United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Franklin Arms Court, L.P.

Bankruptcy No. 02 B 48101

Adversary Caption: National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX v. Franklin Arms Court, L.P.

Adversary No. 03 A 00147

Date of Issuance: April 10, 2003

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
FRANKLIN ARMS COURT, L.P.,	)	Chapter 11
	)	Bankruptcy No. 02 B 48101
Debtor.	)	Judge John H. Squires
	)	
	)	
NATIONAL CORPORATE TAX CREDIT, INC. VIII and NATIONAL CORPORATE TAX CREDIT, INC. IX,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 03 A 00147
	)	
FRANKLIN ARMS COURT, L.P.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX (collectively "NCTC") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by NCTC against Franklin Arms Court, L.P. (the "Debtor") for a declaratory judgment and for a permanent injunction. For the reasons set forth herein, the Court grants the motion.

The Court declares that there have been several major defaults under the Ft. Myers Historic, L.P. partnership agreement. Further, the Court declares that NCTC properly removed the Debtor as the operating general partner and NCTC properly removed the Debtor

from Ft. Myers Historic, L.P. Moreover, the Court declares that NCTC is the sole operating general partner and that the Debtor has no management, ownership, economic or any other interest in Ft. Myers Historic, L.P. Furthermore, the Court enjoins the Debtor from asserting any interest in Ft. Myers Historic, L.P. or holding itself out as operating general partner thereof. The Court orders the Debtor to turn over all of the property, books, records and accounts of Ft. Myers Historic, L.P. in its possession or control or in the possession or control of any of the Debtor's principals.

In addition, the Court grants NCTC its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment. NCTC shall be awarded its reasonable attorneys' fees pursuant to Section 14.19 of the partnership agreement upon the submission within thirty days of the entry of the judgment of the reasonable time expended by its attorneys in connection with this proceeding.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. APPLICABLE STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the

statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases that encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in

dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 323; Matsushita, 475 U.S. at 587; Patrick v. Jasper County, 901 F.2d 561, 564-

566 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 212-13 (Bankr. N.D. Ill. 1993) (citation omitted).

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial summary judgment. Particularly pertinent here is the point that partial summary judgment is available only to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959); Biggins v. Oltmer Iron Works, 154 F.2d 214, 216-17 (7th Cir. 1946); Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987); Arado v. General Fire Extinguisher Corp., 626 F. Supp. 506, 509 (N.D. Ill. 1985); Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25, 28 (N.D. Ill. 1985); In re Network 90°, Inc., 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); Strandell v. Jackson County, 648 F. Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a Rule 56 motion. Capitol Records, 106 F.R.D. at 29.

Summary judgment is appropriate in cases involving the interpretation of contractual

documents. Stenograph Corp. v. Fulkerson, 972 F.2d 726, 728 (7th Cir. 1992); Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 602 (7th Cir. 1989). "[S]ummary judgment should be entered only if the pertinent provisions of the contractual documents are unambiguous; it is the lack of ambiguity within the express terms of the contract that forecloses any genuine issues of material fact." Ryan, 877 F.2d at 602 (citation omitted). Construing the language of a contract is a question of law appropriate for summary judgment, unless the contract is ambiguous. Reaver v. Rubloff-Sterling, L.P., 303 Ill. App.3d 578, 581, 708 N.E.2d 559, 561 (3rd Dist.), appeal denied, 184 Ill.2d 573, 714 N.E.2d 533 (1999); Ford v. Dovenmuehle Mortgage, Inc., 273 Ill. App.3d 240, 244, 651 N.E.2d 751, 754 (1st Dist. 1995) (citations omitted).

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("402.M statement"). The 402.M statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

NCTC filed a 402.M statement that substantially complies with the requirements of Rule 402.M. It contains numbered paragraphs setting out uncontested facts with specific references to an affidavit and parts of the record. NCTC submitted an affidavit in support of the instant motion from Val Muraoka, the individual responsible for the oversight of the interest of NCTC in Ft. Myers Historic, L.P.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

The Debtor has complied with this Rule, but has not filed a counter affidavit to rebut or dispute any of the facts contained in the Muraoka affidavit submitted by NCTC. Rather, the Debtor merely argues and concludes, without any supporting evidence, that the creation of Ft. Myers Historic, L.P. was merely a financing arrangement. Further, according to the Debtor, the relationship between the Debtor and NCTC was "that of borrower and lender and, as such, [NCTC is] only entitled to those rights of an equitable mortgagee."

The Debtor filed a statement of additional material facts as well as exhibits thereto. The Debtor states that the creation of Ft. Myers Historic, L.P. was intended by the parties to be a financing arrangement whereby certain entities would obtain the benefit of utilizing tax credits from the property. Further, the Debtor states that as of December 1, 1999, the value of the "leased fee interest" in the property was $5,050,000.00. See Exhibit A to Debtor's Statement of Additional Facts. The Debtor also contends that the amount of Florida Community Bank's secured claim in the property is approximately $2,876,911.72. See Exhibit C to the Debtor's Statement of Additional Facts. Additionally, the Debtor argues that pursuant to certain terms of a partnership agreement, the Debtor was entitled to retain full possession and control over the property. See Exhibit D to the Debtor's Statement of Additional Facts.

III. FACTS AND BACKGROUND

Based upon NCTC's 402.M statement and the 402.N statement of the Debtor, the Court finds the following facts are undisputed. NCTC was established under the laws of California. See Affidavit of Val Muraoka at ¶ 2. The Debtor is a limited partnership established under Illinois law with its principal place of business in Illinois. Ft. Myers Historic, L.P. ("Ft. Myers") is a limited partnership organized under the laws of Illinois pursuant to an "Agreement of Limited Partnership of Ft. Myers Historic L.P.," dated December 30, 1999 (the "Partnership Agreement"). Id. at ¶ 4. James Economou and Associates, Ltd. ("Economou") and the Debtor served together as the operating general partner of Ft. Myers. See Tab 1 attached to Muraoka's Affidavit. NCTC is the administrative general partner of Ft. Myers. Id.

National Corporate Tax Credit Fund VIII and National Corporate Tax Credit Fund IX are the limited partner of Ft. Myers. Id.

Ft. Myers is the beneficial owner of land, improvements and related personal property in Ft. Myers, Florida, known as Collier Arcade and Franklin Arms (the "Development"). Id. Ft. Myers was formed for the stated purpose of, inter alia, investing in the Development, and through the construction, renovation, rehabilitation, operation, leasing and potential sale of the Development, securing tax credits for the certified rehabilitation of a certified historic structure pursuant to the Tax Reform Act of 1986 and Section 47 of the Internal Revenue Code. See Muraoka Affidavit at Tab 1, § 2.5. As operating general partner, Economou and the Debtor were vested with the overall management and control of the business, assets and affairs of Ft. Myers, subject to certain limitations and restriction. Id. at Tab 1, § 5.1A. Pursuant to an "Amendment to Agreement of Limited Partnership of Ft. Myers Historic L.P.," effective August 30, 2002, Economou withdrew from Ft. Myers, leaving the Debtor as the sole operating general partner of Ft. Myers. Id. at Tab 2.

Section 11.4A of the Partnership Agreement grants NCTC the absolute right to remove the operating general partner upon ten days notice if a major default occurs under the Partnership Agreement and to appoint itself, an affiliate, or any other person as the successor operating general partner. Id. at Tab 1. § 11.4A. Section 11.4A of the Partnership Agreement provides in relevant part:

> Upon a Major Default, the Administrative General Partner shall have the right, but not the obligation, in its sole discretion, upon ten days' prior notice to such Operating General Partner, in the

> case of the occurrence of an event specified in this Section 11.4A, to remove such Operating General Partner and to appoint itself or any of its Affiliates or any other Person to succeed such Operating General Partner as an Operating General Partner in accordance with the provisions of Section 11.2 hereof.

Id.

The major defaults that trigger NCTC's right to remove the operating general partner are expressly designated in the Partnership Agreement. Section 11.4A. provides that:

> the following events shall be considered a Major Default under the terms of this Agreement:
>
> (i) Any Operating General Partner (or Principal, to the extent applicable) shall:
>
> . . .
>
> (b) be in material breach of any monetary provision of this Agreement, the Development Agreement or any other document for ten days after notice thereof has been given by the Administrative General Partner; . . . .
>
> . . .
>
> (d) become Bankrupt; or
>
> (ii) The Partnership shall:
>
> (a) be in material breach of any Project Document[1] or any other material agreement or document affecting the Partnership;
>
> . . .
>
> (iii) Completion shall not have occurred and either

[1] Project Documents include "the Mortgage, the Mortgage Note and any other document relating to the financing, development, rehabilitation or operation of the Development." See Muraoka Affidavit at Tab 1, p. 15.

> Development is not placed in service by the Completion Date; or
> (iv) Prior to Completion, . . . (b) any Lender shall have commenced foreclosure proceedings against either Development.

See Muraoka Affidavit at Tab 1, § 11.4A., pp. 63-64

Section 5.9 of the Partnership Agreement sets forth in relevant part, the financial obligations of the operating general partner and principal to the partnership and states:

> The Operating General Partner and the Principal each hereby jointly and severally (a) guarantees Completion of the Development on or before the Completion Date, (b) covenants that they will pay any Development Deficit and (c) covenants that from the date hereof until Rental Achievement, they will pay all expenses of operating and maintaining the Development to the extent necessary to maintain Break-Even Level, and (d) guarantees Rental Achievement on or before the Rental Achievement Date.

