

alter ego test. As set forth above, the Court can assume this portion of the test for the purposes of this Motion. The County's Motion focuses on the fairness element. As stated, Plaintiffs provide nothing but conclusory allegations in support of that element. Therefore, the Court will grant the County's Motion and dismiss Plaintiffs' claims against the County.

B. BREACH OF CONTRACT

Plaintiffs' breach of contract claim consists of three parts. First, Plaintiffs argue that JSSD breached the Indenture by transferring the foreclosed properties to the Bondholders. Second, Plaintiffs argue that JSSD breached the Indenture by unlawfully levying the assessments and by failing to faithfully account for, collect, settle, and pay the assessments. Finally, Plaintiffs allege that JSSD breached by failing to purchase the Series 2009 Bonds tendered by the Bondholders. The Court will address each argument in turn.

1. Transfer of Foreclosed Properties

Plaintiffs allege that they have the right to elect to direct JSSD to transfer ownership of the foreclosed property and, absent such direction, JSSD must retain the property and pay all assessments. Plaintiffs assert that, by purporting to transfer the foreclosed property to Plaintiffs, JSSD breached the Indenture. JSSD argues that Plaintiffs' claim fails because it was permitted by Utah law to transfer the foreclosed property to the Bondholders. JSSD relies on Utah Code Ann. § 11-42-504(2)(a), which states in pertinent part, that a local entity "may elect to transfer title of the property to the owners of all outstanding assessment bonds . . . as payment in full for all delinquent assessments with respect to the property."²¹

²¹ Utah Code Ann. § 11-42-504(2)(a).

The Court agrees that Plaintiffs have the sole right under the Indenture to elect to direct JSSD to transfer ownership of the foreclosed properties. Absent such direction, JSSD must pay all assessments on the properties so long as JSSD retains ownership of the property. JSSD's purported attempt to transfer the foreclosed properties absent the direction of Plaintiffs constitutes a breach of the Indenture. However, the Court agrees with JSSD that it need not retain title to the foreclosed properties indefinitely. JSSD may sell the property in accordance with Utah Code Ann. § 11-42-504(2)(b). But until it does, JSSD must pay all assessments.

Section 6.5 of the Indenture provides a detailed procedure in the event of a default in the payment of assessments. Under that provision, when a default occurs JSSD must pursue a summary sale of the property. If no one bids the amount due on the assessments plus interest and costs, the property is deemed sold to JSSD for that amount. "So long as [JSSD] retains ownership of the property, it shall pay all delinquent Assessment installments and all Assessment installments that become due, including the interest on them."²² Finally, under Section 6.5, "[t]he Bondholders may at their discretion, elect to direct [JSSD] to transfer ownership of the property to the owner of the Series 2009 Bonds in full satisfaction of all outstanding assessment obligations hereunder and any payment obligations of the Issuer to the Bondholder of the Series 2009 Bonds."²³

JSSD's argument that it has the ability to transfer the foreclosed properties without direction from Plaintiffs is premised on Utah Code Ann. § 11-42-504(2)(a). As set forth above, that provision states that a local entity "may elect to transfer title of the property to the owners of

²² Docket No. 14 Ex. C § 6.5.

²³ *Id.*

all outstanding assessment bonds . . . as payment in full for all delinquent assessments with respect to the property.” JSSD argues that this provision was an implied term of the Indenture and, thus, it was statutorily permitted to transfer the foreclosed properties.

JSSD reads too much into this statute. By its clear language, the statute is permissive, not mandatory. Under the statute, a local entity “may elect to transfer title of the property” to the owners of outstanding bonds. However, nothing in the statute requires the local entity to transfer title and nothing in the statute prohibits the parties from contracting with each other to determine when that election should be made and by whom. JSSD made its election in the Indenture and elected to be governed by the direction of the Bondholders. The Indenture is consistent with the statute in that it allows JSSD to transfer title of the foreclosed properties to the Bondholders, but adds the requirement that the election be made at the direction of the Bondholders.

To the extent that the Indenture and Section 11-42-504(2)(a) are inconsistent, the Indenture provides clear evidence of the parties’ intent to remove any right JSSD may have had to unilaterally transfer the foreclosed properties. The Indenture provides that Plaintiffs “may at their discretion, elect to direct the Issuer to transfer ownership of the property.” This provision cannot be squared with JSSD’s argument that it had the unilateral authority to transfer the foreclosed properties. JSSD is correct in arguing that this provision does not state, as other sections of the Indenture do, that the Bondholders may make the election at their “sole” discretion, but neither does it provide that JSSD may make the election unilaterally. At best, JSSD could argue that the omission of the word “sole” creates an ambiguity, but it has not and the Court agrees that the Indenture is unambiguous.

A recent amendment to Section 11-42-504(2)(a) provides further support for the notion that JSSD did not maintain a unilateral right to transfer the foreclosed property. Section 11-42-504(2)(a) now requires that the local entity and the Bondholders agree to the election to transfer and requires an indenture, private placement memo, or other document explicitly disclose the terms of such an agreement.²⁴ This change provides evidence that the statute prior to the amendment was not intended to give a local entity the unilateral right to transfer foreclosed property.

JSSD argues that Plaintiffs' construction is inconsistent with the limited nature of the 2009 Bonds. This argument seems to assume that if JSSD cannot transfer the foreclosed properties to Plaintiffs it must retain ownership. Nothing in the Indenture or Utah law requires this result. Rather, JSSD has the ability to sell the foreclosed property in accordance with Utah Code Ann. § 11-42-504(2)(b). But while it retains ownership of the property, JSSD must pay all delinquent assessment installments and all assessment installments that become due.

