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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: NORTHWEST SENIOR HOUSING CORPORATION, *et al*.[1] Debtors.	Chapter 11 Case No. 22-30659 (MVL)
Leif M. Clark, Trustee of the Edgemere Litigation Trust Plaintiff, v Intercity Investment Properties, Inc., and Kong Capital LLC, Defendants.	Adv. Pro. No. 22-03040 (MVL)

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Northwest Senior Housing Corporation (1278) and Senior Quality Lifestyles Corporation (2669). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

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Defendants hereby file their Reply to Plaintiff's Response (the "Response," ECF 469) to Defendants' Motion for Judgment on the Pleadings (the "Motion," ECF 445). Capitalized terms not defined herein have the meanings ascribed to them in the Motion.

Count 1, for Breach of Contract, Fails Against Kong.

Plaintiff sues Kong for breach of the NDA—a contract to which Kong was not a signatory. As explained in the Motion, Kong cannot be liable for breach of an agreement to which it was not a party.

Plaintiff does not dispute that Kong is not named a party to the NDA or that Kong never signed the NDA. Plaintiff instead advances, without supporting authority, that "Kong's agreement must be presumed." (Response, p. 12). Not so. For instance, courts have dismissed complaints under Fed. R. Civ. P. 12(b)(6) for failure to plead privity even where the complaint advances, in its briefing, that the non-contracting defendant agreed to be bound to a contract—the allegations must instead appear in the complaint. *Upper Room Bible Church, Inc. v. Sedgwick Delegated Authority*, 2022 WL 27735546 **2-3 (E.D. La. Dec. 16, 2022); *see also, e.g.*, *McCord v. Prudential Ins. Co. of Am.*, 2011 WL 13214397 *8 (E.D. Tex. Feb. 10, 2011) (claim for breach of insurance contract failed for lack of privity allegations although plaintiff was acquirer or administrator of policy).

Not only is Plaintiff's position unsupported in the law, it also is unsupported under the NDA. Plaintiff seizes on isolated language in the NDA defining the term "Representatives" to mean those "who agree to maintain the confidentiality of such information in accordance with the terms of this Agreement." Plaintiff overreads that isolated clause and divorces it from its context. The term includes a party's "officers, directors, partners, members, managers, stockholders, Affiliates, agents, advisors (including, without limitation, attorneys, accountants, consultants,

bankers and financial advisors) and employees, in each case that have a need to know such Confidential Information in order to assist a party in evaluating the Transaction or to assist a party in exercising its rights hereunder and who agree to maintain the confidentiality of such information in accordance with the terms of this Agreement."

Plaintiff thus asks the Court to presume—without any factual enhancement—that each officer, director, and stockholder of the parties to the NDA assumed the position of a signatory party thereunder upon receiving confidential information. While the Court may indulge reasonable inferences in evaluating a complaint, it need not and should not assume that—for instance—each of Edgemere and Lifespace's executives are personally liable for violations of the NDA. The better reading is that the parties are "responsible for any breach of this Agreement by any of its Representatives," as stated in section 11 of the NDA, rather than that a party's "Representatives" each become a separate party to the NDA. In fact, that is *precisely the reading Plaintiff advances in his Complaint*: in footnote 5 of the Complaint, Plaintiff alleges that in "other words, disclosure of Confidential Information by a party's Representative constitutes a breach *by such party* under the NDA." (Emphasis added). And, in paragraph 148 of the Complaint he describes the NDA as a "contract between Edgemere, Lifespace, and Intercity," not Kong.

Kong is not a party to the NDA and Plaintiff omits to allege facts otherwise. Indeed, Plaintiff affirmatively pled facts that Kong was not a party to the NDA. Count 1 of the Complaint therefore fails against Kong.

Count 1 also fails because Plaintiff does not allege Edgemere's performance.

As explained, the Complaint nowhere alleges—even in conclusory terms—that Edgemere performed or tendered performance under the NDA. Indeed, Plaintiff cannot do so because

Edgemere did not perform. But whether Plaintiff *could* allege as much ultimately is beside the point; the point is that *he did not*.