Id. at § 5.9.

On June 28, 2002, Florida Community Bank, as the mortgage holder on the construction loan for the Development, filed a foreclosure action against Economou and Ft. Myers, in the Circuit Court of Lee County, Florida. See Muraoka Affidavit at ¶ 7 and Tab 3 attached thereto. On June 28, 2002, Florida Community Bank, formerly known as Hendry County Bank, as the mortgage holder on another construction loan for the development, filed a foreclosure action against Economou and Ft. Myers, in the Circuit Court of Lee County, Florida. Id. at ¶ 8 and Tab 4 attached thereto.

The completion date is defined in the Partnership Agreement as October 15, 2000, unless completion was delayed due to unavoidable events, but in no event was the completion

date to be extended beyond December 31, 2000. See Muraoka Affidavit at Tab 1, p. 8. To date, the Development has not been completed. See Muraoka Affidavit at ¶ 9. The rental achievement date is defined in the Partnership Agreement as December 31, 2000. See Muraoka Affidavit at Tab 1, p. 15.

To date, Ft. Myers has not secured permanent financing for the Development and a 93% residential occupancy rate has never been achieved. Accordingly, rental achievement has not been completed. See Muraoka Affidavit at ¶s 10 and 11. The Development is currently in default on two mortgage construction loans and foreclosure proceedings have been initiated by the respective mortgage holders. See Muraoka Affidavit at Tabs 3 and 4.

The Debtor has failed to pay real estate taxes on the Development in the approximate amount of $50,000.00. See Muraoka Affidavit at ¶ 12 and Tab 5 attached thereto. The Debtor has further failed to pay the quarterly payments under a promissory note to The City of Fort Myers Downtown Redevelopment Agency (the "Agency"), which was due on June 11, 2002. The Agency has declared the entire principal balance of the note in the amount of $59,806.55 to be due. Id. at ¶ 13 and Tab 6 attached thereto.

By letter dated October 14, 2002, NCTC advised the Debtor that there had been various major defaults and demanded that they be cured within ten days, on or before October 24, 2002. Id. at ¶ 14 and Tab 7 attached thereto. Moreover, the letter advised that pursuant to the relevant provisions of § 11.4 of the Partnership Agreement, the Debtor was effectively removed as the operating general partner from Ft. Myers as of October 24, 2002 and the administrative general partner was appointed as the successor operating partner. Id. The

Debtor failed to cure any of the major defaults. See Muraoka Affidavit at ¶ 15. Thus, the cure period expired on October 24, 2002.

On November 8, 2002, the Debtor filed a Chapter 11 bankruptcy petition. Shortly thereafter, by letter dated November 12, 2002, NCTC advised the Debtor that it was exercising its right to remove it as the operating general partner, and naming NCTC as successor operating general partner, pursuant to Article 11.4 of the Partnership Agreement. Id. at ¶ 16 and Tab 8 attached thereto. Notwithstanding the foregoing notice and demand, the Debtor fails and refuses to acknowledge that it has been removed as the operating general partner of Ft. Myers. Id. at ¶s 17 and 19. The Debtor further fails and refuses to turn over control of Ft. Myers or relinquish Ft. Myers' books and records to NCTC. Id. at ¶ 18. The Debtor continues to manage and control Ft. Myers and refuses to remedy any of the major defaults under the Partnership Agreement. Id. at ¶s 17, 18 and 19. The Debtor's refusal to relinquish control of Ft. Myers is threatening Ft. Myers' ability to continue to own the Development. This threat is manifested by, inter alia, the two foreclosure actions that are pending against Ft. Myers. Id. The Debtors actions are further impeding Ft. Myers' ability to refinance the Development, and without such refinancing, the Development will be lost in the foreclosure actions. Id. at ¶ 20.

On January 21, 2003, NCTC filed the instant complaint against the Debtor. Pursuant to Count I of the complaint, NCTC seeks a preliminary and permanent injunction enjoining the Debtor from holding itself out and otherwise acting as the operating general partner of Ft. Myers and ordering the Debtor to turn over all property, books, records, funds and accounts of

Ft. Myers. In addition, NCTC seeks its taxable costs and reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement. Under Count II of the complaint, Ft. Myers asks the Court for a declaratory judgment declaring that on October 24, 2002, the Debtor was removed as the operating general partner of Ft. Myers and that thereafter, pursuant to Section 11.B of the Partnership Agreement, it had no right to participate in the management or operation of Ft. Myers, to receive any future allocations of profits or losses, distributions, funds, assets or fees from Ft. Myers or to receive any outstanding advances or loans in connection with Ft. Myers; that the removal of the Debtor as operating general partner of Ft. Myers constitutes a voluntary withdrawal by the Debtor effective as of October 24, 2002, at which time any and all of its ownership interest in Ft. Myers was automatically terminated; that the Debtor owns no interest of any kind in Ft. Myers, which is subject to the Debtor's bankruptcy estate; and that as of October 24, 2002, NCTC became successor operating general partner of Ft. Myers. Further, NCTC requests its taxable costs and reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement.