Finally, JSSD argues that its interpretation of the Indenture should be adopted because, otherwise, JSSD would be permitted to sell the foreclosed properties for less than what they are worth. JSSD is correct that Utah law only requires the selling price "not be less than the amount sufficient to reimburse the local entity for all amounts the local entity paid with respect to an assessment on the property."²⁵ However, it does not necessarily follow that JSSD may sell the foreclosed properties for less than fair market value. Doing so has the potential of giving rise to a claim for breach of the covenant of good faith and fair dealing, as it would destroy Plaintiffs'

²⁴ Utah Code Ann. § 11-42-504(2)(a)(i)–(ii).

²⁵ *Id.* § 11-42-504(2)(b).

right to receive the fruits of the contract since the properties were pledged as collateral. Thus, this argument does not support JSSD's interpretation of the Indenture. Dismissal of the claim on this basis is not appropriate.

2. *Mismanaging and Devaluing the Properties*

Plaintiffs further allege that JSSD breached its obligations under the Indenture in a number of ways, including: (a) using bond proceeds to finance projects outside the Assessment Area; (b) using bond proceeds to finance projects that were not identified in the 2005 Notice of Intention; (c) using bond proceeds to construct a wastewater treatment facility (the "Facility") that has never been placed in operation and is capable of serving far more residential units than would be permitted in the Assessment Area; (d) using bond proceeds to acquire land for the Facility even though JSSD already owned land for the facility; (e) charging large administrative fees with no supporting documentation; (f) maintaining inconsistent draw sheets; (g) impairing the development potential and marketability of the properties in the Assessment Area by imposing excessive and illegal exactions; (h) refusing to pay assessments on the properties it obtained through foreclosure sales; and (i) failing to purchase the Series 2009 Bonds tendered by the Bondholders. JSSD argues that the Assessments were lawfully levied, that it did not use the Bond Proceeds in the ways alleged by Plaintiffs, and that it faithfully accounted for, collected, settled, and paid the Assessments to Plaintiffs.

The Indenture states that JSSD is "responsible for the lawful levy of all Assessments . . . and for the faithful accounting, collection, settlement, and payment of the Assessments."²⁶

Additionally, the Indenture provides that "[n]o Assessment will exceed the benefit to be derived

²⁶ Docket No. 14 Ex. C § 6.6.

directly or indirectly from the Improvements by the property assessed, and no parcel of property will bear more than its proportionate share of the cost of the Improvements to be made.”²⁷

Plaintiffs’ myriad allegations call into question whether JSSD complied with these provisions. While JSSD challenges the accuracy of the allegations, the Court must accept Plaintiffs’ well-pleaded allegations as true for the purposes of this Motion. Therefore, the Court declines to dismiss Plaintiffs’ breach of contract claim on this ground. Moreover, to the extent that Plaintiffs’ allegations do not give rise to a breach of the express terms of the Indenture, they do give rise to a claim for breach of the implied covenant of good faith and fair dealing for the reasons discussed below. Therefore, dismissal is not appropriate.

3. *Failure to Purchase*

Finally, Plaintiffs argue that JSSD breached the Indenture by failing to purchase the Series 2009 Bonds tendered by the Bondholders. Section 2.8 of the Indenture allows a Bondholder to deliver an Optional Tender Notice that requires JSSD to purchase the outstanding 2009 Bonds. In October 2015, Plaintiffs issued Optional Tender Notices to JSSD pursuant to Section 2.8, but JSSD failed to purchase the outstanding 2009 Bonds. JSSD’s failure represents an Event of Default under Section 8.1 of the Indenture.

JSSD argues, in a footnote, that this claim is barred by the first breach rule because Plaintiffs failed to accept the transfer of the foreclosed properties in satisfaction of the bond obligations. However, because JSSD had no unilateral authority to transfer the foreclosed properties and Plaintiffs were under no obligation to accept that purported transfer, Plaintiffs’ claims are not barred and this claim will not be dismissed.

²⁷ *Id.* § 6.2.

C. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

“As a general rule, every contract is subject to an implied covenant of good faith.”²⁸

Under the covenant, there is “an implied duty that contracting parties refrain from actions that will intentionally destroy or injure the other party’s right to receive the fruits of the contract.”²⁹

Plaintiffs allege JSSD breached the covenant of good faith and fair dealing by: (1) transferring the foreclosed properties to Plaintiffs; (2) failing to properly manage the Bond Proceeds and assessment funds; and (3) failing to protect the value of the foreclosed properties.

JSSD makes two primary arguments in response to this claim. First, JSSD argues that it had the right to transfer the foreclosed properties to Plaintiffs. Thus, any failure to protect the value of the foreclosed properties was caused by Plaintiffs. This argument hinges on the Court accepting JSSD’s interpretation of the Indenture. As the Court has rejected JSSD’s interpretation, so too must the Court reject this argument.

Second, JSSD argues that this claim seeks to impose new obligations that are not present in the Indenture. However, Plaintiffs allege that through various actions and inactions, JSSD impaired the ability of the property owners to pay the assessments owed and devalued those properties used as collateral. As a result, Plaintiffs allege they are unable to recover the amounts owed. Such allegations are sufficient to plausibly demonstrate that JSSD intentionally destroyed or injured Plaintiffs’ right to receive the fruits of the contract. Therefore, the Court will not dismiss this claim.

²⁸ *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998) (internal quotation marks omitted).

²⁹ *Young Living Essential Oils, LC v. Marin*, 266 P.3d 814, 816 (Utah 2011) (internal quotation marks omitted).