SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

March 30, 2005

Via Facsimile and U.S. Mail

Jeffrey S. Welch, Esquire
Welch & Associates
824 Market Street, Suite 805
P.O. Box 25307
Wilmington, DE 19899

Eugene M. Lawson, Jr., Esquire
Fletcher, Heald, & Hildreth, P.L.C.
1300 North 17th Street- 11th Floor
Arlington, Virginia 22209

RE: WSFS v. Chillibilly's Inc. and Joseph Jeffrey Stein, III Corp.
C.A. No. 03C-11-021(THG)

Date Submitted: March 10, 2005

Dear Counsel:

The following is the Court's decision regarding Defendant Joseph Jeffery Stein, III Corporation's Motion for Summary Judgment. For the reasons set forth herein, the Motion is GRANTED in part, DENIED in part.

Procedural Posture

Wilmington Savings Fund Society (hereinafter "WSFS") sought replevin of certain collateral it claimed according to Security and Landlord's Consent Agreements it held with Chillibilly's Incorporated (hereinafter "Chillibilly's") and Joseph Jeffery Stein Corporation (hereinafter "Stein Corp.") respectively. WSFS claimed a security interest in personalty and fixtures acquired with loan funds it extended to Chillibilly's. After several amended complaints, WSFS added additional claims of fraud, unjust enrichment, promissory estoppel, and misrepresentation alleging that it was induced into extending a loan to Chillibilly's based on

certain misrepresentations by the principal of Stein Corp., Jeffrey Stein. Stein Corp. entered this Motion for Summary Judgment on all claims alleged in the complaint.

When considering a motion for summary judgment under Superior Court Civil Rule 56, the Court may grant the motion when no material issues of fact exist.[1] The burden is on the moving party to establish that there are no material issues of fact to consider.[2] Once the moving party meets its burden, the nonmoving party must proffer any outstanding issues of fact to withstand the summary judgment.[3] When reviewing the motion, the Court will review the evidence in a light most favorable to the nonmoving party.[4] However, the review of the evidence must be confined to the record presented, and may not be based on prospective evidence.[5] If, after drawing all reasonable inferences in favor of the nonmoving party, the Court determines that no genuine issues of material fact survive, summary judgment will be ordered.[6] In this case, there exist some facts that remain in dispute. But based upon the applicable law and because these facts are immaterial, summary judgment is still appropriate.

Statement of the Case

Unless otherwise noted, the following facts are undisputed. In 1997, Stein Corp. purchased the building at 330 Rehoboth Avenue (hereinafter "Premises") from Wilmington Trust

---

[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Id.*

[3] *Id.* at 681.

[4] *Id*. at 680.

[5] *Rochester v. Katalan*, 320 A.2d 704, 705 (Del. 1974)

[6] *Sweetman v. Strescon Indus*., 389 A.2d 1319, 1324 (Del. Super. 1978).

Company (hereinafter "WTC").[7] The $1,650,000 purchase price was financed by WTC in exchange for a mortgage agreement dated September 26, 1997.[8] WTC filed a financing statement on October 7, 1997, perfecting its security interest in various classes of Stein Corp. collateral, including fixtures at the Premises.[9]

Stein Corp. leased the Premises to two separate tenants between 1997 and 2001.[10] Both tenants made unsuccessful runs at the restaurant business.[11] In early 2002, Gary Johnson and Bill Harrison, the principals of Chillibilly's, approached Stein with a presentation regarding their desire to lease the Premises.[12] The parties negotiated a lease and on January 14, 2002, Stein Corp. and Chillibilly's executed a lease agreement.[13] The agreement provided for an initial lease term of five years.[14] It also provided for three, five-year renewal terms to follow.[15]

Chillibilly's planned to renovate the Premises to suit the Tex-Mex theme of the

---

[7]For several years preceding Stein Corp.'s purchase, the building housed the Sea Horse Restaurant.

[8]Mtge. Agmt. between WTC and Stein Corp., of 9/26/1997, at 1.

[9]Financing Statement between WTC and Stein Corp., of 10/07/1997, at 1. The financing statement lists "all furniture, fixtures and equipment, whether any of the foregoing is owned now or acquired later ; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and accounts proceeds); whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance general intangibles and accounts proceeds)." *Id.*

[10]Jeffrey Stein Depo. of 10/22/2004, at 11-14.

[11]*Id.*

[12]*Id.* at 14.

[13]Lease Agmt. between Stein Corp. and Chillibilly's of 01/04/2002.

[14]*Id.* at 1.

[15]*Id.* at 1-2.

restaurant. Jeffrey Stein, the principal of Stein Corp., told the Chillibilly's principals that he was okay with their plans. To finance the renovation and startup of the restaurant, Chillibilly's arranged a loan through WSFS. The first loan provided for $350,000 in funds to be disbursed to Chillibilly's.[16] Chillibilly's authorized a security agreement in favor of WSFS on February 13, 2002.[17] WSFS filed a financing statement on March 23, 2002.[18] This financing statement did not specify any collateral. Then, on November 22, 2002, WSFS filed a second financing statement listing the collateral as all

> inventory, chattel paper, accounts, equipment and general intangibles; whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and other accounts proceeds).[19]

Renovations began in March 2002. During the renovation phase, Jeffrey Stein contends that he visited the Premises on approximately six occasions. WSFS and Chillibilly's contend that Stein Corp. was aware of the major renovations underway at the Premises. The restaurant opened in July 2002. By that point, the project had encountered certain cost overruns. WSFS blames the overruns on unanticipated repairs to kitchen ventilation equipment, the ceiling of the Premises, and other areas of the building. The bank claims that Jeffrey Stein misrepresented the condition of the Premises before leasing it to Chillibilly's. The lease, between the parties, however, explicitly provides that the tenant accepted the property "as is" without reliance on any

---

[16]Promissory Note between WSFS and Chillibilly's of 2/13/2002, at 1.

