IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANGUILLA RE, LLC, a Delaware limited liability company and successor by assignment from DAVID B. SMALL and DAVID B. SMALL 2004 ANNUITY TRUST U/A/D 7/21/04,)))) C.A. No. N11C-10-061 MMJ CCLD
Plaintiff and Counterclaim Defendant,)))
V.)
LUBERT-ADLER REAL ESTATE FUND IV, L.P., a Delaware limited partnership, et al.,))))
Defendants and Third- Party Plaintiffs,)))
V.)
DAVID B. SMALL, an individual,)))
Third-Party Defendant.)

Submitted: July 30, 2012 Decided: October 16, 2012

On Motion of Anguilla RE, LLC to Dismiss Certain Counterclaims Contained in Defendants' Answer to Complaint and Amended Counterclaims

GRANTED IN PART DENIED IN PART

On David B. Small's Motion to Dismiss Amended Third-Party Complaint GRANTED IN PART DENIED IN PART

On Motion of Anguilla RE, LLC and David B. Small for Sanctions Pursuant to Delaware Superior Court Rule 11(c)

DENIED

MEMORANDUM OPINION

Michael R. Lastowski, Esquire, Sommer L. Ross, Esquire (argued), Duane Morris LLP, Wilmington, Delaware, Attorneys for Anguilla RE, LLC, Plaintiff and Counterclaim Defendant and David B. Small, Third-Party Defendant

Stuart M. Brown, Esquire, Laura D. Hatcher, Aleine Porterfield, Esquire, DLA Piper LLP (US), Wilmington, Delaware; Gregory S. Otsuka, Esquire (argued), DLA Piper LLP (US), Chicago, Illinois, Attorneys for Defendants Lubert Adler Real Estate Fund IV, L.P., Lubert Adler Capital Real Estate Fund IV, L.P., and Lubert Adler Real Estate Parallel Fund IV, L.P.

JOHNSTON, J.

INTRODUCTION

Before the Court are two Motions to Dismiss, one filed by Plaintiff Anguilla RE, LLC ("Anguilla") to dismiss the Amended Counterclaims, and the other filed by Third-Party Defendant David B. Small ("Small") to dismiss the Third-Party Complaint. Both Anguilla and Small move to dismiss on the ground that the Defendants, Lubert-Adler Real Estate Fund IV, L.P., Lubert-Adler Capital Real Estate Fund IV, L.P., and Lubert-Adler Real Estate Parallel Fund IV, L.P. (collectively referred to as the "Guarantors" or "Lubert Adler Defendants"), and SOF 82 Anguilla Holdings LLC ("SOF 82"), have failed to state a claim against them.

For the following reasons, Anguilla's Motion to Dismiss is granted in part and denied in part, and Small's Motion to Dismiss is granted in part and denied in part.

FACTUAL BACKGROUND

On May 21, 2005, Small and Barnes Bay Development Ltd. ("Seller") entered into a Purchase and Sale Agreement (the "Original PSA") for the purchase of Unit 6 (the "Villa") of The Villas at Anguilla (the "Resort"), located in the British West Indies. Pursuant to the Original PSA, Small agreed to purchase the Villa for \$6,250,000.00, less a 10% incentive, subject to additional terms and conditions. The Original PSA provided that this sum

was to be paid in incremental deposits,¹ and that Seller would deliver the Villa in May 2007.

That same day, Small and Seller also executed the following documents: (i) Incentive Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Incentive Addendum"); (ii) Furnishings Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Furnishings Addendum"); (iii) Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Addendum"); and (iv) Non-Deed Use Restricted Addendum to Purchase and Sale Agreement The Villas at Anguilla ("Non-Deed Use Restricted Addendum") (collectively, referred to as "Addenda").

On February 20, 2006, Small, Seller, and the Guarantors executed Rider A which modified the Original PSA. Rider A required Small to make two additional deposits, totaling \$1,175,050.00.² Rider A also provided, in pertinent part:

In the event Purchaser has made all Deposits required under this Agreement, such Deposits and all the terms, conditions and obligations of Seller under this Agreement and all ancillary written agreements to the Agreement shall be guaranteed by: 1) Lubert Adler Real Estate Fund IV, L.P., a Delaware limited

2

¹ Small agreed to pay 20% of the purchase price (\$1,125,000.00) upon execution of the Original PSA. Small was required to make an additional 20% deposit (\$1,125,000.00) within 15 days of Seller's notice that the Villa's roof had been completed. The balance of the purchase price (\$3,375,000.00) was due at closing.

