IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

FRANK C. POLLARA and F.C. POLLARA GROUP, LLC., Plaintiffs,	)	CIVIL NO SX-06-CV-423
v.	)	ACTION FOR DAMAGES
CHATEAU ST. CROIX, LLC and ROBERT NEAL, Defendants.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court following remand from the Supreme Court of the Virgin Islands (*Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455 (V.I. 2013)) on: 1) Defendants' Motion for Summary Judgment and accompanying Memorandum in Support ("Motion"), filed May 13, 2014; Plaintiffs' Partial Opposition to Summary Judgment ("Opposition"), filed July 29, 2014; Defendants' Reply thereto, filed December 10, 2014; and 2) Defendants' Motion for Voluntary Dismissal of Counterclaims, filed February 12, 2015; Plaintiffs' Opposition thereto, filed February 27, 2015; and Defendants' Reply, filed March 10, 2015. For the reasons that follow, Defendants' Motion will be granted, Defendants' Motion for Voluntary Dismissal of Counterclaims will be granted and Plaintiffs' Complaint will be dismissed with prejudice.

BACKGROUND

The factual and procedural history of this case was thoroughly reviewed by the Supreme Court. 58 V.I. at 458-66. Thus, the Court will only briefly recount the most salient facts which apply to the instant motions.

On or about March 1, 2006, Plaintiff Frank Pollara entered into a contract ("Contract") with Defendant Chateau St. Croix, LLC ("Chateau") for the purchase and sale of Chateau St. Croix (a/k/a St. Croix-By-The-Sea Hotel) ("the Property"). The Contract provided that the Buyer

(Pollara) would pay Seller (Chateau) the sale price of $2 million, including an earnest money deposit of $100,000 to be paid to Lawyers Title Insurance Corporation ("LTIC"), an international escrow service, within 24 hours of Contract execution. *Id.* at 459; *see also* Motion, 2 (Defendants' Exhibit A). Under the terms of the Contract, $1 million was to be tendered as a down payment, with Seller financing the balance. *Id.* The Contract stated that closing would occur within thirty days (March 31, 2006). *Id.* at 459.

On March 6, 2006, Charles Banacos, Pollara's former business associate and investor concerning this transaction, issued a $100,000 check of Jetstream Finance Corporation to LTIC pursuant to the Contract. However, on April 4, 2006, LTIC advised Chateau that the check was dishonored for "non-sufficient funds." *Id.* at 459-60. On March 30, 2006, Pollara's lender BRAM Realty IV, L.L.C. wired $1.4 million to LTIC to be held in escrow for the closing to occur the following day. *Id.* at 460. However, the March 31, 2006 closing date did not occur. Plaintiff Pollara claims that he appeared for closing, but that Chateau's representatives did not.

On April 6, 2006, both parties signed an addendum to the Contract (entitled "Addendum #2") extending the closing date for twenty-one days. *Id.* at 460;[1] *see also* Motion, 2 (Defendants' Exhibit B). Banacos issued a second check for the $100,000 earnest money deposit. In correspondence of April 19, 2006, LTIC advised that the second check was also was returned for "non-sufficient funds." 58 V.I. at 460.

On April 20, 2006, the end of the twenty-one day closing extension period, Plaintiff Polara alleges that he once again appeared ready to close; however, Defendant Chateau did not appear and represented through counsel that Chateau "was not ready to close because they were waiting

[1] Addendum #2 also eliminated the Seller financing aspect of the transaction, requiring Buyer to pay the full $2 million purchase price at closing.

for documents." *Id.* at 461. On April 24, 2006, Chateau drafted another Contract addendum (entitled "Addendum #3") specifically stating that "This Addendum #3 amends prior terms and conditions and all agreements not specifically amended or changed remains in full force and effect for this sale transaction." Further, "... the closing is extended until May 20, 2006 or sooner by agreement." *Id.* Further, it stated that "time is of the essence..." *Id.* While Pollara did not sign Addendum #3, he admitted that he agreed to an extended third closing date. *Id.* at 462.

On June 7, 2006, Defendants' attorney indicated that previously existing tax issues had been resolved, however when Plaintiffs' attorney contacted Defendants on June 20, 2006, demanding a June 22 closing date, Chateau's attorney informed her that title and tax issues still lingered, and that Chateau would not be ready to close until June 26, 2006. *Id.*

On June 23, 2006, Defendants' attorney informed Plaintiffs' attorney that all documents were complete and solicited a reply regarding financing and the time and location of closing. *Id.* at 463. However, later that day Defendants' attorney informed Plaintiffs' attorney that he had spoken with the attorney for Buyer's lender who represented that the lender could not close until June 28 or 29. *Id.* On June 28, 2006, the lender's attorney advised counsel for both parties that the lender was still waiting for several requested items and authorization documents from Pollara to be able to proceed and that, upon receipt, the lender could proceed quickly to close but would still require about three days to coordinate everything. *Id.* On the same date, Seller's attorney sent an email inquiring when closing would occur. *Id.*

On July 5, 2006, Defendants' attorney informed Plaintiffs' attorney that Chateau had been ready to close since June 23, 2006, and stated that closing must take place on or before July 16, 2006, or that Chateau would consider the transaction to have been abandoned by Buyer. *Id.* Plaintiffs' attorney did not respond until July 14, 2006 when she informed Defendants' attorney

that Plaintiffs had filed a lawsuit against Defendants. *Id.* Plaintiffs' Complaint herein, dated June 30, 2006, was filed July 5, 2006. Plaintiffs' attorney advised Defendants' attorney that the litigation could be terminated if closing occurred before July 18, 2006, and if Seller provided financing in the amount of $1 million as second priority mortgagee, in a subordinate position to the primary lender. *Id.*

When the matter was not settled, Plaintiffs' lawsuit proceeded alleging negligent and fraudulent misrepresentation against both Defendants.[2] On October 4, 2006, Defendant Chateau filed its Answer and Counterclaim against Plaintiffs for breach of contract for Plaintiffs' failure to properly tender a negotiable earnest money deposit; for failure to close on the Contract; and for slander of title for filing legally meritless liens. *Id.* at 464; Counterclaim.[3]

On May 26, 2007, the Superior Court granted Defendants' Motion to Dismiss, and on June 11, 2007, issued an Order dismissing Plaintiffs' Complaint on the basis that Plaintiffs had failed to prosecute their case in a timely fashion and had failed to state a claim upon which relief could be granted. 58 V.I. at 465. On the same date, the Court also entered an Order granting Chateau summary judgment on its Counterclaim, supplemented by Supplementary Order entered February 11, 2008. Following the Superior Court's December 31, 2009 denial of Pollara's Motion for Reconsideration, Plaintiffs appealed that Order to the Supreme Court which reversed the Superior

---

[2] Although Plaintiffs' claims arise from Chateau's alleged failure to perform under the Contract, Plaintiffs assert tort claims for negligent and fraudulent misrepresentation against both Defendants. Plaintiffs' Complaint repeatedly refers to Defendant Chateau and Defendant Neal interchangeably, and asserts that Defendant Neal—a non-party to the Contract—represented that Chateau would be able to provide marketable title at the time of closing. The record shows that Neal acted as Chateau's agent in negotiating and executing the Contract and addenda. *See* Plaintiffs' Response to Defendants' Statement of Material Facts at 9-10, filed July 29, 2014. Thus, despite the fact that Plaintiffs brought their Complaint against Neal individually, all of Neal's alleged misrepresentations were made on behalf of Chateau in connection with the Contract between Pollara and Chateau. *Id.*

[3] Chateau's breach of contract Counterclaim was filed against both Plaintiffs, although only Pollara was a party to the Contract. Together with the Counterclaim, Chateau filed a Third Party Complaint against Jetstream and Banacos, dismissed pursuant to stipulation by Order entered May 26, 2007.

Court's dismissal of Plaintiffs' Complaint and remanded the case to this Court. *Id.* at 458, 476.

The Supreme Court held that the Superior Court abused its discretion by not balancing the *Halliday*[4] factors in reaching its decision to grant dismissal of Plaintiffs' Complaint. *Id.* at 469. Additionally, the Court held that the Superior Court erred in dismissing Plaintiffs' Complaint upon finding that Pollara had breached the Contract, thereby relieving Chateau of all obligations to provide marketable title. *Id.* at 470-71. The Court held that the Superior Court wrongly determined the case on the merits when it should have simply determined whether Plaintiffs' Complaint was sufficiently well pled to survive Defendants' Motion to Dismiss, applying Fed. R. Civ. P. 12(b)(6). *Id.* Finally, the Court held that the Superior Court erred in granting Chateau summary judgment on its breach of contract Counterclaim, finding that there were "a myriad of issues and unanswered questions," and that it was "essentially impossible to conclude that there is no genuine issue of material fact." *Id.* at 475-76.

DISCUSSION

Legal Standard

A moving party will prevail on a motion for summary judgment if the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008), citing Fed. R. Civ. P. 56(e), as applicable per Super. Ct. R. 7. The Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable

---

[4] *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 510-11 (V.I. 2010) (requiring trial courts to consider six factors in considering dismissal of a complaint as a litigation sanction for failure to prosecute, or to comply with rules, procedures and court orders, including: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions other than dismissal, which entails an analysis of such sanctions; and (6) the meritoriousness of the claim or defense. Dismissing a complaint without first considering these factors constitutes an abuse of discretion.)

law. *Id*; *see also Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014). In analyzing the evidence, the Court must consider the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing that there is no unresolved genuine issue of material fact. *Williams*, 50 V.I. at 194-95, and cases cited.

