IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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ANAMARIJA URH, Plaintiff, vs. **GERARD C. BUFFO,** Defendant.	CASE NO. ST-2015-CV-0000315 ACTION FOR BREACH OF CONTRACT, ANTICIPATORY REPUDIATION, BREACH OF GOOD FAITH AND FAIR DEALING, DEBT, UNJUST ENRICHMENT, CONVERSION, DAMAGES AND PUNITIVE DAMAGES
JEAN ANN BUFFO and GERARD C. BUFFO, Counterclaim Plaintiffs, vs. **WOLFGANG BOHRINGER and ANAMARIJA URH,** Counterclaim Defendants.	JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

Before the Court are the following:

1) Defendant's Motion for Summary Judgment (filed on July 15, 2016),

2) Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment (filed on July 15, 2016),

3) Anamarija Urh and Wolfgang Bohringer's Opposition to Defendant's Motion for Summary Judgment (filed on August 26, 2016), and

4) Defendant's Reply (filed on September 19, 2016).

Attached to the pleadings are several exhibits, such as transcript excerpts of the parties' depositions and answers to written interrogatories.

BACKGROUND

This matter involves a dispute over two contracts for loans taken out to buy two boats used by Anamarija Urh's charter boat and diving company. Gerard Buffo seeks favorable summary judgment for both disagreements. Both contracts are oral.[1] The parties' recollection of the two oral contracts' terms is identical mostly but there are also disagreements over key terms. The Court will address each contract separately. Because there is no written contract between Urh and Buffo, the Court must extrapolate the loan agreements' terms from what is available in the record.

One of the points of contention is the involvement of Urh's husband, Wolfgang Bohringer. Jean Ann Buffo and Gerard Buffo contend that Bohringer was a jointly and severally liable party to both contracts while Urh and Bohringer assert that only Urh borrowed money from Gerard Buffo.[2] To provide a simplified narrative, the Court will mention only Anamarija Urh and Gerard Buffo as parties while bearing in mind there is an assertion that Wolfgang Bohringer also is liable and Jean Buffo is a Crossclaim Plaintiff.

I. Dispute over *Summer Wind.*

Urh operates a charter boat service and dive company.[3] In April of 2013, Urh became interested in purchasing a boat named S/V *Summer Wind* ("*Summer Wind*"). However, Urh could not qualify for a loan due to her insufficient credit history.[4] For that reason, Urh asked her friend, Buffo, to co-sign a loan.[5] However, the lender, SGB Finance North America Inc.,[6] required removal of Urh's name from the loan agreement and United States Coast Guard registration.[7] Buffo also represents that Urh could not appear as an owner on U.S. Coast Guard documents because she was not a United States citizen at the time.[8]

Accordingly, the parties agreed Buffo would take out the loan solely, buy *Summer Wind,* and take title in his name only. He would allow Urh to use *Summer Wind* while she repaid Buffo for its purchase, and, after fully repaying Buffo the amount of the loan, Buffo would add Urh to the ship's title. Urh agreed to provide an initial twenty-thousand-dollar ($20,000) down payment on the *Summer Wind* purchase.[9] Buffo took out a loan from SGB Finance for eighty-thousand dollars ($80,000). The loan was memorialized in a Marine Note and Security Agreement dated May 16, 2013.[10] To secure the loan, SGB Finance was given a security interest in *Summer Wind,* i.e. a mortgage.[11] The Marine Note required monthly payments.[12] In exchange, Urh promised Buffo free use of the boat when he travelled to the Virgin Islands and a fee of five-thousand

[1] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶¶ 4, 11.
[2] *Compare* Defendant Gerard Buffo and Jean Ann Buffo's Counterclaim/Crossclaim Complaint Against Anamarija Urh and Wolfgang Bohringer ¶¶ 9, 16 *with* Opposition to Defendant's Motion for Summary Judgment 5 ("Bohringer was never a party to any of the contracts for M/V Aquamarine or S/V Sumer Wind"). The Court notes that Urh and Bohringer filed separate Answers to Buffo's Counterclaims.
[3] Compl. ¶ 8.
[4] *Id.* at ¶ 10.
[5] Compl. ¶ 12; Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 10.
[6] *See* Opp. to Def.'s Mot. for Summ. J., Ex. 10.
[7] Compl. ¶ 14; Gerard Buffo and Jean Ann Buffo's Counterclaim/Crossclaim Complaint Against Anamarija Urh and Wolfgang Bohringer ¶ 8.
[8] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 14.
[9] Compl. ¶ 17.
[10] Opp. to Def.'s Mot. for Summ. J., Ex. 10.
[11] *Id.* at ¶ 8.
[12] *Id.* at ¶ 3, Truth in Lending Disclosures.

($5,000) dollars.[13]

The closing of *Summer Wind's* sale took place and the boat's title was conveyed to Buffo. Urh proceeded to make several payments.[14] Then, Urh emailed Buffo and requested that he include her as an owner on the title and U.S. Coast Guard documents.[15] Urh said she experienced problems with customs and immigration agencies while visiting foreign islands because her name was not on the title.[16] In addition, Urh claims that Buffo was violating their agreement by not using her payments to him to pay off the SGB Finance loan.[17] Buffo responded that he would add Urh as an owner if she paid off the rest of the loan.[18] However, the parties disagreed as to the amount left on the loan. Urh asserted that the leftover balance was "around $60,000."[19] Urh states that Buffo averred the balance was $71, 965.56.[20] Buffo refused to add Urh to the title until she paid back the rest of the loan.[21] After several email exchanges in which Urh repeatedly demanded to be added on the title, Buffo ceased communicating with Urh.[22]

Buffo alleges that, after he refused to add Urh as an owner on the *Summer Wind*'s documentation, Urh "gave notice and vacated *Summer Wind* and refused to maintain, insure, harbor, or otherwise take care of the vessel."[23] Then, Buffo took possession of *Summer Wind* and sold it for "approximately $80,000."[24] Buffo states that the proceeds of the sale were applied to Urh's outstanding loan balance and the cost of facilitating the sale. The remaining proceeds currently are held in escrow. Buffo counterclaims he suffered damages resulting from taking possession of *Summer Wind*, such as hiring a captain, buying substitute insurance dockage, and mooring and docking fees. Buffo also claims he was not paid the $5,000 fee for facilitating the purchase of *Summer Wind.*

Urh alleges that Buffo violated their contract by selling *Summer Wind* and the implied duty of fair dealing by not making payments to SGB Finance to amortize the loan.[25]

II. Dispute over *Aquamarine.*

The other contract involves an agreement for a loan to buy another boat named *M/V Aquamarine 2* ("*Aquamarine*"). Buffo loaned Fifty-Two Thousand Dollars ($52,000) to Urh at seven (7%) percent interest per annum that was supposed to be amortized over a five (5) year

[13] Compl. ¶ 12.
[14] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 18.
[15] Compl. ¶ 22; Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 20.
[16] *See* Dep. of Wolfgang Bohringer 11 (Apr. 11, 2016) attached to Opposition; Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J., Ex. 12, Email from Anamarija Urh and Wolfgang Bohringer (sent July 6, 2013).
[17] Opp. to Def.'s Mot. for Summ. J. 8.
[18] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 21.
[19] Compl. ¶ 24;
[20] Compl. ¶¶ 23, 24; Opp. to Def.'s Mot. for Summ. J. 4.
[21] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 21.
[22] Compl. ¶ 27.
[23] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 22.
[24] *Id.* at ¶ 26.
[25] Compl. ¶ 27;

period.[26] Buffo represents that the parties agreed he could place a lien on *Aquamarine* while Urh paid off the loan.[27] However, Urh contests this alleged contract provision.[28] Urh was responsible for paying costs associated with *Aquamarine's* maintenance and ownership.[29] Urh made payments for several months[30] but, after forty-five (45) monthly disbursements, Urh stopped.[31] Urh states that "[d]ue to a dispute[,] Urh stopped paying the installment amounts and now there is an issue over the balance due."[32] Urh does not explain the "dispute" that caused her to stop making payments for *Aquamarine*. However, during her deposition, Urh admits she ceased making payments toward the loan for *Aquamarine* due to the dispute over *Summer Wind*.[33]

The record includes a Promissory Note that supposedly memorializes the *Aquamarine* agreement.[34] However, the attached Promissory Note is not executed. The record also includes email exchanges between the parties discussing the terms of the loan agreement.

III. Buffo Moves for Summary Judgment.

Buffo contends that there is no longer a genuine dispute over material facts and moves the Court to enter summary judgment in his favor. The parties have conducted extensive discovery, as represented by the multitude of exhibits attached to their pleadings. Buffo seeks payment of the loan for *Aquamarine* and reimbursement for expenses incurred by taking possession of and selling *Summer Wind.*

In a section in the Opposition titled STATEMENT OF DISPUTED FACTS, Urh states this matter continues to involve the following disputed material facts:

> 1. There is a dispute as the remaining balance owed on the debt for M/V Aquamarine,
>
> 2. As to S/V Summer Wind, Gerard Buffo started making changes to [the] parties['] original verbal agreement,
>
> 3. Gerard Buffo did not make certain advance payments to the lender tendered to him by Urh in contravention of the parties' agreement,
>
> 4. Gerard Buffo did not provide Urh with the 2015 U.S. Coast Guard documentation necessary for the operation of Summer Wind,

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[26] Def.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. ¶ 2.
[27] Gerard Buffo and Jean Ann Buffo's Counterclaim/Crossclaim Complaint Against Anamarija Urh and Wolfgang Bohringer ¶ 16.
[28] Counterclaim Def. Anamarija Urh's Answer ¶ 16.
[29] *Id.* at ¶ 3.
[30] *Id.* at ¶ 5.
[31] *Id.* at ¶ 6.
[32] Opp. to Def.'s Mot. for Summ. J. 2.
[33] Buffo's Mot. for Summ. J. 8, Dep. of Anamarija Urh. P. 23 lines 4-8. Def.'s Statement of Undisputed Facts., Ex. A.
[34] Exhibit A of Gerard Buffo and Jean Ann Buffo's Counterclaim/Crossclaim Complaint Against Anamarija Urh and Wolfgang Bohringer.

> 5. Gerard Buffo threatened Urh that he is the owner of the vessel and can do whatever he wants to do with it,
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> 6. Urh requested that her name be added to the U.S. Coast Guard documentation after the threats from Buffo but Buffo failed and/or refused to add her name, and
>
> 7. Bohringer was never a party to any of the contracts for M/V Aquamarine or S/V Summer Wind.[35]

STANDARD FOR SUMMARY JUDGMENT

Virgin Islands Rule of Civil Procedure 56 governs motions for summary judgment. "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." The party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. This burden may be met by pointing out that there is an absence of evidence to support a particular element of the nonmoving party's case.

The Court will consider the evidence provided by both parties and view all inferences to be drawn from that evidence in a light most favorable to the nonmoving party. If the Court does not grant all of the relief requested by the motion, it "may enter an order stating any material fact—including an item of damages . . . that is not genuinely in dispute and [treat] that fact as established in the case." "A fact is material if it can affect the outcome of the case,"[36] and a genuine dispute of material fact exists if the evidence is such that a reasonable jury could find in favor of the nonmoving party on the disputed fact. Summary judgment shall be granted if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law.

ANALYSIS

I. Adherence to the *Aquamarine* Agreement Was Not Dependent on the Parties' Compliance with the *Summer Wind* Agreement.

This matter involves a dispute over two contracts. The record does not indicate that either agreement conditioned adherence upon compliance with the terms of the other. Buffo correctly points out that no law allows a party to a contract to discontinue performance under said contract because of the breakdown of another contractual relationship. Therefore, each contract requires a separate and independent summary judgment analysis.

[35] Opp. 4-5 (citations to the record omitted).
[36] *Burd v. Antilles Yachting Servs., Inc.*, 57 V.I. 354, 360 (V.I. 2012).

II. Several of Urh's Purportedly Disputes Facts Are Immaterial.

The Court finds that the following assertions of fact are immaterial and, therefore, do not preclude summary judgment:

> 4. Gerard Buffo did not provide Urh with the 2015 U.S. Coast Guard documentation necessary for the operation of Summer Wind
>
> 5. Gerard Buffo threatened Urh that he is the owner of the vessel and can do whatever he wants to do with it.
>
> 6. Urh requested that her name be added to the U.S. Coast Guard documentation after the threats from Buffo but Buffo failed and/or refused to add her name.

Urh states that, after Buffo allegedly attempted to change the *Summer Wind* Agreement, she "requested [that] Buffo to [sic] include her name on the U.S. Coast Guard documentation since Urh paid over $45,000.00 for the purchase of the vessel."[37] Neither party alleges the *Summer Wind* Agreement required Buffo to provide Urh with U.S. Coast Guard documentation before she repaid the loan to purchase *Summer Wind.* Additionally, Urh does not address Buffo's argument that federal law precluded her from being added as an owner on the U.S. Coast Guard documentation because she was not a U.S. citizen.[38] Upon review of the pleadings, it does not appear that Buffo's refusal to add Urh to the U.S. Coast Guard documentation concerns a material fact in this matter.

Furthermore, Urh does not explain and the Court cannot on its own deduce how Buffo allegedly stating that "he is the owner of the vessel and can do whatever he wants to do with it" is a material fact. Whether Buffo made such statement does not make his liability for any of the alleged counts in Urh's Complaint more or less probable. Therefore, in regard to the purportedly disputed facts numbered 4 to 6, the Court determines Urh fails to demonstrate this matter continues to involve a genuine dispute over material facts.

III. *Aquamarine* Agreement

A. The Court Determines that Comprehensive Summary Judgment Is Not Appropriate at This Stage of This Matter's Proceedings Because the Court Finds that the Litigation over *Aquamarine* Continues to Involve a Genuine Dispute over Material Facts.

1. Balance of *Aquamarine* Loan

Urh tersely argues that the summary judgment is inappropriate because "[t]he balance of the money due for M/V Aquamarine is in dispute among the parties."[39] Urh does not flesh out the disagreement, such as by stating the disparate outstanding balances averred by the parties. The

[37] Opp. 3.
[38] Mot. for Summ. J. 12 (discussing 46 U.S.C. § 2103(b)(1)).
[39] Opp. 6.

parties, in fact, do not appear to make divergent claims regarding loan's amount, the loan's interest, and when Urh stopped making payments. The evidence cited by Urh, namely her deposition, does not reveal disparate narratives.

In her responses to interrogatories, Urh stated the *Aquamarine* loan was for $52,000, required monthly payments, and she stopped making monthly payments as of May 2015.[40] She also stated the interest rate on the loan was seven percent annum (7%).[41] The monthly payment was $1,029.66.[42] Buffo agrees with these claims.[43] Therefore, there is no genuine dispute over the amount outstanding under the *Aquamarine* agreement. With these facts established, the Court calculates that the outstanding amount is $15,429.60 as of May 2015, excluding pre-judgment and post-judgment interest.

Urh does not justify ceasing payments toward the *Aquamarine* loan. During her deposition, Urh admitted she stopped making payments for *Aquamarine* because of an alleged breach of the *Summer Wind* Agreement.[44] However, Urh does not provide any authority allowing her to end her performance under a contract because of a dispute over another contract.

2. Bohringer's Involvement in the *Aquamarine* Agreement.

The record is unclear as to whether Bohringer was a party to the *Aquamarine* Agreement. In their Counterclaim/Crossclaim, Jean Ann Buffo and Gerard Buffo asserts that Urh and Bohringer "joint and severally executed a Promissory Note" for the purchase of *Aquamarine*.[45] In her answer to the counterclaim, Urh both denies and admits that Bohringer was a party to the loan agreement.[46] In his answer, Bohringer denies that he has a party to the *Aquamarine* Agreement.[47] Urh also denies that Bohringer was a party to the *Aquamarine* Agreement in their Opposition.[48] Lastly, Bohringer and Urh denied that Bohringer was a party to the *Aquamarine* Agreement during their respective depositions.[49] In his Reply, Buffo do not address whether Bohringer was a party to the *Aquamarine* Agreement.

When entering summary judgment, the Court needs to know not only for whom it should enter summary judgment but also against whom it should enter summary judgment. Therefore, it would be imprudent for the Court to issue comprehensive summary judgment while this key contract term is in dispute. The Court allow the issue of Bohringer's involvement in the *Aquamarine* Agreement to proceed to trial.

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[40] Opp., Urh & Bohringer's Responses to Defendant's First Set of Interrogatories, Interrogs. 7, 8.
[41] Interrog. 7.
[42] *Id.*
[43] Reply ¶ 2.
[44] Def.'s Stmt. of Undisputed Facts, Ex. D. Urh & Borhinger's Responses to Interrogatories, Interrog. 8.
[45] Gerard Buffo and Jean Ann Buffo's Counterclaim/Crossclaim Complaint Against Anamarija Urh and Wolfgang Bohringer ¶ 16. The Buffos attached an unsigned copy of a promissory note to their "Counterclaim/Crossclaim." Because the promissory note is not signed, the Court does not consider it to be valid evidence of the parties' agreement.
[46] *Compare* Counterclaim Defendant Anamarija Urh's Answer ¶ 16 *with* ¶ 32.
[47] Counterclaim Defendant Wolfgang Bohringer's Answer ¶¶ 16, 32.
[48] Opp. 5 "Bohringer was never a party to any of the contracts . . .."
[49] Dep. of Wolfgrang Bohringer 23 Lines 19 to 25.

IV. *Summary Wind* Agreement

A. Bohringer's Involvement in the *Summer Wind* Agreement

The record also is unclear as to whether Bohringer was a party to the *Summer Wind* Agreement. In their Counterclaim/Crossclaim, Buffo makes claims against both Urh and Bohringer with respect to *Summer Wind.* Urh and Bohringer also deny Bohringer was a party to the *Summer Wind* Agreement.[50] Before issuing summary judgment as to the *Summer Wind* Agreement, the Court needs to know who were the parties to the contract. Accordingly, the Court also will allow the issue of Bohringer's involvement in the *Summary Wind* Agreement to proceed to trial.

B. The Court Determines that Buffo Did Committed Anticipatory Breach of the *Summer Wind* Agreement.

1. Urh Asserts She Justifiably Anticipated Buffo's Breach of the *Summer Wind* Agreement.

Urh claims she stopped making loan payments to Buffo for the following reasons:

1) she discovered Buffo was not making payments to SGB Finance even though she was paying Buffo, and

2) Buffo stopped communicating with her after she demanded to be added to *Summer Wind's* title.

The record does not reveal that the *Summer Wind* Agreement required Buffo to pay off his loan to SGB Finance in congruence with Urh's payments to Buffo. The pleadings also do not demonstrate that the contract required Buffo to communicate with Urh. However, Urh claims that she was justified in suspending payments toward the SGB Finance loan because these actions signaled an anticipatory breach by Buffo.[51]

In support of this claim, Urh cites to *Bennett v. Sage Payment Solutions*,[52] an opinion issued by the Virginia Supreme Court.[53] The singular Virgin Islands opinion Urh cites in her discussion of anticipatory breach is *Smith v. Robson*, which relies on the Restatement (Second) of Contracts as binding authority. The Supreme Court of the Virgin Islands has held that, due to the repeal of title 1, § 4 of the Virgin Islands Code, the Superior Court should not rely on the Restatements as binding authority or opinions that themselves mechanistically and uncritically rely on the Restatements.[54] Instead, when considering a question of common law not foreclosed by prior precedent from the V.I. Supreme Court, the Superior Court must perform the three-part analysis s