² Small was required to pay an additional 20% deposit (\$1,125,000.00) and a further deposit (\$50,050.00) for the construction of an office within the Villa.

partnership; 2) Lubert Adler Real Estate Parallel Fund IV, L.P., a Delaware limited partnership; and 3) Lubert Adler Capital Real Estate Fund IV, L.P., a Delaware limited partnership as to an undivided one-third obligation each, totaling the entire amount of such Deposits.

Rider A further provided that the Villa would be delivered by December 2008.

In accordance with the Original PSA and Rider A, Small paid all deposits due to the Seller.³ These deposits totaled \$3,425,050.00.

Because of delays in construction of the Villa, Seller offered Small what Small has characterized as "complimentary" stays at the Resort. The Lubert Adler Defendants claim that Small and his family members stayed at the Resort on eight separate occasions for a total of 68 nights. The value of those stays, the Lubert Adler Defendants contend, totals \$707,500.00.

On August 2, 2008, by assignment, Anguilla acquired Small's interest and obligations under the Original PSA, Addenda and Rider A.

On May 4, 2009, Small, Seller, and the Guarantors executed a letter agreement, which further modified the Original PSA, Addenda, and Rider A (all executed documents collectively referred to as the "PSA").⁴ The letter

³ The Lubert Adler Defendants dispute this claim, arguing that Small failed to pay all deposits as required by the PSA and Rider A.

⁴ For reasons not apparent to the Court, Small signed the letter agreement despite having assigned all interest to Anguilla.

agreement expressly provided that: "Buyer has the right to terminate the transaction contemplated by the Purchase Agreement at any time and for any reason prior to Closing."

By letter dated August 15, 2011, Anguilla notified the Guarantors that the Seller was in default of its obligations under the PSA: "Defaults and events of defaults have occurred and are continuing under the Purchase and Sale Agreement because, among other things, the transaction contemplated by the agreement has not yet closed." Anguilla demanded the immediate return of the deposits which totaled \$3,425,050.00.

A second demand letter was sent to the Guarantors on October 5, 2011, by which Anguilla expressly terminated the PSA, effective that date.

The Guarantors did not refund the deposits.

Bankruptcy Proceedings

On March 17, 2011, Seller filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. Seller remains insolvent.

On July 27, 2011, Seller sought and was granted leave of the Bankruptcy Court for Seller's first priority chargee, SOF-VIII-Hotel II Anguilla Holdings LLC ("SOF-VIII-Hotel II"), to exercise its power of sale

through a public auction of the Resort, including the Villa. That same day, the public auction was held and SOF 82 emerged as the highest bidder.

On September 20, 2011, the Bankruptcy Court entered an order authorizing SOF-VIII-Hotel II relief from the automatic stay to take the necessary steps to transfer title to the Resort to SOF 82. SOF 82 is the current owner of the Resort.

PROCEDURAL CONTEXT

On October 6, 2011, Anguilla filed suit in this Court against the Lubert Adler Defendants, alleging breach of contract against each of the Guarantors.

On November 17, 2011, the Lubert Adler Defendants filed an Answer to Anguilla's Complaint and asserted three Counterclaims, alleging: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) entitlement to a declaratory judgment that the Lubert Adler Defendants are not obligated to make payment. The Lubert Adler Defendants also filed a Third-Party Complaint against Small, alleging: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) *quantum meruit*; and (5) entitlement to a declaratory judgment that the Lubert Adler Defendants are not obligated to make payment.

On December 7, 2011, Anguilla moved to dismiss the Lubert Adler Defendants' Counterclaims. On December 20, 2011, Small moved to dismiss the Third-Party Complaint. Following oral argument on the motions, the Court held:

...[T]hat Defendants have waived their right to assert choice of law by failing to include any choice of law argument in their briefing. Additionally, by citing extensively to Delaware case law and statutory law, Defendants have conceded that Delaware law governs these motions.

The Court finds that denial, with leave to re-plead, is appropriate as to Defendants' counterclaims and third-party complaint. In order to determine whether the insolvency (or another) exception applies, Defendants must allege information regarding the transfer of the Resort, including what interests were transferred to the new owner and the identity of that entity. If Defendants are not able to do so, they will be barred from asserting setoff or prosecuting the principal's affirmative claims, unless an exception to the general rule⁵ is applicable.

Finally, unless or until a determination is made regarding the adequacy of the remedies at law, this Court will not be in a position to sever and transfer any equitable claim to the Court of Chancery.

THEREFORE, Plaintiff's Motion to Dismiss Defendants' Counterclaims, and David B. Small's Motion to Dismiss are hereby **GRANTED**, with leave to re-plead. Defendants' Motion for the Honorable Mary M. Johnston to Sit by Designation on the Court of Chancery is hereby **DENIED**,

6

⁵ As previously set forth in this opinion, a guarantor cannot prosecute on an independent cause of action that could be asserted by a principal against a creditor. There are three exceptions: (1) the guarantor has taken an assignment of the claim or the principal has consented to the guarantor's use of the claim; (2) both principal and guarantor are joined as defendants; or (3) the principal is insolvent.

without prejudice, pending further determination of the adequacy of remedies at law.

IT IS SO ORDERED.

On April 19, 2012, the Lubert Adler Defendants, as well as SOF 82, filed an Amended Answer to Anguilla's Complaint and asserted three Counterclaims, alleging: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) entitlement to a declaratory judgment that the Lubert Adler Defendants and SOF 82 are not obligated to make payment.

That same day, the Lubert Adler Defendants, joined by SOF 82, filed an Amended Third-Party Complaint against Small, alleging: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; (4) *quantum meruit*; and (5) entitlement to a declaratory judgment that the Lubert Adler Defendants and SOF 82 are not obligated to make payment.

On May 10, 2012, Anguilla moved to dismiss the Counterclaims raised by the Lubert Adler Defendants and SOF 82. That same day, Small moved to dismiss the Third-Party Complaint.

The Court held oral argument on the most recent set of motions on July 30, 2012.

DISCUSSION

I. MOTIONS TO DISMISS

A. Standard of Review

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof." The Court must accept as true all non-conclusory, well-pleaded allegations. Every reasonable factual inference will be drawn in favor of the non-moving party. If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.

B. Parties' Contentions

Anguilla and Small

Anguilla has moved to dismiss the Lubert Adler Defendants and SOF 82's Amended Counterclaims. In support of its Motion, Anguilla argues that the counterclaims asserted on behalf of SOF 82 must be dismissed because SOF 82 has not been properly joined as a party to this action.

⁸ Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson, 2009 WL 597268, at *2 (Del. Super.) (citing Doe v. Cahill, 884 A.2d 451, 458 (Del. 2005)).

⁶ Spence v. Funk, 396 A.2d 967, 968 (Del. 1978).

⁷ *Id*.

⁹ Spence, 396 A.2d at 968.

Alternatively, Anguilla argues that if SOF 82 had been properly joined as a party, any counterclaims pertaining to the complimentary visits – *i.e.*, breach of contract and implied covenant of good faith and fair dealing – must be dismissed because there was neither an agreement nor an implied understanding that Anguilla would pay for such visits.

Small also has moved to dismiss the Amended Third-Party Complaint, advancing arguments that overlap largely with Anguilla's contentions. Small argues that the claims asserted by SOF 82 must be dismissed because SOF 82 was not properly joined as a party. Small further contends that even if SOF 82 were properly joined, any claims seeking recovery for the complimentary visits – *i.e.*, breach of contract, unjust enrichment, *quantum meruit*, or implied covenant of good faith and fair dealing – must be dismissed because there was neither an agreement nor an expectation that Small would pay for such visits.

Both Anguilla and Small contend that Delaware law governs the instant matter because the Lubert Adler Defendants and SOF 82 have waived any right to assert that Anguillan law applies. In the alternative, Anguilla and Small argue that even if Anguillan governs this litigation, the Lubert Adler Defendants and SOF 82 have failed to state valid claims under Anguillan law.

The Lubert Adler Defendants and SOF 82

The Lubert Adler Defendants and SOF 82 contend that Anguillan law governs any litigation stemming from a breach of the PSA. According to the Lubert Adler Defendants and SOF 82, the PSA "contains a choice of law provision that expressly provides that any claims and disputes stemming [from the PSA] shall be governed by Anguillan law."

The Lubert Adler Defendants and SOF 82 further argue that SOF 82 was properly added as a claimant by virtue of this Court's March 28, 2012 Opinion, which expressly granted the Lubert Adler Defendants leave to replead. The Lubert Adler Defendants and SOF 82 contend that the Court's Opinion "plainly contemplated the addition of the owner of the Resort, SOF 82, for the purposes of addressing any deficiencies noted in the Opinion, and further noted that SOF 82, as owner, may be considered an indispensible party for at least one claim."

Because SOF 82 has been properly added as a party, the Lubert Adler Defendants contend that they may seek affirmative relief, or alternatively, may set-off SOF 82's independent claim. As to the breach of contract claim asserted against both Anguilla and Small, the Lubert Adler Defendants and SOF 82 contend that this claim does not relate to the alleged complimentary visits. Rather, the breach of contract claim stems from Anguilla and Small's

material and repudiatory breach of the PSA by refusing to accept tender of the Villa. Because Anguilla and Small have not moved to dismiss this claim as it relates to the repudiation of the PSA, the Lubert Adler Defendants and SOF 82 contend that this claim survives the pending motions.

The Lubert Adler Defendants and SOF 82 also argue that they have adequately pled a claim for unjust enrichment. According to the Lubert Adler Defendants and SOF 82, Small "received and was enriched by a valuable benefit worth approximately \$707,500" for the complimentary visits.

With respect to their claims for *quantum meruit* and breach of the implied covenant of good faith and fair dealing, the Lubert Adler Defendants and SOF 82 waive such claims if the Court determines that Anguillan law governs the case. However, if a determination is made that Delaware law applies, the Lubert Adler Defendants and SOF 82 request an opportunity to submit supplemental briefing to the Court on these claims

C. Analysis

1. Choice of Law

The parties dispute whether the choice of law provision, set forth in the PSA, governs this litigation. The Lubert Adler Defendants and SOF 82 contend that, pursuant to the PSA, Anguillan law governs any litigation stemming from a breach of the PSA. Anguilla and Small refute this claim, arguing instead that Delaware law controls.

After reviewing pertinent Anguillan law, the Court finds no substantive difference between Delaware law and Anguillan law for the claims at issue in this case. The Court's analysis, and ultimate conclusions, will be the same regardless of whether the Court applies Delaware law or Anguillan law. Therefore, the Court need not resolve whether the choice of law provision, set forth in the PSA, is controlling. The court law controlling.

_

¹⁰ Section 17 of the PSA, under the heading "Miscellaneous," includes the following provision: "This Agreement is governed by Anguillan law notwithstanding any conflicts of law or choice of law principles to the contrary."

¹¹ No party has presented to the Court any Anguillan authority demonstrating that application of Anguillan law would mandate a result that would deviate in any material respect from analysis under Delaware law.

¹² For ease in the Court's analysis, the Court will rely upon, and provide citations to, Delaware statutory and case law only.

2. Status of SOF 82

In their amended pleadings, the Lubert Adler Defendants added SOF 82 as a party, and asserted claims against Anguilla and Small on behalf of themselves and SOF 82. The precise status of SOF 82 in this litigation, however, has been the subject of much dispute among the parties.

Superior Court Civil Rule 14 permits the impleader of a third party.

Rule 14 provides, in pertinent part:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. ¹³

Rule 14 determinations are matters within the sound discretion of the trial court. 14

The Court finds that SOF 82, as the current owner of the Villa and the principal, may be liable to the Lubert Adler Defendants for all or part of Anguilla's claims against the Defendant Guarantors. If a determination is made that the Lubert Adler Defendants, as guarantors, are obligated to return Anguilla's deposit on the Villa, the Lubert Adler Defendants may be entitled

-

¹³ Super. Ct. Civ. R. 14(a).

 $^{^{14}}$ Burris Foods, Inc. v. Deliotte & Touche, 1991 WL 215896, at *4 (Del. Super.).

to seek indemnification¹⁵ from SOF 82, or alternatively, may have a subrogation claim¹⁶ against SOF 82.¹⁷ Therefore, pursuant to Rule 14, SOF 82 should be aligned as a third-party defendant in the case.

