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

GERALD ROY and ROY DEVELOPMENT, LLC,	)	
	)	Case No. ST-14-CV-306
Plaintiffs,	)	
vs.	)	
	)	ACTION FOR BREACH OF CONTRACT
BANCO POPULAR de PUERTO RICO and TERRYL DIGGS de JONGH,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiffs brought this action against Defendants Banco Popular de Puerto Rico ("Banco" or the "Bank") and Terryl de Jongh alleging breach of contract and bringing a claim of promissory estoppel. Currently before the Court are Banco and Plaintiffs' cross-motions for summary judgment.[1] Both sides have filed responses opposing each other's motions. For the reasons set forth below, the Court will grant Banco's motion for summary judgment, and accordingly dismiss the claims against Banco with prejudice. Plaintiffs' motion for summary judgment against Banco will

[1] Banco writes in its "Motion of Banco Popular de Puerto [Rico] for Summary Judgment" that it moves for summary judgment "pursuant to Super. Ct. R. 56". In its "Memorandum of Law in Support of Motion for Summary Judgment," it describes the summary judgment standard "[p]ursuant to Rule 56 of the Federal Rules of Civil Procedure." And in its "Statement of Undisputed Material Facts," it writes that it is moving "pursuant to LRCi 56.1(a)(1)," the rules applicable to the District Court of the Virgin Islands. Yet there is no Super. Ct. R. 56; this jurisdiction no longer follows the Federal Rules; and the Local Rules applicable to the District Court are not applicable to this Court. Only in its "Reply in Support of Its Motion for Summary Judgment" does Banco write that it is moving pursuant to V.I. Rule of Civil Procedure 56, which is the current rule applicable in this Court.

be denied. And Banco will be permitted to pursue its claims against de Jongh via default judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts in this case are relatively few and uncomplicated. On May 15, 2008 Plaintiff Roy Development ("RD"), a limited liability company ("LLC"), signed a commitment letter from Banco wherein the Bank agreed to grant RD a commercial term loan in the sum of $4,000,000.00.[2] Defendant De Jongh was the Bank representative who signed the commitment letter as "Assistant Vice President & Commercial Relationship Officer" on behalf of the Bank. Gerald Roy, President and Managing Member of RD, was not personally a party to the loan agreement. The commitment letter required RD to pay a commitment fee of $80,000 upon RD's acceptance of the loan offer.[3] It further indicated that a closing "shall take place," subject to RD's compliance with the loan terms, on or before June 30, 2008.[4] The commitment letter stated that the Bank's obligation to distribute the loan proceeds was dependent on that closing taking place:

[2] The Bank issued two, nearly identical commitment letters, one dated March 6, 2008 and the other May 12, 2008, both signed by RD. This Court has already opined on the reason for there being duplicate letters and also determined that they represent the same agreement. *See* March 28, 2017 Memorandum Opinion 7. Since the parties also agree that the letters reference the same loan, *see* Plaintiffs' "Statement of Undisputed Facts" ¶ 10, Banco's "Response to Plaintiffs' Statement of Facts," it is not necessary to opine again on that matter. When referring to the commitment letter in this matter, the Court is referring to the May 12, 2008 letter.

[3] "A non-refundable Commitment Fee of Eighty Thousand and 00/100 Dollars ($80,000.00) due and payable upon your acceptance of the Commitment."

[4] "Subject to your compliance with the conditions hereof, the closing of the Loan (the "Closing") shall take place . . . on or before June 30, 2008."

> It must be understood however, that this commitment is for a limited duration and even if the Bank's commitment is timely accepted by the Borrower as provided for herein, should a closing NOT occur on or before June 30, 2008, unless extended in writing by the Bank, TIME BEING OF THE ESSENCE, the bank thereafter shall have no obligation to provide the financing outlined herein.

Despite being aware that the loan was contingent on compliance with the terms of the commitment letter[5], RD did not pay the full commitment fee after signing and accepting the loan offer.[6] It paid only $50,000. Roy alleges that the remainder of the $80,000 "was to be paid by [] de Jongh" to offset certain funds de Jongh allegedly owed RD[7] because de Jongh owed RD "at least $33,846.93 for an unrelated matter."[8]

The June 30, 2008 deadline for closing came and went, and no closing took place. Banco did not extend the closing date and never funded the loan. Roy alleges that as a result he lost assets valued at $6,932,400.[9] Plaintiffs seek reliance damages for breach of contract and under a theory of promissory estoppel.

Plaintiffs move for the Court to grant summary judgment against Banco on its claim of breach of contract and against de Jongh on its claim of promissory estoppel. On the other hand, Banco asks the Court to grant summary judgment against Plaintiffs on both claims against it. De Jongh has not responded to the complaint.[10]

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[5] *See* Aff. of Gerald Roy in Supp. of Mot. for Summ. J. ("Roy Aff.") ¶ 12 ("The [] Letter indicated that, subject to my compliance with its terms, the Bank would schedule a closing . . . .").
[6] This Court in an earlier decision in this matter found that RD's signing of the letter constituted acceptance of the offer. See the Court's March 28, 2017 Memorandum Opinion.
[7] Roy. Aff. ¶ 11.
[8] *Id.* Roy provides considerable detail in his filings regarding this alleged unrelated matter between RD and de Jongh. However, for reasons that will be explained below, those details are irrelevant to the issues before the Court and will not be discussed herein. Suffice to say RD alleges it loaned $30,000 to de Jongh in 2005 and de Jongh supposedly never repaid the loan.
[9] Roy. Aff. ¶ 14.
[10] Default has not been entered against de Jongh.

LEGAL STANDARDS

Summary judgment is a "drastic remedy," *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) which should only be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law," *id.* (citing Fed. R. Civ. P. 56). A fact is material only where it 'might affect the outcome of the suit under the governing law,'" *Gerald v. R.J. Reynolds Tobacco Co.*, 2017 V.I. LEXIS 150, *5 (V.I. Super. Ct.) (quoting *Williams*, 50 V.I. at 194)), and a factual dispute is deemed genuine if, "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Greene v. V.I. Water & Power Authority*, 65 V.I. 67, 73 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

When reviewing the record under a summary judgment motion, a court, "must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party," and, "must take the non-moving party's conflicting allegations as true if supported by 'proper proofs.'" *Williams*, 50 V.I. at 194 (citing *Seales v. Devine*, 2008 V.I. Supreme LEXIS 23 (2008)). A party opposing a motion for summary judgment, the non-movant, "'may not rest upon the mere allegations or denials of [her or] his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.'" *Liberty Lobby, Inc.*, 477 U.S. at 248 (quoting Fed. R. Civ. P. 56(e)).

To entitle the non-movant to proceed to trial, an issue of material fact needn't be clear enough, "to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* at 248-49 (citation and internal quotations omitted). Such evidence presented by the non-movant, "may be direct or circumstantial, but the mere possibility that something occurred in a particular way is not enough, as a matter of law," for a jury or judge to find it *probably* happened that way. *Williams*, 50 V.I. at 195 (citation and internal quotations omitted). Distilling then what evidence is required to survive summary judgment, "the nonmoving party's evidence must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Id.* (citing *Saldana v. Kmart Corp.*, 43 V.I. 361, 364 (3d Cir. 2001)).

Finally, at the summary judgment stage, "if the court finds that a contract is ambiguous and that the extrinsic evidence is undisputed, then the interpretation of the contract remains a question of law for the court to decide . . . ." *White v. Spenceley Realty, LLC*, 53 V.I. 666, 678-79 (citing *In re Columbia Gas System, Inc.*, 50 F.3d 233, 241 (3d Cir. 1995)).

ANALYSIS

I. Roy Has no Standing to Sue Banco in His Personal Capacity.

Banco challenges Roy's standing to bring claims against it. It argues, "Roy is a member of RD, a legal entity, who was the party to the proposed loan that is memorialized by the commitment letters at issue in this case. Therefore, Roy lacks standing to bring any claims against Banco Popular in his individual capacity as a matter of law."[11]

Banco cites to a case from the U.S. District Court for the Virgin Islands for the proposition that, "[a] stockholder, director, officer, or employee of a corporation may not recover for damages to an individual which are derived from an injury to the corporation." *Pemberton Sales & Serv., Inc. v. Banco Popular de P.R.*, 877 F. Supp. 961, 965 (1994) (citing *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 96-97 (3d Cir. 1975)). The Bank cites no case from a Virgin Islands court adopting that rule, and the Court cannot locate one. However, the Court nonetheless agrees: it is a "'fundamental rule' that even though a stockholder owns all of the stock in a corporation, [she or] he cannot sue as an individual for injury to the corporation." *Clancy v. United States*, 2018 U.S. Dist. LEXIS 124405, *3 (D. Ariz.) (quoting *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969)). Under the shareholder standing rule, "injuries to the shareholder which are derived solely from injuries to the corporation, for instance, diminution of share price, belong to the corporation. A shareholder only may bring

[11] Mot. of Banco for Summ. J. 3.

an action for such injuries in the form of a derivative action on behalf of the corporation." *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 761 (7th Cir. 2008).[12] The exception to this rule allows a shareholder with a direct, personal interest in a cause of action, independent of their status as a shareholder, to sue even if the corporation's rights are also implicated. *Franchise Tax Bd.*, 493 U.S. at 336-37.

Plaintiffs correctly point out, however, that, "Roy is not a stockholder, director, officer or employee of a corporation. Rather, he is a managing member of a limited liability company." Yet that distinction is beside the point. As Banco rightly notes, an LLC, like a corporation, "is a legal entity distinct from its members." 13 V.I.C. § 1201. If in the corporate context, an individual may not recover for damages which are derived from an injury to the corporation because the corporation is a separate legal entity, then that principle has equal force in the context of an LLC. That an individual member of an LLC may not sue individually for injuries to the LLC is a rule firmly established and widespread in U.S. jurisdictions.[13] Thus while the Court

[12] *See also*, *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 336 (1990) ("As the Seventh Circuit observed, the rule is a long-standing equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment.") (citation omitted); *Bruno v. Southeastern Services, Inc.*, 385 So. 2d 620, 622 (Miss. 1980) (collecting cases from other jurisdictions and holding, "We adopt the rule in Mississippi that an action to redress injuries to a corporation, whether arising in contract or in tort cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholders whose rights are merely derivative. The rule applies even though the complaining stockholder owns all or substantially all of the stock of the corporation."); *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 20 (1988) ("Although all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.").

[13] *E.g.*, *Clancy*, 2018 U.S. Dist. LEXIS 124405, *3 ("Because the Property is owned by [the] LLC, [the sole owners] have not been injured and do not have standing to sue."); *Lundstedt v. People's United Bank*, 2015 U.S. Dist. LEXIS 15762, *5-6 (D. Conn.) ("Moreover, the claims here are based on a

is unable to find any V.I. case law that adopts the rule or addresses whether an LLC member may sue for injuries to the LLC, the Court finds it appropriate to adopt it. It does so here.[14]

Plaintiffs allege that RD suffered injuries due to Banco's breach of the loan agreement. Roy was not a party to that loan agreement, and suffered no injuries in his individual capacity distinct from those suffered by RD. Roy personally was

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contractual relationship—the relationship between People's and the LLC that is set forth in the account holder agreement. Plaintiff, however, has no contractual relationship with defendants, and he lacks standing to sue."); *Oakmont Note Group LLC v. Andrews*, 2013 U.S. Dist. LEXIS 115073, *10-11 (E.D. Pa.) ("Under Pennsylvania law, a member of a LLC cannot sue in its own name for injuries to the limited liability company."); *Painter's Mill Grille, LLC v. Brown*, 2012 U.S. Dist. LEXIS 21166, *12-13 (D. Md.) ("However, under Maryland law, shareholders cannot sue individually to recover damages for injuries to a corporation. Only the corporation itself can bring an action for an injury . . . . Thus, the Vitales as members of [the] LLC cannot bring individual claims against Defendants for injuries to their business."); *Wallace v. Aeropremier Jet Ctr., LLC*, 2010 U.S. Dist. LEXIS 78866, *5 (E.D. La.) ("It is well-settled Louisiana law that an individual, as a member or shareholder of an LLC, may not sue for damages resulting from damage to the LLC's property. . . . Louisiana law bars an individual member of [an LLC] from pursuing an action for damages to the property of the [LLC].") (citations and internal quotations omitted); *DGC, LLC v. Hinds*, 55 So.3d 218, 229 (Ala. 2010) ("[B]ecause the challenged option related only to an interest in property held by the LLC, the only injury alleged by the petitioners was an injury to the LLC. As a result, any right to bring a declaratory-judgment action with respect to that injury rested with the LLC, and could be pursued only by the LLC itself or by the plaintiffs derivatively . . . .") (citation and internal quotations omitted).

[14] Since no V.I. court has previously adopted the shareholder standing rule for either corporations or LLCs, this Court is required to perform the three-part analysis as set forth in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (2011), and "weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands," *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014) (per curiam). Given the widespread application of the rules, and their basis in the fundamental principle that a corporation or LLC is a separate legal entity, the Court adopts the shareholder standing rule: (1) a shareholder, director, officer, or employee of a corporation may not sue or recover for damages to an individual which are derived from an injury to the corporation; (2) an individual member or shareholder of an LLC may not sue or recover damages to the individual that are derived from an injury to the LLC; and (3) the exception to this rule is if the individual has a direct, personal interest in the cause of action independent of their status as a shareholder, member, director, officer, or employee of that corporation or LLC. *See Elizabeth Retail Props., LLC v. KeyBank Nat'l Ass'n*, 83 F. Supp. 3d 972, 986 (D. Or. 2014) ("the 'shareholder standing rule has been applied to members of LLCs'") (quoting *Rosenberg v. DVI Receivables, XIV, LLC*, 2012 U.S. Dist. LEXIS 151001, *6-7 (S.D. Fla.).

entitled to no performance from the Bank. The Court finds Roy, in his personal capacity, has no standing to pursue claims against the Bank. Only RD may proceed on the claims against Banco.

Regarding Plaintiffs claims against de Jongh, de Jongh has yet to respond to the complaint and has failed to plead or defend herself in this matter. The proper avenue at this point for resolution of those claims is for Plaintiffs to apply for entry of default and move for default judgment. V.I. R. Civ. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the court or the clerk must enter the party's default."); *id.* (b)(2) ("In [cases with no sum certain], the party must apply to the court for a default judgment."). Accordingly, the Court will not address Plaintiff's claims against de Jongh herein and therefore will not reach the issue of Plaintiffs' standing to sue de Jongh.

II. RD Is Not Barred from Pursuing Its Claims for Failing to Meet Annual Reporting Requirements.

Banco next argues that RD is barred from pursuing any claims because at the time of filing, RD was not in compliance with title 13, section 533 of the Virgin Islands Code. Section § 533(a) directs that, "[n]o corporation may commence or maintain any action in any court if it has not paid its annual franchise tax last due." However, RD is an LLC. The Uniform Limited Liability Company Act, 13 V.I.C. §§ 1101-2203, applicable to RD, contains a separate section on the annual reporting requirements for LLCs. *See* 13 V.I.C. § 1211. That statute does *not* provide that an LLC is unable to maintain an action in civil court if it has not met those filing requirements. Instead, it directs that:

> Any limited liability company, or foreign limited liability company, which fails to file the mandatory annual report or pay the required filing fee shall be liable for a penalty of 20 percent of the fee or $50, whichever is greater, and interest at 1.5 percent, compounded annually for each month or part thereof that the fee remains unpaid, payable to the Office of the Lieutenant Governor.

§ 1211(e). Because a separate Act addresses the filing requirements for LLCs, and because that Act came later in time than 13 V.I.C. § 533, the Court finds that 13 V.I.C. § 533 does not control here. Nonetheless, even if § 533 were applicable here, that section provides:

> Notwithstanding the [provision barring an action for corporations delinquent in payment of franchise tax], before a pending case may be dismissed, a corporation shall be given a reasonable time to provide proof that arrangements have been made to pay any delinquent franchise taxes once the matter is brought to the court's attention, as it *is the purpose of this statute to collect the franchise tax and not simply to dismiss a case.* (emphasis added)

In the time since Banco brought to the Court's attention RD's overdue annual reports, RD has submitted copies of an "Annual Report and Computation of Filing Fee" for each of the relevant years[15], each one marked received by the Office of the Lieutenant Governor, along with a check made payable to the Government of the Virgin Islands. Therefore, even if 13 V.I.C. § 533 were applicable, RD has cured its alleged defect in status. Accordingly, the Court will allow the action to proceed.

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[15] *See* Aff. of Denise Johannes, Ex. C. to Banco's Reply in Supp. of Its Motion for Summ. J.

III. RD's Breach of Contract Claim against Banco.

To establish a breach of contract claim, Plaintiffs are required to demonstrate: (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages. *Phillip v. Marsh-Monsanto*, 66 V.I. 612, 621 (V.I. 2017) (citation omitted), *see also Merchants Commercial Bank v. Oceanside Village, Inc.*, 64 V.I. 3, 12-15 (V.I. Super. Ct. 2015). The Court, in a March 28, 2017 Memorandum Opinion, found that an agreement was formed between Banco and RD when Roy signed and returned the commitment letter to the Bank. That much is no longer in debate. The issue the parties now contest is whether Banco had a duty to pay the loan proceeds to RD. Plaintiffs argue that Banco did and that it breached that duty when it didn't disburse the loan proceeds.

Banco, on the contrary, argues that it had no duty to provide the financing outlined in the commitment letter. Pointing to the language of the commitment letter, it argues that, "the obligations of the Parties were conditioned upon the satisfaction of two conditions precedent. . . . Plaintiffs were required to: 1) Pay the full commitment fee of $80,000.00 upon acceptance of the commitment; and 2) Close on the loan by June 30, 2008."[16] The Bank points out that Plaintiffs admitted that RD never fully paid the commitment fee[17], and that Banco was not a party to the alleged agreement wherein de Jongh agreed to pay part of the commitment fee on

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[16] Mem. in Supp. of Mot. 7.
[17] Roy Aff. ¶ 10.

RD's behalf.[18] The Bank concludes that because Plaintiffs failed to pay the full commitment fee and close on the loan within the proscribed time, "no duty or performance was due by Banco Popular, and as such, there could be no breach by Banco Popular[.]"[19]

The question of whether a defendant has a duty under a contract is generally a question of law for a court to decide after interpreting the terms of the agreement.[20] The Court now moves to that determination.

a. Although Banco and RD Entered into a Contract, RD's Failure to Pay the Full Commitment Fee Discharged the Bank's Duty to Perform.

"An obligor will often qualify his duty by providing that performance will not become due unless a stated event, which is not certain to occur, does occur. Such an event is called a condition." Restatement (Second) of Contracts § Scope (Am. Law. Inst. 1981). Section 224 of the Restatement defines a condition: "an event, not certain

[18] Plaintiffs have not alleged that Banco was a party to that agreement.

[19] Banco's Resp. in Oppo. To Pls.' Mot. for Summ. J. 3.

[20] *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) ("The question of whether a contract creates a duty is a question of law.") (citation omitted); *Porter v. Iowa Power & Light Co.*, 1974 Iowa Sup. LEXIS 1322, *9 ("More specifically, [sic] trial court had a right to decide whether the contract established the asserted duty as a question of law. The question of existence of duty is a matter of law for the court.") (citing Prosser, Law of Torts, § 37 at 206 (4th ed. 1971)); *Claimsone v. Prof'l Prop. Mgmt.*, LLC, 2011 Ill. App. LEXIS 994, *21 ("Whether a contract imposes a legal duty presents a question of law.") (citation omitted); *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 134 (2014) ("[W]hether promisor had a duty under [a] contract is a threshold question of law.") (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 568-69 (1991); *see also United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 707 (V.I. 2011) ("Ordinarily, when the terms of a contract are unambiguous, the Superior Court treats the issue of the meaning of those terms as a question of law, but if the terms are ambiguous, the issue of the meaning of the terms becomes a question of fact.").

to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Id.* § 224; *see also Bank of N.S. v. Herman*, 2016 V.I. LEXIS 65, *12 n. 14 (V.I. Super. Ct.) (conducting a *Banks* analysis and finding § 224 "represents the soundest rule for the Virgin Islands and is in accord with local public policy").[21] The Restatement suggests that, although some courts describe an event upon which performance is conditioned as, "a condition that must be performed before a contract comes into existence," it is better to view such events as a condition to the parties' respective performances:

> When an event that is not normally part of the process of formation of contract is made an event upon which the performance of the contract is dependent . . . it is better to view a contract as already in existence, but with the parties' respective performances subject to the specified event, which is a condition to their respective performances.

Restatement § 224, Reporter's Notes cmt. c.

Because the non-occurrence of a condition can excuse a party's performance, causing the other party to lose the right to that performance, conditions are ordinarily disfavored by the law. Courts will often decline to construe stipulations as conditions unless expressed in plain, unambiguous language.[22] Reflecting the principle disfavoring conditions, § 227 of the Restatement, Standards of Preference with Regard to Conditions, instructs:

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[21] While Banco and several courts in multiple jurisdictions refer to a condition preceding performance as a "condition precedent," the Restatement does not follow that terminology, using instead simply "condition" or "condition of the duty." For a discussion of why the Restatement has abandoned the term 'condition precedent', see § 224 cmt. e.

[22] *See, e.g., Peterson v. Wirum*, 1981 Alas. LEXIS 451, *17 n.14; *MFC Invs.*, 2016 Ariz. App. Unpub. LEXIS 1403, *6; *Bucon*, 1991 Kansas App. LEXIS 58, 3-4.

> (1) In resolving whether an event is made a condition of an obligor's duty, and as to the nature of such event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.
> (2) Unless the contract is of a type under which only one party generally undertakes duties, when it is doubtful whether
>> (a) a duty is imposed on an obligee that an event occur, or
>> (b) the event is made a condition of the obligor's duty, or
>> (c) the event is made a condition of the obligor's duty and a duty is imposed on the obligee that the event occur,
>> the first interpretation is preferred if the event is within the obligee's control.
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> (3) In case of doubt, an interpretation under which an event is a condition of an obligor's duty is preferred over an interpretation under which the non-occurrence of the event is a ground for discharge of that duty after it has become a duty to perform.[23]

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[23] In deciding whether to adopt this rule, this Court must again apply the *Banks* analysis required by *Connor*, 60 V.I. 597 at 603. The Court notes first that Restatement (Second) of Contracts § 227 has not been adopted by courts in this jurisdiction, nor has its rule. A review of cases from other jurisdictions that cite § 227 or adopt its rule reveals that courts use the rule in a majority of other U.S. jurisdictions. *See, e.g., Heritage Bank & Trust Co. v. Abdnor*, 906 F.2d 292, 298 (7th Cir. 1990); *LBL Skysystems (USA), Inc. v. APG-America, Inc.*, 2005 U.S. Dist. LEXIS 19065, *92-93 (E.D. Pa.); *Jarvis v. Ensminger*, 2006 Alas. LEXIS 66, *11; *Fed. Ins. Co. v. I. Kruger, Inc.*, 829 So. 2d 732, 739-40 (Ala. 2002); *MFC Invs., LLC v. Gray*, 2016 Ariz. App. Unpub. LEXIS 1403, *6; *Perkins v. Cedar Mt. Sewer Improvement Dist. No. 43*, 360 Ark. 50, 60 (2004); *Kelly v. Teeters*, 2015 Cal. App. Unpub. LEXIS 33, *24-25; *Dinnerware Plus Holdings, Inc. v. Silverthorne Factory Stores, LLC*, 2004 Colo. App. LEXIS 2301, *10-11; *EH Inv. Co. v. Chappo LLC*, 174 Conn. App. 344, 361-62 (2017); *SLMsoft.com, Inc. v. Cross Country Bank*, 2003 Del. Super. LEXIS 112, *49-50; *Wemhoff v. Investors Mgmt. Corp.*, 528 A.2d 1205, 1209 (D.C. 1987); *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.*, 132 Ill. App. 3d 325, 330-31 (1985) (general rule pronounced in majority; § 227 cited in dissent); *Champlain Capital Partners*, 2016 Ind. App. LEXIS 277, *36-37; *Curran Hydraulic Corp. v. Nat'l-Ben Franklin Ins. Co.*, 1978 Iowa Sup. LEXIS 1190, *10; *Bucon, Inc. v. Boylan*, 1991 Kan. App. LEXIS 58, *3-5; *Dimension Serv. Corp. v. Don Jacobs Imps.*, 2014 Ky. App. Unpub. LEXIS 26, *28-29; *Mass. Municipal Wholesale Electric Co. v. Danvers*, 411 Mass. 39, 52 (1991); *N.Y. Bronze Powder Co. v. Benjamin Acquisition Corp.*, 351 Md. 8, 17 (Md. Ct. Spec. App. 1998); *Able Demolition, Inc. v. City of Pontiac*, 275 Mich. App. 577, 583-84 (2007); *Mrozik Constr., Inc. v. Lovering Assoc., Inc.*, 1990 Minn. App. LEXIS 948, *5-8; *Nearburg v. Yates Petro. Corp.*, 123 N.M. 526, 534 (1997); *Oppenheimer & Co. v. Oppenheim*, 86 N.Y.2d 685, 691 (1995); *Craftique, Inc. v. Stevens & Co.*, 321 N.C. 564, 567 (1998); *Agulto v. Northern Marianas Inv. Group*, Ltd., 4 N. Mar. I. 7, 9 (1993); *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 196 Ohio App. 3d 784, 792-793 (2011); *State ex rel. Roberts v. Pub. Fin. Co.*, 294 Ore. 713, 727 (1983) (cited in dissent); *United Plate Glass Co. Div. of Chromalloy Am. Corp. v. Metal Trims Indus., Inc.*, 106 Pa. Commw. 22, 26-27 (1987); *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, P38 (2006); *State v. Howington*, 1995 Tenn. LEXIS 588, *19-20; *Gulf Liquids New River Project, LLC v. Gulsby Eng'g, Inc.*, 2011 Tex. App. LEXIS 1216, *17; *Jones Assocs. v. Eastside Properties*, 41 Wn. App. 462, 469 (1985). Finally, "considering the . . . widespread application of this rule in a majority of jurisdictions . . . the fact that this rule safeguards against contract forfeitures," *Bank of N.S.*, 2016 V.I.

Comment b to § 227 adds that, because, "[t]he non-occurrence of a condition of an obligor's duty may cause the obligee to lose his right to the agreed exchange after he has relied substantially on the expectation of that exchange, as by preparation or performance . . . an interpretation is preferred that will reduce the risk of forfeiture." Nevertheless, Comment b reiterates, if the event that is the condition is within a party's control, "[she or] he will often assume this risk." *Id.*

Banco contends that the following two sections of the commitment letter operated as a condition of its duty to perform:

> [E]ven if the Bank's commitment is timely accepted by the Borrower as provided for herein, should a closing NOT occur on or before June 30, 2008, unless extended in writing by the Bank, TIME BEING OF THE ESSENCE, the Bank thereafter shall have no obligation to provide the financing outlined herein.
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> . . . .
>
> *2. <u>ORIGINATION/COMMITMENT AND APPLICATION FEE</u>:*
> B. Commitment Fee: A non-refundable Commitment fee of [$80,000] due and payable upon your acceptance of the Commitment.

Since the Court is required to read the agreement as a whole[24], the Court finds two more sections that are relevant. One, in the opening paragraph of the letter:

> The loan shall be advanced under the terms, security [sic] and subject to compliance with the conditions set forth below.

And the other later in the letter:

LEXIS 65, *12 n. 14, and considering the fact that the rule accords with § 224, this Court finds that the Restatement (Second) of Contracts § 227 represents a sound rule for the Virgin Islands and adopts it here.

[24] *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 555-56 (V.I. 2012) ("[T]he court examines the terms of the contract as a whole, giving them their ordinary meaning.") (citation omitted).

> ***6 CLOSING***: Subject to your compliance with the conditions hereof, the closing of the Loan (the "Closing") shall place . . . on or before June 30, 2008.[25]

The Court finds no ambiguity in the language of these provisions: (1) RD was required by the commitment letter to pay the $80,000 commitment fee upon acceptance; (2) the loan was to be advanced "under the terms"[26] and "subject to"[27] compliance with the conditions of the commitment letter; (3) the closing was "subject to" RD's "compliance with the conditions" of the letter; and (4) if closing did not occur by June 30, 2008, the Bank would have "no obligation to provide the financing" outlined in the letter. Put another way, the Court reads these provisions together to say: the Bank had no obligation to provide financing if RD did not meet the terms of the commitment letter <u>or</u> if the closing did not occur by June 30, 2018; the terms of the commitment letter included RD's paying the full commitment fee upon acceptance of

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[25] Immediately following this paragraph, and also under the section "Closing", is listed a number of instruments that were to be executed and delivered to the Bank "[a]t the Closing." The Court does not interpret the delivery of those instruments to be the "conditions hereof," as RD was required to furnish those documents "[a]t the Closing," and not prior to the closing taking place. The Court thus finds "the conditions hereof" referred more broadly to the conditions of the commitment letter.

[26] Black's Law Dictionary defines 'term' as: "2. A contractual stipulation <the delivery term provided for shipment within 30 days>. See CONDITION (3)." *Term* (10th ed. 2014). Under *Condition* (3), it says:

> This term condition is generally used to describe any fact, subsequent to the formation of a contract, which operates to make the duty of a promisor immediately active and compelling. Such a fact may be described as such in a term of the contract or it may not. In either event, the term of the contract should not itself be called the condition. ... It is not uncommon, popularly, to speak of a condition of the contract as synonymous with term or provision of the contract. This should be avoided." (citing William R. Anson, Principles of the Law of Contract 226 n.1 (Arthur L. Corbin ed., 3d Am. ed. 1919)).

[27] Black's Law Dictionary defines 'subject' as: "3. Dependent on or exposed to (some contingency); esp., being under discretionary authority <funding is subject to the board's approval>." *Subject* (10th ed. 2014).

the loan commitment. The event, the payment of the commitment fee, was RD's responsibility, and was "within the obligee's control." § 227(1). RD was responsible for paying the $80,000 upon its acceptance of the Bank's promise. This was the "duty . . . imposed on an obligee that an event occur." § 227(2). It is thus consistent with § 227 to interpret that event as a condition, the non-occurrence of which discharged the Bank's duty to perform.

The language of the commitment letter buttresses this interpretation, stating that the closing was, "subject to [RD's] compliance with the conditions" of the commitment letter. There is nothing in the language of that clause—or any other in the commitment letter—that indicated RD was entitled to performance *without* first paying the commitment fee, or that the Bank was willing to waive the fee, or that the fee was optional. This interpretation is also consistent with the ordinary purpose of a commitment fee: "[*a*]*n amount paid* to a lender by a potential borrower *for the lender's promise to lend money* at a stipulated rate and within a specified time." BLACK'S LAW DICTIONARY, *Commitment Fee* (10th ed. 2014) (emphasis added). Also, while no Virgin Islands courts have addressed this issue, courts in other jurisdictions have recognized the payment of a commitment or origination fee to be a condition on the duty of a lender to disburse loan proceeds.[28] Perhaps more to the point, however,

[28] *E.g., Fed Trust Bank v. Marshall Invs. Corp.*, 2009 U.S. Dist. LEXIS 137371, *10-11 (M.D. Fla.) ("The loan agreement also contained a number of express conditions precedent to Marshall's obligation to disburse the loan proceeds. . . . Other conditions precedent included . . . payment of an origination fee in the sum of $560,000."); *Strand Corp. v. Kennedy Funding, Inc.*, 2015 N.J. Super. Unpub. LEXIS 1298, *3 ("As a condition for receiving the loan, plaintiff was required to pay defendant a 'commitment fee in the amount of . . . $80,000 . . . which is non-refundable and earned for, among other things, the commitment to provide funds.'"); *see also, cf., In re Four Seasons Nursing Centers, Inc.*, 483 F.2d 599:

is that Plaintiffs do not make the argument that they *were* entitled to the loan proceeds without first paying the full commitment fee. Instead, they contend that they relied on de Jongh's promise to pay $30,000 of the commitment fee, that the Bank knew or should have known of the promise, and that the Bank breached by not paying the loan proceeds.

b. Plaintiffs' Alleged Agreement with de Jongh Had No Impact on Banco's Duty to Perform under the Loan Agreement.

Plaintiffs seem to suggest that the Bank was bound to perform under the loan agreement, even if RD neglected to pay the full commitment fee, because they claim de Jongh, a Bank officer, promised RD to pay the Bank the $30,000 on RD's behalf. They argue, "the Bank fails to demonstrate that de Jongh's instruction to Roy that he pay only $50,000 for the commitment fee rather than $80,000, or indication that she would fund the remainder, were made outside her official capacity for the Bank, or that plaintiffs would have been aware of this fact."[29] Relying on the fact that de Jongh

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> Loan commitment fees have been referred to as a "fact of financial life" and have been the subject of considerable judicial discussion. Contracts calling for the payment of a loan commitment fee by the borrower to the lender have generally been enforced, even though the borrower for one reason or another does not thereafter draw on the committed funds, or does not draw out the committed amount in its entirety. Enforcement of the payment of such fees, or the refusal to grant a refund where the fee has been paid, has been on the ground that the consideration for the fee is the promise of the lender to commit a specified sum of his money for a specified time for the use and benefit of the lender and that the lender's obligation to commit, as well as the borrower's obligation to pay a fee in return for such commitment, is fixed as of the date the loan commitment agreement is executed. And it has been held that the fact that the borrower thereafter does not draw on the committed funds does not excuse the borrower from payment of the entire commitment fee as called for in the loan commitment agreement.

[29] Pls.' Reply in Supp. of Their Mot. for Summ. J. 2.

signed the commitment letter on the Bank's behalf, and on the following handwritten note on bank stationary:

cell: 626-8014
BANCO POPULAR
home: 776-2211

Pg 1 is different but pmt amounts.

Gerry —

We discussed 4 pmts of $7,500 but I had to settle with 3 pmts of $10,000. Let's discuss. Funds needed ASAP.

Terry

Plaintiffs conclude, "the only reasonable interpretation was that plaintiffs thought she was speaking for the Bank when she instructed a payment of $50,000 rather than $80,000."[30]

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[30] *Id.*

Plaintiffs' argument is unavailing for several reasons. First and foremost, the agreement between de Jongh and RD, if such an agreement existed, was irrelevant to Banco and RD's obligations under their agreement and is thus not a material fact for purposes of the breach of contract claim.[31] The Bank was not a party to, nor bound by, the agreement between RD and de Jongh, and de Jongh was not a party to the agreement between the Bank and RD. Even if Plaintiffs thought that de Jongh was acting in her official capacity in directing RD to pay only $50,000 of the commitment fee, the Bank was not bound by those impressions.[32]

Second, as a matter of law the handwritten note from de Jongh cannot be considered by the Court as proof of the Bank's understanding that de Jongh would pay $30,000 on RD's behalf, as the note was not a part of the loan agreement. "When two parties have made a contract and have expressed it in a writing to which they both have assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Phillip*, 66 V.I. at 626 (citing *Cosgrove v. Mademoiselle Fashions*, 206 Neb. 275, 281 (1980)).

[31] Plaintiffs offer no writing memorializing a promise by de Jongh to pay $30,000 of the commitment fee on RD's behalf or instructing RD to pay only $50,000, and Roy's affidavit does not even aver that de Jongh made such a promise. Therefore, de Jongh's alleged promise would not be a *genuine* material fact in any event.

[32] To prevail on an argument that Banco was bound by de Jongh's promise because she was acting in her official capacity, Plaintiffs would need to show as a matter of law that the Bank was bound by apparent authority or some other principal-agent principle. However, they did not develop that legal argument, or allow Defendants to respond to such an argument (the first time Plaintiffs even hint at such an argument is in their July 13, 2017 Reply), so the issue is deemed waived. *See Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 528 n. 4 (V.I. 2013) (citing *Nat'l Fire Ins. Co. of Hartford v. Lewis*, 898 F. Supp. 2d 1132, 1147 n.11 (D. Ariz. 2012)).

In other words, a court's search for the parties' intent in an agreement is usually limited to the four corners of the agreement. A court may not rewrite an agreement by looking to outside evidence. *Id.* at 628. Therefore, even if the note *plainly* showed that de Jongh agreed to pay $30,000 to the Bank on RD's behalf, the note could not be considered by the Court for purposes of showing that the Bank and RD had an additional understanding beyond that reflected by the commitment letter.

Third, even if the Court were free to consider outside evidence and vary the terms of the commitment letter—which again, it may not—the handwritten note would be weak evidence of an antecedent understanding between the Bank and RD. Critically, although Plaintiffs argue that the note, "concern[ed] her agreement to pay a portion of the commitment fee . . .,"[33] Roy admits that the note related to the 2005 matter between de Jongh and Roy[34] and not to Banco and RD's loan agreement. The note is not dated, Plaintiffs do not suggest a date for it, and it contains no information linking it to the loan agreement. Also, while the note was written on Bank stationary, there is no indication it was intended to be an official Bank communication: the note wasn't typed, didn't have a formal heading, didn't list de Jongh's title, and Plaintiffs admit that de Jongh wrote it to ask Roy for money in a <u>personal</u> matter. Most problematic however is that the note offers no evidence that the Bank was aware of

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[33] Pls.' Reply in Supp. of Their Motion for Summ. J. 2.

[34] Roy Aff. ¶ 11(a) ("The unrelated matter goes back to June 2005 when Terryl de Jongh asked me to lend her money to buy out her ex-husband's 50% interest in a parcel of real property known as No. 6 Estate Staabi on St. Thomas (*See* Ex. F the handwritten note].).")

the unrelated transaction between de Jongh and Roy that was made three years earlier, or consented to Plaintiffs paying only $50,000 commitment fee because of it.

The Court finds that even viewing the inferences from the underlying facts in the light most favorable to Plaintiffs, it cannot reach a finding as a matter of law that the Bank had a legal duty under the commitment letter to distribute the loan proceeds. A condition on the duty of Banco's performance was that RD pay the $80,000 commitment fee, RD failed to do so, and so the Bank's performance did not become due. De Jongh's promise to RD, if de Jongh indeed made that promise, had no effect on Banco and RD's obligations vis-à-vis each other under the commitment letter.

Summary judgment is due to Banco on RD's theory of breach of contract.[35]

IV. Banco is Entitled to Summary Judgment on RD's Promissory Estoppel Claim

Plaintiffs' complaint originally stated a claim of promissory estoppel against both Banco and de Jongh.[36] However, Plaintiffs seemingly concede that because a contract existed between RD and the Bank, they cannot sustain their promissory estoppel claim against the Bank.[37] The U.S. Sixth Circuit in *Lynch v. Sease* provided

[35] In their Reply in support of their summary judgment motion, Plaintiffs for the first time make passing reference to an implied duty of good faith and fair dealing. However, Plaintiffs did not develop this legal argument or allow Defendants opportunity to respond, so the argument is deemed waived. *See Perez*, 59 V.I. at 528 n. 4.

[36] "Count 2 . . . Defendants made a promise to Plaintiffs intending to induce action or forbearance."
[37] *See* Pl. Roy and RD's Resp. to Def Banco's Second Mot. for Summ. J. 9-10.

a thorough explanation for why a party may not sustain a promissory estoppel claim upon a finding or admission that a contract existed:

> Promissory estoppel requires a promise without consideration . . . [it] comes into play in situations where actual consideration is not present, and is thus inapplicable in situations where a contract exists since a necessary element of a valid contract is consideration. Therefore, although contract and promissory estoppel claims may be pled in the alternative, a plaintiff cannot recover under both theories for the same promise. Once it is established, either by an admission of a party or by a judicial finding, that there is in fact an enforceable contract between the parties, and therefore consideration exists, then a party may no longer recover under the theory of promissory estoppel. If a valid, enforceable contract exists between the parties as to a certain issue, their rights and obligations are governed solely by the contract terms. Promissory estoppel is not available when an unambiguous contract exists that covers the issue for which damages are sought.

244 Fed. Appx. 736, 739 (6th Cir. 2007) (citations and internal quotations omitted).[38]

Thus Banco is entitled to summary judgment on RD's promissory estoppel claim.

V. Plaintiffs' Claims against de Jongh Are Better Resolved Pursuant to Default.

De Jongh has not responded to Plaintiffs' complaint and has failed to plead or defend herself. Summary judgment is not the appropriate avenue for the resolution

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[38] *See also Massaro Ltd. P'ship (Park West Two) v. Baker & Taylor Inc.*, 161 Fed. Appx. 185, 188-89 (3d Cir.) ("[Promissory estoppel] is an equitable remedy to be implemented only when there is no contract; it is not designed to protect parties who do not adequately memorialize their contracts in writing.") (citation and internal quotations omitted); *Olson v. Synergistic Techs. Bus. Sys.*, 628 N.W.2d 142, 155 (Minn. 2001) ("Promissory estoppel is the name applied to a contract implied in law where no contract exists in fact.") (citation and internal quotations omitted); *Glimcher Supermall Venture, LLC v. Coleman Co.*, 2007 SD 98, P29 ("Because there is a contract, promissory estoppel cannot apply."); 28 Am. Jur. 2d Estoppel and Waiver § 54 (2000) ("Once it is established, either by an admission of a party or by a judicial finding, that there is in fact an enforceable contract between the parties, and therefore, a consideration exists, then a party may no longer recover under the theory of promissory estoppel.").

of Plaintiffs claim against her. Plaintiffs must apply to the Court for default judgment on those matters. Of course, Plaintiff must first obtain an entry of default against de Jongh before default judgment can be considered.

CONCLUSION

In summary, Plaintiffs have failed to prove that Banco had a duty to perform under the loan agreement between the parties and thus Plaintiffs' motion for summary judgment must be denied. Banco on the other hand has demonstrated that it is entitled to summary judgment on Plaintiffs' breach of contract claim. Plaintiffs' promissory estoppel claim against Banco necessarily fails because the parties had a loan agreement. For those reasons, Banco's motion for summary judgment is granted as to both counts, and those claims are dismissed with prejudice. The Court will contemporaneously herewith enter such an order.

Defendant de Jongh has not responded to the complaint. Therefore, Plaintiffs' claims against her must be resolved through default judgment. The Court will contemporaneously herewith enter an order to permit Plaintiff's claims against de Jongh to proceed and require Banco to provide her forwarding address.

DATED: August 29, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: ______________________
DONNA DONOVAN
Court Clerk Supervisor 8/29/2018