[17]Security Agmt. between WSFS and Chillibilly's, of 2/13/2002, at 1.

[18]Financing Stmt. between WSFS and Chillibilly's of 3/23/2002, at 1.

[19]Financing Stmt. between WSFS and Chillibilly's of 11/22/2002, at 1.

representation by the landlord.[20] The overruns resulted in WSFS extending a second loan of $150,000 on August 13, 2002, presumably secured by the same collateral as the first loan.

Stein Corp. claims that Chillibilly's regularly made its lease payments until fall 2002, when it began to fall behind. At that time, the restaurant closed for a brief period. Following a business reorganization, the restaurant opened again for a short time. But when the restaurant closed permanently, Stein Corp. contends that Chillibilly's principals never formally discussed a termination of the lease or the failure of the restaurant with Jeffrey Stein. Stein Corp. claims that when the business failed, the Chillibilly's principals simply shut the doors and abandoned the enterprise.[21]

On November 6, 2002, Stein Corp. sent WSFS a written notice of Chillibilly's default under the lease. It informed WSFS of its right, under the Landlord's Consent agreement, to have the lease assigned to it and to find an alternative tenant for the remainder of the leasehold. WSFS did not respond. Stein Corp. then terminated the lease and was granted summary possession of the Premises by the Justice of the Peace Court on January 14, 2003.[22]

Meanwhile, Chillibilly's had also defaulted on its obligations to WSFS. WSFS responded by declaring its promissory notes immediately due and payable. The $303,531.40 and $137,002.52 principal balances on the two notes remain unpaid. Chillibilly's also owes interest and past due penalties on the loan. To satisfy Chillibilly's obligations to it, WSFS sought

---

[20]Lease Agmt. between Stein Corp. and Chillibilly's of 1/4/2002, at 6.

[21]The inconsistencies contained in the record made it difficult for the Court to decipher the exact dates of these events. The timing of the business' demise, however, is not relevant to the status of the security interests.

[22]Def.'s Br. in Resp. to. Pl.'s Op. Br. of 05/20/04, at 4.

replevin of the collateral and business assets located at the Premises. Some of the items WSFS claims are property that Stein Corp. claims preexisted Chillibilly's tenancy and therefore belongs to Stein Corp.. WSFS also claims the right to certain fixtures throughout the building, including HVAC air compressors, electrical components, and plumbing fixtures. Stein Corp. insists that these items constitute fixtures, which were attached to the Premises during the Chillibilly's renovation and are now the property of Stein Corp. by virtue of the lease agreement.

As a result of this dispute, WSFS filed an initial complaint on November 24, 2003. In it, WSFS sought replevin of the collateral it claimed subject to the security agreement. The initial complaint claimed only an action in replevin. WSFS filed an amended complaint on December 15, 2003, including additional allegations of fraud, promissory estoppel, and unjust enrichment. On February 18, 2004, WSFS filed a motion to amend its complaint again. A hearing for the motion was scheduled for the following day. Mr. Welch, counsel for WSFS, failed to appear for the conference, despite the fact that he had requested it. The motion to amend was denied because it was not properly noticed nor signed by counsel.

On February 20, 2004, WSFS filed another motion to amend its complaint. The Court denied the motion at a hearing held on March 19, 2004.[23] However, on April 30, 2004, the Court ordered that WSFS be granted leave to file a Second Amended Complaint. On May 6, 2004, WSFS filed that complaint, which included an additional allegation of misrepresentation.

The evolution of this case has been extremely disorganized and needlessly slow.

---

[23]The record includes another amended complaint, which was authorized on April 14, 2004 by Jaclyn Smagala. The complaint was filed April 15, 2004. The Court's docket, however, indicates that the Complaint filed on May 6, 2004, but authorized on February 17, 2004, is the most recent amended complaint. There are, by the Court's count, four (4) complaints contained in the record.

Frequently, the Court has been frustrated by the Plaintiff's tactics and handling of the case. The numerous amendments, delays and errors complicated an already complex topic of law and resulted in an unnecessary and burdensome workload for all parties involved.

General Status of Security Interests

For clarity's sake, the Court finds it necessary to repeat some of the facts cited above in the more specific context of secured transaction procedures.

In 1997, in connection with its sale of the Premises to Stein, Wilmington Trust Company ("WTC") attached and perfected a security interest in Stein Corp.'s personal property and fixtures located at 330 Rehoboth Avenue.[24] The financing statement lists the following as collateral:

> All furniture, fixtures and equipment, whether any of the foregoing is owned now or acquired later, all accessions, additions, replacements and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and accounts proceeds); whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and accounts proceeds).

WTC's interest in the furniture, fixtures and equipment located at 330 Rehoboth Avenue is a perfected security interest. WTC's interest is the first recorded interest indicated in the record.

On January 4, 2002, Stein Corp. attached a security interest to Chillibilly's equipment,

---

[24]Mtge. Agmt. between WTC and Stein Corp. of 09/26/1997, at 1; Financing Statement between WTC and Stein Corp., of 10/07/1997, at 1.

fixtures and inventory on the Premises at the commencement of its lease with Chillibilly's.[25]

In February 2002, Chillibilly's contracted with WSFS to finance the renovations of the Premises. WSFS obtained a security agreement attaching a security interest to Chillibilly's inventory, chattel paper, accounts, equipment and general intangibles in connection with its loan.[26] At certain points in its briefs, WSFS has stated that its security agreement included fixtures.[27] This is incorrect. WSFS' security agreement lists Chillibilly's "inventory, chattel paper, accounts, equipment and general intangibles" as collateral.[28]

WSFS also obtained a Landlord's Consent Agreement authorized by Stein. The Consent Agreement subordinated any interest of Stein Corp.'s in Chillibilly's "Inventory, Chattel Paper, Accounts, Equipment and General Intangibles." Fixtures are not mentioned in either agreement.

WSFS filed a financing statement on March 23, 2002.[29] Incredibly, the financing statement did not specify any collateral. On November 22, 2002, WSFS filed a second financing

---

[25]Security Agreement between Stein Corp. and Chillibilly's, of 01/14/2002, at 1.

[26]Security Agreement between WSFS and Chillibilly's, of 02/13/2002, at 1.

[27]In two (2) of Plaintiff's pleadings, the Court located misstatements by WSFS. One assertion claims that the Security Agreement between Chillibilly's and WSFS covered fixtures.(Praecipe at 5; Pl.'s Op. Br. at 2). The other appeared to quote directly from the Lease Agreement between Stein Corp. and Chillibilly's that the Tenant would repair "any alterations, improvements, additions, Utility Installations, *fixtures*, equipment, merchandise or other personal property." (Pl.'s Resp. to the Br. in Supp. of Mot. for Summ. Judg. at 6)(emphasis added). In actuality, the Lease Agreement cited *furniture*, not *fixture*s. (Lease Agreement between Stein Corp. and Chillibilly's Inc. of 1/4/2002, at 7). These misstatements are particularly egregious because they incorrectly state the central facts of this case. The actual language of the agreements between WSFS, Chillibilly's and Stein Corp. is crucial to determining which party has priority as to the fixtures in this restaurant. The proper classification and listing of collateral is imperative in secured transactions and the ensuing litigation.

[28]Security Agmt. between WSFS and Chillibilly's of 02/13/2002, at 1.

[29]Financing Stmt. between WSFS and Chillibilly's of 03/23/2002, at 1.

statement listing the collateral covered by the Security and Landlord's Consent Agreements.[30] This filing occurred after all renovations had been performed. Furthermore, this filing did not comply with the official requirements of a fixture filing.[31]

Replevin of Non-Fixture Property

An action for replevin seeks to recover personal property which has been unlawfully taken or withheld from its rightful owner.[32] In order to maintain a claim of replevin, a party must demonstrate that it has title and the right to immediate possession of the property at issue.[33] A successful replevin action will result in the return of the specified property or, in the alternative, the proceeds or value derived from the sale or disposition of the property.[34]

When addressing disputes concerning secured transactions, generally, the first secured creditor to file or perfect an interest in collateral has priority over other secured creditors in the distribution of collateral or its proceeds.[35] This preference continues despite a sale, entitling the creditor to claim the proceeds from a sale or value of the collateral in satisfaction of its debt.[36]

---

[30]Financing Stmt. between WSFS and Chillibilly's of 11/22/2002, at 1.

[31]Section 9-334(d) gives purchase money priority to a perfected security interest holder that files a fixture filing before the fixtures are installed or within twenty (20) days of attachment. Section 9-502 (b) provides that a fixture filing is sufficient if it indicates the specific type of collateral (fixtures), indicates that it is to be filed in the real property records, and "provides a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage...." 6 *Del. C.* § 9-502 (b).

[32]*Taylor v. Snyder*, 1999 Del. LEXIS 144, *5 (Del. Supr.).

[33]*Harlan & Hollingsworth v. McBride*, 69 A.2d 9, 11 (Del. 1949).

[34]*Allstate Ins. Co. v. Rossi Auto Body, Inc.*, 787 A.2d 742, 745 (Del. Super. 2000).

[35]6 *Del. C.* § 9-322 (a)(1).

[36]6 *Del. C.* § 9-315 (a) (1)-(2).

But if a secured party authorizes a sale of collateral in the security agreement or otherwise, the secured party loses its security interest in the collateral.[37]

On February 5, 2004, approximately six months after the restaurant closed, Stein Corp. contacted WSFS to advise the bank that a full inventory of the Premises had been completed and offered the inventory documents for their review.[38] At that time, Stein Corp. also conceded that several items of personalty[39] left at the Premises belonged to WSFS and requested that WSFS collect the property promptly.[40] WSFS did not respond. On February 11, 2004, counsel for Stein Corp. contacted WSFS again via facsimile.[41] Stein Corp. informed WSFS that a new tenant would begin leasing the premises on February 13, 2004. Stein Corp. requested that WSFS retrieve the uncontested personalty before that date.[42]

Plaintiff WSFS did not respond to Stein Corp.'s offer until February 25, 2004, nearly two weeks after the deadline Stein Corp. gave for removal.[43] At that time, WSFS tardily accepted the offer to retrieve the specified items and requested access to remove additional items that had not been offered by Stein Corp. in the February 5th communication.[44]

Stein Corp. promptly responded to Plaintiff by repeating the offer to prepare "selected"

---

[37]*Scott v. Bosari*, 1994 Del. Super. LEXIS 501 (Del. Super. Ct.).

[38]Letter from Lawson to Welch of 2/5/2004, at 1.

[39]Lawson authorized the removal of the bar, the mirrors surrounding the bar, the new flooring, including the carpeting, the bar tile, marble tops and bar stools.

[40]Letter from Lawson to Welch of 2/5/2004, at 1.

[41]Facsimile from Lawson to Welch of 2/11/2004, at 1.

[42]*Id.*

[43]Facsimile from Welch to Lawson of 2/25/2004, at 1.

[44]*Id.*

items for removal, but refusing access to the additional items.[45] WSFS refused the offer to pick up the "selected" items, and instead insisted on retrieving all of its claimed property in a single trip.[46] WSFS also insisted that the property be stored in a secure location until its rightful ownership was determined.[47]

The Court considered whether WSFS' refusal to retrieve the items (on any of the deadlines offered by Stein Corp.) was a knowing and intentional waiver of the property offered for collection. While the Court is disappointed in WSFS' imprudent refusal to collect the uncontested property, its tardy responses and inaction do not constitute a waiver of ownership. WSFS has consistently maintained its entitlement to certain property at 330 Rehoboth Avenue. Its express statements to Stein Corp. reserving a right in the personalty prove that WSFS had a continued interest in the property. The bank explicitly requested that Stein Corp. safeguard the property it requested in a secure storage location until the matter was resolved.[48] Therefore, despite WSFS' refusal to pick up the items offered for removal by Stein Corp., it did not waive or abandon its security interest in Chillibilly's inventory, chattel paper, accounts, equipment.

In order to specify which items of personalty belonged to Chillibilly's, the Court ordered both parties to inspect the leased premises and conduct a videotape deposition of Jeffrey Stein. This was ordered at WSFS' request. However, on February 13, 2004, the scheduled date of the

---

[45]Facsimile from Welch to Lawson of 03/04/2004, at 1.

[46]*Id.*

[47]*Id.*

[48]*Id.*

inspection and deposition, WSFS failed to appear.[49] Unfortunately, the bank's absence is another example of the its failure to cooperate with the Defendant and comply with orders of the Court.

On February 25, 2004, counsel for WSFS wrote Stein Corp. to "make the record absolutely clear about WSFS's position regarding the subject property. . . ."[50] Since WSFS did not see the necessity in inspecting the premises or conducting the deposition as ordered by the Court, the Court must presume that its February 25th letter provides a full accounting of its interests.

WSFS first accepted Stein Corp.'s offer to pick up "the new flooring, including all floor tiles and carpeting, the large custom made Bar, the numerous mirrors surrounding the Bar, the Bar tile and marble tops along with the subject Bar Stools." It went on to list the other items it wished to retrieve, including numerous items which are disputed as fixtures[51] and

5. all of the other property purchased with the proceeds of the

---

[49]Def.'s Br. in Supp. of Mot. for Summ. J. at 6. Stein Corp.'s counsel's office is in Arlington, Virginia. Mr. Welch, counsel for WSFS, in the late hours of February 12, faxed a notice to the Arlington office cancelling the video deposition scheduled at 10:00 a.m. the next morning. It was faxed in the late evening hours of the night before the morning deposition in Rehoboth Beach, Delaware. It is only reasonable to assume that Mr. Welch knew that this late night fax would not provide notice to Stein Corp.'s counsel and in fact, it did not. Mr. Lawson, counsel for Stein Corp., was already in Delaware and learned of the "cancellation" of the deposition while waiting for Mr. Welch to appear. Mr. Lawson's secretary called him to inform him of the fax. The Court scheduled a teleconference for February 19, 2004 to address the aforementioned incident. Mr. Welch was unavailable to participate by phone and had an associate appear for him. The Court noted its disappointment with Mr. Welch's conduct and his failure to participate in the teleconference addressing his absence.

[50]Facsimile from Welch to Lawson of 2/25/2004, at 1.

[51]The priority as to those items disputed as fixtures are addressed *infra* at 14.

> two (2) WSFS loans, including, inter-alia, the lobby display case...all kitchen equipment, utensils, and all other improvements to the kitchen made with the use of the proceeds of WSFS' two (2) loans.

The bar, the mirrors surrounding the bar, the new flooring, including carpeting, the bar tiles, bar tile, marble tops, and bar stools previously offered by Stein Corp. for WSFS' retrieval, as well as the lobby display case, kitchen equipment and utensils listed in Item 5, are either items conceded by Stein or non-fixture property. After the expiration of Stein Corp.'s offer to WSFS, the offered collateral was "removed from the premises and sold or otherwise disposed of by the contractors working for the new tenant."[52]

The Delaware Code provides that if the collateral specified in the security agreement is unavailable, a secured party with priority is entitled to its identifiable proceeds.[53] As to the uncontested items it offered for WSFS' retrieval, Stein Corp. was aware that WSFS claimed an interest in the property. Stein Corp., therefore, is responsible for turning over any identifiable proceeds from the sale or disposition of those items it offered in its February 5th letter.

The remaining portion of Item 5 claims a right to

> all of the other property purchased with the proceeds of the two (2) WSFS loans...and all other improvements to the kitchen made with the use of the proceeds of WSFS' two (2) loans.

According to the record, WSFS loaned $500,000 to Chillibilly's in exchange for a security interest in the company's inventory, chattel paper, accounts, equipment and general

---

[52]Def.'s Br. in Supp. of Mot. for Summ. J. at 7.

[53]6 *Del. C.* § 9-315 (a) (1)-(2).

intangibles. WSFS is the preferred secured creditor as to those classes of collateral. But WSFS is not entitled to "all of the other property purchased with the proceeds of the two (2) WSFS loans" simply because it funded its purchase. In exchange for its loan, WSFS took a security interest in Chillibilly's inventory, chattel paper, accounts, equipment and general intangibles.[54] Its right to replevin is limited to items that fall within those categories.

Item 5 is merely a catch-all attempt by WSFS to claim a right to all property acquired with WSFS funds. But, WSFS' generic description of the property is insufficient. The Court cannot find that WSFS has rightful title to and the right to immediate possession of property if the property has not been identified. WSFS only has the right to specified *Chillibilly's* collateral.

The only specified personalty claimed by WSFS or conceded by Stein Corp. is the bar, the mirrors surrounding the bar, the new flooring, including carpeting, the bar tile, the marble tops, the bar stools, and the lobby display case. WSFS also claimed a right to certain kitchen equipment and utensils. WSFS does not have the rightful title to the kitchen equipment and utensils which were leased to Chillibilly's by a third party.

To successfully claim replevin to any items of personalty, WSFS must adequately identify the property. Because WSFS has failed to provide the Court with a detailed account of the property it seeks to recover, the Court can only rule as to those items that have been identified properly. While the Court recognizes that WSFS may have had a rightful claim to replevin for certain other items left at the Premises, its failure to comply with the identification requirements of replevin limits its recovery here.

Therefore, the motion for summary judgment is DENIED as to the replevin of the non-

[54]Sec. Agmt. between WSFS and Chillibilly's of 2/13/2002, at 1.

contested bar, mirrors surrounding the bar, new flooring, including carpeting, bar tile, marble tops, bar stools, as well as the lobby display case listed in Item 5 above. The Court hereby orders the traceable proceeds from the sale of any of those items to the Plaintiff. If those items were not stored and are not available, the Court will conduct a hearing as to a valuation of this property.

Replevin of Fixture Property

According to WSFS, Chillibilly's spent more than $500,000 on improvements to the Premises. In exchange, WSFS has a valid security interest in Chillibilly's equipment, as well as other non-applicable categories of collateral. WSFS does not have a valid security interest in any fixtures.

WSFS is attempting to claim certain chattels installed at 330 Rehoboth Avenue as Chillibilly's ***equipment***. "Equipment" is defined as "goods other than inventory, farm products, or consumer goods." [55] Stein Corp. claims the same items belong to it because they became ***fixtures*** upon their attachment to the realty. A "fixture" under the Delaware Code is a good that has "become so related to particular real property that an interest arises in them under real property law."[56] The following items are at issue:

1. the seven (7) five ton ACC Units, air conditioners/heat pumps, including roof top condensers, air handlers, cooling/heating coils etc. currently located, in part, on the roof;
2. the seven (7), two hundred amp electric panels/electric boxes, which WSFS paid to have installed in the interior of the restaurant;

[55] 6 *Del. C.* § 9-102 (33).

[56] 6 *Del. C.* § 9-102 (41).

3. all plumbing fixtures and "upgrades" in the bathrooms, i.e., toilets, sinks, cabinets, accessories, etc., throughout the subject premises;
4. all of the newly installed doors and hardware to the premises; and
5. all of the other property purchased with the proceeds of the two (2) WSFS loans, including, inter-alia,...all new lighting fixtures, both inside and outside,...and all other improvements to the kitchen made with the use of the proceeds of WSFS' two (2) loans. [57]

Whether these items are the property of WSFS, Stein Corp. or WTC will depend on their classification under the Delaware Code, the security agreements and the priority of financing statements between WTC, Stein Corp., WSFS and Chillibilly's.

A chattel becomes a fixture upon its attachment to real property based on "the intention of the party making the annexation and, also, whether or not the chattel has been so affixed that it cannot be removed without serious damage to the realty or to the chattel, itself."[58] "[T]he mere fact that [a] chattel *may* be removed from the real estate by detaching whatever affixes it, while significant, is nevertheless not controlling."[59] Instead, the focus becomes whether the chattel can be removed without material damage.

Each air compressor was placed on the roof of the premises, replacing and/or adding to the heating and cooling capacity of the pre-existing units.[60] Their removal may not cause serious damage, but it will affect the normal tenancy of the building. The electrical circuits and distribution panels, plumbing fixtures and upgrades, and other interior hardware were integrated

---

[57]Facsimile from Welch to Lawson of 2/25/2004, at 1.

[58]*Della Corp. v. Diamond*, 58 Del. 465, 470 (Del. 1965).

[59]*Del-Tan Corp. v. Wilmington Housing Authority*, 269 A.2d 209, 210 (Del. 1970).

[60]Facsimile from Welch to Lawson of 2/25/2004, at 1.

throughout the structure. Removing all of these items would be costly and potentially destructive to the structure of the building.

In examining a party's intention in attaching a chattel to real property, "the nature of the chattel, the mode of its annexation, the purpose or use for which the annexation has been made, and the relationship of the annexor to the property are all to be considered and weighed...."[61] But, the Court must focus on whether the party affixing the chattel did so for a temporary or permanent purpose.[62]

Chillibilly's purpose in renovating the Premises and attaching the fixtures now at issue was to convert the preexisting restaurant into a Tex-Mex theme restaurant. It invested in and installed new air compressor units, seven electrical circuit and distribution panels, plumbing fixtures and interior hardware throughout the Premises. Given that Chillibilly's lease agreement with Stein had a potential duration of twenty (20) years, it is reasonable to find that Chillibilly's was investing in property that it hoped to convert into a long-term tenancy.

Finally, any issue of fact as to the question of intent is put to rest by the lease. The lease agreement reserves that

> [a]ll alterations, improvements, additions and Utility Installations (whether or not such Utility Installations constitute trade fixtures of Tenant) which may be made in or about the Premises shall be the property of Landlord and shall remain upon and be surrendered with the Premises at the expiration of the term hereof unless Landlord requires their removal pursuant to the foregoing.[63]

---

[61] *Wilmington Housing Authority v. Parcel of Land*, 219 A.2d 148, 151 (Del. 1966).

[62] *Del-Tan,* 269 A.2d at 210.

[63] Lease Agreement between Stein Corp. and Chillibilly's Inc. of 1/4/2002, at 6.

Chillibilly's could not have installed the electrical, plumbing, heating, venting and air systems with the expectation of retaining them at the end of its tenancy since it explicitly agreed to leave such utility installations to Stein Corp. in the lease.[64]

In *Stoneback Realty Company v. Jones Refrigeration & Air Conditioning, Inc.*, Delaware's Court of Common Pleas found that five air conditioning and refrigeration condensing units attached to a restaurant building constituted fixtures.[65] To reach this conclusion, the Court considered the following factors relevant: 1) the lease specifically claimed all improvements and fixtures to belong to the landlord at the termination of the lease; 2) the units replaced existing air conditioning and refrigeration units; 3) the units were an integral part of the air conditioning system that ran throughout the building; and 4) air conditioning is a necessary feature for the "convenient occupancy of the Premises."[66] The same reasoning can be applied to the facts of this case.

