

STATE OF NORTH CAROLINA
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 725

LORAY MILL DEVELOPERS, LLC;
LORAY MILL MANAGER, LLC;
LORAY COMMERCIAL TENANT,
LLC; LORAY MILL
REDEVELOPMENT PHASE II, LLC;
JBS VENTURES, LLC; and JOSEPH
LENIHAN,

Plaintiffs,

v.

CAMDEN LORAY MILL PHASE I,
LLC and JOHN GUMPERT,

Defendants.

**ORDER AND OPINION ON
PLAINTIFFS' MOTION TO
RECONSIDER THE COURT'S
AMENDED ORDER AND OPINION
ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court on Plaintiffs' Motion to Reconsider the Court's Amended Order and Opinion on Cross-Motions for Summary Judgment (the "Motion"),¹ filed 11 April 2023 in the above-captioned case.

2. Having considered the Motion, the briefs in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court hereby **GRANTS** the Motion as set forth below.

Rosenwood, Rose & Litwak, PLLC, by Erik M. Rosenwood, for Plaintiffs-Counterclaim Defendants Loray Mill Developers, LLC, Loray Mill Manager, LLC, Loray Commercial Tenant, LLC, Loray Mill Redevelopment Phase II, LLC, JBS Ventures, LLC, and Joseph Lenihan.

Berman Fink Van Horn P.C., by William J. Piercy, and McGuire Wood & Bisette, P.A., by Joseph P. McGuire and Matthew S. Roberson, for Defendants-Counterclaim Plaintiffs Camden Loray Mill Phase I, LLC and John Gumpert.

¹ (ECF No. 101.)

Bledsoe, Chief Judge.

I.

PROCEDURAL HISTORY

3. Plaintiffs filed their Complaint initiating this action on 23 February 2021.² Defendants subsequently filed their Answer and Verified Counterclaims (the “Counterclaims”) on 5 April 2021.³ In Count IX of their Counterclaims, Defendants raised a claim for declaratory judgment (the “DJ Claim”),⁴ seeking a “determination by this Court concerning the extent of Camden’s ownership interest” in Loray Mill Developers, LLC (“LMD”), Loray Mill Manager, LLC (“LMM”), and Loray Commercial Tenant, LLC (“LCT”). The DJ Claim also sought a declaration pertaining to the amount, timing, and conditions precedent for the payment of a development fee that Plaintiffs had allegedly failed to pay to Defendants.⁵

4. The parties filed cross-motions for summary judgment on 15 March 2022 (the “Cross-Motions”),⁶ which were fully briefed as of 25 April 2022.⁷ Plaintiffs’

² (Verified Compl., ECF No. 3.)

³ (Defs.’ Answer and Verified Countercls. ¶¶ 189–94 [hereinafter “Countercls.”], ECF No. 4.) Defendants’ Answer and Verified Counterclaims contains two sections with separately numbered paragraphs for Defendants’ Answer and Defendants’ Counterclaims, respectively. The Court’s citations in this Order refer to the Counterclaims section only.

⁴ (Countercls. ¶¶ 189–94.)

⁵ (Countercls. ¶ 191.)

⁶ (Defs.’ Motion Summ. J. Pls.’ Claims Defs.’ Countercl. Declaratory J., ECF No. 30; Pls.’ Motion Summ. J., ECF No. 32.)

⁷ (See ECF Nos. 31, 35, 37, 39, 40.)

Motion for Summary Judgment (“Plaintiffs’ SJ Motion”), sought summary judgment on all of Defendants’ claims, contending, *inter alia*, that most of Defendants’ claims were time-barred under the applicable statutes of limitations.⁸

5. During its consideration of the Cross-Motions, the Court ordered supplemental briefing twice: (i) first on 6 December 2022 regarding the potential application of the economic loss rule to Defendants’ derivative counterclaims for breach of fiduciary duty and constructive fraud⁹ and (ii) again on 9 December 2022 regarding the potential impact on the issues presented in the Cross-Motions of a K-1 tax form produced to Defendants for LCT.¹⁰ The parties timely submitted supplemental briefing on both issues, and briefing was completed on the Cross-Motions on 22 December 2022.¹¹

6. The Court issued its Order and Opinion on Cross-Motions for Summary Judgment (the “Original Order”) on 7 February 2023.¹² The Court concluded in the Original Order that Defendants’ claims for breach of contract, declaratory judgment, and breach of fiduciary duty were time-barred to the extent they were premised on conduct occurring before 5 April 2018.¹³

⁸ (Pls.’ Motion Summ. J. 2.)

⁹ (Order Suppl. Briefing Motions Summ. J., ECF No. 73.)