On February 24, 2003, the Debtor filed its answer, affirmative defenses and counterclaim. NCTC filed an answer to the counterclaim and has asserted seven affirmative defenses. The Debtor asserts a counterclaim against NCTC pursuant to the Illinois Uniform Fraudulent Transfers Act, 740 ILCS 160/5 et seq. The Debtor contends that its beneficial interest in the Development was an asset of the Debtor. Further, the Debtor maintains that the assignment of the Debtor's beneficial interest in the Development was a transfer that was made without receiving a reasonably equivalent value in exchange for the transfer, and was made

while the Debtor was engaging in a business or transaction for which after making the transfer, the remaining assets of the Debtor were unreasonably small in relation to the business transaction. Moreover, the Debtor alleges that it became insolvent as a result of the transfer. The Debtor seeks to avoid the transfer and recover judgment against NCTC. NCTC has disputed these allegations made by the Debtor. The instant motion deals only with NCTC's causes of action against the Debtor and does not encompass the Debtor's counterclaim.

IV. DISCUSSION

A. Count I–Injunctive Relief

Pursuant to Count I of the complaint, NCTC seeks a preliminary and permanent injunction against the Debtor from holding itself out and otherwise acting as the operating general partner of Ft. Myers. NCTC requests that the Debtor be ordered to turn over all property, books, records, funds and accounts to Ft. Myers. NCTC also seeks the award of its taxable costs and reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement.

A party seeking a preliminary injunction is required to demonstrate a likelihood of success on the merits, that it has no adequate remedy at law, and that it will suffer irreparable harm if the relief is not granted. Prematek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 811 (7th Cir. 2002) (citations omitted); Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001). If the moving party can satisfy these conditions, the Court must then consider any irreparable harm an injunction would cause the nonmoving party. Prematek, 300 F.3d at 811

(citation omitted). Finally, the Court must consider any consequences to the public from denying or granting the injunction. Id. (citation omitted). The Court, sitting as a court of equity, then weighs all these factors employing a sliding-scale approach. Id. (citation omitted). The more likely the plaintiff's chance of success on the merits, the less the balance of harms need weigh in its favor. Id. (citation omitted). The Court finds that NCTC has established all factors necessary for the entry of a permanent injunction in its favor.

Initially, the Court notes that the Partnership Agreement provides that it shall be governed by and construed in accordance with the laws of the state applicable to contracts made and to be performed entirely therein. See Tab 1 attached to Muraoka Affidavit at § 14.1, p. 68. Thus, the Court will apply Illinois law to the matter at bar. A partnership and the rights and duties of its member partners are controlled by the terms of the partnership agreement. Galesburg Clinic Ass'n v. West, 302 Ill. App.3d 1016, 1018, 706 N.E.2d 1035, 1036 (3rd Dist. 1999) (citing Fisher v. Parks, 248 Ill. App.3d 666, 674-75, 618 N.E.2d 1202, 1208 (5th Dist.), appeal denied, 153 Ill.2d 559, 624 N.E.2d 806 (1993)). A partnership agreement is interpreted and enforced pursuant to general contractual principles so that the agreement's meaning is determined from the language in that agreement. Fisher, 248 Ill. App.3d at 675, 618 N.E.2d at 1208. In construing a partnership agreement, "the court's primary objective is to ascertain the intent of the parties as evidenced by the language used." Johnson v. Johnson, 129 Ill. App.3d 22, 25, 472 N.E.2d 72, 75 (4th Dist. 1984). A partnership is a contractual relationship, and the principles of contract law fully apply. 129 Ill. App.3d at 25, 472 N.E.2d at 74-75.

Contract interpretation, including the question of whether a contract is ambiguous, involves conclusions of law. Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1036 (7th Cir. 1998). Illinois law utilizes a "four corners" approach in the interpretation of contracts, holding that if the language of a contract appears to admit only one interpretation, the case is over. See AM Int'l Inc. v. Graphic Mgmt. Assocs., Inc., 44 F.3d 572, 576 (7th Cir. 1995) (citing Illinois law). Contracts "'must be construed to give effect to the intention of the parties which, when there is no ambiguity in the terms of the [contract], must be determined from the language of the [contract] alone.'" Bourke, 159 F.3d at 1036 (citing Flora Bank & Trust v. Czyzewski, 222 Ill. App.3d 382, 388, 583 N.E.2d 720, 725 (5th Dist. 1991)). See also In re McCoy, 260 B.R. 863, 868 (Bankr. N.D. Ill. 2001) (court must interpret a contract in accordance with the intentions of the parties). As the Illinois Supreme Court recently stated, "[t]he terms of an agreement, if not ambiguous, should generally be enforced as they appear, . . . and those terms will control the rights of the parties. . . . Moreover, any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision." Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 479, 693 N.E.2d 358, 368 (1998) (internal citations omitted).

