/s/ H. Charles Carl, III
Circuit Court Judge
Ref. Code: 2149LJKB

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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

DAN RYAN BUILDERS WEST VIRGINIA, LLC,
a West Virginia limited liability company,

Plaintiff,

vs.

Civil Action No. 20-C-110
Presiding Judge: H. Charles Carl, III
Resolution Judge: Shawn D. Nines

OVERLAY I, LLC,
A Virginia limited liability company,

Defendant.

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Comes now the Court this 17th day of June 2021, upon *Defendant, Overlay I, LLC's Motion to Dismiss Plaintiff's Amended Complaint.*

The Dan Ryan West Virginia Builders, LLC, by counsel, William F. Gibson, II, Esq., and Defendant, Overlay I, LLC, by counsel, Gregory E. Kennedy, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This action commenced on May 6, 2020, with the filing of the Complaint in which Plaintiff, Dan Ryan West Virginia Builders, LLC (hereinafter "Dan Ryan" or "Plaintiff") alleged causes of actions against Defendant Overlay I, LLC (hereinafter "Overlay" or "Defendant") regarding agreements between the parties to develop residential lots for building residential real

estate improvements for sale as new homes to consumer purchasers in Berkeley County, West Virginia. *See* Compl., ¶¶1, 3; *see also* Def's Mem., p 5. On March 23, 2021, Plaintiff filed its Amended Complaint asserting the following causes of action against Defendant: 1) Count 1 – Declaratory Judgment/Specific Performance/Injunctive Relief; 2) Count 2 – Breach of Money Damages (in the Alternative); and 3) Count 3 – Establishment of a Vendee's Lien (in the Alternative). *See* Am. Compl., ¶¶20-31.

2. Attached to the Amended Complaint were certain contracts/documents at issue in this civil action. The May 14, 2018 Original Lot Purchase Agreement (hereinafter "LPA") was attached as Exhibit 2 to the Amended Complaint. *See also* Am. Compl., ¶3. The First Amendment to the Original LPA was attached as Exhibit 3 to the Amended Complaint. *See also* Am. Compl., ¶5. The Second Amendment to the Original LPA (hereinafter "Second Amendment") was attached as Exhibit 5 to the Amended Complaint[1]. *See also* Am. Compl., ¶8. An April 1, 2019 letter to Defendant in which Plaintiff allegedly informed Defendant it was in default (hereinafter "4/1/19 Default Notice") was attached as Exhibit 4 to the Amended Complaint. *See also* Am. Compl., ¶7. An October 1, 2019 Notice of Termination letter (hereinafter "10/1/19 Notice of Termination") was attached as Exhibit 7 to the Amended Complaint. *See also* Am. Compl., ¶13.

3. On April 23, 2021, Defendant filed *Defendant Overlay I, LLC's Motion to Dismiss Plaintiff's Amended Complaint*, requesting that the Court dismiss Plaintiff's Amended Complaint, with prejudice, arguing Plaintiff has failed to state a claim upon which relief can be granted because it argued Plaintiff "had successfully terminated the [Original LPA]". *See* Def's Mem., p. 1, 10, 15. Further, it argued Plaintiff sought a claim for specific performance which should be

[1] The Court notes a Third Amendment, Fourth Amendment and Fifth Amendment to the Original LPA was attached to the Amended Complaint as Exhibit 9. *See also* Am. Compl., ¶14.

dismissed as untimely. *Id.* at 16-18. Further, it argued Counts 2 and 3[2] should be dismissed as they "are repugnant to the agreed upon limitation of Buyer's Actual Damages". *Id.* at 21-22.

4. On May 14, 2021, Plaintiff filed its Opposition to Motion to Dismiss Amended Complaint and Request for Hearing, arguing the motion to dismiss should be denied because it is based upon a faulty premise that the Plaintiff terminated the parties' agreement in its entirety via its 10/1/19 Notice of Termination. *See* Def's Resp., p. 1-2. Plaintiff explained its position was that the 10/1/19 Notice of Termination "only terminated the Seller's going-forward rights under the Second Amendment....and, at the same time, asserted [Plaintiff's] continuing breach remedies under the Original LPA as amended by the First Amendment with respect to Defendant's antecedent breach – which was a Seller breach, expressly acknowledged in the Second Amendment § 2". *Id.* at 2. In addition, Plaintiff argued its claim for specific performance was, in fact, timely filed. *Id.* at 11-12. Finally, Plaintiff argued its causes of action for Counts 2 and 3 were validly pled as alternate claims. *Id.* at 12-16.

