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UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA

In re:)	Case No.: 15-10110-LED
)	
AMERI-DREAM REALTY, LLC,)	Chapter 7
)	
Debtor.)	
_____)	
)	Adv. No.: 15-01087-LED
VICTORIA NELSON, In her Capacity As The)	
Chapter 7 Trustee of AMERI-DREAM)	
REALTY, LLC,)	
)	
Plaintiff,)	Hearing Date: October 26, 2015
v.)	Hearing Time: 1:30 p.m.
)	
ELSIE PELADAS-BROWN,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Victoria Nelson, in her capacity as the Chapter 7 Trustee (the “**Plaintiff**” or the “**Trustee**”) of Ameri-Dream Realty, LLC (the “**Debtor**” or the “**Company**”), by and through her attorneys of record, Schwartz Flansburg PLLC, submits her Motion for Summary Judgment (the “**Motion**”) against defendant Elsie Peladas-Brown (“**Brown**” or the “**Defendant**”) on all claims for relief set forth in that certain adversary complaint (the “**Complaint**”) filed on May 21, 2015 (Docket No. 1). The Trustee respectfully asks this Court

for an order granting summary judgment on the grounds that there are no genuine material issues of fact in dispute regarding the claims set forth in the Complaint filed by the Trustee against defendant Brown.

This Motion is made and based on Rule 56 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, the points and authorities which follow, the Statement of Undisputed Facts in Support of the Trustee's Motion for Summary Judgment (the "**SOF**")¹ and exhibits attached thereto, filed contemporaneously with the Motion, the pleadings and papers and other records contained in the Court's file, judicial notice of which is hereby requested, and any evidence or oral argument presented at the time of the hearing on this matter. In support of the Motion, the Trustee respectfully states as follows:

Factual Background

1. In 2014, the Defendant was a member, manager and property manager of the Company, a real estate sales and property management company based in Las Vegas, Nevada, prior to filing for relief under Chapter 7 of the United States Bankruptcy Code. The Company was family owned and operated prior to its collapse. The Defendant was a member and manager of the Company for all time periods that are the subject of this lawsuit.

2. The Company is domiciled in the State of Nevada and conducted significant business activities in the District of Nevada. The Defendant is believed to be a resident of the State of Nevada, but upon information and belief, fled to Philippines.

3. The Plaintiff is the Court-appointed Trustee over the Company in Case No. 15-10110-LED, United States Bankruptcy Court, for the District of Nevada (the "**Action**").

¹ Capitalized terms not otherwise defined herein shall have those meanings ascribed to them in the Statement of Undisputed Facts in Support of this Motion.

4. As part of its business, the Company managed residential rental properties (the “**Business**”). In the normal course of its Business, the Company received and held rental security deposits on behalf of its customers’ tenants. At the time of the wrongful actions asserted herein, the Company held in excess of \$1,200,000 of tenant security deposit money (the “**Security Deposits**”).

5. Under Nevada Revised Statutes Section 645.310(1), security deposits for tenants are to be retained until the termination of the underlying lease or rental transaction.

6. In late March of 2014, the Company discovered that significant funds were missing from the bank account designated to hold tenant security deposits. At the time of the theft, the Company held security deposits for more than 1,000 tenants.

7. The Defendant orchestrated various unauthorized transactions, unbeknownst to the Company or her co-manager and husband, John M. Brown (“**Mr. Brown**”), which transactions included the wire transfers of the majority of the Security Deposits to the Philippines.

8. The Trustee understands the Security Deposits were disbursed in the Philippines and are likely not recoverable. The Defendant apparently disbursed the Security Deposits to friends and family in need after the damage caused by Typhoon Haiyan in November of 2013. Typhoon Haiyan was reported to be one of the strongest storms ever recorded, with winds reaching or exceeding 195 miles per hour.

9. Neither the Company nor Mr. Brown had any knowledge of the Defendant’s scheme, and on May 4, 2015, Mr. Brown was divorced from the Defendant. The divorce decree, which was uncontested, requires the Defendant to indemnify Mr. Brown and the Company from any claims of embezzlement or theft relating to the loss of the Security Deposits. Mr. Brown has

not been charged with a crime in this matter, and is available to testify if called as a witness.

