

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

RB AFFORDABLE HOUSING, INC. f/k/a )  
ASB AFFORDABLE HOUSING, INC. and )  
REGIONS BANK, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
GEP, LLC and EDEN POINTE, L.P., )  
 )  
Defendants. )

Case No. 20-0670-BC

**MEMORANDUM AND ORDER**

This matter came before the Court on February 12, 2021, upon Plaintiffs RB Affordable Housing, Inc. f/k/a ASB Affordable Housing, Inc. and Regions Bank (collectively “Plaintiffs”) Motion for Judgment on the Pleadings pursuant to Tenn. R. Civ. P. 12.03. In their motion, Plaintiffs ask the Court to order the dissolution of Defendant Eden Pointe, L.P., to appoint a Liquidating Trustee and/or Receiver with powers enumerated under Tenn. Code Ann. § 61-2-803(b), and to declare that Defendant GEP, LLC breached the terms of the Partnership Agreement.

Additionally, in their February 8, 2021 response to Plaintiffs’ January 12, 2021 Motion for Judgment on the Pleadings, Defendants GEP, LLC and Eden Pointe L.P. (“GEP” and “Eden Pointe” or collectively “Defendants”) filed a Motion to Dismiss Pursuant to TRCP 12.02(6) Based on Prior Suit Pending/Absence of Subject Matter Jurisdiction.<sup>1</sup>

Plaintiffs filed a reply to Defendants’ response, and a response to Defendants’ Rule 12.02(6) motion, prior to the February 12, 2021 hearing. Defendants filed a Supplemental Response on February 12, 2021 after the motion hearing. On February 22, 2021, the Defendants

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<sup>1</sup> The Clerk & Master did not docket Defendants’ Response, which was not filed in compliance with Local Rule 26.03, as a new motion. The Court will, however, address the issues raised therein in this Memorandum and Order.

also filed a Notice of Delivery of Copies of Eden Pointe, LP's Federal Income Tax Returns for the Years 2017, 2018, and 2019 and [Eden Pointe's] State of Tennessee Franchise and Excise Taxes for the Year 2017, which had been filed with the taxing authorities the same day. On February 26, 2021, Plaintiffs filed a response to Defendants' Notice of Delivery of copies of Eden Pointe, LP's tax returns.

Having reviewed the materials submitted in relation to these matters and having considered the argument of counsel, the Court is now ready to rule.

### **UNDISPUTED FACTUAL ALLEGATIONS IN PLEADINGS**

Plaintiffs Regions Bank ("Regions") and RB Affordable Housing, Inc. ("RBAH"), formerly known as ASB Affordable Housing, are active corporate entities. Defendant GEP was administratively dissolved as a limited liability company on August 6, 2019. All three entities formed Eden Pointe as a Tennessee limited partnership organized under the Tennessee Revised Uniform Limited Partnership Act, Tenn. Code Ann. § 61-2-101 *et seq.* ("the Act"), to own and operate the Eden Pointe Apartments, an affordable housing development in Memphis, Shelby County, Tennessee (the "Project"). The parties each executed and agreed to the Amended and Restated Agreement of Limited Partnership of Eden Pointe, LP. (the "Agreement"), submitted as Exhibit A to the Complaint.

The Agreement, in pertinent part, provides as follows:

- GEP is defined as the General Partner and Tax Matters Partner, § 2.2, § 9.6(a), Exhibit 3.
- RBAH is defined as the Special Limited Partner, § 2.2, Exhibit 3.
- Regions is defined as the Investment Limited Partner, § 2.2, Exhibit 3.

