EFiled: Nov 06 2020 08:17AM EST
Transaction ID 66086754
Case No. S18C-06-013 RFS

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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November 5, 2020

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RE: *Sweetwater Point, LLC v. Winifred White Kee, the Estate of Margaret F. White, Virginia T. Frazier, and the Estate of Mary W. McMahon*, C.A. No. S18C-06-012 RFS
and
Lehman Brothers Holdings, Inc. v. Winifred White Kee, the Estate of Margaret F. White, Virginia T. Frazier, and the Estate of Mary W. McMahon, C.A. No. S18C-06-013 RFS

DATE SUBMITTED: October 30, 2020

Dear Counsel:

Pending before the Court are motions to dismiss the complaints of the plaintiffs in these two interconnected cases. The parties thoroughly briefed the motions and oral argument took place on July 29, 2020. This is my decision on the pending motions.

I. FACTS

The plaintiffs are Sweetwater Point, LLC, referenced as "Sweetwater" or "Buyer" and Lehman Brothers Holdings, Inc., referenced as "Lehman." The defendants in both cases are Winifred White Kee, the Estate of Margaret F. White, Virginia T. Frazier, and the Estate of Mary W. McMahon, and they are referred to, collectively, as "defendants" or "Sellers." When defendant Winifred White Kee is individually referenced, the short-handed version used is "Kee". Although two lots of land are a part of the factual make-up in the litigation, the dispute mostly involves the lot that is referenced as Parcel 46. The other, less-involved lot, is referenced as Parcel 44.

The background facts are rather well-developed because of extensive litigation in Chancery Court involving the property in dispute.[1] After a ten-day trial, Vice Chancellor Glasscock issued a written decision in *State v. Sweetwater Point, LLC.*[2] That decision narrates this case's intricate factual scenario. Therein, the Vice Chancellor made factual findings and reached legal conclusions on the issue of who holds superior title to Parcel 46. I review below the pertinent facts and conclusions from that decision as well as some of the pleadings filed in the Chancery case to help the reader understand the procedural, legal and factual posture of this case.

During the era when mills abounded in Sussex County, there existed the Doe Bridge Mill and its pond. Doe Bridge Road was in the area; currently, the road is more of a lane. When the

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[1]This Court may take judicial notice of the decision and pleadings in this Chancery Court action in a motion to dismiss. D.R.E., Rule 201(b); *Windsor I, LLC v. CWCapital Asset Management, LLC,* 2020 WL 5417547, * 7 (Del. Sept. 10, 2020); *Newborn v. Christiana Psychiatric Services, P.A.*, 2017 WL 375637, *2 (Del. Super. Jan. 25, 2017); *In re Wheelabrator Technologies Inc. Shareholders Litigation*, 1992 WL 212595, ** 11-12 (Del. Ch. Sept. 1, 1992).

[2] 2017 WL 2257377 (Del. Ch. May 23, 2017) ("*Chancery Sweetwater*").

mill operations stopped, the area reverted to woodlands. Eventually, Houston-White Company ("Houston-White"), a peach basket manufacturer, laid claim to ownership of the property and used it as a wood-lot.

Parcel 46 consists of 63 acres. To the north of this property at issue are state-owned lands where the Stockley Center is located.

The State of Delaware ("the State") and Sweetwater have laid claims to Parcel 46. As the Chancery Court explains:

> By way of the most recent source deeds, the State points to a 1931 deed from Wingate Matthews (the "1931 Matthews Deed"), while Sweetwater has a 2005 deed from Winnie White Kee (the "2005 Deed"). Each deed can be traced to separate, minimally descriptive sheriff's deeds from the latter half of the 19th century. Each chain of title is more or less problematic.
>
> As the facts below will set forth, it is clear to me that from the middle of the 20th century to the very recent past, the State was unaware of its interest in Parcel 46, while Sweetwater's 20th century predecessors-in-title clearly believed they owned Parcel 46 and exerted ownership of it, including through payment of tax assessments. In fact, were the Petitioner *any party other than the State*, which has legislatively shielded itself from claims of adverse possession, this would be a very simple case and I would find that, if by no other basis, Sweetwater held title to Parcel 46 by way of adverse possession by its predecessors-in-title.[3]

In 1974, Sussex County undertook a tax reassessment; that is when the land at issue came to be labeled Parcel 46. The County taxed this 63-acre parcel to Houston-White. Throughout the latter half of the 20th Century, Houston-White paid taxes on the land and timbered it.

In 1989, the State began planning a 250-acre nature preserve on the lands where the Stockley Center is located. In connection with that endeavor, the State sent a letter to Houston-White as an adjoining landowner. In 1991, Charles Ronald Vickers ("Vickers"), a State

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[3] *Id.* at * 3 (italics in original; footnote omitted).

employee, drafted and recorded Articles of Dedication ("Articles of Dedication") that created the Stockley Center Nature Preserve ("the Nature Preserve"). Included with these documents was a drawing of the Nature Preserve's boundaries that Vickers prepared ("the Nature Preserve Drawing"). Part of the Nature Preserve encompassed parts of Parcel 46. The Articles of Dedication were recorded with the public records of Sussex County.

In 1997, Houston-White executed a deed conveying Parcel 46 to J. Reese White, Jr., Virginia T. Frazier, and Mary W. McMahon. J. Reese White died that year and Winnie White Kee as well as Harold Purnell, Esquire became co-executors of J. Reese White, Jr.'s estate.

The Sellers reached out to the State about selling Parcel 46 to it. They contacted Vickers. Vickers was aware of the 1931 Matthews Deed that conveyed Parcel 46 to the State. The Chancery Court found that during this time period, Vickers relied on the Nature Preserve Drawing, which did not include all of Parcel 46, and he did not realize there was a dispute as to ownership. Vickers did not mention the 1931 Matthews Deed to the Sellers, there was no deal, and there was no realization on both parties' part that title to Parcel 46 was disputed at this point.

Because Parcel 46 was landlocked, Kee purchased Parcel 44 to provide a means of ingress and egress to Parcel 46. The Sellers cut a lane, felled trees, and installed no trespassing signs on Lot 46. The State did not object. The Sellers listed the property for sale. The State did not object.

In April, 2005, Key, as executrix of the estate of Margaret White, Virginia T. White, and Mary W. McMahon entered into a contract for the sale of Parcel 46 to Oriskany, Inc. At that time, Kee also entered into a contract to sell Parcel 44 to Oriskany, Inc. Oriskany, Inc.'s president was Peter O'Rourke ("O'Rourke"). Ultimately, Oriskany, Inc. transferred its contract

rights to Sweetwater. O'Rourke acted on behalf of Sweetwater, too. Sweetwater arranged for mortgage financing from Lehman.

Sweetwater intended to develop the property and call it Sweetwater Pointe.

During the time period before settlement, red flags regarding ownership of Parcel 46 arose.

On August 1, 2005, Delaware's Department of Natural Resources and Environmental Control ("DNREC") sent a letter to an environmental engineering firm doing work for Sweetwater's land planner that indicated the existence of a dispute over the exact boundary between the Nature Preserve and the proposed development and that stated the dispute needed to be resolved before the environmental engineering firm could proceed further. In their Amended Counterclaim to the Chancery complaint, Sweetwater and Lehman maintain that this letter was sent to an employee of an environmental firm subcontracted by Ken Christenbury ("Christenbury"), an engineer retained by O'Rourke for environmental matters, and they maintain that neither Sweetwater, Lehman, O'Rourke nor Christenbury had knowledge of this letter until after Sweetwater made settlement on Sweetwater Pointe.[4]

In September, 2005, O'Rourke and Christenbury met with Connie Holland ("Holland") of the State Planning Office to discuss environmental concerns. Holland showed them a map displaying State-owned properties in the vicinity that appeared to affect a portion of Sweetwater's development plan. She suggested they meet with Vickers. O'Rourke met with Vickers. The State did not produce a deed or survey that showed ownership of the land. Vickers showed O'Rourke a map that reflected a claim to a small part of the northeastern portion of

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[4]Amended Counterclaim in Chancery action ("Amended Counterclaim") at ¶¶44-46.

Parcel 46. This disputed area, which was smaller than that shown on the Nature Preserve Drawing, would have had minimal impact on Sweetwater's development plan. O'Rourke thus knew of the land dispute but considered the impact on the land he thought was involved too minor to stop settlement. To rephrase, O'Rourke knew there was a title dispute to a portion of the land; he was unaware there was a title dispute to virtually all of the land.

In the meanwhile, Chuck Adams ("Adams"), Sweetwater's surveyor, attempted to confirm with the State the extent of its claims to the area. As the Chancery Court decision explains:

> In response, Adams eventually received a file of materials from the State in September or October of 2005, in which he found a copy of the Articles of Dedication for the Nature Preserve, including the Nature Preserve Drawing, **and the 1931 Matthews Deed.** Adams verified that a sealed copy of the Nature Preserve Drawing was in fact recorded with the Sussex County Recorder of Deeds. When James Fuqua, Sweetwater's attorney, received this information from Adams, he concluded that, the Nature Preserve Drawing notwithstanding, the Nature Preserve covered only Parcel 8, to the north of Parcel 46.[5]

In their Amended Counterclaim filed in the Chancery action, Sweetwater and Lehman explain that Sweetwater's attorney advised Sweetwater that the 1931 Matthews Deed was fatally flawed as a conveyance of Parcel 46; the Articles of Dedication extended only to Parcel 8 and could not be regarded as affecting Parcel 46 without violating 9 *Del. C.* § 9605(f);[6] the Survey

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[5]*Chancery Sweetwater*, at *6 (footnotes and citations omitted; emphasis added).

[6]This statute provides:

> f) The recorder shall not accept for recordation any deed or other instrument affecting real property unless the deed or other instrument contains thereon in a conspicuous place the county tax assessment parcel identification number of the parcel or parcels affected. In all cases where the affected parcel was just created by subdivision, the number of the parcel which was subdivided shall be identified and the number of the newly created parcel or parcels shall be

was not valid because it did not show ascertainable boundaries for a Nature Preserve within Parcel 46; the State consistently had dealt with Houston-White and the sellers as owners of Parcel 46; and in the absence of any asserted claim by the State that it owned Parcel 46, Sweetwater should proceed with settlement rather than forfeit its earnest money deposit and lose its investments in the subdivision approval process. Sweetwater maintains that it went forward with the settlement "[b]ased on the advice of its attorney, the Vickers' Plan, and Holland and Vicker's [sic] characterization of the State's interests as a mere 'boundary line dispute.'"[7]

Lehman provided the funds to purchase Parcels 46 and 44. Neither Sweetwater nor any of its agents or employees informed Lehman about the 1931 Matthews Deed, the Articles of Dedication, the Survey, or the existence of any boundary line dispute before or at the time of the settlement.

Sweetwater closed on Parcels 44 and 46 on November 4, 2005. Settlement was conducted by a Wilmington law firm designated by Lehman, unconnected to the sellers' attorneys. The Wilmington law firm, as the issuing agent for Lawyer's Title Insurance Company, conducted a title search of the property, and issued an owner's policy of title insurance and a mortgagee's policy of title insurance – in both instances without exception for any claims or interests of the State. The issuing agent for the title insurance was unaware of any of the red flags noted above.

The State accepted transfer tax payments from the sale.

> listed, if available. In cases where the affected parcel was just created by the combining of separate parcels, the number of the parcels that were combined shall be identified. The number or numbers of the newly created parcel or parcels shall be listed, if available.

[7]Amended Counterclaim at ¶53.

Nearly a year later, by October, 2006, Sweetwater had obtained all necessary permit approvals for the development of Sweetwater Pointe except for a Delaware Department of Transportation ("DelDOT") permit to construct an entrance on Parcel 44.

On October 12, 2006, DNREC sent a letter to Sussex County's Planning and Zoning Commission stating that DNREC "'formally recognize[d] that there is a significant boundary dispute between the developer of Sweetwater Point and the State of Delaware.'"[8]

O'Rourke began clearing fallen trees on Parcel 46. The State told him to stop. O'Rourke, Sweetwater's attorney, and others met with John Hughes, who was representing DelDOT regarding the delay in granting approval to construct the entrance. DelDOT advised them of the State's tentative plans to construct a highway bypass of downtown Millsboro over land including Parcel 46. There apparently were some meetings in 2007. However, nothing was resolved.

In 2009, the State filed with Chancery Court its action to quiet its claim of title to Parcel 46 and a portion of Parcel 44. The State amended its complaint to remove any claim to Parcel 44. Sweetwater and Lehman counterclaimed, seeking both confirmation of Sweetwater's title and damages. The action evolved from one of quieting title to one where the issue was which entity had superior title. The Vice Chancellor concluded that both parties have colorable claims to title to Parcel 46, but neither established title absolutely.[9] Employing the preponderance of the evidence standard,[10] the Court concluded that the State has superior title.

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[8] *Chancery Sweetwater*, at *7.

[9] *Chancery Sweetwater*, at * 3

[10] *Id.*

After the Chancery decision that the State had established superior title, Sweetwater and Lehman filed an Amended Counterclaim on November 21, 2017, "in reliance upon and conformity with the Court's Memorandum Opinion...."[11]

The lawsuit continues in Chancery Court. What remains to be litigated are equitable defenses Sweetwater and Lehman have advanced against the State as well as their counterclaims asserting gross or wanton negligence, fraudulent misrepresentation and concealment, bad faith acts or omissions, breach of quasi-contract, inverse condemnation, delay damage, equitable lien, and equitable title. They seek damages to compensate for losses as if the property had been fully developed as planned as well as to compensate for delay in the property's development.

During oral argument in this matter, plaintiffs' counsel explained that when the Chancery action was filed, Lehman and Sweetwater thought that they would win the Chancery case and be deemed to have superior title. Once they lost, they determined that to the extent they are unable to recover damages from the State, they should be able to recover those damages from defendants. It is their position that the point when their claims against the defendants in these Superior Court cases arose is when the Chancery Court issued its decision on May 23, 2017.

I now turn to the two pending motions to dismiss the actions before this Court.

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[11]Amended Counterclaim at page 20, fn. 1. They also state the following in this footnote: "Owner and Lender reserve all rights with respect to damages they may have sustained if the Opinion is overturned on appeal, and Owner is found to be hold superior title to Parcel 46, and Owner and Lender do not waive any such claims by filing this Amended Counterclaim."

II. STANDARD OF REVIEW

Defendants' motion to dismiss the two complaints are two-pronged. They assert the applicable statute of limitations bars the claims and they argue plaintiffs fail to state causes of action. Because I resolve this matter on the basis of the statute of limitations, I do not review the arguments asserting failures to state causes of actions.

Defendants correctly set forth the standard of review to employ at page 6 of their Opening Brief in Support of their Motion to Dismiss Sweetwater's action:

> On a motion to dismiss, the Court limits its considerations to the well-pleaded allegations in the complaint. *Dickerson v. Murray*, 2015 WL 447607, at *2 (Del. Super Ct. Feb. 3, 2015). The Court accepts as true those well-pleaded allegations and draws reasonable factual inferences in favor of the non-moving party. *Id.* The Court limits its review to the four corners of the complaint, subject to certain exceptions relating to extrinsic evidence, including "where an extrinsic document is integral to a plaintiff's claim and is incorporated into the complaint by reference." *Re Newborn, P.A.*, 2017 WL 375637, at *2. In that scenario, the Court may consider such extrinsic evidence in a motion to dismiss analysis. *Id.* The Court may also take judicial notice of matters that are not subject to reasonable dispute without converting the motion to dismiss into one for summary judgment. *See id.*

This standard is reflected in the Supreme Court's recent examination in *Windsor I, LLC v. CWCapital Asset Management, LLC,*[12] of the parameters followed in considering a motion to dismiss:

> In most cases, when the Superior Court considers a 12(b)(6) motion, it limits analysis to the "universe of facts" within the complaint and any attached documents. This rule protects parties from the harm that may be caused by a lack of notice. The court, however, may consider documents outside the pleadings when "the document is integral to a plaintiff's claim and incorporated into the complaint," or "when the document is not being relied upon to prove the truth of its contents." Additionally, "[t]he trial court may also take judicial notice of matters that are not subject to reasonable dispute."

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[12]2020 WL 5417547, * 7 (Del. Sept. 10, 2020) (footnotes and citations omitted).

III. REVIEW OF LEHMAN'S COMPLAINT AND CONSIDERATION OF MOTION TO DISMISS

A) Summary of the Complaint

I first examine Lehman's Complaint,[13] which was filed on June 13, 2018.

Lehman had no relationship with defendants. Consequently, its claims differ from those of Sweetwater. Lehman maintains it is entitled to relief against defendants "for their misrepresentations relating to their title to lands on which Lehman holds as mortgage [sic]."[14] It further asserts:

> Defendants should be liable to Lehman for damages by reason of Sellers providing erroneous information to Lehman and its agents to induce Lehman's funding of a commercial transaction in which Sellers had a material interest, in reliance on which Lehman made the Loan to Sweetwater, the proceeds from which were paid to Sellers.[15]

Lehman alleges the following. Sellers knew that Sweetwater's purchase of the parcels was contingent on the loan from Lehman. They "were required to make certain representations under oath to Lehman's attorney at closing. Sellers knew that Lehman and its attorney would rely upon the representations made at closing in order to fund the Loan."[16] These representations are contained in the owners' Affidavits of Title ("Affidavits" or "Owners' Affidavits").[17]

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[13]C.A. No. S18C-06-013.

[14]Lehman Complaint, opening paragraph.

[15]*Id.* at ¶ 10.

[16]*Id.* at ¶ 13.

[17]Although Lehman referenced these Affidavits in its complaint, it did not incorporate them within its complaint. Lehman did provide these Affidavits to the Court for it to review upon the court's request. I am of the opinion that I could consider and include the Owners'

Count I of Lehman's Complaint is a claim for false information.

Lehman asserts that the Bayard Firm represented Lehman at closing. That firm "had requested that Sellers supply information in their possession regarding title to the Land so that the Bayard Firm could guide and advise Lehman in deciding whether it would or would [sic] make the Loan in order to fund the payment to Sellers."[18] Lehman asserts defendants provided the Bayard Firm "with sworn statements that Sellers owned and could convey good title to Parcel 46, free of all adverse agreements, easements, claims and encumbrances."[19] Sellers knew and intended for the Bayard Firm to rely on these sworn statements in guiding and advising Lehman to make the loan, and Lehman made the loan.

Lehman, as explained in oral argument, does not contend that it made the loan solely because of defendants' representations regarding ownership. It considers others responsible for the situation and has filed suit against them, too. Lehman then maintains that if the Chancery Court awards to the State title to Parcel 46, then defendants "will have wrongfully induced Lehman to loan Sweetwater $6,000,000, which Sweetwater paid to Sellers, by falsely swearing to

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Affidavits in deciding this motion to dismiss based on the case law set forth in *Windsor I, LLC v. CWCapital Asset Management, LLC*, 2020 WL 5417547, *7 (Del. Sept. 10, 2002). However, out of an abundance of caution and to prevent any confusion about whether the inclusion of the Owners' Affidavits renders the motion to be one for summary judgment, the Court does not consider the Owners' Affidavits. Instead, it considers only Lehman's allegations that at the closing, defendants swore under oath that they owned the land.

[18] *Id.* at ¶ 21.

[19] *Id.* at ¶ 22.

Lehman's attorneys that they owned the Land free and clear of all adverse agreements, easements, claims and encumbrances."[20]

Lehman also alleges that if the Chancery Court does not force the State to pay Lehman's damages claims, then Lehman will be harmed due to the Sellers providing false information to Lehman's attorneys. Lehman further alleges:

> If Lehman is harmed by the provision of false information to Lehman's attorneys, such harm will have been caused by Sellers' failure to exercise reasonable care and competence in providing accurate and complete information known to Sellers, which if communicated to Lehman's attorneys would have resulted in Lehman being advised that any mortgage placed against the Land was at risk, based on which Lehman would not have made the Loan to Sweetwater.[21]

Count II is an unjust enrichment claim. Lehman alleges the following.

In November, 2005, the fair market value of Parcels 44 and 46, "if developable [sic] as the site of 49 waterfront homes was at least equal to the Purchase Price that Sellers received from Sweetwater. Sellers would not have received the Purchase Price if Lehman had not made the Loan to Sweetwater."[22] Lehman seeks a disgorging of Sellers' unjust enrichment if the Chancery Court awards title to the State and does not award Lehman damages.

Count III is a claim for declaratory judgment. Lehman asserts:

> 34. A genuine, material and present controversy exists between the parties as to whether any decision, order, or judgment issued or to be issued by the Court of Chancery in the Chancery Action, entitles or will entitle Lehman to recover damages against Defendants, with interest.

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[20] *Id.* at ¶ 24.

[21] *Id.* at ¶ 26.

[22] *Id.* at ¶ 30.

In its prayer for relief, Lehman asks that if it is completely unsuccessful in Chancery Court, then this Court should declare it is entitled to recover from defendants the amount of the loan, with interest, plus damages for costs and expenses incurred in defending title to Parcel 46, including legal fees and litigation costs that might be awarded against Lehman to the State and to enter a judgment in those amounts.

B) Discussion

Defendants argue Lehman's claims are time-barred.

Because the nature of Lehman's first claim was a bit unclear in the parties' briefing, the Court sought clarity at oral argument. Counsel stated that defendants gave Lehman false information as to who owned the property and Lehman relied upon that false information in lending the money for the purchase of the property. Counsel also stated during oral argument in this matter that at this time, he did not think the defendants fraudulently misrepresented ownership to the property. Instead, he argued the claim is a negligent misrepresentation claim.

If the claim is one for negligent misrepresentation, then it must be pursued in Chancery Court because that court has exclusive jurisdiction over negligent misrepresentation claims.[23] However, rather than dismissing the claim, the court employs the same rationale as did the Superior Court in *Van Lake v. Sorin CRM USA, Inc.*,[24] and considers the claim to be one in simple negligence.

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[23] *Bobcat North America, LLC v. Inland Waste Holding, LLC*, 2020 WL 5587683, *9 (Del. Super. Sept. 18, 2020); *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, **11-12 (Del. Super. Feb. 15, 2013) ("*Van Lake*").

[24] *Van Lake, supra.*

In any case, the applicable statute of limitations for claims arising from a promise and for unjust enrichment is that provided in 10 *Del. C.* § 8106:[25]

> (a) No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

In general, claims accrue under 10 *Del. C.* § 8106 at the time of the wrongful act.[26]

> A claim for breach of contract accrues when the breach occurs. The cause of action for fraud accrues when the fraud is successfully perpetrated. The cause of action of negligence accrues at "the time of the injury."[27]

Judge Ableman succinctly set forth the general law regarding statutes of limitations, and the tolling thereof, within the context of a land deal in *Lee v. Linmere Homes, Inc.*:[28]

> Generally, where a plaintiff alleges claims of breach of contract, fraudulent misrepresentation, and negligence related to the purchase of a home, the statute of limitations begins to run on the date of settlement or closing. The statute may be

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[25] *Wal-Mart Stores, Inc. v. AIG Life Insurance Company,* 860 A.2d 312, 319 (Del. 2004); *Vichi v. Koninklijke Philips Electronics NV,* L.G., 62 A.3d 26, 42 (Del. Ch. 2012) ("*Vichi*"); *Taplin v. Schuitemaker*, 2019 WL 126981, *7 (Del. Super. Jan. 7, 2019); *Van Lake v. Sorin CRM USA, Inc, supra* at *6.

[26] *Wal-Mart Stores, Inc. v. AIG Life Insurance Company,* 860 A.2d at 319; *Vichi, supra,* at 42; *Taplin v. Schuitemaker, supra* at *7.

[27] *Silverstein v. Fischer,* 2016 WL 3020858, * 4 (Del. Super. May 18, 2016) (footnotes and citations omittted).

[28] 2008 WL 4444552, *3 (Del. Super. Oct. 1, 2008) (footnotes and citations omitted). *Accord Van Lake, supra* at **7-8 (footnotes and citations omitted) (Theories to support tolling are the discovery rule, fraudulent concealment, or equitable tolling).

> tolled, however, under the "time of discovery rule," also known as the "doctrine of inherently unknowable injuries," if the cause of action is inherently unknowable and the plaintiff was blamelessly ignorant of the cause of action, or if the defendants fraudulently concealed the cause of action. For the doctrine to be applicable, a plaintiff must establish that there were no observable or objective factors to alert her of the injury and that she was blamelessly ignorant. Once the plaintiff is objectively aware of facts giving rise to the injury, the statute begins to run.

The unjust enrichment claim has its own guiding principle. The Superior Court explains that with regard to a claim for unjust enrichment: "The statute of limitations for a claim of unjust enrichment generally begins to run upon the occurrence of (1) the wrongful act giving rise to a duty of restitution, or (2) when all of the elements of unjust enrichment are present."[29] The Court further stated: "Just as there is no unjust enrichment before there has been enrichment, there is no unjust enrichment before the defendant's retention of a benefit becomes unjust."[30]

The burden is on a plaintiff to show that the statute of limitations has been tolled.[31]

> "... [T]he limitations period begins to run when the plaintiff is objectively aware of facts giving rise to the wrong, *i.e.*, is on inquiry notice. Inquiry notice is sufficient to prove that the statute of limitations was not tolled for purposes of summary judgment." *Eluv Holdings*, 2013 WL 1200273 at *7 (internal quotation omitted). "Inquiry notice exists when person[s] of ordinary intelligence and prudence [have facts sufficient to place them] on inquiry which, *if pursued*, would lead to the discovery of the injury." *Id.* (alteration in original). A plaintiff is "on inquiry notice if [she] is in possession of facts sufficient to make [her] suspicious, or that ought to make [her] suspicious." *Smith v. McGee*, 2006 WL 3000363, *3 (Del. Ch. Oct. 16, 2006) (internal quotation omitted).[32]

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[29] *Taplin v. Schuitemaker,* 2019 WL 126981, at * 8 (footnote and citation omitted).

[30] *Id.* (footnote and citation omitted).

[31] *Lee v. Linmere Homes, Inc., supra; Vichi v. Koninklijke Philips Electronics N.V.*, 62 A.3d at 43.

[32] *Smith v. Whelan,* 2013 WL 3169373, *2 (D. Del. June 21, 2013) (footnote omitted), *aff'd*, 566 Fed. Appx. 177 (3rd Cir. 2014).

I consider Lehman's first claim in light of the statute of limitations.

The statute on this negligence claim started running at the time of the settlement on November 4, 2005. Lehman asserts a tolling either because of the discovery rule or because the defendants, in stating under oath they had title, took affirmative action to conceal the title problem so that Lehman would not discover defendants did not have title. However, even if the Court deems the statute of limitations to have been tolled, it concludes the tolling ceased once Lehman was on inquiry notice of the title issue.[33] In other words, if the facts show that a plaintiff is on inquiry notice of the alleged injuries more than three years before filing the complaint, then the complaint must be dismissed.

In this case, the Court can take judicial notice of the following facts. The State filed its original action in the Chancery case on October 21, 2009, naming only Sweetwater as a defendant. The State filed an amended complaint on January 12, 2010, adding Lehman as a defendant. Lehman filed an answer to the Amended Complaint on January 29, 2010. Thus, it is indisputable that no later than January 29, 2010, Lehman was well-aware of the title dispute involving the mortgaged property.

Lehman argues the statute was tolled until the date the Chancery Court entered its decision ruling the State had superior title. The time for a statute of limitations to start running after being tolled is not when some type of legal resolution on the issue is made; instead, it is

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[33] *Silverstein v. Fisher*, 2016 WL 3020858, at * 6. *Accord In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) ("[N]o theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong. Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory plaintiff who was not or should not have been fooled. (Footnote and citation omitted).")

when red flags regarding the legal issue arise so that the plaintiff should realize it has a claim.[34] In this case, that date was no later than when Lehman was served with a copy of the State's complaint in the Chancery Court action, which was sometime in January, 2010. The statute of limitations ran in January, 2013.The filing of this complaint on June 13, 2018, was well beyond the running of the statute of limitations. Lehman's first count must be dismissed as untimely filed.

Lehman's arguments seeking to avoid the statute of limitations on its unjust enrichment claim[35] differ, subtly, from those advanced regarding its first claim. With regard to the first claim, the argument is that the statute was tolled until the Chancery decision was rendered. With regard to the unjust enrichment claim, the argument is that the claim itself did not accrue until the

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[34]*Silverstein v. Fisher*, 2016 WL 3020858, at **6-7 (documents referencing stucco problems and an inspection noting water problems constituted red flags about the condition of the home plaintiffs bought and precluded the tolling of the statute of limitations); *Commonwealth Land Title Ins. Co. v. Funk*, 2014 WL 8623183 (Del. Super. Dec. 22, 2014) (the day an attorney advised the title company of a Superior Court action disputing a lien priority is the date the title insurance company was put on inquiry notice of its breach of contract claim with the attorney); *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, **6-7 (Del. Ch. Jan. 27, 2010), *rearg. den.*, 2010 WL 975581 (Del. Ch. Mar. 4, 2010), *aff'd*, 7 A.3d 485 (Del. 2010) (TABLE)(email notice of the existence of a study precluded a tolling argument when the person receiving the email failed to follow up and obtain a copy of the study which showed environmental issues on a property); *Ruger v. Funk*, 1996 WL 110072 (Del. Super. 1996) (numerous events put plaintiffs on notice of title defect issues).

[35]I assume for purposes of the motion only that the complaint states a claim for unjust enrichment against defendants. Lehman has not alleged a direct relationship between defendants' enrichment and Lehman's impoverishment; Lehman did not act for the defendants' benefit. Instead, it acted for Sweetwater's benefit. *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5351229, *6 (Del. Super. Oct. 16, 2012); *Vichi v. Koninklijke Philips Electronics N.V.*, 62 A.3d at 58-60.

Chancery decision because it was only then that all of the elements of an unjust enrichment claim existed.

In *Schock v. Nash,*[36] the general law regarding unjust enrichment appears:

> For a court to order restitution it must first find the defendant was unjustly enriched at the expense of the plaintiff. "Unjust enrichment is defined as 'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'" To obtain restitution, the plaintiffs were required to show that the defendants were unjustly enriched, that the defendants secured a benefit, and that it would be unconscionable to allow them to retain that benefit. Restitution is permitted even when the defendant retaining the benefit is not a wrongdoer. Restitution serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.'"[37]

Lehman argues that until the Chancery decision was issued, Lehman, Sweetwater and defendants were confident that the title dispute would resolve in their favor. It was only when the decision was issued against them that all of the elements of unjust enrichment were met because the retention of the monies paid to the defendants became unjust. Lehman cites to *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*[38] and *Taplin v. Schuitemaker*[39] in support of its argument.

In the case of *Wal-Mart,* the Supreme Court determined that the time of commencement and tolling of a statute of limitations on an unjust enrichment claim (and other claims) were fact questions that could not be decided on a motion to dismiss.

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[36]732 A.2d 217 (Del. 1999).

[37]*Id.* at 232-33 (footnotes and citations omitted).

[38]860 A.2d 312 (Del. 2004) ("*Wal-Mart*").

[39]2019 WL 126981 (Del. Super. Jan. 7, 2019) ("*Taplin*").

Between 1993 and 1995, Wal-Mart had purchased 350,000 corporate-owned life insurance ("COLI") policies on its employees from defendants, who were insurance providers and insurance brokers. The reason for the purchases was to reduce Wal-Mart's federal income taxes. In 1996, however, Congress changed the law to disallow those deductions. This law was prospective. In 1997, the Internal Revenue Service ("IRS") brought lawsuits seeking to disallow, retrospectively, those deductions taken before 1996. Wal-Mart was not a defendant in these lawsuits. Of particular significance was a Tax Court decision in October 1999, which was the first time when a court retrospectively disallowed COLI tax deductions taken before 1996. Wal-Mart entered into a settlement with the IRS that was concluded in 2002. Meanwhile, families of the insured employees sued and in 2002, a Court ruled Wal-Mart had no insurable interest in the lives of Texas employees. Other suits in other jurisdictions were ongoing. Wal-Mart filed suit against defendants in 2002 asserting, among other claims, unjust enrichment. The common premise of all claims was that the defendants failed to disclose the risks inherent in the COLI policies at the time those policies were purchased. The unjust enrichment claim was based on frustration of commercial purposes, a ground not attributable to any wrongful conduct of defendants. The Chancery Court determined that those claims accrued at the time of purchase by 1995 and that, as matter of law, the statute of limitations had not been tolled because Wal-Mart's claims were not inherently unknowable. The Chancery Court cited to newspaper articles published during the 1990s and several technical advisory memoranda ("TAMs") in reaching this decision on a motion to dismiss under Chancery Court Rule 12(b)(6). These documents were extrinsic to the complaint and were not a matter of public record.

The Supreme Court held the Chancery decision was erroneous for several reasons. First, the Chancery Court improperly considered the TAMS and newspaper articles, which were not referenced in the complaint or publicly filed, on a motion to dismiss. The consideration thereof turned the motion into one for summary judgment. Second, even if those articles and TAMS could be considered, they did not conclusively demonstrate that Wal-Mart was on inquiry notice of its claims before September 3, 1999. The articles discussed only prospective application of proposed legislation, not retroactive application. The TAMS are IRS rulings issued to private companies and have questionable value as being binding on or persuasive authority to non-parties. The record before the Chancery Court did not show whether the TAMs were available before 1999. Finally, the newspaper articles and TAMs did not discuss the insurable interest-related issue nor did Chancery Court make any specific determination of how Wal-Mart was placed on inquiry notice of the insurance interest-related claims. The complaint alleged Wal-Mart did not settle the retrospective tax deduction claims until 2002 and no court had retrospectively disallowed the deductions until the Tax Court decision in October, 1999. Wal-Mart alleged in its complaint that its injuries were inherently unknowable until at least one court determined Georgia law did not govern the insurance interest issue. The Supreme Court concluded that the pleaded facts permitted a reasonable inference that the statute of limitations was tolled until a period less than three years before the lawsuit was filed. The Court ruled that whether Wal-Mart's injuries were inherently unknowable and whether Wal-Mart was blamelessly ignorant of the wrongful acts could not be decided on a Rule 12(b)(6) motion because conflicting inferences of fact existed and thus, the matter could not be decided as a matter of law.

The *Wal-Mart* case does not support Lehman's position that the statute of limitations on an unjust enrichment claim is tolled until a court decision is rendered. Instead, it stands for the proposition that a court, in deciding a tolling issue on a motion to dismiss, is bound by the allegations in the pleadings. Thus, in *Wal-Mart*, the red-flags of the TAMS and newspaper articles could not be considered in addressing when Wal-Mart became unaware of the restrospective issue. The only red flag which triggered the running of the statute of limitations that appeared in the pleadings was the 1999 tax decision. The *Wal-Mart* decision is clear that if the red flags of the TAMs and the newspaper articles could have been considered and if it was established Wal-Mart was aware of those documents, then there would have been a basis for concluding the tolling had ended before 1999. This pending case differs. The pleadings as well as the matters of which this Court can take judicial notice clearly establish the existence of red flags to Lehman regarding the title issue starting in January, 2010, when it was served in the Chancery action.

I now review *Taplin*, the next case Lehman cites in support of its position. In that case, Taplin purchased a home for defendant Schuitemaker and paid many of her living expenses starting in 2012. Defendant promised to repay plaintiff when she received a disability settlement. Plaintiff made those payments directly for defendant's benefit and in reliance upon defendant's promise to repay plaintiff. The promise to pay was conditioned on the receipt of defendant's disability settlement. When the disability settlement took place in May 2016, Schuitemaker did not repay Taplin and Schuitemaker indicated she no longer wished to purchase the mobile home. Taplin filed suit in the Court of Common Pleas. She sued on contract and advanced quasi-contractual claims of *quantum meruit, quantum valebant*, and unjust enrichment. That court

dismissed the case based upon the statute of limitations. Plaintiff appealed to the Superior Court, which reversed. Of significance is the Superior Court's ruling that the statute of limitations did not bar the quasi-contractual claims.

The Superior Court held that the quasi-contractual claims did not accrue before defendant received her disability benefit. Until then, there was no unjust retention of a benefit because there was a promise to repay after receipt of the settlement money and not before. When defendant did not pay upon receipt of the settlement monies, an unjust retention of the benefit arose.

Again, the factual differences render *Taplin* inapplicable. Nothing in the pending case was conditioned on an event occurring in the future. Instead, the promise of good title and conveyance thereof occurred at settlement in November 2005.

No legal basis for Lehman's position exists. The statute of limitations on the unjust enrichment claim began running at settlement; defendants' retention of the benefit arose then when they were paid for not conveying full title to the land. At most, there was a tolling of the statute until the Chancery action was served on Lehman in January, 2010. It was then that Lehman undoubtedly was placed on inquiry notice that defendants' promise of conveying good title was in question.

Lehman knew in January, 2010 that if the litigation resolved against it, then the defendants would have been paid for property they did not own and that defendants would have retained benefits for property they did not own. At that time, Lehman had to assess its various claims against the various parties involved in the transaction: the defendants, the attorneys, the title company, the surveyors. The fact that it thought it would succeed in the litigation with the

State does not provide Lehman with any basis to toll the statute of limitations. There is no principle of law which allows for a tolling of the statute of limitations until a party's position is squashed at the trial court level.

Besides lacking legal support, the position that, in general, a trial court decision is the trigger for a statute of limitations is not logical. If the argument is that a party must be aware of its legal rights via a court decision before the statute stops tolling, then it seems the more appropriate trigger would be when a final decision on appeal is rendered or when a final decision after remand is rendered. The existing law is simple to apply: a tolling ends when a party is on inquiry notice of a problem. In this case, that was no later than when Lehman was served with the Chancery complaint in January of 2010.[40]

The final outstanding issue regarding Lehman's complaint concerns the declaratory judgment actions. Where a declaratory judgment claim is completely duplicative of the affirmative counts of the complaint, it must be dismissed.[41] Where a declaratory judgment does not set forth a distinct cause of action and the other claims fail, the declaratory judgment claim must fail.[42] The claims here are duplicative. Because the other claims are time-barred, the declaratory judgment claim fails.

For the foregoing reasons, Lehman's complaint must be dismissed.

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[40]The facts of the case of *The Hoag Living Trust dated February 4, 2013 v. Hoag*, 424 P.3d 731 (Or. App. 2018), also are sufficiently different as to render it unhelpful in reaching a decision.

[41]*US Ecology, Inc. v. Allstate Power Vac, Inc.*, 2018 WL 3025418, * 10 (Del. Ch. June 18, 2018); *aff'd*, 202 A.3d 510 (Del. 2019) (TABLE); *Trusa v. Nepo*, 2017 WL 1379594, *12 (Del. Ch. Apr. 13, 2017); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 67 03980, *29 (Del. Ch. Nov. 26, 2014).

[42]*Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, * 20 (Del. Ch. Sept. 18, 2014).

IV. REVIEW OF SWEETWATER'S COMPLAINT AND CONSIDERATION OF MOTION

A) Summary of Complaint

In its complaint filed on June 13, 2018, Sweetwater seeks damages and declaratory relief.[43]

Sweetwater asserts that if the Chancery "order is upheld as a final ruling on title, then Sweetwater is entitled to relief against the Defendants for failing to convey good title to Sweetwater."[44] Sweetwater further maintains:

> In two Agreements of Sale of Property (together, the "Agreements")(one being for approximately 27 acres of land known as Parcel 44, signed by Kee, and the other being for approximately 63 acres of land known as Parcel 46, signed by White, Frazier and McMahon) Sellers stated they owned and promised to convey good title to the Land. Each of the Agreements was expressly dependent upon the other.[45]

Sweetwater also alleges regarding these Agreements:

> Both Agreements identified land being sold by Sussex County tax parcel number; stated that the land being sold was "all the lands owned by the above Seller at this location"; and required the conveyance to Buyer at settlement, by special warranty deed, of "good, marketable, fee simple absolute title of record, free and clear of all liens and encumbrances".[46]

The "Title" section of each Agreement of Sale of Property ("Agreement") states:

> (6) TITLE: Title to the property is to be conveyed by deed of special warranty and is to be good, marketable, fee simple absolute title of record, free and clear of

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[43]C.A. No. S18C-06-012.

[44]Introductory paragraph of Sweetwater Complaint.

[45]Sweetwater Complaint at ¶ 6.

[46]*Id.* at ¶ 12.

> all liens and encumbrances of record and free and clear of zoning and governmental subdivision violations, but subject to all existing easements and restrictions of record. If Seller is unable to give good and marketable title meeting the above requirements, such as will be insured at regular rates by a title insurer duly authorized to transact insurance in the State of Delaware, Buyer shall have the option of taking such title as Seller can give, without reduction of the purchase price, or of being repaid all deposit money, and this agreement shall be null and void.[47]

Sweetwater further contends that "[b]ased on Sellers' representations of ownership in the Agreements," Sweetwater expended monies to develop the land and purchase the land.[48]

In addressing the issues of the information it had before the settlement, Sweetwater asserts:

> 8. Shortly before the closing, Sellers, Buyer, their respective legal counsel, and Sellers' surveyor became aware of a possible adverse deed and nature preserve easement in favor of the State with respect to a portion of Parcel 46. Neither the deed nor the easement appear in the Sellers' chain of title for Parcel 46 going back over 125 years. Based on the State's conduct over the course of many decades recognizing the ownership of Parcel 46 by certain of the Sellers and their predecessors in interest, and the State's characterization of any conflict between its property and Parcel 46 as a "boundary line dispute," Sellers, Buyer, their respective legal counsel and Sellers' surveyor concluded that the State had no valid interest in any material portion of Parcel 46.

Sweetwater proclaims that purchasing Parcels 44 and 46 was a package deal. Sweetwater relates in the complaint the information set forth earlier in this decision addressing what it learned about a possible title dispute. Then, Sweetwater alleges:

> 16. Despite the 1931 Deed and Articles of Dedication, the Sellers assured Buyer that they owned Parcel 46, based on: (a) their chain of title reaching back to a Sheriff's Deed in 1879; (b) their continuous payment of taxes on Parcel 46 for many decades; (c) their logging of Parcel 46 without objection by the State; and (d) an ongoing pattern of conduct by the State from the mid-1970's to the mid-

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[47]Agreements for Sale of Property for Parcels 46 and 44.

[48]*Id.* at ¶ 7.

> 2000's that recognized ownership of the Land by Sellers and their predecessors-in-title, including the State's expressions of interest in acquiring Parcel 46 by gift or purchase, without expressing any claim to already own all or any part of it. These assurances were consistent with the plan of the nature preserve that Vickers provided to Buyer just a few months before, without informing Buyer that the State was asserting any claim to own Parcel 46 in whole or in part.
>
> 17. In the mutual belief that Sellers owned and could convey good, clear, marketable fee simple title to Parcel 46, subject at most to a *de minimus* boundary line encroachment that would not adversely affect Buyer's development plans, Buyer and Sellers made settlement under the Agreements on the Land on November 4, 2005.

Count I of Sweetwater's Complaint seeks rescission based on mutual mistake. Sweetwater asserts that **if** Chancery awards title to Parcel 46 to the State, then "Buyer and Sellers will have been mutually mistaken in their belief as to Sellers' title to and exclusive possession of Parcel 46, and Buyer will be entitled to rescind the Agreements."[49] They maintain if the State is awarded title and does not have to pay Sweetwater damages, then "Buyer will be entitled to restitution from Defendants of the entire Purchase Price paid to Sellers under the Agreements, with interest."[50]

Count II seeks rescission based on failure of consideration. Sweetwater maintains that if the State is awarded title, then Buyer will suffer a total failure of consideration and be entitled to rescission. Sweetwater further maintains that if, in addition, the State does not have to pay Sweetwater damages, the "Buyer will be entitled to restitution from Defendants of the entire Purchase Price paid to Sellers under the Agreements, with interest."[51]

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[49] *Id.* at ¶ 22.

[50] *Id.* at ¶ 23.

[51] *Id.* at ¶ 26.

Count III is a claim for unjust enrichment. Sweetwater asserts if it loses in Chancery Court, then Sellers will have been unjustly enriched by the purchase prices paid for the two pieces of property and it seeks the return of the purchase prices, along with interest.

Count IV is a declaratory judgment claim. Sweetwater states:

> 33. A genuine, material and present controversy exists between the parties as to whether any decision, order, or judgment issued or to be issued by the Court of Chancery in the Chancery Action, entitles or will entitle Buyer to rescind, cancel or terminate the Agreements, and entitle Buyer to recover restitution from, and/or damages against, Defendants, with interest.

Sweetwater then requests that if Chancery Court rules against it, this Court declare that Buyer is entitled to rescission, the purchase price of the properties as well as damages for costs and expenses incurred in performing the agreement and defending title to Parcel 46, as well as reimbursement for any award against Buyer of the State's legal fees and litigation costs and expenses, plus costs and attorneys' fees of this action.

Sweetwater's first two claims seek rescission as a remedy. I clarify that rescission is not a cause of action, it is a remedy.[52]

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[52]*Schlosser & Dennis, LLC v. Traders Alley, LLC*, 2017 WL 2894845 , *9 (Del. Super. July 6, 2017); *Deutsche Bank National Trust Company v. Goldfeder*, 2014 WL 7692441, *1 (Del. Super. Dec. 9, 2014). At times in the briefing, reference is made to a claim of rescission.

Fraud, misrepresentation and mistake are common grounds for granting rescission.[53] Sweetwater claims it is entitled to rescission based upon mutual mistake.[54] This court has jurisdiction over cases where rescission is based on mutual mistake and/or fraud.[55]

B) Discussion

Sweetwater attempts to make the claims contractual, and that allows for its argument that the claims are not time-barred because the Agreements were under seal.[56] Defendants argue Sweetwater is not suing on the Agreements because they are rejecting the agreements.[57] However, I conclude that a claim alleging mutual mistake is an action in contract.[58] Furthermore,

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[53]*Schlosser & Dennis, LLC v. Traders Alley, LLC*, 2017 WL 2894845, at *10.

[54]In the briefing, defendants advanced some arguments based on the supposition that Sweetwater may be seeking rescission due to defendants' alleged misrepresentations that they had title. Sweetwater's complaint and briefing represent it seeks rescission based on mutual mistake and not misrepresentation or fraud. Sweetwater clarified at oral argument that it is seeking rescission based on mutual mistake and not on misrepresentation or fraud.

[55]*Beard v. West Manor Apartments, Inc.*, 130 A.2d 556 (Del. Super. 1957).

[56]There is no dispute that the deed is under seal. However, Sweetwater is not suing on the deed to Parcel 46. An example of a breach of covenant of title suit is *State ex rel. Secretary of Dept. of Transp. v. Regency Group, Inc.*, 598 A.2d 1123 (Del. Super. 1991), *opinion clarified*, 1991 WL 113637 (Del. Super. May 16, 1991), *reargu. den.*, 1991 WL 113342 (Del. Super. June 5, 1991). The deed is a special warranty deed. With a special warranty deed, the "grantor warrants against any defects in the title arising during his association with the land but not against any defects arising before that time." *Aument v. Kosciuszko Savings and Loan Ass'n*, 1978 WL 194997, *1 (Del. Super. April 4, 1978). In this case, the defects arose before defendants' association with the land. Thus, there is no basis to sue on the special warranty deed.

[57]Such a claim seeks to render the contract void *ab initio*. *Base Optics Inc. v. Liu*, 2015 WL 3491495, * 14 (Del. Ch. May 29, 2015).

[58]*See Hicks v. Sparks*, 89 A.3d 476 (Del. 2014) (TABLE) (mutual mistake encompassed within the Restatement (Second) of Contracts).

I will assume, without deciding, that the claim arguing lack of consideration is valid. That claim would be contractual, too.

The statute of limitations applicable to actions based on a contract not under seal is that provided by 10 *Del. C.* § 8106. However, if the court finds the Agreements were under seal, then the statute of limitations has not passed because, at a minimum, the parties have 20 years to file suit.[59]

I now examine whether the Agreements were under seal.

The Agreements provide, in pertinent part as follows: "IN WITNESS WHEREOF, the parties hereto have hereupon set their hands and seals the day and year first above written." The individual sellers and O'Rourke, on behalf of Oriskany, Inc., signed the Agreements. Beside each person's signature is the following: "(s)" This "(s)" is preprinted on the form.

A necessary requirement for rendering a document under seal is that either the word "seal" or some form of a symbolic "seal" be affixed near the signature line.[60]

Here, the word "sealed" is not attached to the signature line. The question for the Court is whether the "(s)" marking may be considered a symbolic seal. Only then will the document be deemed to be under seal.

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[59] *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 10 (Del. 2009); *Saunders-Gomez v. Rutledge Maintenance Corp.*, 2017 WL 1277682, *5 (Del. Super. April 3, 2017), *aff'd*, 189 A.3d 1288 (Del. 2018), *cert. den.* 139 S.Ct. 1175 (2019); *Wilmer v. Ocwen Financial Corp.*, 2016 WL 3366060, * 3 (Del. Super. May 31, 2016); *Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, 1995 WL 411319, *5 (Del. Super. June 30, 1995).

[60] *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734, 737 n. 5 (Del. 1983); *Mortgage Electronic Registration Systems, Inc. v. Strong*, 2011 WL 5316766, *2 (Del. Super. Oct. 19, 2011).

In *Whittington*, the Supreme Court noted that there is a different standard applied in determining whether an individual, as opposed to a corporation, has signed a document under seal.[61] When examining a contract signed by an entity, such as a corporation, it must be clear that the seal was intended to be the seal of the corporation and not of the individual. In *Rabinovich v. Liberty Morrocco Co.*,[62] the Court held that a corporation may adopt, for a particular transaction, any seal, or any device resembling a seal but it is necessary that such seal or device shall be used and intended as the seal of the corporation and not an individual. It further is stated in that case:

> When corporate officers who have been authorized by the corporation to execute a particular instrument that requires the use of the corporate seal, affix some other seal as the corporation seal, and such instrument bears on its face clear evidence of an intention to execute the same under the corporate seal of the corporation, and to adopt, as the seal of the corporation, the seal actually used as such, it will be regarded prima facie as the seal and act of the corporation in the absence of evidence showing that the seal that was affixed was not intended to be the corporate seal.[63]

It is clear here that the "(s)", which was preprinted on the form and which was also beside the individual sellers' signatures was not Oriskany, Inc's corporate seal or adopted to be used as

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[61] As the Supreme Court explained in *Whittington* at 14:

> [I]n Delaware, in the case of an individual, in contrast to a corporation, the presence of the word "seal" next to an individual's signature is all that is necessary to create a sealed instrument, "irrespective of whether there is any indication in the body of the obligation itself that it was intended to be a sealed instrument."

[62] 125 A. 346, 347 (Del. 1924).

[63] *Id.*

the corporation's seal. Thus, I conclude the Agreements were ordinary, unsealed contracts and not specialty contracts[64] as to the Buyers.

I also conclude that the "(s)" is insufficient to render the Agreements under seal with regards to the individual sellers' signatures. The marking "(s)" is not a commonly accepted symbol for a seal. For a frame of reference, in other jurisdictions, "L.S." is an accepted abbreviation for the phrase "locus sigilli", which means "the place of the seal," and which is considered to replace actual seals.[65] "L.S." after a signature then renders a document under seal if the parties intended it to be under seal. That law does not help here because "L.S." is not the abbreviation used.

I return to the *Whittington* case for guidance in addressing this unique issue of whether "(s") is a sufficient substitution for the word "seal". Both the majority and dissent in *Whittington* considered the importance of adopting a bright line standard that is easily applied when determining whether the signatories meant for a document that is not a mortgage or promissory note to be under seal. The clarity is significant in light of the lengthy statute of limitations imposed on a sealed instrument. A twenty-year statute of limitations may well frustrate the

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[64] *Whittington*, 991 A.2d at 10 ("The term "specialty contract" refers to a contract under seal and is used to distinguish a sealed contract from an ordinary, unsealed contract.").

[65] 1 Williston on Contracts § 2:4 (4th ed.); *Beach v. Beach*, 107 A.2d 629 (Conn. 1954) ("L.S." is customary abbreviation for a seal); *Caputo v. Di Loreto*, 148 A. 367 (Conn. 1930) (some statutes allow for "L.S." to render a document under seal); *McKain v. Miller*, 1841 WL 2254 (S.C. Ct. App. 1841)("L.S." may be deemed a seal so long as the parties intended it to be so and their intent is a jury question).

reasonable expectations of a party to a contract.[66] That concern is particularly pertinent here where the Agreements provided for a contractual relationship meant to be of a short duration.[67]

Based on the foregoing, I conclude that the "(s)" marking beside the individual signatures is not sufficient as a matter of law to turn this ordinary contract into a specialty contract.

Because the Agreements are not under seal, the three-year statute of limitations applies and renders the rescission claims based in contract time-barred. Even if the Court gave Sweetwater the benefit of the doubt and concluded that Sweetwater was unaware of title issues at the closing, there is no doubt that Sweetwater was on notice of the State's title claims in 2007 when it told O'Rourke to stop clearing the lot and told him it intended to build a bypass over Parcel 46. And, even if the Court extended judicial generosity by tying the end of any tolling to the filing of the Chancery suit in October 2009, Sweetwater's claims seeking rescission based on mutual mistake and lack of consideration are time-barred.

Sweetwater's final claim for unjust enrichment also is time-barred.

The discussion addressing Lehman's argument and the statute of limitations of the unjust enrichment claim applies here. I will not repeat the arguments and analysis. The conclusion is the same: Lehman's claim for unjust enrichment did not commence nor did any tolling end only upon the issuance of the Chancery Court decision. The statute of limitations commenced running at the time of the settlement. That was when the failure to convey good title occurred and defendants were unjustly enriched by payment for land they did not outright own. Furthermore,

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[66] *Whittington*, 991 A.2d at 14 (dissent).

[67] *See Consolidated Rail Corp. v. Liberty Mut. Ins. Co.*, 2002 WL 32080503, *6 (Del. Super. Sept. 6, 2002).

in 2007, the State told O'Rourke to stop clearing trees on the property and that it intended to build a highway over Parcel 46 because it owned the land. Sweetwater was on notice then that the State claimed title to the land and that defendants may have wronged it. Even if the Court gave Sweetwater every benefit, reasonable or otherwise, it would conclude any tolling stopped when the State filed the action in Chancery in October, 2009. At that point, Sweetwater, just as Lehman, had every indication that there was a title issue and that defendants may be unjustly retaining the benefits of the land deal. The statute of limitations had long expired by the time Sweetwater filed this suit.

The final outstanding issue regarding Sweetwater's complaint concerns the declaratory judgment action. Where a declaratory judgment claim is completely duplicative of the affirmative counts of the complaint, it must be dismissed.[68] Where a declaratory judgment does not set forth a distinct cause of action and the other claims fail, the declaratory judgment claim must fail.[69] The claim here seeking declaratory relief is duplicative. Because the other claims are time-barred, the declaratory judgment claim fails.

For the foregoing reasons, Sweetwater's complaint must be dismissed.

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[68] *US Ecology, Inc. v. Allstate Power Vac,* Inc., 2018 WL 3025418, at *10; *Trusa v. Nepo*, 2017 WL 13796494, at *12; *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP,* 2014 WL 6703980, at *29.

[69] *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at * 20.

V. CONCLUSION

For the foregoing reasons, the claims in both cases are time-barred and both actions are dismissed with prejudice.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office