The threshold inquiry under the Illinois "four corners" rule, is whether the Partnership Agreement is ambiguous. Section 11.4A. of the Partnership Agreement explicitly provides that in the event of a major default, NCTC has the absolute right, "in its sole discretion,... to remove [the] Operating General Partner and to appoint itself or any of its Affiliates or any other Person to succeed [the] Operating General Partner. . . ." See Tab 1 attached to Muraoka Affidavit at § 11.4A., p. 64. The clear and unambiguous terms of the Partnership Agreement

state that NCTC has the sole discretion to remove the Debtor as operating general partner of Ft. Myers in the event of a major default. In short, the Court does not find any ambiguity in the Partnership Agreement with respect to NCTC's right to remove the Debtor as operating general partner of Ft. Myers in the event of a major default. Hence, "[w]here the contractual provisions are unambiguous, the court will enforce them according to their plain meaning." Lavelle v. Dominick's Finer Foods, Inc., 227 Ill. App.3d 764, 768, 592 N.E.2d 287, 289 (1st Dist. 1992).

Next, the Court must determine whether the Debtor committed a "major default" under the Partnership Agreement. The Court finds that the undisputed evidence demonstrates that several major defaults occurred under the Partnership Agreement, thereby triggering NCTC's right to remove the Debtor as operating general partner of Ft. Myers.

First, § 11.4A.(ii)(a) of the Partnership Agreement provides that a major default occurs when the partnership is "in material breach of any Project Document," which by definition includes the mortgage and note. Id. at § 11.4A.(ii)(a), p. 63. It is undisputed that the Bank initiated two mortgage foreclosure proceedings against Ft. Myers on June 28, 2002 in the Florida state court. The Court finds that pursuant to the plain and unambiguous language in the Partnership Agreement, the initiation of these foreclosure actions establishes a breach of a project document and, therefore, constitutes a major default under the Partnership Agreement.

Next, § 11.4A.(i)(d) of the Partnership Agreement provides that a major default occurs when any operating general partner "become[s] Bankrupt." Id. at § 11.4A.(i)(d), p. 63. In is undisputed that the Debtor filed a voluntary Chapter 11 petition on November 8, 2002.

Hence, the Court finds that under the clear and unambiguous terms of the Partnership Agreement, the Debtor's voluntary act of filing bankruptcy constitutes a major default under the Partnership Agreement.

Additionally, § 11.4A.(iv)(b) of the Partnership Agreement provides that a major default occurs when "any Lender shall have commenced foreclosure proceedings against either Development." Id. at § 11.4A.(iv)(b), p. 64. It is undisputed that the Bank initiated two mortgage foreclosure actions against the Development on June 28, 2002 in the Florida state court. The Court finds that under the plain and unambiguous language of the Partnership Agreement, the initiation of the two foreclosure proceedings constituted a major default under the Partnership Agreement.

Further, under § 11.4A.(iii) of the Partnership Agreement, a major default occurs when "Completion shall not have occurred and either Development is not placed in service by the Completion Date. . . ." Id. at § 11.4A.(iii). It is undisputed that the Development was not complete by the agreed completion date, which was defined in the Partnership Agreement to be December 31, 2000 at the latest. Thus, the Court finds that under the plain and unambiguous language of the Partnership Agreement, the untimely completion of the Development constituted a major default under the Partnership Agreement.

Moreover, § 11.4A.(i)(b) of the Partnership Agreement provides that a major default occurs when an operating general partner is "in material breach of any monetary provision of this Agreement." Id. at § 11.4A.(i)(b), p. 63. The monetary provision in the Partnership Agreement includes § 5.9, which states that the Debtor:

> (c) covenants that from the date hereof until Rental Achievement, they will pay all expenses of operating and maintaining the Development to the extent necessary to maintain Break-Even Level, and (d) guarantees Rental Achievement on or before the Rental Achievement Date.

Id. at § 5.9(c) and (d), p. 38.

The Court finds that the undisputed evidence shows that two breaches of § 5.9 of the Partnership Agreement occurred, which each resulted in a major default thereunder. Specifically, subsection (c) of § 5.9 provides that the operating general partner will fund partnership obligations that Ft. Myers cannot fund out of operations necessary to maintain "break-even level." Break-even level is defined as "the operation of the Development such that the actual collected receipts on a cash basis by the Partnership of revenues from rental, laundry and parking income is sufficient to meet all operating obligations of the Partnership...." Id. at p. 5. Pursuant to § 5.9 of the Partnership Agreement, the Debtor was obligated to fund any amounts by the partnership which the partnership could not pay.

