STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 21135

GVEST REAL ESTATE, LLC, (formerly Gee Real Estate, LLC)

Plaintiff,

v.

JS REAL ESTATE INVESTMENTS, LLC; SHAW CAPITAL & GUARANTY, LLC; TR REAL ESTATE, LLC; LEVAN CAPITAL, LLC (formerly known as Trinvest Partners, LLC); JAMES SHAW; TYSON RHAME; and YARDS AT NODA, LLC,

Defendants,

v.

JS REAL ESTATE INVESTMENTS, LLC; TR REAL ESTATE, LLC; JAMES SHAW; TYSON RHAME; and YARDS AT NODA, LLC,

Counterclaim Plaintiffs,

v.

GVEST REAL ESTATE, LLC (formerly GEE REAL ESTATE, LLC),

Counterclaim Defendant.

ORDER AND OPINION ON MOTIONS FOR SUMMARY JUDGMENT

1. Yards at NoDa, LLC owns an apartment complex of the same name in Charlotte, North Carolina's vibrant North Davidson neighborhood. By all accounts, the company is prosperous and has room to grow. Phase one of the complex is complete and generating rental income; phase two, though still in the planning

stages, shows promise. But success has not been enough to ward off internal conflict. The founders of Yards at NoDa have split into two factions that distrust one another and, in this lawsuit, have traded accusations and recriminations of self-interested scheming going all the way back to the company's formation.

2. Discovery is now closed. Each side has moved for summary judgment. For the following reasons, the Court **GRANTS** Defendants' motion and **GRANTS** in part and **DENIES** in part Plaintiff's motion.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for Plaintiff Gvest Real Estate, LLC.

Alston & Bird, LLP, by Matthew P. McGuire, Caitlin Van Hoy, Ryan P. Ethridge, and Michael A. Kaeding, for Defendants JS Real Estate Investments, LLC, Shaw Capital & Guaranty, LLC, TR Real Estate, LLC, Levan Capital, LLC, James Shaw, Tyson Rhame, and Yards at NoDa, LLC.

Conrad, Judge.

I.
BACKGROUND

3. The Court does not make findings of fact when ruling on motions for summary judgment. The following background, drawn from the evidence submitted by the parties, provides context for the Court's analysis and ruling only.

4. All parties agree that Ray Gee had the original idea for what eventually became Yards at NoDa. Gee, a real estate developer, found an undeveloped parcel whose owners were in financial distress. Convinced that it was a prime location for apartments, Gee began looking for investors. He approached James Shaw, a friend and business associate. Shaw came on board and then invited Tyson Rhame, another business associate, to join as well. Gee, Shaw, and Rhame together formed Yards at

NoDa in 2012 to buy and develop the parcel and later manage the apartment complex once up and running. (*See, e.g.*, Bell Dep. 83:5–14, ECF Nos. 89 & 101.3; Gee Dep. 26:21–27:16, 50:22–51:23, 64:3–6, 65:18–66:13, ECF No. 101.1; Rhame Dep. 82:3–15, ECF No. 101.4.)

5. Yards at NoDa's original members are holding companies owned by either Gee, Shaw, or Rhame. Gee's company, Gvest Real Estate, LLC ("Gvest"), took a 25% interest based on a token $1,000 capital contribution. Shaw's company, JS Real Estate Investments, LLC ("JS Real Estate"), took a 37.5% interest based on a $2,500,000 capital contribution. And Rhame's company, TR Real Estate, LLC ("TR Real Estate"), also took a 37.5% interest based on a $2,500,000 capital contribution. Yards at NoDa's operating agreement names Gee and Shaw as the initial managers. (*See* Op. Agrmt. §§ 2.7, 3.1, 5.1.1, Ex. A, ECF No. 20.5.)

6. If there was a honeymoon period after the formation of Yards at NoDa, it didn't last long. Relations between Gee and Shaw deteriorated so rapidly that, by 2014, they had ended their friendship and dissolved many of their business ventures other than Yards at NoDa. Two years later, Gvest filed this lawsuit. (*See* Defs.' Ex. F-4, ECF No. 101.6.)

7. Many of Gvest's allegations reflect concerns that Shaw and Rhame have tried to dilute its interest or shut it out of Yards at NoDa. As an example, Shaw filed tax forms that assigned a 16.78% membership interest to Gvest rather than the 25% interest listed in the operating agreement; the forms were later amended to correct the size of Gvest's interest. In addition, Shaw and Rhame allegedly refused a series

of requests by Gvest to review company books and records. (*See* Gee Dep. 136:5–11; Pl.'s Ex. 5, ECF No. 93.1.)

8. Other allegations go toward changes or attempted changes in Yards at NoDa's membership and management. In 2013, Shaw and Rhame took preliminary steps to transfer the interests of JS Real Estate and TR Real Estate to other holding companies ("Shaw Capital" and "Levan Capital") that they personally own. Around the same time, they proposed to amend the operating agreement to admit Shaw Capital and Levan Capital as members. Gvest approved the amendment at first but revoked its approval before it took effect. Then, in August 2014, JS Real Estate and TR Real Estate voted to remove Gee as manager and replace him with Rhame. Gvest contends that these actions have thrown a cloud over Yards at NoDa's membership and management. (*See, e.g.*, Defs.' Exs. F-3, F-7, F-8, F-10, F-11, ECF No. 78.1.)

9. A third set of allegations sound in fraud. In 2015 and 2016, the federal government filed a civil forfeiture action against Shaw and Rhame and indicted them for wire and mail fraud and money laundering. The prosecution resulted from an investigation into the practices of a currency trading business ("Sterling Currency Group") jointly owned by Shaw and Rhame. Gvest alleges that Shaw and Rhame misled it about the legality of Sterling Currency Group's business and that they used tainted funds to capitalize Yards at NoDa. (*See* Am. Compl. Ex. B, ECF No. 20.2.)

10. Based on these allegations, Gvest filed suit against seven named Defendants: Shaw, Rhame, JS Real Estate, TR Real Estate, Shaw Capital, Levan Capital, and Yards at NoDa. Gvest has asserted a claim for declaratory judgment

regarding the status of Yards at NoDa's members and managers; a pair of claims to enforce its informational rights under the operating agreement and N.C.G.S. § 57D-3-04; and claims for breach of fiduciary duty, constructive fraud, fraudulent inducement, and negligent misrepresentation. Gvest also claims that Yards at NoDa is an alter ego of Shaw and Rhame and demands punitive damages.

11. Defendants deny any wrongdoing; five of the seven have also counterclaimed.[1] They allege that Gee abdicated his responsibilities as a manager by refusing to show up to work, skipping meetings, and ignoring calls, e-mails, and text messages. His actions and inactions supposedly pushed a key employee to resign and jeopardized financing for the development. (*See, e.g.*, Frericks Aff. ¶¶ 3, 4, ECF No. 92; Shaw 2d Aff. ¶ 7; Bell Dep. 108:11–14, 113:23–114:1.)[2]

12. Defendants further allege that Gvest fraudulently induced Shaw and Rhame to invest in Yards at NoDa. Gee supposedly told Shaw and Rhame that the project would require just $5 million in capital up front because Yards at NoDa would be able to get the rest of the funding from a lender called ANICO at a 90% loan-to-cost ratio. In reality, Defendants say, funding from ANICO was not available, and the lender that eventually funded the project imposed far less favorable terms. Shaw and Rhame had to contribute over $13 million as a result. In addition, Gvest supposedly received its 25% interest in Yards at NoDa based on representations that Gee would

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[1] Shaw Capital and Levan Capital are the only Defendants that have not asserted counterclaims.

[2] The record contains several affidavits by Shaw and Rhame. For ease of reference, the affidavits cited in this opinion are noted here. (Shaw 1st Aff., ECF No. 81; Shaw 2d Aff., ECF No. 90; Rhame 1st Aff., ECF No. 80; Rhame 2d Aff., ECF No. 91.)

provide the "sweat equity" needed to make the development successful. As alleged, though, Gee was an absentee manager. (*See, e.g.*, Shaw 2d Aff. ¶¶ 4–6; Rhame 2d Aff. ¶¶ 3, 4; Shaw Dep. 71:13–73:2, ECF No. 101.2.)

13. These allegations underlie counterclaims against Gvest for breach of fiduciary duty, constructive fraud, fraudulent inducement, negligent misrepresentation, and unfair or deceptive trade practices under N.C.G.S. § 75-1.1. Defendants also demand punitive damages.

14. Both sides have moved for summary judgment. (*See* ECF Nos. 75, 82.) Their motions have been fully briefed, and the Court held a hearing on 11 May 2023. The motions are ripe for decision.

II.
LEGAL STANDARD

15. Summary judgment is appropriate when "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 any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must consider the evidence in the light most favorable to the nonmoving party, drawing all inferences in the nonmoving party's favor. *See, e.g.*, *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

16. The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The moving party meets its burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the

opposing party cannot produce evidence to support an essential element of his claim." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations and quotation marks omitted). If the moving party makes that showing, "the burden shifts to the nonmoving party to 'produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial.' " *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (quoting *DeWitt*, 355 N.C. at 682). The nonmoving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. R. Civ. P. 56(e).

III.
DEFENDANTS' MOTION

17. Defendants move for summary judgment on every claim in Gvest's amended complaint. The Court notes at the outset that some of Defendants' arguments are uncontested because Gvest did not respond to them in its opposition brief. *See* BCR 7.2 ("A party should . . . brief each issue and argument that the party desires the Court to rule upon and that the party intends to raise at a hearing.").

A. Declaratory Judgment

18. In its claim for declaratory judgment, Gvest alleges that JS Real Estate and TR Real Estate forfeited their membership rights in Yards at NoDa by attempting to transfer their interests to Shaw Capital and Levan Capital in 2013. Gvest also alleges that JS Real Estate and TR Real Estate were not members when they removed Gee as manager and replaced him with Rhame. Based on these allegations, Gvest seeks declarations that it is the sole member of Yards at NoDa, that JS Real

Estate and TR Real Estate are merely economic interest holders, and that Gee remains a manager.

19. Defendants admit that JS Real Estate and TR Real Estate attempted to transfer their interests but contend that undisputed evidence shows that the attempt did not comply with the operating agreement, making it null and void. As a result, they contend, the membership of Yards at NoDa never changed, all three original members remain members today, and the removal of Gee as manager was valid.

20. An LLC is primarily a creature of contract, meaning that members have great freedom in choosing the rules that govern their relationship. This includes the rules that govern transfers of membership interests. *See* N.C.G.S. § 57D-2-30(a). Here, the members of Yards at NoDa agreed that a transfer is not permitted unless it satisfies certain conditions, including delivery of "a written instrument agreeing to be bound by the terms of Section VI" of the operating agreement, delivery of "the transferee's taxpayer identification number" and "initial tax basis" of the transferred interest, and "the prior written consent of the Manager." (Op. Agrmt. §§ 6.1.1.2, 6.1.1.5, 6.1.1.6.) A transfer of membership rights that fails to meet these conditions "shall be deemed invalid, null and void, and of no force or effect." (Op. Agrmt. § 6.1.3.)

21. As Defendants note, Gee testified on Gvest's behalf that he had seen no evidence that JS Real Estate and TR Real Estate had delivered either the required written instrument agreeing to be bound by Section VI of the operating agreement or the required information regarding their taxpayer identification number and initial tax basis. (*See* Gee Dep. 148:24–149:24.) Gvest offers no response in its opposition

brief and does not point to any evidence tending to show that JS Real Estate and TR Real Estate complied with those conditions on transfer.

22. In addition, in early 2013, Gee and Shaw were Yards at NoDa's managers. Arguably, both men needed to give written consent to the disputed transfer under section 6.1.1.6 of the operating agreement. But even if that section requires the consent of just one of the two managers, there is insufficient evidence that either Gee or Shaw gave consent in writing. Gee certainly didn't; he contends that he didn't even know about the attempted transfer because Shaw and Rhame hid it from him. Although Shaw admits that he wanted to transfer JS Real Estate's interest to another of his wholly owned entities, no document in the record reflects his *written* consent. The evidence includes two draft consent forms, each of which has a blank signature line for Shaw. (*See* Defs.' Exs. F-7, F-8.) And Gee testified that he had seen no evidence that Shaw gave consent in writing. (*See* Gee Dep. 149:25–150:10.)

23. Gvest offers no evidence to show written consent from either manager. It argues that Shaw must have complied with the operating agreement because he was aware of its terms and because he later signed tax forms stating that Shaw Capital and Levan Capital were members of Yards at NoDa. This is supposition, not evidence. Shaw's knowledge of the operating agreement has no bearing on his compliance with it, and his signature on the tax forms underscores the absence of a signature on the draft consent forms. "Cases are not to be submitted to a jury on speculations, guesses, or conjectures." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 69 (1992).

24. In short, Gvest has not offered substantial evidence to create a genuine issue of material fact regarding JS Real Estate's and TR Real Estate's compliance with sections 6.1.1.2, 6.1.1.5, or 6.1.1.6 of the operating agreement. This means that the attempted transfer of their interests is null and void. (*See* Op. Agrmt. § 6.1.3.) Accordingly, Gvest is not entitled to a declaration that it is the only member of Yards at NoDa or that JS Real Estate and TR Real Estate are merely economic interest holders. It follows that Gvest is not entitled to a declaration that Gee is a manager of Yards at NoDa. As members, JS Real Estate and TR Real Estate had the right to remove Gee as manager at any time and for any reason by a majority vote. (*See* Op. Agrmt. § 5.1.4.)

25. The Court therefore grants Defendants' motion as to Gvest's claim for declaratory judgment.

B. Claims Relating to Corporate Records

26. Gvest alleges that Shaw and Rhame have wrongfully refused to provide access to Yards at NoDa's books and records. On that basis, Gvest has asserted one claim to enforce its contractual right to information under the operating agreement and another to enforce its statutory inspection right under N.C.G.S. § 57D-3-04. The relief sought for each claim is the same: an order compelling Shaw and Rhame to allow inspection of company records.

27. Defendants argue that both claims are moot because Gvest has received all the documents that it requested. In support, Defendants offer evidence to show that they have satisfied every document demand made by Gvest and that no further demands have been made. (*See* McGuire Aff. ¶¶ 4, 5, ECF No. 101.)

28. Gvest concedes as much. In its opposition brief, it does not point to any record that it sought and that Defendants withheld. Rather, it worries that Defendants might deny access to records again in the future.

29. Apprehension about a potential future dispute cannot sustain these claims. Gvest demanded Yards at NoDa's books and records, and it has now received them. An order compelling Shaw and Rhame to provide access to the same documents would serve no purpose. Accordingly, the Court dismisses both claims as moot. *See In re Peoples*, 296 N.C. 109, 147 (1978) (holding that a court usually should dismiss a claim when "the relief sought has been granted or . . . the questions originally in controversy between the parties are no longer at issue"); *Brady v. Van Vlaanderen*, 2015 NCBC LEXIS 59, at *6–8 (N.C. Super. Ct. June 3, 2015) (dismissing inspection demand as moot because the plaintiff had received access to records at issue).

C. Breach of Fiduciary Duty and Constructive Fraud

30. Gvest's claims for breach of fiduciary duty and constructive fraud share a common premise. As alleged, JS Real Estate and TR Real Estate together own 75% of Yards at NoDa and are therefore controlling members that owe a fiduciary duty to Gvest as minority member. Defendants argue that JS Real Estate and TR Real Estate are minority members and that no fiduciary duty arises from their collective majority interest.

31. The Court agrees with Defendants. The usual rule is that members of an LLC do not owe a fiduciary duty to one another. *See Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473 (2009). In some circumstances, "a holder of a majority interest who exercises control over the LLC owes a fiduciary duty to minority interest

members." *Bennett v. Bennett*, 2019 NCBC LEXIS 19, at *19 (N.C. Super. Ct. Mar. 15, 2019) (citation and quotation marks omitted). But Yards at NoDa has no majority member. JS Real Estate and TR Real Estate hold minority interests, just as Gvest does. (*See* Op. Agrmt. Ex. A.) Our courts have routinely "refused to impose a fiduciary duty on *minority* members that exercise their voting rights by joining together to outvote a third member." *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *20 (N.C. Super. Ct. June 19, 2019) (emphasis in original); *see also Duffy v. Schussler*, 287 N.C. App. 46, 63–64 (2022) (finding *Vanguard*'s "reasoning persuasive").

32. Accordingly, Gvest has not shown a genuine issue of material fact regarding the existence of a fiduciary relationship. The Court grants Defendants' motion for summary judgment as to the claims for breach of fiduciary duty and constructive fraud. *See Dalton v. Camp*, 353 N.C. 647, 651 (2001) ("For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties."); *Forbis v. Neal*, 361 N.C. 519, 528 (2007) (noting that constructive fraud requires the existence of a confidential or fiduciary relationship).

D. Fraudulent Inducement and Negligent Misrepresentation

33. Gvest's claims for fraud and negligent misrepresentation are both centered on allegedly false representations made by Shaw and Rhame regarding the legality of Sterling Currency Group's business practices. Defendants move for summary judgment on these claims on two grounds: first, that each representation alleged in the amended complaint was true; and second, that Gvest did not reasonably rely on any representation when it invested in Yards at NoDa. Defendants offer evidence—

including affidavits from Shaw and Rhame as well as excerpts of Gee's deposition testimony—to support their arguments. (*See* Shaw 1st Aff. ¶¶ 5–8; Rhame 1st Aff. ¶¶ 5–8; Gee Dep. 85:2–14, 96:8–10.)

34. Defendants have met their initial burden, as the moving parties, to show an absence of evidence to support an essential element of the claims. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224 (1999) (noting that fraud and negligent misrepresentation require analogous showings of reasonable or justifiable reliance, respectively); *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17 (1992) (noting that a "false representation" is an essential element of fraud). As a result, Gvest needed "to come forth with evidence to controvert" Defendants' arguments "or otherwise suffer entry of summary judgment against it." *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 205 (1980). Gvest's opposition brief is silent about both claims, and it has therefore failed to establish a genuine issue of material fact regarding the falsity of any alleged representations and its own reliance on them.

35. The Court grants Defendants' motion for summary judgment as to Gvest's claims for fraudulent inducement and negligent misrepresentation.

E. Alter Ego Liability & Punitive Damages

36. The entry of summary judgment on every claim for relief asserted by Gvest necessitates the entry of summary judgment on its claim of alter ego liability and its demand for punitive damages, neither of which is an independent cause of action. *See Green v. Freeman*, 367 N.C. 136, 146 (2013) ("There must also be an underlying legal claim to which [alter ego] liability may attach."); *Funderburk v. JPMorgan*

Chase Bank, N.A., 241 N.C. App. 415, 425 (2015) ("[A] claim for punitive damages is not a stand-alone claim.").

IV.
GVEST'S MOTION

37. Gvest seeks summary judgment on some, but not all, counterclaims asserted by Shaw, Rhame, JS Real Estate, TR Real Estate, and Yards at NoDa.

A. Breach of Fiduciary Duty

38. In response to Gvest's motion for summary judgment, Defendants have narrowed their counterclaim for breach of fiduciary duty. They now concede that Gvest owed no fiduciary duty to Shaw, Rhame, JS Real Estate, or TR Real Estate. Based on that concession, the Court enters summary judgment in Gvest's favor on the counterclaim for breach of fiduciary duty as to those four Defendants.[3]

39. That leaves Yards at NoDa. Its counterclaim is peculiar in that it does not allege that Gvest directly owed or breached any fiduciary duty. Indeed, a member of an LLC typically does not owe a fiduciary duty to the company. What Yards at NoDa alleges instead is that Gee (who is not a party in this litigation) owed a fiduciary duty as manager, that he breached that duty through mismanagement and dereliction, and that Gvest is responsible for his actions as his alter ego.

40. Gvest concedes for purposes of summary judgment that it can be liable for Gee's breach of fiduciary duty if there was one. It contends only that Gee's conduct

[3] At the hearing, Defendants' counsel conceded that Shaw, Rhame, JS Real Estate, and TR Real Estate do not have a viable claim for constructive fraud for the same reason. Because Gvest's motion does not challenge the counterclaim for constructive fraud, however, the Court will address the issue in a future proceeding.

did not amount to a breach of fiduciary duty, partly because the operating agreement provides that a manager is not liable for any act or omission unless "made fraudulently or in bad faith" or constituting "gross negligence." (Op. Agrmt. § 5.4.1.)

41. On that point, there is a genuine issue of material fact. Yards at NoDa offers evidence to show that Gee missed important meetings, refused to respond to calls and e-mails, sabotaged an appraisal for a construction loan, and alienated a key employee. (*See, e.g.*, Frericks Aff. ¶¶ 3, 4; Shaw 2d Aff. ¶ 7; Bell Dep. 108:11–14, 113:23–114:1.) Although the parties dispute whether Gee acted in bad faith or was grossly negligent, intent is generally a question for the jury. Viewing the evidence in the light most favorable to Yards at NoDa, a jury could conclude that Gee was not only derelict in his duty but also that he acted in bad faith or was grossly negligent.

42. The Court therefore denies Gvest's motion for summary judgment as to Yards at NoDa's counterclaim for breach of fiduciary duty.

B. Fraudulent Inducement

43. Defendants claim that Gvest fraudulently induced them to invest in Yards at NoDa. They allege that Gvest misrepresented Gee's experience as a real estate appraiser, made erroneous projections for Yards at NoDa's expected net rental income, falsely promised that Gee would contribute "sweat equity" in return for Gvest's 25% membership interest in Yards at NoDa, and represented that JS Real Estate and TR Real Estate would have to contribute only $5 million based on a false promise that Gvest could secure financing from ANICO at a 90% loan-to-cost ratio.

44. Although Gvest's arguments are not as clear as they could be, a fair reading of its motion reveals three grounds for summary judgment. It contends, first, that

representations regarding Gee's experience are true; second, that Defendants failed to plead certain allegations with particularity; and third, that predictions and estimates are not fraudulent simply because they turn out to be inaccurate.

45. Fraud has five "essential elements": (a) a false representation or concealment of a material fact, (b) calculated to deceive, (c) made with intent to deceive, (d) that did in fact deceive, and (e) that resulted in damage to the injured party. *Rowan Cnty. Bd. of Educ.*, 332 N.C. at 17. The claimant must show not only that he actually relied on the misrepresentation but also that his reliance was reasonable. *See Forbis*, 361 N.C. at 527.

46. Statements of opinion, predictions of future events, and promises of future intent generally do not give rise to an action for fraud. *See, e.g.*, *Lester v. McLean*, 242 N.C. 390, 397 (1955); *Leftwich v. Gaines*, 134 N.C. App. 502, 508 (1999); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 87 (1985). Of course, "a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and no intent to comply with the stated promise or representation." *Braun*, 77 N.C. App. at 87. To show fraud based on promissory misrepresentations, the claimant must offer evidence "from which a court and jury may reasonably infer that the defendant did not intend to carry out such representations when they were made." *Whitley v. O'Neal*, 5 N.C. App. 136, 139 (1969).

47. Under Rule 9(b), the claimant must plead fraud with particularity. This means that Defendants must allege the "time, place and content" of the misrepresentation, the "identity of the person making the representation," and "what

was obtained as a result." *Terry v. Terry*, 302 N.C. 77, 85 (1981). If the pleading does not allege fraud with particularity, "summary judgment is proper." *Trull v. Cent. Carolina Bank & Tr. Co.*, 117 N.C. App. 220, 224 (1994); *see also In re Se. Eye Center-Pending Matters*, 2019 NCBC LEXIS 29, at *47 (N.C. Super. Ct. May 7, 2019) (collecting cases holding that "summary judgment is appropriate . . . where a plaintiff has failed to plead fraud with particularity").

48. Gvest contends that representations regarding Gee's experience as an appraiser, including his professional certifications, were true. Defendants concede the point in their opposition brief. Thus, no reasonable jury could conclude that Gvest made fraudulent representations regarding Gee's experience.

49. Next, Gvest argues that Defendants' allegations regarding projections of net rental income are not sufficiently particular to state a claim for fraud. The Court agrees. Defendants do not allege when or where Gee provided a projection for Yards at NoDa's rental income. Nor do they allege the content of the projection, other than to say that it turned out to be erroneous. These scant allegations do not satisfy Rule 9(b). *See, e.g.*, *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 611 (2008) (affirming dismissal of fraud claim that did not allege time or place of misrepresentation); *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006) (same). Moreover, Defendants have not offered evidence to show that Gee's projection was a false representation of an existing fact as opposed to a statement of opinion. *See, e.g.*, *Lester*, 242 N.C. at 397 ("The value of the property . . . was

necessarily a matter of opinion. It does not appear to have been represented as anything else. . . . [S]uch representations do not constitute fraud.").

50. The other arguments in Gvest's opening brief are not fully developed. It says nothing about the alleged promise that Gee would contribute sweat equity toward the development. It does address the alleged representation regarding available financing terms but contends only that ANICO's refusal to provide financing was the fault of Shaw and Rhame. But there are genuine issues of material fact regarding the representations that Gee made with respect to anticipated financing terms and the reason that financing from ANICO was not available. (*See, e.g.*, Shaw Dep. 82:23–83:11.)

51. In its reply brief, Gvest asserts a series of new, more detailed arguments. One of the new arguments is that Rhame has no viable claim for fraud because the alleged misrepresentations were made only to Shaw. Another new argument is that Gee's alleged promise to contribute sweat equity is not sufficiently definite and specific to support a claim for fraud. These are reasonable arguments. *See, e.g.*, *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974) (To be fraudulent, a "misrepresentation must be definite and specific."); *Hospira Inc. v. AlphaGary Corp.*, 194 N.C. App. 695, 699 (2009) ("An essential element of actionable fraud is that the false representation or concealment be made *to the party acting thereon*." (emphasis in original)). But because Gvest made them for the first time in its reply brief, the Court declines to consider them. *See* BCR 7.7.

52. The Court therefore denies Gvest's motion for summary judgment as to the fraud counterclaim.

C. Section 75-1.1

53. Defendants claim that Gvest engaged in unfair or deceptive trade practices under section 75-1.1 by misrepresenting the value of the Yards at NoDa project and the amount of financing that it would require. Gvest contends that its alleged acts, even if true, were not in or affecting commerce and therefore not a violation of section 75-1.1.

54. The General Assembly has declared that "unfair or deceptive acts or practices in or affecting commerce" are "unlawful." N.C.G.S. § 75-1.1(a). Although "commerce" broadly means "business activities," *id.* § 75-1.1(b), our Supreme Court has stressed that section 75-1.1 is "not intended to apply to all wrongs in a business setting," *Dalton v. Camp*, 353 N.C. 647, 657 (2001). The term "business activities" refers to "a business's regular interactions with other market participants," *White v. Thompson*, 364 N.C. 47, 52 (2010), and "connotes the manner in which businesses conduct their regular, day-to-day activities," *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594 (1991). This excludes "a business's internal operations," *White*, 364 N.C. at 53, as well as activities "done for the purpose of raising capital" and similar extraordinary events, *Nobel v. Foxmoor Grp.*, 380 N.C. 116, 120–21 (2022) (citation and quotation marks omitted). Put simply, "any unfair or deceptive practices occurring in the conduct of extraordinary events of, or solely related to the internal operations of, a business will not give rise to a claim under" section 75-1.1. *White*, 364 N.C. at 52.

55. The alleged misconduct here concerns the formation of Yards at NoDa and its acquisition of capital. In Defendants' own words, Gvest allegedly made "misrepresentations to Shaw and Rhame to induce them *to create and bankroll* Yards" at NoDa. (Defs.' Br. Opp'n Gvest's Mot. Summ. J. 10, ECF No. 88 (emphasis added).) It may be true that Gvest did so for its "own . . . gain" and that its conduct in securing investments from Defendants is "morally suspect." *Nobel*, 380 N.C. at 121. Even so, the alleged conduct "was not 'in or affecting commerce' because" it involved the sort of extraordinary event that does "not constitute a 'business activity' " under binding appellate precedent. *Id.*

56. Defendants contend that Gvest's solicitation of investments is not an extraordinary event because soliciting investors is its day-to-day business. This Court has rejected identical arguments in the past. *See, e.g.*, *Aym Techs., LLC v. Scopia Cap. Mgmt. LP*, 2021 NCBC LEXIS 29, at *28–31 (N.C. Super. Ct. Mar. 31, 2021) (granting summary judgment on section 75-1.1 claim involving entity whose "day-to-day business involves capital raising activities"). The "focus under the relevant cases is not who is a party to the transaction, but rather what is the purpose of the transaction." *Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc.*, 2007 NCBC LEXIS 17, at *11 (N.C. Super. Ct. June 11, 2007) (citation and quotation marks omitted). "If the transactions at issue involve capital raising, our courts have held that the" conduct is not in or affecting commerce within the meaning of section 75-1.1. *Aym Techs.*, 2021 NCBC LEXIS 29, at *29. So it is in this case.

57. The Court therefore grants Gvest's motion for summary judgment on the section 75-1.1 counterclaim.

V.
CONCLUSION

58. For these reasons, the Court **GRANTS** Defendants' motion for summary judgment.

59. The Court also **GRANTS** in part and **DENIES** in part Gvest's motion for partial summary judgment as follows:

a. The Court **GRANTS** the motion as to the counterclaim for breach of fiduciary duty to the extent brought by Shaw, Rhame, JS Real Estate, and TR Real Estate and **DENIES** the motion as to that counterclaim to the extent brought by Yards at NoDa.

b. The Court **DENIES** the motion as to Defendants' counterclaim for fraudulent inducement.

c. The Court **GRANTS** the motion as to Defendants' counterclaim for violation of section 75-1.1.

60. In addition to these rulings, the Court notes that counterclaims for constructive fraud, negligent misrepresentation, and punitive damages also remain pending.

SO ORDERED, this the 12th day of September, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases