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

MERCHANTS COMMERCIAL BANK,

Plaintiff,

vs.

JFOV, LLC, JOHN PALCZUK, KAREN PALCZUK, DAN BOCK and SARAH BOCK as Trustees of the Bock Living Trust, WILLIAM WILLIGEROD, SARA WILLIGEROD, GERALD LOESCH, DARLA LOESCH, TAUNYA LAND, STEPHEN LEARY, PATRICIA LEARY, JOHN J. GHENT, CAROL GHENT, ANGELA HODGE, ANDAN NASIR, ALEXANDER CHIARAMONTI, GEORGE IBRAHIM, STACEY IBRAHIM, MICHAEL PIKE, JAMES M. HOPKINS, DEBORAH M. HOPKINS, MARY BETH KINSELLA, STEVE CONWAY, LORI CONWAY, MICHAEL B. WARNER, DEBRA G. WARNER, STEWART A. MILLER, KATHLEEN A. MILLER, CHARLES TEAGUE, THOMAS SKELTON, DARLA SKELTON, ROBERT JOHNSON, MICHAEL DELISSIO, SAHID BUTT, THE PRO SHOP, INC., ELENA LAURENCIN, JOHN HEBERT, ROBERT SHEA, JR., LINDA SHEA, WILLIAM WILLIGEROD, P.C., JOHN G. HOPKINS IV, and SILK GREENERY, INC. d/b/a Silk Greenery Home,

Defendants.

CASE NO. ST-09-CV-419

ACTION FOR BREACH OF CONTRACT (2), DEBT, FORECLOSURE OF REAL PROPERTY MORTGAGE, & ENFORCEMENT OF GUARANTY (2)

THE PRO SHOP INC., JOHN HEBERT, and ELENA LAURENCIN,

Plaintiffs,

vs.

JOHN'S FOLLY OCEAN VILLAS, LLC,

Defendant.

CASE NO. ST-08-CV-247

ACTION FOR DEBT AND FORECLOSURE

MEMORANDUM OPINION

THIS MATTER is before the Court on the Supplemental Motion for Partial Summary Judgment[1] filed by Merchants Commercial Bank ("Merchants") seeking summary judgment on the amended counterclaims[2] filed by The Pro Shop, Inc., Elena Laurencin, and John Hebert (collectively, "the Pro Shop Defendants"[3]) against Merchants.[4]

I. Facts

This litigation arises from the construction of a luxury vacation rental villa on St. John, U.S. Virgin Islands.

JFOV, LLC purchased property on St. John in 2005. Ex. A to Merchant's Supp. Mot. for Partial Summ. J. (hereinafter "Merchant's Mot."). In August 2006,

[1] Filed on January 14, 2014. After granting Pro Shop an extension of time to reply, the Pro Shop Defendants filed Response to Court Order of July 24, 2015 on August 10, 2015, and Merchants filed its Response to Pro Shop Defendants' Response to Court Order of July 24, 2015 on August 25, 2015. Merchants' initial Motion For Summary Judgment addressed its case in chief and was decided by Partial Judgment entered July 24, 2015.

[2] Amended counterclaims filed on April 4, 2011.

[3] John Hebert is the Chief Executive Officer of the Pro Shop, Inc. Elena Laurencin is married to John Hebert.

[4] The parties previously briefed the issues relevant to the Pro Shop Defendants counterclaims in their submissions regarding Merchants' Motion for Default Judgment and Summary Judgment on Merchants' claims for debt and foreclosure. *See* Merchants' Mot. for Default J. and Summ. J., filed July 26, 2010; Merchants' Statement of Undisputed Facts, filed July 26, 2010; Pro Shop Defendants' Opp. to Merchants' Mot. for Summ. J., filed January 21, 2011; Pro Shop Defendants' Cross Statement of Undisputed Material Facts, filed January 21, 2011; and Merchants' Reply to Pro Shop Defendants, filed February 26, 2011. The Court considers the arguments set forth in those filings in addition to the Summary Judgment motion and responses now before the Court.

JFOV and Merchants executed a loan agreement wherein Merchants agreed to loan $5.8 million dollars to JFOV for the purpose of constructing two luxury vacation villas on JFOV's St. John property. Ex. B to Merchant's Mot. The loan is secured by a mortgage, executed by the principals of JFOV,[5] on Parcel No. 14 I-3, 14 I-2, 14 I-1, Remainder 14 I and R.O.W. 14 I-4 Estate John's Folly, No. Coral Bay Quarter, St. John, United States Virgin Islands, comprising an area of 1.74 U.S. acres, more or less, as shown on D9-7585-T005 ("the Property"). The Pro Shop was the general contractor on the villa construction project.

In 2008, the Pro Shop Defendants recorded three Notices of Claims of Construction Lien for unpaid invoices, as follows: 1) The Pro Shop, Inc. recorded a Notice of Claim of Construction Lien on February 11, 2008 for the sum of $451,967.78; 2) Elena Laurencin and John Hebert recorded a Notice of Claim of Construction Lien on February 21, 2008 for the sum of $520,000; and 3) The Pro Shop, Inc. filed a Notice of Claim of Construction Lien on April 4, 2008 for the sum of $556,187.72. Ex. D. to Merchant's Mot.

Merchants filed this debt and foreclosure action against JFOV in 2009, and joined junior lienholders, including the Pro Shop Defendants. The Pro Shop Defendants filed counterclaims against Merchants disputing the priority of Merchants' mortgage lien and asserting a claim for damages on the unpaid construction invoices based on theories of breach of contract and unjust enrichment.

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[5] Richard M. Heyl, Jennifer A. Heyl, John J. Palczuk, and Karen E. Palczuk.

In a Partial Judgment issued on July 24, 2015, the Court determined that Merchants holds a valid lien on the Property and foreclosed all liens, but left unresolved the validity and order of priority of liens. The Court must now determine validity and prioritize Merchants' lien and all other liens on the property. 28 V.I.C. § 533.

II. Summary Judgment Standard

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) [6]; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (A dispute is genuine if, based on the evidence in the summary judgment record, a reasonable jury could find in favor of the non-moving party). If the moving party makes this showing, "the burden shifts to the non-moving party to present 'affirmative evidence' from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Liberty Lobby*, 477 U.S. at 248). At the summary judgment stage, this Court examines the evidence in the light most favorable to the non-moving party. *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012).

[6] Rule 56 of the Federal Rules of Civil Procedure is applicable to proceedings in the Superior Court through Rule 7 of the Superior Court Rules.

III. Supplemental Motion for Partial Summary Judgment

The Pro Shop Defendants assert the following counterclaims: (1) The Pro Shop Defendants' construction liens have priority over Merchants' mortgage lien; or, alternatively, Merchants' lien should be equitably subordinated to the Pro Shop Defendants' liens; and (2) The Pro Shop Defendants are entitled to an award of damages (against Merchants) for all unpaid construction invoices approved by the architect based on either the April 2007 oral agreement or unjust enrichment.

Merchants seeks summary judgment on all counterclaims. The Court will now address the arguments.

1. Lien Priority

Merchants' mortgage lien was recorded on August 25, 2006. Merchants asserts its mortgage lien has priority over all other liens on JFOV's property. The Pro Shop Defendants assert that Merchants' lien must be "equitably subordinated" to the Pro Shop Defendants' construction liens based on Merchants' false or negligent and reckless promise to guarantee payment of all Pro Shop's construction invoices as long as the Pro Shop Defendants completed construction of the villa.[7]

"In the Virgin Islands, the priority of liens is determined by the timing of the recordation of the liens." *Balbo Corp. v. Enighed Condos., LLC*, 58 V.I. 93, 100 (V.I. Super. Ct. 2013) (citing 28 V.I.C. § 258(b)); 28 V.IC. § 533 (when a judgment

[7] Equitable subordination is a concept recognized in federal bankruptcy court and is covered in the Bankruptcy Code, but it has not been applied in any reported Virgin Islands cases. *See, e.g., Shubert v. Lucent Techs. Inc. (In re Winstar Communications, Inc.)*, 554 F.3d 382 (3d Cir. 2009); 11 U.S.C. § 510(c). For reasons explained herein, the Court will not reach the question of whether it should be applied in this case.

forecloses two or more liens on a property held by "different persons not united in interest such judgment shall determine and specify the order of time, according to their priority, in which the debts secured by such lien shall be satisfied out of the proceeds of the sale of the property").

When an owner has recorded notice of commencement of construction, a construction lien attaches (retroactively) to the date the notice of commencement of construction was recorded, or if no owner's notice of commencement of construction was recorded, the lien attaches when the notice of lien is recorded. 28 V.I.C. § 258, 262.

None of the parties assert that JFOV filed a notice of commencement of construction. Therefore, the Pro Shop Defendants' Notices of Claims of Construction Liens attached on the dates of recording: February 11, 2008, February 21, 2008, and April 4, 2008.

To effectively perfect and foreclose a construction lien, 1) suit must be filed within 90 days of the recording of lien, and 2) the lien holder must file notice of the commencement of action. 28 V.I.C. §§ 269, 271.

Notices of construction liens do not "bind[ ] any property for a period of time longer than 90 days after the recording of the notice of lien unless within that time an action to foreclose the lien is commenced in a proper court." 28 V.I.C. § 271. The Pro Shop Defendants filed suit relating to only one of their three Notices – the

February 21, 2008 Notice.[8] However, the complaint was filed in Superior Court on May 23, 2008, which was ninety-three (93) days after the lien was recorded on February 21, 2008. Because the complaint was not filed within the 90-day period, the February 21, 2008 Notice of Claim of Construction Lien had expired and ceased to bind the Property at the time the suit was filed.

The Pro Shop Defendants did not file suit – not within 90 days or ever - to foreclose the liens recorded on February 11, 2008 and April 4, 2008. Therefore, those two liens have also expired and no longer bind the property.[9]

Accordingly, the Pro Shop Defendants do not have a security interest in the Property; the Pro Shop Defendants do not have any enforceable lien on the Property that can be prioritized, equitably or otherwise, above Merchants' mortgage lien.[10] Therefore, Merchants is entitled to summary judgment on the Pro Shop Defendants' lien priority counterclaim.

In addition to Merchants, Defendants holding valid liens against the Property are Robert Shea, Jr. and Linda Shea (mortgage lien recorded February 20, 2009 as Document No. 2009001108), John Palczuk and Karen Palczuk (mortgage lien recorded July 28, 2009 as Document No. 2009005654), and Defendant Silk Greenery, Inc. d/b/a Silk Greenery Home (judgment lien recorded April 9, 2010 as

[8] That suit, captioned as *The Pro Shop, Inc. v. John's Folly Ocean Villas*, LLC, ST-08-CV-247, is consolidated in this litigation. *See* Order entered in ST-08-CV-247 on October 23, 2014.

[9] The Pro Shop Defendants also never filed a Notice of Commencement of Action on any of the construction liens.

[10] This finding has no bearing on the Pro Shop Defendants' claims to recover a money judgment against JFOV.

Document No. 2010002733). Therefore, based upon the dates of recording, the order of lien priority is as follows: Merchants Commercial Bank has first priority, Defendants Robert Shea, Jr. and Linda Shea have second priority, Defendants John Palczuk and Karen Palczuk have third priority, and Defendant Silk Greenery, Inc. d/b/a Silk Greenery Home has fourth priority.

2. Breach of Contract and Unjust Enrichment Claims[11]

The Pro Shop Defendants' Counterclaims include a claim for breach of contract against Merchants. Defendant John Hebert affirms:[12] that when payment on their invoices slowed in 2007 they had a meeting with JFOV and Merchants, and The Pro Shop advised JFOV and Merchants' representative that The Pro Shop would halt construction on the villa and would do no further work, and would remove all workers and materials from the property, unless the outstanding construction invoices were paid in full. Defendant John Hebert further affirms that the Pro Shop Defendants then entered into an oral contract with Merchants where Merchants agreed to pay all approved outstanding and future construction invoices up to $5.2 million in exchange for the Pro Shop Defendants' agreement to complete construction of the villa and defer payment of $340,000 in previously submitted

[11] Merchants does not offer any affidavit to support its Supplemental Motion for Partial Summary Judgment on the breach of contract claims. Nor does the Pro Shop Defendants' Opposition offer any affidavit to support their opposition to summary judgment. The Court, however, has reviewed and considered the parties' filings, including affidavits, on the initial Motion For Summary Judgment. *See supra* footnote 4.

[12] These facts are taken from Ex. A to Pro Shop Defendants' Facts.

invoices. Construction was completed in December 2007, but invoices totaling more than $600,000 remain unpaid.

An affidavit by Richard Heyl contains a similar description of a 2007 meeting with Pro Shop and Merchants' representative where Merchants promised to pay both past and future construction invoices until the loan cap was exhausted. Ex. B to Pro Shop Defs' Facts. Heyl further asserts that the purpose of the agreements made at the 2007 meeting was "to induce [the Pro Shop Defendants] to complete and finish construction of the Villa, which was at that point uncompleted and unusable." *Id.* at ¶ 3. In Heyl's estimation, the Pro Shop Defendants' work "added substantial value to the property and there is now an income stream flowing from the Villa as a result of [the Pro Shop Defendants'] performance."

The Pro Shop Defendants allege that Merchants had a duty to pay their invoices and agreed to or had a duty to advise Pro Shop if JFOV defaulted on the loan or if the loan was modified. Pro Shop claims Merchants breached that agreement by failing to pay certain invoices and failing to advise Pro Shop that JFOV was in default and the $5.2 Million loan had been modified and capped at $3.5 Million, all while allowing Pro Shop to continue construction on the villa. In the alternative, the Pro Shop Defendants argue if there was no binding agreement, they are entitled to damages under an unjust enrichment theory.

Merchants argues it did not promise to pay the Pro Shop Defendants under any and all circumstances, nor did it promise that JFOV would not default on its loan.

"To succeed on a breach of contract claim, a plaintiff must show four elements: (1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages." *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702 (V.I. 2011).

Merchants' position is not that it made no promises to the Pro Shop Defendants, but rather that it did not make an absolute promise to pay the Pro Shop Defendants under any and all circumstances.[13] Merchants seems to suggest that any promise to pay it might have made was voided when JFOV defaulted on its loan. Hebert and Heyl's affidavits assert that Merchants failed to pay some construction invoices despite its promise to do so. This evidence creates a genuine dispute as to whether Merchants made a legally enforceable promise, and if so, the precise terms of the promise. Therefore, Merchants' motion for summary judgment will be denied with respect to the Pro Shop Defendants' counterclaim alleging breach of contract.[14]

As an alternative to their breach of contract claim, the Pro Shop Defendants allege an unjust enrichment claim.

"Unjust enrichment is an equitable quasi-contract cause of action, imposing liability where there is no enforceable contract between the parties 'but fairness dictates that the plaintiff receive compensation for services provided.'" *Cacciamani*

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[13] *See* Merchants' Supplemental Mot. for Partial Summ. J. at 11 (stating "Merchants made no promises to pay the Pro Shop Defendants under any circumstances, nor did Merchants promise the Pro Shop Defendants that JFOV would not default on the terms of the loan documents.").

[14] As noted in footnote 10, Merchants offered no affidavit to support its argument that it is entitled to summary judgment on The Pro Shop Defendants' breach of contract claims. Therefore, even if the Court did not consider the Pro Shop affidavits filed elsewhere, Merchants could not succeed on its motion for summary judgment on the breach of contract claims.

& *Rover Corp. v. Banco Popular de Puerto Rico*, 61 V.I. 247, 251 (V.I. 2014). "To recover for unjust enrichment, a plaintiff must prove '(1) that the defendant was enriched, (2) that such enrichment was at the plaintiff's expense, (3) that the defendant had appreciation or knowledge of the benefit, and (4) that the circumstances were such that in equity or good conscience the defendant should return the money or property to the plaintiff.'" *Id.*, 61 V.I. at 251 n.2 (quoting *Walters v. Walters*, 60 V.I. 768, 776 (V.I. 2014)).

The Pro Shop Defendants allege that Merchants was enriched because Pro Shop completed construction of the villa pursuant to the April 2007 agreement with Merchants, but Merchants failed to pay more than $600,000 in construction invoices, and Merchants was aware the villa had been completed.[15]

Although Merchants requests summary judgment on all counterclaims, it gives the unjust enrichment claim scant attention. It appears to treat the unjust enrichment claim as only a component of the Pro Shop Defendants' equitable subordination claim instead of a wholly separate claim. Paradoxically, it argues "Lending money for development of property does not amount to unjust enrichment and is simply a routine business practice of Merchants." Merchants' Reply to Supplemental Mot. for Partial Summ. J. at 11. As the party moving for summary

[15] The Pro Shop Defendants' unjust enrichment claim presents an interesting question: Can the Pro Shop Defendants recover under an unjust enrichment theory where Merchants does not own the subject property, but has only a security interest in it? To succeed, the Pro Shop Defendants must prove that their work in completing the villa enriched Merchants in some way, despite the fact that the property is owned by another entity (JFOV) and that the money or property should be returned to the Pro Shop Defendants. However, because Merchants failed to meet its prima facie summary judgment burden, the Court need not evaluate this aspect of the Pro Shop Defendants' claim at this juncture.

judgment, Merchants must "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). It has not made this showing in relation to the Pro Shop Defendants' unjust enrichment claim.[16] Accordingly, summary judgment will be denied on the unjust enrichment claim.

IV. Conclusion.

The Pro Shop Defendants' construction liens are not enforceable against the Property and as a result they have no priority over Merchants' mortgage lien. Therefore, Merchants is entitled to summary judgment on the Pro Shop Defendants' counterclaim that seeks to have the Merchants' lien subordinated to Pro Shop's.

Merchants has not met its burden to prove that it is entitled to summary judgment on the Pro Shop Defendants' counterclaims seeking damages for breach of contract or unjust enrichment. Therefore, summary judgment will be denied as to the counterclaims for breach of contract and unjust enrichment.

[16] In a single sentence in its summary judgment argument, Merchants argues the statute of limitations bars the unjust enrichment claim if the Court finds that claim sounds in tort. The Pro Shop Defendants' unjust enrichment claim is based on an alleged promise or agreement, a quasi-contract theory. Additionally, the Supreme Court of the Virgin Islands recently described unjust enrichment as a claim that "sounds in contract." *Vanterpool v. Gov't of the Virgin Islands*, No. 2013-0072, 2015 V.I. Supreme LEXIS 23 at *42 (V.I. Aug. 10, 2015) (explaining that "[a] cause of action for quantum meruit is one that sounds in contract") and *id.* at 40 n.16 ("'quantum meruit' and 'unjust enrichment' refer to the same cause of action). Accordingly, the Pro Shop Defendants' unjust enrichment claim sounds in contract, not tort.

The Court will enter an Order consistent with this Opinion.

Dated: October 2, 2015

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

By:
DONNA D. DONOVAN
Court Clerk Supervisor 10/2/2015