IT IS ORDERED as set forth below:

Date: July 26, 2013

James R. Sacca
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	CASE NO. 12-69799-JRS
	}	
OXLEY DEVELOPMENT COMPANY, LLC,	}	CHAPTER 11
	}	
Debtor.	}	

GERMAN AMERICAN CAPITAL CORPORATION,	}	
	}	
Plaintiff,	}	ADVERSARY PROCEEDING
	}	
v.	}	NO. 12-05568-JRS
	}	
OXLEY DEVELOPMENT COMPANY, LLC, CARL M. ("CHIP") DRURY, TIDEWATER PLANTATIONS, INC., DUCK POINT, LLC, and MARITIME FORESTS HOLDINGS, LLC,	}	
	}	
Defendants.	}	

ORDER

Before the Court is the Plaintiff's Motion for Judgment on the Pleadings as to Defendants' Counterclaims. [Doc. 9]. The case involves a $37,000,000 loan on a real estate development project for property located on Laurel Island in Camden County, Georgia. The project was a massive undertaking, and when the real estate market began to collapse soon after the loan was made, the developer encountered numerous struggles. After significant litigation and two separate bankruptcy filings, the case is now before this Court.

PROCEDURAL HISTORY AND PROPOSED FINDINGS OF FACT[1]

In April 2007, Oxley Development Company ("Oxley") entered into a loan agreement (the "Loan Agreement") with German American Capital Corporation ("GACC") in order to develop property on Laurel Island in Camden County, Georgia (the "Property"). Carl M. "Chip" Drury executed the Loan Agreement as President of Oxley. In addition to being President of Oxley, Drury is also the manager of Tidewater Plantations Inc. ("Tidewater"), which is the 100% owner of Oxley and also a Defendant in this case.[2] The Loan Agreement permitted Oxley to borrow up to $37,000,000 from GACC to develop the Property. This loan was secured by the Property and was evidenced by a promissory note. Drury, individually and as Chief Executive Officer of Tidewater, was a guarantor of the promissory note.

Although the U.S. real estate market began to collapse shortly after the parties entered into the Loan Agreement, Oxley did not despair. Early in 2008, Oxley began a marketing campaign to sell waterfront lots on the property to wealthy Germans and Swiss Germans (the

[1] When ruling on a motion for judgment on the pleadings, the Court makes no findings of fact but instead must "accept as true all allegations in the [pleading] and construe them in the light most favorable to the nonmoving party." *Northlake Foods, Inc., v. Stephens* (*In re Northlake Foods, Inc.)*, 715 F.3d 1251, 1255 (11th Cir. 2013) (citation omitted).

[2] According to Defendants, at the time of Tidewater's formation, "Drury and his wife owned approximately 90% of Tidewater, although Drury subsequently forfeited his interest in Tidewater." (Counterclaims [Doc. 5] ¶ 2).

"German Sales Program"). According to Drury, the German Sales Program was implemented in an effort to capitalize on the strength of the Euro over the U.S. Dollar as well as the relative liquidity of wealthy Germans. According to Defendants,[3] Oxley spent approximately $1.3 million implementing the German Sales Program, an amount Defendants assert GACC was required to reimburse to Oxley. The record is unclear as to whether this amount was ever reimbursed in its entirety. However, the parties appear to agree that there was at least some delay in disbursing the payments. Defendants insist that GACC's failure to provide timely reimbursement of these funds forced Oxley to abandon the German Sales Program and default on its obligations under the Loan Agreement.

Following the default, GACC filed suit in the Supreme Court of New York County, New York. On May 16, 2011, GACC won a summary judgment against Oxley, Tidewater, and Drury for the full amount of the loan: $37,000,000. In that case, Oxley asserted that GACC's failure to reimburse the funds amounted to a breach of the Loan Agreement. The Appellate Division of the Supreme Court of New York upheld the judgment, and required that Oxley repay the loan notwithstanding GACC's alleged breach. *German Am. Capital Corp. v. Oxley Dev. Co., LLC*, 958 N.Y.S.2d 49, 50 (N.Y. 2nd Dept. 2013). The court noted that "[t]o the extent that the breach of contract defense may amount to a viable claim, it may be asserted in a separate action." *Id.* at 50. The court explained that "[s]uch a defense, which rests upon an apparent claim of breach of a loan agreement provision regulating the availability of certain loan proceeds for marketing purposes, is separate from Oxley's unequivocal and unconditional obligation to repay the monies

