DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: Grand County Combined Courts 307 Moffat Ave Hot Sulphur Springs, CO 80451 Telephone No.: (970) 725-3357	DATE FILED: July 30, 2021 6:37 PM FILING ID: 1F4579D74B952 CASE NUMBER: 2021CV30008
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, **v.** **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC; GRANBY PRENTICE, LLC.; GR TERRA, LLC.	**▲COURT USE ONLY▲** Case No.: 2021CV030008 Div.: Rm.:
Counsel for Plaintiff: Charles E. Norton, #10633 Alicia M. Garcia, #53860 NORTON & SMITH, P.C. 600 17th Street, Suite 2150S Denver, Colorado 80202 Phone Number: (303) 292-6400 FAX Number: (303) 292-6401 E-mail: CNorton@NortonSmithLaw.com AGarcia@NortonSmithLaw.com	

PLAINTIFF GRANBY RANCH METROPOLITAN DISTRICT'S RESPONSE IN OPPOSITION TO REDWOOD CAPITAL'S MOTION TO DISMISS

Plaintiff Granby Ranch Metropolitan District ("GRMD") through its undersigned counsel, submits the following Response in Redwood Capital's Motion to Dismiss, and in support thereof states as follows:

INTRODUCTION AND PROCEDURAL POSTURE OF CASE

Plaintiff GRMD commenced this action on February 23, 2021 by filing a complaint against two defendants, Headwaters and GP Granby Holdings, LLC ("GPGH"). On June 2, 2021, GPGH changed its name to Gray Jay Ventures, LLC ("Gray Jay").

On May 20, 2021 GRMD exercised its right under C.R.C.P. 15(a) to file an amended complaint before any responsive pleading has been filed. The amended complaint added Redwood Capital Finance Co., LLC ("Redwood") and Granby Prentice, LLC ("Granby Prentice"), as defendants. Subsequently, the original defendants filed a notice with the court stating that the original Complaint was superseded by the amended complaint and thus they would not be filing any replies. After receiving leave from the court, the Second Amended Complaint was filed on July 6, 2021, its purpose was to include GR Terra as a party (upon its request) and to reflect Gray Jay's name change.

At the core of this lawsuit is the Second Amended Lease Purchase Agreement ("LPA"), entered into on December 31, 2012 between Headwaters and Granby Realty Holdings, LLC and the failure of the defendants to oblige by its terms. As a threshold matter, the law makes GRMD a third-party beneficiary of the LPA which can enforce it according to its terms. Further, the LPA was not extinguished by the foreclosure, both because the LPA is a covenant running with the land and as an installment land contract should have been foreclosed through the courts. Plaintiff GRMD has also stated a plausible claim for a breach of the covenant of good faith and fair dealing and tortious interference with a contract.

For the most part, Redwood simply repeats arguments made by Gray Jay, Granby Prentice, and GR Terra in their combined motion to dismiss. However, it does raise one novel theory. It contends after initiating foreclosure on the property subject to the LPA, Redwood assigned its interest in the certificate of purchase issued by the Public Trustee to Granby Prentice, a related entity formed by Redwood to hold the property. After doing this, Redwood then purports to have cancelled itself, which it asserts under Delaware law prevents it from being ever served with process by GRMD or ever being sued on its obligations as recited in the LPA. If

this contention were a valid recitation of Delaware law, it would of course raise troubling issues under the due process and full faith and credit clause of the United States constitutions. Fortunately, the argument is based on a faulty analysis of Delaware law, and there is no indication that Redwood did anything required of it by Delaware in order to wind up its business, including making provision for any damages that might be suffered by GRMD because Redwood refused to honor its obligations as Landlord under the LPA.

GRMD recited additional pertinent facts in the section of its Response in Opposition to Gray Jay Ventures', Granby Prentice's, and GR Terra's Motion to Dismiss entitled "Introduction and Procedural Posture of the Case." Given the substantial overlap of the defense motions, GRMD incorporates that Introduction fully into this Response.

RESPONSE TO INTRODUCTION AND BACKGROUND

Redwood has presented a statement of what it maintains are relevant facts in the sections of its Motion entitled INTRODUCTION and BACKGROUND. GRMD has presented an extensive factual recitation in response to Headwater's Statement of Facts in its Response to Headwater's Motion to Dismiss. Given the substantial overlap of the motions, GRMD incorporates the Statement fully into this Response.