- GEP, as General Partner, is “responsible for the management of the Partnership business”, including “pay[ing] all Partnership debts when they become due.” §§ 5.1, 5.5.
- “The Accountants shall prepare, for execution by the General Partner, all tax returns of the Partnership” and may be any “independent certified public accountant or firm of independent certified public accountants as may be engaged by the General Partner[.]” §§ 9.3, 2.2.
- As the Tax Matters Partner, GEP is required to “comply with the responsibilities set forth in Sections 6222 through 6232 of the Code” and “has a fiduciary obligation to perform its duties in such manner as will serve the best interests of the Partnership and the Limited Partners.” § 9.6(a).
- GEP is required to annually prepare and deliver to the other partners Eden Pointe’s federal and state tax returns for the prior calendar year, a budget, financial statements and other financial documents. § 9.7.
- Eden Pointe is to be dissolved if GEP withdraws, unless it is continued in accordance with Article 8 of the Agreement. § 10.1.

At the time of the filing of the Complaint, GEP had not provided Defendants its tax returns for 2018 or its financial statements, in compliance with § 9.7(a) and (c)(1). GEP had also been administratively dissolved.

These parties have been engaged in litigation in Shelby County regarding the foreclosure of the apartment complex project that was the basis for the limited partnership. In 2014, Eden Pointe initiated an action against Regions to enjoin the foreclosure. Shelby County Chancery Court, CH-14-0019. The property was foreclosed upon, and a receiver was appointed to manage

the limited partnership's affairs. In 2016, while the 2014 action was still pending, Eden Pointe and GEP filed another lawsuit against Regions and the receiver, alleging tortious actions by both in violation of their contractual and statutory duties. Shelby County Chancery Court, CH-16-1103. The suits were subsequently consolidated.

The receiver's appointment was concluded on August 11, 2017. The consolidated case remains pending with a sole issue remaining: the disposition of funds being held in the registry of the court, which represent excess proceeds from the foreclosure. GEP and Regions are in a dispute regarding who is entitled to those funds.

### **DEFENDANTS' POST-HEARING FILINGS**

Regarding the delinquent tax returns, Defendants have made two post-hearing filings supplementing their prior pleadings and filings with additional information relevant to the pending motion. Both filings relate to the Eden Pointe delinquent tax returns. In a February 12, 2021 filing, Defendants asserted that GEP was in the process of preparing Eden Pointe's state and federal income tax returns for the years 2017, 2018 and 2019. In its February 22, 2021 filing, Defendants represented to the Court that the federal tax returns for those years had been filed and provided to Plaintiffs. Additionally, they stated that Eden Pointe's 2017 State Franchise and Excise Tax returns had been filed and provided to Plaintiffs.

### **LEGAL ANALYSIS**

#### **Judgment on the Pleadings Rule 12 Standard**

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. In reviewing a trial court's ruling on a motion for judgment on the pleadings, an appellate court must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the

motion. *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn.1991). In addition, “[c]onclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment.” *Id.* See also *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004). A motion for judgment on the pleadings is effectively a motion to dismiss for failure to state a claim upon which relief can be granted. *Timmins v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. Ct. App. 2009) (citing *Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998)). “Such a motion admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action.” *Id.*

The complaint does not need to contain detailed allegations of all facts giving rise to the claims, but it “must contain sufficient factual allegations to articulate a claim for relief.” *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103-104 (Tenn. 2010)). “The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader’s right to relief beyond the speculative level.” *Id.* (quoting *Abshure*, 325 S.W.3d at 103-104). Under Rule 12.03, the Court should “deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief.” *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999).

#### Rule 12.02(6) Standard

A motion to dismiss based upon Tennessee Rule of Civil Procedure 12.02(6) requires a court to determine if the pleadings state a claim upon which relief may be granted. Tenn. R. Civ. P. 12.02(6); *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn.2013). A Rule 12.02(6) motion challenges “only the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence.” *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

A defendant filing a motion to dismiss “admits the truth of all the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action.” *Id.* (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn.2010)) (alteration in original) (internal quotation marks omitted). The resolution of such a motion is determined by examining the pleadings alone. *Id.* See also *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 237 (Tenn. 2014).