Plaintiff endeavors to salvage this failure by advancing that his allegation that the NDA was "valid and enforceable" is implicitly an allegation of performance. Again, Plaintiff identifies no authority for his position and it is inconsistent with prevailing case authorities. Under Texas law, the existence of a "valid and enforceable" contract and a plaintiff's performance thereunder are separate elements of the claim; if the former satisfied the latter, there would be no need for the latter to exist as an element of the claim. *Mitchell v. Ocwen Loan Servicing, LLC*, 2016 WL 11663143 *2 (N.D. Tex. Apr. 18, 2016).

Moreover, it cannot be true that, when Plaintiff writes in his Complaint that a contract is or was "valid and enforceable," such an allegation includes prior performance. For instance, Plaintiff alleges at paragraph 183 of the Complaint that the Ground Lease was a "valid contract" even while, in the very same paragraph, he acknowledges Edgemere's uncured defaults thereunder.

The Complaint does not allege facts to support Edgemere's performance or tender of performance under the NDA. Consequently, Count 1 fails as a matter of law.

Count 2, for promissory fraud, fails as a matter of law.

As explained, the Complaint affirmatively alleges (and Plaintiff in his Response concedes) that Kong induced ICI's breach of the NDA, but that Kong did not enter the picture until November 2021—two months after the NDA was executed. The Complaint therefore affirmatively alleges that ICI entered the NDA intending to perform—that is, it was not until two months later, according to the Complaint, that Kong changed ICI's mind.

Plaintiff advances that the Complaint is no different on that score than the original complaint. That is false. The original complaint did not allege when Kong became involved and

Plaintiff realizes that, acknowledging in his Response that he "*now knows*," and therefore alleges for the first time, "that Kong entered the picture in November 2021." (Response, p. 15) (emphasis added).

Plaintiff charges also that his promissory fraud claim survives this patent deficiency because "ICI recommitted to the NDA twice at a time after Kong entered the picture." But Plaintiff supplies no authority that doing so gives rise to *tort* liability; indeed, Plaintiff acknowledges in his response that ICI's duties under the NDA were "contractual and ongoing." (Response, p. 15).

Texas law is crystal clear that while a fraud claim may lie for fraudulent inducement into a contract, once the contract is executed a party's failure to perform gives rise only to liability in contract (subject to limited inapplicable exceptions, such as where failure to perform results in physical injury). Here, Plaintiff affirmatively pleads that ICI decided to breach the NDA only *after* same was executed. Any potential resultant liability, therefore, is contract liability, and cannot be tort liability.

Count 3, for tortious interference with contract, fails as a matter of law.

Kong was legally incapable of tortiously interfering with ICI's contracts because, as alleged, Kong was ICI's agent. Plaintiff does not dispute the legal premise that an agent cannot interfere with its principal's contracts. Instead, he advances that his Complaint did not allege that "Kong was only and always acting as an agent, but that Kong was alternatively acting as an agent or in its own self-interest, or both." (Response, p. 16).

Plaintiff asks the Court not only to draw inferences in his favor, but also to disregard his allegation that Kong "[a]t all relevant times" acted "both as an agent for Intercity and for its own interests." What is more, even if the Court disregarded Plaintiff's allegations as he requests, the Complaint still is insufficient. As explained, Texas law requires that before an agent may be liable

for tortious interference with its principal's contracts, the agent must act not only in its own interests but also at the expense of the principal's interests. No such allegations appear in the Complaint, nor does Plaintiff identify any such facts in his Response.

Plaintiff also offers the bizarre contention that Defendants have not "stipulated" to Kong's agency. As noted, however, Plaintiff alleged at paragraph 16 of his Complaint that at "all relevant times Kong has been acting both as an agent for Intercity and for its own interests." Defendants admitted that allegation in paragraph 16 of their Answer. Thus, the pleadings are as clear as day: Kong was ICI's agent at "all relevant times." And the pleadings foreclose Kong's liability for tortious interference with contract.

Although Kong cannot be liable *at all* on Count 3 under the facts alleged, it certainly cannot be liable to the extent Count 3 rests on the Ground Lease because there was no breach of the Ground Lease. Purportedly as a response, Plaintiff quotes paragraph 183 of the Complaint as supporting a breach of the Ground Lease. But the only breach of the Ground Lease identified there was *Edgemere's* and, at any rate, even Edgemere's breaches ultimately were cured. Plaintiff identifies no authority that a contract party may sue another for tortious interference resulting in the *plaintiff's* own breach of contract, and Defendants' research similarly reveals none.

Count 4, for tortious interference with prospective business relations, fails.

As Plaintiff acknowledges, the original complaint's claim for tortious interference with prospective business relations was dismissed for its failure to identify specific prospects with which Defendants tortiously interfered. Plaintiff advances that he cured that defect in the Complaint by stating that there was at least one unnamed potential resident who withdrew her interest and that, consequently, Defendants are foreclosed from further challenging Count 4.

The Court's prior order, of course, does not foreclose challenge to the Complaint and this challenge is warranted by the prior order. As the Court recognized there—and as advanced in the Motion—a tortious interference claim like that advanced here must allege "independently tortious" conduct "actionable under a recognizable tort." (ECF 99, n.61). It is not sufficient, under Texas law, for the conduct merely to violate a contract. *S&W Enters., LLC v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 538 (5th Cir. 2003).

To be sure, the Court previously found that the original complaint adequately alleged independently tortious conduct because it alleged that Defendants "disclos[ed] confidential information in breach of the NDA." (ECF 99, p. 12). But contract breach—even if adequately pled—does not support a tortious interference claim. The Court had no reason in its prior order to evaluate that issue before because it found the count deficient on other grounds. The issue now is squarely presented, however, and the Court should adhere to the binding authority holding that breach of contract is insufficient to support a tortious interference claim.

The Complaint does not allege independently tortious conduct. Count 4 therefore fails as a matter of law.

Count 5, for defamation, fails.

In the Response, Plaintiff advances that Defendants intended to leave "any reasonable person with the false and misleading impression that Edgemere was engaged in an illegal Ponzi-scheme operation and cover up." (Response, p. 21). But his allegations do not support his argument. As alleged, Defendants stated that the "only way for Edgemere to repay the $25M [in] deposits it owes is to use deposits collected from new residents, which resembles a 'Ponzi-eseque' financing structure." (FAC, ¶¶ 67, 158). He similarly alleges that Defendants "intentionally communicat[ed] to others that Edgemere was running a 'ponzi-esque' scheme." (*Id.* at ¶ 206).

At no point does Plaintiff allege either Defendant actually accused Edgemere of running a Ponzi scheme. He instead alleges that Defendants characterized Edgemere's business model as resembling a Ponzi scheme in that new contributions are used to pay out old liabilities. And, in his Response, he goes outside the pleadings to confirm that is how readers understood Defendants' contention as characterized by DMN: he points to a March 23, 2022 letter to the editor questioning whether the "Ponzi-like scheme of deposits and refunds is legal and appropriate."

Defendants' characterization of Edgemere's business model as resembling a Ponzi scheme is non-actionable opinion—a matter to be determined by the Court as a matter of law. *Dallas Morning News v. Tatum*, 554 S.W. 3d 614, 638 (Tex. 2018). It is, moreover, grounded in fact in that there is no dispute and never has been any dispute that Edgemere relied on receiving new deposits to satisfy its liability to repay old deposits. Count 5 therefore fails.

Plaintiff also argues—as usual, without support—that Defendants owed Edgemere a tort duty to disclose their motives to DMN. Plaintiff offers no citation to supporting authority because none exists. And anyway, Plaintiff never explains how Defendants' motives impact the truthfulness of the DMN stories: whether motivated by public-spiritedness or profit, it is undisputed in the pleadings that Edgemere was in dire financial straits, that it lacked the financial wherewithal to repay prior deposits, and that new depositors risked physical displacement even if they ultimately were able to recover their deposits.

Finally, while Plaintiff advances that Kong's opinion that it was "unfair and unjust for Edgemere to continue to take deposits from future residents under current circumstances" must be evaluated in the context it appeared in the DMN story to determine whether it is fact or opinion or true or false, the context does not help him. As explained in the DMN story (available at ECF 1-6): "Edgemere's own financial disclosures . . . document the luxury senior living community's dire

cash position;" the "company that operates the community . . . recently alerted bond investors that it had fallen far below a requirement to keep 150 days of cash on hand, according to a filing with Electronic Municipal Market Access;" as "of Dec. 31, Edgemere said it had only 62 days' worth of cash—or enough to stretch through March 3." Under those circumstances, Kong opined that it was "unfair and unjust" to take new deposits "considering that a financial failure of Edgemere could affect the living situation and health of hundreds of seniors."

Plaintiff's feeble response is that new deposits were protected by an escrow agreement. *But that wasn't the point*, as made clear in the article. The point, as expressed there, was that Edgemere's impending financial failure "could" (not would, but could) "affect the living situation and health of hundreds of seniors." And that is obviously true: Edgemere's own disclosure was that it had only 62 days of cash on hand *before it ran out of money entirely*, at which point it would have had no resources to pay for resident care.

Count 5 is non-actionable opinion as a matter of law based on the facts of the Complaint. And well-founded opinion at that. Defendants are entitled to judgment thereon.

Count 7, for civil conspiracy, fails.

For the reasons explained above, Plaintiff's underlying tort claims fail. So too, therefore, does Count 7 for civil conspiracy.

Count 8, for equitable subordination, fails.

Count 8 offers mere conclusions, not factual allegations. It was spartan as advanced in the original petition and it is inexcusably barebones with the amount of documentation and access now afforded to Plaintiff. Plaintiff offers the conclusion that ICI's conduct injured Edgemere's "other creditors" without ever identifying which creditors or how they were injured. Plaintiff offers the conclusion that Edgemere's "other creditors, including the bondholders, were deceived to their

damage," without ever identifying how or when they were deceived or how or to what extent they were damaged.

To be sure, Plaintiff asserts that ICI's acts and omissions damaged Edgemere. But it is not the case, and never has been the case, that equitable subordination lies against any creditor who damages a debtor. Rather, as the Court recognized in its earlier order, equitable subordination lies only when (and only to the extent that) a creditor's inequitable conduct confers an advantage on the creditor to the detriment of other creditors. Here, ICI was the lessor. By Plaintiff's own characterization, Edgemere would fail without a restructure of the Ground Lease. At no point does Plaintiff explain how ICI's exercise of its rights as lessor—or even, if proven, its alleged unlawful acts or omissions—conferred an advantage on ICI at the expense of other creditors. In fact, it always remained the case that Edgemere had two options vis-à-vis ICI: reject the Ground Lease (and fail) or cure, assume, and assign the Ground Lease (which it did).

Nor is it any answer that additional information will be available in discovery. For one thing, the availability of discovery is not a license to permit a deficient theory to proceed. For another, Plaintiff refuses to answer questions about how Defendants' alleged acts or omissions harmed Edgemere. Asked for that information in an interrogatory, Plaintiff objected and then, "[s]ubject to and without waiving any objection," stated that he "will disclose [his] expert's damages analysis as specified in the Court's scheduling order." In other words, Plaintiff refuses to plead facts and, after refusing to do so, refuses also to provide detail in discovery. That is utterly unworkable. Count 8 is deficient and Defendants are entitled to judgment thereon.

Plaintiff has not shown his entitlement to re-plead.

Plaintiff asks leave to re-plead his Complaint to cure the identified deficiencies. He has not shown his entitlement to do so. The Court's Scheduling Order imposed a deadline for amended

pleadings, which has come and gone. Once established, a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Plaintiff identifies no "good cause" for further amendment. Indeed, he had ample time to craft his Complaint and the benefit of thousands upon thousands of pages of document productions to do so. He identifies no reason he came up short and has not demonstrated good cause for any further additional untimely amendment. *Kovalchuk v. Wilmington Savings Fund Society*, 2021 WL 5119705 *2 (5th Cir. Nov. 3, 2021) (per curiam) (where plaintiff requested leave to amend as part of his response to motion for judgment on the pleadings, after pleadings amendment deadline already had expired, he failed to identify with particularity grounds for amendment and relief he sought and therefore leave to amend was properly denied).

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Dated: February 9, 2024

/s/ *Ryan C. Hardy*

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 2024 a true and correct copy of the foregoing was filed electronically with the Clerk of Court via ECF, which caused a copy of same to be sent by email to all counsel of record.

/s/ *Ryan C. Hardy*
Ryan C. Hardy