5. On May 24, 2021, Defendant filed Defendant Overlay I, LLC's Reply to Plaintiff's Opposition to Motion to Dismiss Amended Complaint and Request for Hearing, in which it incorporated its Response to Plaintiff's Motion for Partial Summary Judgment filed in the instant civil action and reiterated its argument that the Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted. *See* Reply, p. 1-2.

6. The Court now finds this issue ripe for adjudication.

STANDARD OF LAW

[2] The Court notes Defendant also argues with regard to Count 3 that the cause of action should be dismissed as moot because it has delivered the Initial Deposit to Plaintiff's agent and thus, any request for an equitable remedy to the extent of any monies paid as a deposit is rendered moot. *Id.* at 22.

7. First, this matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading." *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

8. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

9. As an initial matter, the Court notes West Virginia law allows it to consider documents attached to, referred to, or integral to the Complaint without transforming a Rule 12(b)(6) motion into a Rule 56 motion. *See Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008). Paragraph 2 of this Order, above, explains that the relevant documents considered by the Court and mentioned in this Order were attached to the Amended Complaint as exhibits.

10. Here, the parties have fundamentally different positions regarding an alleged termination of the parties' agreement(s). Defendant has alleged that the Plaintiff terminated the parties' entire agreement when it sent the 10/1/19 Notice of Termination. *See* Def's Mem., p. 9. On the other hand, Plaintiff alleges in the Response to the instant motion, as well as pleads in the Amended Complaint, that Plaintiff did not terminate the parties' agreement in its entirety, and

instead the 10/1/19 Notice of Termination only terminated the Seller's going-forward rights under the Second Amendment and, at the same time, asserted Plaintiff's continuing breach remedies under the Original LPA as amended by the First Amendment with respect to Defendant's antecedent breach – which was a Seller breach, expressly acknowledged in Second Amendment §2 (*citing* Exhibit 5 to Amended Complaint, at p. 1 ("Seller and Buyer hereby acknowledge and agree that Seller is currently in default under the Agreement…")). *See* Pl's Resp., p. 2.

11. The West Virginia Supreme Court of Appeals has instructed circuit courts, when deciding a Rule 12(b)(6) motion to dismiss for failure to state a valid claim, to "construe the factual allegations in the light most favorable to the plaintiffs." *Murphy v. Smallridge,* 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996).

12. Plaintiff plainly alleged in Paragraphs 10-17 of the Amended Complaint that the 10/1/19 Notice of Termination merely **(i)** terminated the Defendant's conditional rights under the Second Amendment, **(ii)** expressly invoked the post-termination (of the Second Amendment) rights set forth in the Second Amendment, thereby returning the parties to their pre-Second Amendment *status quo ante*, and **(iii)** gave the Defendant additional time to try and cure its expressly admitted (and still uncured) default under the Original LPA as amended by the First Amendment, as expressly provided in the Second Amendment. *See* Amended Complaint ¶¶10-17; *see also* Pl's Resp., p. 5.

13. The Court's review of the parties' agreement and Notice of Termination, which were attached to the Complaint as Exhibits, supports denial of the motion to dismiss. The Court considers the first "Whereas" clause of the Second Amendment (on p. 1) contains defined terms, which supports Plaintiff's position that the term "Agreement" as used in the Second Amendment means the Original LPA as amended by the First Amendment, while the term "Amended

Agreement" as used in the Second Amendment means the Original LPA as amended through and including the Second Amendment:

> **WHEREAS,** Seller and Buyer entered into a Lot Purchase Agreement dated May 14, 2018, as amended by Amendment to Lot Purchase Agreement dated June 1, 2018 (collectively, the **"Agreement,"** and after the Amendment Effective Date, the Agreement amended by this Second Amendment shall collectively be referred to as the **"Amended Agreement")**...

See Exhibit 5 to Amended Complaint at p. 1; *see also* Pl's Resp., p. 6.

14. The Second Amendment in § 2 provides, in pertinent part:

> ...In the event that Seller fails to satisfy all of its obligations under this Second Amendment as and when required hereunder, Seller shall be deemed to have failed to cure any default as and when required under the Agreement, and Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b) of the Agreement. In the event that Buyer either (i) fails to satisfy all of its obligations under this Second Amendment as and when required hereunder (in which event Seller shall serve written notice of such breach upon Buyer which shall be deemed to give Buyer ten (10) days to cure such Buyer default, and in the event that Buyer does not cure such default within such time, this Second Amendment shall be deemed null and void for all purposes), or (ii) if Buyer shall timely deliver written notice of termination of the Amended Agreement under Paragraph 5(b) then the Seller and Buyer shall be returned to their respective positions as they existed prior to the Amendment Effective Date, except that as of such date of termination of this Second Amendment, Buyer shall be deemed to have served additional notice of breach of the Agreement on Seller giving Seller sixty (60) additional days to cure such breach. If Seller fails to cure such default within such time, Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b) of the Agreement.

See Exhibit 5 to Amended Complaint (Second Amendment) at p. 1-2.

15. Plaintiff has pled in its Amended Complaint that under Paragraph 2(ii) of the Second Amendment, it did deliver timely written notice of terminating the *Amended Agreement* under Paragraph 5(b) of the *Original LPA*. Plaintiff pled it did this via the 10/1/19 Notice of

Termination, sent by the last date of the Study Period. Thus, Plaintiff pled in the Amended Complaint that "then the Seller and Buyer shall be returned to their respective positions as they existed prior to the Amendment Effective Date, except that as of such date of termination of this Second Amendment, Buyer shall be deemed to have served additional notice of breach of the Agreement on Seller giving Seller sixty (60) additional days to cure such breach". *Id.*

16. At this stage in the litigation, these allegations contained in the Amended Complaint must be accepted as true in deciding Defendant's motion to dismiss. The Court finds the Amended Complaint clearly states a cognizable cause of action. The Court cannot accept Defendant's position, that Plaintiff terminated the parties' entire agreement via the 10/1/19 Notice of Termination, as a matter of law. At this stage in the proceedings, Plaintiff's claims as pled establish a claim upon which relief could be granted in favor of Plaintiff. Accordingly, Defendant's motion must be denied on this basis. *See* Pl's Mem., p. 10.

17. Second, the Court examines Defendant's argument that Plaintiff's specific performance claim was untimely because it was not brought within 180 days of the 10/1/9 Notice of Termination. *See* Pl's Mem., p. 16.

18. However, Paragraph 2(ii) of the Second Amendment, as outlined above, provides that if Buyer shall timely deliver written notice of termination of the Amended Agreement under Paragraph 5(b) then the Seller and Buyer shall be returned to their respective positions as they existed prior to the Amendment Effective Date, except that as of such date of termination of this Second Amendment, Buyer shall be deemed to have served additional notice of breach of the Agreement on Seller giving Seller sixty (60) additional days to cure such breach. If Seller fails to cure such default within such time, Buyer shall have the right to exercise all of its rights and remedies at law or in equity in accordance with Paragraph 11(b) of the Agreement.

19. It is undisputed that Plaintiff filed its original Complaint on May 6, 2020, which is outside of the 180-day timeframe but inside of the 180-day plus 60-day timeframe. *See* Pl's Mem., p. 16; *see also* Def's Resp., p. 12. At this stage in the litigation, the Court must find Defendant's motion must be denied on this issue, as the Court has determined that the documents at issue (attached to the Amended Complaint) support that the claim was timely filed, and the Court cannot rule as a matter of law that Plaintiff's specific performance claim was untimely brought pursuant to parties' agreement. Further discovery may occur on the issue, but at this stage in the litigation, Plaintiff's claim for specific performance cannot be dismissed as untimely.

20. Finally, the Court addresses Plaintiff's other causes of action, which were plainly, in the title of each count, brought in the alternative. West Virginia Rule of Civil Procedure 8(a) expressly allows a plaintiff to advance alternate claims for relief. *See* W.Va. R. Civ. P. 8(a) ("[r]elief in the alternative or of several types may be demanded in a pleading that sets forth a claim for relief").

21. With regard to Count II, Plaintiff argued that the Agreement provides that the Plaintiff can seek, as its sole and exclusive remedy, an action to recover "Buyer's Actual Damages, as hereinafter defined and described". *See* Pl's Mem., p. 21. Plaintiff avers the sole damages available to the Plaintiff are the actual damages, should the Plaintiff select this as its remedy, and the Agreement further establishes that in no event shall Plaintiff be entitled to pursue punitive or consequential damages, including any lost profit damages. *Id.*

22. A review of the Amended Complaint reveals Count II has expressly been pled in the alternative, as outlined in the title of the Count. Paragraph 29 of the Amended Complaint seeks "costs and expenses incurred in reliance on the Seller's failed promises" which Plaintiff avers clearly falls within the Original LPA's definition of "Actual Damages" (defined, in part, as "actual,

provable, out-of-pocket costs incurred to third parties in connection with the transaction described in this Agreement"). *See* Pl's Resp., p. 13-14. Further, with regard to "lost profit" damages, Plaintiff has argued that it distinguishes between the (unrecoverable/collateral) "lost profits" prohibited by the terms of Original LPA §11(b), and the (recoverable/direct) lost benefit of the bargain damages (*e.g.*, the difference between the agreed contract price and the fair market value of the subject property, as promised) sought in Count II. *Id.* at 14. Plaintiff argues that the direct (not consequential) lost benefit of the bargain damages are those that result immediately from the contract being breached; conversely, "lost profits" are those collateral benefits that are also eventually lost because the contract was broken, as in the loss of new home sales on those lots promised but not delivered. *Id.*

23. Because Plaintiff has sought to recover the lost benefit of its bargain which is not inherently prohibited by the limited exclusion of "lost profits", the Court finds that at this stage in the litigation, the Amended Complaint properly alleges a claim for such "Actual Damages" in the alternative. Accordingly, the motion to dismiss will be denied on this basis.

24. Finally, with regard to Count III, Establishment of a Vendee's Lien (in the Alternative), Plaintiff agues Count III fails to state a claim upon which relief can be granted because the Agreement provides the Plaintiff's sole and exclusive remedy is to either terminate the Agreement, pursue an action to recover actual damages, or seek specific performance. *See* Pl's Mem., p. 22. Additionally, Plaintiff argues it has returned its initial deposit to Plaintiff's agent, rendering Count III moot. *Id.*

25. Again, the Court finds Count III has been plainly pled in the alternative. The Court considers Plaintiff's averment that "nothing in Original LPA §11(b) expressly precludes the right to an equitable lien against the property at issue herein, whether as an ancillary

component of [Plaintiff's] breach of contract (specific performance and alternate Actual Damages) claims or otherwise". *See* Pl's Resp., p. 16. At this stage in the litigation, the Court finds Count III shall not be dismissed. The Court notes that Paragraph 31 of the Amended Complaint provides that the vendee's lien shall be "included but not limited to the deposit. *See* Am. Compl., ¶31.

26. In conclusion, the Court finds *Defendant, Overlay I, LLC's Motion to Dismiss Plaintiff's Amended Complaint* must be DENIED. The Court notes Plaintiff's request for a hearing, and finding a hearing is not necessary to aid the Court's decisional process, denies said request for the same.

27. Therefore, it is hereby ADJUDGED and ORDERED that *Defendant, Overlay I, LLC's Motion to Dismiss Plaintiff's Amended Complaint* is DENIED. The Clerk is directed to provide a copy of this Order to counsel of record; and to the West Virginia Business Court Division, Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, WV 25401.

IT IS SO ORDERED.

ENTERED this 17th day of June 2021.

JUDGE H. CHARLES CARL, III
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION