SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

KEVIN WALSH and TERRYHILL ENTERPRISES VI, LLC,	
Plaintiffs,	**CASE NO. ST-01-CV-165**
vs.	
JOHN R. DALY,	
Defendant.	

MEMORANDUM OPINION

Pending before the Court is Defendant's January 9, 2004, Motion to Dismiss.[1] For the following reasons, Defendant's Motion will be granted.

FACTUAL & PROCEDURAL HISTORY

Following a series of recusals and case reassignments dating back to September 2005,[2] by an Order dated January 7, 2014, the Hon. Denise M. Francois recused herself, and this matter was subsequently reassigned to the undersigned. The matter arises out of a Complaint originally filed on April 2, 2001, that has since been amended on several occasions, alleging that Defendant John Daly, who obtained ownership of a majority of the parcels in the Virgin Grand Estates Subdivision on St. John from the original

[1] Plaintiffs responded on January 22, 2004, to which Defendant replied on February 6, 2004. Of note, the parties' submissions only sparsely cite to relevant authority and are stunningly insufficient in their legal analysis. The Court strongly cautions counsel to abide by the rules that govern the practice before this Court including Loc. R. Civ. P. 11.1.

[2] Following a recusal by the Hon. Ive A. Swan, this matter was assigned to the Hon. Leon Kendall on September 5, 2005. On March 25, 2010 the case was reassigned to the Hon. Adam G. Christian, who recused himself on September 9, 2011. On September 19, 2011, the Hon. Brenda J. Hollar recused herself, after which this case lay dormant until it was assigned to the Hon. Denise M. Francois.

developer in July 2000, improperly acted as a developer and unilaterally moved the location of the primary access route to the subdivision, significantly diminishing the value of Lot 72, currently owned by Plaintiff Terryhill Enterprises VI, LLC ("Terryhill").

STANDARDS

Defendant's Motion to Dismiss advances several grounds for relief, including (1) that Plaintiffs have failed to state a claim upon which relief can be granted, in part, because Plaintiffs lack standing, and (2) that Plaintiffs have failed to join necessary parties to the action.

I. Failure to State a Claim Upon Which Relief Can Be Granted

Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff's "failure to state a claim upon which relief can be granted."[3] Generally, when considering such a motion, the Court must first liberally construe the pleadings to the extent permitted by the pleading requirements of Fed. R. Civ. P. 8[4] and "accept as true all well-pleaded allegations in the complaint" in favor of the plaintiff.[5] While "the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a

[3] FED. R. CIV. P. 12(b)(6).
[4] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
[5] *Gov't Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) ("[I]n considering a motion to dismiss under Rule 12(b) (6), the Court must accept as true the well-pleaded allegations in the complaint . . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a) . . . .") (internal citations omitted).

factual allegation." [6] Second, once the legal and factual allegations have been distinguished, the Court must decide whether "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"[7] such that the claim is plausible on its face. In other words, "[a] motion to dismiss a complaint should be denied if the factual allegations are 'enough to raise a right to relief above the speculative level'"[8] and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[9]

II. Real Party in Interest & Standing

Pursuant to Fed. R. Civ. P. 17(a), a complaint may also be dismissed if a plaintiff is not a "real party in interest." However,

> [t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.[10]

The "real party in interest" requirement is also similar to the justiciability principle regarding standing, since both concepts address whether the plaintiff has a personal interest in the matter. To prove standing, however, "[a] plaintiff must allege [a] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to

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[6] *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. Ct 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
[7] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446).
[8] *Williams v. Seabourne V.I., Inc.*, 2010 WL 7371480, at *1 (V.I.Super. Ct 2010) (citing *Phillips v. County of Allegheny*, 2008 WL 305025, at *6 (3d Cir. 2008)).
[9] *Twombly*, 550 U.S. at 555.
[10] FED. R. CIV. P. 17(a)(3). *See Brooks v. Gov't of the V.I. Dept. of Edu.*, 58 V.I. 417 (V.I. 2013).

be redressed by the requested relief."[11] While the application of the standing doctrine in the Virgin Islands courts is derived from the federal courts, where standing determines jurisdiction under Article III of the U.S. Constitution, the Supreme Court of the Virgin Islands has held that in the Virgin Islands, "standing . . . functions . . . [simply] as a claims processing rule" and does not determine whether a Virgin Islands court holds jurisdiction because the Virgin Islands courts are not Article III courts.[12] However, the concept of standing has been repeatedly incorporated into Virgin Islands jurisprudence as a judicially-imposed restraint, particularly when raised by a defendant as an affirmative defense,[13] because it is "prudential"[14] for the Court, in its discretion, to hear cases in which the plaintiff has a personal interest.[15]

III. Failure to Join Necessary and Indispensable Party

Pursuant to Fed. R. Civ. P. 12(b)(7), a party may move to dismiss a matter pursuant to Fed. R. Civ. P. 19(a) for failure to join a necessary party. A party is considered necessary when

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the act in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or

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[11] *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see Turnbull v. Twenty-Sixth Legislature of the V.I.*, 48 V.I. 127 (V.I. Super. Ct 2006).
[12] *Benjamin v. AIG Ins. Co. of Puerto Rico*, 56 V.I. 558 (V.I. 2012).
[13] *See In re Guardianship of Smith*, 54 V.I. 517, n. 5 (V.I. 2010) ("Significantly, because claims-processing rules are equivalent to the statute of limitations and other affirmative defenses, litigants who seek to invoke a claims-processing rule to dismiss or limit an appeal must do so at the first opportunity prior to the case becoming fully briefed.").
[14] *Benjamin*, 56 V.I. at 564.
[15] *See, e.g., Romano v. V.I. Gov't Hospitals & Health Facilities Corp.*, ST-13-CV-137, ___ V.I. ___, slip. op. (V.I. Super. Ct May 28, 2014).

> (ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.[16]

If the Court determines a party is necessary and that party cannot be joined, the Court must then determine whether the party is indispensable utilizing several balancing factors enumerated by Fed. R. Civ. P. 19(b). The burden is on the party moving for dismissal to prove a party is necessary and indispensable.[17]

ANALYSIS

As a threshold matter, while Plaintiff filed a Motion for Leave to Amend and File a Third Amended Complaint on November 25, 2003, it appears that the Court never explicitly granted Plaintiff leave to amend. However, the parties seem to have proceeded on the assumption that leave would be granted, particularly because both parties rely on the Third Amended Complaint[18] in their briefs. Insofar as Defendant's Reply to Plaintiffs' Opposition to Motion to Dismiss suggests that Plaintiffs are attempting to "sneak"[19] in a new cause of action into the Third Amended Complaint, the Court disagrees. The facts asserted in the original complaint placed Defendant on sufficient notice of the grounds for Plaintiffs' claims in the Third Amended Complaint,[20] such that there is minimal prejudice to Defendant. Considering that these facts suggest there is minimal prejudice to Defendant in granting leave and that the Court "should freely give

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[16] FED. R. CIV. P. 19(a)(1). *See Epstein v. Fancelli Paneling, Inc.*, 55 V.I. 150 (V.I. Super. Ct 2011).
[17] *See Richards v. Gov't of the V.I.*, 49 V.I. 1086 (D.V.I. 2008).
[18] In his Motion to Dismiss Defendant refers to the November 25, 2003, Complaint as the "Fourth Complaint." However, this Memorandum Opinion shall refer to the November 25, 2003, Complaint as the Third Amended Complaint.
[19] Defendant's Reply to Plaintiffs' Opposition to Motion to Dismiss, Feb. 6, 2004, at 4.
[20] FED. R. CIV. PRO. 15(c)(1)(B) (permitting "relation back" where "the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading . . .").

leave [to amend] when justice so requires,"[21] the Court grants Plaintiffs leave to file a Third Amended Complaint, *nunc pro tunc* to November 25, 2003. As a result, the Court will examine the Third Amended Complaint when considering Defendant's Motion to Dismiss.[22]

I. Plaintiff Walsh does not have standing to prosecute this action.

Even construing the facts alleged in the Complaint in a light most favorable to Plaintiffs,[23] Plaintiffs have not averred facts demonstrating that Walsh suffered a "personal injury fairly traceable to the defendant's allegedly unlawful conduct."[24] Specifically, in summary, the Plaintiffs' Complaint states the following:

(1) Walsh "len[t] substantial funds under a Construction Loan Agreement" to Grand Development, Inc. ("GDI"), an affiliate of the original developer of Virgin Grand Estates, A. W. Landvest, Inc.,[25] based on the "premium market value of Lot 72" because of its prime location at the end of a *cul de sac* based on the original development plans for Virgin Grand Estates, as memorialized by the Virgin Grand Estates' Declaration of Covenants, Conditions and Restrictions dated June 21, 1990 ("1990 Declaration");[26]

(2) Walsh held a senior mortgage of Lot 72;[27]

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[21] FED. R. CIV. PRO. 15(a)(2).

[22] While leave to amend should not be granted where an amendment would be considered futile, *Harvey v. Christopher*, 55 V.I. 565, n. 8 (V.I 2011) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)), for the sake of clarity, the Court will address Plaintiffs' Third Amended Complaint in its entirety and will dismiss Plaintiffs' Third Amended Complaint because it does not withstand the Fed. R. Civ. P. 12(b)(6) standard as asserted in Defendant's January 9, 2004, Motion.

[23] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking *federal* jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim. . . . [But,] at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.") (emphasis added) (internal citations and quotations omitted).

[24] *Hein*, 551 U.S. at 598.

[25] Compl. ¶ 5.

[26] Compl. ¶¶ 6 - 8.

[27] Compl. ¶ 3.

(3) at some point after June 4, 1998, Defendant began altering the location and design of the subdivision's roads including altering the main entrance to the subdivision causing the premium market value of Lot 72 to diminish;[28]

(4) on July 6, 2000, Defendant purchased the remaining lots from the original developer and improperly began to act as the successor developer by (1) taking on the duties of the "successor Declarant and Developer" when such rights were not conveyed by the original developer; (2) by obtaining a "retroactive" assignment of rights from the original developer on or about June 12, 2001, (3) by unilaterally amending the Declaration and restricting the rights of other property owners on or about February 21, 2001; and (4) by "excluding all other owners from effective representation and membership" by holding board meetings outside of the territory;[29]

(5) on some unspecified date, upon default of GDI, Walsh initiated foreclosure proceedings, and ultimately became the owner of Lot 72 by purchasing Lot 72 at the foreclosure sale from GDI.;[30] and,

(6) at some point, Walsh transferred his interest via Marshall's Deed dated May 29, 2002, to Terryhill[31]

These facts suggest that Plaintiffs allege that Walsh, as the prior mortgagee of Lot 72, suffered a loss of value of his security interest in Lot 72 due to the acts of Defendant, as well as a loss of property value as the equitable interest holder of Lot 72 after foreclosure.

The Court finds Plaintiffs have not articulated sufficient facts to establish that Walsh, as the prior mortgagee of Lot 72, ultimately suffered any injury as a result of Defendant's conduct. Generally, a mortgagee enjoys standing to assert claims against a defendant when that defendant has diminished the value of the property, thereby threatening the mortgagee's security interest in the property.[32] But, once a foreclosure is

[28] Compl. ¶¶ 8-11. The June 4, 1998, date is taken from the date of decision of *Saastopankkien Keskus-Osake Pankki (Skopbank) v. Allen-Williams Corp.*, 39 V.I. 220 (D.V.I. 1998), a case cited in Plaintiffs' Complaint. *See* Compl. ¶ 8.
[29] Compl. ¶¶ 12-17.
[30] Compl. ¶ 3. The role of Grand Development, Inc. and its relationship to the original developer is unclear to the Court. However, construing the facts in a light most favorable to Plaintiff, Grand Development, Inc.'s role is not material to the Court's determination of standing.
[31] Compl. ¶ 4.
[32] *See, e.g., Williams v. Mackay*, 54 V.I. 713 (D.V.I. App. Div. 2009); *Armstrong v. Armstrong*, 266 F. Supp. 2d 385, 394 (D.V.I. App. Div. 2003) (holding that the Virgin Islands has adopted a lien theory of mortgages, such that a mortgage is considered a security interest); *Gov't Guarantee Fund v. Hyatt Corp.*,

complete and the property is sold at a Marshall's sale, the mortgagee's security interest expires.[33] While in some cases a prior mortgagee's standing to assert a claim against a third party may survive a foreclosure action,[34] the prior mortgagee must allege an actual injury caused by the third party because the mortgagee's primary remedy under Virgin Islands law is to recover any deficiency against the mortgagor. In other words, where the sale of foreclosed property is insufficient to fully satisfy the judgment of foreclosure, the mortgagee may seek to recover a deficiency judgment against the defaulting party.[35]

While this action was initiated prior to the District Court granting a judgment of foreclosure to Walsh against Grand Development, Inc., Walsh's security interest as the mortgagee expired at the time of the Marshall's sale. Further, the Complaint fails to assert any facts which establish that Walsh, as the mortgagee of Lot 72, sustained damages as a result of Defendant's conduct other than the overly broad allegation that the lot's value was diminished prior to the foreclosure sale. Unlike the rights of a title holder to property, when a property has been foreclosed upon, allegations of the depletion of a property's value, without more, do not necessarily constitute sufficient facts establishing

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166 F.R.D. 321 (D.V.I. 1996) *aff'd sub nom. Gov't Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996).

[33] *See generally* 55 Am. Jur. 2d Mortgages § 719.

[34] *Accord Williams v. Mackay*, 54 V.I. 713 (D.V.I. Jan. 6, 2011) (suggesting a mortgagee must also be joined to an action where the action will threaten the value of its security interest in the property).

[35] *See* 28 V.I.C. §524(c) ("When the judgment is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed are not sufficient to satisfy the judgment as to the sum remaining unsatisfied to either, the judgment may be enforced by execution as in ordinary cases. When in such case the judgment is in favor of different persons not united in interest, it shall be deemed a separate judgment as to such persons, and may be enforced accordingly."); *Soly v. Warlick*, CIV. 1991/212, 2011 WL 3625393 (D.V.I. Aug. 17, 2011) (finding that under Virgin Islands law "deficiency is calculated based on the proceeds of the foreclosure sale, not the fair market value of the property"). *See generally* 125 Am. Jur. Trials 541 (Originally published in 2012) ("[T]he lender is entitled to seek a personal judgment or decree against the mortgagor or any other person liable for the mortgage debt for such deficiency. The deficiency is the difference between the amount which the mortgagee is able to have applied to the debt and the amount of that debt.")

that the mortgagee, a lien holder, sustained damages or any actual injury.[36] In fact, Walsh concedes, and the Complaint alleges, that he won a judgment of foreclosure against GDI, the mortgagor. But Plaintiffs do not assert any facts establishing that Walsh was, for instance, unable to recover all his damages against GDI through a deficiency judgment.[37] As a matter of law, Plaintiff may not recover in excess of his actual damages.[38] Thus, pleading additional facts that establish an actual injury other than a generalized loss of property value is essential to Walsh's causes of action against Defendant. As a result, the Court finds that Plaintiff Walsh, as the prior mortgagee of Lot 72, lacks standing to assert any causes of action against Daly because, even construing Plaintiffs' allegations in a light most favorable to Walsh, Plaintiffs have alleged no actual injury fairly traceable to Defendant's conduct.

Insofar as Plaintiffs allege that Walsh has standing as a prior equitable interest holder of the property, the Court also disagrees. Even construing the facts of the Complaint in a light most favorable to Plaintiffs, Plaintiffs do not allege sufficient facts to establish that Defendant committed any wrongful conduct that caused Walsh an injury during the limited period of time between Walsh's purchase of the property at foreclosure and subsequent assignment of the property to Terryhill. Specifically, Plaintiffs concede in their Opposition to Defendant's Motion to Dismiss that foreclosure was granted by the

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[36] *See, e.g., Allstate Fin. Corp. v. Zimmerman*, 272 F.2d 323, 325 (5th Cir. 1959) (noting that a mortgagee may only recover damages measured by the impairment of its ability to collect its debt).
[37] Defendant provided the Court with a copy of the Order Confirming Sale of Lot 72, among others, which indicates that Walsh received a deficiency judgment in the amount of $729,316.29 plus interest. Plaintiff makes no reference to this Order Confirming Sale in his Complaint and conveniently omits the fact that he received a substantial deficiency judgment. *See* Defendant's Motion to Dismiss, Jan 9, 2004, at Exhibit 1.
[38] *See Soly*, 2011 WL 3625393 at *4, *5; *see also Cohen v. Ortzsik*, CIV. 7-1973, 1974 WL 383711 (D.V.I. Dec. 23, 1974).

District Court on August 17, 2000, and the Marshall's sale was held on June 26, 2001, at which point Walsh purchased the property at the foreclosure sale. Walsh asserts he assigned his interest to Terryhill via a Marshall's deed dated May 29, 2002,[39] but an exhibit submitted by Defendant suggest the assignment occurred earlier.[40] Plaintiff has submitted no documentary evidence establishing an assignment on some other date, such as a copy of the assignment referred to in the Order Confirming Sale or a copy of the Marshall's Deed.

Plaintiff appears to allege that Defendant's wrongful conduct began around 1998 and continued after Defendant purchased the remaining lots from the original developer in July 2000, ultimately diminishing the value of Lot 72 by the time of the Marshall's sale.[41] While the Complaint does not provide a complete timeline of events, Plaintiffs allege that on or about February 21, 2001, Defendant unilaterally amended the rights of property owners under the Declaration and received an unlawful retroactive assignments of rights as developer from the original developer on June 12, 2001. But, both these acts also occurred prior to the Marshall's sale.

While the Complaint also appears to suggest that Defendant's wrongful conduct was ongoing after the date of the Marshall's sale, it is unclear whether Walsh immediately assigned all his equitable rights in Lot 72 to Terryhill or if Walsh held his equitable interest in the property for a period of time before he assigned his rights to

[39] Compl. ¶ 4.
[40] Defendant's Motion to Dismiss indicates that the Order Confirming Sale of Lot 72 "assigned, at Walsh's request, his interest in Lot 4-72 to Terryhill," an allegation that the Order Confirming Sale clearly supports. Defendant's Motion to Dismiss, Jan 9, 2004, at 4.
[41] Compl. ¶¶ 9-19. While the Court makes its finding by construing the facts in a light most favorable to the Plaintiff, the Order Confirming Sale of Lot 72, among others, appears to be dated April 12, 2002, and clearly assigns the rights in the judgment and sale to Terryhill.

Terryhill. Further, even if Walsh was an equitable interest holder for some period of time prior to the assignment of Lot 72 to Terryhill, the Complaint does not allege that Walsh sustained damages or had an actual injury - such as a diminution in value of the property - as a result of Defendant's wrongful conduct during that period. In fact, the Complaint does not even aver that Lot 72 was assigned to Terryhill for value or for a value which was less than the amount Walsh paid at the Marshall's sale. For the foregoing reasons, the Court finds that Plaintiff Walsh lacks standing to assert any causes of action against Defendant.

II. Terryhill has standing to prosecute this action and is a real party in interest for all damages occurring after Terryhill acquired an interest in the property.

While it appears that Terryhill has not yet recorded the Marshall's deed to Lot 72, Plaintiffs allege in the Complaint that Terryhill is currently the lawful title holder of the property based on the May 29, 2002, Marshall's deed which was conveyed subject to the Virgin Grand Estates' Declaration of Covenants, Conditions and Restrictions dated June 21, 1990. While it was unwise for Terryhill to have failed to record title immediately after the transfer of ownership because the Virgin Islands is a race-notice jurisdiction,[42] absent evidence of another innocent purchaser for value, the Court finds that the facts alleged by Plaintiffs are sufficient to establish that Terryhill is the lawful title holder of Lot 72.[43] A current holder of property subject to certain covenants and restrictions

[42] *See* 28 V.I.C. §124 ("Every conveyance of real property hereafter made within the Virgin Islands which is not filed for record shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance is first duly recorded."); *Morton v. Ernest*, 44 V.I. 153 (V.I. Terr. 2001).
[43] *Cf. Callwood v. Callwood*, 3 V.I. 287, 158 F. Supp. 54, 56 (D.V.I. 1958).

certainly has standing to enforce the rights granted under the covenants that run with the land.[44] As a result, unlike Walsh, the Court finds that Terryhill is a real party in interest and has standing to prosecute this matter because Terryhill, the current lawful title holder of the property, has alleged – albeit only in general terms – ongoing wrongful conduct that is adversely affecting Terryhill's rights as a property owner under 1990 Declaration.

However, Terryhill does not have standing to assert a claim for damages that occurred prior to Terryhill acquiring an interest in the property. While the Complaint appears to suggest that Terryhill and Walsh were both prior mortgagees,[45] viewing the Complaint as a whole, even in a light most favorable to Terryhill, Terryhill has not alleged any facts establishing that it was a mortgagee of any property located in the Virgin Grand Estates subdivision. In fact, it is clear that Terryhill was never a mortgagee of Lot 72 because Plaintiff's exhibits to his original Complaint clearly demonstrate that Walsh - not Terryhill - entered into multiple "construction loan agreements" with GDI.[46] Finally, the April 12, 2002, Order Confirming Sale clearly refers to the entry of judgment in favor of Walsh on August 17, 2000, the sole Plaintiff in the foreclosure action.[47] As a result, Terryhill does not have standing to assert any claims as a prior mortgagee because Terryhill never held an interest in the property prior to Walsh's assignment of the

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[44] *See, e.g., Dalton v. Kosick*, 24 V.I. 222 (Terr. V.I. 1989).
[45] Compl. ¶ 9.
[46] *See* Plaintiff's Original Complaint (February 11, 1993, "Construction Loan Agreement" (between GDI and Walsh); November 8, 1993, "First Amendment to Construction Loan Agreement" (between GDI and Walsh); November 25, 1992, "First Priority Construction Mortgage Security Interest" (between GDI and Walsh); February 11, 1993, "First Amended and Restated Construction Mortgage Note" (between GDI and Walsh); February 11, 1993, "Amended and Restated First Priority Construction Mortgage Security Interest and Security Agreement" (between GDI and Walsh); November 8, 1993, "Modification of Amended and Restated Construction Mortgage Note" (between GDI and Walsh)).
[47] *See* Defendant's Motion to Dismiss, Jan 9, 2004, at Exhibit 1.

property to Terryhill. Thus, any alleged claims for damages to the property prior to the assignment of the property must be dismissed.

The Court's having found that Terryhill does enjoy standing insofar it avers damages to its rights as a property owner and to the property value after it became the lawful title owner of the property, the Court will now discuss each cause of action asserted on behalf of Terryhill.

III. Breach of Contract (Count II); Breach of the Covenant of Good Faith & Fair Dealing (Count III); Breach of Fiduciary Duties of Due Care, Loyalty, Good Faith & Fair Dealing (Count VI); and "Unconscionable, Bad Faith Exercise of . . . Power" (Count VII)

Even construing the Complaint in a light most favorable to Terryhill, the Court finds that Terryhill's factual assertions seeking recovery under a contract theory are too generalized for the Court to establish that Defendant breached any duty to Terryhill under the 1990 Declaration or its subsequent amendments. Specifically, Terryhill's breach of contract claims alleges that, even if Defendant held the rights of the developer under the 1990 Declaration, his rights as developer were "greatly reduced rights" because at the time of the "retroactive" assignment Defendant no longer owned any lots in the subdivision.[48] Terryhill's causes of action for covenant of good faith and fair dealing and breach of fiduciary duties seem to allege that, even if Defendant holds all or any rights as the developer pursuant to the original or amended 1990 Declaration, Defendant unlawfully limited Terryhill's rights and benefits as a property owner by amending the Declaration.[49] While it is unclear under what theory Terryhill seeks to recover for

[48] Compl. ¶ 25.
[49] Compl. ¶ 32.

"unconscionable, bad faith exercise of power," this claim also relies on the allegation that Defendant unlawfully amended the Declaration.

The Court finds that Defendant has alleged specific damages. Although a majority of Defendant's conduct occurred prior to Terryhill acquiring title to Lot 72, construing the Complaint in a light most favorable to Plaintiff, the Complaint suggests that Defendant's wrongful conduct is ongoing and continuing to cause damages to Terryhill's interests under the Declaration as well as to its property. For instance, Terryhill asserts that it is no longer permitted to place a "for sale" sign on its property, that Defendant has reassigned most of the "cost of the development and maintenance" of the subdivision to property owners, and that Defendant has held board meetings at his home or place of business in Virginia, limiting the opportunity for owners of properties the subdivision to participate meaningfully.[50] Further, Terryhill claims that "Defendant's road construction is causing substantial and irreparable harm to the real property here in question by fundamentally altering its character. . . ."[51]

Nevertheless, these damages are insufficient in and of themselves to establish a cause of action under a breach of contract theory because Plaintiff has not established facts demonstrating that Defendant has breached any duty owed to Terryhill under the specific terms of the covenants enumerated in the 1990 Declaration. Rather, the Complaint offers several sweeping legal conclusions couched as factual allegations. Specifically, in order to establish a breach of contract claim, a plaintiff must allege sufficient facts showing there was (1) an agreement; (2) a duty created by that agreement;

[50] Compl. ¶¶ 14-16, 32.
[51] Compl. ¶¶ 9-11, 52.

(3) a breach of that duty; and (4) damages.[52] While the Court finds that Plaintiff alleges sufficient facts to suggest that the 1990 Declaration may constitute an agreement[53] between the property holders and the original developer, Plaintiff subsequently simply argues that the rights enumerated in the Declaration were unlawfully assumed by Defendant and the covenants in the 1990 Declaration were subsequently unlawfully amended by Defendant.[54] Plaintiff does not enumerate a specific instance where Defendant breached a specific duty as the purported developer of the property under the terms of the 1990 Declaration or its amendments.

Similarly, a claim under a theory of a breach of the covenant of good faith and fair dealing and a claim under a theory of breach of fiduciary duties both arise out of contract. Therefore, a plaintiff must allege some sort of specific breach under the terms of the contract or agreement to recover under these theories. In the Virgin Islands, to state a claim for breach of the covenant of good faith and fair dealing, Plaintiff must allege:

> (1) that a contract existed between the parties, and

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[52] Considering the recent Supreme Court of the Virgin Islands decision in *Government of the Virgin Islands v. Connor*, S. Ct. Civ. No. 2013-0095, slip. op at 6 (V.I. Feb. 24, 2014), the Superior Court, in an 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, must conduct a "*Banks* analysis," *see Simon v. Joseph*, S. Ct. Civ. No. 2012-0011, slip. op (V.I. Sept. 11, 2013) (interpreting *Banks*); *Matthew v. Herman*, 56 V.I. 674 (V.I. 2012), to determine the applicable common law. However, the Supreme Court of the Virgin Islands has repeatedly upheld the basic elements of a breach of contract claim. *See, e.g., Chapman v. Cornwall*, 58 V.I. 431 (V.I. 2013). Furthermore, the essential elements of a breach of contract claim are so fundamental to the common law jurisprudence in the Virgin Islands that a *Banks* analysis is unnecessary in this instance.

[53] While Plaintiff does not attach the Declaration to the Third Amended Complaint, the Court finds it sufficient that the 1990 Declaration is incorporated into the Third Amended Complaint by reference because it is attached to the original complaint, thereby placing Defendant on notice. The 1990 Declaration states that the covenants "shall be deemed to run with the land" and is both "a burden and benefit to Declarant ["Developer"] . . . and . . . persons acquiring or owing an interest in the Real Property."

[54] Compl. ¶¶ 14-16.

> (2) that, in the performance or enforcement of the contract, the opposing party engaged in conduct that was fraudulent, deceitful, or otherwise inconsistent with the purpose of the agreement or the reasonable expectations of the parties.[55]

Further, in order to establish a claim for a breach of fiduciary duties,[56] a plaintiff must allege sufficient facts establishing that:

> (1) there must be a fiduciary relationship
> (2) the fiduciary must have breached its duty imposed by such relationship,
> (3) the plaintiff must have been harmed, and
> (4) the fiduciary's breach must be a proximate cause of the plaintiff's harm.[57]

"A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."[58] Finally, Plaintiff's claim for "bad faith exercise of power" for altering or amending the Declaration must also be supported by some facts alleging a breach of the Declaration, which Terryhill has failed to do. Since Terryhill has generally failed to allege any specific breach of any duty owed by Defendant to Plaintiff under the terms of the Declaration, the Court will dismiss all counts related to a breach of contract theory or

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[55] *Roebuck v. V.I. Housing Authority*, 2014 WL 2109066, at *6 (V.I. Super. Ct 2014) (*quoting LPP Mortgage Ltd. v. Prosper*, 50 V.I. 956, 960–61 (D.V.I. 2008)). This language is derived from the Restatement (Second) of Torts § 205. A *Banks* analysis is unnecessary to adopt Restatement (Second) of Torts § 205 here because the Supreme Court of the Virgin Islands affirmed a Superior Court's grant of summary judgment on this basis in *Chapman v. Cornwall,* 58 V.I. 431, 441 (V.I. 2013) ("The duty of good faith limits the parties' ability to act unreasonably in contravention of the other party's reasonable expectations. A successful claim ... requires proof of acts amounting to fraud or deceit on the part of the employer.") (citing *Pennick v. V.I. Behavorial Serv. Inc.*, No. 2006-0060, 2012 U.S. Dist. LEXIS 23402 (D.V.I. App. Div. Feb. 22, 2012)).

[56] Considering the Court finds that Plaintiffs have failed to allege sufficient facts establishing a breach of a fiduciary relationship, it is unnecessary for the Court to conduct a *Banks* analysis regarding the common law action of a breach of fiduciary duties here.

[57] *Roebuck*, 2014 WL 2109066 at *6 (citing *Watts v. Blake–Coleman*, Civil No. 2011–61, 2012 WL 1080323, at *4 (D.V.I. March 29, 2012)).

[58] *Guardian Ins. Co. v. Khalil*, 2012 WL 3114601, at *7 (V.I. Super. Ct 2012) (citing RESTATEMENT (SECOND) OF TORTS § 874 (1979)).

related to a "bad faith exercise of power as developer" and grant Plaintiff leave to amend in this regard consistent with this Memorandum Opinion.

IV. Declaratory Judgment (Counts I and X)

Terryhill's demand for a declaratory judgment arises out of the allegation that Defendant has never lawfully held rights as the Virgin Grand Estate's developer pursuant to the original 1990 Declaration because the original developer never had the authority to assign its rights to a successor after the original developer's abandonment of the property.[59] The Court holds the discretionary[60] authority to grant declaratory judgment pursuant to 5 V.I.C. § 1261, *et seq.*, but declaratory judgment is only permissible where a justiciable controversy exists.[61] Here, it is unclear to the Court based on the Complaint whether Terryhill asserts that it has suffered any actual injury due to the fact that Defendant began to act as the developer of the property, even assuming the initial grant of authority to Defendant from the original developer was unlawful or otherwise impermissible. Rather, the Complaint suggests that Terryhill's enumerated damages arise from Defendant's amendment to the Declaration or failure to abide by the terms of the 1990 Declaration. Thus, even construing the Complaint in a light most favorable to Terryhill, it seems that Terryhill has not alleged any actual injury from the wrongful conduct which forms the basis of Terryhill's claim for declaratory judgment, and thereby no justiciable controversy exists on this basis. Furthermore, it is questionable whether Terryhill even has standing to assert a claim for Defendant's alleged "unlawful"

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[59] Compl. ¶ 20.
[60] *See Flavo-Rich v. Quinn*, 18 V.I. 530 (D.C.V.I. 1981).
[61] *See Companion Assurance Co. v. Alliance Assurance Co.*, 21 V.I. 34 (D.C.V.I. 1984).

assumption of the rights of developer under the 1990 Declaration, which occurred prior to Terryhill acquiring any interest in the property. However, since the Court has not been properly briefed on this matter by the parties, the Court will grant Plaintiff leave to amend its claim for declaratory judgment consistent with this Memorandum Opinion.

V. Breach of Settlement Agreement (Count IV)

Terryhill seeks recovery for breach of a settlement agreement on the basis that Plaintiffs and Defendant "orally agreed to settle their dispute . . . in consideration of the exchange of certain real properties involved in this litigation, the crediting of certain sums from Defendant to Plaintiffs, and the execution of mutual releases."[62] While Plaintiff alleges that a draft settlement agreement was delivered by Plaintiffs to Defendant, and Plaintiffs and Defendant orally agreed to certain amendments to the settlement agreement,[63] Plaintiffs do not aver that the final settlement agreement was placed in writing and signed by the parties to be bound. Rather the Complaint states that the "conduct and communications" between Plaintiffs, Plaintiffs' counsel, Defendant, and Defendant's counsel "resulted in the creation of a binding settlement contract,"[64] a legal conclusion couched as a factual allegation.

Generally, a settlement agreement "voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court, and even in the absence of a writing."[65] Whether a settlement agreement is valid is "governed by principles of local

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[62] Compl. ¶ 35.
[63] Compl. ¶¶ 35-37.
[64] Compl. ¶ 38.
[65] *Nicholas v. Wyndham Int'l, Inc.*, CIV. 2001-147, 2007 WL 4811566 (D.V.I. Nov. 20, 2007) (quoting *Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3d Cir.1970)).

law applicable to contracts generally,"[66] and thereby the agreement can be enforced only where "all material terms have been agreed upon by the parties."[67] However, where a settlement agreement specifically involves a transfer of interest in land, the agreement must be in writing pursuant to Virgin Islands statute of frauds,[68] in order to be a valid and enforceable agreement under local contract law.[69]

Here, Plaintiffs did not outline sufficient facts to support a plausible claim for a breach of a settlement agreement because, while Plaintiffs clearly allege the settlement agreement involved a transfer of properties, Plaintiffs do not assert that the agreement was in writing and signed by the parties in accordance with the Virgin Islands statute of frauds, an essential element to their cause of action. At most, the Complaint claims that the parties entered into an oral agreement for the transfer of land, which is insufficient to survive a motion to dismiss. Further, a general expression of intent to settle does not amount to an enforceable agreement.[70] As a result, the Court will dismiss Plaintiffs' claim for breach of a settlement agreement.

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[66] *Id.*
[67] *Castolenia v. Crafa*, 2014 WL 239427, at *2 (V.I. Super. Ct 2014) (citing *Pennsbury Village Assocs., LLC v. McIntyre*, 11 A.3d 906 (Pa. 2011)).
[68] *See* 28 V.I.C. § 242 ("Every contract for the leasing for a longer period than one year from the making thereof, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum is in writing, and signed by the party to be charged, or by his lawful agent under written authority.").
[69] *See generally* 72 Am. Jur. 2d Statute of Frauds § 93 ("Generally, when a settlement agreement includes a transfer of an interest in land, it necessarily implicates the Statute of Frauds . . . In determining whether the Statute of Frauds applies to a settlement agreement conveying an interest in real property, courts must consider the terms of the settlement agreement, not the subject matter of the litigation.").
[70] *See generally Castolenia*, 2014 WL 239427.

VI. Constructive Fraud (Count V)

Plaintiffs' claim for constructive fraud arises out of Plaintiff's allegation that "Plaintiffs loaned Defendants funds, acquired a mortgage interest and ultimately purchased title to Lot 72 in justifiable reliance upon the landscape and roadway design specified in the original Declarations." As already discussed, the Court has found that Walsh does not have standing to assert this claim because he has failed to allege any actual injury as the prior mortgagee.[71] Further, the Court has already found that the Complaint fails to allege sufficient facts to establish that Terryhill was a prior mortgagee of the property.[72] Finally, while it is unnecessary for the Court to undergo a *Banks* analysis here, it looks as if no Court in the Virgin Islands has previously adopted the common law action of constructive fraud.[73] As a result, the Court shall dismiss Plaintiffs' claim for constructive fraud.

VII. Breach of U.S. Interstate Land Sales Full Disclosures (Count VIII)

Plaintiffs have indicated that they will no longer pursue Count VIII of the Third Amended Complaint. As a result, the Court will dismiss Count VIII.

VIII. Damage to Environmental Landscape around Lot 72 (Count IX)

Insofar as the Court has limited its claims to damages to the property occurring after Terryhill acquired an interest in the property, Terryhill alleges that the construction of the roadway has caused damages to the landscape surrounding his property by

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[71] Supra n. 23-41; *see also* 37 Am. Jur. 2d Fraud and Deceit § 25.
[72] Supra n. 45-47.
[73] *See Nicholas v. Wyndham Int'l, Inc.*, CIV. 2001-147, 2007 WL 4201032 (D.V.I. Nov. 13, 2007) (noting that, in addition to the Restatements being silent in regards to an action for constructive fraud, no Court in the Virgin Islands or the Third Circuit has recognized a claim for constructive fraud).

"clearing land, cutting down mature trees, wiping out mature natural vegetation, and otherwise devastating the environment immediately surrounding Lot 72."[74] It appears that this Count may arise out of a theory of tort, but Plaintiff also asserts a similar claim arising out of a theory of contract under Counts II, III, and IV. "[T]he 'gist of the action' doctrine bars plaintiffs from bringing a tort claim that merely replicates a claim for breach of an underlying contract."[75] Further, while the Court acknowledges that Terryhill claims damages to the property surrounding Lot 72, Plaintiff fails to assert that Defendant has breached any specific duty in altering the landscape around Lot 72. As a result, the Court shall dismiss Count IX. However, considering the Court shall grant Terryhill leave to amend on Counts II, III, and IV, the Court shall also grant Terryhill leave to amend Count IX consistent with this Memorandum Opinion.

IX. Necessary Parties Pursuant to Fed. R. Civ. P. 19(a).

The Court recognizes that some parts of Complaint may implicate rights of other property owners in the Virgin Grand Estates subdivision under the Declaration and covenants that run with the land because Plaintiffs are generally alleging Defendant has unlawfully amended the Declaration. However, the Court finds that Defendant has not met his burden to show that the rights of other property owners would not be adequately represented here or would be otherwise adversely effected.

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[74] Compl. ¶ 53.
[75] *Addie v. Kjaer*, 51 V.I. 463 (D.V.I. 2009) (omitting internal citations).

CONCLUSION

For the foregoing reasons, the Court will grant Defendant Daly's January 9, 2004, Motion to Dismiss, Plaintiff Walsh shall be dismissed from this action, and Plaintiff Terryhill will be granted leave to amend consistent with the holdings of this Memorandum Opinion. An Order consistent with this Opinion shall follow.

Dated: June 18, 2014

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Acting Clerk of Court

by:
Donna D. Donovan
Court Clerk Supervisor 6/23/14