10. At all times relevant to this Complaint, the Defendant was a member, manager and the property manager for the Company. The Defendant was also a licensed real estate agent and property manager in the State of Nevada, and a member of the Greater Association of Las Vegas Realtors.

11. As a licensed realtor and property manager in the State of Nevada, the Defendant is charged with the knowledge and responsibility of safeguarding the Security Deposits. It is undeniable in light of the Defendant's licenses that she knew sending the Security Deposits to the Philippines would be a violation of the law, and would cause her to lose her real estate licenses, which licenses are now inactive. The Defendant also knew she had a duty to manage the Security Deposits prudently and in a fashion that minimized risk.

12. In sum, the Defendant had the knowledge and the motive to breach her fiduciary duties to the Company, its customers and its tenants, and in fact did breach such duties by secretly transferring the Security Deposits to the Philippines. The transfers of the Security Deposits were made for no consideration at all, and the Defendant understood the Security Deposits could not possibly be repaid.

13. As a result of the foregoing, the Trustee retained counsel and agreed to pay her counsel a reasonable fee for their services.

14. All conditions precedent to the institution of this action have been performed, waived or excused.

Jurisdiction

15. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. §§

157(b)(2)(A), and (O). Venue of the Debtor's Chapter 7 case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

16. This Court also has supplemental jurisdiction over all claims in this case because they are asserted in connection with the Trustee's duties to recover assets on behalf of the estate, and because the allegations in this lawsuit share a common nexus of facts with those in the Action.

17. This Court has personal jurisdiction over the Defendant and venue is proper in the Bankruptcy Court for the District of Nevada because: a) the Defendant engaged in significant business in this District; b) the Defendant's wrongful conduct occurred in significant part in this District; and c) the Company is a debtor before this Court, and holds the claims asserted in this Complaint.

Argument

Standards for Summary Judgment

18. Fed. R. Civ. P. 56(c) provides for summary judgment on a claim when "the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The substantive law determines which facts are material for purposes of summary judgment, and disputes over facts that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. The non-moving party may not rest on "the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial," i.e., that the evidence is such that a rational trier of fact could return a verdict for the non-moving party. Id. at 248, 251-52.

19. “There is no genuine issue of material fact if the party opposing the motion ‘fails to make an adequate showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’” Taylor, 880 F.2d at 1045, quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Ray, 920 F. Supp at 1097. Issues of material fact must be supported by evidence, and conclusory allegations that are unsupported cannot defeat a motion for summary judgment. Taylor, at 880 F.2d at 1045; Ray, 920 F. Supp. at 1097.

20. A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

21. In this matter, there are no genuine issues of material fact with respect to all claims set forth in the Complaint. Indeed, “[w]hen the facts are not in dispute, contract interpretation is a question of law.” Federal Ins. Co. v. American Hardware Mut. Ins. Co., 124 Nev. 319, 322, 184 P.3d 390,392 (Nev, 2008) (citing Grand Hotel Gif Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992)). Importantly, as set forth herein, the exhibits attached hereto, the accompanying Statement of Undisputed Facts, and the Court’s Docket demonstrate that the Trustee is entitled to summary judgment on all claims set forth in the Complaint.

The Trustee is Entitled to Summary Judgment on Count I of the Complaint as the Defendant Breached Her Fiduciary Duty to the Company

22. Under Nevada law, an officer or director of a corporation “stands as a fiduciary to the corporation.” In re AgriBio Tech, Inc., 319 B.R. 216, 223 (Bankr. D. Nev. 2004), citing

Leavitt v. Leisure Sports Inc., 734 P.2d 1221, 1224 (Nev. 1987). The fiduciary duty requires a duty of good faith, honesty and full disclosure. Western Indus., Inc. v. General Ins. Co., 533 P.2d 473, 476 (1975). Moreover, courts apply fiduciary duties to managers of limited liability companies. As recently explained by the Delaware Chancery Court:

It seems obvious that, under traditional principles of equity, a manager of an LLC would qualify as a fiduciary of that LLC and its members. . . . Equity distinguishes fiduciary relationships from straightforward commercial arrangements where there is no expectation that one party will act in the interests of the other.

