IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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JAMES GALLIVAN and JAMES C. SMITH,	)	CIVIL NO. ST-09-CV-294
Plaintiffs,	)	ACTION FOR BREACH OF CONTRACT, DAMAGES, BREACH OF FIDUCIARY DUTY AND FRAUD
v.	)	
POWER SAVE VI, RICKIE NORMAN, RE/MAX DREAM PROPERTIES, ROSEMARY SAUTER-FRETT a/k/a ROSEMARY SAUTER and LLOYD L. WILLIAMS,	)	JURY TRIAL DEMANDED
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Rickie Norman's Motion to Dismiss.[1] In Norman's Motion, he seeks a dismissal of Count I of Plaintiffs James Gallivan and James C. Smith's Verified Complaint for failure to state claim upon which relief may be granted under FED. R. CIV. P. 12(b)(6). And, as to Count II, Norman asserts that Plaintiffs have failed to meet the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure. The Court will grant the Motion to Dismiss as to Count I because Plaintiffs have failed to state a claim upon which relief may be granted and will deny the Motion to Dismiss as to Count II, since the Verified Complaint's factual allegations sufficiently plead fraud in inducement against Norman with the requisite particularity of Rule 9(b).

FACTS

On March 27, 2009, Defendant Power Save VI and Plaintiffs executed and entered into a Contract of Sale[2] through Defendant Re/Max Dream Properties, a licensed real estate broker, for the purchase by Power Save of Plaintiff's real property. Norman executed the Contract of Sale on Power Save's behalf, as an agent.

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[1] A. Jennings Stone, Esq., of BoltNagi, P.C. represents Plaintiffs James Gallivan and James C. Smith. Mia L. Woodard, Esq., of the Law Offices of Douglas L. Capdeville, P.C. represents Defendant Lloyd L. Williams. W. Mark Wilczynski, Esq., of of the Law Offices of W. Mark Wilczynski, P.C. represents Defendants Power Save VI and Rickie Norman. James L. Hymes III, Esq., of Law Offices of James Hymes III, P.C. represents Defendants Re/Max Dream Properties and Rosemary Sauter-Frett.

[2] Plaintiffs attached the Contract of Sale to their Verified Complaint as Ex. A.

Pursuant to the Contract of Sale, the initial purchase price for the real property was $840,000.00, which was to be paid with an initial and immediate earnest money deposit by Power Save in the amount of $1,000.00 at the time the contract was executed. The terms of the Contract of Sale required Power Save VI to place in escrow with Re/Max a second earnest money deposit in the amount of $81,000.00.

Plaintiffs allege that Power Save did not comply with the terms of the Contract of Sale, by failing to deposit into escrow the $81,000.00 earnest money deposit. Plaintiffs assert that Power Save issued a check for $81,000.00 ostensibly to cover the earnest money deposit, but the check was returned by the bank for insufficient funds. Plaintiffs claims that each of the Defendants knew or should have known that the check for the earnest money deposit would be returned for insufficient funds, yet none of the Defendants informed the Plaintiffs of this fact until after the deadline for closing.

In April 2009, Power Save caused an inspection to be done on the real property and discovered that the property required significant repairs. As a result, Plaintiffs agreed to lower the purchase price of the property to $815,000.00. On April 27, 2009, the last day of the 30-day financing period, Power Save, as an act of further assurance of its performance under the Contract of Sale, entered into an Addendum to the Contract of Sale with the Plaintiffs.[3] In the Addendum, the parties reiterated their intention to consummate the real estate transaction. The Addendum also provided that "[a]ll other terms, conditions and provisions of the Contract shall remain in full force and effect except as amended in this Addendum."[4] Further, the Addendum permitted Norman as Trustee of the Rickie Norman Revocable Living Trust to be an alternative buyer.

On June 22, 2009, Plaintiffs filed the two-count Verified Complaint. In Count I, Plaintiffs sue Power Save for breach of the Contract of Sale and the Addendum and sue Norman for breach of the Addendum. In Count II, Plaintiffs sue Power Save, Norman, Re/Max, Williams and Defendant Rosemary Sauter-Frett for fraud in the inducement.

DISCUSSION

I. STANDARD

A Rule 12(b)(6) motion to dismiss permits a defendant to move for dismissal on the ground that plaintiff has failed to state a claim upon which relief may be granted.[5] In considering such motions, the Court, in considering a motion to dismiss, accepts well-pleaded factual allegations in the complaint as true and draws all reasonable inferences in favor of the non-moving party.[6] The Court must go beyond an analysis of whether a complaint "simply

[3] Plaintiff's attached the Addendum to the Contract of Sale to their Verified Complaint as Ex. B.
[4] V. Compl. Ex. B.
[5] FED. R. CIV. P. 12(b)(6).
[6] *United States DOT ex rel. Arnold v. CMC Eng'g*, 564 F.3d 673, 676 (3d Cir. 2009).

'suggest[s]' that the defendant is liable[7], [and also consider whether it] state[s] a 'claim for relief that is plausible on its face.'"[8]

II. THE COURT FINDS THAT COUNT I FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER FED. R. CIV. P. 12(b)(6).

In the Motion to Dismiss, Norman alleges that Count I's claim for breach of the Addendum should be dismissed because he was not a party to the contract. Norman states that he was merely acting as an agent of a disclosed principal and thus, is not liable under the contract. In support of Norman's contention, he directs the Court's attention to Section 6.01 of the Restatement (Third) Agency.

Section 6.01 of the Restatement (Third) Agency states: "[w]hen an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal: (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise."[9]

Although Plaintiffs have alleged that Norman was a party to the Addendum[10], the Addendum, which is an attachment to the Complaint indicates, that it "is made and entered into between Power Save, as Buyer and Gallivan & Smith, as Seller."[11] Based on the Addendum's language, the obligation to deposit the earnest money deposit rested solely on Power Save. Specifically, the Addendum states that "Buyer, in conjunction with the signing of this Addendum, shall deposit in escrow . . . the earnest money deposit of Eighty One Thousand Dollars ($81,000.00)."[12]

Further, to state a claim for a breach of contract claim under Virgin Islands law, a plaintiff must assert that: "(1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages."[13] Again, under the language of the Addendum, Norman did not have a duty to perform under the Addendum. And thus, the Court will grant the Motion to Dismiss as to Count I of the Verified Complaint.

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[7] *Robles v. HOVENSA, LLC*, 49 V.I. 491, 500 (V.I. 2008).

[8] *Jones v. L.S. Holdings, Inc. et al.*, Civ. No. 145/2009, 2010 WL 893086, at *3 (VI Super. Ct. Feb. 25, 2010) (citing *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009)); *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 n.8 (2007).

[9] "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." V.I. CODE ANN. tit. 1, § 4 (1995).

[10] V. Compl.

[11] V. Compl. Ex. B.

[12] V. Compl. Ex. B ¶ 4.

[13] *Arlington Funding Servs, Inc. v. Geigel*, 51 V.I. 118, 135 (V.I. 2009).

I. COUNT II OF PLAINTIFF'S VERIFIED COMPLAINT SUFFICIENTLY PLEADS FRAUD IN INDUCEMENT AS REQUIRED BY FED. R. CIV. P. 9(b).

The Motion to Dismiss states that Count II's claim of fraud in inducement fails to meet the specificity requirement of Rule 9(b) of the Federal Rules of Civil Procedure.[14] In opposition, Plaintiffs assert that the Verified Complaint sufficiently alleges the individuals that made the fraudulent misrepresentations, when the misrepresentations were made, and the substance of the misrepresentations. Thus, Plaintiffs allege that the claim of fraud in inducement meets Rule 9(b)'s standard. Initially, in the Motion to Dismiss, Norman alleged that Count II failed to state a claim upon which relief may be granted and relied on the "gist of the action" doctrine. Norman, in his reply, later withdrew this argument and thus, the Court will only address Count II under Rule 9(b).

Rule 9(b) states: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[15] Rule 9(b)'s "reference to 'circumstances' is to matters such as time, place and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby."[16] Further, to assert a claim of fraud, Rule 9(b) requires a plaintiff to plead: (1) a specific false representation or omission of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damages.[17]

In their Verified Complaint, Plaintiffs allege that Norman misrepresented facts and fraudulently induced them to enter into a real estate transaction. Specifically, Plaintiffs state that on April 27, 2009, Norman, Power Save VI, Sauter, Williams, and Re/Max falsely indicated to Plaintiffs' representatives that they had deposited $81,000.00 in escrow as an earnest money deposit.[18] Plaintiffs assert that the Defendants were aware that no later than April 27, 2009 the earnest money deposit check had bounced because of insufficient funds.[19] Plaintiffs further state that Defendants' misrepresentations induced Plaintiffs to enter into the Addendum to Contract of Sale on April 27, 2009.[20] Plaintiffs claim that they had first learned that Power Save VI and Norman had not deposited the $81,000.00 earnest money deposit on June 1, 2009.[21] On that same day, Mashall Bell, Esq., Norman's agent with respect to the real estate transaction, falsely

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[14] *See* SUPER. CT. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Civil Procedure . . . .").
[15] FED. R. CIV. P. 9(b).
[16] *In re Tutu Water Wells Contamination Litig.*, 32 F. Supp. 2d 800, 805 (D.V.I. 1998) (internal citations omitted).
[17] *Fin. Trust Co., Inc. v. Citibank, N.A.*, 351 F. Supp. 2d 329, 330-31 (D.V.I. 2004) (citing *In re Rockefeller Ctr. Props., Inc.*, 311 F.3d 198, 215 (3d Cir. 2002)).
[18] V. Compl. ¶ 54.
[19] *Id.* ¶ 55.
[20] *Id.* ¶ 56.
[21] *Id.* ¶ 57.

told Plaintiff's representatives that Norman had wired the funds for the entire purchase price to Re/Max to be deposited in escrow.[22]

The Court finds that the Verified Complaint's factual allegations sufficiently plead fraud in this inducement against Norman with the requisite particularity. Plaintiffs have fulfilled the basic purpose of Rule 9(b) by alleging sufficient facts, including specific names and dates, to put Norman on notice of the misrepresentation allegedly committed.

CONCLUSION

The Court will grant the Motion to Dismiss as to Count I, since Plaintiffs have failed to plead facts that show Norman had a duty under the Addendum. Because Plaintiffs have asserted facts sufficient to plead fraud in inducement against Norman with the requisite particularity of Rule 9(b), the Court will deny the Motion to Dismiss as to Count II.

DATED: April 28, 2011

James A Carroll

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court
BY: Donna D. Donovan
DONNA D. DONOVAN
Court Clerk Supervisor 4 / 29 / 2011

CERTIFIED A TRUE COPY
Date: 5-9-2011
Venetia H. Velazquez, Esq.
Clerk of the Court
By: M. Scott
Court Clerk

[22] *Id.* ¶ 60-61.

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JAMES GALLIVAN and JAMES C. SMITH, Plaintiffs,	)	CIVIL NO. ST-09-CV-294
v.	)	ACTION FOR BREACH OF CONTRACT, DAMAGES, BREACH OF FIDUCIARY DUTY AND FRAUD
POWER SAVE VI, RICKIE NORMAN, RE/MAX DREAM PROPERTIES, ROSEMARY SAUTER-FRETT a/k/a ROSEMARY SAUTER and LLOYD L. WILLIAMS, Defendants.	)	JURY TRIAL DEMANDED

ORDER

AND NOW, pursuant to the Memorandum Opinion date of today's date, it is hereby

ORDERED that Defendant Rickie Norman's Motion to Dismiss is **GRANTED** as to Count I and **DENIED** as to Count II; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record.

DATED: April 28, 2011

James Carroll
JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court
BY: Donna D. Donovan
DONNA D. DONOVAN
Court Clerk Supervisor 4/29/2011

CERTIFIED A TRUE COPY
Date: 5-9-2011
Venetia H. Velazquez, Esq.
Clerk of the Court
By: MScott
Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

JAMES GALLIVAN and JAMES C. SMITH, Plaintiffs, v. **POWER SAVE VI, RICKIE NORMAN, RE/MAX DREAM PROPERTIES, ROSEMARY SAUTER-FRETT a/k/a ROSEMARY SAUTER and LLOYD L. WILLIAMS,** Defendants.	CIVIL NO. ST-09-CV-294 ACTION FOR BREACH OF CONTRACT, DAMAGES, BREACH OF FIDUCIARY DUTY AND FRAUD JURY TRIAL DEMANDED

ORDER

This matter is before the Court on Defendant Lloyd L. Williams' faxed copy of his Motion to Postpone April 11, 2011 Status Conference ("Motion to Postpone") and W. Mark Wilczynski's Motion to Withdraw as Counsel for Defendants Rickie Norman and Power Save VI ("Motion to Withdraw").[1]

Having considered the Motion to Postpone, the Court will grant the Motion to Postpone. The Court will continue the present scheduled conference to Tuesday, June 7, 2011 at 9:45 a.m. The Court will also reserve rendering a decision on the Motion to Withdraw as Counsel. Norman and a representative of Power Save VI will be ordered to appear at the Tuesday, June 7, 2011 scheduled status conference. The Court will also direct Attorney Wilczynski to serve a copy of this Order on Norman and Power Save VI and to file a proof of service.

Accordingly, it is hereby

ORDERED that Defendant Lloyd L. Williams' Motion to Postpone April 11, 2011 Status Conference is **GRANTED**; and it is further

ORDERED that the conference scheduled for April 11, 2011 is **CONTINUED** to **Tuesday, June 7, 2011 at 9:45 a.m., in Courtroom III**; and it is further

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[1] A. Jennings Stone, Esq., of BoltNagi, P.C. represents Plaintiffs James Gallivan and James C. Smith. Mia L. Woodard, Esq., of the Law Offices of Douglas L. Capdeville, P.C. represents Defendant Lloyd L. Williams. Joe Breen, Esq., of the Law Offices of W. Mark Wilczynski, P.C. represents Defendants Power Save VI and Rickie Norman. James L. Hymes III, Esq., of Law Offices of James Hymes III, P.C. represents Defendants Re/Max Dream Properties and Rosemary Sauter-Frett.

ORDERED that the Court **RESERVES** decision on W. Mark Wilczynski's Motion to Withdraw as Counsel for Defendants Rickie Norman and Power Save VI; and it is further

ORDERED that W. Mark Wilczynski shall serve a copy of this Order on Defendants Rickie Norman and Power Save VI and file proof of service with the Court **on or before Tuesday, May 31, 2011**; and it is further

ORDERED that Defendant Rickie Norman and a representative of Defendant Power Save VI shall appear at the June 7, 2011 scheduled conference; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record and a copy thereof shall served on Defendants Rickie Norman and Power Save VI at 6500 Estate Smith Bay, St. Thomas, VI 00802.

DATED: April 28, 2011

James S. Carroll III

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 5-9-2011
Venetia H. Velazquez, Esq.
Clerk of the Court

By: M. Okeefe
Court Clerk

ATTEST:
VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court
BY: Donna D. Donovan
DONNA D. DONOVAN
Court Clerk Supervisor 4/29/2011