¹⁰ (Second Order Suppl. Briefing Motions Summ. J., ECF No. 74.)

¹¹ (See ECF Nos. 76–77, 83–86.)

¹² (Order and Op. Cross-Motions Summ. J. [hereinafter “Original Order”], ECF No. 91.)

¹³ (Original Order ¶¶ 78, 102.)

7. The Court, acting *sua sponte*, subsequently amended the Original Order on 27 March 2023 in its Amended Order and Opinion on Cross-Motions for Summary Judgment (the “Amended Order”).¹⁴ Part of the Amended Order’s purpose was “to amend and clarify certain of the Court’s rulings on Plaintiffs’ Motion on Defendants’ counterclaim for declaratory judgment.”¹⁵

8. Of particular significance here, the Court modified paragraph 78 of the Original Order. That provision read as follows:¹⁶

Accordingly, based on the above, the Court concludes that the applicable statutes of limitations bar Defendants’ claims for breach of contract, declaratory judgment, and breach of fiduciary duty related to (i) JBS’s failure to pay the development fee, (ii) LMM’s failure to pay the construction management fee, (iii) unbudgeted commercial tenant upfit expenditures flowing from JBS’s design changes in 2013 and 2014, (iv) JBS’s failure to reach an agreement with Foss regarding tax credits, (v) Gumpert’s lost financing, (vi) Lenihan’s alleged self-dealing prior to 5 April 2018, and (vii) the Capital Calls on 8 December 2015 and 6 June 2017. Accordingly, Plaintiffs’ Motion will be granted to this extent and the foregoing claims will be dismissed with prejudice.

9. Paragraph 78 of the Amended Order changed the original paragraph 78 to read:¹⁷

Accordingly, based on the above, the Court concludes that the applicable statutes of limitations bar Defendants’ claim for breach of contract[, declaratory judgment,] and breach of fiduciary duty related to (i) JBS’s *alleged* failure to pay the development fee, (ii) LMM’s *alleged* failure to pay the construction management fee, (iii) unbudgeted commercial tenant upfit expenditures flowing from JBS’s design changes in 2013

¹⁴ (Am. Order and Op. Cross-Motions Summ. J. [hereinafter “Amended Order”], ECF No. 98.)

¹⁵ (Amended Order 1 n. 1.)

¹⁶ Footnotes in the original text have been omitted.

¹⁷ For ease of comparison, newly added text appears in italics, and deleted text is enclosed in brackets. Footnotes in the amended text have also been omitted.

and 2014, (iv) JBS's failure to reach an agreement with Foss regarding tax credits, (v) Gumpert's lost financing, (vi) Lenihan's alleged self-dealing prior to 5 April 2018, and (vii) the Capital Calls on 8 December 2015 and 6 June 2017. *The Court further concludes that the applicable statute of limitations likewise bars Defendants' declaratory judgment claim concerning Camden's alleged right to payment of the development fee given that claim's close correlation to Defendants' breach of contract claim based on the same conduct and seeking essentially the same relief.* Accordingly, Plaintiffs' Motion will be granted to this extent and the foregoing claims will be dismissed with prejudice.

10. The Court also added a new footnote 115 to indicate that "issues of fact preclude[d] summary judgment for Plaintiffs dismissing Defendants' declaratory judgment counterclaim for the period prior to 5 April 2018"¹⁸ and modified paragraph 102(b) to deny Plaintiffs' SJ Motion as to "Defendants' declaratory judgment counterclaim to the extent that claim seeks to establish the parties' respective ownership rights in LMM, LCT, and LMD."¹⁹ The effect of the Court's amendments was to allow that portion of Defendants' declaratory judgment claim seeking to establish the respective parties' ownership interests in LMD, LMM, and LCT to survive summary judgment, whether premised on events before or after 5 April 2018.

11. Plaintiffs filed the current Motion on 11 April 2023, contending that the Court's changes to paragraphs 78 and 102(b) in the Amended Order constituted clear legal error and should be reconsidered.²⁰ The Court convened a hearing on the Motion on 25 May 2023 by Webex videoconference, at which all parties were represented by counsel. The Motion is now ripe for resolution.

¹⁸ (Amended Order ¶ 79, n.115.)

¹⁹ (Amended Order ¶ 102(b).)

²⁰ (Pls.' Mot. Reconsider Court's Am. Order and Op. Cross-Mots. Summ. J. 3–4.)

II.

LEGAL STANDARD

12. The Motion is made under Rules 54(b) and 60(b) of the North Carolina Rules of Civil Procedure (the “Rule(s”).²¹ Rule 54(b) provides that “any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”²² *See also Vizant Techs., LLC v. YRC Worldwide, Inc.*, 2018 NCBC LEXIS 155, at *9 (N.C. Super. Ct. Nov. 15, 2018) (“[A] trial court judge has the authority to reconsider his or her own summary judgment ruling[.]”), *aff’d per curiam*, 373 N.C. 549 (2020). Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [m]istake, inadvertence, surprise, or excusable neglect . . . [or a]ny other reason justifying relief from the operation of the judgment.”²³

13. As an initial matter, to the extent that the Motion seeks reconsideration under Rule 60, it must be denied. Rule 60(b) applies only to “final judgments, orders, and proceedings; it has no application to interlocutory orders.” *Pratt v. Staton*, 147 N.C. App. 771, 775 (2001). Because both the Original Order and the Amended Order are interlocutory rulings on partial summary judgment, Rule 60 does not apply. *Cf. Parmley v. Barrow*, 253 N.C. App. 741, 745 (2017) (“A grant of partial summary

²¹ (Pls.’ Mem. Law Supp. Motion Reconsider 3, ECF No. 102.)

²² N.C.G.S. § 1A-1 Rule 54.

²³ N.C.G.S. § 1A-1 Rule 60.

judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” (quoting *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 652 (2007))).

14. In contrast, Rule 54(b) applies to interlocutory orders and may be properly invoked to reconsider the Amended Order. See *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 798 (2016). But “[a] motion for reconsideration is not a vehicle to identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending,” *W4 Farms, Inc. v. Tyson Farms, Inc.*, 2017 NCBC LEXIS 99, at *5 (N.C. Super. Ct. Oct. 19, 2017) (quoting *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015)), and “[m]ost courts have adhered to a fairly narrow set of grounds on which to reconsider their interlocutory orders and opinions.” *Akeva, LLC v. Adidas Am., Inc.*, 385 F. Supp. 2d 559, 565 (M.D.N.C. 2005) (considering Rule 54(b) of the Federal Rules of Civil Procedure).²⁴ These grounds include “(1) the discovery of new evidence, (2) an intervening development or change in the controlling law, or (3) the need to correct a clear error or prevent manifest injustice.” *RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2016 U.S. Dist. LEXIS 74550, at *3–4 (M.D.N.C. June 8, 2016).

²⁴ “Although the North Carolina courts have not formulated a standard to guide trial courts in considering a motion to amend an interlocutory ruling under Rule 54(b), federal case law addressing similarly worded portions of Federal Rule 54(b) provides useful guidance.” *In re Se. Eye Ctr.-Judgments*, 2017 NCBC LEXIS 77, at *9 (N.C. Super. Ct. Aug. 22, 2017).

III.

ANALYSIS

15. To begin, it is important to recognize that “an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *Lide v. Mears*, 231 N.C. 111, 118 (1949). As a result, a trial court “has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise.” *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 198 (2009) (quoting *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287 (1964)). It follows that “where it appears that the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgment[] Act.” *Newman Mach. Co. v. Newman*, 2 N.C. App. 491, 494 (1968), *rev’d on other grounds*, 275 N.C. 189 (1969).

16. Significantly for this Motion, declaratory judgment claims are not subject to an independent, statutorily–mandated statute of limitations and instead “are subject to the . . . statute of limitations . . . that governs the substantive right that is most closely associated with the declaration that is being sought.” *Chisum v. Campagna*, 376 N.C. 680, 719 (2021); *see, e.g., McLean v. Spaulding*, 273 N.C. App. 434, 442 (2020) (dismissing declaratory judgment claim as time-barred because “[t]he statute

of limitations for declaratory relief [was] based upon the [untimely] underlying claims”). If the statute of limitations on the claim most closely associated with the requested declaration expires, the associated declaratory judgment claim will thus be time-barred. *See, e.g., Ludlum v. State*, 227 N.C. App. 92, 94 (2013) (“[I]f the statute of limitations was properly applied to plaintiff’s underlying claims, no relief can be afforded under the Declaratory Judgment Act.”).

17. Here, Defendants sought a declaratory judgment as to Camden’s ownership interests in LMD, LMM, and LCT, as well as Camden’s right to payment of a purported development fee, under the terms of the respective entities’ operating agreements. The Court concluded in both its Original Order and its Amended Order that Camden’s claims for breach of contract, breach of fiduciary duty, and declaratory judgment concerning Plaintiffs’ payment of the development fee to Defendants were time-barred.²⁵ The Motion does not seek reconsideration of the Court’s rulings in these respects, and they shall remain undisturbed.

18. Instead, the Motion seeks the Court’s reconsideration of its conclusion in paragraphs 78 and 102(b) of the Amended Order that the declaratory judgment claim based on the 8 December 2015 and 6 June 2017 Capital Calls (the “Capital Calls”) should not be dismissed as time-barred. Based on its careful review, the Court agrees with Plaintiffs that paragraphs 78 and 102(b) of the Amended Order reflect clear error and must be further amended.

²⁵ (Original Order ¶ 78; Amended Order ¶ 78.)

19. The amendment is required because Defendants support their declaratory judgment claim as to these two Capital Calls by alleging that the Capital Calls were (i) improperly issued because they were made before the “Chevron Reserve” had been released (in alleged violation of Article 4.3 of the operating agreements), (ii) based on funds JBS already contributed to the project through the conversion of loans to equity (in alleged violation of Article 4.2 of the operating agreements), and (iii) caused by improper or unbudgeted project expenses (in alleged violation of Articles 3.1, 3.2, and 3.3 of the operating agreements).²⁶

20. Thus, by their pleading’s plain terms, Defendants rest their counterclaim as to the two Capital Calls on alleged breaches of the applicable operating agreements, alleged self-dealing in violation of JBS’s fiduciary duties, or both. As such, Defendants’ declaratory judgment counterclaim simply restates Defendants’ counterclaims for breach of contract or breach of fiduciary duty and, like those claims, is subject to a three-year statute of limitations.²⁷ *See, e.g., McLean*, 273 N.C. App. at 442; *Futures Group, Inc. v. Brosnan*, 2022 NCBC LEXIS 150, at *14 (N.C. Super. Ct.

²⁶ (Countercls. ¶¶ 83–91; *see* Aff. Erik M. Rosenwood, dated 15 Mar. 2022, Ex. 1, Operating Agreement Loray Mill Manager, LLC Arts. 3.1–.3, 4.2–.3 [hereinafter “LMM Agreement”], ECF No. 33.1). The operating agreements for LMD and LCT are identical to the LMM Agreement and appear on the Court’s electronic docket as ECF Nos. 33.2 and 33.3, respectively.

²⁷ N.C.G.S. § 1-52(1); *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66 (2005) (“Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C.G.S. § 1-52(1)[.]”).

Dec. 7, 2022) (applying three-year breach of contract statute of limitations to “closely associated” declaratory judgment claim).

21. Since Defendants filed their Counterclaims on 5 April 2021, Defendants’ claims for breach of contract, breach of fiduciary duty, and declaratory judgment based on those claims are time-barred to the extent they are premised on conduct occurring prior to 5 April 2018. The Court’s conclusion to this effect was correct in paragraphs 78 and 102(b) of the Original Order, and its conclusion to the contrary in paragraphs 78 and 102(b) of the Amended Order was clear error. Accordingly, the Court concludes that the Motion should be granted, paragraphs 78 and 102(b) of the Amended Order should therefore be amended, superseded, and replaced as set forth below, and footnote 115 in the Amended Order should be omitted.

IV.

CONCLUSION

22. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** the Motion²⁸ and **ORDERS** as follows:

a. Paragraph 78 of the Court’s Amended Order shall be amended to state in its entirety as follows:

Accordingly, based on the above, the Court concludes that the applicable statutes of limitations bar Defendants’ claim for breach of contract and breach of fiduciary duty related to (i) JBS’s alleged failure to pay the development fee, (ii) LMM’s alleged failure to pay the construction management fee, (iii) unbudgeted commercial tenant upfit expenditures flowing from JBS’s design changes in 2013 and 2014, (iv) JBS’s failure to reach an agreement with Foss regarding tax credits, (v) Gumpert’s lost financing, (vi) Lenihan’s alleged self-dealing prior to 5 April 2018, and (vii) the Capital Calls on 8 December 2015 and 6 June 2017. The

²⁸ As noted above, the Court grants the Motion under Rule 54(b) and not Rule 60(b).

Court further concludes that the applicable statute of limitations likewise bars Defendants' declaratory judgment claim based on (i) the validity of the Capital Calls on 8 December 2015 and 6 June 2017 and (ii) Camden's alleged right to payment of the development fee since those aspects of the claim are closely associated with Defendants' breach of contract and breach of fiduciary duty claims based on the same conduct and seeking essentially the same relief. Accordingly, Plaintiffs' Motion will be granted to this extent, and the foregoing claims will be dismissed with prejudice.

b. Footnote 115 of the Amended Order shall be omitted. All other footnotes in the Amended Order shall retain their current numbering.

c. Paragraph 102(b) of the Amended Order shall be amended to read as follows:

Plaintiffs' Motion is **DENIED** as to Defendants' breach of contract and declaratory judgment counterclaims to the extent those claims are based on Plaintiffs' conduct after 5 April 2018; and

d. This Order and Opinion shall not otherwise alter or modify any other provisions of the Amended Order.

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

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge