mor, Inc. Sec. Litig.*, 185 B.R. 497, 504-505 n. 4 (W.D.Pa.1995), *aff'd sub nom Coopers and Lybrand v. Shapiro*, 101 F.3d 689 (3d Cir.1996); *Treasure Valley Opportunities, Inc. v. National Resources Recovery Inc.*, 166 B.R. 701 (Bankr.D.Idaho 1994). Plaintiff's fraudulent transfer claim is dismissed.

III. Banyan's Motion For Summary Judgment

Defendant BMC Westholme Corporation ("Banyan") moves for summary judgment arguing that plaintiff has alleged no facts to support a claim against it, and requests sanctions against plaintiff for refusing to dismiss the claim voluntarily, alleging plaintiff knew its claim was unsustainable.

Plaintiff offers no opposition to Banyan's motion; indeed it would be hard pressed to do so because the record is devoid of any evidence that would illuminate what role, if any, Banyan played in CGI's decision to transfer its interest in the Winding River project to Anden. In their respective depositions, neither Tedesco nor Greenberg was able to articulate any reason for bringing a claim against Banyan. The Bank's moving papers reveal only that Banyan was a limited partner in the Westholme entity; plaintiff has yet to inform the court what its role was beyond that. Tedesco testified that he had "no idea" what Banyan is, and when asked whether Banyon had a role in the Winding River project, he testified. "[n]ot that I can remember."

Greenberg's testimony reflects that he had little understanding of Banyan's role in the transfer of the Winding River project to Westholme. When asked what he knew about Banyan. Greenberg offered only vague statements, such as "Banyan had a role to play in the operation of Westholme," "the Westholme transaction contemplated Banyan's participation in the overall transaction." "Banyan had participated in this reorganization." and "Banyan being a lender ... somehow got in control of Westholme Partners. And beyond that, I'm not privy to how that worked."

***25** Given Greenberg's lack of knowledge of Banyan's relationship to the other defendants, it is not surprising that he could offer no hard facts to support the claim that Banyan made representations about the project on which plaintiff relied to its detriment. Greenberg admitted that he had no direct dialogue

with Banyan prior to the Westholme transfer. Asked whether he relied on any representations by Banyan, he testified

> Chip George indicated to me that Banyan had consented to the transaction, and at least he led me to believe that there was a management committee or that there were meetings that Banyan participated in. That's what I was led to believe. And my own belief was that the two lenders were in support of and behind the Westholme transaction. I relied on that ...

When pressed on where this belief about Banyan originated. Greenberg answered. "[j]ust general discussions;" he could not identify any related documents that might support these beliefs, and he admitted having no other facts to support the allegation that Banyan had any control over the Westholme partnership.

Banyan has also submitted evidence indicating that plaintiff knew by the close of discovery that it had no claim against Banyan: to wit, a certification by Michael Stein, Esq. (Banyan's counsel) that Steven M. Kalebic, Esq. (plaintiff's counsel) had agreed and confirmed in numerous conversations during the summer of 1997 that there was no justification whatsoever for keeping Banyan in the case and that authorization to dismiss would be forthcoming from plaintiff. As well, there is a letter from Stein to Kalebic dated September 16.1997 purporting to confirm a conversation that plaintiff would dismiss the complaint against Banyan within 10 days or at least prior to Stein's attendance at a deposition in Florida, and a similar letter dated December 1, 1997, confirming a conversation between counsel that plaintiff had no justification for keeping Banyan in the case and would agree to dismiss the claim "perhaps even by week's end. Included in that letter was a stipulation of dismissal for plaintiff's execution.

Because the record contains no testimony, documents, or other evidence to support a claim that Banyan acted in any way to influence CGI's decision to transfer its interest in the Winding River project to Westholme. Banyan's motion for summary judgment must be granted. Also, because it was clear that plaintiff had no support for a claim against Banyan following the depositions of John Tesdesco and William Greenberg in May 1997, and since plaintiff maintained the action notwithstanding the lack of evidence, refusing to voluntarily dismiss the claim when given the opportunity to do so in September 1997 and December 1997, the court finds that plaintiff acted in bad faith and will grant Banyan's costs of defending the suit beginning September 26, 1997.

CONCLUSION

For the foregoing reasons, defendants Bank and Banyan's motions for summary judgment are granted and Banyan's motion for sanctions is also granted. An appropriate order is attached.

ORDER

***26** This matter having come before the Court upon the motion of Defendants Continental Bank and BMC Westholme Corp. for summary judgment on Plaintiff Coastal Group Inc.'s complaint against them pursuant to Fed.R.Civ.P. 56;

The Court having considered the submissions of the parties;

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is this 15th day of December, 1998, hereby

ORDERED that Defendant Continental Bank's motion for summary judgment on Counts One. Two, Three, Four, and Five is granted; and

It is further ORDERED that Defendant BMC Westholme Corporation's motion for summary judgment on all Counts is granted; and

It is further ORDERED that Defendant BMC Westholme Corporation's motion for attorney's fees and costs is granted; and

It is further ORDERED that Defendant BMC Westholme Corporation submit a certification of services and statement of costs arising out of this litigation beginning September 26, 1997, together with a form of Order, no later than 30 days from receipt of this order.

SO ORDERED.

1998 WL 34233133 (D.N.J.)

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