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

MAYHEM ENTERPRISES, LLC, Plaintiff, vs. **CHRISTOPHER POWELL and REGINALD TYSON,** Defendants.	CASE NO. ST-10-CV-125 ACTION FOR DEBT

PARTIAL JUDGMENT AND ORDER

THIS MATTER is before the Court on Defendant Christopher Powell's Motion to Dismiss Count Two of the Amended Complaint (filed on May 6, 2013) and Plaintiff Mayhem Enterprises, LLC's Motion for Summary Judgment (filed on April 15, 2014).

In accordance with the Memorandum Opinion entered on this date, it is hereby

ORDERED that Defendant Christopher Powell's Motion to Dismiss Count Two of the Amended Complaint is **GRANTED**; and it is further

ORDERED that Count Two of the Amended Complaint against Defendant Powell is **DISMISSED**; and it is further

ORDERED that Judgment on the Pleadings is entered in favor of Powell on Mayhem's cause of action for fraud; and it is further.

ORDERED Plaintiff's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that Plaintiff is granted summary judgment on Count 1 (for Breach of Contract); and it is further

ORDERED ADJUDGED AND DECREED that Defendant Christopher Powell is indebted to Plaintiff on the breach of contract claim for the sum of $380,163.53, consisting of $291,711.09 in principal and $88,452.44 in accrued interest through October 29, 2015; and it is further

ORDERED that Plaintiff's Motion For Summary Judgment is **DENIED** as to Counts 2, 3 and 4; and it is further

ORDERED that Plaintiff's request for an award of attorney's fees will be considered at the conclusion of the matter; and it is further

ORDERED that copies of this Partial Judgment And Order and Memorandum Opinion shall be directed to Rosh Alger, Esq. and Benjamin Currence, Esq.

DATED: October 30, 2015

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:
DONNA DONOVAN
Court Clerk Supervisor 11/3/2015

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

MAYHEM ENTERPRISES, LLC, Plaintiff, vs. **CHRISTOPHER POWELL and REGINALD TYSON,** Defendants.	)	CASE NO. ST-10-CV-125 ACTION FOR DEBT

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Christopher Powell's Motion to Dismiss Count Two of the Amended Complaint (filed on May 6, 2013) and Plaintiff Mayhem Enterprises, LLC's Motion for Summary Judgment (filed on April 15, 2014).[1] For the reasons set forth herein, the Court will grant Powell's Motion To Dismiss Count Two (Fraud) of the Amended Complaint and grant Plaintiff's Motion for Summary Judgment on the claim for breach of contract, but deny summary judgment on the other claims.

[1] This motion is against Defendant Powell only. Despite the entry of default against Defendant Reginald Tyson, Mayhem has not moved for judgment against him.

Background[2]

To facilitate the sale of its "business assets"[3] to Virgin Island Pancakes, LLC,[4] Plaintiff Mayhem Enterprises, LLC extended two loans, for $295,000.00 and $1,711.09, to Virgin Island Pancakes. On or about February 3, 2009, Plaintiff, as Seller, and Virgin Island Pancakes, LLC, as Purchaser, executed an "Installment Sale and Financing Agreement." Virgin Island Pancakes, LLC also executed two Promissory Notes in favor of Mayhem Enterprises, LLC.[5] Defendants Reginald Tyson and Christopher Powell also signed individual guaranties backing the loans. After making a single $5,000 payment on the loan, Virgin Island Pancakes defaulted. Defendants promised Mayhem that they would resume payments as soon as they had an opportunity to sell a piece of real estate in New York. Mayhem accepted this promise and forbore from further immediate action to collect the debt.

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[2] Unless otherwise noted, the facts herein recounted reflect both the facts as alleged in Mayhem's Amended Complaint and the undisputed facts the Court found in Mayhem's Motion for Summary Judgment. Normally, the facts must be assessed differently in motions to dismiss (where the facts as alleged in the complaint must be accepted as true) versus motions for summary judgment (where facts are assessed according to whether evidence exists to support them and where inferences are drawn in favor of the non-movant). Due to the simplicity of the facts in this case, and because the Mayhem's Motion for Summary Judgment is unopposed, the same set of facts applies in each instance.

[3] Restaurant equipment, according to Ex. F of the Motion for Summary Judgment.

[4] The record is not consistent in referring to this entity, sometimes referring to Virgin Island Pancakes and other times to Virgin Island<u>s</u> Pancakes. The Court adopts the former styling for this Memorandum Opinion since that is the form used in the signature line of the relevant contracts.

[5] Reginald Tyson, as Member-Manager, and Christopher Powell, as Member, of Virgin Island Pancakes, LLC, executed the Agreement and the promissory notes binding Virgin Island Pancakes, LLC.

However, Plaintiff concluded soon thereafter that Defendants would not follow through on their promise and that no payments from the real estate sale would be forthcoming. In February 2010, Mayhem issued a formal notice of default and filed this case against Powell and Tyson the following month. Mayhem filed an Amended Complaint on August 6, 2012,[6] claiming causes of action for breach of contract, fraud, promissory estoppel, and unjust enrichment.[7] On May 6, 2013, Powell answered the Amended Complaint and simultaneously filed a motion to dismiss Mayhem's fraud count for failure to state a claim. Tyson did not answer the Amended Complaint and the Clerk of the Court entered default against him on June 12, 2013.

On April 15, 2014, Mayhem filed a Motion for Summary Judgment on all counts against Powell. The Parties filed a stipulation extending Powell's time to respond until September 3, 2014. The Court approved the stipulation after the fact, but Powell has never responded despite the passage of another year. The Court here considers both Powell's Motion to Dismiss and Mayhem's still unopposed Motion for Summary Judgment.

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[6] The Court approved the Motion to Amend Complaint on March 6, 2013.

[7] Mayhem had previously filed an Amended Complaint on March 15, 2011, which added Virgin Island Pancakes as a defendant. However, Mayhem did not file a motion to amend and Mayhem was not entitled to an amendment as of right since Defendant Powell had filed an Answer. Therefore, the filing of that Amended Complaint, without a motion, was futile. Then on August 6, 2012, Plaintiff filed a motion to amend and filed a new Amended Complaint. However, Virgin Island Pancakes was no longer listed as a party in the new proposed Amended Complaint. Since the Court approved this second iteration, and since there is no evidence that Virgin Island Pancakes was ever served, it is not a party in this case, despite the fact that a handful of filings and even one court order appear to have adopted the erroneous caption in the past.

I. Motion to Dismiss/Motion for Judgment on the Pleadings

As a preliminary matter, the Court notes that Powell's Motion to Dismiss is out of order, since it should have been "made before pleading." Fed. R. Civ. P 12(b) (as incorporated by Super. Ct. R. 7); *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 565 (V.I. 2012); *Turbe v. Government of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991). Because Powell filed it simultaneously with his Answer, the Court will instead construe the Motion to Dismiss as a Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c). Fed. R. Civ. P. 12(h)(2) (as incorporated by Super. Ct. R. 7); *Benjamin*, 56 V.I. at 565; *Turbe* 938 F.2d at 428. Although it is important to be precise, this distinction is ultimately of little consequence in this case since "[t]here is no material difference in the applicable legal standards." *Spruill v. Gillis*, 372 F.3d 218, 223 n.2 (3d Cir. 2004). *See Turbe*, 938 F.2d at 428. "As with a rule 12(b)(6) motion, th[e] Court [will assess] the facts alleged in the pleadings and the inferences to be drawn from those facts in the light most favorable to" Mayhem. *Benjamin*, 56 V.I. at 566. "However, [Mayhem's C]omplaint must contain 'more than labels and conclusions' or a 'formulaic recitation of the elements of a cause of action." *Gebhart v. Steffen*, 574 Fed. App'x. 156, 158 (3d Cir. 2014) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Powell challenges only Mayhem's cause of action for fraud, arguing that the Amended Complaint does not actually allege facts, but instead asserts only legal conclusions. Moreover, Powell argues that regardless of whether the pleadings allege real facts, they certainly do not meet the Rule 9 requirement that "[i]n alleging fraud . . ., [Mayhem] must state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b) (as incorporated by Super. Ct. R. 7).

Although there is only one count of fraud in the Amended Complaint, Mayhem appears to allege two separate false misrepresentations: 1.) a pre-loan misrepresentation to the effect that Powell had the resources to pay back the loan; and 2.) a post-loan misrepresentation to the effect that Powell would pay the amounts due on the loan once he sold real property in New York.[8] Each of these claims must be dismissed for separate reasons.

The pre-note misrepresentation fails to support a claim for fraud because the pleadings do not offer any "particularity" concerning the "circumstances" of the misrepresentation. The Amended Complaint says only that Powell "made misrepresentations as to the availability of resources to repay" the loan. Although this alleges what the misrepresentation was about (i.e. "availability of resources"), it does not allege what the misrepresentation actually *was*; there are no facts concerning what it was that Powell actually communicating about the "availability of resources." This is left to the reader's own supposition. Nor does Mayhem explain

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[8] The specific text concerning fraud in the Amended Complaint states only that "Defendants made misrepresentations as to availability of resources to repay the Guarantee and Notes, before and after execution of the Guarantee and Note." However, the Court has inferred that the post-loan misrepresentation refers to an instance related earlier in the Amended Complaint where Mayhem alleged that "Defendants assured Plaintiff that payment would be forthcoming upon the closing of the sale of real property in New York of Defendant Powell." There is no equivalent elaboration of any pre-loan misrepresentation.

how, when, or where the misrepresentation occurred. It could be that Mayhem means to suggest that the loan agreements themselves are the misrepresentation, since the agreements contain a promise to repay the loans. But this would plainly go too far: if the Court were to accept broken contractual promises as fraudulent misrepresentations in and of themselves without something more, then every breach of contract claim in the Virgin Islands would come pre-loaded with a claim for fraud as a bonus.

The alleged post-note misrepresentation also fails, but not for lack of description of the particulars of the misrepresentation. The alleged misrepresentation that the proceeds of the real estate sale would be directed toward servicing the loan debt is sufficiently specific as to content and the allegation that the misrepresentation was made in response to Mayhem's notice of breach is sufficiently specific as to context. The problem with the alleged post-loan misrepresentation is that the Amended Complaint alleges no cognizable harm. The Amended Complaint says only that Mayhem "has been damaged by Defendants' fraud." This is the epitome of a bald legal conclusion with no factual allegation to support it. Without any factual allegation concerning the nature of the harm, Mayhem's cause of action will not survive a motion to dismiss or a motion for judgment on the pleadings. Therefore, neither allegation of fraud passes muster under the applicable standards and the Court will enter Judgment on the Pleadings in favor of Powell for Mayhem's cause of action for fraud.

II. Motion for Summary Judgment

Mayhem moves for summary judgment pursuant to Fed. R. Civ. P. 56 (as incorporated by Super. Ct. R. 7). To succeed, Mayhem must demonstrate "that there is no genuine dispute as to any material fact [such that the party] is entitled to judgment as a matter of law." *Id.* In analyzing the motion, the Court must "view all inferences from the evidence in the light most favorable to . . . the nonmoving party and take [its] allegations as true if properly supported." *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (citing *Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013)). However, "the mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way." *Saldana v. Kmart Corp.*, 43 V.I. 361, 368 (3d Cir. 2001). Mayhem asks for judgment on all four counts in the Amended Complaint.

A. Breach of Contract

To succeed on its breach of contract claim, Mayhem must demonstrate 1.) the existence of an agreement; 2.) a duty created by that agreement; 3.) a breach of that duty; and 4.) damages caused by the breach. *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 707 (V.I. 2011) (citing *Arlington Funding Servs., Inc. v. Geigel*, 51 V.I. 118, 134-35 (V.I. 2009)). Mayhem has submitted copies of the financing agreement, promissory notes, and guaranty, which, taken together, show the existence of the underlying agreements (element one) and Powell (and Tyson)'s guarantee of Virgin Island Pancakes' performance and payment (element two). Damien Cordle's affidavit and the notice of default show that the Defendants did not repay more than five thousand dollars of the loan (element three).

Mayhem also provides financial documents that support its request for judgment in the amount of $402,384.73.[9] However, Mayhem's accounting does not stand up to scrutiny. The Court has identified three likely errors. First, although Cordle's affidavit and Mayhem's statement of facts each concede that Defendants made an initial five thousand dollar payment, Mayhem's accounting does not reflect this. Second, Mayhem has calculated the amount owed using a 6.5% annual rate of interest, which rate the Court cannot find in either the contracts (which call for a 4.5% annual rate of interest) or the V.I. Code. Third, Mayhem has calculated the interest with annual compounding through February 2013 and then monthly compounding thereafter whereby it converts interest owed into principal (that in turn generates additional interest), again, without apparent justification in either the contracts or the Code. *Cf. Bookworm, Inc. v. Tirado*, 44 V.I. 300, 307 n. 2 (V.I. Terr. Ct. 2002). Since these three likely errors may be remedied arithmetically, the Court

[9] Or $410,935.81 according to Cordle's affidavit and Ex. G.

has recalculated the damages[10] for the sake of expediency. If Mayhem believes it can justify any of the three irregularities identified above, or if Mayhem believes the Court has erred in its arithmetic, then it should timely move the Court to reconsider.

B. Remaining Counts

Mayhem's three remaining counts – Unjust Enrichment, Promissory Estoppel, and Fraud – may be resolved expeditiously. Having already granted summary judgment on the breach of contract claim, granting Mayhem's claim for unjust enrichment would be inappropriate now, because unjust enrichment is merely an equitable alternative to breach of contract. *See Cacciamani & Rover Corp. v. Banco Popular de Puerto Rico*, 61 V.I. 247, 251-52 (V.I. 2014) ("Because unjust enrichment is an equitable remedy, it – like all equitable remedies – is inappropriate where a legal remedy is available").

Mayhem's motion for summary judgment on its promissory estoppel claim fails because Mayhem has failed to make any showing of a detriment flowing from its reliance on Powell's promise to pay his debt after selling the New York property. Cordle's affidavit only alleges that Mayhem delayed filing this action, "which resulted in future financial loss." If Mayhem is arguing that the delayed initiation caused

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[10] By crediting Defendants with a $5000 payment against principal on March 1, 2009 (the first due date), reducing the interest rate to 4.5%, and eliminating the interest compounding. Therefore, the Court calculates the interest as follows:
For the period from 2/3/09-3/1/09: $296,711.09 (principal balance) x 26 days x 4.5% / 365 days = $951.10
For the period from 3/1/09-10/29/15: $291,711.09 (principal balance) x 2,433 days x 4.5% / 365 days = $87,501.34
Total Interest: $951.10 + $87,501.34 = $88,452.44

harm through a corresponding delay in collection, then it must at least allege some harm in excess of the extra interest it will collect from the delay. But Mayhem has produced no evidence beyond the affidavit's bald assertion of an unquantified, inchoate harm.[11]

Finally, having already granted Powell's motion to dismiss the fraud count above, Mayhem's motion for summary judgment on its fraud claim will be denied. Therefore, all three of Mayhem's remaining counts will be denied summary judgment.

III. Conclusion

Judgment will be entered in favor of Powell on Mayhem's cause of action for fraud because Mayhem's Amended Complaint does not describe Powell's pre-loan misrepresentation with particularity and fails to allege facts from which the Court may infer damages with respect to Powell's alleged post-loan misrepresentation. However, Mayhem's unopposed Motion for Summary Judgment provides sufficient evidence to demonstrate that Powell is liable for breach of contract and debt in the re-calculated amount of $380,163.53, of which $291,711.09 is principal and $88,452.44 accrued interest through October 29, 2015. Therefore, the Court will enter judgment for that sum.

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[11] The Court notes too that Mayhem's briefing is insufficient in that it does not cite to any authoritative source of law and instead relies on the Restatement (Second) of Contracts. *See Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011); *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014). If Mayhem intends to pursue this claim further, it should ensure that it provides authoritative citations.

An appropriate Partial Judgment and Order will accompany this opinion.

DATED: October 30, 2015

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: Donna Donovan

DONNA DONOVAN
Court Clerk Supervisor 11 / 3 / 2015