The Court finds that the evidence shows that the Debtor breached this unambiguous obligation in several respects, including failing to fund the mortgages on the Development, which is now the subject of two foreclosure proceedings; failing to fund a payment of $60,000.00 under a promissory note thereby causing the note to go into default; and failing to fund approximately $50,000.00 in past due real estate taxes on the Development. Pursuant to the clear language of the Partnership Agreement, the Debtor's failure to fund the payment of these partnership obligations constitutes a major default under § 11.4A(i)(b).

Further, subsection (d) of § 5.9 of the Partnership Agreement provides that rental achievement is to be complete no later than the rental achievement date, which is defined in the Partnership Agreement to be December 31, 2000. Pursuant to the Partnership Agreement, rental achievement is attained when all of the following have occurred: (1) permanent financing is obtained; (2) a 93% residential occupancy rate is achieved; and (3) a break-even level is achieved. It is undisputed that at no time prior to the removal of the Debtor did Ft. Myers reach rental achievement. Further, it is undisputed that as of the current date, more than two years after the rental achievement date, there is no permanent financing, residential occupancy is less than 93% and the Development continues to lose money. The Court finds that this failure constitutes yet another major default under the unambiguous language of Section 11.4A.(i)(b) of the Partnership Agreement.

As a result of these major defaults under the Partnership Agreement, NCTC exercised its rights under § 11.4A. to remove the Debtor as operating general partner of Ft. Myers by providing written notice to the Debtor of the major defaults on October 14, 2002. This written notice permitted the Debtor an opportunity to cure the major defaults, but the Debtor failed to cure any of these major defaults. Hence, the Court finds that the Debtor was properly removed as of October 24, 2002 as operating general partner from Ft. Myers in accordance with the Partnership Agreement. The Court finds that Ft. Myers is entitled to judgment as a matter of

law declaring that the Debtor has no remaining right, title or interest in the partnership. Consequently, the Court finds that NCTC has demonstrated that it would be successful on the merits.

The Debtor argues, without furnishing the Court any relevant evidence, that the Partnership Agreement should not be enforced according to its clear and unambiguous terms because the creation of Ft. Myers was merely a financing arrangement and did not operate to convey any interest in the Development to NCTC. Further, the relationship between the Debtor and NCTC was that of borrower and lender and that NCTC is only entitled to those rights of an equitable mortgagee. The only documents furnished by the Debtor in support of its position were portions of a December 16, 1999 letter appraisal of the Development; a copy of the Debtor's Schedule A filed in the bankruptcy case, which summarily values the Development at $4,400,000.00, subject to a secured claim of over $2.8 million; and a select few portions of the Partnership Agreement. Unfortunately, the Debtor's arguments are not supported by any persuasive documentary or testimonial evidence. The Debtor provides no evidence to demonstrate that a loan was made or that the parties intended to create a debtor-creditor relationship or use the Development as security in a debt transaction. Additionally, the Debtor failed to submit any evidence to show that the Partnership Agreement is a part of a financing transaction that should be deemed a mortgage. Further, the Debtor has not come forward with a counter-affidavit to rebut any of the statements made by Muraoka in his uncontested affidavit. The Court finds that the record is wholly devoid of any facts to demonstrate that the parties intended anything other than what was expressly provided in the Partnership Agreement.

Next, there is no adequate remedy at law if NCTC is prevented from ownership of the Development. If the Debtor is not enjoined from asserting an ownership interest in the Development, and NCTC lost the Development in the foreclosure proceedings, there would be no adequate remedy at law because the Development is unique. A piece of property is considered unique, and its loss is always an irreparable injury. United Church of the Med. Ctr. v. Medical Ctr. Comm'n, 689 F.2d 693, 701 (7th Cir. 1982). The Court finds that the Debtor's refusal to acknowledge that it has been replaced as operating general partner of Ft. Myers threatens Ft. Myers' ownership of the Development.

Moreover, the Debtor has included the Development as a part of its bankruptcy estate. The Court finds that these actions are prejudicial to NCTC's ability, as successor operating general partner, to refinance the Development, satisfy the outstanding mortgage debt owed to Florida Community Bank, and avoid losing the Development in the pending foreclosure actions. Furthermore, Florida Community Bank's motion to modify the automatic stay to allow the foreclosure proceedings to continue in the Florida state court is set for final hearing on April 17, 2003, less than one week hence. Florida Community Bank has already received interim stay relief and the state court receiver for the Development has been retained pursuant to 11 U.S.C. § 543(d)(1). The Court finds that NCTC has demonstrated that it will suffer irreparable harm.