"[T]o survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Id.* at 195 (quotation omitted). The nonmoving party then has the burden to "set out specific facts showing a genuine issue for trial." *Id.* (citation omitted). The Court may not weigh the evidence or determine the credibility of witnesses. *Id.* at 194-95. Instead, the Court must view all inferences from the evidence in the light most favorable to the nonmoving party, and take the nonmoving party's conflicting allegations as true if properly supported. *Id*; *see also Perez,* 59 V.I. at 527. As to materiality, "only those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Williams*, 50 V.I. at 195 (citations omitted). A movant must meet his burden of demonstrating the absence of genuine material factual issues and his entitlement to judgment as a matter of law. *Seales v. Devine*, 2008 V.I. Supreme LEXIS 23, *4 (V.I. 2008) (unpublished).

Gist of the Action Doctrine

The application of the gist of the action doctrine arises "... out of the concern that tort recovery should not be permitted for contractual breaches." *Addie v. Kjaer*, 60 V.I. 881, 898 (3d Cir. 899); *see also Glazer v. Chandler*, 200 A.2d 416, 418 (Pa.1964). Parties to a contract are not

automatically prevented from bringing a tort action, however "... the gist of the action doctrine precludes tort suits for the mere breach of contractual duties unless the plaintiff can point to separate or independent events giving rise to the tort." *Kjaer*, 60 V.I. at 899; *see also Air Prods. & Chems., Inc. v. Eaton Metal Prods. Co.*, 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003).

The Superior Court has previously found that the gist of the action doctrine is applicable in the U.S. Virgin Islands following the reasoning of the Third Circuit Court of Appeals in *Addie v. Kjaer*. *See Port Auth. v. Callwood*, 2014 V.I. LEXIS 11, at *11 (V.I. Super. Ct. 2014).[5] Although this Court is not generally bound by Third Circuit decisions concerning claims arising after the commencement of existence of the Virgin Islands Supreme Court in 2007, such decisions—particularly those applying Virgin Islands law—still represent significant, persuasive authority in this jurisdiction.

Because this common law gist of the action doctrine is not the subject of any binding precedent, we perform an analysis pursuant to *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) to determine whether the doctrine applies in the Virgin Islands. In the exercise of its "concurrent authority with [the Supreme] Court to shape Virgin Islands common law" in the absence of local law to the contrary or binding precedent, this Court must conduct a "*Banks* analysis" to determine the applicable common law. *Government of the Virgin Islands v. Connor*, 60 V.I. 597, 604 (V.I. 2014). The *Banks* analysis consists of a balancing of the following three

---

[5] In *Callwood*, the Superior Court mistakenly characterized the Third Circuit's *Kjaer* decision as binding precedent with respect to the Superior Court. 2014 V.I. LEXIS 11, at *11. However, because *Kjaer* originated in the federal District Court (based upon diversity of citizenship jurisdiction) rather than in the Superior Court, the decision constitutes only persuasive precedent despite the fact that the District Court, and later the Third Circuit Court of Appeals, decided issues of Virgin Islands common law. *See Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755 (V.I. 2014) ("the Superior Court is only required to follow cases the Third Circuit decided while serving in its capacity 'as the de facto court of last resort in the Virgin Islands,' *Najawicz v. People*, 58 V.I. 315, 327-28 (V.I. 2013), as opposed to those cases decided in its capacity as a federal court exercising jurisdiction in federal question or diversity cases").

non-dispositive factors: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands. *See Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013); *Connor,* 60 V.I. at 603.

Whether Virgin Islands Courts have previously adopted a particular rule

The Superior Court of the Virgin Islands has applied the gist of the action doctrine following the Third Circuit's decision in *Williams v. Hilton Group PLC*, 93 Fed. Appx. 384 (3d Cir. 2004). *See e.g. Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, at * 16-17, n.43 (V.I. Super. Ct. 2015); *VI Port Auth. v. Callwood*, 2014 V.I. LEXIS 11 (V.I. Super. Ct. 2014); *Ringo v. Southland Gaming of the USVI, Inc.*, 2010 V.I. LEXIS 62, *13-14 (V.I. Super. Ct. 2010); *see also, Jefferson v. Bay Isles Associates, L.L.L.P.*, 59 V.I. 31, 51 (V.I. Super. Ct. 2011) (acknowledging the application of the gist of the action doctrine in the Virgin Islands). In addition, the District Court of the Virgin Islands has applied the gist of the action doctrine in multiple cases. *See e.g. Charleswell v. Chase Manhattan Bank*, 45 V.I. 495 (D.V.I. 2004); *see also Davis v. Ragster*, 49 V.I. 932 (D.V.I. 2008) (applying gist of the action doctrine to a claim for intentional infliction of emotional distress); *Galt Capital, LLP v. Seykota*, 2007 U.S. Dist. LEXIS 53199, *9 (D.V.I. July 18, 2007) (applying doctrine to intentional misrepresentation).

The Third Circuit has forcefully held that the gist of the action doctrine applies in the Virgin Islands. While recognizing that "[n]either this Court in its former supervisory capacity, nor the Virgin Islands Supreme Court has explicitly held that the gist of the action doctrine applies under Virgin Islands law," the Court surveyed decisions of the Superior Court and the Virgin Islands District Court applying the doctrine and concluded, "[w]e agree and hold that the doctrine is applicable in the Virgin Islands." *Addie v. Kjaer,* 60 V.I. at 898-99.