STANDARD OF REVIEW

In its motion to dismiss, Redwood asserts that GRMD's breach of contract and tortious interference claims must be dismissed under C.R.C.P 12(b)(1) for lack of subject matter jurisdiction. Redwood does not assert its own argument, but instead adopts that of the Private Defendants. As such, GRMD incorporates fully its discussion regarding the standard of review for a C.R.C.P. 12(b)(1) motion to dismiss in its response to the Private Defendants' motion to dismiss.

Redwood contends that GRMD's complaints should be dismissed pursuant to C.R.C.P. 12(b)(4) for insufficient process on Redwood. However, on June 2, 2021 GRMD served the Amended Complaint of Redwood's Registered Agent: Nation Registered Agents, Inc. in Wilmington, Delaware. GRMD has not yet served the Second Amended Complaint on Redwood but, under C.R.C.P. 4 has until August 9th (63 days from the filing of the complaint) to do so.

ARGUMENT

I. Redwood Can Still be Sued Even as a Cancelled Entity

Redwood claims that as a cancelled entity it cannot be sued (or served) and thus GRMD's claims against it fails since it filed a certificate of cancellation. Assuming that Redwood properly wound up the LLC upon its dissolution and the certificate of cancellation is valid, Delaware law does not completely bar any lability against a cancelled entity.

Section 18–804 of the Delaware LLC Act ("LLC Act") governs the distribution of a dissolved LLC's assets. In particular, Section 18–804(b)(1) provides that "[a] limited liability company which has dissolved" "[s]hall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company." Section 18–804(b)(3) requires an LLC undergoing the wind-up process to

> make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the limited liability company or that have not arisen but that, based on facts known to the limited liability company, are likely to arise or to become known to the limited liability company within 10 years after the date of dissolution.

DE ST TI 6 § 18-804(b)(3).

If an LLC is not wound up in accordance with the LLC Act, this Court "may nullify the certificate of cancellation, which effectively revives the LLC and allows claims to be brought by

and against it." *Capone v. LDH Mgmt. Holdings LLC*, No. CV 11687-VCG, 2018 WL 1956282, at *7 (Del. Ch. Apr. 25, 2018), judgment entered, (Del. Ch. 2018) (*quoting Matthew v. Laudamiel*, 2012 WL 605589, at *22 n.148 (Del. Ch. Feb. 21, 2012).

In holding that the certificate of cancellation of an LLC should be nullified, the *Capone* court looked at (1) the nature of the plaintiff's claims; and (2) whether the defendants were on notice of the Defendant's claims when the LLC was dissolved.

First, the court notes that section 18–804(b)(1) is clear that a dissolved LLC must provide for all claims—"including all contingent, conditional or unmatured contractual claims"—that are "known to the limited liability company." *Id.* at 8. Additionally, it notes that "claims" are not limited to purely contractual obligations; instead, they "include, without limitation, contract, tort, or statutory (e.g., tax) claims against ... the limited liability company, whether or not ... reduced to judgment. *Id.*

Secondly, the court notes that,

> Section 18–804(b)(1) requires that provision be made for claims "known to the limited liability company." The LLC Act defines "knowledge" "as a person's actual knowledge of a fact, rather than the person's constructive knowledge of the fact." Thus, "known claims and obligations [are] limited to those of which the limited liability company has actual, rather than constructive, knowledge."

Here, Redwood had a contractual obligation to GRMD under the LPA. It had delivered to Granby Ranch Holdings a document described in the LPA expressly obligating it to act a Landlord under the LPA and to convey the Leased Premises to Headwaters if it ever succeeded to the interest of Granby Ranch Holdings (which it did by foreclosing) and/or acquired either title or the right to possess the property (which it did by being the successful bidder at the foreclosure sale and obtaining a certificate of purchase). As discussed above, GRMD is a third-party beneficiary to the LPA and thus, any claims brought by it subject to the LPA should have

been reasonably known to Redwood, since it had voluntarily obligated itself under the LPA at the time it was entered into. Redwood should have been aware that failure to act in accordance with the LPA would result in a claim against it either by Headwaters or a third-party beneficiary. Thus, Redwood's "cancellation" was a legal nullity, and it can still be sued and served with process. [1]

II. GRMD has pled a plausible claim to be a third-party beneficiary to the LPA with standing to bring this suit.

In its motion to dismiss, Redwood contends that GRMD lacks standing to bring this suit because it is not a third-party beneficiary of the LPA. In order to establish standing, a plaintiff must prove (1) that it "suffered an injury-in-fact" and (2) that the "injury was to a legally protected interest." *Wimberly v. Ettenberg*, 194 Colo. 163, 167, 570 P.2d 535, 538 (1977). Under Colorado law, a third-party beneficiary is an individual or an entity that is not a party to an express contract but may nevertheless bring an action on the contract if (1) the parties to the agreement intended to benefit the third party; and (2) if the benefit claimed is a direct and not merely an incidental benefit of the contract. *SK Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868 (Colo. 2015).

GRMD has pled facts which, when viewed in the light most favorable to GRMD, more than meet the standard of showing that it has a "plausible claim" to be a third-party beneficiary of the LPA. It is true that in order for a non-party to be considered a third-party beneficiary under an agreement, the parties to the agreement must have intended to benefit the non-parties and the

[1] Redwood tacitly acknowledges its own difficulty with all of this. Since it does not believe that it can sue or be sued, it could not file the Motion to Dismiss on its own behalf. It therefore selected the entity it formed, Granby Prentice, to file the Motion as its "Successor by Contract." The only contract to which Granby Prentice is a "successor" is the LPA. This is a telling admission that both Redwood and Granby Prentice are bound by that document.

benefit claimed must be a direct and not merely incidental benefit of the contract. *E.B. Roberts Const. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985). However, under Colorado law, in determining whether a party has standing as a third-party beneficiary to a contract, the Court should look not just to the terms of contract but also to the surrounding circumstances. *E. Meadows Co., LLC v. Greeley Irr. Co.*, 66 P.3d 214, 217 (Colo. App. 2003). In E. *Meadows*, the Court held that in determining whether a party is a third-party beneficiary:

> The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

66 P.3d 214, 217 (Colo. App. 2003)(citing Concrete Contractors, Inc. v. E.B. Roberts Construction Co., 664 P.2d 722, 725 (Colo.App.1982), aff'd, 704 P.2d 859 (Colo.1985)).

In *E.B. Roberts Construction Co.*, the Colorado Supreme Court found a third party, Concrete Contractors, Inc. ("CCI"), was a third-party beneficiary of a contract between Ideal Construction Services, Inc. ("Ideal") and E.B. Roberts Construction Co. ("Roberts") despite CCI being nowhere mentioned in the contract. Roberts (general contractor) and CCI (subcontractor) had entered into a contract which obligated CCI to perform work as subcontractor. 664 P.2d 722, 861. Subsequently, Roberts, CCI and Ideal entered into a "Contract Amendment" whereby Ideal was substituted for CCI as the subcontractor due to CCI's inability to perform part of the contract. Although Ideal was named as the performing party in this subsequent contract, "CCI performed the work, billed Roberts for progress payments, and received such payments from Roberts." *Id.* at 862. Thus, it was clear from the parties' conduct that they intended for CCI to perform the construction work even though there was never "a formal agreement between Ideal

and CCI, or among Ideal, CCI and Roberts . . .” and “[n]othing in the written contract or the bonds, however, [gave] any indication of this arrangement.” *Id.* 861-62.

Unlike the situation in *E.B. Roberts*, where third party beneficiary status was found despite the fact that the contract nowhere mentions the third-party, the LPA mentions GRMD expressly in Recital B, which notes that Headwaters had previously adopted, with the Granby Ranch Metropolitan District, a Joint Resolution to Establish an Amenity Fee dated May 26, 2005. Specifically, Recital B. provides that the Joint Resolution imposing the Amenity Fee had been adopted “In order to pay rental payments with respect to the Leased Premises and pay the purchase price of the Leased Premises.” GRMD jointly adopted an Amenities Fee with Headwaters to allow Headwaters to fund the rental payments for the ski area and golf course and eventually to buy them. The reference to GRMD in recital B. alone gives rise to a plausible inference that the acquisition of the Amenities under the LPA was intended by the parties to benefit GRMD.

