UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:19-bk-09424-CED
Chapter 11

929485 Florida, Inc.,

Debtor.
_____/

ORDER (1) DENYING SUNSET WAYPOINT LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO OBJECTIONS TO CLAIM NO. 5 AND (2) GRANTING SHAREHOLDERS' MOTION FOR SUMMARY JUDGMENT SEEKING DISALLOWANCE OF CLAIM NO. 5-1 FILED BY SUNSET WAYPOINT, LLC
(Doc. Nos. 212 and 216)

THIS CASE came before the Court for hearing on March 10, 2021, of the *Motion for Partial Summary Judgment as to Objections to Claim No. 5* filed by Sunset Waypoint, LLC ("Sunset") ("Sunset's Motion"),[1] the *(1) Motion for Summary Judgment Seeking Disallowance of Claim No. 5-1 Filed by Sunset Waypoint, LLC and (2) Response in Opposition to Sunset Waypoint's Motion for Partial Summary Judgment* filed by Debtor's shareholders and joined by Debtor (the "Shareholders' Motion");[2] and Sunset's response to the Shareholders' Motion.[3] For the reasons set forth below, the Court denies Sunset's Motion, grants the Shareholders' Motion, and disallows Sunset's Claim No. 5.

I. BACKGROUND

A. Facts

The debtor in this Chapter 11 case, 929485 Florida, Inc. ("Debtor"), previously owned commercial real property located in St. Pete Beach, Florida (the "Property"). The Property is occupied by two restaurants, one of which is owned by Vario, Inc. ("Vario").

On June 26, 2015, Debtor and DN Equities, LLC (the "Purchaser") entered into a Real Estate Purchase Contract (the "Contract") under which the Purchaser agreed to purchase the Property from Debtor for $2.6 million.[4] Section 3 of the Contract required the Purchaser to pay a $10,000 Earnest Money Deposit (the "Earnest Money Deposit").[5] Under "Rider No. 1" to the Contract,[6] the Purchaser's obligation to purchase the Property was conditioned on the rezoning of the Property to allow the construction of a 120-room hotel, first-floor retail space, and parking garage "all of which shall be of such size and configuration as Purchaser shall determine in its sole discretion."

Rider No. 1 also provided that the time periods under Section 5 of the Contract for the Purchaser to investigate the Property for suitability (the "Feasibility Period") "shall not commence prior to the date on which Purchaser obtains such final Rezoning."[7] Section 4 of the Contract required the Purchaser to close the Contract within 30 days following the expiration of the Feasibility Period.[8] In addition, Rider No. 1 provided that if the Property was not rezoned or if the rezoning was "in such manner that is unacceptable to Purchaser in its sole discretion," the Purchaser could terminate the Contract and Debtor was required to return the Earnest Money Deposit to the Purchaser.[9]

The Contract also provided for the damages that Debtor or the Purchaser could claim in the event of a default by the other party. Under Section

[1] Doc. No. 212.
[2] Doc. No. 216. Debtor's four shareholders are Hafiz Damani, Zulfikar Damani, Nizarali Jaffer, and Rahim Jaffer (the "Shareholders").
[3] Doc. No. 222.
[4] Claim No. 5-1, pp. 11-19.
[5] Claim No. 5-1, p. 11.
[6] Claim No. 5-1, p. 18.
[7] *Id.*
[8] Claim No. 5-1, p. 11.
[9] Claim No. 5-1, p. 18.

11.K of the Contract, if Debtor defaulted under the Contract, the Purchaser could enforce the Contract and Debtor's obligations in an action seeking specific performance. Section 11.K states:

> [Debtor] and Purchaser acknowledge that it is impossible to measure the damages which would accrue to Purchaser by reason of [Debtor's] default hereunder. Accordingly, Purchaser may enforce this Contract and [Debtor's] obligations hereunder in an action seeking specific performance.[10]

And under Section 11.Q of the Contract, the parties agreed that if the Closing did not occur because the Purchaser defaulted, Debtor's sole remedy was to retain the Earnest Money Deposit.[11]

On May 18, 2016, Debtor, the Purchaser, and Sunset executed an *Assignment of Commercial Contract and Consent* in which the Purchaser assigned all of its rights under the Contract to Sunset (the "Assignment").[12] Under the Assignment, Sunset—described as a "Florida limited liability company *to be formed*"—assumed the performance of all the terms, covenants, and conditions of the Contract.[13]

In September 2016, the City of St. Pete Beach (the "City") adopted Resolution No. 2016-15, the "practical impact of which was the imposition of a moratorium on commercial development within the City of St. Pete Beach until the City could repair, replace and expand its sewer capacity."[14]

On March 18, 2017, ten months *after* the Assignment, Nickolas Ekonomides and Andrew McIntosh, two attorneys in the Tampa/Clearwater, Florida area, formed Sunset as a Florida limited liability company.[15] Mr. Ekonomides and Mr. McIntosh are Sunset's managers and sole members. Sunset is not an active, operating company; it never engaged in any business unrelated to the Property, and it never opened its own bank account.[16]

By October 2019, over four years after Debtor entered into the Contract and over two years after Purchaser assigned the Contract to Sunset, the City had declared a moratorium on new commercial development, the Property had not been rezoned, the Feasibility Period had not commenced, Sunset's obligation to purchase the Property had not been triggered, and the Contract had not closed. In short, in exchange for the refundable $10,000 Earnest Money Deposit (that the parties have represented is still held in escrow), Debtor was obligated to sell the Property to Sunset. But Sunset was not obligated to close on the sale until the Property had been rezoned to allow the construction of a hotel, retail space, and parking garage, the design and configuration of which was at Sunset's sole discretion. In other words, Debtor's obligation to sell the Property to Sunset continued into the indefinite future, but, conceivably, Sunset *never* would become obligated to purchase the Property.

On October 3, 2019, Debtor filed a petition under Chapter 11 of the Bankruptcy Code.[17] Shortly thereafter, Debtor filed a motion under 11 U.S.C. § 365(a)[18] to reject the Contract (the "Rejection Motion").[19] In the Rejection Motion, Debtor alleged that Sunset had not closed on the Contract in the four years since its entry, that Sunset had been informed by the City that its proposed construction on the Property could not be approved under the City's existing land development code, and that Debtor needed to sell the Property in order to satisfy the claims of its creditors.

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[10] Claim No. 5-1, p. 15.
[11] *Id.*
[12] Claim No. 5-1, pp. 20-22. Debtor signed the Assignment "for purposes of consent only."
[13] Claim No. 5-1, pp. 20 (emphasis added).
[14] Doc. No. 221-1, Affidavit of Nickolas Ekonomides, ¶ 12.
[15] Doc. No. 215, Deposition transcript of Andrew McIntosh, Ex. 11 (pp. 68-70).
[16] Doc. No. 215, Deposition transcript of Andrew McIntosh, pp. 31-32, 45.
[17] Doc. No. 1.
[18] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq*.
[19] Doc. No. 22.

Sunset consented to the relief requested in the Rejection Motion, and the Court entered an agreed order approving Debtor's rejection of the Contract (the "Rejection Order").[20] The Rejection Order allowed Sunset twenty-one days from the date of the order to file a claim arising out of the rejection.

Sunset timely filed Claim No. 5-1 (the "Claim") for "rejection damages in lieu of specific performance" in in the amount of $4.36 million. In the Claim, Sunset acknowledges that the Contract had not closed as of the date of Debtor's bankruptcy petition because the City had not rezoned the Property. Sunset also states that the delay in the rezoning was "caused by a moratorium on new commercial development by the City due to the inadequacy of the City's sewer systems, a lack of funding for said replacements, and multiple third party legal challenges to the City's development code, including related appeals."[21]

In the Claim, Sunset further asserts that Debtor prevented Sunset's performance by rejecting the Contract in the Chapter 11 case, and that Sunset's rejection damages are therefore the difference between the value of the Property at the time of the breach and the Contract price. Sunset estimated that the value of the Property with the requested zoning is $6.96 million. Consequently, Sunset computed its rejection damages at $4.36 million, the difference between the Contract Price of $2.6 million and its $6.96 million valuation of the Property if rezoned.[22]

Sunset later amended its Claim to include a supplemental narrative.[23] In its supplement, Sunset asserts that the sale of the Property had not closed as of the date of the bankruptcy petition due to the "non-occurrence" of the rezoning condition in the Contract, and that Debtor, by rejecting the Contract, "rendered itself unable to fulfill its contractual obligations" by rejecting the Contract.[24]

In June 2020, Debtor filed its Chapter 11 Plan in which it proposed to sell the Property to Vario, the owner of one of the two restaurants on the Property.[25] The proposed sale to Vario did not contemplate any rezoning of the Property. Debtor filed an Amended Plan in August 2020,[26] and the Court held a hearing on September 29, 2020 (the "Confirmation Hearing"). At the Confirmation Hearing, Sunset's attorney represented that Sunset would "like to see the property sold," but wished to preserve its rejection damages claim.[27] On October 21, 2020, the Court entered an *Order Approving Debtor's Disclosure Statement and Confirming Debtor's Plan* which approved Debtor's sale of the Property for the sale price of $2.7 million, and stated that the Court "makes no findings" regarding the allowance of Sunset's Claim.[28]

Meanwhile, the Shareholders filed an objection and an amended objection to Sunset's Claim, in which Debtor has joined.[29] Generally, the Shareholders assert that under Section 11.K of the Contract, Sunset's remedy for Debtor's breach was limited to specific performance; that Sunset lost that remedy by agreeing to rejection of the Contract; and that Sunset has no support for its claim that the "fully-developed" value of the Property is $6.96 million.

On January 29, 2021, Vario closed on the sale of the Property, and Debtor received proceeds in the aggregate amount of $2,637,552.63, from which $735,228.52 was paid to Stearns Bank in satisfaction of its first mortgage on the Property.[30]

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[20] Doc. No. 62.

[21] Claim No. 5-1, p. 5.

[22] Claim No. 5-1, p. 9. Sunset estimates that the value of a hotel on the Property (calculated as the number of rooms by the average daily rental rate) is $1.7 million, the value of 10,000 square feet of retail space on the Property is $500,000, and the value of a parking garage on the Property (calculated from the number of spaces, parking fee, and occupancy rate) is $4.76 million, for a total Property value of $6.96 million "assum[ing] that the condition to closing had occurred as of the date of breach."

[23] Claim No. 5-2.

[24] Claim No. 5-2, pp. 5, 7.

[25] Doc. No. 88.

[26] Doc. No. 117.

[27] Doc. No. 170, Transcript of September 29, 2020 hearing, pp. 21-23, 37.

[28] Doc. No. 176, ordering paragraph 4.a.

[29] Doc. Nos. 133, 134, and 169.

[30] Doc. No. 2016, p. 12; Doc. No. 217, Affidavit of Rahim Jaffer.

B. The Motions for Summary Judgment

In its motion for summary judgment, Sunset asks the Court to (1) recognize Debtor's rejection of the Contract as a breach by Debtor, (2) allow its Claim in an amount to be determined, and (3) exclude evidence of Sunset's alleged breach of the Contract or its inability to perform under the Contract.[31]

In their motion for summary judgment, the Shareholders and Debtor ask the Court to disallow Sunset's Claim because (1) the Contract expressly bars any claim for monetary damages against Debtor, (2) Sunset was never ready, willing, and able to perform the Contract, (3) the amount of any monetary damages cannot be established, and (4) Sunset's damages are limited to any excess profits realized by Debtor from the sale of the Property.[32]

II. ANALYSIS

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), a party "may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought."[33] Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the nonmovant bears the burden at trial, the moving party may either show that there is an absence of evidence to support the nonmoving party's claim or may come forward with affirmative evidence showing that the nonmoving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility moves to the nonmoving party to show the existence of a genuine issue of material fact.[34]

Here, Sunset's Claim is based on Debtor's breach of the Contract. Under Florida law, a party suing on a contract bears the burden of proof, although the party defending a contract action bears the burden of proof on any affirmative defense.[35]

B. Rejection of an Executory Contract Under the Bankruptcy Code

Under § 365(g), the rejection of an executory contract constitutes the debtor's breach of the contract immediately before the date of the filing of the bankruptcy petition. Under § 502(g)(1), a claim arising from the rejection of an executory contract under § 365 may be allowed under § 502(a), (b), or (c) as if the claim had arisen before the date of the filing of the petition.[36]

Under § 502(c)(2), "any right to payment arising from a right to an equitable remedy for breach of performance" may be estimated for purposes of allowance.[37] The question before the Court is whether Sunset has a "right to payment" arising from its right to enforce the Contract in an action for specific performance. Generally, courts look to state law to determine whether a claimant has a "right to payment" under § 502(c)(2).[38]

C. A Non-Breaching Purchaser's "Right to Payment" Under Florida Law

In two separate cases, *Coppola Enterprises, Inc. v. Alfone* and *Gassner v. Lockett*, the Florida Supreme Court has held that:

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[31] Doc. No. 212, p. 2.
[32] Doc. No. 216, p. 3.
[33] Fed. R. Civ. P. 56(a) made applicable to this contested matter by Fed. R. Bankr. P. 7056.
[34] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).
[35] *In re Print Harmony, LLC*, 567 B.R. 632, 638 (Bankr. M.D. Fla. 2017) (citing *Knowles v. C.I.T. Corporation*, 346 So. 2d 1042, 1042 (Fla. 1st DCA 1977)).
[36] 11 U.S.C. § 502(g)(1).
[37] 11 U.S.C. § 502(c)(2).
[38] *In re John Q. Hammons Fall 2005, LLC*, 2017 WL 4638439, at *4 (Bankr. D. Kan. Oct. 13, 2017) (citations omitted).

> [W]here a vendor is unable to perform a prior contract for the sale of the lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit.[39]

By holding the seller to the obligations of a trustee for the benefit of the original buyer, the court essentially created a constructive trust remedy in which the seller holds the difference between the original contract price and the higher price received from a different buyer in a constructive trust for the original buyer. The policy underlying the Florida Supreme Court's holding is that a seller should not profit from its own breach of a contract when the breach is followed by a sale of the property to a new purchaser.[40] But under Florida law, to establish a prima facia claim for specific performance, a non-breaching purchaser must establish that it was a ready, willing, and able buyer.

> To establish a prima facie claim for specific performance of a contract or for damages for breach of a contract, Florida law requires the plaintiff to show it was ready, willing, and able to perform the contract. A purchaser may show it is financially ready and able by showing it has (1) the necessary "cash in hand," (2) "personal[] possess[ion] of assets . . . and a credit rating" that show a "reasonable certainty to command the requisite funds," or (3) "a binding commitment . . . by a financially able third party."[41]

In *In re TOUSA, Inc*.,[42] the debtor was a large home developer that contracted to sell homes to another large home developer; the businesses of both the debtor and the proposed buyer failed and the sales were not consummated. The debtor filed a voluntary bankruptcy petition, and then filed a motion to reject its contracts with the buyer. The bankruptcy court granted the motion, the buyer filed claims for rejection damages, and the debtor objected to the buyer's claims, primarily on the grounds that under the parties' contracts, the buyer had waived its right to monetary damages and agreed to pursue only its equitable remedies in the event of the debtor's default.

The *TOUSA* court considered whether the buyer had a "right to payment" under Florida law as an alternative to its equitable remedies. The bankruptcy court recognized the Florida Supreme Court's holding in *Gassner* and *Coppola Enterprises*, as well as a Florida district court of appeals ruling in *Schachter v. Krzynowek*,[43] in which that court concluded that the buyer was entitled to monetary damages for a seller's breach of a sales contract even though the contract limited the buyer's remedy to specific performance.

But the *TOUSA* court distinguished the facts and analysis in *Schachter* from the case before it on a number of grounds. First, in *Schachter*, the seller—just three months after entering into a contract to sell his property—intentionally breached the original sales contract so that he could sell the property to another buyer at a higher price, whereas in *TOUSA*, the contracts failed primarily because of declining market conditions.[44] Second, the seller in *Schachter* sold his property for $95,000 more than the original $800,000 contract price, while in *TOUSA*, there was no evidence that the debtor sold any homes at prices greater than its contract prices with the buyer. Third, in *TOUSA*, the debtor sold the homes that had been under contract to the buyer *after* the debtor had filed its bankruptcy petition and was granted permission to sell the property by the court. Finally, the court found that in *Schachter*, the contract limited the buyer's remedy to specific performance, but did not expressly bar the buyer's claim for monetary

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[39] *Coppola Enterprises, Inc. v. Alfone*, 531 So. 2d 334, 335 (Fla. 1988) (quoting *Gassner v. Lockett*, 101 So. 2d 33, 34 (Fla. 1958)).

[40] *Coppola Enterprises*, 531 So. 2d at 335-36.

[41] *M & M Realty Partners at Hagen Ranch, LLC v. Mazzoni*, 982 F. 3d 1333, 1337 (11th Cir. 2020) (quoting *Hollywood Mall, Inc. v. Capozzi*, 545 So. 2d 918, 920 (Fla. 4th DCA 1989)).

[42] 503 B.R. 499 (Bankr. S.D. Fla. 2014).

[43] 958 So. 2d 1061 (Fla. 4th DCA 2007).

[44] *TOUSA* filed its Chapter 11 bankruptcy case in January 2008, during what has come to be known as the "Great Recession."

damages, whereas in *TOUSA*, the buyer had expressly waived its right to seek monetary damages from the debtor. For these reasons, the *TOUSA* court concluded that the buyer did not have a monetary remedy against the debtor under Florida contract law and the rule established in *Gassner* and *Coppola Enterprises*.

D. Sunset cannot establish a "right to payment" under Florida law.

Having carefully considered the parties' motions for summary judgment, the applicable Florida case law, and the bankruptcy court's analysis in *TOUSA*, the Court concludes that, as a matter of law, Sunset's Claim for monetary damages is not allowable under § 502(c).

First, Sunset expressly agreed in the Contract that it was "impossible to measure the damages which would accrue to [Sunset] by reason of [Debtor's] default" and, because of the impossibility of measuring damages, that Sunset "may enforce this Contract and [Debtor's] obligations" by seeking specific performance.[45] The Court recognizes that this provision of the Contract is not as definitive as the contract in *TOUSA*, but the equitable remedy of specific performance is available only when legal damages cannot be measured or are inadequate.[46] Here, although Sunset's right to seek monetary damages was not expressly waived, Sunset agreed to the impossibility of measuring damages, and Sunset's waiver is implicit.

The mutuality of the Contract's limitations on damages also supports a finding that Sunset waived its right to seek monetary damages. In addition to limiting Sunset's remedy to an action for specific performance, the Contract also limited Debtor's remedy to recovery of the Earnest Money Deposit (less $1.00) because of the impracticality of measuring Debtor's damages in the event of Sunset's default.[47] Under Florida law, parties to a contract may mutually limit their damages for a breach by the other party, and the limitation is enforceable unless the alternative remedies provided by the contract are unreasonably disparate.[48] The Court finds that the alternative remedies under the Contract are not unreasonably disparate. Sunset is not an unsophisticated buyer—its principals are attorneys and there is no "unreasonable disparity" between the remedies provided. Accordingly, the Court finds that the mutual contractual limitations are enforceable, and Sunset's only remedy upon Debtor's default is an action for specific performance.

Second, Sunset cannot establish its right to specific performance under Florida law because it was not a ready, willing, and able buyer. As set forth above, to establish a prima facie claim for specific performance of a contract, Florida law requires a buyer to show it was ready, willing, and able to perform the contract by showing it has (1) the necessary "cash in hand," (2) "personal[] possess[ion] of assets . . . and a credit rating" that show a "reasonable certainty to command the requisite funds," or (3) "a binding commitment . . . by a financially able third party."[49]

Here, Sunset asserts that proof of its ability to perform under the Contract is irrelevant because Debtor first breached the Contract. And, even if Sunset's ability to perform were relevant, the Court should not grant summary judgment against it because issues of fact exist regarding Sunset's claim that it had a "clear plan, the experience and the relationships necessary" to provide the funding required to purchase the Property.[50] But the record shows that Debtor and the Purchaser entered into the Contract in 2015, that the Contract was conditioned on the rezoning of the Property to allow the Purchaser to build a 120-room hotel, that more than four years passed between the date of the Contract and the date of Debtor's bankruptcy

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[45] Claim No. 5-1, p. 15, § 11K.
[46] *Degirmenci v. Sapphire-Fort Lauderdale, LLLP*, 693 F. Supp. 2d 1325, 1347 (S.D. Fla. 2010).
[47] Claim No. 5-1, p. 15, § 11Q.
[48] *Inlet Beach Capital Investments, LLC v. Federal Deposit Insurance Corporation*, 778 F.3d 904, 906-07 (11th Cir. 2014) (quoting *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 151 (Fla. 4th DCA 2005), and citing *Terraces of Boca Associates v. Gladstein*, 543 So. 2d 1303, 1304 (Fla. 4th DCA 1989)). *See also In re TOUSA, Inc.*, 503 B.R. at 508 (citations omitted).
[49] *M & M Realty Partners at Hagen Ranch, LLC v. Mazzoni*, 982 F. 3d at 1337 (citations omitted).
[50] Doc. No. 212, pp. 8-9; Doc. No. 222, pp. 3-10.

petition, and that neither the Purchaser nor Sunset were able to obtain the rezoning within that four-year period. Just as in *TOUSA*, the Court finds here that the parties' inability to obtain the rezoning was the "driving factor" behind the Contract's failure, not Debtor's rejection of the Contract.[51]

In addition, the record evidence is that Sunset did not even exist at the time that the Contract was assigned to it in 2016, that Sunset was not formed until 2017 (ten months after the Assignment), and that Sunset has never engaged in business, owned other property, earned income, or opened a bank account. And Sunset offers no evidence for its assertion that it can or could have obtained funding through its existing "relationships." In any event, Sunset has never expressed an interest in waiving the conditions precedent to its obligation to close on the Contract. Nor did Sunset ever assert *any* interest in closing on its purchase of the Property, unless at some point in the indeterminable future, the Property is rezoned to allow its development as a hotel, retail space, and parking garage. Based on this record, the Court finds that Sunset did not establish a prima facie claim for specific performance because it did not show that it was ready, willing, and able to perform the Contract, or that it had either the immediate access to funds or the creditworthiness required to pay the $2.6 million purchase price under the Contract.

Third, even if Sunset had established its right to specific performance under the Contract, it did not establish under § 502(c)(2) and Florida law that it has a "right to payment" arising from its failed equitable remedy. Under *Gassner* and *Coppola Enterprises*, a buyer's monetary remedy when it is unable to obtain specific performance is calculated as the difference between the original contract price and any higher price later received by the seller. But here, Debtor did not obtain a significantly higher price when it sold the Property to Vario in 2021. Debtor's June 2015 Contract with the Purchaser, and later Sunset, was for the purchase price of $2.6 million. Five and one-half years after it entered into the Contract, Debtor sold the Property to Vario for $2.7 million, just $100,000 more than the Contract price. In the absence of any evidence that Debtor breached the Contract in order to obtain a higher sales price, the Court finds that the $100,000 increased price was insignificant and did not represent "excess sales proceeds."[52] Accordingly, the Court finds Debtor is not holding any excess sale proceeds in "trust" for Sunset, and Sunset does not have a monetary remedy against Debtor arising from Debtor's breach of the Contract.

Finally, Sunset did not calculate its claim in the manner mandated by the Florida Supreme Court in *Gassner* and *Coppola Enterprises*. Under the *Gassner/Coppola Enterprises* analysis, Sunset would have been entitled, at best, to a claim of $100,000 (the difference between the $2.6 million Contract price and the $2.7 paid by Vario). Instead, Sunset asserts that it is entitled to a claim of $4.36 million—$1.76 million more than the Contract price—by subtracting the $2.6 million Contract price from its hypothetical $6.96 million valuation of the Property "with the regulatory changes in place." Sunset arrived at this "valuation" by estimating the value of the Property if it were improved with a hotel, retail space, and parking garage. But Sunset never obtained the required rezoning to develop the Property; no hotel, retail space, or parking garage were ever built on the Property; and Sunset provides no evidentiary support for its estimated Property value of $6.96 million. Sunset's "alternative" estimate of its damages (the "difference between the 'as is' value of the Property as of the Contract date, and the 'as is' value of the property as of the date of breach")[53] is not consistent with the *Gassner/Coppola Enterprises* analysis and is also belied by Debtor's sale to Vario for only $100,000 more than the Contract price.

In essence, Sunset seeks its "loss of bargain" damages for Debtor's breach of the Contract. But the general rule in Florida is that a buyer is only

[51] *In re TOUSA*, 503 B.R. at 506.

[52] The Court notes that the $100,000 increase in sales price is only 3.7% greater than the Contract's $2.6 million sales price; this is in marked contrast to the facts in *Schachter* where, just three months after the date of the original contract, the seller sold the property for nearly 12% more than the original $800,000 contract price. *Schachter v. Krzynowek*, 958 So. 2d at 1063.

[53] Amended Claim No. 5-2, p. 7, FN 1.

entitled to full compensatory damages, including the loss of its bargain, if the seller has acted in bad faith.[54] Here, there has been no suggestion that Debtor intentionally breached the Contract in order to accept a higher offer from a third party; rather, Debtor sold the Property to Vario after Sunset was unable to close the Contract, and after Debtor filed a bankruptcy petition and obtained Court approval for the sale. The record does not support a finding that Debtor acted in bad faith in connection with the Contract.

In summary, Sunset did not establish that it has a "loss of bargain" claim based on Debtor's sale of the Property to Vario, and did not establish any alternative claim for monetary damages arising from the loss of its remedy of specific performance.

III. CONCLUSION

Sunset filed its Claim for "rejection damages in lieu of specific performance." Under § 502(c)(2), a claimant's right to payment arising from a right to an equitable remedy is determined by state law. The Court finds that Sunset's Claim is not allowable under § 502(c)(2) and Florida law because (1) Sunset's sole remedy under the Contract is an action for specific performance, (2) Sunset did not establish its right to specific performance because it has not established that it was a ready, willing, and able buyer, (3) even if Sunset had established its right to the equitable remedy of specific performance, Sunset does not have a "right to payment" arising from the equitable remedy because Debtor did not receive significant profits from its later sale of the Property to Vario, and (4) Sunset is not entitled to the "benefit of the bargain" damages it asserts in its Claim.

Accordingly, it is

ORDERED:

1. Sunset Waypoint LLC's *Motion for Partial Summary Judgment as to Objections to Claim No. 5* (Doc. No. 212) is **DENIED.**

2. The *Motion for Summary Judgment Seeking Disallowance of Claim No. 5-1 Filed by Sunset Waypoint, LLC* filed by the Shareholders and joined by Debtor (Doc. No. 216) is **GRANTED.**

3. The Shareholders' *Objection to Claim No. 5-1 Filed by Sunset Waypoint, LLC* (Doc. No. 133) is **SUSTAINED.**

4. Claim No. 5-1 and amended Claim No. 5-2 filed by Sunset Waypoint, LLC, are **DISALLOWED.**

DATED: April 20, 2021.

/s/ Caryl E. Delano

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Caryl E. Delano
Chief United States Bankruptcy Judge

[54] *S.K.Y. Management LLC v. Greenshoe, Ltd.*, 2007 WL 9701121, at *7 (S.D. Fla. Mar. 11, 2007) (citations omitted); *In re Besade*, 76 B.R. 845, 847 (Bankr. M.D. Fla. 1987).