IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS and ST. JOHN

VINCENT A. FULLER, JR., Plaintiff, v. ROSWELL PROPERTIES LLC, LTD, Defendant.	)))))))	Case No. ST-16-CV-438 ACTION FOR NEGLIGENT MISREPRESENTATION AND UNJUST ENRICHMENT

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant Roswell Properties LLC, Ltd. (Roswell)'s Motion to Dismiss or, in the Alternative, for Summary Judgment (Motion), filed October 17, 2016; Plaintiff Vincent A. Fuller, Jr. (Fuller)'s Opposition, filed November 30, 2016; and Roswell's Reply, filed January 19, 2017. Roswell's Motion, filed in lieu of an answer, refers to the standards for motions to dismiss filed pursuant to V.I. R. Civ. P 12(b)(6), recognizing that under Rule 12(d), when matters outside the pleadings are presented and not excluded, the motion must be treated as one for summary judgment under Rule 56.[1] Because the Motion presents matters outside Plaintiff's Complaint, it is reviewed pursuant to V.I. R. Civ. P. 56(a). The Motion came on for hearing on December 7, 2017, following which Plaintiff was provided the opportunity to submit a supplemental filing on the issues by December 22, 2017, to which Defendant could respond within 14 days. No supplemental filing was filed by either party. For the reasons set forth below, the Court finds that there is no genuine dispute as to any material fact and that Roswell is entitled to judgment as a matter of law and, as such, grants Roswell's Motion, and dismisses Plaintiff's Complaint with prejudice.

Legal Standard

In evaluating a motion for summary judgment, the Court must determine whether there exists a genuine dispute of material fact; one that would impact the outcome of the case under applicable law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). Such a dispute is genuine if a reasonable

[1] The Motion was filed prior to the March 31, 2017 effective date of the Virgin Islands Rules of Civil Procedure, which nonetheless apply to this proceeding as the Court makes no finding that to do so would be infeasible or work an injustice. *See* V.I. R. Civ. P. 1-1(c)(2).

trier of fact could find that factual issue material to the claim presented in favor of the non-moving party. *Id.* at 391-92. "Summary judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact," and judgment is appropriate as a matter of law. *Id.* at 379-80.

Reviewing Roswell's Motion, the Court does not weigh the credibility of the evidence offered – instead, all inferences from the evidence are drawn in favor of the nonmoving party, and any conflicting allegations, if properly supported by the record, are resolved in favor of the nonmovant. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citing *Williams*, 50 V.I. at 194-95). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin,* 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. *See Perez,* 59 V.I. at 527-28. At this point, "the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, showing a genuine issue for trial." *Id.* at 527.

Background

This controversy arises from Fuller's purchase at March 25, 2015 Marshal's sale of "Remainder Parcel No. 10, Estate Caret Bay, Eastern Portion, No. 8 Little Northside Quarter, St. Thomas, U.S. Virgin Islands" (hereinafter "Rem. Parcel 10"). Complaint, ¶ 13. Rem. Parcel 10 was advertised for sale in The Virgin Islands Daily News as "consisting of 0.57 U.S. acres, more or less, as shown on P.W.D. Drawing No. D9-604-T66, dated October 6, 1966." *Id.* A copy of the pertinent portion of that drawing is attached to the Complaint as Exhibit D. A nearly illegible copy of the Daily News legal notice was filed with the Complaint as Exhibit J.

Previously, on September 30, 1987, Rem. Parcel 10 had been subdivided by its owner Harold B. Reese into Rem. Parcel 10 and Parcel No. 10-B, depicted in Public Works Drawing No. D9-4108-T87, wherein the newly created Parcel No. 10-B comprised 0.2521 acre and the area of Rem. Parcel 10 was decreased to 0.3108 acre.[2] Complaint, ¶ 9 and Exhibit E. Following its

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[2] On both Public Works Department Drawings and herein, the designation Rem. Parcel 10 refers to both the pre-1987 subdivision parcel consisting of 0.57 acre, as well as to the post-subdivision 0.3108-acre parcel.

subdivision, Parcel No. 10-B was lawfully conveyed by Warranty Deed recorded December 11, 1987, and has been reconveyed since, in transactions that are not relevant to this analysis. *See* Complaint, ¶¶ 10-11.