[50] Counterclaim Defendant Anamarija Urh's Answer ¶ 9(i).
[51] Opp. 7.
[52] 282 Va. 49 (Va. 2011).
[53] Opp. 10.
[54] *Gov't of the Virgin Islands v. Connor*, 60 V.I. 597, 602 (V.I. 2014).

set forth in *Banks v. International Leasing and Rental.* The *Banks* analysis requires a court to consider the following factors 1) whether any Virgin Islands courts had previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represented the soundest rule for the Virgin Islands.[55]

2. The Court Will Adopt the Doctrine of Anticipatory Breach of Contract.

The relevant portion of the doctrine of anticipatory breach of contract is articulated in Restatement (Second) of Contract § 253(2). The doctrine provides that "[w]here performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance." The VI. Supreme Court has not yet addressed anticipatory breach and the Superior Court has not adopted anticipatory breach through a *Banks* analysis. Therefore, the Court will conduct a *Banks* analysis to determine if it should adopt anticipatory breach as Virgin Islands common law.

An anticipatory breach of contract is a party's repudiation of his contractual duty before the time fixed for his performance has arrived.[56] The doctrine of anticipatory breach provides, in relevant part, that the material breach of a contract by one party justifies the other party's cessation of performance under the contract.[57] In general, courts have held that, for repudiation to be sufficient so as to entitle the other party to treat the contract as materially breached, a party's repudiation must be to an unqualified refusal, or a declaration of inability to perform his contractual obligations.[58] Mere refusal to perform upon a mistake or misunderstanding of facts or upon an erroneous construction of a contract term does not amount to repudiation.[59] Instead, "[i]t is well established that in order to constitute an anticipatory breach of contract there must be a positive and unequivocal manifestation on the part of the party allegedly repudiating that he will not render the promised performance when the time fixed for it in the contract arrives."[60]

Virgin Islands courts have previously applied the doctrine of anticipatory breach in contract disputes.[61] However, as noted above, these courts relied on the Restatement. Almost every

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[55] *Id.* at 600.
[56] *Foley v. Munio*, 669 P.2d 198, 200 (Idaho 1983); *see also* Breach of Contract, Anticipatory Breach, BLACK'S LAW DICTIONARY 77 (Second Pocket Ed. 2001).
[57] *See Roehm v. Horst*, 178 U.S. 1 (1900) ("That rule is, that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option").
[58] *Mobley v. N.Y. Life Ins. Co.*, 295 U.S. 632, 638 (1935).
[59] *Id.*
[60] *Diamos*, 372 P.2d at 78; *see also Ubiquitel Inc. v. Sprint Corp.*, Civil Action No. 1489-N, 2005 Del. Ch. LEXIS 198, at *32 (Ch. Dec. 14, 2005) ("To constitute anticipatory breach under Pennsylvania law there must be an absolute and unequivocal refusal to perform or a distinct and positive inability to do so"); *In re Marriage of Olsen*, 528 N.E.2d 684, 686 (Ill. 1988) ("The doctrine of anticipatory repudiation requires a clear manifestation of an intent not to perform the contract on the date of performance").
[61] *See e.g., Smith v. Robson,* Case No. 286/96, 2001 V.I. LEXIS 21 (V.I. June. 26, 2001); *Christian v. Sylvest*, Case No. 809/1994, 1995 V.I. LEXIS 31 (V.I. Super. Ct. Aug. 23, 1995).

jurisdiction in the United States has adopted the doctrine of anticipatory breach.[62] With a few exceptions, Massachusetts appears to be the only jurisdiction that has chosen not to adopt the doctrine.[63]

The Court finds adopting the doctrine of anticipatory breach of contract represents the soundest policy for the Virgin Islands. The landmark case establishing the doctrine is the 1853

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[62] *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 715 (Alaska 2003) ("to be an anticipatory breach based on a request for additional conditions, the request must be coupled with an absolute refusal to perform unless the request is granted"); *Diamos v. Hirsch*, 372 P.2d 76, 78 (Ariz.1962) ("It is well established that in order to constitute an anticipatory breach of contract there must be a positive and unequivocal manifestation on the part of the party allegedly repudiating that he will not render the promised performance when the time fixed for it in the contract arrives"); *Stocker v. Hall*, 602 S.W.2d 662, 665 (Ark. 1980); *Gold Mining & Water Co. v. Swinerton*, 142 P.2d 22, 27 (Cal. 1943); *Albright v. McDermond*, 14 P.3d 318, 324 (Colo. 2000) ("An anticipatory breach or anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance"); *Zanker Group LLC v. Summerville at S. Windsor, LLC*, Case No. CV000446374S, 2002 Conn. Super. LEXIS 3082 (Conn. Super. Ct. September 19, 2002) (adopting § 253(2)); *Ubiquitel Inc. v. Sprint Corp.*, Civil Action No. 1489-N, 2005 Del. Ch. LEXIS 198, at *32 (Ch. Dec. 14, 2005) ("To constitute anticipatory breach under Pennsylvania law there must be an *absolute and unequivocal* refusal to perform or a distinct and positive inability to do so.); *Order of AHEPA v. Travel Consultants, Inc.*, 367 A.2d 119, 125 (D.C. 1976) ("for a repudiation of a contract by one party to be sufficient to give the other party the right to recover for breach, the repudiating party must have communicated, by word or conduct, unequivocally and positively its intention not to perform"); *Slaughter v. Barnett*, 154 So. 134, 139 (Fla. 1934) ("requiring some fact which shows a direct, unequivocal and absolute purpose to breach the contract amounting in substance to an actual breach"); *Smith v. Ga. Loan, Sav. & Banking Co.*, 39 S.E. 410, 410 (Ga. 1901); *Francone v. McClay*, 41 Haw. 72, 84 (1955); *Swafford v. Huntsman Springs, Inc.*, Case No. 44240, 2017 Ida. LEXIS 337, at *9 (Idaho Dec. 13, 2017) ("An anticipatory breach of contract has been defined as 'a repudiation [by the promisor] of his contractual duty *before the time fixed in the contract for his performance has arrived*"); *Foley v. Munio*, 669 P.2d 198, 200 (Idaho 1983); *Mut. Ben. Health & Acci. Ass'n v. Keiser*, 14 N.E.2d 707, 712 (Ind. 1938) ("Where one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not, before the time arrives for an act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform, and may maintain his action for a breach of the contract when the day has passed"); *In re Marriage of Olsen*, 528 N.E.2d 684, 686 (Ill. 1988); *Pavone v. Kirke*, Case No. 9-657, 2009 Iowa App. LEXIS 1547, at *10 (Iowa Ct. App. Nov 25, 2009) (adopting § 253(2)); *Mabery v. W. Cas. & Sur. Co.*, 250 P.2d 824, 829 (Kan. 1952) ("The doctrine of anticipatory breach applies to contracts which embody mutual and interdependent conditions and obligations. Indeed, it has been said that it applies only to contracts involving interdependent obligations. It does not apply to 'mere promises to pay money, or other cases of that nature where there are no mutual stipulations"); *Jordon v. Nickell*, 253 S.W.2d 237, 239 (Ky. 1952) ("the doctrine of anticipatory breach is recognized in Kentucky"); *Marek v. McHardy*, 858, 101 So. 2d 689, 695 (La. 1958); *Paul v. Bogle*, 484 N.W.2d 728, 735 (Mich. App. 1992); *Down East Energy Corp. v. RMR, Inc.*, 677 A.2d 1070 (Me. 1996) (adopting § 253(2)); *Gilmore v. Duderstadt*, 961 P.2d 175 (N.M. Ct. App. 1998) (adopting § 253(2)); *Comput. Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 A.D.2d 70, 77 (N.Y. App. Div. 2002) (adopting § 253(2)); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 358 S.E.2d 566, 569 (N.C. Ct. App. 1987) (adopting § 253(2)); *W.O.M., Ltd. v. Willys-Overland Motors, Inc.*, Case No. L-05-1201, 2006 Ohio App. LEXIS 6907 (Ct. of App. Ohio, December 29, 2006) (adopting § 253(2)); *Deming Inv. Co. v. Christensen*, 159 P. 663, 667 (Okla. 1916); *Jitner v. Gersch Dev. Co.*, 789 P.2d 704, 706 (Or. 1990) (citing17 CJS, "Contracts," § 471(1)); *Jonnet Dev. Corp. v. Dietrich Indus., Inc.*, 463 A.2d 1026, 1031 (Pa. Super. 1983); *Winegar v. Earle*, 276 A.2d 468 (R. I. 1971); *Hofer v. St. Clair*, 381 S.E.2d 736, 740-41 (S.C. 1989); *Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, 894 (S.D. 2006); *Brady v. Oliver*, 147 S.W. 1135 (Tenn. 1911); *Glass v. Anderson*, 596 S.W.2d 507, 510 (Tex. 1980); *Hurwitz v. David K. Richards & Co.*, 436 P.2d 794, 796 (Utah 1968); *Lowe v. Beaty*, 485 A.2d 1255, 1257 (Vt. 1984); *Simpson v. Scott*, 53 S.E.2d 21, 23 (Va. 1949); *Wallace Real Estate Inv., Inc. v. Groves*, 881 P.2d 1010, 1019 (Wash. 1994); *Mollohan v. Black Rock Contracting*, 235 S.E.2d 813, 816 (W. Va. 1977); *Pierson v. Dorff*, 1223 N.W. 579, 582 (Wis. 1929); *Kolschefsky v. Harris*, 72 P.3d 1144, 1146 (Wy. 2003).

[63] *KGM Custom Homes, Inc. v. Prosky*, 10 N.E.3d 117 (Mass. 2014).

English case of *Hochster v De La Tour*.[64] The rationale expressed in *Hochster v De La Tour* and its progeny applies today. It would be a needless waste of time, resources, and money for a party to continue to perform under a contract knowing he would not receive an expected benefit from a contract. In addition, it would contradict the common law principle requiring a party to mitigate damages for a party to further accrue damages by continuing carry out his obligations under a soon-to-be broken contract.

Bearing in mind the above-three factors, the Court decides it will adopt the doctrine of anticipatory breach of contract. Like most jurisdictions, the Court holds that the doctrine applies only if a party's anticipated breach is material and the party's repudiation of the contract is an unqualified refusal or declaration of inability to perform his prospective contractual obligations.

3. The Court Finds that Buffo Repudiated the *Summer Wind* Agreement by Risking Default on the SGB Finance Loan.

Urh contends that Buffo acted in contradiction to the *Summer Wind* Agreement by not forwarding funds she paid Buffo to SGB Finance.[65] Buffo admits to not making payments toward the SGB Finance loan[66] but argues that *Summer Wind* Agreement did not have an express provision requiring "the Buffos to tender every penny Urh paid to the Buffos to the Buffo's [sic] lender."[67] The record does not indicate an express contract term requiring Buffo to pay SGB Finance congruently with Urh's payments to Buffo. Urh cites portions of her deposition to support her claim, but the cited portion of her deposition does not assert that the *Summer Wind* Agreement had such a term.[68] However, Urh also claims Buffo's failure to make payments to the lender violated the implied covenant of good faith and fair dealing.[69]

Every contract has an implied, if not explicit, covenant of good faith and fair dealing.[70] The implied covenant recognizes that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.[71] A party breaches the implied covenant of good faith and fair dealing by taking actions that deprive another party of the benefits for which it had bargained.[72]

The Court finds that Buffo's failure to make payments to SGB Finance undermined Urh's reasonably expected benefit from the *Summer Wind* Agreement. Urh's reasonably expected benefit from the *Summer Wind* Agreement was unhindered use of *Summer Wind* while making monthly

[64] 2 E&B 678 (1853).
[65] Opp. 8.
[66] Mot. for Summ. J. 4 ("he [Buffo] kept the first $7,500 Urh paid to him as a security deposit"); Reply 3 ("It is also undisputed that the Buffos did not pay directly to the Buffos' lender every penny Urh paid the Buffos").
[67] Reply 8, ¶ 11.
[68] *Id.* (citing Urh's Depo. P. 88, lines 6-10, and p. 89, lines 6-12).
[69] *See also* Compl. Count III (filed on July 6, 2015).
[70] *Merchs. Commercial Bank v. Oceanside Vill., Inc.*, 64 V.I. 3, 34 (V.I. Super. Ct. 2015) (providing *Banks* analysis); *see also Celestin v. LLP Mortg., Ltd.*, No. 2007-014, 2007 V.I. Supreme LEXIS 6, at *4 (V.I. Nov. 9, 2007) (recognizing the duty of good faith in loan agreements).
[71] *Id.* (quoting *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1036-37 (Cal. 1973)).
[72] *Id.*

payments and eventual ownership of *Summer Wind* after paying off her debt to Buffo.[73] Buffo erroneously states "[o]nce Urh paid the loan off to the Buffos, she would own Summer Wind."[74] However, the Marine Note and Security Agreement provides SGB Finance with the right to take possession of *Summer Wind* and sell it to amortize the loan as a remedy for default.[75] The record does not reveal if SGB Finance had taken steps to take possession of the vessel. However, by not keeping up with the monthly payments, Buffo put the loan in default and risked SGB Finance foreclosing on *Summer Wind.* Such event would prevent Urh from receiving unhindered ownership of *Summer Wind.* Therefore, by placing Urh's reasonably expected benefit at risk, Buffo violated the implied covenant of good faith and repudiated the agreement.

4. Buffo Did Not Commit Anticipatory Breach by Suspending Communication with Urh.

The Court finds that Buffo's failure to communicate with Urh does not amount to an unequivocal repudiation of the *Summer Wind* Agreement. While the Court acknowledges that a breakdown in communication can raise doubts as to a party's intent to perform a contractual obligation, "[a]n anticipatory breach or anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."[76] Considering the totality of circumstances and viewing the facts in a light most favorable to the nonmoving party, the Court does not find that the purported breakdown in communication allowed Urh to reasonably anticipate material breach of the *Summer Wind* Agreement. While a breakdown in communication may cause anxiety over the future of a contract, the record does not demonstrate Buffo's failure to communicate would cause a reasonable person to anticipate he would refuse to carry out his end of the bargain upon full repayment.

5. Buffo's Purported Attempt to Unilaterally Change the *Summer Wind* Agreement Did Not Justify Urh's Cessation of Payments.

Urh asserts that "Buffo started making changes to the parties['] original verbal agreement."[77] Specifically, Urh claims "Buffo incorrectly and deliberately asserted a higher rate of interest (8%) to Urth rather than the rate (4.24%) inserted in the [Marine Note and Security Agreement]."[78] Urh makes this assertion for the first time in the Opposition. However, as the Court held above, a mere misunderstanding of facts does not amount to repudiation of a contract.[79] The Court appreciates that it is more difficult to remember the terms of a contract when they are not memorialized in writing. Even if the Court accepts that Buffo tried to increase the interest charge in the middle of the contract's term, this action would not justify cessation of payments by Urh.

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[73] Opp. 2 ("Urh agreed to pay Gerard Buffo $5,000 and free time on her vessels on Buffo's various trips to St. Thomas and to allow Buffo to put a lien on the vessel until Urh paid off the loan in full").
[74] Reply 3.
[75] Marine Note and Security Agreement ¶¶ 8,11 attached to u as Ex. 10 of Opp.
[76] *Albright v. McDermond*, 14 P.3d 318, 324 (Colo. 2000).
[77] Opp. 4.
[78] *Id.* at 9.
[79] *See Mobley*, 295 U.S. at 638.

Instead, she would have been justified in continuing to make monthly payments at the agreed upon interest rate.

C. The Record is Unclear as to Whether Buffo Was Permitted to Sell *Summer Wind.*

Buffo claims that Urh breached the *Summer Wind* Agreement by abandoning the ship and ceasing payments. He himself asserts the doctrine of anticipatory breach and avers he placed the vessel for sale only after Urh abandoned the vessel.[80] Urh, however, claims Buffo put the vessel up for sale immediately after she demanded to be added to the title in May 2015. Buffo argues Urh lacks evidence to support her claim.[81] However, as the moving party, Buffo has the burden of proving there is no genuine issue as to this material fact.

The only evidence Buffo presents as to the timeline of *Summer Wind's* sale is his own affidavit.[82] While the V.I. Supreme Court has held that a single, non-conclusory affidavit, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment, it has not held that it is enough to win the summary judgment.[83] The affidavit is self-serving and does not convince the Court that a reasonable trier of fact would only believe his recollection of facts. Therefore, the Court finds this matter continues to involve a genuine dispute over whether circumstances permitted Buffo to sell *Summer Wind* under the doctrine of anticipatory breach.

D. Expenses Associated with Taking Possession of and Selling *Summer Wind.*

Buffo claims that he incurred expenses associated with taking possession of and selling *Summer Wind*, such as hiring a captain, buying substitute insurance, and paying for maintenance and dockage.[84] Buffo only provides his affidavit to substantiate these damages.[85] Likewise, the Court does not find that Buffo's self-serving affidavit without supporting documentation demonstrates a lack of genuine dispute with regards to these damages.

CONCLUSION

The Court determines that Buffo has successfully demonstrated that certain material facts are no longer genuinely in dispute but he has failed to prove he is entitled to summary judgment as a matter of law. This matter continues to involve a genuine dispute over material facts needed to meet certain elements of his claims. Namely, the Court determines the following material factual issues remain disputed:

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[80] Reply ¶ 16.
[81] *Id.*
[82] *See* Affidavit of Gerard Buffo ¶¶ 16 to 18.
[83] *Burd v. Antilles Yachting Servs., Inc.*, 57 V.I. 354, 360 (V.I. 2012).
[84] Counterclaim Defendant Anamarija Urh's Answer ¶¶ 14 to 15; Mot. for Summ. J. 3 to 4.
[85] Affidavit of Gerard Buffo ¶ 19.

Aquamarine Agreement

1) whether Wolfgang Bohringer was a party to the *Aquamarine* Agreement,

Summer Wind Agreement

1) whether Wolfgang Bohringer was a party to the *Summer Wind* Agreement,

2) whether Anamarija Urh abandoned *Summer Wind,*

3) if Urh abandoned *Summer Wind*, whether Gerard Buffo took possession of the ship before or after she abandoned it, and

4) Buffo's damages incurred as a result of taking possession of and selling *Summer Wind.*

Therefore, the Court will reserve ruling on the Motion for Summary Judgment and allow these unresolved material facts to be determined by a trier of fact at trial.

Accordingly, it is hereby

ORDERED that the Court **RESERVES RULING** on Defendant's Motion for Summary Judgment; and it is further

ORDERED that this matter will proceed to trial to determine the following factual issues:

Aquamarine Agreement

1) whether Wolfgang Bohringer was a party to the *Aquamarine* Agreement,

Summer Wind Agreement

1) whether Wolfgang Bohringer was a party to the *Summer Wind* Agreement,

2) whether Anamarija Urh abandoned *Summer Wind,*

3) if Urh abandoned *Summer Wind*, whether Gerard Buffo took possession of the ship before or after she abandoned it

4) Buffo's damages incurred as a result of taking possession of *Summer Wind*; and it is further

ORDERED that this matter is scheduled for a **status conference** on **Tuesday, April 10, 2018, at 9:30 a.m. in Courtroom III**; and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to Attorney Stylish Willis and Moore, Dodson & Russell, P.C. (Attorneys Charles S. Russell and Kanaan L. Wilhite).

DATED: February 20, 2018

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: ______________________
LORI BOYNES-TYSON
Court Clerk Supervisor 2/20/18