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Re: Prestancia Management Group, Inc. v. Virginia Heritage
Foundation, II LLC, et al.
C.A. No. 1032-S
Date Submitted: April 1, 2005

Dear Counsel:

This case is about a real estate investment that is going awry. The Plaintiff alleges that it was induced by knowingly false misrepresentations to invest in the project. Because the Plaintiff has not set forth an equitable claim and has not

demonstrated that the law courts cannot provide an adequate remedy, this Court lacks subject matter jurisdiction and, accordingly, this action must be dismissed.

I. FACTS¹

Plaintiff Prestancia Management Group, Inc. (“Prestancia”), a Florida corporation with experience in real estate investment and management,² entered into a contract with Defendant Scott Luellen and Defendant Virginia Heritage Foundation II, LLC (“VHF”), a Virginia limited liability company controlled by Defendant Scott Luellen, (collectively, the “Defendants”), to invest in the development of an 83-acre unimproved parcel known as the “Smoot Property” in Seaford, Sussex County, Delaware.³

VHF agreed to purchase the Smoot Property on October 10, 2003.⁴ The Smoot Contract required VHF to close within 30 days after satisfaction (or waiver) of the various contingencies, but in no event later than two years after execution.⁵

¹ The “facts” are more accurately described as well-pled allegations from the Plaintiff’s First Amended Verified Complaint for Declaratory Judgment and Equitable Relief (the “Amended Complaint”) and documents referenced therein.

² Amended Compl., at ¶ 4.

³ HJK Family/Middleburg, LLC (“HJK”), Bryan T. Brooks, Wm. I. Smoot, Rebecca S. Moore, and Ann S. Cowin are also named defendants because of various interests that they are alleged to have in the Smoot Property.

⁴ Agreement for Purchase and Sale of Real Property, dated October 10, 2003 (the “Smoot Contract”), Amended Compl., Ex. A.

⁵ Smoot Contract, at ¶ 6(a).

The contractual contingencies included rezoning and subdivision approval for at least 115 residential lots.⁶

Sometime after entering into the Smoot Contract, the Defendants promoted an investment opportunity under which, in exchange for an investment of \$500,000, an investor could receive a \$2,000,000 preferential return plus its initial investment back (a total of \$2,500,000) upon the resale of the Smoot Property.⁷ In late September 2004, VHF and Luellen offered this opportunity to Prestancia. In presenting this offer, VHF and Luellen made various representations. The relevant representations are listed below:

- (1) [VHF's] contract to purchase the property was executed on October 15, 2003, and was scheduled for closing on October 15, 2005 or 30 days after any and all governmental approvals, whichever comes first;
- (2) the [Smoot Property] is situated within the City of Seaford city limits . . . ;
- (3) City of Seaford officials are enthusiastic about the development and have rezoned the [Smoot Property] from C-2 to R-1;
- (4) the City of Seaford has given final approval to a subdivision site plan that consists of a minimum of 115 residential lots, in satisfaction of the condition set forth in ¶ 5(B) of the Smoot Contract;

⁶ *Id.* at ¶ 5(a), (b).

⁷ Amended Compl., at ¶ 16. It is likely that the Defendants intended to “flip” the Smoot Property after receiving the necessary approvals.

(5) all State of Delaware approvals, and the approvals of any political subdivisions thereof, for construction of subdivision improvements, residential improvements, public utilities, rights of way to and/or on the Smoot Property . . . have been obtained, and there exists no governmental impediments, conditions or requirements that must be met by [VHF] . . . except building permits, individual water tap fees, and other customary fees associated with the construction of residential improvements in the City of Seaford and/or Sussex County, Delaware;

(6) [VHF] owns the purchaser's rights in and to the Smoot Contract to purchase the Smoot Property and the purchaser's rights thereunder are not subject to the interest of any third party;

(7) the sale of the lots would occur within 120 days, yielding [Prestancia] a return of 400% in that period of time.⁸

Prestancia, although in the business of "real estate investment, management and operations,"⁹ alleges that it relied on VHF and Luellen's "skill, expertise, land development and marketing abilities"¹⁰ to deliver its promised 400% return and that, based on the Defendants' representations, it believed that "the sale of the Smoot Property by VHF was imminent."¹¹

⁸ *Id.* at ¶ 18. A 400% return in 120 days is equivalent to an annualized return of 1,200%. It is fair to characterize Prestancia's Amended Complaint as one focused more on obtaining the preferential payment than on recouping its investment.

⁹ *Id.* at ¶ 4.

¹⁰ *Id.* at ¶ 17.

¹¹ *Id.* at ¶ 21.

On October 11, 2004, Prestancia wire-transferred \$500,000 to VHF and, in consideration, received a Partial Transfer and Assignment of Real Estate Contract (the “Assignment Agreement”)¹² and a Security Agreement.¹³ In the Assignment Agreement, VHF transferred Prestancia “an undivided 24% interest in and to [VHF’s] rights, title and interest as purchaser in and to the Smoot Contract”¹⁴ and the right to a preferential payment of \$2,500,000 (including reimbursement of the investment).¹⁵ The preferential payment is to be made upon the resale of the Smoot Property. The Assignment Agreement also contains a reversion clause, under which, if after 240 days (June 8, 2005) from the effective date of the Assignment Agreement, Prestancia has not received its \$2,500,000 payment, it will be repaid its original \$500,000 investment with 3% interest.¹⁶ As with its earlier representations, VHF, in the Assignment Agreement, warranted that the Smoot Property had been zoned to R-1 by the City of Seaford (in satisfaction of the rezoning contingencies of the Smoot Contract); that the City of Seaford had given final approval to a subdivision site plan authorizing at least 401 residential lots;

¹² Amended Compl., Ex. B.

¹³ Amended Compl., Ex. C.

¹⁴ Assignment Agreement, at ¶ 2.

¹⁵ *Id.* at ¶ 3.

¹⁶ *Id.* at ¶ 4.

that the State of Delaware had given VHF all necessary approvals; that utility service had been secured; and that VHF owned a 100% interest in the Smoot contract.¹⁷

Under the Security Agreement VHF pledged as collateral for Prestancia's investment:

all of [VHF's] interest in and to the proceeds of the transfer, sale, assignment or hypothecation of (i) the transfer, sale, assignment or hypothecation by [VHF] of the Smoot Contract . . . , (ii) the proceeds of the transfer, sale, assignment or hypothecation by [VHF] of any equitable right, title or interest in and to the [Smoot Property]¹⁸

Additionally, VHF represented that it owned the collateral described above, had the right to transfer its interest therein, and that the collateral was not subject to the claim of any third party.¹⁹

Contrary to the Defendants' representations: (1) VHF had "executed and delivered to HJK an assignment of part *or all* of VHF's purchaser's rights in the Smoot Contract" before October 11, 2004;²⁰ (2) the City of Seaford had not rezoned the Smoot Property to R-1 and had not given final approval to the

¹⁷ *Id.* at ¶ 5.

¹⁸ Security Agreement, at ¶ 1.

¹⁹ *Id.* at ¶ 4(A).

²⁰ Amended Compl., at ¶ 30(a) (emphasis in original). The Amended Complaint alleges that VHF's rights in the Smoot Contract were assigned to HJK on June 4, 2004.

subdivision site plan; and (3) the various Delaware governmental agencies' approvals had not been obtained.²¹ Thus, the conditions precedent to closing under the Smoot Contract had not been satisfied and, therefore, closing did not occur by November 10, 2004, as the Defendants had represented.²²

Prestancia did not receive its preferential payment or the return of its investment (the \$2,500,000 payment) within 120 days (February 8, 2005) of October 11, 2004.²³ Prestancia alleges that its reasonable reliance on the false representations set forth earlier and other representations as to Luellen's skill and experience,²⁴ caused it to make this investment.²⁵

II. CONTENTIONS

Prestancia sets forth its claims in six counts: (1) Count I seeks a declaratory judgment that it and VHF together own 100% of the Smoot Contract, that it is the owner of an undivided 24% interest in the Smoot Contract, and that any interest HJK has in the Smoot Contract is inferior to Prestancia's; (2) Count II seeks both

²¹ *Id.* at ¶ 30(b).

²² *Id.* at ¶ 30(c).

²³ *Id.* at ¶ 30(d). Nor has it subsequently been paid.

²⁴ *Id.* at ¶ 34.

²⁵ There is no allegation in the Amended Complaint that Prestancia's \$500,000 investment (plus 3% interest) will not be (or is not likely to be) returned when the 240-day period contained in the reversion clause expires on June 8, 2005.

reformation of the Assignment Agreement to eliminate the 240-day reversion clause and specific performance by VHF of all conditions precedent to the closing of the Smoot Contract; (3) Count III seeks rescission of Assignment Agreement; (4) Count IV alleges that there is a fiduciary relationship between VHF and Prestancia and asks this Court to impose a constructive trust on the Smoot Contract and the proceeds of any sale by VHF of the Smoot Property; (5) Count V seeks damages (including punitive damages) against VHF for the fraud perpetrated against Prestancia; and (6) Count VI seeks foreclosure of Prestancia's security interest under the Security Agreement.

The Defendants have moved to dismiss for lack of subject matter jurisdiction under Court of Chancery Rule 12(b)(1). The Defendants argue that the relief that Prestancia seeks is not equitable in nature and that Prestancia has adequate remedies at law.

Prestancia has opposed the Defendants' motion to dismiss by arguing that many of its claims are equitable in nature or cannot adequately be remedied in the law courts and those claims that are not equitable are within the scope of the "clean-up doctrine," which enables this Court, once it has subject matter jurisdiction, to resolve those legal claims that constitute, in part, the dispute.

III. ANALYSIS

This Court is of limited jurisdiction.²⁶ “It is the Plaintiff’s burden to demonstrate that equitable subject matter jurisdiction exists. Subject matter jurisdiction is determined from the face of the complaint as of the time it was filed, with all material factual allegations assumed to be true.”²⁷ In determining whether equitable jurisdiction exists, this Court will look beyond the language of a complaint and examine the substance and nature of the relief being sought.²⁸ Once the Court determines that equitable relief is warranted, “even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine.”²⁹

²⁶ See 10 *Del. C.* § 342 (“The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.”).

²⁷ *Block Fin. Corp. v. Inisoft Corp.*, 2003 WL 136182, at *2 n.4 (Del. Ch. Jan. 7, 2003) (internal quotations and citations omitted). Prestancia asserts that this Court has jurisdiction under 10 *Del. C.* § 341, which provides: “The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity.”

²⁸ See *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987) (“Chancery jurisdiction is not conferred by the incantation of magic words. Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court . . . from a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate.”).

²⁹ *Beal Bank SSB v. Lucks*, 2000 WL 710194, at *2 (Del. Ch. May 23, 2000) (internal quotations omitted).

The inquiry into whether this Court has subject matter jurisdiction necessitates a claim-by-claim analysis of Prestancia's Amended Complaint.

A. Count V: Damages

Prestancia's claim for damages for breach of contract or intentional fraud in the inducement does not provide this Court with subject matter jurisdiction.³⁰ Damages for breach of a contract or fraud area available at law. Thus, Prestancia's claim for damages clearly does not confer subject matter jurisdiction.³¹

B. Count II: Reformation of the Assignment Agreement and Specific Performance

Count II seeks reformation of the Assignment Agreement and specific performance of the contract for the purchase of the Smoot Property. More precisely, Prestancia asks the Court to delete the 240-day reversion clause³² and to order the Defendants "to specifically perform all conditions precedent to the closing of the Smoot Contract and to consummate the purchase of the Smoot Property according to the terms of the Smoot Contract."³³

³⁰ See, e.g., *Heston v. Miller*, 1979 WL 174446, at *2 (Del. Ch. Oct. 11, 1979).

³¹ This Court has not awarded punitive damages. See, e.g., *Pac. Ins. Co. v. Higgins*, 1993 WL 133181, at *6 (Del. Ch. Apr. 15, 1993) (citing sources in support of this principle). I decline Prestancia's invitation to begin to do so.

³² See *supra* text accompanying note 16.

³³ Amended Compl., at ¶ 45.

Although Prestancia couches its claim under the doctrine of reformation, the heart of what it is seeking does not lie in reformation.

Reformation is an equitable remedy through which a court of equity may modify or reform a written contract to reflect the true intent of the contracting parties The remedy is appropriately employed when an agreement is made or a transaction entered into but where, because of fraud or mutual mistake, the contract or instrument reflecting such agreement or transaction *does not express the actual agreement of the parties*. In that instance, a court of equity may order the instrument reformed so that it represents the agreement or transaction actually intended.³⁴

Prestancia does not present a traditional claim for reformation because the Assignment Agreement between VHF and Prestancia accurately expresses the bargained-for agreement between the parties.³⁵ Presumably, the reversion clause is in the Assignment Agreement because of the risks associated with closing the Smoot Contract. The reversion, by its terms, limits the temporal nature of the transactional risk to which Prestancia is exposed. While perhaps, through

³⁴ DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §12-5, at 12-64.3 to 12-64.4 (2005) (footnotes omitted) (emphasis added).

³⁵ Prestancia approaches the limits of our acceptance of inconsistent pleading. In its reformation claim, it seeks to avoid the Defendants' duty to repay the money which Prestancia advanced, but, in its rescission claim, it seeks to set aside the Assignment Agreement in order to get its money back. Thus, it has asserted claims seeking to excise the Defendants' contractual obligation to repay the funds in one count and then to require the Defendants to repay the sums in another count of the Amended Complaint.

Defendants' fraud, the risk was greater than Prestancia anticipated, the Court is unable to reform the Assignment Agreement to reflect the parties' intent because the Assignment Agreement accurately expressed the parties' intent when they entered into their contractual relationship: if the Smoot Property is not acquired and resold by a date certain, VHF will return Prestancia's investment with interest.

Even if Prestancia had alleged a viable reformation claim, specific performance of a reformed Assignment Agreement would not be an available remedy. First, surveying and site layout, engineering, and all the other work that is necessary to secure land use approval require the developer to exercise informed discretion. Thus, the Defendants' obligations under a reformed Assignment Agreement would be so imprecise as to make judicial supervision impracticable.³⁶ Second, specific performance will not be ordered if damages would be an adequate remedy.³⁷ In this instance, Prestancia does not focus on acquiring a parcel of real

³⁶ See, e.g., *Ryan v. Ocean Twelve, Inc.*, 316 A.2d 573, 575 (Del. Ch. 1973) (describing the difficulties in ordering specific performance of a construction agreement); *N. Del. Indus. Dev. Corp. v. E. W. Bliss Co.*, 245 A.2d 431, 432 (Del. Ch. 1968).

³⁷ See, e.g., *Collins v. Am. Int'l Group, Inc.*, 1998 WL 227889, at *6 (Del. Ch. Apr. 29, 1998) ("The remedy of specific performance, however, 'is designed to take care of situations where the assessment of money damages is impracticable or somehow fails to do justice.'") (quoting *Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 546 (Del. 1954)).

estate;³⁸ instead, it focuses on obtaining the preferential payment. Damages as the law courts may award for Defendants' breach of the Assignment Agreement or for their intentional fraud in inducing Prestancia to enter into the Assignment Agreement would be an adequate remedy and would "protect the expectations" of Prestancia in entering into its relationship with the Defendants.

Accordingly, neither Prestancia's claim for reformation of the Assignment Agreement nor its claim for specific performance of that agreement provides this Court with subject matter jurisdiction.

C. *Count III: Rescission*

Prestancia seeks rescission of its agreement with VHF,³⁹ as it alleges that it was induced to enter into the transaction through fraudulent representations.

³⁸ It is routinely accepted that the acquisition of real estate is "unique" and, thus, specific performance of a contract for the purchase of real estate is an appropriate exercise of this Court's equitable jurisdiction. *See, e.g., WOLFE & PITTINGER, supra* note 34, §12-3, at 12-36. Prestancia, however, has no contractual right to acquire the Smoot Property, as such. At most, it has a security interest in rights established by the Smoot Contract, a contract to which is not a party. The Defendants' ultimate obligation to Prestancia is the payment of money.

³⁹ A claim for rescission and a claim for damages may create an election of remedies quandary. *See Elysian Fed. Savs. Bank v. Sullivan*, 1990 WL 20737, at *3 (Del. Ch. Mar. 2, 1990) ("That doctrine holds that where a plaintiff has two 'inconsistent remedies' available for redress of a single right, he must elect one of those remedies. An example of 'inconsistent remedies' is when a party is induced to enter a contract through fraud. Such a plaintiff has a choice between money damages or rescission—inconsistent remedies because they are contradictory to one another.") (citations omitted).

The subject matter jurisdiction of the Court of Chancery over claims for rescission is limited to actions for *equitable* rescission, or cancellation. The Court of Chancery has noted that, while it is perhaps not commonly appreciated that rescission is a remedy awarded by law courts, *legal* rescission may be awarded by Superior Court. Thus, the Superior Court may, for example, rescind a contract—that is, declare it invalid—and enter an order restoring plaintiff to his original condition by awarding money or other property of which he had been deprived.⁴⁰

Accordingly, the jurisdiction question depends on whether Prestancia seeks legal or equitable rescission.

Equitable rescission, . . . , which is otherwise known as cancellation, is a form of remedy in which, in addition to a judicial declaration that a contract is invalid and a judicial award of money or property to restore the plaintiff to his original condition is made, further relief is required. Thus, the remedy of equitable rescission typically requires that the court cause an instrument, document, obligation or other matter affecting plaintiff's rights and/or liabilities to be set aside and annulled, thus restoring plaintiff to his original position and reestablishing title or recovering possession of property.⁴¹

Prestancia, through its claim for rescission, only asks this Court to set aside its agreement with VHF and to order repayment of the funds it advanced. Since a court of law may rescind the Assignment Agreement and order repayment of the \$500,000, Prestancia does not seek a remedy that requires the exercise of this

⁴⁰ WOLFE & PITTENGER, *supra* note 34, §12-4[a], at 12-51 (footnotes and internal quotations omitted) (emphasis in original).

⁴¹ *E.I. duPont de Nemours & Co. v. HEM Research, Inc.*, 1989 WL 122053, at *3 (Del. Ch. Oct. 13, 1989).

Court's equitable powers. Thus, Prestancia's claim is one for legal rescission, which would be an adequate remedy at law, and this Court does not have subject matter jurisdiction of the claims alleged in Count III.⁴²

D. Count IV: Constructive Trust

Prestancia alleges that it relied on Luellen and VHF to purchase, and then to sell, the Smoot Property because Luellen was held out as "skilled in and possessed of expertise and experience in the development and marketing of residential subdivisions."⁴³ Because of this reliance and dependence, Prestancia argues that Luellen and VHF owed it fiduciary duties, which were violated by the Defendants' misrepresentations and their failure to move forward with acquisition of the Smoot Property. Accordingly, Prestancia seeks "a constructive trust on the Smoot Contract and on all the proceeds of the sale of the Smoot Property for the benefit of [Prestancia]."⁴⁴

⁴² As noted, Prestancia does not allege in its Amended Complaint that there is reason to believe that it will not receive its original \$500,000 back when the 240-day reversion period expires.

⁴³ Amended Compl., at ¶ 34.

⁴⁴ *Id.* at ¶ 49. Prestancia relies upon the existence of a fiduciary relationship as the foundation for imposition of a constructive trust. This is made clear by its framing of the claim:

49. The Assignment created a fiduciary relationship between [Prestancia] and VHF by which VHF owed [Prestancia] the fiduciary responsibilities of good faith, fair dealing and acting in [Prestancia's] best interest with regard to the Smoot Contract and the Assignment. Defendant VHF breached its fiduciary responsibilities to Plaintiff thereby causing [Prestancia] irreparable harm and

While a sufficiently alleged claim for a constructive trust would provide this Court with subject matter jurisdiction over the matter, Prestancia has not pled nonconclusory facts that show that the Defendants owed it fiduciary duties and, therefore, its remedy against the Defendants is one under the contract itself.

A fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another. The relationship connotes a dependence. The traditional relationships recognized by equity as “special” are express trustees and corporate officers and directors. Delaware has recognized several other relationships which also carry the “special” nature of a fiduciary relationship, including: general partners; administrators or executors; guardians; and, in special circumstances, joint venturers or principals and their agents. The existence of a principal/agent relationship does not, in and of itself, give rise to a fiduciary relationship. A fiduciary relationship will arise when there is an element of confidentiality or a joint undertaking between the principal and agent. The hallmark of this form of special principal/agent relationship is when matters are peculiarly within the knowledge of the agent.⁴⁵

[Prestancia] seeks an order of this Court imposing a constructive trust on the Smoot Contract and on all of the proceeds of the sale of the Smoot Property for the benefit of [Prestancia].

Id.

⁴⁵ *Metro Ambulance Inc. v. E. Med. Billing, Inc.*, 1995 WL 409015, at *2-3 (Del. Ch. July 5, 1995) (citations and internal quotations omitted).

A fiduciary relationship “generally requires confidence reposed by one side and domination and influence exercised by the other.”⁴⁶ Prestancia has not alleged facts that show that such a “special” relationship existed between it and the Defendants or that it was “influenced” by VHF. After all, Prestancia is a sophisticated party whose “business is real estate investment, management and operations.”⁴⁷ Additionally, the contract between VHF and Prestancia is comprehensive. Finally, there are no allegations that the negotiations were one-sided. “[W]hile some cases in Delaware have found certain aspects of a commercial relationship to implicate fiduciary duties, these cases should not be read so broadly as to engulf in fiduciary duties ordinary commercial relationships.”⁴⁸ In the case at hand, “[n]o special knowledge, element of confidentiality or dependence exists which would lead me to conclude the parties had a fiduciary relationship.”⁴⁹ The relationship between Prestancia and the

⁴⁶ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 2005 WL 1048802, at *8 (Del. Ch. Apr. 1, 2005) (internal quotations omitted).

⁴⁷ Amended Compl., at ¶ 4.

⁴⁸ *Wal-Mart Stores*, 2005 WL 1048802, at *8; *see also BAE Sys. N. Am., Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *7 (Del. Ch. Aug. 3, 2004).

⁴⁹ *Metro Ambulance, Inc.*, 1995 WL 409015, at *3 (emphasis added).

Defendants was a bargained-for commercial relationship between sophisticated parties, a relationship that does not give rise to fiduciary duties.⁵⁰

Because no fiduciary relationship exists between the Defendants and Prestancia and because the existence of such a relationship is critical to the claim framed by Prestancia for a constructive trust, Prestancia has not pled an entitlement to that equitable remedy and, thus, has failed to allege sufficiently that this Court has subject matter jurisdiction. Instead, Prestancia must seek a remedy against the Defendants under the contract itself.⁵¹

⁵⁰ Prestancia argues that it placed its “trust” in Luellen and VHF to close on the Smoot Property. However, imposing fiduciary relationships between contracting parties whenever “trust” is alleged would create a fiduciary relationship every time fraud is alleged, as reliance (*i.e.*, trust) is a necessary element of fraud. Indeed, many ordinary contractual relationships involve trust in the specialized knowledge or skill of one party to the agreement—for example, replacing brake pads or heart valves. This would be a broad, and unsuitable, expansion of this Court’s jurisdiction and the principles of fiduciary duty.

⁵¹ Prestancia has not, in its Amended Complaint, alleged that the Defendants’ fraudulent conduct—in the absence of fiduciary duties—would entitle it to the imposition of a constructive trust. “A constructive trust is an equitable remedy imposed to compel a person who wrongfully has obtained or asserted title to property, by virtue of fraud . . . , to hold such property in trust for the person by whom in equity it should be owned and enjoyed and convey it to that rightful owner.” WOLFE & PITTENGER, *supra* note 34, §12-7[b], at 12-74 to 12-75. Prestancia only seeks a constructive trust as to the Smoot Contract (and any proceeds derived from it). Prestancia has not alleged that its funds were used in pursuit of the Smoot Contract and it has not alleged that the Defendants acquired rights in the Smoot Contract as the result of fraudulent conduct directed at it. Moreover, although it may be that the \$500,000 payment made by Prestancia to the Defendants was procured wrongfully through fraud, Prestancia has not sought a constructive trust with respect to those funds. Thus, it may be—but it is not necessary to decide—that Prestancia had an equitable claim which could have been—but was not—asserted here.

E. Count VI: Foreclosure of Security Interest

By Count VI of its Amended Complaint, Prestancia seeks “foreclosure of its security interest” in the Smoot Contract.⁵² However, the Security Agreement contains a forum selection clause which provides: “The jurisdiction for *any* controversy arising [under the Security Agreement] shall be in the courts of competent jurisdiction of Loudoun County, Virginia, to the fullest extent permissible by Virginia law.”⁵³ The Defendants assert that the Security

⁵² See *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 735 (Del. 1983), for the proposition that foreclosure may be “by either a bill in equity, filed in the Court of Chancery, or at law by *scire facias sur mortgage*.” One may wonder whether any question involving foreclosure of Prestancia’s security interest in the Smoot Contract is ripe for judicial determination. The Amended Complaint adequately pleads facts that, if true, would lead one to believe that VHF breached an express warranty to the Security Agreement (*i.e.*, that it was the sole and exclusive owner of the rights of the purchaser under the Smoot Contract, *see* Security Agreement, at ¶ 4(A)) and that Prestancia, as a result of that default, might be entitled to foreclose on its interest. In the Security Agreement, VHF pledges “all of [VHF’s] interest in and to the *proceeds* of the transfer, sale, assignment or hypothecation” of the Smoot Contract and the Smoot Property. Security Agreement, at ¶ 1 (emphasis added). Although VHF may have breached the Security Agreement, it has not been alleged that there currently are any proceeds (*i.e.*, collateral) on which to levy. One may also question whether this claim should be viewed as one in foreclosure or whether one must first consider the substantive claim (and not the potential remedy of foreclosure). The substantive claim alleges a simple breach of warranty: “VHF has breached the expressed warranty set forth in the Security Agreement that it was the sole and exclusive owner of the rights of the purchaser under the terms of the Smoot Contract. That warranty was material. Plaintiff is entitled to the foreclosure of its security interest in and to the Smoot Contract according to the terms of the Security Agreement.” Amended Compl., at ¶¶ 53-54. Count VI will be treated as a foreclosure claim simply because that is how the parties addressed it and because it makes little, if any, difference in the disposition.

⁵³ Security Agreement, at ¶ 8(C) (emphasis added). By way of comparison, the Assignment Agreement has a choice of law clause that designated the laws of Virginia to govern that contract, but it does not contain a forum selection clause. *See* Assignment Agreement, at ¶ 9.

Agreement's forum selection clause precludes the exercise of subject matter jurisdiction over Court VI.⁵⁴

Delaware courts generally “give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties’ contractual designation.”⁵⁵ While there may be exceptions to the deference that Delaware courts accord forum selection clauses, none of those possible exceptions

⁵⁴ Although the parties have argued about whether the forum selection clause controls this Court's subject matter jurisdiction (a Court of Chancery Rule 12(b)(1) inquiry, *see Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999)), it may be that a motion to dismiss based on a forum selection clause is more appropriately considered under Court of Chancery Rule 12(b)(3) as a motion to dismiss for improper venue. *See Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000) (“A motion to dismiss based on a forum selection clause fits neatly within Rule 12(b)(3). The fact is that an inquiry into whether parties have chosen an exclusive venue by contract is not materially different than determining whether statutory or common law dictates a different venue than the plaintiff has chosen. Quite plainly, Court of Chancery Rule 12(b)(3) focuses on whether the plaintiff has sued in a permissible venue. It seems highly artificial to construe Rule 12(b)(3) as applying only when a statutory or common law bar to the court's venue is alleged, and to analyze a motion to dismiss based on a forum selection clause under Rule 12(b)(3) to determine if the complaint states a claim upon which relief may be granted *by this particular court*. Thus I agree with the majority approach taken by the federal courts, which construes the identical federal counterpart to this court's Rule 12(b)(3) as applying to dismissal motions premised on a forum selection clause.”) (footnotes omitted) (emphasis in original). Any distinctions between Rule 12(b)(1) and Rule 12(b)(3) motions are not outcome determinative here.

⁵⁵ WOLFE & PITTENGER, *supra* note 34, §5-4[a], at 5-53 to 5-54; *see also In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *1 (Del. Ch. Apr. 18, 2001) (“[B]ecause of the forum selection clause, only a Delaware court can handle all the claims between IBP and Tyson, a factor favoring procession of this case here on the expedited schedule that has already been set.”).

is applicable in this case.⁵⁶ The issue, as a matter of contract, is whether the parties' forum selection clause is permissive or mandatory.⁵⁷ In *Eisenbud v. Omnitech*,⁵⁸ this Court, in determining whether a forum selection clause⁵⁹ was permissive or mandatory, observed that "parties must use express language clearly indicating the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action. . . . [A]bsent clear language, a

⁵⁶ These exceptions may include (1) if "enforcement would be unreasonable and unjust under the circumstances," WOLFE & PITTENGER, *supra* note 34, §5-4[a], at 5-58, and (2) if the forum selection clause "was procured by fraudulent inducement." *Id.* at 5-59. Given that VHF is a Virginia company and that foreclosure of the Security Agreement requires a judgment on personal property (*i.e.*, the proceeds of the Smoot Contract), it is certainly not "unreasonable or unjust" that this matter would be litigated in Virginia. Additionally, while Prestancia alleges that the agreement itself was procured by fraudulent inducement, it presents no allegation that the forum selection clause was procured by fraudulent inducement. *See Double Z Enters., Inc. v. Gen. Marketing Corp.*, 2000 WL 970718, at *3 (Del. Super. June 1, 2000) ("To invalidate a forum selection clause on the grounds of fraud, the party seeking to invalidate the clause must demonstrate that the clause itself was procured by fraud.").

⁵⁷ As with the most basic of contractual inquiries, the question is what did the parties intend, a question to be answered from the perspective of the objective and reasonable third person. *See The Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 2694912 (Del. Ch. Nov. 16, 2004).

⁵⁸ 1996 WL 162245 (Del. Ch. Mar. 21, 1996).

⁵⁹ The forum selection clause in question in *Eisenbud* read:

The parties hereto agree that if any disagreement shall arise between the Shareholders hereunder, the same shall be resolved pursuant to the laws of New Jersey. As the corporation maintains its principal office in Bergen County, New Jersey, the parties further agree that the Court having competent jurisdiction over all legal and equitable matters shall be the Superior Court of the State of New Jersey in Bergen County, New Jersey.

Id. at *1. This venue provision, unlike the choice of laws provision in the same paragraph, lacks the exclusiveness provided by the word "any" in the Security Agreement. The venue provision in *Eisenbud* was read as confirming that the New Jersey court would be an appropriate court, but not the only one.

court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive.”⁶⁰ While Prestancia argues that the forum selection clause in the Security Agreement is permissive, the Court concludes that, because of its use of the word “any,” a word that, in this specific context, connotes all-encompassing inclusion, the forum selection clause in the Security Agreement is distinguishable from the forum selection clause in *Eisenbud*. The forum selection clause in the Security Agreement is mandatory, as it expressly requires any dispute under the Security Agreement to be litigated in Loudoun County, Virginia.⁶¹ Therefore, dismissal of Count VI under the forum selection cause is appropriate.⁶²

F. *Count I: Declaratory Judgment Concerning Ownership of the Smoot Contract*

“A declaratory judgment is, of course, not a purely equitable remedy, as courts of law have the power to issue declarations.”⁶³ “It has long been recognized that the Declaratory Judgment Act did not expand the jurisdiction of this court or

⁶⁰ *Id.*

⁶¹ Prestancia agrees that foreclosure (or the exercise of its rights as creditor protected by a security agreement) involves a dispute under the Security Agreement.

⁶² Unlike Prestancia’s other claims, this conclusion requires dismissal without the right to transfer to the law courts of Delaware. As to this claim, the forum selection provision precludes consideration by any Delaware court. Even though any “foreclosure” effort pursuant to the Security Agreement must start within Virginia’s judicial system, a court having jurisdiction over a dispute involving the Assignment Agreement would, if supported by the evidence, have the power to order relief with respect to the Smoot Contract, and perhaps the Smoot Property (or the associated proceeds), that would, in substance, be tantamount to foreclosure.

⁶³ *Jacobsen v. Ronsdorf*, 2005 WL 29881, at *2 (Del. Ch. Jan. 6, 2005).

alter the jurisdictional relationship between this court and the Superior Court. Thus, a complaint for declaratory judgment does not fall within this court's subject matter jurisdiction unless it concerns equitable subjects, claims or rights or properly contains a claim for equitable relief."⁶⁴

Evaluation of Prestancia's underlying claims⁶⁵ leads to the conclusion that the Court does not have subject matter jurisdiction over Prestancia's request for a declaratory judgment to determine its rights relating to the Smoot Contract. As previously discussed, the claims surrounding ownership of the Smoot Contract are based on relationships that were contractually bargained for and defined and the wrongs asserted by Prestancia may all be remedied in the law courts. The Amended Complaint does not "concern equitable subjects, claims or rights or properly contain[] a claim for equitable relief"⁶⁶ and, therefore, this Court has no subject matter jurisdiction to issue a declaratory judgment.⁶⁷

⁶⁴ *The Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at *4 (Del. Ch. Nov. 9, 2004) (footnotes and internal quotations omitted).

⁶⁵ *See supra* Part III.A-E.

⁶⁶ *The Town of Smyrna*, 2004 WL 2671745, at *4.

⁶⁷ As the Court has determined that none of Prestancia's claims in its Amended Complaint, confers subject matter jurisdiction, the "cleanup doctrine" is inapplicable.

IV. CONCLUSION

In general, Prestancia brings an action for the breach of a commercial contract and for fraud in the inducement; the law courts can provide adequate remedies. It has alleged no cognizable equitable claim. Accordingly, for the reasons set forth above, this Court lacks subject matter jurisdiction over Counts I-V of the Amended Complaint and those counts are dismissed for lack of subject matter jurisdiction unless, within sixty days, Prestancia exercises its right to transfer in accordance with 10 *Del. C.* § 1902. Count VI is dismissed because of the forum selection clause in the Security Agreement and is not amenable to transfer. All dismissals are without prejudice.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-S