Under Rule 21, the Court has broad discretion to add a party "at any stage of the action and on such terms as are just." Exercising its authority under Rule 21, the Court joins SOF 82 as a Third-Party Defendant.

3. Right to Set-off Claims

Under Delaware law and Anguillan law, a guarantor may only assert the independent claim of the principal (as a defense or counterclaim) where, *inter alia*, the principal and guarantor are joined as defendants.¹⁹ In such

¹⁵ See State for Use of Bldg. Comm'n for William M. Henry Comprehensive High Sch. for Use of M. A. Harnett v. Wood, 173 A.2d 327, 333 (Del. Super. 1961); see also 38 Am. Jur. 2d Guaranty § 99 (2012) ("A guarantor has the right to indemnity but only after paying the creditor.").

¹⁶ See Brooks v. Savitch, 576 A.2d 1329, 1331 (Del. Super. 1989) ("When a surety discharges an obligation of his principal, the surety becomes entitled by right of subrogation, to whatever security the creditor has for enforcement of his claim against the principal or to all the rights ... means or remedies which the creditor has for enforcing payment against the principal."); Leiter v. Carpenter, 22 A.2d 393, 395 (Del. Ch. 1941) ("[T]he surety or guarantor who pays the creditor's debt is ordinarily subrogated to all of his rights and remedies, of every nature, against the principal, for its collection.").

¹⁷ The Court was not provided with a copy of the Guaranty Agreement between the Lubert Adler Defendants and SOF 82. Therefore, the Court can only speculate as to each party's rights and obligations under the Guaranty Agreement, and whether the parties have waived any rights.

¹⁸ Super. Ct. Civ. R. 21.

¹⁹ Continental Group, Inc. v. Justice, 536 F.Supp, 658, 661 (D. Del. 1982).

instances, the guarantor may set off the principal's claims against the creditor's claim; however, the guarantor may not recover affirmatively.²⁰

As the Court previously has found, SOF 82, the principal, is now properly joined as a party. Therefore, the Lubert Adler Defendants may assert the independent claims of SOF 82 in the nature of set-off against Anguilla's claim on the guaranty.

Quautum Meruit and Breach of the Implied Covenant of Good Faith and Fair Dealing

It is well-settled Delaware law that a party waives an argument by not including it in its brief.²¹ With the exception of a single footnote, there is no reference to (or analysis of) the claims for *quantum meruit*, or breach of the implied covenant of good faith and fair dealing, in the brief of the Lubert Adler Defendants or SOF 82.²² Therefore, the Court finds that the Lubert Adler Defendants and SOF 82 have waived their claims for *quantum meruit* and breach of the implied covenant of good faith and fair dealing.

²⁰ *Id.* at 662; *see also First Texas Serv. Corp. v. Roulier*, 750 F.Supp. 1056, 1061 (D. Colo. 1990) ("[I]f the guarantor's recovery on his counterclaim exceeds his liability under the guaranty, the guarantor may not recover this excess.").

²¹ Murphy v. State, 632 A.2d 1150, 1152 (Del. 1993); In re Asbestos Litig., 2007 WL 1651968, at *6 n.82 (Del. Super.).

²² The Lubert Adler Defendants and SOF 82 presented no additional argument with respect to these claims at oral argument.

Unjust Enrichment Claim

Unjust enrichment is defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.²⁴

In order for a claim of unjust enrichment to withstand a motion to dismiss, there must be allegations of "some direct relationship ... between a defendant's enrichment and a plaintiff's impoverishment."²⁵ In other words, there must be "[a] showing that the defendant was enriched unjustly by the plaintiff who acted *for* the defendant's benefit."²⁶

In this case, the Lubert Adler Defendants and SOF 82 have failed to show that they, individually or collectively, were impoverished by Small's

²³ Nemec v. Shrader, 991 A.2d 1120, 1130 (Del. 2010) (citing Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1061 (Del. 1988)).

²⁴ Nemec, 991 A.2d at 1130 (citing Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 394 (Del. Ch. 1999)).

²⁵ MetCap Sec. LLC v. Pearl Senior Care, Inc., 2007 WL 1498989, at *5 (Del. Ch.).

²⁶ *Id.* at *6 (emphasis in original).

complimentary visits. The record demonstrates that SOF 82's predecessor in interest – Barnes Bay – is the proper party to pursue an unjust enrichment claim against Small. At the time of Small's complimentary visits, Barnes Bay was the owner of the Resort, and therefore, would have been the party to suffer any alleged impoverishment resulting from Small's visits.

Further, the pleadings are devoid of any minimal factual allegations whatsoever to support a *prima facie* showing of impoverishment by any party. There are no claims that the Resort could and would have used the space occupied during the alleged "complimentary" visits for other customers. There is no contention that the Resort otherwise was fully occupied during the relevant time period and that, but for the Small's family visits, the Resort would or could have filled those rooms with paying guests (or even with other non-paying "complimentary" occupants). The Lubert Adler Defendants and SOF 82 simply have failed to set forth any factual basis for any impoverishment at all – whether financial or even any non-monetary loss, such as inconvenience. Therefore, the Lubert Adler Defendants and SOF 82's claim for unjust enrichment must be dismissed.

Breach of Contract Claim

Contrary to Anguilla and Small's contention, the Lubert Adler Defendants and SOF 82 have not sought recovery for the complimentary

visits under a breach of contract theory. Rather, the Lubert Adler Defendants and SOF 82's breach of contract claim relates solely to Anguilla and Small's alleged material and repudiatory breach of the PSA by refusing to accept tender of the Villa. Because Anguilla and Small have not moved to dismiss this claim as it relates to the alleged repudiation of the PSA, the breach of contract claim survives the pending motions.

II. Motion for Sanctions

A. Parties' Contentions

Anguilla and Small

Anguilla and Small argue that many of the claims asserted by the Lubert Adler Defendants in their original pleadings were "not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." Rather, according to Anguilla and Small, "it appears the claims have been asserted by [the Lubert Adler] Defendants solely to harass Small, cause unnecessary delay and increase the cost of litigation, each of which is an improper purpose under Rule 11(b)(1)."

The Lubert Adler Defendants

The Lubert Adler Defendants contend that they have asserted good faith claims for relief that are founded in law and fact, and are not the result

of misrepresenting the facts or the law. In support of their argument, the Lubert Alder Defendants point to the fact that the Court granted them leave to re-plead their claims. According to the Lubert Adler Defendants, had "the Court believed that the Lubert Adler Parties had asserted the dismissed claims simply to harass, cause delay, or increase the cost of litigation, it is difficult to imagine that the Court would have expressly allowed the Lubert Adler Parties to replead."

B. Analysis

Superior Court Civil Rule 11 requires all pleadings, motions and other papers submitted to the Court to be signed by an attorney. By signing, filing or submitting such papers, attorneys certify that, to the best of their knowledge, and based upon a reasonable inquiry, such papers are well-grounded in fact and warranted by existing law.²⁷ Under Rule 11(b)(1), an attorney certifies that the pleading or motion is "not being presented for any improper purpose, such as to harass or to cause unnecessary delay or to needless[ly] increase the cost of litigation."²⁸ Similarly, Rule 11(b)(2) requires an attorney to certify that the "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for

²⁷ Super. Ct. Civ. R. 11(b).

²⁸ Super. Ct. Civ. R. 11(b)(1).

the extension, modification, or reversal of existing law or the establishment of new law."²⁹

An attorney who violates Rule 11's duty of candor may be subject to sanctions.³⁰ Delaware trial courts, however, rarely impose Rule 11 sanctions.³¹ "[S]anctions should be reserved for those instances where the Court is reasonably confident that an attorney does not have an objective good faith belief in the legitimacy of a claim or defense."³² When a court does deem a Rule 11 sanction appropriate, such sanctions are to be "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."³³

Allegations of violations of Rule 11's ethical and professional obligations are extremely serious. Such charges are all too easily made and may require the unnecessary expenditure of scarce judicial and client resources to address and resolve. The threat of asserting Rule 11 claims should never be used as a litigation strategy.

²⁹ Super. Ct. Civ. R. 11(b)(2).

³⁰ Super. Ct. Civ. R. 11(c).

³¹ Sternberg v. Nanticoke Mem'l Hosp., 2009 WL 2219287, at *1 (Del. Super.); Wilson v. B & R. Transporters, Inc., 1994 WL 381001, at *2 (Del. Super.).

³² Smith v. Donald L. Mattia, Inc., 2012 WL 252271, at *5 (Del. Ch.) (citing Xen Investors, LLC v. Xentex Techs, Inc., 2003 WL 25575770, at *3 (Del. Ch.)).

³³ Super. Ct. Civ. R. 11(c)(2).

The standards set by the Delaware Bench and Bar demand that a motion for Rule 11 sanctions be brought only after the most careful and conscientious consideration, and to seek a remedy for clearly egregious and abusive conduct. Moreover, under appropriate circumstances, a Rule 11 movant may and should be subject to sanctions where it is demonstrated that the motion is pursued for an improper purpose.³⁴

Upon a review of the record and counsel's conduct in this case, the Court finds the imposition of Rule 11 sanctions to be inappropriate. There is nothing in the record to suggest that the Lubert Adler Defendants' Original Counterclaims against Anguilla or the Original Third-Party Complaint against Small were filed in bad faith or with the intent to harass the opposing parties. Although ultimately unsuccessful, certain positions advanced by the Lubert Adler Defendants were neither frivolous nor wholly lacking in merit. The Court granted the Lubert Adler Defendants leave to re-plead the Counterclaims and Third-Party Complaint. This determination clearly indicates that the Court did not find that the arguments were improperly advanced in the first instance.

_

³⁴ See Super. Ct. Civ. R. 11(b)(1); Coughlin v. S. Canaan Cellular Invs., LLC, 2012 WL 2903924, at *2 (Del. Ch.) ("[L]awyers should think twice, three times, four times, perhaps more before seeking Rule 11 sanctions or moving for fees under the bad faith exception.... These types of motions are inflammatory.").

Anguilla and Small's success on the previous motions to dismiss does not provide a basis to impose sanctions against the Lubert Adler Defendants. As this Court has observed, "prevailing on a motion during the course of the proceedings does not satisfy Rule 11 standards nor is there a presumption created in favor of the Rule 11 moving party."³⁵ Therefore, Anguilla and Small's Motion for Sanctions must be denied.

CONCLUSION

For the claims at issue in the pending motions, the Court finds no substantive difference between Anguillan law and Delaware law. Therefore, the Court need not resolve whether the choice of law provision in the PSA controls.

The Court finds that SOF 82, as the current owner of the Villa and the principal, may be liable to the Lubert Adler Defendants for all or part of Anguilla's claims against the Defendant Guarantors. Therefore, exercising its authority under Superior Court Civil Rules 14 and 21, the Court finds that SOF 82 should be added and properly aligned as a Third-Party Defendant.

Because SOF 82 has been added as a party to the litigation, the Lubert Adler Defendants are entitled to assert the independent claims of SOF 82 as a set-off against Anguilla's claim on the guaranty.

³⁵ Ford, 1992 WL 423830, at *2 (Del. Super.).

Turning to the individual claims advanced by the Lubert Adler Defendants and SOF 82, the Court finds that the claims for *quantum meruit* and breach of the implied covenant of good faith and fair dealing have been waived. As to the claim for unjust enrichment, the Court finds that the Lubert Adler Defendants and SOF 82 have failed to show that they, individually or collectively, were impoverished by Small's "complimentary" visits. Finally, the Court finds that the claim for material and repudiatory breach of the PSA -- for refusal to accept tender of the Villa -- survives the pending motions. Neither Anguilla nor Small sought to dismiss this claim.

THEREFORE, the Motion of Anguilla RE, LLC to Dismiss Certain Counterclaims Contained in Defendants' Answer to Complaint and Amended Counterclaims, and David B. Small's Motion to Dismiss Amended Third-Party Complaint are hereby GRANTED IN PART and DENIED IN PART.

The Court finds the imposition of Rule 11 sanctions inappropriate in this case. The Court has seen no evidence suggesting that the Lubert Adler Defendants' Original Counterclaims against Anguilla or the Original Third-Party Complaint against Small were filed in bad faith or with the intent to harass the opposing parties. Although the positions advanced by the Lubert

Adler Defendants ultimately did not prevail, the claims were neither frivolous nor wholly lacking in merit.

THEREFORE, the Motion of Anguilla RE, LLC and David B. Small for Sanctions Pursuant to Delaware Superior Court Rule 11(c) is hereby **DENIED.**

IT IS SO ORDERED.

1s/ Mary M. Johnston

The Honorable Mary M. Johnston