DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **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.	DATE FILED: January 28, 2022 11:31 AM CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV030008

ORDER GRANTING THE MOTION TO DISMISS OF REDWOOD CAPITAL FINANCE CO., LLC, BY GRANBY PRENTICE, LLC, ITS SUCCESOR BY CONTRACT AND INDEMINITOR

This matter comes before the Court on the Motion to Dismiss of Redwood Capital Finance Co., LLC ("Redwood") by the Granby Prentice, LLC ("Granby Prentice"), its Successor by Contract and Indemnitor (the parties collectively shall be "Granby Prentice/Redwood") filed on July 12, 2021. The Plaintiff Granby Ranch Metropolitan District (the "Plaintiff") filed its Response on July 30, 2021, and Granby Prentice/Redwood filed its Reply on August 13, 2021. Upon being fully apprised of the facts and law, the Court finds and rules as follows:

FACTS

The Court issued orders in this matter dated January 28, 2022, which more thoroughly discusses the facts of this case. For purposes of this motion and in addition to the facts stated in the Court's Order issued January 28, 2022, the Court notes Redwood was a limited liability company organized in the State of Delaware.[1] (Mot. Dismiss, Ex. A.) In 2005, Redwood entered into a loan agreement with Granby Realty Holdings ("GRH" and the "GRH Loan"), which granted Redwood a deed of trust on property GRH sought to develop (the "2005 Redwood Deed of Trust"). (Mot. Dismiss, Ex. B.)

In April 2016, Redwood assigned its right, title, and interest in the 2005 Redwood Deed of Trust to Granby Prentice. (Mot. Dismiss, Ex. C.).

In December 2018, the Delaware Secretary of State issued a Certificate of Cancellation for Redwood. (Mot. Dismiss, Ex. D.) There is a California Certificate of Cancellation for Redwood filed on the same date. (Mot. Dismiss, Ex. E.) Redwood was not authorized to do business in Colorado.

GRH defaulted on the GRH Loan. (Sec. Amend. Compl., ¶ 34.) On March 24, 2020, Granby Prentice initiated a non-judicial foreclosure proceeding on the Leased Premises pursuant to its rights under the Deed of Trust. (Sec. Amend. Compl., ¶ 34.) On August 14, 2020, the Grand County Public Trustee (the "Public Trustee") held a public sale of the property. Granby Prentice submitted the successful bid and the Public Trustee issued Granby Prentice a Certificate of Purchase. At some point, Granby Prentice assigned the Certificate of Purchase to Gray Jay Ventures, LLC, f/k/a GP Granby Holdings, LLC ("Gray Jay").

On February 23, 2021, the Plaintiff filed this action, asserting claims against Headwaters Metropolitan District ("Headwaters") and Gray Jay. On May 20, 2021, the Plaintiff amended its Complaint and added Redwood, among others, as a party defendant.

On June 7, 2021, the Plaintiff filed an Affidavit of Service (the "Affidavit") that describes GRMD's attempt to serve the Amended Complaint and Summons on Redwood. The Affidavit states that the Amended Complaint and Summons were served on June 2, 2021 on Redwood's "Registered Agent: National Registered Agents, Inc." in Wilmington, Delaware.

On July 6, 2021, the Plaintiff filed a Second Amended Complaint asserting breach of contract and tortious interference with contract claims against Redwood. The Plaintiff has not served Redwood with the Second Amended Complaint.

[1] According to the Plaintiff's Second Amended Complaint "Defendant Redwood Capital is a Delaware Limited Liability Company with its principal place of business located at 10100 Santa Monica Blvd., Suite 1000, Los Angeles, CA 90067. Defendant's registered agent is National Registered Agents, Inc. whose mailing address is 1209 Orange Street, Wilmington, DE 19801. According to the records of the California Secretary of State, Redwood Capital was authorized to do business in the State of California but was 'cancelled.' There is no evidence that Redwood Capital was ever authorized to do business in Colorado." (Sec. Amend. Compl., ¶ 4).

RULING

I. C.R.C.P. 12(b)(4) and Insufficient Service of Process.

The Court grants Granby Prentice/Redwood's motion to dismiss the Second Amended Complaint on the grounds of ineffective service of process.

Granby Prentice/Redwood seeks dismissal of the Second Amended Complaint because of ineffective service of process on a cancelled LLC (incapable of being served). Granby Prentice/Redwood also argues ineffective service of process as to the Second Amended Complaint.[2]

The Court dismisses this matter pursuant to Colorado Rule of Civil Procedure ("C.R.C.P") 4(m). As to the Second Amended Complaint, C.R.C.P. 4(m) requires that "[i]f a defendant is not served within 63 days (nine weeks) after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--shall dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." C.R.C.P. 4(m). The Plaintiff has not served Redwood with the Second Amended Complaint. The Plaintiff acknowledged that, as of July 31, 2021, it had not served the Second Amended Complaint on Redwood but would do so by August 9, 2021. There is no record in the file that this took place. For this reason alone, dismissal without prejudice is proper.

The Court also finds that service of the Amended Complaint was not perfected. "A court may not exercise personal jurisdiction over a defendant without valid service of process." Ledroit Law v. Kim, 360 P.3d 247, 250 (Colo. App. 2015); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473, 476 (Colo. App. 1992) (mere existence of personal jurisdiction is insufficient, and proper service must be accomplished to perfect court's exercise of jurisdiction.). Absent valid service, any default judgment issued by the court is a nullity. Ledroit Law, 360 P.3d at 254; Goodman Associates, LLC v. WP Mountain Properties, LLC, 222 P.3d 310, 315 (Colo. 2010).

Colorado law permits service on a "registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction" and on "any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person." C.R.C.P. 4(e)(4) and (12).

Granby Prentice/Redwood's argument is essentially that service on "National Registered Agents, Inc." in Wilmington, Delaware did not conform to Rule 4(e) because Redwood was a cancelled entity at the time of service.

A Delaware limited liability company cannot be sued after it dissolves and files a certificate of cancellation. Corder v. Antero Resources Corporation, 322 F. Supp. 3d 710, 716 (N.D.W. Va.

[2] Granby Prentice/Redwood does not seek to quash the affidavit of service nor does it challenge this Court's personal jurisdiction over Redwood pursuant to Rule 12(b)(2). These issues are, therefore, not before the Court.

2018); Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies Inc., 854 A.2d 121, 139 (Del. Ch. 2004) ("[A]bsent statutory authority, no claim may be brought against a dissolved entity"). Delaware's Limited Liability Company Act provides that "[a] certificate of formation shall be canceled upon the dissolution and the completion of winding up of a limited liability company" and that "[a] certificate of cancellation shall be filed in the office of the Secretary of State to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company…" 6 D. Code § 18-203. Up until this point, those winding up an LLC's affairs may prosecute and defend suits on the LLC's behalf until the filing of the certificate of cancellation." Del C. 18-803(b); Matthew v. Laudamiel, 2012 WL 605589, at *21 n.148 (Del. Ch. 2012).[3] Thus, a dissolved limited liability company cannot "be served with process through traditional means available for service upon a viable legal entity" where the entity "no longer has a registered agent or active senior officers upon whom personal service could be perfected." Tratado de Libre Commercio, LLC v. Splitcast Technology, LLC, 2019 WL 1057976, at *1 (Del. Ch. 2019).

The Plaintiff argues that Delaware law permits the Plaintiff to recover from Redwood, despite the LLC's cancellation/dissolution, because Redwood knew of its obligation to the Plaintiff (to act as a Landlord under the LPA) and Redwood should have anticipated that a third-party beneficiary (such as the Plaintiff) could bring a cause of action against it. According to the Plaintiff, Redwood's "cancellation was a legal nullity, and it can still be sued and served with process."

The Court disagrees.

The Plaintiff cites to 6 Del. C. § 18–804: "[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." It must

> 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.

