**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**TRIAL DIVISION – CIVIL**

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| CAMBRIDGE WALNUT PARK, LLC, | : | OCTOBER TERM, 2007 |
| | : | |
| Plaintiff, | : | NO. 01102 |
| | : | |
| v. | : | COMMERCE PROGRAM |
| | : | |
| MUNICIPAL CAPITAL APPRECIATION PARTNERS I, L.P., et al., | : | Control No. 10030805, 10030909 |
| | : | |
| Defendants. | : | |

**ORDER**

**AND NOW**, this 10th day of November, 2010, upon consideration of plaintiff's Motion for Partial Summary Judgment, the MCAP defendant's Motion for Summary Judgment, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Plaintiff's Motion is **DENIED**.
2. The MCAP defendants' Motion is **GRANTED in part** and Counts V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of the Amended Complaint are **DISMISSED**.

**BY THE COURT:**

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**ARNOLD L. NEW, J**.

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| Defendants. | : | |

**OPINION**

In this action, plaintiff Cambridge Walnut Park, LLC ("Cambridge") asserts fifteen claims against seven related companies and two other entities associated with the development and operation of a multi-family housing facility in West Philadelphia (the "Property"). Cambridge is the current holder of certain bonds issued in 1988 in connection with the Property (the "1988 Bonds"). Cambridge claims the defendants owe it over $4 million in principal and interest on the 1988 Bonds. Defendants deny that any money is due to Cambridge because the Property has not generated sufficient revenues to pay off the 1988 Bonds in accord with the terms of a Subordination Agreement executed in 2000 (the "Subordination Agreement").

Cambridge moved for summary judgment claiming the 1988 Bonds should have been paid off with the $14.9 million in capital contributions received by one of the defendants[1] in 2006. Defendants moved for summary judgment claiming Cambridge has not sustained any damages. Defendants argue the Property would never have generated the funds to pay off the 1988 Bonds even if defendants had not done any of the things Cambridge claims were wrongful.

[1] Walnut Housing Associates 2003 Limited Partnership ("WHA").

This case involves a multitude of interrelated contracts, numerous similarly named parties, and 22 years of transactions among them. The most relevant facts are the following. The Redevelopment Authority of the City of Philadelphia ("RDA") issued two sets of bonds in connection with the Property, the first in 1988 and the second in 2000. In 2000, when the second set of bonds was issued, the RDA, along with the bank who acted as trustee with respect to the Bonds,[2] the owner of the Property,[3] and the 1988 Bondholder[4] entered into the Subordination Agreement. The Subordination Agreement calls for the 2000 Bonds to be paid off before the 1988 Bonds and subordinates the mortgage securing the 1988 Bonds to the mortgage securing the 2000 Bonds.

At the time Cambridge filed this action, Cambridge owned the 1988 Bonds, one of the defendants[5] owned the 2000 Bonds, and another of the defendants[6] owned the Property. All parties agree that the 2000 Bonds went into default in 2003, so the default provisions of the Subordination Agreement and related documents apply. The Subordination Agreement provides as follows:

> The indebtedness evidenced and secured by the Series 1988 Bond Documents (the "Subordinate Indebtedness") is hereby subordinated in right of payment to any and all of the indebtedness evidenced and secured by the Series 2000 Bond Documents (the "Senior Indebtedness") as and to the extent, but only to the extent, provided in Sections 6.07 and 7.04 of the Series 2000 Indenture. **Unless and until any Senior Creditor gives the Subordinate Creditors notice of the occurrence of an Event of Default under the Series 2000 Bond Documents,**

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[2] In 2000, the trustee bank was State Street Bank and Trust. Its successor in interest, U.S. Bank National Association, is one of the defendants in this case (the "Trustee Bank").

[3] Defendant Walnut Park Plaza Associates ("WPPA") was the "Owner" of the Property at the time the 2000 Subordination was executed. In 2004, it transferred the Property by quitclaim deed to WHA.

[4] In 2000, the 1988 Bondholder was defendant Municipal Capital Appreciation Partner I, L.P.("MCAP I").

[5] MCAP I

[6] WHA. In 2009, the Property was sold at sheriff's sale to defendant Walnut Park Plaza LLC ("WPPLLC"), which currently owns it. The sheriff's sale resulted from a foreclosure under the 2000 Mortgage.

> **the Subordinate Creditors may receive and accept payments on account of principal and interest payable under the Series 1988 Note, only to the extent and from the sources permitted in the Series 2000 Indenture.** Accordingly, all Net Revenues (as defined in the Series 2000 Indenture) will be paid by the Developer[7] to the 2000 Trustee for deposit and disposition solely as provided in Section 6.07(a) and (b) of the Series 2000 Indenture, and the provisions of Sections 5.02 and 5.03 of the Series 1988 Indenture shall apply only to the amounts to be paid by the Trustee under Section 6.07(b)(viii) of the Series 2000 Indenture. If the Subordinate Creditors shall receive any payments or other rights in any property of the Company[8] after any Senior Creditor has given the Subordinate Creditors notice of a default under the Series 2000 Bond Documents, such payments or property shall be received by the Subordinate Creditors in trust for the Senior Creditors and shall immediately be delivered and transferred to the Senior Creditors.[9]

The parties disagree as to the effect of the highlighted portion of the Disputed Subordination Provision once the 2000 Bonds are declared in default.

Cambridge argues the highlighted portion allows it and the Subordinate Creditors[10] to continue to collect payments against the Subordinate Indebtedness. Cambridge also argues the Subordinate Creditors are no longer limited to the collection provisions and priorities of the 2000 Indenture, which expressly prohibit collecting against capital contributions.[11] Instead, the Subordinate Creditors are entitled to revert to the broader collection provisions of the 1988 Note and Loan Agreement, which Cambridge argues allow collection against capital contributions.[12]

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[7] Defendant WPPA was the "Developer" of the Property at the time the Subordination Agreement was executed.

[8] In 2000, the "Company" was WPPA.

[9] Subordination Agreement, ¶ 2 (emphasis added) (hereinafter the "Disputed Subordination Provision").

[10] The relevant rights and obligations in the Disputed Subordination Provision are those of the "Subordinate Creditors" which are defined in the Subordination Agreement as the RDA and the Trustee Bank. *See* Subordination Agreement, p. 1. The term does not include the 1988 Bondholder. Therefore, the 1988 Bondholder, Cambridge, does not have the express right to do anything under the Disputed Subordination Provision of the Subordination Agreement.

[11] *See* 2000 Indenture, p. 10.

[12] The 1988 Bond Documents do not expressly state the 1998 Trustee may seize capital contributions, and it is questionable whether the authors of those documents intended to allow such funds to be used for repayment.

Defendants argue the Disputed Subordination Provision prevents the Subordinate Creditors from collecting anything against the 1998 Bonds once the 2000 Bonds are in default. Instead, Cambridge is limited to whatever excess monies the Senior Creditors obtain after they exercise their default rights with respect to the 2000 Bonds.

Cambridge's interpretation makes no sense when the Disputed Subordination Provision is read, as it must be, in conjunction with the other default provisions of the Subordination Agreement and with the sections of the 2000 Indenture referenced in the Disputed Subordination Provision.

The following provisions of the Subordination Agreement show the parties intended for the 1998 Bond indebtedness to remain subordinate to the 2000 Bond indebtedness even after default, and they intended the 1988 Bondholders to get paid only after the 2000 Bondholders do.

> The Subordinate Creditors agree that the Senior Creditors shall have, as determined in accordance with and subject to the terms of the Series 2000 Bond Documents, upon the occurrence of an Event of Default under and as defined in the Series 2000 Bond Documents, the exclusive right, as between the Senior Creditors and the Subordinate Creditors to (i) accelerate any Senior Indebtedness; (ii) commence any action to foreclose or exercise any power of sale under the Senior Mortgage; (iii) accept a deed or assignment in lieu of foreclosure for the property or any part or portion thereof; (iv) seek or obtain a receiver for the Property or any part or portion thereof; (v) take possession or control of the Property, and collect and accept rents from the Property; (vi) sue the Company under any of the Series 2000 Bond Documents; (vii) exercise any rights of set-off or recoupment that any Senior Creditor may have against the Company; or (viii) take any other enforcement action against the Property or any part or portion thereof, all without any responsibility or liability to the Subordinate Creditors with respect to the Property, except that to the extent that such action yields proceeds in excess of the amounts secured by the Series 2000 Bond Documents, the Senior Creditors shall cause such excess proceeds to be paid to the Series 1988 Trustee for application in accordance with the Series 1988 Bond Documents.

In other words, only the Senior Creditors may hunt for assets to pay off the Bond indebtedness. The Subordinate Creditors and Cambridge may look forward to whatever crumbs are left after

the 2000 Bondholders have eaten their fill. Cambridge may not forage on its own or dine first on the Company's assets.

The 2000 Subordination Agreement further provides: "No act, omission, breach or other event under this Agreement shall defeat, invalidate or impair in any respect the absolute, unconditional and irrevocable subordination of the Series 1988 Bond Documents to the Series 2000 Bond Documents as provided in this Agreement."[13] In other words, Cambridge is always in second place when it comes to repayment, no matter what happens.

The sections of the 2000 Trust Indenture referenced in the Disputed Subordination Provision also support the defendants' interpretation of that Provision. Under Section 6.07, which applies if the 2000 Bonds are not in default, the repayment scheme has the 1988 Bonds in 8th place and the 2000 Bonds in 1st and 2nd place. Under Section 7.04(b), which applies in the event of a default under the 2000 Bonds, the 2000 Trustee is directed to "apply such moneys, securities, revenues, payments and receipts, and the income therefrom" to pay its own expenses first, the 2000 Bonds second, and the 1988 Bonds fourth.[14] There is nothing in the 2000 Indenture that permits the 1988 Bondholder to pay itself first out of any sources of payment it finds. Indeed, the Disputed Subordination Provision of the Subordination Agreement clearly prohibits the Subordinate Creditors from engaging in such activities:

> If the Subordinate Creditors shall receive any payments or other rights in any property of the Company after any Senior Creditor had given the Subordinate Creditors notice of a default under the Series 2000 Bond Documents, such payments or property shall be received by the Subordinate Creditors in trust for the Senior Creditors and shall immediately be delivered and transferred to the Senior Creditors.[15]

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[13] Subordination Agreement, ¶ 3(e).

[14] 2000 Indenture, §7.04(b).

[15] Subordination Agreement, ¶ 2.

The language of the Subordination Agreement and the 2000 Indenture clearly contradicts Cambridge's view of what occurs upon a default under the 2000 Bonds. Instead, the documents provide for the Subordinate Creditors to continue to be bound by the 2000 Subordination Agreement and the limitations of the 2000 Indenture. Since Cambridge's interpretation of the 2000 Subordination Agreement is incorrect, its Motion for Summary Judgment is denied.

Since Cambridge cannot look to the capital contributions for repayment, it must point to some other source of funds from which it should have been paid under the 1988 Bonds. If there was never any money nor a chance of any money to pay Cambridge, then, as defendants claim, Cambridge has not been harmed by any of their allegedly wrongful acts. In order to defeat summary judgment, Cambridge must show that one or more of the defendants' wrongful acts decreased the profitability of the Property and deprived Cambridge of money due to it under the 1988 Bonds. Cambridge has not done so.

In their Motion for Summary Judgment, defendants state:

> Cambridge's contract and tort claims (Counts I-III, V-VII, and IX-XV) are also subject to summary judgment because Cambridge cannot establish that the supposed misconduct of the MCAP Defendants caused any injury to Cambridge. Rather, undisputed evidence shows that, under the Subordination Agreement, Cambridge had no right to receive any payments on the 1988 Bonds *before* MCAP II took over the project. Moreover, it is undisputed that Walnut Park did not generate sufficient net revenues to make payments on the 1988 Bonds under the governing bond documents. Because Cambridge lacks evidence of causation and damages, summary judgment is appropriate.[16]

Cambridge responds as follows:

> The averments of paragraph 6 are legal conclusions, to which no response is required, and the Subordination Agreement is a document that speaks for itself and is the best evidence of its contents. By way of further response, the Subordination Agreement provides for only a limited subordination of the Series 1988 Bonds to the Series 2000 Bonds. So long as the Series 2000 Bonds are not in default, the Series 1988 Bonds are limited to being repaid out of the sources

[16] Defendants' Motion for Summary Judgment, ¶ 6.

> allowed under the 2000 Trust Indenture and 2000 Loan Agreement. However, following notice of an event of default under the Series 2000 Bonds, the holder of the Series 1988 Bonds is entitled to receive payment from any source of revenue allowed under the 1988 Note. The 1988 Note allows the Series 1988 Bonds to be repaid out of sources of payment, such as capital contributions to the obligor, that are not available to the Series 2000 Bonds. The obligor on the Series 1988 Bonds and Series 2000 Bonds received $14.9 million in capital contributions in 2006, long after the Series 2000 Bonds had gone into default. Despite that under the plain terms of the Subordination Agreement, Cambridge was entitled to be paid the amounts it was owed under the Series 1988 Bonds out of these capital contributions, the MCAP Defendants diverted this money to themselves. Thus, the MCAP Defendants have indeed caused injury to Cambridge. Furthermore, the MCAP Defendants' repeated violations of the Subordination Agreement estop them from relying on the Subordination Agreement as a basis for arguing that they have not "caused any injury to Cambridge."

Cambridge's response is inadequate. It does not identify evidence in the record creating an issue of fact[17] as to whether the Property did generate sufficient "moneys, securities, revenues, payments and receipts, and the income therefrom"[18] to make payments on the 1988 Bonds under the governing bond documents. Instead, Cambridge focuses entirely upon its losing argument that it is entitled to be paid out of capital contributions.

Cambridge's response to Defendants' Statement of Undisputed Facts is similarly evasive. Defendants state:

> Mr. Gruber [defendants' expert] similarly concluded, based on his own analysis, that "for the period from 2002 to 2008 and for each year within that period, [the Property] did not generate Net Project Revenues sufficient to pay the 1988 Bonds under the 'waterfall' set forth in Section 6.07(b) or Section 7.04(b) of the [2000] Indenture."[19]

Cambridge responds:

> It is admitted only that Mr. Gruber drew the conclusions attributed to him in paragraph 197. It is denied that the project lacked sufficient funds to pay the

[17] *See* Pa. R. Civ. P. 1035.3 (a)(2).

[18] These are the types of funds the Trustee may use to pay off the 1988 Bonds as set forth in the 2000 Trust Indenture. *See* 2000 Trust Indenture, §7.04(b).

[19] Defendants' Statement of Undisputed Facts, ¶ 197.

> Series 1988 Bonds – a statement that incorporates legal conclusions to which no response is required. By way of further response, Cambridge was entitled to be paid from funds that were not included in the Net Project Revenues referenced by Mr. Gruber and that are not subject to the "waterfall" referenced by Mr. Gruber. *See* [Cambridge's Argument Regarding Entitlement to Capital Contributions].[20]

Cambridge points to no evidence of any funds that were or could have been generated by the Property and should have been used to pay off the 1988 Bonds. Instead, Cambridge again harps on the capital contributions to which it was not entitled under the term of the Subordination Agreement.

Cambridge does not point to any evidence the defendants committed a wrongful act which caused the Property to generate less money than it could have. If there was never any chance of generating revenue from which to pay off the 1988 Bonds, then the defendants have not deprived Cambridge of any funds to which it was entitled. In other words, defendants have not harmed Cambridge by their conduct.

Harm, loss, or damages are required elements of Cambridge's claims for breach of contract,[21] breach of fiduciary duties,[22] fraudulent conveyance,[23] and tortious interference.[24]

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[20] Cambridge's Response to Statement of Undisputed Facts, ¶ 197.

[21] Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 580 (Pa. Super. 2003) (To support a claim for breach of contract, a plaintiff must allege: 1) the existence of a contract, including its essential terms; 2) a breach of a duty imposed by the contract; and 3) resultant damage. The purpose of damages in a breach of contract case is to return the parties to the position they would have been in but for the breach.")

[22] *See* Estate of Stetson, 463 Pa. 64, 84, 345 A.2d 679, 690 (1975) (To prevail on breach of fiduciary duty claim, the beneficiary must prove "that the trustee has committed a breach of duty and that a related loss has occurred.")

[23] Under the Uniform Fraudulent Transfer Act, a "creditor" may assert a claim. A "creditor" is a person with "a right to payment." 12 Pa.C.S. § 5101. Under the terms of the Subordination Agreement, which incorporates the 2000 Indenture, Cambridge has no right to payment from capital contributions, so it has no claim against such funds.

The transfer of the Property to WHA in 2004 was not a fraudulent conveyance because the mortgage securing the 1988 Bonds was transferred with the Property. The transfer did not "hinder, defraud, or delay" Cambridge's continuing claim against the Property. *See* 12 Pa. C.S. § 5104.

[24] Skiff Re Business, Inc. v. Buckingham Ridgeview, LP, 991 A.2d 956, 965-966 (Pa. Super. 2010)

Since Cambridge has failed to proffer any evidence of a necessary element of its tort and contract claims, such claims in Counts V, VI, VII, IX, X, XI, XII, XIII,[25] XIV, and XV of the Amended Complaint must be dismissed.

Since Cambridge cannot show that it suffered harm as a result of any wrongful act by defendants, Cambridge has no basis for requesting certain of its declaratory or equitable relief. Specifically, it has not produced evidence to justify this court: 1) awarding Cambridge a deed to the Property;[26] 2) awarding Cambridge immediate payment of the value of its equity in the Property;[27] 3) invalidating the sheriff's sale under the 2000 Mortgage;[28] and 4) recharacterizing the 2000 Bond debt as equity.[29] Therefore, these four requests for relief in Counts I, II, III and IV, as well as the entirety of Count VIII, must be dismissed.[30]

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("the elements of tortious interference with contractual relations . . .[include] the occasioning of actual legal damage as a result of the defendant's conduct.")

[25] Count XIII for conversion is also dismissed because Cambridge now has possession of the 1988 Bonds it claims were converted by defendants, and it does not point to any damage it sustained as a result of defendants' possession of the 1988 Bonds.

[26] Cambridge has not shown that is has any current right or entitlement to a deed to the Property. At best, it was a beneficiary of a now discharged mortgage against the Property.

[27] Cambridge has no equity in the Property because the subordinate 1988 Mortgage was discharged by the foreclosure of the 2000 Mortgage.

[28] In a separate action, Cambridge appealed the issue whether it should have been allowed to intervene in, and stay, the foreclosure proceedings under the 2000 Mortgage. Its appeal is presently pending before the Superior Court.

[29] To the extent the 2000 Bond debt still exists after the 2000 Mortgage foreclosure, recharacterizing it as equity in the current owner of the Property, WPPLLC, will not benefit Cambridge because it has no claims to repayment from WPPLLC. Cambridge's claim against the Property under the 1988 Mortgage has been discharged by the foreclosure, and its claim under the 1988 Note is against WPPA, which apparently now has no real assets.

[30] The only claims remaining for resolution at trial are Cambridge's requests for declaratory judgment holding defendants in breach of various provisions of the parties' many agreements and defendants' counterclaim for plaintiff's breach of those same agreements.

For all the foregoing reasons, Cambridge's Motion for Partial Summary Judgment is denied and the MCAP defendants' Motion for Summary Judgment is granted in part.

**BY THE COURT:**

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**ARNOLD L. NEW, J**.