First, WSFS had a copy of the lease before loaning money to Chillibilly's and knew of Stein Corp.'s right to retain all improvements to the property. Paragraph 7(b) of the lease states: "Tenant's furniture, equipment, merchandise and other personal property, ***other than that which is affixed to the Premises so that it cannot be removed without material damage to the Premises, and other than Utility Installations***, shall remain the Property of Tenant, and shall be

---

[64]Section 7 (b) of the lease agreement between Stein Corp. and Chillibilly's defines Utility Installations as "carpeting, window coverings, air lines, power panels, electrical distribution systems, lighting fixtures, space heaters, air conditioning and plumbing systems, and fencing." Lease Agreement between Stein Corp. and Chillibilly's Inc. of 1/4/2002, at 6.

[65]*Stoneback Realty Company v. Jones Refrigeration & Air Conditioning, Inc.*, 1986 WL 716910 (Del. CCP).

[66]*Id.*

removed by Tenant on the last day of the term hereof, or on any sooner termination."[67] Simply put, any chattel connected to the realty in such a way that its removal would cause material damage to the Premises OR any chattel which qualifies as a "Utility Installation" under the lease was agreed to remain the property of Stein Corp..

WSFS is an experienced and sophisticated lender. The right to retain improvements and additions on property is commonly included in commercial real estate contracts and Stein Corp.'s exercise of its contractual rights should be no surprise to WSFS. The lease documents and customary practice indicate that Chillibilly's intended the improvements to be permanent and WSFS knew that these improvements were permanent. The Court's reading of the case law and the lease produce the same outcome. These chattels are fixtures, based on Chillibilly's intention in attaching them and WSFS' knowledge that attachment meant forfeiture under the lease.

Second, when Stein Corp. leased the building to Chillibilly's, the premises contained the fixtures now at issue, albeit in older forms. By allowing their removal, without requiring their replacement, the "tenant would be permitted to leave the premises in worse condition than when he took the lease."[68] Stein Corp. would be forced to refurnish the building with heating, air conditioning, electrical wiring, plumbing and hardware to prepare it for another tenant.

Finally, all of the systems that WSFS seeks to recover are integral to the electrical, lighting, plumbing, heating, venting and air systems in the Premises. These utilities are

---

[67]Lease Agreement between Stein Corp. and Chillibilly's of 1/14/2002, at 7.

[68]*Stoneback Realty Company v. Jones Refrigeration & Air Conditioning, Inc.*, 1986 WL 716910 (Del.Com.Pl.).

necessary features for the future leasing and occupancy of the building. Their removal would greatly impair Stein's ability to relet the Premises.

WSFS argues that Stein Corp. is not entitled to retain the fixtures because Stein Corp. leased Chillibilly's substandard property and the replacement items were necessary in order to open the restaurant. It also claims that these changes were not anticipated by WSFS or Chillibilly's because Stein Corp. neglected to reveal or misrepresented the condition of the building. However, the lease between Chillibilly's and Stein Corp. clearly states that Chillibilly's accepted the

> Premises in their "as is and with all faults" condition. . .[and] that neither Landlord nor any agent of Landlord has made any representation or warranty whatsoever concerning the condition of the Premises...or any fixture, system or equipment serving the Premises and that neither Landlord nor any agent of Landlord has agreed to alter, remodel, decorate, clean or improve the Premises, or any portion thereof. . . ."[69]

WSFS had a copy of the lease containing this provision. Neither Chillibilly's nor WSFS can now blame Stein Corp. for the cost overruns of remodeling in light of the clear language of the lease.

Finally, WSFS cannot claim that it is blameless in its failure to recover the fixtures at the Premises. WSFS failed to avail itself of any measure prescribed by the Delaware Code to protect its interests in fixtures against Chillibilly's, Stein Corp. or WTC. Under the Delaware Code, a creditor may take certain steps beyond attachment and perfection to obtain a priority position on special types of collateral, such as fixtures and purchase money property. Section 9-334 of Title 6 of the Code sets forth priority interests in fixtures.[70] It provides that

---

[69]Lease Agreement between Stein Corp. and Chillibilly's of 1/14/2002, at 6.

[70]*See* 6 *Del. C.* § 9-334.

(d) a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property and:
(1) the security interest is a purchase money security interest (hereinafter "PMSI");
(2) the interest of the encumbrancer or owner arises before the goods become fixtures; and
(3) the security interest is perfected by fixture filing before the goods become fixtures or within 20 days thereafter.[71]

Therefore, the enabling lender who perfects its PMSI and properly files a fixture filing obtains a super-priority over conflicting security interests. By complying with this section after supplying the funds to purchase and attach what it now claims as fixtures, WSFS could have obtained the super-priority position over WTC as to those items. But it did not. WSFS' security interest only covers the inventory, chattel paper, accounts, equipment and general intangibles listed in its security agreement and eventual financing statement.

Section 9-334 (f) of the Code also grants priority for a perfected or unperfected security interest in fixtures over the owner or encumbrancer of real property if "the encumbrancer or owner has, in an authenticated record, consented to the security interest or disclaimed an interest in the goods as fixtures" or if "the debtor has a right to remove the goods as against the encumbrancer or owner."[72] But WSFS failed to attach any interest in fixtures.

If the Landlord Consent agreement had given WSFS the right to remove fixtures at the end of the Chillibilly's tenancy, then WSFS would have priority over Stein. But, the Landlord's

[71] 6 *Del. C.* § 9-334 (d).
[72] 6 *Del. C.* § 9-334 (f)(1)-(2).

Consent failed to mention the removal of fixtures. Moreover, the lease between Stein Corp. and Chillibilly's specifically reserved fixtures for the Stein Corp..

Nevertheless, WSFS would still lack a first priority lien position because it failed to obtain any consent from WTC, the priority encumbrancer as to fixtures. Therefore, if WSFS attached a security interest to the fixtures located at the Premises, and then sought both Stein's and WTC's authenticated consent to subordinate their interests, WSFS would have priority as to the fixtures. WSFS did not take advantage of this mechanism of the Code.

The permanent and integral nature of the chattels used in the electrical, lighting, plumbing, heating, venting and air systems, as well as WSFS' notice that the repairs would remain the property of Stein Corp., demonstrates their permanency. Even in drawing all reasonable inferences in favor of WSFS,[73] I am unable to find any conceivable scenario that Chillibilly's intended to remove the affixed items at the end of its tenancy. Moreover, WSFS failed to take any protective measures to ensure that they receive a priority lien position on the fixtures installed on the Premises. For these reasons, the motion for Summary Judgment as to fixtured property including:

1. the seven (7), five ton ACC Units, air conditioners/heat pumps, including roof top condensers, air handlers, cooling/heating coils etc. currently located, in part, on the roof;
2. the seven (7), two hundred amp electric panels/electric boxes, which WSFS paid to have installed in the interior of the restaurant;
3. all plumbing fixtures and "upgrades" in the bathrooms, i.e., toilets, sinks, cabinets, accessories, etc., throughout the subject premises;

[73] *Sweetman v. Strescon Indus.*, 389 A.2d 1319, 1324 (Del. Super.1978).

4. all of the newly installed doors and hardware to the premises; and
5. all of the other property purchased with the proceeds of the two (2) WSFS loans, including, inter-alia,...all new lighting fixtures, both inside and outside,...and all other improvements to the kitchen made with the use of the proceeds of WSFS' two (2) loans [74]

is hereby GRANTED.

Fraud

WSFS claims that Jeffrey Stein, acting on behalf of Stein Corp., committed fraud "based on Stein Corp.'s representations that there were no other liens in existence against the Property . . ."[75] Based on that fraud, WSFS claims that it was induced into loaning $500,000 to Chillibilly's. Stein Corp. now requests summary judgment as to the fraud allegation.[76] Despite the fact that actions in fraud are typically fact intensive, a trial court may grant a Motion

---

[74]Facsimile from Welch to Lawson of 2/25/2004, at 1.

[75]Pl.'s Op. Br. at 9.

[76]The essential elements of fraud are as follows:

1. a false representation, usually one of fact, made by the defendant;
2. the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3. an intent to induce the plaintiff to act or to refrain from acting;
4. the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5. damage to the plaintiff as a result of such reliance.

Gaffin v. Teledyne, Inc., 611 A.2d 467, 472 (Del. 1992).

for Summary Judgment if it finds that the non-moving party has failed to meet its prima facie burden of alleging fraud.

WSFS alleges that during a telephone conversation with Scott Baylis, a WSFS loan officer, it specifically asked Jeffrey Stein whether WSFS was "receiving a 'first' lien position on all of the business assets, the furniture, fixtures and equipment located at and otherwise being the Chillibilly's restaurant."[77] WSFS claims that Jeffrey Stein responded "I understand that."[78] WSFS contends that Jeffrey Stein made this statement fraudulently because, in 1997, he authorized a security agreement with WTC, giving it an interest in Stein Corp.'s personal and real property at 330 Rehoboth Avenue. WSFS contends that Stein Corp. did not reveal the existence of the WTC lien for the purpose of inducing WSFS to lend the money to Chillibilly's, enabling the business to open its doors.

Baylis claims that he called Stein to confirm that Stein signed the Landlord's Consent agreement and that he understood and adopted the terms of the agreement. Baylis testified in his supplemental affidavit that he specifically inquired into the priority of its lien status on "fixtures", to which Jeffrey Stein responded "I understand that."[79] WSFS' and Baylis' contentions strain credibility given that Baylis' purpose in calling Jeffrey Stein was to confirm Jeffrey Stein's signature on a document that did not mention fixtures.

The Court has previously noted that WSFS counsel mistakenly included a claimed security interest in fixtures into its argument and briefs. Fearing that similar mistakes had been

---

[77]Bayliss Supp. Aff. ¶ 2.

[78]*Id.*

[79]*Id.*

incorporated in the Baylis affidavit, the Court felt it appropriate to hold an evidentiary hearing. At the hearing, Baylis was questioned directly by the Court. The Court asked him if he specifically recalled discussing "WSFS' priority interest" in fixtures with Jeffrey Stein during that conversation. Baylis informed the Court that the purpose of his call was to confirm that Jeffrey Stein personally signed the Landlord's Consent Agreement and that he understood the contents of the document. But, as the Court suspected, Baylis was unable to affirmatively report that he specifically referenced "fixtures" while speaking to Jeffrey Stein.

Weighing Baylis' uncertainty with the obvious flaws that occurred in classifying, attaching and perfecting WSFS' security interest, the Court is convinced that the factual basis of this claim does not meet the requirements of fraud.

The Court is not persuaded even if accepting Jeffrey Stein's alleged misrepresentation as true because WSFS' position is also legally flawed. What help is it to WSFS that Jeffrey Stein said "I understand that" when, in fact, Baylis' statement as to WSFS' security interests was legally incorrect? WSFS had no legal interest in the fixtures at 330 Rehoboth Avenue. To find fraud in Stein's "I understand that" response to a flawed representation would be a real stretch.