Further, the Court finds that the balance of harms clearly favors entry of injunctive relief. In contrast to the irreparable harm to NCTC absent an injunction, the only harm the Debtor would suffer is to be forced to abide by the terms it agreed to in the Partnership Agreement and it would be enjoined from exercising rights that were terminated.

Finally, the Court finds that there will be no harm to the public interest if the injunctive relief is granted. The injunctive relief will merely enforce the agreed terms of the Partnership Agreement and allow NCTC to rehabilitate the Development.

Accordingly, the Court enjoins the Debtor from asserting any interest in Ft. Myers or holding itself out as operating general partner of Ft. Myers. The Court orders the Debtor to turn over all of the property, books, records and accounts of Ft. Myers in its possession or control or in the possession or control of any of the Debtor's principals.

B. Count II–Declaratory Judgment

Pursuant to Count II of the complaint, NCTC seeks a declaratory judgment declaring that on October 24, 2002, the Debtor was removed as the operating general partner of Ft. Myers and that thereafter, pursuant to Section 11.B of the Partnership Agreement, it had no right to participate in the management or operation of Ft. Myers, to receive any future allocations of profits or losses, distributions, funds, assets or fees from Ft. Myers or to receive any outstanding advances or loans in connection with Ft. Myers; that the removal of the Debtor as operating general partner of Ft. Myers constitutes a voluntary withdrawal by the Debtor effective as of October 24, 2002, at which time any and all of its ownership interest in Ft. Myers was automatically terminated; that the Debtor owns no interest of any kind in Ft. Myers,

which is subject to the Debtor's bankruptcy estate; and that as of October 24, 2002, NCTC became successor operating general partner of Ft. Myers. Further, NCTC requests its taxable costs and reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement.

Federal courts are empowered to give declaratory judgments by the Declaratory Judgment Act. See 28 U.S.C. § 2201. The Declaratory Judgment Act provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201. The Act does not enlarge the jurisdiction of federal courts nor does it expand substantive rights. Deveraux v. City of Chicago, 14 F.3d 328, 330 (7th Cir. 1994). A court's subject matter jurisdiction must be independent of the declaratory judgment action, and such actions are discretionary even where a court has jurisdiction. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942). In order to support a declaratory judgment action, there must be a substantial controversy that is real and immediate between parties with adverse legal interests. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). There is no precise definition of "case or controversy." Id. However, a court cannot enter a declaratory judgment unless its ruling will provide specific relief that binds the parties or alters the legal relationship between them. Deveraux, 14 F.3d at 331 (citation omitted).

The Court finds that there is an actual case or controversy between NCTC and the Debtor in light of NCTC's allegations that the Debtor committed major defaults under the Partnership Agreement. Hence, the Court, pursuant to 28 U.S.C. § 151, as a unit of the district court, which is a court of the United States, has the authority under § 2201 to issue a declaratory judgment.

As the Court previously found, due to several major defaults under the Partnership Agreement, NCTC exercised its rights under § 11.4A. of the Partnership Agreement to remove the Debtor as operating general partner of Ft. Myers effective October 24, 2002 by providing written notice to the Debtor of the major defaults on October 14, 2002. This written notice permitted the Debtor an opportunity to cure the major defaults, but the Debtor failed to cure any of these major defaults. Hence, the Debtor was removed pre-petition as operating general partner from Ft. Myers in accordance with the Partnership Agreement.

Accordingly, the Court grants declaratory judgment in favor of NCTC and against the Debtor. The Court declares that there have been several major defaults under the Partnership Agreement. Further, the Court declares that on October 24, 2002, the Debtor was removed as the operating general partner of Ft. Myers and that thereafter, pursuant to Section 11.B. of the Partnership Agreement, it had no right to participate in the management or operation of Ft. Myers, to receive any future allocations of profits or losses, distributions, funds, assets or fees from Ft. Myers or to receive any outstanding advances or loans in connection with Ft. Myers. In addition, the Court declares that the removal of the Debtor as operating general partner of Ft. Myers constitutes an effective withdrawal by the Debtor as of October 24, 2002, at which

time all of its ownership interest in Ft. Myers was automatically terminated. Further, the Court declares that the Debtor owns no interest of any kind in Ft. Myers, which is subject to the Debtor's bankruptcy estate; and that as of October 24, 2002, NCTC became successor operating general partner of Ft. Myers.

C. <u>The Award of Court Costs</u>

NCTC seeks the award of its court costs. Pursuant to Federal Rule of Bankruptcy Procedure 7054(b), "[t]he court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provide." Fed. R. Bankr. P. 7054(b). The Court knows of no statute or Bankruptcy Rule that would not provide for the allowance of costs to NCTC. The Court may award a prevailing party taxable costs pursuant to 28 U.S.C. § 1920, which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> > (1) Fees of the clerk and marshal;
> > (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> > (3) Fees and disbursements for printing and witnesses;
> > (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> > (5) Docket fees under section 1923 of this title;
> > (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920.

The Court has broad discretion to determine whether and to what extent to award costs to prevailing parties. See Barber v. Ruth, 7 F.3d 636, 644 (7th Cir. 1993). There is a strong presumption favoring the award of costs to the prevailing party. Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 945 (7th Cir. 1997). Allowable costs, however, are limited to the categories in § 1920 and expenses that are not authorized by statute must be borne by the party incurring them. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-45 (1987). The losing party must satisfy a heavy burden when asserting that he should be excused from paying costs and affirmatively establish that the costs either fall outside the parameters of § 1920, were not reasonably necessary to the litigator, or that the losing party is unable to pay. See Muslin v. Frelinghuysen Livestock Managers, Inc., 777 F.2d 1230, 1236 (7th Cir. 1985). The Court grants NCTC its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment.

Additionally, NCTC requests its reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement, which provides in relevant part:

> **Attorneys' Fees.** In the event that any court . . . proceeding is brought under or in connection with this Agreement, the prevailing party in such proceeding (whether at trial or on appeal) shall be entitled to recover from the other party all costs, expenses, and reasonable attorneys' fees incident to any such proceeding. The term "prevailing party" . . . shall mean the party in whose favor the final judgment or award is entered in any such judicial . . . proceeding.

See Tab 1 attached to Muraoka Affidavit at § 14.19, p. 72.

Clearly, NCTC is the "prevailing party" in this adversary proceeding. Accordingly, based upon § 14.19 of the Partnership Agreement, NCTC shall be awarded its reasonable attorneys' fees upon the submission within thirty days of the entry of the judgment of the time and services expended by its attorneys in connection with this proceeding.

V. CONCLUSION

For the foregoing reasons, the Court grants the motion for summary judgment. The Court declares that there have been several major defaults under the Ft. Myers Partnership Agreement. Further, the Court declares that NCTC properly removed the Debtor as the operating general partner and NCTC properly removed the Debtor from Ft. Myers. Moreover, the Court declares that NCTC is the sole operating general partner and that the Debtor has no management, ownership, economic or any other interest in Ft. Myers. Furthermore, the Court enjoins the Debtor from asserting any interest in Ft. Myers or holding itself out as operating general partner thereof. The Court orders the Debtor to turn over all of the property, books, records and accounts of Ft. Myers in its possession or control or in the possession or control of any of the Debtor's principals.

In addition, the Court grants NCTC its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment. NCTC shall be awarded its reasonable attorneys' fees pursuant to Section 14.19 of the Partnership Agreement upon the submission within thirty days of the entry of the judgment of the reasonable time expended by its attorneys in connection with this proceeding.

Concurrently entered herewith is the Court's Preliminary Pretrial Order with respect to the Debtor's counterclaim against NCTC on which the parties are at issue. A pretrial conference has been set for May 29, 2003 at 9:00 a.m.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
FRANKLIN ARMS COURT, L.P.,	)	Chapter 11
	)	Bankruptcy No. 02 B 48101
Debtor.	)	Judge John H. Squires
	)	
	)	
NATIONAL CORPORATE TAX CREDIT, INC. VIII and NATIONAL CORPORATE TAX CREDIT, INC. IX,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 03 A 00147
	)	
FRANKLIN ARMS COURT, L.P.,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 10th day of April, 2003, the Court grants the motion of National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX for summary judgment pursuant to Counts I and II of the complaint.

The Court declares that there have been several major defaults under the Ft. Myers Historic, L.P. partnership agreement. Further, the Court declares that National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX properly removed Franklin Arms Court, L.P. as the operating general partner and National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX properly removed Franklin Arms Court, L.P. from Ft. Myers Historic, L.P. Moreover, the Court declares that National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX are the sole operating general partner and that Franklin Arms Court, L.P. has no management, ownership, economic or any other interest in Ft.

Myers Historic, L.P. Furthermore, the Court enjoins Franklin Arms Court, L.P. from asserting any interest in Ft. Myers Historic, L.P. or holding itself out as operating general partner thereof. The Court orders Franklin Arms Court, L.P. to turn over all of the property, books, records and accounts of Ft. Myers Historic, L.P. in its possession or control or in the possession or control of any of Franklin Arms Court, L.P.'s principals.

In addition, the Court grants National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment. National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX shall be awarded reasonable attorneys' fees pursuant to Section 14.19 of the partnership agreement upon the submission within thirty days of the entry of the judgment of the reasonable time expended by their attorneys in connection with this proceeding.

Concurrently entered herewith is the Court's Preliminary Pretrial Order with respect to Franklin Arms Court, L.P.'s counterclaim against National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX on which the parties are at issue. A pretrial conference has been set for May 29, 2003 at 9:00 a.m.

ENTERED:

DATE:_____ **_____**

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

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