6 Del. C. § 18-804(b)(3).

This section thus requires a dissolved LLC to provide compensation for all claims – "including all contingent, conditional or unmatured contractual claims" - that are known to the limited liability company. Capone v. LDH Management Holdings LLC, 2018 WL 1956282, at

[3] The Court recognizes the lack of precedential value in unpublished cases. In this instance, however, the Court finds the unpublished cases cited herein carry persuasive authority and the Court cites to them accordingly. See Patterson v. James, 2018 COA 173, ¶ 43 (trail court did not err when it considered unpublished decision). Colorado appellate courts also frequently cite to unpublished cases. See Gagne v. Gagne, 2019 COA 42, ¶ 20; People v. Garrison, 2017 COA 107, ¶ 50.

*7 (Del. Ch. 2018); see also 800 Cooper Finance, LLC v. Shu-Lin Liu, 2019 WL 5078725, at *4 (D.N.J. Oct. 10, 2019) (citing to Capone). Claims "'include, without limitation, contract, tort, or statutory (e.g., tax) claims against . . . the limited liability company, whether or not reduced to judgment.'" Capone, at *8. According to the Plaintiff, Redwood agreed to enter into a subordination agreement and "[a]ssuming that this agreement was in fact executed and delivered, Redwood Capital agreed to be bound by the LPA and all of Headwater's rights under the LPA, including the purchase provisions of Section 23, and to act as Landlord if it acquired title to the Leased Premises."

The Court finds this problematic for two reasons. First, the Plaintiff has not provided any evidence that Redwood knew about the LPA or the purported subordination agreement. There is no evidence, other than the language of the LPA, that the subordination agreement was executed and delivered. Second, the Plaintiff has not provided any evidence that it has petitioned the Court of Chancery to nullify Redwood's certificate of cancellation.

If a court "finds that an LLC's affairs were not wound up in compliance with the Delaware Limited Liability Company Act, it may nullify the certificate of cancellation, which effectively revives the LLC and allows claims to be brought by and against it." Laudamiel, 2012 WL 605589, at *22 n. 148;

> When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 18-203 of this title, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the managers of the limited liability company to be trustees, or appoint 1 or more persons to be receivers, of and for the limited liability company, to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the limited liability company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company.

6 Del. C. § 18-805.

The Plaintiff has not demonstrated that it is currently seeking to nullify Redwood's cancellation for final settlement of unfinished business. It has also not argued that Redwood was noncompliant in winding up its affairs.

There is no evidence, therefore, before the Court that sections 804 and 805 apply herein. As such, Section 803 and Delaware common law protect Redwood from being sued post dissolution and post filing of the certificate of cancellation. Corder, 322 F. Supp. 3d at 716.[4]

[4] As an aside, the Court notes that in Delaware, dissolved corporations are continued for three years for the purpose of prosecuting and defending suits. 8 Del. C. § 278. The Delaware Limited Liability Company Act does not contain a similar three-year wind up provision.

Redwood filed its Certificate of Cancellation on December 28, 2018. (Mot. Dismiss, Ex. D.) The Plaintiff filed its Amended Complaint on May 20, 2021, two and a half years after Redwood dissolved and filed its certificate of cancellation. As such, the Plaintiff's attempted service on "National Registered Agents, Inc." in Wilmington, Delaware was ineffective. The Plaintiff has not met its burden of proof to establish proper service where service is facially invalid. Bush v. Winker, 892 P.2d 328, 332 (Colo. App. 1994).

The Court, however, notes that while it may lack jurisdiction over a defendant because of defective service, such failure does not warrant dismissal of the complaint for that reason alone. ReMine ex rel. Liley v. Dist. Court for City and County of Denver, 709 P.2d 1379, 1383 (Colo. 1985) (citing Hoen v. District Court, 412 P.2d 428, 430 (1966) and Fletcher v. District Court, 322 P.2d 96, 97 (Colo. 1958)). The Colorado Supreme Court has expressly stated that

> the proper procedure is not to dismiss a complaint because of improper or invalid service of process; the trial court should, in such a case, merely hold the service invalid and allow the action to stand so that the plaintiff can continue to seek proper service. To do otherwise could, for example, prevent the tolling of a statute of limitations or harm a plaintiff in some other manner.

Bolger v. Dial-A-Style Leasing Corp., 409 P.2d 517, 518 (Colo. 1966).

Regardless, the Court does not allow for more time in which to perfect service because, as outlined below, the Plaintiff fails to state a claim for either breach of contract or tortious interference of contract, therefore, regardless of whether Redwood is properly served, the claims against Redwood fail as a matter of law.

II. C.R.C.P. 12(b)(1) and Subject Matter Jurisdiction.

The Court denies Redwood's Motion to Dismiss on the grounds of lack of standing and lack of subject matter jurisdiction.

Redwood joins in Section 1 of the Private Defendants' Motion to Dismiss (i.e., that the Plaintiff is not a party to or third-party beneficiary of the LPA). For the same reasons discussed in its Order dated January 28, 2022, the Court denies Redwood's Motion to Dismiss for lack of standing and subject matter jurisdiction.

III. C.R.C.P. 12(b)(5) and Failure to State a Claim.

The Court grants Redwood's C.R.C.P. 12(b)(5) motion on the grounds that the Plaintiff has failed to state a claim upon which relief can be granted.

"A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted serves as a test of the formal sufficiency of a plaintiff's complaint. The chief function of a complaint is to give a defendant notice of the transaction or occurrence that is the subject of a plaintiff's lawsuit." Public Service Co. of Colorado v. Van Wyk, 27 P.3d 377, 385 (Colo. 2001). A C.R.C.P. 12(b)(5) motion to dismiss is looked upon with disfavor, and a complaint should not

be dismissed unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief. A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law. Id. at 385-386 (citations omitted).

"To survive a motion to dismiss under C.R.C.P. 12(b)(5), a plaintiff must plead sufficient facts that ... suggest plausible grounds to support a claim for relief." Patterson v. James, 2018 COA 173, ¶ 23 (citing Warne v. Hall, 2016 CO 50, ¶ 24). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Barnes v. State Farm Mutual Automobile Insurance Company, 497 P.3d 5, 10 (Colo. App. 2021). This Court views the factual allegations in the complaint as true and in the light most favorable to the plaintiff. Pena v. American Family Mutual Insurance Company, 2018 COA 56, ¶ 15. The Court is not required to accept as true legal conclusions couched as factual allegations and a complaint may be dismissed if the substantive law does not support the claims asserted. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008); Froid v. Zacheis, 2021 COA 74, ¶ 29 (quoting Scott v. Scott, 2018 COA 25, ¶ 19, 428 P.3d 626) ("plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true").

In its review, a court may consider only the facts alleged in the complaint, documents attached as exhibits or referenced in the complaint, and matters of which the court may take judicial notice, such as public records. Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006); Pena v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14. A motion to dismiss, however, may be converted to a motion for summary judgment if a party presents matters outside the pleadings. C.R.C.P. 12(c); SaBell's, Inc. v. Flens, 599 P.2d 950, 952 (Colo. App. 1979).

"A document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered a 'matter outside the pleading.'" Yadon v. Lowry, 126 P.3d 332, 336 (Colo. App. 2005). If that document "is central to the plaintiff's claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." Id. (quoting James Wm. Moore et al., Moore's Federal Practice § 56.30[4], at 56–225 & –226 (3d ed. 2005)). An authentic copy is not required (and conversion unnecessary) where the plaintiff refers to and relies upon that document and does not dispute its authenticity. See Yadon, 126 P.3d at 336.

Conversion is required, however, if matters are submitted in a motion to dismiss that are outside of these described situations. Bristol Bay Productions, LLC v. Lampack, 2013 CO 60, ¶ 46; Churchey v. Adolph Coors Co., 759 P.2d 1336, 1339 (Colo.1988) ("Because [defendant] attached affidavits and exhibits to its motion, the court properly treated [defendant's] motion as one for summary judgment."); Garcia v. Centura Health Corp., 2020 COA 38, ¶ 50 (motion to dismiss properly treated as motion for summary judgment where defendant attached affidavits and exhibits to its motion and the district court considered these attachments in its order).

The Court does not need to convert the present motion into one for summary judgment. Here, Granby Prentice/Redwood submitted six unauthenticated exhibits that were not attached to the pleadings. These exhibits were, however, referenced by the Plaintiff in the Second Amended Complaint. (Mot. to Dismiss, Exs. A-F; Sec. Amend. Compl., ¶ 4, 33-34.) The Plaintiff does not dispute their authenticity. The Plaintiff also does not submit any exhibits or affidavits of its own.

When documents are presented to the court in a motion to dismiss, the legal effect of the document is determined by their contents rather than by the allegations as stated in the complaint. Peña, 463 P.3d at 882; Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006). In considering documents attached or referenced in a complaint, "a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of the document attached to the complaint." Stauffer, 165 P.3d at 716.

A. The Plaintiff's Breach of Contract Claim Against Redwood Fails as A Matter of Law (Claim III).

The Plaintiff's breach of contract claim of Second Amended and Restated Lease Purchase Agreement (the "LPA") against Redwood fails as a matter of law.

According to the Plaintiff, Redwood breached its duties to the Plaintiff, when it "refused to acknowledge the existence of the LPA and thus failed to act as a Landlord to and recognize the rights of Headwaters under the LPA." (Sec. Amend. Compl. ¶ 60). According to the Plaintiff, "Redwood Capital agreed to execute a Subordination, Non-disturbance and Attornment Agreement. Assuming that this agreement was in fact executed and delivered, Redwood Capital agreed to be bound by the LPA and all of Headwater's rights under the LPA, including the purchase provisions of Section 23, and to act as Landlord if it acquired title to the Leased Premises." (Sec. Amend. Compl., ¶ 59).

Granby Prentice/Redwood seeks dismissal of this claim because the Plaintiff fails to allege Redwood was a party to the LPA, or that Redwood ever took title to the Leased Premises. The Court does not address the first argument because it is already found the Plaintiff sufficiently alleged third-party beneficiary status under C.R.C.P. 12(b)(1) in its Order dated January 28, 2022. The Court finds the Plaintiff satisfied the C.R.C.P. 12(b)(5) standards regarding pleading third-party beneficiary status as to the breach of contract claim.

As to the breach of contract claim itself, to prevail on such a claim, a plaintiff must prove: (1) the existence of a contract, (2) that it performed their contractual duties or a justification for nonperformance of contractual duties, (3) that the other party to the contract failed to perform, and (4) damages resulted. Long v. Cordain, 343 P.3d 1061, 1067 (Colo. App. 2014).

The Plaintiff's allegation rests on Section 13.b. and Section 26 of the LPA. Section 13.b. 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).

(Sec. Amend. Compl., Ex. 6, ¶ 13.b.).[5] Section 26 provides:

> Upon the request of Landlord, Tenant shall subordinate the lien of this Lease to the lien of any mortgage or deed of trust encumbering the Leased Premises, so long as such lender provides Tenant a Non-Disturbance Agreement in form and substance reasonably acceptable to Tenant and which shall provide, among other things, that upon such lender's succession of interest it shall be bound as Landlord to the provisions of this Lease, including the Tenant's right to acquire the Leased Premises in accordance with Section 23 hereof. Such instrument will be completed by Tenant and delivered to Landlord within 10 days of the date requested.

(Sec. Amend. Compl., Ex. 6 ¶ 26).

The conditions described in Section 26 are not pleaded by the Plaintiff. For instance, the Plaintiff has not alleged that GRH requested Headwaters to subordinate the Lease to the 2005 Redwood Deed of Trust. The Plaintiff has not alleged that Headwaters completed a subordination agreement, with or without the request. The Plaintiff has also not alleged that Redwood provided Headwaters a non-disturbance agreement. The Plaintiff argues only that Sections 13 and 26 of the LPA are evidence that these events took place thereby binding Redwood.

In Section 13.b., the parties acknowledged that GRH delivered an actual subordination agreement, executed by Redwood, to Headwaters obligating Redwood to be bound by the LPA. The Plaintiff has not provided evidence that Redwood executed this agreement or that it was delivered to Headwaters. The Plaintiff has not cited any legal authority that acknowledgment of the agreement is evidence that it was executed.

