

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-19

HL I, LLC, et al.,

Plaintiffs

v.

DECISION AND ORDER
(Motion to Dismiss)

Riverwalk, LLC, et al.,

Defendants

This matter was heard on July 8, 2009, on the Motion of Defendants Intercontinental Fund IV Ocean Gateway, LLC, Intercontinental Real Estate Investment Fund IV, LLC, Intercontinental Real Estate Corporation and Riverwalk, LLC, Ocean Gateway Garage, LLC, and OGG, LLC (collectively Defendants) to Dismiss Plaintiffs' Amended Complaint pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

I. Factual Background¹

Plaintiffs HL1, LLC (HL1) and Shipyard Brewing Company, LLC (Shipyard), are Maine limited liability companies. Plaintiff Fred M. Forsley is engaged in, among other things, the business of developing real estate, and maintains a principal place of business in Portland, Maine.

Defendants Riverwalk, LLC, OGG, LLC, and Pennbrook Properties, II, LLC, are also Maine limited liability companies. Intercontinental Fund IV Ocean Gateway, LLC, is a Massachusetts limited liability company, as is Defendant Intercontinental Real Estate Investment Fund IV, LLC.

¹ The facts set forth herein are based upon the allegations contained in Plaintiffs' Amended Complaint, which allegations the Court deems to be true in the Court's assessment of the motion to dismiss.

Intercontinental Real Estate Investment Fund IV, LLC, is the manager of Intercontinental Fund IV Ocean Gateway, LLC. Defendant Intercontinental Real Estate Corporation is a Massachusetts corporation and is the manager of Intercontinental Real Estate Investment Fund IV, LLC.

On or about September 29, 2006, Intercontinental Fund IV Ocean Gateway, LLC (Intercontinental) and Riverwalk, LLC (Riverwalk) entered into a "Mezzanine Loan Agreement", pursuant to which agreement Intercontinental agreed to loan up to Nineteen Million Dollars (\$19,000,000) to Riverwalk upon certain terms and conditions, including the terms and conditions of a Promissory Note executed by Riverwalk. Under the terms of the Mezzanine Loan Agreement, the proceeds of the Intercontinental loan were to be used to fund the construction of a multi-story, 720 space parking garage (the Garage) on land in Portland, which land was owned by Ocean Gateway Garage, LLC (Ocean Gateway).

The Mezzanine Loan Agreement expressly ratified and confirmed the terms of a certain Purchase and Sale Agreement by and between Ocean Gateway, as Seller, and OGG, LLC (OGG) as Buyer (the Garage P&S). Following execution and delivery of the Mezzanine Loan Agreement, Riverwalk obtained funds that were made available pursuant to that agreement in order to fund the construction of the Garage.

On or about November 16, 2007, Intercontinental declared that the Mezzanine Loan Agreement was in default. Riverwalk disputed the existence of a default. Despite the notice of default and the dispute as to the default, Intercontinental and Riverwalk entered into negotiations regarding possible means to resolve the dispute.

On or about December 7, 2007, Riverwalk and Intercontinental, together with Ocean Gateway, and OGG purported to enter into an agreement for the resolution of the default. The agreement was evidenced by a written document entitled "Memorandum of Understanding" or "MOU." The MOU provides, among other things, for the modification of the Garage P&S to increase the purchase price by One Million Dollars to Twelve Million Dollars, and for the modification of the Promissory Note held by Shipyard and payable by Ocean Gateway.

Following the purported execution of the MOU, Riverwalk and Intercontinental began the process of drafting proposed documents intended to evidence the terms of the MOU. Plaintiffs contend that the MOU is not a valid or duly authorized agreement of Riverwalk, Ocean Gateway or OGG because, among other things, it was not authorized by Shipyard, it lacks consideration, and it has been repudiated by the actions of Riverwalk, Ocean Gateway, OGG and/or Intercontinental.

II. Procedural Background

On March 27, 2008, Plaintiffs filed their original Complaint in this action pursuant to Maine's Declaratory Judgments Act, 14 M.R.S. §§ 5951-5963. Count I of Plaintiffs' original Complaint sought a declaration that:

- (a) The MOU is not binding, valid, properly authorized, or otherwise enforceable against the parties thereto, nor is any other document or agreement that is executed and delivered pursuant thereto or to evidence the terms thereof;
- (b) The MOU is unenforceable because there is no valid consideration for it, there having been no event of default under the Mezzanine Loan Agreement;
- (c) The Garage P&S is a binding, valid and enforceable agreement in accordance with its terms, and such agreement has not been modified or amended by the MOU or by any document or agreement purported to be executed and delivered in connection with the MOU; and
- (d) The promissory note held by Shipyard Brewing Company, LLC is valid, binding and enforceable in accordance with its terms, and such promissory note has not been modified

or amended by the MOU or any document or agreement purported to be executed and delivered in connection with the MOU.

Count II of Plaintiffs' original Complaint sought a declaration that "Fred M. Forsley is the sole manager of OGG" and "HLI, LLC is the sole member of OGG."

In July 2008, Plaintiffs sought leave to file an Amended Complaint, which the Court granted. Plaintiffs' Amended Complaint contained three additional claims (Counts III-V), which can be summarized as follows:

Count III alleges that Ocean Gateway Garage has repudiated and breached the original Garage P&S through the execution and delivery of the MOU, which altered the original terms of the sale of the Garage, and by refusing an offer to purchase the Garage for the original purchase price;

Count IV seeks judicial dissolution of Ocean Gateway Garage, LLC under 31 M.R.S. § 702(2), based on Ocean Gateway Garage, LLC's alleged insolvency; and

Count V seeks the appointment of a liquidating trustee to oversee the judicial dissolution of Ocean Gateway Garage, LLC.

After Plaintiffs filed their original Complaint and before they filed their Amended Complaint, Defendants filed a Motion to Compel Arbitration and Stay Proceedings. Through that motion, citing a provision of the OGG Operating Agreement, to which Pennbrook and HLI are parties, Pennbrook and the Intercontinental Defendants asked the Court to compel HLI to arbitrate the parties' dispute.

The Court granted Defendants' motion, and stayed the instant proceedings pending the conclusion of the arbitration proceeding. *See HLI, LLC v. Riverwalk, LLC*, BCD-WB-CV-08-19 (Me. Super. Ct., Sag. Cty. June 27, 2008). Following the arbitration hearing and the issuance of the arbitrators' Award, Pennbrook and the Intercontinental Defendants filed a Motion to Confirm the Award and Dismiss Plaintiffs' Complaint. The Court bifurcated its consideration of Defendants' motion and considered first Defendants' request to confirm the Award. On April 3, 2009, the Court entered an

Order confirming the Award, having concluded that judicial review was not warranted under Maine's Uniform Arbitration Act, 14 M.R.S. §§ 5927-5949. The Court will now address Defendants' Motion to Dismiss.

III. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Env'tl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Bean v. Cummings*, 2008 ME 18, ¶7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

IV. Motion to Dismiss

In support of their motion to dismiss, Defendants contend that the Arbitration Award fully and finally adjudicated not only the claims made by HLI, LLC against Pennbrook Properties, LLC, the named parties to the arbitration, but also decided the material factual issues presented in this action. As such, Defendants contend the principles of *res judicata* compel the dismissal of this matter.

Res judicata “prevents the relitigation of matters already decided.” *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097, 1099. The doctrine of *res judicata* is comprised of two distinct, though related, components: claim preclusion and issue preclusion. *Id.*

Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.

Id. ¶ 8, 940 A.2d at 1100.