The manager of an LLC – which is in plain words a limited liability “company” having many of the features of a corporation – easily fits the definition of a fiduciary. The manager of an LLC has more than an arms-length, contractual relationship with the members of the LLC. Rather, the manager is vested with discretionary power to manage the business of the LLC.

Thus, because the LLC Act provides for principles of equity to apply, because LLC managers are clearly fiduciaries, and because fiduciaries owe the fiduciary duties of loyalty and care, the LLC Act starts with the default that managers of LLCs owe enforceable fiduciary duties.

Auriga Capital Corp. v. Gatz Props, 40 A.3d 839, 850-51 (Del. Ch. 2012).

23. The United States Supreme Court has held that an officer or director’s breach of his or her fiduciary obligations to a corporation “is enforceable directly by the corporation, or through a stockholder’s derivative action, [but] in the event of bankruptcy of the corporation, [it is] enforceable by the trustee” because “that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation – creditors as well as stockholders.” In re AgriBio Tech, Inc., 319 B.R. 216, 223 (Bankr. D. Nev. 2004), quoting Pepper v. Litton, 308 U.S. 295, 306-07 (1939).

24. Finally, “[a] claim for breach of fiduciary duty under Nevada law requires a plaintiff to demonstrate a fiduciary duty exists, that duty was breached, and the breach proximately caused the damages.” J.P. Morgan Chase Bank, N.A. v. KB Home, 632 F.Supp. 2d

1013, 1024 (D. Nev. 2009), citing Brown v. Kinross Gold U.S.A., Inc., 531 F.Supp. 2d 1234, 1245 (D. Nev. 2008). “[A] fiduciary relationship is deemed to exist when one party is bound to act for the benefit of the other party. Such a relationship imposes a duty of the utmost good faith.” Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 880-81 (9th Cir. 2007), quoting Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev. 1986).

25. Here, the Defendant owed fiduciary duties to the Company as a manager of the Company. Moreover, under Nevada Revised Statutes Section 645.310(1), security deposits for tenants are to be retained until the termination of the underlying lease or rental transaction. Simply put, the Defendant owed fiduciary duties to the Company to safeguard the Security Deposits.

26. The Defendant breached her fiduciary duties to the Company by not only failing to safeguard the Security Deposits, but purposely stole the Security Deposits for her own personal benefit, with malice and intent to injure the Company.

27. The tortious conduct of the Defendant proximately causes the damage to the Company because the Security Deposits were transferred for no consideration, with the Defendant’s knowledge, whereby the Company lost over \$1,200,000 in tenant Security Deposits. Accordingly, the Trustee is entitled to summary judgment on Count I of her Complaint.

The Trustee is Entitled to Summary Judgment on Count II of the Complaint for Defendant’s Common Law Misrepresentation to the Company

28. Under Nevada law, a claim for common law misrepresentation requires: (i) defendant made a false representation; (ii) defendant knew or believed that his or her representation was false, or that defendant had an insufficient basis of information for making the representation; (iii) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; (iv) plaintiff justifiably relied upon defendant’s misrepresentation; and (v)

plaintiff sustained damages as a result. Barmettler v. Reno Air, Inc., 956 P.2d 1382 (Nev. 1998); Blanchard v. Blanchard, 839 P.2d 1320 (Nev. 1992).

29. As set forth above, the Defendant owed fiduciary duties to the Company, including the duty to use ordinary care when representing the reasons for transferring the Security Deposits. The Defendant made a false representation to the Company by representing the transfer of the Security Deposits was an appropriate transaction for the Company to undertake, when in fact, the Defendant knew that the Security Deposits would be transferred to the Philippines and would never be recovered by the Company.

30. Indeed, the Defendant intended to induce the Company to refrain from acting upon her misrepresentation and the Company justifiably relied on the Defendant's misrepresentation regarding the safekeeping and wire transfers of the Security Deposits. As a result of the Defendant's misrepresentation, the Security Deposits were transferred for no consideration and the Company lost approximately \$1,200,000, for which sums were disbursed in the Philippines and are not recoverable by the Trustee or Company. Accordingly, the Trustee is entitled to summary judgment on Count II of her Complaint.