[3] In addition to Oxley, Drury, and Tidewater, there are two additional entities named as Defendants in this case. Both entities, Duck Point, LLC ("Duckpoint") and Maritime Forests Holdings, LLC ("Maritime"), are at least partially owned and controlled by Drury. Duckpoint and Maritime are named as defendants based on a fraudulent transfer claim the Plaintiffs assert in the Complaint. [Doc. 1]. According to GACC, Drury, acting on behalf of Oxley, purported to grant easements to himself and other entities owned or controlled by Drury or Tidewater. In the Answer, Defendants do not admit that the easement was granted to these specific parties. However, they do admit that Oxley granted an easement over the Property.

it was loaned.". *Id.* Defendants apparently took this message to heart, as the litigation did not end with the New York judgment.

After domesticating the New York judgment in Georgia,[4] GACC advertised the property for a non-judicial foreclosure sale, scheduled to take place on November 1, 2011. However, the day before the scheduled sale, Oxley filed for Chapter 11 bankruptcy in the Southern District of Georgia, triggering the automatic stay and preventing the foreclosure from occurring.[5] Soon afterward, GACC filed a motion with that court for relief from the automatic stay, seeking to foreclose on the Property. In May 2012, six months after the case was filed, the court granted GACC's motion for relief. That bankruptcy case was subsequently dismissed, following a motion by the U.S. Trustee. Once permitted by the court, GACC attempted to foreclose on the property a second time. However, GACC's second attempt was also met with resistance.

In August of 2012—again just one day before the rescheduled foreclosure sale—Oxley filed for bankruptcy a second time, bringing the case into this Court.[6] Immediately after Oxley filed, GACC filed an emergency motion for relief from the stay—still hoping to conduct the foreclosure sale as scheduled. The Court held a hearing in the afternoon on the day of the sale and orally granted the motion, effective as of 2:00 PM that day. On August 8, 2012—the day after the scheduled sale—the Court entered an Order confirming its oral ruling. In that Order, the Court granted GACC stay relief as of 2:00 PM on the day the sale was to have taken place.

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[4] Plaintiff domesticated the judgment by order of the Superior Court of Fulton County, Georgia on September 7, 2011 (Case No. 2011-CV-204648).

[5] The first bankruptcy case was filed in the U.S. Bankruptcy Court for the Southern District of Georgia, Brunswick Division (Case No. 11-21338).

[6] This Court entered an order dismissing the underlying bankruptcy case on November 2, 2012. [Doc. 48]. In the Order dismissing the case, the Court retained jurisdiction over this adversary proceeding. However, nearly four months after the case was dismissed, Drury filed a *pro se* motion to dismiss the proceeding, arguing that the Court lacked subject matter jurisdiction to hear the case. On May 16, 2016 the Court entered an Order denying Defendant's Motion to Dismiss and explaining why it was proper to retain jurisdiction. *See German Am. Capital Corp. v.Oxley Dev. Co., LLC (In re Oxley Dev. Co., LLC),* --- B.R. ----, 2013 WL 2250133 (Bankr. N.D. Ga., May 16, 2013) [Doc. 84].

The parties dispute whether a proper foreclosure sale occurred. Although GACC contends that it purchased the property for $3.9 million at the sale,[7] Oxley argues that the sale could not have been properly cried and thus no valid sale took place.

On October 25, 2012, GACC filed a Complaint commencing this adversary proceeding. [Doc. 1]. In its Complaint, GACC seeks a declaratory judgment that, among other things, "GACC is now the title owner of the property, free and clear of any liens or interests of any of Defendants." (Compl. [Doc. 1] ¶ (j)). In addition, GACC included a count seeking to quiet title to the Property.

Defendants timely filed an Answer to the Complaint on November 23, 2012. [Doc. 5]. In their Answer, Defendants asserted three counterclaims (the "Counterclaims"): (1) conversion of funds held in escrow, (2) breach of contract based on the failure of GACC to deliver funds to Oxley in a timely manner, and (3) fraud based on allegations that GACC made false representations to induce Oxley to spend funds in a "scheme to bring about Oxley's default . . . so that GACC could foreclose on the property." (Counterclaims [Doc. 1] ¶ 27). On February 15, 2013, GACC filed a Motion for Judgment on the Pleadings seeking to dismiss the Counterclaims (the "Motion"). [Doc. 9].

JURISDICTION AND AUTHORITY

This Court has subject matter jurisdiction over the claims involved in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a). Congress has provided in 28 U.S.C. § 1334(b) that the district courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Congress has authorized the district courts to refer any of these matters to

[7] According to Drury, "[a]t the time of the Loan Agreement, the Oxley Tract was appraised at a value of $106,000,000 'as-is.'" (Answer [Doc. 5] Ex. C).

bankruptcy judges for the district. 28 U.S.C. § 157(a). In this district, the district court has in fact referred all of these matters to the bankruptcy judges for the district. *See* N.D. Ga. R. 83.7A.

Here, the Counterclaims are not matters "arising under title 11" or "arising in" a bankruptcy case because they involve neither "matters invoking a substantive right created by the Bankruptcy Code" nor "administrative-type matters . . . that could arise only in bankruptcy." *Cont'l Nat. Bank of Miami v. Sanchez (In re Toledo*), 170 F.3d 1340, 1345 (11th Cir.1999) (citations and quotations omitted). Thus the claims involved here are not "core" claims where the Court could enter final orders and judgments. *See Stern v. Marshall*, 131 S. Ct. 2594, 2603–05 (2011) (explaining that "core proceedings are those that arise in a bankruptcy case or under Title 11" and that "[b]ankruptcy judges may hear and enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.'") (*quoting* 28 U.S.C. § 157(b)(1)).

However, the Counterclaims were related to the underlying bankruptcy case at the time the adversary proceeding was filed;[8] thus the Court has authority to hear these "non-core" claims and submit findings of fact and conclusions of law to the district court. *See Stern*, 131 S. Ct. at 2605 ("The terms 'non-core' and 'related' are synonymous") (citation and quotations omitted); *see also* 28 U.S.C. § 157(c)(1) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court . . . ."). The Eleventh Circuit has explained that "related to" jurisdiction is "extremely

[8] Although the underlying bankruptcy case was ultimately dismissed, this Court retained jurisdiction over this adversary proceeding, and the proper time for determining jurisdiction over a claim is at the time the adversary proceeding in which the claim is asserted is filed. *See German Am. Capital Corp. v.Oxley Dev. Co., LLC (In re Oxley Dev. Co., LLC)*, --- B.R. ----, 2013 WL 2250133 (Bankr. N.D. Ga., May 16, 2013) [Doc. 84] ("[T]he presence or absence of jurisdiction must be evaluated based on the state of affairs existing at the time the adversary complaint was filed . . . not at some later time.") (*quoting In re Toledo*, 170 F.3d at 1346 n.8). The Court also notes that Oxley listed these counterclaims as an asset on its Schedule of Assets filed with the Court in the main case.

broad." *In re Toledo*, 170 F.3d at 1345. In determining whether a proceeding is related to a bankruptcy case, the question is whether its outcome "could conceivably have an effect on the estate being administered in bankruptcy." *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir.1990) (*quoting Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir.1984)). At the time the adversary proceeding was filed, a resolution in Oxley's favor would have increased the assets that its bankruptcy estate would have available for distribution to creditors. Conversely, a decision against Oxley would deprive its estate of assets. Furthermore, because the Court has "related to" jurisdiction over the adversary proceeding, it must necessarily have 'related to" jurisdiction over the Counterclaims. Therefore, the Counterclaims are related to the underlying bankruptcy case, and this court has subject matter jurisdiction to hear these claims and propose findings of fact and conclusions of law to the district court pursuant to 28 U.S.C. § 157(c)(1).[9]

PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure Rule 12(c) allows a party to move for judgment on the pleadings after the pleadings have closed "but early enough not to delay trial." Fed. R. Civ. P. 12(c). When ruling on a motion for judgment on the pleadings, the Court makes no findings of fact but instead must "accept as true all allegations in the [pleading] and construe them in the

[9] The Court must propose findings of fact and conclusions of law here because this Order is a "final order." A final order is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). "[T]o be final, a bankruptcy court order must "completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief." *Barben v. Donovan (In re Donovan)*, 532 F.3d 1134, 1136-37 (11th Cir. 2008) (citations omitted). However, if this Order did not completely resolve the Counterclaims, it would not be a final order. *See Lockwood v. Snookies, Inc., (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 726 n.3 (11th Cir. 1995) (denial of summary judgment is non-final because it does not conclusively resolve a claim).

light most favorable to the nonmoving party."[10] *Northlake Foods, Inc., v. Stephens* (*In re Northlake Foods, Inc.)*, 715 F.3d 1251, 1255 (11th Cir. 2013) (citation omitted). However, the Court is "not obligated to accept alleged legal conclusions as true." *CompuCredit Holdings Corp. v. Akanthos Capital Mgmt., LLC*, 661 F.3d 1312, 1314 (11th Cir. 2011) (citation omitted). Under this standard, the Court should dismiss a claim or counterclaim "[i]f upon reviewing the pleadings it is clear that the [party] would not be entitled to relief under any set of facts that could be proved consistent with the allegations." *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (citation omitted).

The Motion seeks a judgment of dismissal as to all three counterclaims asserted by Defendants. Although Defendants' claims for conversion and breach of contract are both analyzed under the standards set forth above, the claim for fraud requires a heightened standard of pleading. *See* Fed. R. Civ. P. Rule 9(b) ("In alleging fraud . . . a party must state with particularity the circumstances constituting fraud."). The three counterclaims are discussed individually below.

Count I: Conversion

Defendants' first counterclaim is for conversion of funds held in escrow pursuant to the Loan Agreement.[11] The parties agree that on December 17, 2008 and December 19, 2008, Oxley

[10] The Court may also consider exhibits attached to the pleadings. Rule 12(d) of the Federal Rules of Civil Procedure—made applicable to this adversary proceeding by Bankruptcy Rule 7012—provides that on a motion for judgment on the pleadings, if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment." Fed. R. Civ. P. 12(d). However, the 11th Circuit has explained that "if an attachment to an answer is a 'written instrument' [in accordance with Fed. R. Civ. P. Rule 10(c)], it is part of the pleadings and can be considered on a Rule 12(c) motion for judgment on the pleadings without the motion being converted to one for summary judgment." *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

[11] Escrowed funds were held in accounts with the "Cash Management Bank." The term "Cash Management Bank" is defined in the Loan Agreement as "a depository institution mutually selected by Lender and Borrower from time to time, in which the Collateral Accounts may be maintained. The initial Cash Management Bank shall be Deutsche Bank Trust Company Americas." Both GACC and Deutsche Bank Trust Company Americas appear to be subsidiaries of Deutsche Bank Americas Holding Corp.

made requests for reimbursement of certain funds held in escrow by GACC—the total requested amounting to more than $1,000,000.[12] The amounts requested were to replace funds Oxley spent implementing the German Sales Program. According to Defendants, GACC "ignored these requests" and then, "[r]ather than abide by the Loan Documents, GACC converted the funds for its own use." (Counterclaims [Doc. 5] ¶ 19). Defendants argue that this misappropriation amounts to illegal conversion pursuant to O.C.G.A. § 16-6-4. Because the claimants fail to assert a viable theory of recovery and because they fail to state a claim for civil conversion, Defendants' counterclaim for conversion should be dismissed.

In the Counterclaims, Defendants assert their claim for theft by conversion under Georgia law, pursuant to O.C.G.A. § 16-8-4. Although the violation of some criminal statutes does give rise to a civil cause of action, the case is not so with the specific provision at issue here. "Where a criminal statute evidences no intent to cause a private right of action, civil liability must be determined under applicable provisions of state tort law, if any." *Stroman v. Bank of Am. Corp.*, 852 F. Supp. 2d 1366, 1380 (N.D. Ga. 2012) (quotations omitted). Another court in this District has previously determined that O.C.G.A. § 16–8–4 does not purport to create a private cause of action for conversion. *Am. Gen. Life & Acc. Ins. Co. v. Ward*, 509 F. Supp. 2d 1324, 1330. (N.D. Ga. 2007). However, even as the Court reads this counterclaim liberally, Defendants fail to allege a claim for the tort of conversion.

Defendants fail to allege sufficient facts to properly plead a claim for civil conversion. To establish a claim for conversion, Defendants must show: "(1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property." *Johnson v. First Union Nat. Bank,* 255 Ga.

[12] According to Defendants, "On December17, 2008 and December 19, 2008, Oxley made a written request for [the funds] in the amounts of $385,982.97 and $739,563.82, respectively." (Counterclaims, [Doc. 5] ¶ 16).

App 819, 823, 567 S.E.2d 44, 48 (2002). Defendants' claim for conversion fails because there are insufficient facts to show that Oxley had title to the Property or the right of possession. Additionally, the claim fails because there is no independent, non-contractual duty GACC violated by retaining the escrowed funds for its own benefit, and so the facts asserted are merely duplicative of those for the breach of contract claim.

Defendants fail to allege sufficient facts demonstrating that Oxley had a right of possession or title to the escrowed funds. To satisfy the first element of a claim for conversion, Defendants must show that Oxley possessed an ownership right in the property. Here, the facts do not support this proposition. According to the Loan Agreement, Oxley was required to deposit specific amounts of money into different collateral accounts held at a mutually agreed-upon bank. The parties agreed that the initial institution for these accounts would be Deutsche Bank Trust Company Americas. Although Oxley was responsible for depositing money into these collateral accounts, the Loan Agreement does not appear to grant any additional rights in the funds to Oxley.[13] According to the Loan Agreement, not only did Oxley have no right to withdraw money from the accounts, but GACC also had an extensive right to set-off indebtedness with these accounts in the event of Oxley's default.[14] From these facts, the Court concludes that Oxley did not have a right of possession or an ownership right in the escrowed funds. Any claim Oxley did have to the deposited amounts would arise solely from the Loan Agreement itself, so Defendants cannot satisfy the first element of the conversion claim.

[13] Although not the sole reason why Oxley fails to demonstrate an ownership interest, "[u]nder Georgia law, when money is deposited in a bank, title to the funds passes to the bank." *Trust Co. of Columbus v. United States*, 735 F.2d 447, 449 (11th Cir. 1984).

[14] Loan Agreement § 9.20 "Right to Set-Off." The right to set-off is relevant in determining the first element of a claim for conversion. *See Eleison Composites, LLC v. Wachovia Bank, N.A.*, 267 F. App'x 918, 924 (11th Cir. 2008) (discussing right to set-off in a claim for conversion).

In addition, Defendants fail to show an independent, non-contractual duty that GACC violated by retaining the escrowed funds. "Georgia's conversion law does not transform every breach of a contractual obligation to pay money into a tort, comprised of withholding funds and exercising dominion over them." *LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc.*, 959 F.2d 189, 191 (11th Cir. 1992). Those cases that do recognize a separate claim for conversion are distinguishable from the current situation and usually involve specific amounts set aside for a particular purpose.[15] Where one party misappropriates money held for a specific purpose and uses the funds for a clearly different purpose, a claim for conversion may lie. *See, e.g., Atl. Mech. Contractors, Inc. v. Hurston*, 185 Ga. App. 511, 364 S.E.2d 638 (1988) (conversion claim was appropriate where employer deducted funds from employee's paycheck and used the funds for his personal benefit). However, where no independent, non-contractual duty to release the funds exists, a party cannot state a claim for conversion in addition to one for breach of contract. *LaRoche*, 959 F.2d at 191.

Defendants assert that GACC fraudulently converted funds in the escrowed accounts and applied those funds to interest payments due under the Loan Agreement.[16] The Loan Agreement clearly states that GACC has a right to set-off in the event of Oxley's default. Thus, the question the Court must decide is not whether GACC converted funds specifically set aside for another purpose. Rather, the question is whether, given each party's actions leading up to the alleged

[15] *Compare Atl. Mech. Contractors, Inc. v. Hurston*, 185 Ga. App. 511, 364 S.E.2d 638, 639 (1988) (employee's claim for conversion was upheld where employer failed to pay health insurance premiums with the funds specifically withheld from employee for that purpose.) *with WESI, LLC v. Compass Envtl., Inc.*, 509 F. Supp. 2d 1353, 1361 (N.D. Ga. 2007) (conversion claim dismissed where company retained funds payable in accordance with an asset purchase agreement).

[16] In the Counterclaims, Defendants allege that the parties executed two different versions of a certain letter agreement extending the maturity date of the loan. Defendants assert that the copy executed by GACC lacked "critical reservation language" included in the original letter executed by Drury. The relevant language reads: "Conversely, neither Borrower's agreement to allow Lender to apply the Reserve Accounts and extend the maturity date of the loan . . . shall constitute a waiver or limitation of Borrower's rights arising under the Loan Documents and/or other applicable law . . . ." (Counterclaims [Doc. 5] ¶ 15). It is unclear how the inclusion or exclusion of this language affects GACC's rights to the escrowed funds.

"conversion," the Loan Agreement allowed GACC to retain the escrowed funds to service the loan. Because the Loan Agreement granted GACC certain rights to the escrowed funds and because Oxley's rights to the funds were extremely limited, Oxley could not have had title to the funds or a right to possession. Therefore, Defendants have failed to state the facts necessary for a claim for conversion.

Count II: Breach of Contract[17]

Defendants' second counterclaim is for breach of contract based on the failure of GACC to deliver funds to Oxley in a timely manner. To state a claim for breach of contract under New York law,[18] the claimant must establish four elements: (1) the existence of an agreement, (2) performance of the contract by the plaintiff, (3) breach of the contract, and (4) damages. *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996). Because Defendants Drury, Tidewater, Duckpoint, and Maritime are not parties to the Loan Agreement, they have no standing to assert a breach of contract claim. Oxley, on the other hand, is the borrower under the Loan Agreement, so it may properly assert a claim for breach of contract. But Oxley's counterclaim for breach of contract should be dismissed for failure to state a claim.

Defendant Oxley fails to state a claim because it has not alleged the plausibility, or even possibility, of the third and fourth elements—breach of the contract and resulting damages. The alleged breach involves a specific covenant requiring that GACC reimburse Oxley for certain

[17] In Defendants' Counterclaims, Defendants label the second counterclaim "Breach of Contract." However, they actually assert that GAAC's failure to reimburse Oxley for the expenses amounted to a breach of the implied covenant of good faith and fair dealing in addition to a breach of contract. The Court need not distinguish between the claims. "Under New York Law, a claim for breach of an implied covenant of good faith and fair dealing does not provide a cause of action separate from a breach of contract claim. '[P]arties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.'" *Atlantis Info. Tech., GmbH v. CA, Inc*., 485 F. Supp. 2d 224, 230 (E.D.N.Y. 2007) (*quoting Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 80 (2d Cir.2002)).

[18] The Loan Agreement "shall be governed by, and construed in accordance with, the laws of the state of New York." (Compl. [Doc. 1] Ex. B § 9.2(A)).

expenses relating to the Property in a specified time period.[19] Pursuant to the Loan Agreement, "[u]pon the request of [Oxley] . . . [GACC] shall cause disbursements to [Oxley] . . . within seven (7) Business Days of the date of the request, to reimburse [Oxley] for the cost of Marketing and Sales." (Compl. [Doc. 1] Ex. B § 3.5). Although this provision offers a schedule on which disbursements are due, GACC's failure to make payments in accordance with the provision does not amount to a material breach. In addition, the language of the Loan Agreement precludes Oxley from receiving damages due to GACC's alleged unreasonable delay.

Oxley fails to assert a viable claim for breach of contract because it fails to demonstrate that a material breach could have plausibly occurred. If the Court were to allow the claim to stand, the question the Court would then need to determine is whether GACC's failure to reimburse the funds to Oxley within the seven-day period described in the Loan Agreement amounts to a material breach. The answer to this question turns on whether time is of the essence for that agreement. Because the language of the Loan Agreement does not include language making time of the essence, this delay cannot amount to a material breach. New York law has long held "that the mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract." *Ballen v. Potter*, 251 N.Y. 224, 228, 167 N.E. 424, 425 (1929). Here, the Loan Agreement does not contain a time-is-of-the-essence provision, and it does not contain any other language suggesting this delay amounts to a

[19] There are actually two provisions at issue in the case. Section 3.5 describes the "Marketing and Sales Reserve Account" and Section 3.7 describes the "Development Costs Reserve Account." However, because both sections include the same 7-day language, only one provision is discussed here. (Compl. [Doc. 1] Ex. B §§ 3.5 & 3.7).

material breach. For this reason, the purported delay could not feasibly have caused a material breach of the contract.[20]

In addition, the Loan Agreement itself precludes Oxley from receiving monetary damages in this particular situation. The language of the Loan Agreement appears to limit the remedies of the borrower when a claim is made that the lender has "unreasonably delayed" or "acted unreasonably." (Compl. [Doc. 1] Ex. B § 9.10). Section 9.10 of the Loan Agreement states that in such a situation, Oxley "agrees that no such person shall be liable for any monetary damages, and [Oxley's] sole remedy shall be limited to commencing an action seeking specific performance, injunctive relief and/or declaratory judgment." *Id.* The Court may not simply overlook this limiting provision. Under New York law, a "clear contractual provision limiting damages is enforceable absent a special relationship between the parties, a statutory prohibition, or an overriding public policy." *Schietinger v. Tauscher Cronacher Prof'l Engineers, P.C.*, 40 A.D.3d 954, 955, 838 N.Y.S.2d 95, 96 (2007). None of these exceptions apply here.

Under the Loan Agreement, in a situation where GACC has in some way "unreasonably delayed," the contract unmistakably limits Oxley's remedies to seeking specific performance, injunctive relief, or declaratory judgment.[21] The Loan Agreement clearly sets out this limitation, and Oxley—a sophisticated party—chose to enter into the agreement notwithstanding the limiting language. The parties were free to assign and limit liability as they wished, and in this circumstance they chose to limit GACC's liability—thus preventing Oxley from asserting a

[20] Whether a delay in payment amounts to a material breach turns on whether time was of the essence for that agreement. The highest court of New York has said that for certain kinds of contracts, such as real estate contracts where interim payments are due on specified dates, "time of performance is not normally of the essence unless the contract so states or one of the parties has unequivocally declared it upon proper notice." *ADC Orange, Inc. v. Coyote Acres, Inc.*, 7 N.Y.3d 484, 486, 857 N.E.2d 513, 514 (2006).

[21] (Compl. [Doc. 1] Ex. B § 9.10).

plausible claim for breach of contract in this case.[22] Because of the language included in the Loan Agreement, Defendants are unable to assert a viable claim for damages based on GACC's delay in reimbursing Oxley.

Accepting all factual allegations as true, and taking into account the language of the Loan Agreement, it is apparent that Oxley "would not be entitled to relief under any set of facts that could be proved consistent with the allegations." *Horsley*, 292 F.3d at 700. Thus, Defendants have failed to state the facts necessary for a breach of contract claim.

Count III: Fraud

Defendants' third and final counterclaim is for fraud. This claim is based on allegations that GACC made false representations to induce Oxley to spend funds in a "scheme to bring about Oxley's default under the loan documents so that GACC could foreclose on the property." (Counterclaims [Doc. 5] ¶ 27). To survive a motion for judgment on the pleadings, a claim for fraud must meet the requirements of a heightened standard of pleading. Specifically, when alleging fraud, "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9.[23] However, "conditions of a person's mind may be alleged generally." *Id.* Under Georgia law, the tort of fraud requires five elements: (1) "a false representation by a defendant," (2) "scienter," (3) "intention to induce the plaintiff to act or refrain from acting," (4) "justifiable reliance by plaintiff," and (5) "damage to plaintiff." *Fuller v. Perry*, 223 Ga.App. 129, 131, 476 S.E.2d 793 (1996). At this stage in the litigation it is not necessary for the Court to find that these elements have been satisfied. Rather, the Court must

[22] *See McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1195 (2d Cir. 1995) ("It is axiomatic that parties to a contract must remain free to allocate risks and shield themselves from liability.").

[23] Fed. R. Civ. P. 9(b) is made applicable in adversary proceedings via Bankruptcy Rule 7009(b).

determine whether the claimant states the facts necessary to satisfy the requirements for a claim established under Rule 9(b).

Defendants fail to state a claim for fraud upon which relief may be granted because they do not assert a claim with the particularity required under Rule 9(b). To state a claim for fraud pursuant to Rule 9(b), the claimant must allege "(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the Plaintiffs; and (4) what Defendants gained by the alleged fraud." *Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1316–17 (11th Cir. 2007) (citation omitted).[24]

Even as the Court treats all facts alleged in the Pleadings as true, Defendants' Counterclaims assert few, if any, of these necessary facts. In the Counterclaims, Defendants allege that "throughout the pendency of the German Sales Program, GACC made the false representation to Oxley that it would reimburse it for the costs of marketing and sales." (Counterclaims [Doc. 5].¶ 25). Additionally, Oxley asserts that "GACC made these representations to induce Oxley and Drury to spend significant funds implementing the German Sales Program in a scheme to bring about Oxley's default under the loan documents so that GACC could foreclose on the property." (Counterclaims [Doc. 5].¶ 27). Nowhere in the Counterclaims do Defendants point out what specific misrepresentations were made, when the statements were made, who was responsible for making those statements, or how the misrepresentations misled Defendants. Although Defendants assert a theory of recovery, they fail to assert facts with the necessary detail to satisfy the requirements of Rule 9(b).

[24] In *Ambrosia*, the court was analyzing the Rule 9(b) requirements for a RICO claim. The 11th circuit has expanded the use of these elements in analyzing all fraud claims under Rule 9(b). *See, e.g., Ziemba v. Cascade Int'l, Inc.*, 256 F. 3d 1194, 1202 (11th Cir. 2001) (in analyzing a securities fraud claim, the court states that "Rule 9(b) is satisfied if the complaint sets forth [the aforementioned elements]").

Although the Court might ordinarily grant leave to amend when a claimant has failed to plead fraud with sufficient specificity to satisfy the heightened standard,[25] the Court need not grant leave *sua sponte*. The 11th Circuit has long held that a court "is not required to grant a [claimant] leave to amend his [pleadings] *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002). Defendants fall within the guidelines of this rule.[26] Although the Motion was filed more than five months prior to the entry of this Order, Defendants still have not filed a motion to amend the Counterclaims and have not requested leave to amend.[27]

In addition, even if Defendants were granted leave, any attempt on their part to amend the counterclaim for fraud would likely be futile. The 11th Circuit has held that dismissing a claim with prejudice is appropriate "if a more carefully drafted complaint could not state a claim." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *overruled on other grounds by Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541 (11th Cir. 2002). Based on the information contained in the pleadings, the Court concludes that any such attempt by Defendants to amend the counterclaim for fraud would be futile, so dismissal with prejudice is appropriate.

In the Counterclaims, Defendants allege that "[t]hroughout the pendency of the German Sales Program, GACC made the false representations to Oxley that it would reimburse it for the

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[25] *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir. 2006) (where plaintiffs asserted plentiful factual information but failed to link facts to a specific cause of action, the appropriate remedy was to order "repleading for a more definite statement of the claim, rather than in Rule 12(b)(6)'s remedy of dismissal for failure to state a claim.").

[26] Although at times during the case Defendants have appeared *pro se*, all of Defendants except for Drury are currently—and have been since at least March, 2013—represented by their most recent counsel, D. Scott Cole of Hall Booth Smith, P.C. [Doc. 43]. Although Drury is not currently represented by counsel, the 11th Circuit has also permitted courts *not* to grant leave *sua sponte* for *pro se* claimants in certain situations. Here, the Court finds no reason to separate Drury's claim from the other Defendants.

[27] Defendants have, however, filed a motion to voluntarily dismiss the Counterclaims without prejudice. [Doc. 62].

cost of marketing and sales." (Counterclaims [Doc. 5] ¶ 25). These alleged misrepresentations occurred *after* the parties entered into the Loan Agreement and were merely reinforcing the promissory language included therein: a promise to perform a future event. Under Georgia law, absent a very limited exception,[28] claims of fraud must relate to backward-looking statements and cannot be based on forward-looking contractual promises. *TechBios v. Champagne*, 301 Ga.App. 592, 594 (2009). "Actionable fraud cannot be predicated on a promise contained in a contract because fraud generally cannot be predicated on statements that are in the nature of promises as to future events, and to hold otherwise, any breach of a contract would amount to fraud." *Id.* Under this standard, it appears that any attempt to amend the fraud claim would be futile. Because Defendants have not sought to amend the Counterclaims and because any attempt to amend the counterclaim would likely be futile, Defendants should not be allowed to amend these claims now that almost half a year has passed since they were filed.

CONCLUSION

The Court has considered the record in this case, and based thereon, the Court submits the above-stated findings of fact and conclusions of law for the District Court's consideration and *de novo* review in accordance with 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033. This Court recommends that Plaintiff's Motion be GRANTED and that Defendants' Conversion claim (Count I), Breach of Contract claim (Count II), and Fraud claim (Count III) be DISMISSED with prejudice.

[END OF ORDER]

[28] There is an exception to the rule "where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place." *TechBios v. Champagne*, 301 Ga.App. 592, 594 (2009) (*citing BTL COM Ltd., Co. v. Vachon*, 278 Ga. App. 256, 628 S.E.2d 690 (2006) (internal quotations omitted). It seems impossible for Defendants to argue convincingly that this exception applies in their case. The parties agree that the relevant reimbursement payments were made late, as opposed to not at all, and so it is implausible for Defendants to argue now that GACC knew it would not make the payments to Oxley when it did in fact ultimately make those payments.