The position taken by a majority of courts in other jurisdictions

A survey of case law from other jurisdictions reveals that the gist of the action doctrine—alternatively referred to as the "gravamen of the action,"— is a well-established and longstanding doctrine applied in one form or another in nearly every jurisdiction in the nation. *See, e.g., McClure v. Johnson*, 50 Ariz. 76, 81 (1937) (applying gravamen of the action doctrine to find that claims sounded in tort not contract because the parties' contract did not create any rights beyond those already imposed by law); *Robins v. Finestone*, 308 N.Y. 543, 546 (N.Y. 1955) (applying gist of the action doctrine to find that plaintiff's claim was not barred by two year statute of limitations on tort claims because the claim sounded in contract); *McCree & Co. v. State*, 253 Minn. 295, 306 (Minn. 1958) (finding the gist of the action laid in contract, not tort, because the right allegedly violated existed solely by virtue of the contract); *Williams v. Illinois C. R. Co.*, 360 Mo. 501, 506-07 (Mo. 1950) (finding the gist of the action was a claim for breach of contract rather than in tort).

Although the doctrine seems to frequently be used in determining which statute of limitations—tort or contract—should govern a party's claim, it has also been applied in many jurisdictions to preclude the litigation of contract claims improperly couched as tort claims, and tort claims improperly cast as contract claims. This particular version of the gist of the action doctrine is routinely applied by the Third Circuit Court of Appeals.[6] On the basis of the foregoing, the Court finds that the gist of the action doctrine is widely applied by a majority of courts from

---

[6] The Third Circuit has routinely applied the gist of the action doctrine, both in state and federal contexts. *See Williams v. Hilton Group PLC*, 93 Fed. Appx. 384 (3d Cir. 2004); *see also Bruno v. Erie Ins. Co.*, 2014 Pa. LEXIS 3319 (Pa. 2014). The Fourth Circuit Court of Appeals recently confirmed the application of the gist of the action doctrine in West Virginia. *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976 (4th Cir. 2015). New Jersey courts have applied the gist of the action doctrine at both the state and federal level. *See Vaz v. Sweet Ventures, Inc.*, 2011 N.J. Super. Unpub. LEXIS 3189 (Law Div. July 12, 2011); and *International Minerals & Mining Corp. v. Citicorp N. Am., Inc.*, 736 F. Supp. 587, 597 (D.N.J. 1990). Delaware has also utilized the gist of the action doctrine when deciding a party's available defenses. *See Fleetboston Fin. Corp. Fleet Nat'l Bank v. Advanta Corp.*, 2003 Del. Ch. LEXIS 8, at *38 (Del. Ch. Jan. 22, 2003). Research reveals no jurisdictions that have considered the gist of the action doctrine and determined it to be not applicable.

other jurisdictions.

Which approach represents the soundest rule of law for the Virgin Islands

As discussed above, the gist of the action doctrine is rooted in the basic notion "that tort recovery should not be permitted for contractual breaches." *Kjaer*, 60 V.I. at 898; *see also Glazer v. Chandler*, 200 A.2d at 418. Although parties to a contract are not necessarily prevented from bringing actions sounding in tort, "... the gist of the action doctrine precludes tort suits for the mere breach of contractual duties unless the plaintiff can point to separate or independent events giving rise to the tort." *Kjaer*, 60 V.I. at 899; *see also Air Prods,* 256 F. Supp. 2d at 340.

The Court finds that this reasoning represents the soundest rule for the Virgin Islands. An aggrieved party has options for recovery. If the harm incurred arose from the breach of a duty established within the four corners of a contract, then the aggrieved party's remedies are governed by contract law. If the harm is separate and distinct from the contract, creating a viable, stand-alone tort claim, then the gist of the action doctrine will not prevent the tort claim from being litigated. *See e.g Air Prods.*, 256 F. Supp. 2d at 341 (the "distinction between fraud in the inducement and fraud in the performance claims with regard to the gist of the action doctrine is crucial... [as]... fraud to induce a person to enter into a contract is generally collateral to (i.e., not 'interwoven' with) terms of the contract itself.")

This determination to adopt the gist of the action doctrine for the Virgin Islands is consistent with and follows well-reasoned Third Circuit case law, examining and applying both Virgin Islands law and the laws of other jurisdictions. *See Williams v. Hilton Group PLC*, 93 Fed. Appx. 384; *Addie v. Kjaer*, 60 V.I. 881. It has been applied by both federal and local courts in the Virgin Islands applying Virgin Islands law, and therefore has been and will continue to be cited in the Virgin Islands as persuasive, if not controlling law. The Court finds the gist of the action

doctrine to be the soundest rule for the Virgin Islands, as it has been incorporated and relied on by many courts throughout the United States, including states within the Third Circuit, as well as by courts throughout the Virgin Islands.

Pursuant to the Gist of the Action Doctrine, Defendant Chateau is entitled to Summary Judgment on Plaintiffs' tort claims

There are no genuine issues of material fact in dispute

Briefly, the gist of the action doctrine is applied when the claims are: "(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contact claim or the success of which is wholly dependent on the terms of a contract." *Kjaer*, 60 V.I. at 898 (citing *Etoll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d 10, 19 (Pa. Super. Ct. 2002) (internal citations omitted)). Plaintiffs do not argue that there are material facts in dispute relevant to the determination of factors that must be found to apply the gist of the action doctrine, and the Court finds that there are no such issues of fact in dispute.

The Court is satisfied that the record establishes that Plaintiffs' claims are subject to the application of the gist of the action doctrine in that there existed a Contract between the parties (Pollara and Chateau) from which Plaintiffs' claims arise; that Chateau allegedly did not perform duties created by and grounded in the terms of that Contract, as amended; and that Plaintiffs' common law tort claims of negligent and fraudulent misrepresentation claims and damages incurred arose solely and directly as a result of Defendant Chateau's alleged nonperformance of the Contract.

Plaintiffs argue that their damages are not limited to the remedy of liquidated damages specified in the Contract. Opposition, 3. All Plaintiffs' arguments and factual representations seek

to establish that Defendant Chateau knew that it could not present marketable title to the Property by the initial or extended closing dates (March 30, 2006 and later April 20, 2006). Opposition, 4.

Defendants disagree as to whether Chateau knew that it could not deliver marketable title by the contractual closing dates. This disagreement would constitute a genuine issue of material fact if the Court were to adjudicate Plaintiffs' negligent and fraudulent misrepresentations claims as a matter of tort law. However, the Court does not need to reach the merits of those tort claims because, as explained below, Plaintiffs' claims exist solely by virtue of the existence of the Contract between Pollara and Chateau and are properly analyzed within the framework of contract law.[7]

<u>The gist of the action doctrine prevents Plaintiffs from disguising their contract claims as tort claims</u>[8]

Defendants primarily argue that, based on the facts before the Court, Plaintiffs' claims do not meet the requirements for establishing the torts of negligent or fraudulent misrepresentation. Defendants claim that the misrepresentation in question "... must be factual in nature and not promissory or relating to future events that might never come to fruition." Motion, 8 (citing *Hyrdro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 20-21 (3d Cr. 2000)).

---

[7] The Court also need not discuss or determine whether, when, or how Chateau breached the Contract as Plaintiffs did not present any breach of contract claims, instead alleging only tort claims for negligent and fraudulent misrepresentation.

[8] The Supreme Court noted, in *dicta*, that "taking all of Pollara's well-pleaded factual assertions as true, Pollara submitted enough facts to present a plausible claim of fraudulent misrepresentation." *Pollara*, 58 V.I. at 472. However, as discussed above, a review of the record establishes that Plaintiffs' alleged damages arose solely and directly as a result of Defendant Chateau's alleged nonperformance of the Contract. Thus, although it may have appeared, based solely on the factual assertions in the Complaint, that Pollara's claims were plausible, the record—particularly the Contract and Addendum #2— reveals that the alleged misrepresentations upon which Pollara's claims are based consisted of nothing more than the promise, embodied in the Contract itself, that Chateau would perform under the Contract, as amended, and deliver marketable title at closing. In this light, it is clear that under the gist of action doctrine, Pollara's claims are not tort claims at all, but simple breach of contract claims in disguise.

However, Defendants also argue that "the gravamen of Pollara's claim is that when Chateau entered into the Contract, Chateau knew or should have known that it would not be prepared to close the transaction by the Closing Date." Motion, 7. Plaintiffs, in their Opposition, exclusively address the dispute relating to the "... legal issue of Plaintiffs' remedy under the contract," reserving the right to supplement their Opposition once the Court rules on their motion for more time to complete factual discovery.[9] Plaintiffs strongly disagree with Defendants' contention that Plaintiffs' only recourse under the Contract is the return of Buyer's $100,000 earnest money deposit. Opposition, 3. They assert that their tort claims are "... separate and distinct from the claims under the contract itself." *Id.* at 5.

Defendants, in their Reply, focus primarily on the gist of the action doctrine, arguing that "Plaintiffs are aggrieved of the Defendants' *failure of performance* under the Contract and the Addendum.... the measure of damages sought by Plaintiffs is premised upon all of the work that Plaintiffs allegedly did and all of the money that Plaintiffs allegedly spent in preparation for their ownership and development of the real estate." Reply, 3-4, emphasis in original.

Plaintiffs have not sought leave to file a surreply and have not filed any supplement to their Opposition. As such, the Court has a complete record of all information necessary to determine whether the gist of the action doctrine bars Plaintiffs' tort claims.

As noted above, the gist of the action doctrine applies to claims "(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract or the success of which is wholly dependent on the terms

[9] The Court notes that discovery has been ongoing following remand, with multiple notices of productions, etc. filed from March 13, 2015 through May 5, 2015. Additional discovery would have no bearing on the determination of Defendants' Motion.

of a contract." *Addie v. Kjaer*, 60 V.I. at 898. In determining whether to apply the gist of the action doctrine, the Court is guided by the Third Circuit's analysis in *Williams v. Hilton Group PLC*:

> [T]he "gist of the action" doctrine "is designed to maintain the conceptual distinction between breach of contract claims and tort claims [by] precluding plaintiffs from recasting ordinary breach of contract claims into tort claims." The... difference between contract and tort claims as follows: "Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals."... [Where] the fraud claims were so "inextricably intertwined with the contract claims" that they were barred as a matter of law from being raised independently.

93 Fed. Appx. 384, 386 (3d Cir. 2004) (quoting *Etoll, Inc. v. Elias/Savion Adver., Inc.*, 811 A.2d at 14, 21) (other citations omitted).

The *Kjaer* decision is particularly instructive to the present case as it directly addresses a fraudulent misrepresentation claim:

> Here, the Sellers' fraudulent misrepresentation claim was clearly barred by the gist of the action doctrine because the misrepresentation became a part of the contract. The Sellers alleged that the Buyers "made material misrepresentations in Paragraph 12 of the Contracts of Sale, regarding Plaintiffs' financial ability to close with cash...." The Sellers' use of the Contracts of Sale for evidence of the misrepresentation indicates that the misrepresentation became a part of the contract. Therefore, we hold that this claim was barred by the gist of the action doctrine.

Kjaer, 60 V.I. at 899.

In order to distinguish an action in tort from an action arising under a contract it is necessary to examine how this jurisdiction analyzes claims for negligent and fraudulent misrepresentation.[10] The Supreme Court of the Virgin Islands, in addressing claims of negligent misrepresentation, has

---

[10] To support a claim of negligent misrepresentation the claimant must show (1) that the non-claimant supplied false information; (2) that the information was supplied in the course of the non-claimant's business, or in a transaction in which the non-claimant had a pecuniary interest; (3) that the claimant was guided by the information in her business transactions; (4) that the claimant suffered pecuniary loss as a result of a justifiable reliance upon the information; and (5) that the non-claimant failed to exercise reasonable care or competence in obtaining or communicating the information. *See In re Tutu Water Wells Contamination Litig.*, 40 V.I. 279, 292-93 (D.V.I. 1998).

To support a claim for fraudulent misrepresentation the claimant must prove that the maker of the contract "intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion." *Pollara,* 58 V.I. at 471.

held that "an alleged misrepresentation must be factual in nature and not promissory or relating to future events that might never come to fruition.... [t]his requirement is rooted in the principle that it is impossible to be negligent in failing to ascertain the truth or falsity of one's own future intentions." *Chestnut v. Goodman*, 59 V.I. 467, 476 (V.I. 2013) (citations omitted).

In *Callwood*, the Superior Court endorsed the Third's Circuit's analysis "defin[ing] fraudulent misrepresentation that sounds in tort as: [O]ne who fraudulently makes a [material] misrepresentation of fact for the purpose of inducing another to act or refrain from action in reliance upon it [and the other party reasonably relies upon the misrepresentation to his or her detriment], is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." 2014 V.I. LEXIS 11, at * 17 (citing *Island Insteel Systems, Inc. v. Waters*, 44 V.I. 389, 403 (3d Cir. 2002).[11]

The tort of fraudulent misrepresentation "requires an express representation which is false or misleading at the time it is made." *Goodman*, 59 V.I. at 475-76 (citing *Kjaer*, 51 V.I. at 511). Plaintiffs' claims here arise solely from Chateau's alleged breach of the Contract between the parties, where the duties allegedly breached were created by and grounded in the Contract itself. In this case, Defendant Chateau, similar to the buyer in *Kjaer*, made a contractual representation about a future event; specifically, that it would be ready for closing at a certain date.

Defendants have admitted that Chateau was unable to proceed to close by the contractual closing date, as amended. Regardless of why Chateau was unable to close the real estate

[11] *Island Insteel*, was decided by the Third Circuit sitting in its capacity as the *de facto* court of last resort for the Virgin Islands. Nonetheless, *Island Insteel* is not binding precedent as it was decided pre-*Banks*, applying an analysis based upon RESTATEMENT (SECOND) TORTS § 526, in reliance upon 1 V.I.C. §4, which was implicitly repealed by the adoption of 4 V.I.C. § 21. *Simon v. Joseph*, 59 V.I. 611, 622 (V.I. 2013). The Supreme Court has recognized the same elements of proof required for a successful claim of the tort of fraudulent misrepresentation, set forth in the preceding footnote. *See Pollara*, 58 V.I. at 471.

transaction, Defendant Chateau admittedly failed to provide marketable title on the agreed date of closing. Plaintiffs allege that they suffered damages in reliance on the terms of the Contract.[12] If Defendant Chateau had been able to deliver marketable title to Plaintiff Pollara on April 20, 2006, the Contract closing date as extended by Addendum #2, Plaintiffs would not have incurred any loss and the basis for Plaintiffs' claims would not exist. The alleged harm to Plaintiffs arose as the result of Chateau's failure to perform its duty as spelled out within the four corners of the Contract when it failed to meet the contractual closing dates. According to Plaintiffs, Pollara began to expend resources on the Property, relying on the Contract closing date. Just as the Third Circuit found in *Williams,* the parties' "pre-contractual statements concerned specific duties that the parties later outlined in the contract." *Williams* 93 Fed. Appx. at 386.

Thus, Plaintiffs' claims of negligent and fraudulent misrepresentation are not, in fact, tort claims at all, but are properly construed as breach of contract claims. The essence of Plaintiffs' case is that Defendant Chateau breached the Contract between the parties by failing to provide marketable title to the Property at the time of closing. The additional assertion that Defendants knew or should have known that Chateau would be unable to timely perform under the Contract, standing alone, is not enough to transform a clear breach of contract claim into a tort claim for negligent and/or fraudulent misrepresentation.[13] Plaintiffs should have filed a breach of contract

---

[12] To state a claim for a breach of contract under Virgin Islands law, a plaintiff must allege: "(1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *Arlington Funding Services, Inc. v. Geigel,* 51 V.I. 118, 135 (V.I. 2009) (citations omitted); accord, *United Corp. v. Tutu Park, Ltd.,* 55 V.I. 702, 707 (V.I. 2011); *see also Marcus v. BMW of America, LLC,* 687 F.3d 583 (3d Cir. 2012).

[13] As discussed above, this assertion cannot transform a simple breach of contract claim into an action for negligent misrepresentation, because the only representation made was that Chateau intended to perform its obligations under the contract and, "it is impossible to be negligent in failing to ascertain the truth or falsity of one's own future intentions." *Chestnut v. Goodman,* 59 V.I. at 476. Additionally, this assertion cannot transform Plaintiff's breach of contract claim into a fraudulent misrepresentation claim because, even assuming *arguendo,* that Defendants made some material misrepresentation, there is no evidence, and indeed no rational basis to infer that such misrepresentation was made "for the purpose of inducing another to act or refrain from action in reliance upon it [and the other party reasonably relies upon the misrepresentation to his or her detriment]." *Callwood,* 2014 V.I. LEXIS 11, *17.

action rather than seeking damages based upon purported tort claims that actually only allege Chateau's failure to perform under the Contract. Accordingly, the gist of the action doctrine, as applied in the Virgin Islands, operates in the instant case as a bar to Plaintiffs' claims for negligent and fraudulent misrepresentation.

Defendant Neal is entitled to Summary Judgment on both of Plaintiffs' tort claims

Although Plaintiffs generally do not distinguish between Defendant Neal and Defendant Chateau, the two Defendants' situations differ significantly in that Defendant Neal was not a party to the Contract between Pollara and Chateau. Thus, there can be no breach of contract claim against Neal and the gist of the action doctrine as outlined above does not apply. However, Defendant Neal is entitled to Summary Judgment because while the record establishes that Neal made various statements *as the representative of Chateau* in the Contract negotiations, the record is devoid of any evidence suggesting that Neal, *in his individual capacity*, made any material statement to Plaintiffs whatsoever. Because Plaintiffs have failed to demonstrate or even allege that Defendant Neal made any representations to Plaintiffs in his individual capacity, Plaintiffs cannot succeed on either a negligent or fraudulent misrepresentation theory against Defendant Neal and Neal is entitled to judgment as a matter of law. *See, e.g., McCarthy v. Azure,* 22 F.3d 351, 360 (1st Cir. 1994) (collecting cases upholding the distinction between claims aimed at a defendant in his individual as opposed to his representative capacity).[14]

---

[14] A corporate agent, even when acting in his or her representative capacity, may still be personally liable who, "through his or her own fault injures another to whom he or she owes a personal duty." *McCarthy*, 22 F.3d at 360 (citing 3A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 1135, at 66-67 (1986 ed. & Supp. 1992). However, upon this record, the limited liability company representative made no representations beyond those representations of the company memorialized in the Contract—the promise to deliver marketable title at closing—and any alleged harm resulting from reliance on those representations cannot, as a matter of law, be said to have occurred through the fault of the company's representative individually. In turn, because whatever harm might have occurred cannot be said to be the personal fault of Neal, who owed no personal duty to Plaintiffs, those acts performed by Neal in his representative capacity must be deemed acts of Chateau rather than acts of Neal acting individually.

In Plaintiffs' Counter Statement of Facts, Plaintiffs contend that Defendant Neal executed the Contract with Pollara "on behalf of Chateau." Counter Statement ¶ 2. Plaintiffs characterize their Complaint as "alleging that Defendant Neal, on behalf of Defendant Chateau St. Croix, LLC, knew at the time he signed the Contract of Sale that he would be unable to convey marketable title to the property." *Id.* at ¶ 14. Furthermore, Plaintiffs' claims are all based on the assertion that "Defendant Robert Neal on behalf of Chateau St. Croix repeatedly misrepresented that they would close by the date as mutually extended." *Id.* at ¶ 17. In fact, nowhere in Plaintiffs' Counter Statement of Facts is any statement or representation attributed to Defendant Neal individually without the qualifier, "on behalf of Chateau St. Croix."

Plaintiffs sometimes ambiguously refer to "Defendants' representation(s)," without attributing the representation to either of the named Defendants. *See, e.g.,* Counter Statement at ¶¶ 3-4, 6. However, given that these representations were all made in the context of contract negotiations between Pollara and Chateau, in which Neal was serving as the representative of Chateau, and given that these representations contained nothing more than a simple affirmation that Chateau would perform according to the terms of the Contract, the only permissible inference is that all such statements were made "on behalf of Chateau St. Croix."

Thus, even drawing all reasonable inferences in the light most favorable to Plaintiffs, it is nonetheless clear that Plaintiffs' claims against Neal must fail. According to Plaintiffs' own description of the facts, each and every alleged misrepresentation made by Neal was made on behalf of Chateau. *See* Counter Statement ¶¶ 2, 14, 17. Plaintiffs have not pointed to a single misrepresentation that could reasonably be attributed to Neal in his individual, as opposed to his representative, capacity. Therefore, as a matter of law, Plaintiffs have failed to demonstrate that Neal, in his individual capacity, breached any personal duty owed to Plaintiffs causing the damages

of which Plaintiffs complain.[15] Accordingly, Defendant Neal is entitled to Summary Judgment on Plaintiffs' tort claims against him.

Defendant's Motion for Voluntary Dismissal

Under the Federal Rules of Civil Procedure, applicable per Super. Ct. R. 7, "except as provided for in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Additionally, "if a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication." *Id.*

Here, Defendant Chateau moves for voluntary dismissal of its Counterclaim against Plaintiffs, reasoning that the collection of any judgment from the Counterclaim seemed "highly unlikely," and that, based upon the Supreme Court's ruling on appeal, the Counterclaim could not be resolved summarily and would need to proceed to trial. Motion for Voluntary Dismissal at 2. In response, Plaintiffs argue that they have incurred "considerable attorney fees and costs defending against the counterclaim," which has been pending since 2006. *Id.* at 3. And though Plaintiffs cite the Middle District of Pennsylvania's list of factors for consideration in ruling on motions for voluntary dismissal,[16] Plaintiffs offer no argument as to why these factors should be

---

[15] "To succeed on a claim of fraudulent misrepresentation one must prove that *the maker of a contract* 'intends his assertion to induce a party to manifest his assent and *the maker* (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he sates or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.'" *Pollara v. Chateau,* 58 V.I. at 471, quoting RESTATEMENT (SECOND) CONTRACTS § 162 (emphasis added).

[16] *See Elsevier, Inc. v. C'prehensive Microfilm & Scanning Servs., Inc.*, 2012 U.S. Dist. LEXIS 29598 at *5-6 (M.D. Pa. 2012) (Relevant factors include: 1) the excessive and duplicative expense of a second litigation, 2) the effort and expense incurred by the defendant in preparing for trial, 3) the extent to which the current suit has progressed, 4) the plaintiff's diligence in bringing the motion to dismiss and the explanation therefor, and 5) the pendency of a dispositive motion by the non-moving party).

adopted by this Court and no analysis whatsoever of how the cited factors apply in the instant case other than the conclusory statement that "all of the relevant factors weigh in favor of denying Defendants' motion." *Id.* at 1. Further, Plaintiffs present no quantification of time spent and expenses incurred in defending the Counterclaim that would not have been spent and incurred in prosecuting their case in chief.

Despite the fact that Plaintiffs object to Chateau's Motion for Voluntary Dismissal, Plaintiffs' claims "remain pending for independent adjudication" without respect to the dismissal of Chateau's Counterclaim. While Plaintiffs' claims are also dismissed upon entry of this Order, that dismissal is the result of the independent adjudication of those claims, based solely upon Plaintiffs' Complaint's legally deficient pleading presenting breach of contract claims in the guise of an action in tort. Critically, Plaintiffs' claims would have remained pending for adjudication independent of Chateau's Counterclaim, had Plaintiffs' claims themselves been sufficiently pled to survive summary judgment. As such, pursuant to Rule 41(a)(1), the Court exercises its discretion to grant Defendant's Motion for Voluntary Dismissal.

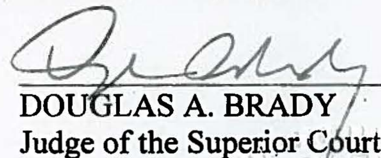
Therefore, for the foregoing reasons it is hereby

ORDERED that Defendants' Motion for Voluntary Dismissal of Chateau's Counterclaim against Plaintiffs is GRANTED. It is further

ORDERED that Defendants' Motion for Summary Judgment is GRANTED. It is further,

ORDERED that Plaintiff's Complaint is DISMISSED with prejudice

DATED: May 3, 2016.



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST: ESTRELLA GEORGE
Acting Clerk of the Court

By:
Court Clerk Supervisor 5/3/16

CERTIFIED A TRUE COPY
DATE: May 3, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY:
COURT CLERK II