The Trustee is Entitled to Summary Judgment on Count III of the Complaint for Defendant's Negligent Misrepresentation

31. Under Nevada law, a claim for negligent misrepresentation requires: (i) a defendant, in the course of an action in which he or she had a pecuniary interest, failed to exercise reasonable care or competence in obtaining or communicating information to plaintiff; (ii) plaintiff justifiably relief on this information; and (iii) plaintiff suffered damages as a result. Barmettler v. Reno Air, Inc., 956 P.2d 1382 (Nev. 1998); Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nevada, 575 P.2d 938 (Nev. 1978). Moreover, a special relationship arising from contract can serve as a basis for liability for economic or physical injury resulting from reliance

upon negligent misrepresentation. Elizabeth E. v. ADT Sec. Systems West, Inc., 839 P.2d 1308 (Nev. 1992).

32. Here, the Defendant owed fiduciary duties to the Company, including the duty to use ordinary care when safeguarding the Security Deposits. The Defendant, as a manager and member of the Company, had a pecuniary interest in the business of the Company but failed to exercise reasonable care to the Company by falsely transferring the Security Deposits.

33. The Company and the tenants managed by the Company relied on the Defendant's misrepresentations that the Security Deposits were safe, when in fact, the Defendant transferred them to the Philippines for her own personal benefit. As a result of the representations made by the Defendant to the Company and the tenants, the Company lost \$1,200,000 in Security Deposits, and roughly 1,000 tenants lost the money they transferred to the Company. The Defendant knew that neither the Company nor the tenants would ever be repaid, given the Defendant's plan to abscond with the money. Accordingly, the Trustee is entitled to summary judgment on Count III of her Complaint.

The Trustee is Entitled to Summary Judgment on Count IV of the Complaint and a Declaration that the Company and John M. Brown are Innocent

34. As set forth above, the Defendant, acting alone, and without the knowledge of the Company or John M. Brown, stole the Security Deposits from the Company and transferred them to the Philippines for no consideration.

35. Neither the Company nor Mr. Brown had any knowledge of the Defendant's scheme, and on May 4, 2015, Mr. Brown was divorced from the Defendant. See Declaration of Vicki L. Nelson, attached as **Exhibit A** to the Trustee's Statement of Undisputed Facts, filed concurrently herewith. Indeed, Mr. Brown's divorce decree with the Defendant, which was uncontested, requires the Defendant to indemnify Mr. Brown and the Company from any claims

of embezzlement or theft relating to the loss of the Security Deposits. Id. Mr. Brown has not been charged with a crime in this matter. Id.; see also the Declaration of Kyle Edwards, filed as **Exhibit B** to the Trustee's Statement of Undisputed Facts.

36. Accordingly, the Trustee is entitled to a declaration that Mr. Brown and the Company are innocent in this matter, had nothing to do with the Defendant's actions and scheme to steal the Security Deposits from the Company, and to transfer them to the Philippines. See also the Declaration of Kyle Edwards, filed as **Exhibit B** to the Trustee's Statement of Undisputed Facts. As a result, the Trustee is entitled to summary judgment on Count IV of her Complaint.

Conclusion

37. For the reasons stated herein, the Trustee is entitled to Summary Judgment on all claims for relief set forth in her Complaint.

Dated this 28th day of August, 2015.

Respectfully Submitted,

/s/ Samuel A. Schwartz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent electronically via the Court's CM/ECF system on August 28, 2015, to the following:

SAMUEL A. SCHWARTZ on behalf of Plaintiff VICTORIA NELSON

sam@schwartzlawyers.com, ecf@schwartzlawyers.com;schwartzecf@gmail.com

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via REGULAR MAIL on August 28, 2015, to the following:

Pearl Insurance Group
c/o The Corporation Trust Company of Nevada
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Bellon & Maningo
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Greenwich Insurance Company
c/o Lee Santos
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100 Constitution Plaza, 17th Floor
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/s/ Janine Lee
Janine Lee