Following the 1987 subdivision and conveyance of Parcel No. 10-B to a third party, on January 17, 1990 Harold B. Reese borrowed $86,000 from U.S. Small Business Administration, secured by a Mortgage (Reese Mortgage), ostensibly encumbering "Remainder of parcel No. 10 of Estate Caret Bay – Eastern portion No. 8 little northside Quarter, St. Thomas, U.S. Virgin Islands, consisting of 0.57 U.S. acre, more or less, all as is more particularly shown and described on Public Works Department Drawing No. D9-604-T66, dated October 6, 1966." Complaint, Exhibit A. That legal description of the real property encumbered by the Reese Mortgage was erroneous, in light of the 1987 conveyance by Harold B. Reese of Parcel No. 10-B (0.2521 acre), such that he retained and could lawfully pledge as security for the 1990 SBA loan only Rem. Parcel 10, comprising 0.3108 acre, correctly described with reference to the September 30, 1987 PWD Drawing No. D9-4108-T87. The Reese Mortgage was recorded in the office of the Recorder of Deeds in St. Thomas on January 30, 1990, at Book 35-H, Page 269, Sub. Nom. 559, Aux. 5, Page 276. Complaint, ¶ 5.

On January 10, 2003, SBA assigned the Reese Mortgage and promissory note to Mortgage Electronic Registration Systems (MERS), which subsequently filed an action (ST-05-CV-620) against the Estate of Harold B. Reese, who died in 2000, for debt and to foreclose the Reese Mortgage, reciting the erroneous property description as "Remainder of Parcel No. 10 of Estate Caret Bay – Eastern portion No. 8 Little Northside Quarter, St. Thomas, U.S. Virgin Islands consisting of 0.57 U.S. Acre, more or less, all as is more particularly shown and described on Public Works Department Drawing No. D9-604-T66, dated October 6, 1966." Complaint, Exhibit C.

Following a series of assignments, Roswell became the owner of the Reese Mortgage and promissory note by Assignment of Mortgage, dated September 7, 2011, recorded October 3, 2011, and substituted into the foreclosure action as plaintiff, pursuant to Order entered May 22, 2014.[3] Roswell obtained Default Judgment, entered November 24, 2014, for debt in the amount of

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[3] The Court judicially notes the records of the Superior Court in ST-05-CV-620. *See Mendez v. Gov't of the Virgin Islands,* 56 V.I. 194, 205-06 (V.I. 2012).

$94,875.46, plus post judgment interest, declaring the Reese Mortgage to be a first priority lien on Rem. Parcel 10 (described as consisting of 0.57 acre), foreclosing all subordinate interests therein, and ordering that the "Subject Property be sold by the Superior Court Marshal according to law and the proceeds of such sale shall be applied first to the costs of said sale, then toward the satisfaction of this Default Judgment in favor of Plaintiff Roswell, including any costs and attorneys' fees that have been awarded... Any surplus monies remaining after the application of the proceeds of the sale as provided above shall be returned to Defendant Estate of Harold B. Reese." Complaint, Exhibit H.

Roswell caused the Daily News publication of notice of sale, wherein Rem. Parcel 10 was erroneously described, as in the Reese Mortgage and the Default Judgment, with reference to the 1966 Drawing No. D9-604-T66, as consisting of 0.57 acre, more or less. Complaint, ¶ 13. At the Marshal's sale, conducted March 25, 2015, Plaintiff Fuller was the highest responsive bidder, placing a successful bid of $104,855.38. Complaint, ¶ 16.[4] Fuller alleges that his bid was made "in reliance upon the false representations in Roswell's Notices… without knowledge of their falsity," *Id.* Fuller indicated at the December 7, 2017 hearing that he took no steps prior to placing his winning bid to confirm the accuracy of the advertised notice of sale, or to undertake any title research personally or through a title company, or to otherwise inquire as to the existence of any title issues relative to Rem. Parcel 10.

Following the March 25, 2015 Marshal's sale, the Marshal's June 18, 2015 Amended Report of Sale, the Superior Court's September 3, 2015 Amended Order Confirming Sale, and the expiration of the statutory redemption period, Chief Superior Court Marshal Dwane A. Callwood executed on February 29, 2016 and delivered to Fuller a Marshal's Deed by which he "quitclaims in fee unto the Grantee, his heirs, successors and assigns, that certain parcel of real property known and described as:

> Remainder of Parcel No. 10 of Estate Caret Bay – Eastern portion No. 8 Little Northside Quarter, St. Thomas, U.S. Virgin Islands consisting of 0.57 U.S. Acre, more or less, all as is more particularly shown and described on Public Works Department Drawing No. D9-604-T66, dated October 6, 1966." Complaint, Exhibit K.

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[4] Roswell entered an initial credit bid of $99,855.38. Amended Report of Sale, dated June 5, 2015, of Superior Court Chief Marshal Dwayne A. Callwood, filed June 18, 2015 in ST-05-CV-620, of which the Court takes judicial notice, together with the Superior Court's Amended Order Confirming Sale, entered September 3, 2015, *nunc pro tunc* August 4, 2015.

Discussion

Fuller advances two theories that he claims entitle him to relief. His first cause of action presents a claim for negligent misrepresentation, wherein Fuller alleges that "Roswell misrepresented its interest in the subject property both to the Court, in the Reese foreclosure action, and in its NOTICES, by stating that it had a mortgage interest and then a judgment lienor's interest in property as to which it had no such interest." Complaint, ¶ 20. Second, Fuller claims that Roswell "has been unjustly enriched and should be required to make restitution to Plaintiff by remitting to him the dollar sum corresponding to the amount by which it has been unjustly enriched." *Id.* ¶ 30.

Count I: Negligent Misrepresentation

The Supreme Court has established five elements which Fuller must prove to successfully prosecute his claim for negligent misrepresentation. He must "introduce sufficient evidence for a reasonable trier of fact to find (1) that [Roswell] supplied false information; (2) that the information was supplied in the course of [Roswell]'s business, or in a transaction in which [Roswell] had a pecuniary interest; (3) that [Plaintiff] was guided by the information in h[is] business transactions; (4) that [Plaintiff] suffered pecuniary loss as a result of h[is] justifiable reliance upon the information; and (5) that [Roswell] failed to exercise reasonable care or competence in obtaining or communicating the information." *Chestnut v. Goodman*, 59 V.I. 467, 475 (V.I. 2013). In *Chestnut*, the Supreme Court relied upon nonbinding precedent of the District Court of the Virgin Islands which, in turn, mechanistically applied the RESTATEMENT (SECOND) OF TORTS § 552, without determining whether that section sets forth the soundest rule for the Virgin Islands.[5]

Because the Supreme Court has yet to determine the elements of negligent misrepresentation at common law by conducting a *Banks* analysis,[6] the Superior Court would err

[5] The restatements of the law approved by the American Law Institute formerly applied as the rules of decision in the courts of the Virgin Islands through 1 V.I.C. § 4, which the Legislature has effectively repealed. *See Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. at 396.

[6] So named for the Supreme Court's paradigm-shifting holding in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011). This analysis weighs "three non-dispositive factors" to determine Virgin Islands common law, considering "(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." *Gov't of the V.I. v. Connor*, 60 V.I. 597, 600 (V.I. 2014) (quoting *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013)).

in applying a common law rule without first examining the issue under the appropriate framework.[7] Although the elements of negligent entrustment adopted here are similar to those established by the Supreme Court in *Chestnut* and outlined in the Restatement, analysis of the *Banks* factors is necessary until such time as the Supreme Court determines the issue. *Connor*, 60 V.I. at 603-04 (citing *Banks*, 55 V.I. at 980 and Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 456-57 (2004)).

In *Merchants Commercial Bank v. Oceanside Village, Inc.*, the Superior Court conducted a thorough *Banks* analysis and adopted elements of negligent misrepresentation representing the soundest rule for the Virgin Islands, as follows: "one who, in the course of his or her business, profession, or employment, or in any other transaction in which he or she has a pecuniary interest, supplies false information for the guidance of others, is subject to liability for pecuniary loss caused to those others due to the others' justifiable reliance on the information, but only if he or she failed to exercise reasonable care or competence in obtaining or communicating the information." 64 V.I. 3, 28 (V.I. Super. 2015). The Court noted that this rule "mirrors the language of the rule previously relied upon by courts in the Virgin Islands, and therefore fosters consistency concerning the scope of a defendant's liability."[8] *Id.*

The Court adopts the Superior Court's analysis in *Merchants Bank*, such that to prove liability for negligent misrepresentation, Plaintiff must demonstrate: 1) that Roswell supplied false information to Fuller for his guidance; 2) that Roswell did so in the course of its business; 3) that Roswell failed to exercise reasonable care or competence in obtaining or communicating the

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[7] *King v. Appleton*, 61 V.I. 339, 349 (V.I. 2014) ("because this Court has yet to determine the elements of an express trust at common law under the appropriate analysis, the Superior Court erred in applying a common law rule without examining the *Banks* factors"); *Walters v. Walters*, 60 V.I. 768, 776 (V.I. 2014) (Supreme Court rejected elements it had previously adopted, because it had "summarily adopted those elements of unjust enrichment by citing a single District Court of the Virgin Islands case, without determining whether that rule represents the sounder rule for the Virgin Islands"); *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014) ("[T]he Superior Court err[s] by applying a common law rule this Court has never addressed without first conducting the appropriate analysis"); *Connor*, 60 V.I. at 603-04 (a trial court must weigh the *Banks* factors in order to avoid "mechanistic and uncritical reliance on the Restatements," which "has the effect of inappropriately delegating the judicial power of the Virgin Islands to the American Law Institute and to the governments of other jurisdictions").

[8] While the rule adopted by the Superior Court in *Merchants Bank* mirrors language of the rule previously relied upon by Virgin Islands courts, the rule adopted by the Supreme Court in *Chestnut* includes the additional element of a plaintiff's reliance on the defendant's alleged misrepresentation in the course of the plaintiff's business transaction. *Compare Chestnut*, 59 V.I. at 475 *with Merchants Bank*, 64 V.I. at 38. That distinction is of no moment in the determination of this dispute as both tests require Plaintiff to prove not only that he relied on the information provided by Defendant, but also that the reliance was justified. It is upon this common element where Plaintiff's claim fails.

information; 4) that Fuller justifiably relied on the information; and 5) that Fuller's reliance caused pecuniary harm. *See Turnbull v. Univ. of the V.I.*, 2016 V.I. LEXIS 22, *13 (V.I. Super. 2016) (citing *Merchants Bank*, 64 V.I. at 28).

With regard to the first element, Roswell acknowledges Plaintiff's assertion that he "bid and paid for 0.57 U.S. acres, but only has received a fee interest in 0.3108 U.S. acres, more or less" (Complaint, ¶ 18), yet disputes that it supplied false information for Fuller's guidance. Motion, at 3. Roswell argues that the words "more or less" served to disclaim any discrepancy in the area of the property conveyed, such that the information that Roswell supplied was not false, but rather that 0.3108 U.S. acre is indeed "more or less" 0.57 U.S. acre. *See* Motion, at 9-10 (citing 23 Am. Jur. 2d Deeds § 259) ("When used with reference to the quantity of land conveyed, the words... 'more or less'... indicate that the parties do not intend to convey a precise number of acres.")[9]

Yet, drawing all inferences in favor of Plaintiff, a reasonable fact-finder clearly could find that, while "more or less" may disclaim *de minimis* deviations between advertised and actual acreage, the 45% difference here was not *de minimis*, but that the information provided by Roswell was indeed false.[10]

In its Motion, Roswell does not address the second or third elements of Plaintiff's negligent misrepresentation claim. By not presenting proof to the contrary, the questions of whether the relevant information was supplied in the course of Roswell's business and whether Roswell failed to exercise reasonable care or competence in communicating the information to Fuller are left for determination by the fact-finder at trial. As such, Roswell has failed to meet its "burden of demonstrating the absence of any genuine issue of material fact" on the second and third elements. *Martin*, 54 V.I. at 389.

Regarding the fourth element, Roswell's Motion submits that the undisputed material facts establish that Fuller's reliance upon erroneous information regarding the acreage of the subject

[9] *See also Thorp v. Smith*, 5 V.I. 209 (3d Cir. V.I. 1965) (In a deed, the phrase "more or less" indicates merely that the acreage is approximate and is not the precise area of the parcel of land conveyed. Where a parcel of land was described in a deed as "comprising 13 acres, more or less," the fact that the parcel actually comprised less than thirteen acres did not entitle the grantees to additional land which was not included in the conveyance and which they had not contracted to purchase.)

[10] "The words 'more or less,' when related to the description of the property in a deed, are generally construed with reference to the particular circumstances involved... The words 'more or less' are used as words of precaution and safety and are intended to cover unimportant inaccuracies." 23 Am. Jur. 2d Deeds § 259. In the particular circumstances of this case, the trier of fact could certainly determine that the 45% discrepancy between advertised and actual acreage was more than an unimportant inaccuracy.

property cannot be deemed justifiable as a matter of law. Fuller has presented no facts or actual evidence relating to the issue of whether his reliance on Roswell's alleged misrepresentations was justified. Fuller's Complaint fails to allege facts supporting his assertion of justifiable reliance, but rather recites the bare legal conclusion that he "justifiably relied upon" Roswell's misrepresentations. Complaint, ¶ 25. In claiming that he "justifiably relied upon Roswell's misrepresentations," Fuller states that he "was guided by the Notice which Roswell caused to be published in The Daily News and to be posted and published by the Territorial Marshal before and during the sale of the property." Opposition, at 15.

However, while the Court accepts Fuller's assertion that he relied upon the notice misstating the acreage, Fuller has failed to present evidence that sufficiently presents a question of fact to be resolved at trial as to his reliance was, in fact, justified. Fuller conceded at the hearing that he took no other steps to investigate the title prior to the sale, but relied exclusively upon the property description and acreage described in the published and posted notices of sale. The published notice of sale contained the erroneous property description quoted in the Complaint (¶ 25). However, the words immediately following the description quoted by Fuller states: "without any representation or guarantee." Complaint, Exhibit J. the published notice further advised Fuller that: "Sale is further subject to … the Terms of Sale, the full text of which may be reviewed at the Office of the superior Court Marshal." *Id.*

Those Terms of Sale advised Fuller that the Property was to be sold "in the state and condition in which it is found at the knock of the hammer and stands for the account and risk (subject to any unpaid real property taxes) of the Purchaser in all respects." Motion, Exhibit 1 (Terms of Sale), ¶ 1. Further: "No representations or warranties of any kind express or implied are made as to the conditions of the Property or its suitability for any use. The Property is being offered "AS IS.'" *Id.* ¶ 11.

Fuller concedes that he "was guided by" and "justifiably relied upon" the published notice and the terms of sale, notwithstanding the express disclaimers which "did not address the size of the parcel, only the condition of the improvements on the property and the suitability of the property for any use." Opposition, at 15. Fuller's claim that the Marshal's disclaimers of "representations and warranties of any kind" is limited to the conditions of improvements on the

Property and its suitability for any use and that the acreage to be conveyed was warranted is unsupported by reference to any case law or other authority.[11]

Consistent with the terms of sale, some 11 months following the sale, Fuller Marshal's Deed to Rem. Parcel 10, by which the Chief Marshal "quitclaims in fee unto the Grantee" without warranty of title or warranties of any type. Complaint, Exhibit K. At the hearing, Fuller stated that following his receipt of the Marshal's Deed he went to see if he could get title insurance and discovered that the property description on the deed was incorrect. Fuller stated that he made that discovery by visiting the Recorder of Deed's office and looked through the various deeds. Fuller further confirmed that neither personally nor through a title company did he conduct a title search or review the deeds in the chain of title in the public records at the office of the Recorder of Deeds prior to bidding at the Marshal's sale. Although he was a sufficiently sophisticated purchaser to know how to look through deeds in the Property's chain of title, Fuller nevertheless failed to do so before bidding on the Property in the foreclosure with sale terms disclaiming warranties.[12]

No Virgin Islands case law has been cited or discovered regarding a Marshal's sale in foreclosure with similar facts and legal issues presented. Yet, an analogous dispute has been adjudicated by the Appellate Division of the District Court. In *Lombardi v. Wingo*, appellant Lombardi purchased a property from the Virgin Islands in a tax sale, and received a certificate of purchase. 54 V.I. 725, 728 (D.V.I. App. Div. 2009), *aff'd*, 2011 U.S. App. LEXIS 1441 (3d Cir. V.I., Jan. 24, 2011).[13] After the one-year redemption period had expired, Lombardi recorded the certificate at the office of the Recorder of Deeds in Christiansted, St. Croix. *Id.* Lombardi subsequently sold the property for $19,000 to third-party Suffecool, who assigned the property to Wingo. *Id.* at 728-29. Later, Jaleh Grobein, the previous owner whose unpaid taxes led to Lombardi's purchase, successfully contested the validity of the tax sale, alleging deficiencies in the attachment and sale, as well as a lack of notice. *Id.* at 729. Wingo then successfully sued

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[11] Ironically, in claiming that he "was entitled to receive the property advertised," Fuller ignores the disclaimer regarding the Property's suitability for any purpose, arguing that "he cannot even add a second unit on the property" and "cannot expand this property to the east more than about three feet." Opposition, at 15.

[12] *See Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000) ("If the plaintiff has access to information that was equally available to both parties and would have led to discovery of the true facts, the plaintiff has no right to rely upon the misrepresentation.")

[13] "The Appellate Division issued a detailed and thoughtful opinion that carefully considered the issues. We will affirm substantially for the reasons set forth in the opinions of the Appellate Division and the Superior Court." 2011 U.S. App. LEXIS 1441, at *6.

Lombardi for return of the $19,000 purchase price because Lombardi had failed to deliver clean title as promised. *Id.* Summary judgment was entered against Lombardi on his claim seeking indemnification from the Government for the $19,000 purchase price, prompting his appeal. *Id.* at 731.

Addressing Lombardi's claim for indemnification for the purchase price, the Appellate Division held: "Generally, a purchaser at a tax sale is deemed to take title with notice — either actual or constructive — of, and subject to, any defects in title." *Id.* at 738 (citing 8 C.J.S. TAXATION § 1380 at 472 and 4 V.I. Op. A.G. 41, 42 (1960) (purchaser acquires nothing in a voided tax sale, and the Government has no obligation to the purchaser)). The Court elaborated: "Because tax records are open for public inspection and because a purchaser at a tax sale is deemed a volunteer in the payment of another's delinquent taxes, the purchaser is deemed to have notice of defects, and the doctrine of *caveat emptor* applied to preclude liability against the taxing authority." *Id.* (citing 4 V.I. Op. A.G. 41, 42 and 72 AM. JUR. 2D STATE AND LOCAL TAXATION § 1036 (noting that purchaser assumes the risk of all irregularities and illegalities in the proceedings, and no liability is imposed on taxing authority for invalid tax sales, absent statute to the contrary)). "However," the Court qualified, "*caveat emptor* is applied only where the irregularity or defect is discernible from the record." *Id.* (citing 72 AM. JUR. 2D STATE AND LOCAL TAXATION § 1036).

Here, Fuller purchased Rem. Parcel 10 at Marshal's sale, advertised by published notice with express disclaimers of warranty. The "irregularity or defect" in the Property, the erroneously reported acreage, was "discernible from the record," as Fuller discovered after receipt of the Marshal's Deed when he reviewed the various deeds in the Property's chain of title. Those records of the office of the Recorder of Deeds, like tax records, are "open for public inspection." *Lombardi*, 54 V.I. at 738. As such, Fuller is deemed to have had constructive notice of any defects in title ascertainable by a review of the public records. The doctrine of *caveat emptor* applies, such that Fuller's failure to take any steps to research title to Rem. Parcel 10 prior to purchase was a risk that he assumed. In these circumstances, the Court cannot infer that Fuller was justified relying upon Roswell's erroneous representations concerning the acreage to be conveyed. As such, the Court finds there is no genuine dispute of material fact regarding the "justifiable reliance" element of Fuller's negligent misrepresentation claim, and that Roswell is entitled to judgment as a matter of law.[14]

Fuller must prove the existence of a genuine issue of material fact as to all of the elements of negligent misrepresentation to avoid summary judgment. Because he cannot prove the justifiability of his reliance on Roswell's alleged misrepresentation, the Court need not address the final element – whether Fuller's reliance caused pecuniary harm - and will grant Roswell's Motion seeking summary judgment as to Count I of the Complaint, which will be dismissed with prejudice.[15]

Count II: Unjust Enrichment

"Unjust enrichment is defined as the retention of a benefit conferred by another without offering compensation in circumstances where compensation is reasonably expected. One is not unjustly enriched by receipt of that to which he is legally entitled. To find unjust enrichment, a party must have received something of value to which he is not entitled and which he should restore." *Maso v. Morales*, 57 V.I. 627, 634 n.9 (V.I. 2012) (internal citations omitted). To successfully prosecute a claim for unjust enrichment, Plaintiff must "prove (1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff." *Walters*, 60 V.I. at 779-80 (footnote omitted).

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[14] Whether a party's reliance is justifiable is a question of fact. Here, however, there is no *genuine* issue of fact as to the justifiability of Fuller's reliance because no reasonable trier of fact could determine that issue in favor of Fuller. *See Machado*, 61 V.I. at 391-92. This result is consistent with case law of other jurisdictions where the justifiability of a plaintiff's reliance has been considered in the context of negligent misrepresentation claims. *See, e.g Honolulu Disposal Serv. v. Am. Benefit Plan Adm'rs, Inc.*, 433 F. Supp. 2d 1181, 1190 (D. Haw. 2006) ("The question of whether a plaintiff's reliance was justifiable is ordinarily a question for the jury, but may be decided at the summary judgment stage where the facts support only one conclusion"); *Vigortone Ag Prods., Inc. v. PM Ag Prods., Inc.*, 217 F. Supp. 2d 858, 865 (N.D. Ill. 2001) ("The issue of justifiable reliance is a question of fact, but it can be decided on summary judgment when no reasonable jury could find that it was reasonable for a plaintiff to rely upon the defendants' statements"); *Keenan v. Allan*, 889 F. Supp. 1320, 1386 (E.D. Wash. 1995) (stating that justifiable reliance "can be decided on summary judgment if reasonable minds would reach only one conclusion").

[15] Roswell further contends that Plaintiff's negligent misrepresentation claim is barred as a matter of law by the economic loss doctrine, which purportedly forbids a party from maintaining an action in tort for economic losses arising from a contractual relationship. The Virgin Islands has not adopted the economic loss doctrine, and it need not be addressed here as Plaintiff's tort claim fails on its own merit.

Fuller's proof fails as to the first element. He has not challenged the legitimacy of the judgment for debt in the amount of $94,875.46 obtained by Roswell against the Estate of Reese as a part of the Default Judgment in the foreclosure action. Complaint, Exhibit H. Nor has Fuller challenged the fact that, following execution on the judgment and the foreclosure sale, the amount due Roswell was the amount of $97,380.38, as the Superior Court ordered to be "immediately disbursed to Plaintiff Roswell Properties, LLC, Ltd." which amount consisted of "the judgment award, post-judgment interest, and the costs of the sale, in accordance with the Default Judgment." Amended Order Confirming Sale, entered September 3, 2015, *nunc pro tunc* August 4, 2015 (ST-05-CV-620).[16]

Fuller has not disputed the amount of the judgment debt due Roswell and has provided no actual evidence that Roswell received anything more than the $97,380.38 to which it was legally entitled to in the foreclosure proceedings. Because Fuller has proffered no evidence showing that Roswell "received something of value to which [it was] not entitled" *Maso v. Morales*, 57 V.I. at 634 n.9, there are no facts in dispute for determination at trial as to whether Roswell was enriched. Accordingly, Roswell's Motion will be granted as to Count II of Fuller's Complaint, which will be dismissed with prejudice.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Defendant Roswell Properties LLC, Ltd's Motion to Dismiss or, in the Alternative, for Summary Judgment is GRANTED, and Plaintiff's Complaint is DISMISSED with prejudice in its entirety.

DATED: March 5, 2018.

DOUGLAS A. BRADY, JUDGE

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: 3/6/18
Court Clerk Supervisor

CERTIFIED TO BE A TRUE COPY
This 6 day of 3 2018
ESTRELLA GEORGE
CLERK OF THE COURT
By ________ Court Clerk Sup

[16] Within the context of the unjust enrichment claim, the question of correct acreage of Rem. Plot 10 is irrelevant. The Default Judgment established the sum to which Roswell was entitled, and provided "that the Subject Property be sold by the Superior Court Marshal according to law and the proceeds of such sale shall be applied first to the costs of said sale, then toward the satisfaction of this Default Judgment in favor of Plaintiff Roswell, including any costs and attorneys' fees that have been awarded." Complaint, Exhibit H.