When considering whether a claim is barred, courts “apply a transactional test, ‘examining the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong.’” *Id.* (quoting *Norton v. Town of Long Island*, 2005 ME 109, ¶ 18, 883 A.2d 889, 895)). Under the doctrine of *res judicata*, “[s]uch a claim is precluded even if the second action relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case.” *Id.* (quotation marks omitted).

“Issue preclusion, or collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Whereas claim preclusion is focused on the claims set forth in the prior proceeding, collateral estoppel concerns factual issues, and applies even when the two proceedings offer different types of remedies. Collateral estoppel can be applied to administrative proceedings as well as to court proceedings.” *Id.* ¶ 9, 940 A.2d at 1100 (internal citations and quotation marks omitted). Insofar as Defendants maintain that the arbitration proceeding resolved the issues that are central to Plaintiffs’ claims in this action, in part because not all

of the parties to this action were parties to the arbitration proceeding, Defendants' argument is one of issue preclusion.

As mentioned above, Defendants seek dismissal pursuant to M.R. Civ. P. 12(b)(6). "A Rule 12(b)(6) motion is appropriate to raise the affirmative defense of res judicata only if the facts establishing the defense appear on the face of the complaint." *Sargent v. Sargent*, 622 A.2d 721, 723 (Me. 1993).

Plaintiffs contend that dismissal is not appropriate because the facts necessary to establish the defense of issue preclusion are not apparent on the face of Plaintiffs' Amended Complaint. The Court's review is not, however, limited exclusively to the allegations in the Amended Complaint. In *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47, the Law Court concluded that "a court [may] consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged." Under *Moody*, the Court can consider the Memorandum of Understanding as it was referenced in and made part of the Amended Complaint. In addition, the Court can consider the arbitration award insofar as the Court has confirmed the Award, which makes it, in the Court's view, an official document of the type contemplated by the Law Court in *Moody*.² Not insignificantly, however, the transcript of the arbitration proceeding is not a public document, nor is it central to or part of the Plaintiffs' claim. The Court cannot, therefore, consider the transcript at this stage of the proceedings.

Upon review of Plaintiffs' Amended Complaint, the Arbitration Award, and the Memorandum of Understanding, the Court concludes that Plaintiffs are precluded from obtaining the relief requested in

² Given that all parties have referenced and relied upon the arbitration award in their respective arguments, the parties evidently agree that the Court can consider the arbitration award when assessing the merit of Defendants' motion to dismiss.

paragraphs A & B of Count I of the Amended Complaint. Although Defendants could conceivably develop a record to demonstrate that the arbitration proceeding addressed all of the issues central to the remaining claims in Plaintiffs' Amended Complaint, the Court cannot make that determination based solely on a review of the Amended Complaint and arbitration award. To determine whether Plaintiffs are foreclosed from pursuing their remaining claims, the Court would, at a minimum, have to consider portions of the transcript of the arbitration proceeding. That is, whether all of the issues that are central to Plaintiffs' claims in this action are within the scope of the arbitration proceeding is not apparent on the face of the Amended Complaint even if the Court considers the arbitration award and the Memorandum of Understanding. If the Court is to consider matters outside the pleadings, such as the transcript of the arbitration proceedings, all parties must have the opportunity to present any pertinent materials in accordance with M.R. Civ. P. 56. Defendants are not, therefore, entitled to dismissal pursuant to M.R. Civ. P. 12(b)(6) on all of the claims set forth in Plaintiffs' Amended Complaint.

V. Conclusion

Based on the foregoing analysis, the Court grants in part and denies in part Defendants' Motion to Dismiss. The Court grants Defendants' motion as to Plaintiffs' claims for relief in paragraphs A & B of Count I of Plaintiffs' Amended Complaint. The Court, therefore, dismisses Plaintiffs' claims for relief in paragraphs A & B of Count I of Plaintiffs' Amended Complaint. The Court denies Defendants' motion as to the remaining claims set forth in Plaintiffs' Amended Complaint.

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

Date:

9/21/09


Justice, Maine Business & Consumer Docket