*Applicable Provisions of the Tennessee Revised Limited Partnership Act (the “Act”)*

Provisions of the Act that are relevant to the Court’s consideration of Plaintiffs’ pending motion are as follows:

**Tenn. Code Ann. § 61-2-402. When person ceases to be partner.**

- (a) A person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

\* \* \*

- (9) In the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter and the expiration of ninety (90) days after the date of notice to the corporation of administrative dissolution or revocation without a reinstatement of its charter;

**Tenn. Code Ann. § 61-2-405. Discharge of duties – Liability.**

- (a) A general partner shall discharge his duties as a partner, including his duties as a member of a committee:
  - (1) In good faith;
  - (2) With the care an ordinarily prudent person in the like position would exercise under similar circumstances; and
  - (3) In a manner he reasonably believes to be in the best interest of the partnership.

**Tenn. Code Ann. § 61-2-801. When required – Exception.**

- (a) A limited partnership is dissolved and its affairs shall be wound up upon the first to occur of the following:

- (1) At the time or upon the happening of events specified in the partnership agreement;
- (2) Written consent of all partners;
- (3) In the event of withdrawal of a general partner. . .; or
- (4) Entry of a decree of judicial dissolution under § 61-2-802.

**Tenn. Code Ann. § 61-2-802. Judicial dissolution.**

On application by or for a partner, the court of record may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

**Tenn. Code Ann. § 61-2-803. Winding up.**

- (a) Unless otherwise provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners or a person approved by the limited partners ... may wind up the limited partnership's affairs, but the court of record, upon cause shown, may wind up the limited partnership's affairs upon application of any partner, his legal representative or assignee, and in connection therewith, may appoint a liquidating trustee.
- (b) Upon dissolution of a limited partnership and until the filing of a certificate of cancellation as provided in § 61-2-203, the persons winding up the limited partnership's affairs may, in the name of and for and on behalf of the limited partnership, prosecute and defend suits, whether civil criminal or administrative, settle in a reasonable manner and close the limited partnership's business, dispose of and convey the limited partnership's property, discharge or make reasonable provision for the limited partnership's liabilities, and distribute to the partners any remaining assets of the limited partnership, all without affecting the liability of limited partners and without imposing the liability of a general partner or a liquidating trustee.

This Court has the authority to appoint a receiver both through the Limited Partnership Act and, generally, pursuant to Tenn. Code Ann. § 29-1-103. Receiverships are matters over which the Court has substantial discretionary authority. *State ex rel Gibbons v. Smart*, No. W2013-00470-COA-R3-CV, 2013 WL 5988982, at \*6 (Tenn. Ct. App. Nov. 12, 2013); *Huggins v. McKee*, 500 S.W.3d 360, 374 (Tenn. Ct. App. 2016). Tenn. Code Ann. § 29-1-103 provides the Court with authority to appoint a receiver “for the safekeeping, collection, management, and disposition of property in litigation in such court, whenever necessary to the ends of substantial

justice[.]” The burden is on an applicant to establish the case as one proper for such an appointment, which is an extraordinary remedy available as a “process ancillary to a pending suit.” *Huggins*, 500 S.W.3d at 378; *see also Davis v. Reaves*, 70 Tenn. 649, 650 (1879). *Gibson’s Suits in Chancery*, 8<sup>th</sup> Ed. (2004), sets out factors for the Court’s consideration that militate in favor of appointment. *Id.* at § 24.12(A), p. 24-7. Those factors include: the controlling parties are engaging in fraud or inequitable conduct; they are insolvent and enjoying the proceeds of the subject property; they are not properly maintaining the property, including paying taxes or keeping it insured; and they are being indifferent to the plaintiff’s rights. *Id.* Factors the Court is required to consider that militate against appointment of a receiver include “[t]hat the benefits of a receiver are likely to be counterbalanced by the trouble, confusion, expenses, or losses that will probably result from the appointment.” *Id.* at § 24.12(B), pp. 24-7 and 8.

The Act envisions the appointment of a receiver in the context of a judicial dissolution and winding up of a limited partnership. Tenn. Code Ann. §§ 61-2-802 and 803.

#### Prior Suit Pending Doctrine

The Tennessee Supreme Court analyzed the prior suit pending doctrine in its 2008 decision in *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618 (Tenn. 2008), and its 2014 decision in *Cannon ex rel. Good v. Reddy*, 428 S.W.3d 795 (Tenn. 2014). “Under the common-law rule, a party could have an action barred on procedural grounds if there was a prior suit pending against him in the same jurisdiction for the same cause of action.” *West*, 256 S.W.3d at 622 (citing 1 William M. McKinney, *the Encyclopaedia of Pleading and Practice: Under the Codes and Practice Acts, at common Law, in Equity and in Criminal Cases* 750-51 (Northport, Edward Thompson Co. 1895) and *Sperry’s Case*, 77 Eng. Rep. 148, 148 (Exch.)). The four elements to a defense under the prior suit pending doctrine are: “1) the lawsuits must involve identical subject

matter; 2) the lawsuits must be between the same parties; 3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; and 4) the former lawsuit must be pending in a court having personal jurisdiction over the parties.” *West*, 256 S.W.3d at 622 (citing *Cockburn v. Howard Johnson, Inc.*, 215 Tenn. 254, 385 S.W.2d 101 (1964)).

*Analysis of Prior Suit Pending Claim*

The Court has been provided with limited pleadings from the consolidated Shelby County Chancery Court action. From these pleadings, it is apparent that the case involves different parties and different claims. Those suits, initiated by the defendants in this action, claim various contract breach and tort actions against the plaintiffs, and against the court-appointed receiver. These claims revolve around actions taken during the existence of the limited partnership. The 2014 action, for example, was initiated to prevent a foreclosure. The foreclosure occurred, a receiver was appointed, and disputed proceeds are yet to be distributed. None of those claims or actions involve the more tailored claims in this case, i.e., that GEP breached its contractual and statutory duties as general partner of Eden Pointe, L.P., and that a liquidating trustee or receiver should be appointed to wind up the limited partnership. While it is apparent that granting such relief would impact the Shelby County case, granting authority to the court-appointed trustee or receiver to direct that litigation, the Shelby County litigation is not the same case, with the same claims, between the same parties. Accordingly, the Court denies Defendants’ request that it dismiss this action based upon the theory of prior suit pending.

*Analysis of Plaintiffs’ Motion for Judgment on the Pleadings*

As with a claim for relief under Rule 12.02(6), the Court’s analysis of this Rule 12.03 claim is confined to the pleadings, and all inferences are to be drawn in favor of the non-moving party. Defendants have submitted supplemental pleadings showing that the delinquent tax returns – or at

least some of them – have been filed and provided to Plaintiffs. However, GEP has not reinstated its corporate existence, an issue of concern under the Act. Consequently, the Court is not prepared to grant a judgment on the pleadings at this time. With the tax issue resolved, or partially resolved, the reasons typically justifying the appointment of a liquidating trustee or receiver are not present here. There does not appear to be any current fraud or inequitable conduct, nor is GEP benefiting through its control of the partnership as its general partner. There is also no property that is subject to waste. The Court does not believe it appropriate, at this time, to appoint a receiver or liquidating trustee given the expense involved and the limited resources available to fund such an appointee’s activities, i.e., the money held in the Shelby County Clerk & Master’s registry. The Court finds no proof to justify a grant of such relief. Therefore, the Court denies Plaintiffs’ motion for a judgment on the pleadings.

**INSTRUCTION TO THE PARTIES FOR FURTHER PROCEEDINGS**

Given the limited claims and small number of parties, the Court intends to fast track this litigation. The Court sets a Rule 16 conference for Wednesday, March 24, 2021, at 1:30 p.m., and instructs the parties to appear with a proposed schedule that includes a 2021 trial date. This case should require limited discovery and pre-trial pleading, since the Court has disposed of these significant legal issues at the Rule 12 pleading stage. Zoom instructions will be provided by the Calendar Clerk in advance of the Conference.

IT IS SO ORDERED.

  
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ANNE C. MARTIN, CHANCELLOR, PART II  
TENNESSEE BUSINESS COURT PILOT PROJECT

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