SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

FIRSTBANK PUERTO RICO, **Plaintiff,** **vs.** **EDMOND WEBSTER a/k/a EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER a/k/a CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC,** **Defendants.**	**CASE NO. ST-12-CV-239**
EDMOND WEBSTER a/k/a EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER a/k/a CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC, **Third-Party Plaintiffs,** **vs.** **MORIKI N'SELE, H.D.V.I. HOLDINGS, INC. d/b/a HOME DEPOT, and NATIONAL GYPSUM COMPANY,** **Third-Party Defendants.**	

MEMORANDUM OPINION

Pending before the Court are: (1) Plaintiff Firstbank Puerto Rico's motion to dismiss Defendants' Counterclaim,[1] (2) Third-Party Defendant Moriki N'Sele's motion

[1] Firstbank filed its motion on September 11, 2012, Defendants filed an opposition on December 17, 2012, and Firstbank filed a reply on January 2, 2013.

to dismiss Defendants' Counterclaim,[2] and (3) Firstbank and N'Sele's motion to sever.[3] For the following reasons, Plaintiff's motion will be granted in part and denied in part, N'Sele's motion will be granted, and the motion to sever will be granted.

FACTUAL AND PROCEDURAL HISTORY

On September 5, 2007, Plaintiff and Defendants executed two mortgage agreements for loans in the amounts of $275,000.00 and $400,000.00. Defendants then sought an additional loan from Plaintiff in order to construct an apartment building and, on March 6, 2008, Defendants entered into a Construction Loan Agreement with Plaintiff to acquire a loan in the amount of $821,000.00. The 2008 loan was subsequently increased to $1,091,000.00 on June 18, 2009, and then to $1,541,000.00 on January 21, 2010. Judging Defendants to be in default under the loan agreements, Plaintiff filed a Complaint on May 11, 2012. Defendants filed an Answer and Counterclaim against Plaintiff as well as a Third-Party Complaint against Plaintiff's employee Moriki N'Sele, Home Depot, and National Gypsum on June 26, 2012.

ANALYSIS

1) Counterclaim against Firstbank

Fed. R. Civ. P. 12(b), made applicable to the Superior Court through SUPER CT. R. 7, provides that upon motion by the pleader, a claim, counterclaim, cross-claim, or third-party claim shall be dismissed when there is a "failure to state a claim upon which

[2] N'Sele filed his motion on September 11, 2012, Defendants filed an opposition on December 17, 2012, and N'Sele filed a reply on January 2, 2013.
[3] Firstbank and N'Sele filed their joint motion on September 12, 2012, Defendants filed an opposition on December 17, 2012, and Firstbank and N'Sele filed a reply on January 2, 2013.

relief can be granted" to the claimant. When determining whether the allegations in a compliant are sufficiently pled, a court must engage in a three step inquiry:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim.".... Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth".... Finally, "where there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."[4]

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."[5]

a) Count I: Breach of Fiduciary Duty

A person or entity "standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."[6] A fiduciary relationship between a lender and borrower may arise "if the lender gains substantial control over the borrower's business affairs, such as participating in the borrower's day-to-day management."[7] Generally, however, a lender and borrower are presumed to operate at "arms-length" and act in their own interest.[8]

Defendants allege that Firstbank "through its purposeful underfunding of the original loan, placed substantial hurdles for which Websters to stumble (sic) ..."[9] Defendants also assert that "as per the original loan agreement, Firstbank would take an active role in continued oversight of the construction of the apartment building to ensure

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[4] *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 881 (2009)).
[5] *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
[6] Restatement (Second) of Torts § 874.
[7] *Jo-Ann's Launder Center, Inc. v. Chase Manhattan Bank, N.A.*, 854 F.Supp. 387, 392 (D.V.I. 1994).
[8] *Id.*
[9] Counterclaim, ¶ 40.

its progress toward completion, requiring schedules and dates of materials purchased and construction to take place on the project."[10] Moreover, Defendants allege that when they advised Firstbank of a mold issue on the apartment building's interior walls, "Firstbank was insitant (sic) that [Defendants] continue with the project before the mold issue was resolved."[11]

Defendants' reference to the loan agreement invokes Section 5.5 of the Construction Loan Agreement, which states that Firstbank shall receive "a projected construction cost breakdown and schedule containing reasonable details of amounts to the satisfaction of [Firstbank] anticipated to be paid for each category of work to be performed and materials supplied in connection with the Project." Section 5.5 is a common clause to a construction project contract[12] and does not amount to day to day management of the project on the part of Firstbank. Similarly, the allegation that Firstbank insisted that Defendants continue with the project instead of addressing the presence of mold on the interior walls does not, without more, amount to day to day management of the project. Moreover, allegations concerning the amount of the loan Defendants received have no relevance to the question whether Firstbank managed the project.

Construing the pleadings, and the documents referenced therein,[13] in the light most favorable to Defendants, Defendants have alleged no facts suggesting that Firstbank

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[10] Counterclaim, ¶ 11.
[11] Counterclaim, ¶ 18.
[12] See, e.g., 48 CFR 852.236-84.
[13] Materials referenced in the pleadings may be considered by the court. See *Giles v. Phelan, Hallinan & Schmieg, L.L.P.*, 2012 WL 4506294, at *9 (D.N.J. 2012) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

gained substantial control over Defendants' day to day management of the construction project. Accordingly, Count I will be dismissed for failure to state a claim upon which relief can be granted.

b) Count II: Misrepresentation

To succeed on a cause of action for misrepresentation, "a complainant must demonstrate: (1) a knowing misrepresentation of a material fact, (2) intent by the defendant that the plaintiff would rely on the false statement, (3) actual reliance, and (4) detriment as a result of that reliance."[14] In addition, under Fed. R. Civ. P. 9(b), a party alleging fraud or misrepresentation "must state with particularity the circumstances constituting fraud" such as indicating the "date, place or time of the fraud." The claimant "also must allege who made a misrepresentation to whom and the general content of the misrepresentation."[15]

The Counterclaim paragraphs under Count II are devoid of any representations made by Firstbank or its agents. Elsewhere in the Counterclaim, Defendants assert that N'Sele assured Defendants that the amount of the original loan would be sufficient initially and that additional funds would be given. Defendants also assert that the additional funds would be given under the original loan agreement.

Defendants have not stated with particularity the circumstances of the alleged misrepresentation. The Counterclaim lacks information concerning the date, place or time of the misrepresentation, and to whom the misrepresentation was made. In addition, the facts as alleged do not suggest that N'Sele knew that he was misrepresenting a material

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[14] *Mendez v. Coastal Sys. Dev't, Inc.*, 2008 WL 2149373, at *10 (D.V.I. May 20, 2008).
[15] *Holst v. Oxman*, 290 Fed. Appx. 508, 510 (3d Cir. 2008).

fact or that he intended that Defendants rely on a false statement. Instead, the Counterclaim merely alleges that N'Sele made a promise to provide additional funds which he purportedly failed to fulfill. A "promise in itself contains no assertion of fact other than the implied representation that the speaker intends to perform the promise."[16] The claimant must provide facts suggesting "that the promissor is falsely declaring that he has the intent to perform."[17] As a result, Count II will be dismissed for failure to state a claim upon which relief can be granted.

c) Count III: Breach of Duty of Good Faith and Fair Dealing

In the Virgin Islands, a viable claim for breach of the implied duty of good faith and fair dealing requires allegations: "(1) that a contract existed between the parties,[18] and (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."[19]

Here, Defendants had a reasonable expectation that their private financial information, submitted to Firstbank in order to acquire a loan, would remain confidential. As a result, Defendants' allegation that Firstbank improperly disclosed their private financial information to a third party states a viable claim for breach of the duty of good faith and fair dealing that is sufficient to survive a motion to dismiss.

d) Count IV: Duress

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[16] *Addie v. Kjaer*, 2009 WL 453352, at *2 (D.V.I. 2009).
[17] *Id.*
[18] See *Mendez v. Coastal Systems Development, Inc.*, 2008 WL 2149373, at *6 (D.V.I. 2008) ("[o]nly in the limited insurance context have courts within the Third Circuit allowed recovery in tort for breach of the implied covenant of good faith and fair dealing").
[19] *Smith v. Virgin Islands Housing Authority*, 2011 WL 797373, at *7 (D.V.I. 2011).

Fed. R. Civ. P. 8(c) classifies duress as an affirmative defense. Similarly, Restatement (Second) of Contracts §§ 174 and 175 state that evidence of duress can make a contract voidable. Defendants have pointed to nothing in the Restatement or in Virgin Islands case law that recognizes duress as an affirmative tort. As a result, Count IV will be dismissed for failure to state a claim upon which relief can be granted.

e) Count V: Intrusion upon Seclusion against Firstbank

Pursuant to Restatement (Second) of Torts § 652B, "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Courts may decide whether the conduct alleged was "highly offensive" as a matter of law at the pleading stage.[20]

As the basis for their intrusion upon seclusion claim, Defendants allege that N'Sele, an employee of Firstbank, divulged Defendants' private financial information to a third party lender. Intrusion upon seclusion, however, "does not depend upon any publicity given to the person whose interest is invaded or to his affairs."[21] Rather it is the unauthorized intrusion itself that creates the liability.[22] Accessing information "voluntarily provided does not amount to unauthorized intrusion."[23] Defendants have failed to allege facts showing that there was an unauthorized intrusion and that the intrusion was highly offensive. As Defendants' claim does not pass muster under *Twombly*, Count V will be dismissed.

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[20] *Boring v. Google Inc.*, 362 Fed. Appx. 273, 279 (3d Cir. 2010).
[21] *In re Trans Union Corp., Privacy Litigation*, 326 F.Supp.2d 893, 901 (N.D. Ill. 2004).
[22] *Id.*
[23] *Id.*, at page 902.

2) Counterclaim against N'Sele

a) Count I: Intrusion upon Seclusion

Defendants have only alleged a misuse of private information by N'Sele and not an unauthorized intrusion of their private affairs by N'Sele. As a result, Defendants' intrusion upon seclusion claim against N'Sele fails for the same reason their same claim against Firstbank fails.

b) Count II: Breach of Duty of Good Faith and Fair Dealing

In support of their claim for breach of the duty of good faith and fair dealing, Defendants rely on the loan agreements between Firstbank and Defendants. However, absent a contractual relationship between Defendants and N'Sele, Defendants may not allege a claim for breach of the duty of good faith and fair dealing against N'Sele.[24] As N'Sele was not a party to the loan agreements, Defendants have not set forth a claim upon which relief may be granted.

3) Motion to Sever

Federal Rule of Civil Procedure 42(b) provides that a court may order a separate trial of one or more separate issues for "convenience, to avoid prejudice, or to expedite and economize." Factors to be considered are: "(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the

[24] See, e.g., *Bethea v. Merchants Commercial Bank*, Civil Action No. 11–51, 2011 WL 4861873 (D.V.I. 2011).

party requesting the severance will be prejudiced if it is not granted."[25] Generally, courts are "afforded large discretion in deciding whether to sever claims for trial."[26]

Firstbank and N'Sele seek to sever Plaintiff's foreclosure action and Defendants' third-party action against N'Sele from the third-party action against Home Depot and National Gypsum, which is a breach of warranty-products liability action. As the claims against N'Sele will be dismissed, the Court will only examine Plaintiff's foreclosure claim, Defendants' Counterclaim, and the products liability claims.

There are several reasons why the requested severance would be appropriate in this case. First, Firstbank's foreclosure action and the Counterclaim are significantly different from Defendants' third-party products liability action against Home Depot and National Gypsum. The two actions would require different witnesses and different documentary proof and even different triers of fact, given that Defendants waived their right to a jury trial in relation to the foreclosure action[27] and have asserted their right to a jury trial in the products liability action. In addition, while there is a summary judgment motion pending in the foreclosure action, Home Depot and National Gypsum have only recently been served in the products liability action. Rather than subjecting Plaintiff to an extensive delay as discovery on the third-party action proceeds, the efficient resolution of justice supports severing the foreclosure action and the Counterclaim from the third-party

[25] *Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D.Pa. 2000) (quoting *German v. Fed. Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1400 (S.D.N.Y. 1995)).
[26] *Kiskidee v. Certain Interested Underwriters at Lloyd's of London*, 2010 WL 2555037, at *1 (D.V.I. June 18, 2010).
[27] Exhibit 11 to Plaintiff's motion for summary judgment, at ¶ 17.

products liability action and resolving the actions separately.[28] As a result, the motion to sever will be granted.

An Order consistent with this Opinion shall follow.

Dated: January 17, 2013

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

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: ______________________
for Lori Tyson
Court Clerk Supervisor 1/17/2013

[28] See, e.g., *Turner Const. Co., Inc. v. Brian Trematore Plumbing & Heating, Inc.*, 2009 WL 3233533 (D.N.J. 2009) (citing *Cruzan Terraces, Inc. v. Antilles Ins., Inc.*, 138 F.R.D. 64, 66 (D.V.I. 1991)).

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DIVISION OF ST. THOMAS AND ST. JOHN

FIRSTBANK PUERTO RICO, **Plaintiff,** **vs.** **EDMOND WEBSTER a/k/a EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER a/k/a CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC,** **Defendants.**	)	**CASE NO. ST-12-CV-239**
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ORDER

The Court having issued a Memorandum Opinion on this date, it is

ORDERED that Firstbank's motion to dismiss Defendants' Counterclaim is GRANTED with respect to Counts I, II, IV, and V and DENIED with respect to Count III; and it is

ORDERED that Moriki N'Sele's motion to dismiss Defendants' Counterclaim is GRANTED; and it is

ORDERED that Firstbank and N'Sele's motion to sever is GRANTED; and it is

ORDERED that Defendants shall file an opposition to Firstbank's November 8, 2012, motion for summary judgment **by February 8, 2013**, failing which Firstbank's motion will be deemed conceded; and it is

ORDERED that a copy of this Order and the accompanying Memorandum Opinion shall be directed to counsel of record.

Dated: January 17, 2013

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

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:
Lori Tyson
Court Clerk Supervisor 1/17/2013