Even if such an agreement does exist, there is no dispute that it is an unrecorded document. C.R.S. § 38-35-108 provides that

> When a deed or any other instrument in writing affecting title to real property has been recorded and such deed or other instrument contains a recitation of or reference to some other instrument purporting to affect title to said real property, such recitation or reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever unless the instrument mentioned or

[5] The "Prior Lease" is the "Amended and Restated Lease Purchase Agreement dated as of June 1, 2006, as amended by the First, Second, Third, Fourth and Fifth Addenda." (Sec. Amend. Compl., Ex. 6, Recital A).

> referred to in the recital is of record in the county where the real property is situated.

C.R.S.§ 38-35-108 (underline added). The Plaintiff does not allege that the purported agreement was recorded. The Plaintiff also does not allege that Redwood had actual notice of this agreement. See Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980) (constructive notice of a reservation of royalty interest is binding, even though the reservation is not part of a recorded document).

As such, any purported subordination agreement bound only Headwaters and GRH, not Redwood.

Without the allegations of the occurrence of the conditions described in Section 26, without legal authority that reference to certain conditions is evidence that the conditions took place, and without evidence of a recorded document, the Court finds that the Plaintiff has failed to state a claim for breach of the LPA.

To the extent the Plaintiff alleges Redwood succeeded to GRH's interest as Landlord when Redwood foreclosed on the property, the Plaintiff has not cited any legal authority or citations to the record (other than the LPA) to support this argument. The Court further notes the 2005 Redwood Deed of Trust specifically provides that it "shall not cause Beneficiary to be … responsible or liable for the control, care, management or repair of the Subject Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases…" (Mot. to Dismiss, Ex. B, ¶ 3.3). Leases is defined as "all leases of the Subject Property or any portion thereof, all licenses and agreements relating to the management, leasing, operation of the Subject Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Subject Property or any portion thereof, whether now existing or entered into after the date hereof, if any; and (b) the rents, issues, deposits and profits of the Subject Property, including, without limitation, all amounts payable and all rights and benefits accruing to Trustor under the Leases." (Id. ¶ 3.1).

B. The Plaintiff's Tortious Interference with Contract Claim Against Redwood Fails as A Matter of Law (Claim VI).

The Plaintiff's sixth claim, tortious interference with contract claim against Redwood, fails as a matter of law.

The Plaintiff argues that Redwood was a successor in interest to the LPA, knew of its termination requirements and knew that the failure of Headwaters to operate the Amenities would trigger termination of the LPA under Section 10.[6]

[6] This argument is based on Gray Jay's November 2020 notification to Headwaters that it was terminating the LPA under § 10 based upon Headwaters' failure to operate the Amenities in accordance with the LPA. (Sec. Amend. Compl. ¶ 40-41).

A claim of tortious interference with contract requires 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, 912 (Colo. App. 1991).

A claim for tortious interference applies only when one, not a party to the contract, induces a third party to breach the contract, or interferes with the third party's performance of the contract. Colorado Nat. Bank of Denver v. Friedman, 846 P.2d 159, 170 (Colo. 1993). "[I]t is the conduct of the third person who is not a party to the contract that is punished for inducing a breach or preventing performance of the contract." Id.

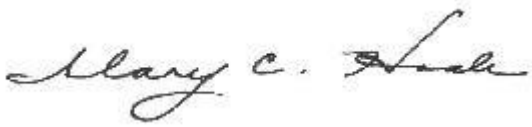
The Court finds the Plaintiff's claim for tortious interference with contract fails because there are no allegations that Redwood took any action to interfere with the LPA under Section 10 or otherwise. The Plaintiff bases its entire claim on the conduct and actions of Gray Jay.

The Court dismiss the Plaintiff's Claim VI as to Redwood.

CONCLUSION

WHEREFORE, the Court hereby GRANTS Granby Prentice LLC's Motion to Dismiss.

SO ORDERED this 28th day of January, 2022.



Mary C. Hoak, District Court Judge