That intent is even clearer when one reads the Joint Resolution of May 26, 2005, attached to the Second Amended Complaint as Exhibit 4. The Joint Resolution recites that “the Districts” (GRMD and Headwaters) “have determined that it is in the best interests of *the Districts* to acquire, lease, construct, maintain, provide, operate, and or administer” the Amenities, which include a golf course, ski area, river park and related improvements. The Joint Resolution goes on to note that these Amenities will benefit “the property within the Districts.” The inference is strong that the intent of the parties was to confer a direct benefit on GRMD through the rental and acquisition of the amenities. The Joint Fee Resolution is expressly identified in the LPA as the source of rental payments under the LPA, and it is part of the provisions of the LPA.

This reference to the Joint Fee Resolution in the LPA negates the Redwood's contention that GRMD alleges no surrounding facts or circumstances illustrating that the parties intend to afford GRMD the benefits of the above cited LPA provisions. Moreover, it establishes the parties' intent to include the Joint Fee Resolution as part of the LPA. Further, even if the Joint Resolution was not intended to be a part of the LPA (which it was), the Court of Appeals has held that, third party beneficiary status "is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish." *E. Meadows*, 66 P.3d at 214. Examination of the Joint Fee Resolution is part of interpreting the LPA as a whole and understanding the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

Redwood also contends that the LPA does not directly benefit GRMD because it was Headwaters that remitted the Rental Payments/Amenity Fee. However, the circumstances surrounding the LPA, including the relationship between GRMD and Headwaters, undercut this contention. Pursuant to the Master IGA between Headwaters and GRMD, which governed the relationship between the parties until 2016 (the LPA was entered into in 2012), Headwaters was to manage and control the financing of infrastructure, and to establish all necessary service charges including "development fees" for GRMD. Second Amended Complaint, para.14. It was Headwaters' duty to collect the Amenity Fee, and to use it to fund the acquisition of the golf course and ski area to benefit both GRMD and Headwaters. Viewing the surrounding circumstances in a light most favorable to GRMD, this supports the contention that Headwaters would use its authority under the Master IGA to collect an Amenity Fee to fund payments under

the LPA and confer a direct benefit to GRMD through the acquisition of the ski area, golf course, and other Amenities on behalf of both Districts.

Also, upon the dissolution of Headwaters, it was GRMD that would accept responsibility for the operation and maintenance of any infrastructure located within GRMD. See Second Amended Complaint, para. 15. Because Headwaters was a developer-controlled entity, it would initially operate and eventually own the Amenities. However, once the SolVista project sold out and the Developer had no interest, it was GRMD that would own and operate the Amenities. GRMD is thus a direct beneficiary of the LPA.

Additional evidence of the circumstances surrounding entry into the LPA support GRMD's status as a third-party beneficiary. Four years before the LPA was concluded, the Town of Granby, Headwaters, GRMD, and the Granby Ranch Metropolitan Districts Nos. 1-8 entered into an Intergovernmental Agreement (the "Granby IGA") which is attached to the Amended Complaint as Exhibit 5. This Granby IGA provided that "the Districts will be authorized to acquire, construct, own, operate and maintain the ski area and lifts, ski lodge, golf courses and appurtenant clubhouse and maintenance facilities, which included a Fishing Camp on the Fraser River, the 18-hole Headwaters Golf Course, and the Sol Vista Ski Basin. All of these were Amenities that were subsequently leased and to be purchased by Headwaters under the LPA. See Second Amended Complaint, para. 19. "Districts" was once again a defined term in the Granby Ranch IGA, and included Headwaters, GRMD, and the Granby Ranch Metropolitan Districts.

Redwood contends that GRMD is barred from being a third-party beneficiary to the LPA because the LPA bars the right to recover the payments made under it. However, this is irrelevant to the question of whether or not GRMD was an intended third-party beneficiary. It is rare that a purchaser can recover the amount that it has paid of a purchase price for land except in cases of

fraud, and GRMD did not seek such restitution. Even if the LPA precluded the right to recover the payments made under the LPA, GRMD has also sustained damages unrelated to the payments, specifically the loss of its option to purchase the Lease Premises under Section 23 and to have the Amenities managed under public ownership. GRMD also contends that it is entitled to the equity that has been built up that is represented by the fair market value of the Amenities less the amount of the lease payments made under the LPA. This is a different remedy than direct restitution of the lease payments, and nothing in the structure of the LPA precludes the claim.

GRMD has stated a plausible claim to third party beneficiary status under the LPA, and that it has suffered injury in fact to a legally protected interest. Headwaters' motion to dismiss must be denied.

III. Redwood breached the LPA when it refused to be bound as Landlord to Headwaters and refused to accept the purchase provisions of Section 23 of the LPA.

The LPA contains a Subordination, Non-Disturbance, and Attornment Agreement in Section 13(b), which provides that,

> [I]n connection with the Prior Lease, Landlord shall cause to be delivered to Tenant a Subordination, Non-Disturbance and Attornment Agreement, to be executed by Redwood Capital Finance Company (the "**Lender**"). Landlord and Tenant hereby acknowledge that, in connection with the execution of this Lease, ***Landlord has delivered to Tenant, an agreement executed by the Lender either subordinating this Lease to the deed of trust held by the Lender but obligating the Lender and any successor thereto to be bound by this Lease and by all of Tenant's rights hereunder*** (to the extent such Lender should succeed to the interest of Landlord and/or acquire title or right of possession of the Leased Premises), including but not limited to the rights of Tenant conferred by Sections 2 and 23 hereof.

(emphasis added).

According to Section 26 of the LPA, the Non-Disturbance Agreement shall provide, among other things, that upon such lenders' succession of interest it shall be bound as Landlord to the provisions of the LPA, including Headwater's right to acquire the Leased Premise pursuant to Section 23. Section 23 provides for eventual acquisition of the Leased Premises by the Tenant.

There had been a "Prior Lease" entered into between GRH and Headwaters, which was entitled "Amended and Restated Lease Purchase Agreement," along with the First, Second, Third, Fourth and Fifth Addenda to that Agreement. LPA, Recital A. As is recited in Section 13 quoted above, Redwood had provided a Subordination and Attornment Agreement in connection with the Prior Lease. However, in connection with the LPA, GRH had delivered to Headwaters an agreement executed by Redwood in which Redwood obligated itself and any successor to be bound by the LPA and all of Headwaters' rights under the LPA, including the rights of Headwaters to acquire title or the right of possession of the Leased Premises.

Under the plain language of the LPA, Redwood succeeded to the interest of the Landlord (GRH) when GRH foreclosed on the property. Instead of honoring the LPA and its obligations, it purported to assign its rights under the certificate of purchase to a related entity (Granby Prentice) in the expressed hope that this would extinguish its own obligations under the LPA. This breached its contract obligations to accept the Amenities Fee as the sole rent for the Amenities, and to transfer the property to Headwaters at the end of the lease term in exchange solely for the payment of facilities fees. GRMD has stated a claim for breach of contract against Redwood.

IV. GRMD properly maintains a claim for Tortious Interference against Redwood

Under Colorado law, in order to prove there was tortious interference with a contract, the Plaintiff must prove that (1) the plaintiff had a contract; (2) the defendant knew or reasonably should have known of the contract; (3) the defendant by words or conduct, or both, intentionally caused the nonperformance or termination of the contract; (4) the defendant's interference with the contract was improper; and (5) the defendant's interference with the contract caused the plaintiff damages. *Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.*, 831 P.2d 908, 910 (Colo. App. 1991).

As discussed above, the parties to the LPA intended for GRMD to benefit from the LPA and can thus maintain a claim for tortious interference as a third-party beneficiary to the LPA. As a successor in interest to the LPA, Redwood was fully aware of its obligations to Headwaters (and GRMD) under the LPA. Specifically, Redwood was aware of the termination requirement under the LPA and that the failure of Headwaters to operate the Amenities would trigger termination under Section 10.

For these reasons, there was tortious interference with the LPA by Redwood.

CONCLUSION

For all of the foregoing reasons, GRMD requests that Redwood's Motion to Dismiss be denied.

Dated this 30th day of July, 2021.

NORTON & SMITH,
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s/ Charles E. Norton
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CERTIFICATE OF SERVICE

I certify that on the 30th day of July, 2021, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO REDWOOD CAPITAL LLC's MOTION TO DISMISS** was served electronically and/or sent via U.S. Mail, postage prepaid to the following:

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