If WSFS failed to attach or perfect an interest in fixtures in its security agreement, financing statement or Landlord's Consent agreement, it 1) cannot elevate its security interest based on Jeffrey Stein's "I understand that" comment to Michael Baylis, 2) is not legally entitled to more than it did to protect itself, and 3)cannot blame Stein Corp. for its failure to utilize the fixture filing or purchase money security mechanisms which could have secured its loan. WSFS' interests rest in legal documents, not Stein's representations. Oral comments do not create security interests.

Moreover, WSFS has failed to prove the remaining elements of fraud. To successfully plead fraud, a plaintiff is required to show that its action was taken in justifiable reliance upon a fraudulent representation.[80] Whether a plaintiff has the right to rely on specific representations depends on whether "the representations relied upon involve matters which a reasonable person would consider important in determining his course of action in the transaction in question."[81] It may also depend on the willingness of the claimant to avail itself of all relevant information surrounding the transaction because "in the purchase of goods and chattels, the purchaser's eyes are his market, and where he is put upon inquiry, he is charged with notice or knowledge of all facts which he could have learned by reasonable inquiry, and such investigation as a man of common prudence would have made...."[82] Even assuming Stein misrepresented the lien status of his personalty and the fixtures at 330 Rehoboth Avenue by stating "I understand that", WSFS' reliance on that statement must be deemed reasonable before granting relief for fraud.

In *Poplos v. Norton*, the Court of Chancery rejected a Buyer's claim for fraud because his reliance on certain misrepresentations about the purchased property was unreasonable.[83] The Court found that "[a] buyer's fault in not knowing or discovering the facts before making a contract...will not make his reliance unjustified ***if*** he does not have the knowledge or reasonable opportunity to obtain knowledge of the character or essential terms of the contract."[84] However, "the buyer is bound to act in accordance with reasonable standards of fair dealing, that is, he is

---

[80] *Gaffin*, 611 A.2d at 472.

[81] *Craft v. Bariglio,* 1984 Del. Ch. LEXIS 421 (1983).

[82] *Thomas v. Grise*, 41 A. 883, 885 (Del. Super. 1898)

[83] 1983 Del. Ch. LEXIS 402, at *11.

[84] *Id.*(emphasis added)

expected to use his senses and not rely blindly on the maker's assertion."[85] Finding that the buyer had both the awareness and opportunity to discover the accurate information regarding restrictions on the property, but chose not to, the Court held that it was unreasonable for the Buyer to rely on the seller's assertions alone.[86]

WSFS is a sophisticated lender who should be aware of the risks involved in using unverified collateral as security for a loan. WSFS grants loans daily based on the strength of its security interests. As a routine matter, WSFS should verify the lien status of collateral it lists in its security agreements. The fundamental purpose of a recording system is to warn subsequent creditors that items offered as collateral may be subject to a preexisting security interest.[87] If WSFS had checked the recording system for previously filed interests against Stein Corp.'s property before extending its loan, it would have located the financing statement listing Stein Corp.'s property and fixtures at 330 Rehoboth Avenue as collateral for WTC's security interest. The subordination of a claim to a previously filed security interest is the likely risk taken by the lender who fails to properly check the lien records and *unjustifiably* relies on the representations of another. This risk of subordination becomes a certainty when a lender makes the additional and fatal mistake of failing to attach or perfect a right in collateral.

WSFS cites authority from foreign jurisdictions holding that a claim for fraud should not

---

[85] *Id.* at 11-12.

[86] *Id.* at 11-13.

[87] "The key to perfection under Article 9 is notice. . .[t]he purpose of a financing statement is to put a searcher on notice that an underlying security agreement may be outstanding. A properly filed financing statement would thus serve its intended purpose if a subsequent party would have been put on notice of an outstanding security agreement." *Bramble Transp., Inc. v. Sam Senter Sales, Inc.*, 294 A.2d 97, 103 (Del. Super. 1971).

be defeated simply because a search of public records would have revealed the truth.[88] These cases establish that the existence of a public record does not automatically defeat a fraud claim. But, they also make clear that access to a public record may weigh in whether or not reliance by a party was justified.[89] WSFS' claim is not being rejected simply because a check of the records would have revealed the truth about WTC's lien on Stein Corp.'s property and fixtures. It is rejected because WSFS' failure to verify the lien status of the claimed collateral before disbursing a sizeable loan was unjustifiable. Finally, it is unjustifiable to take a mistaken communication by Baylis as to fixtures and bootstrap it into a claim against Stein Corp. simply because Stein agreed with the misstatement.

Even assuming WSFS' allegations as to Jeffrey Stein's representations are true, WSFS improperly relied on those representations alone in extending $500,000. It may not now "demand judicial protection when [it] could have protected [itself] with reasonable inquiry into any misrepresented facts."[90] A reasonable commercial lender would have independently verified the status of collateral rather than loan a half-million dollars on nothing more than a third party's "say so."

---

[88]Pl.'s Op. Br. at 8.

[89]*First Nat. Bank in Lenox v. Brown,* 181 N.W. 2d 178, 183 (Iowa 1970) (holding that if a deceived party relies upon fraudulent representations of another his claim of fraud is not barred merely because he has not used due diligence to discover the true facts by a search of public records); *Nautilus LLC v. Langello*, 1998 Conn. Super. LEXIS 1801 (Conn. Super. 1998)(finding that false statements and misrepresentations as to the existence of liens and encumbrances on property are usually deemed to constitute actionable fraud, even though liens are a matter of public record); *Bishop Creek Lodge v. Scira*, 54 Cal. Rptr. 2d 745 (Cal. Ct. App. 1996) (holding that the existence of public records may be relevant to whether a victim's reliance was justifiable, but it is not conclusive).

[90]37 AM. JUR. 2d § 248.

Finally, WSFS cannot claim that its reliance on Jeffrey Stein's statements caused its damages. WSFS did not properly attach or perfect a security interest in Stein Corp.'s personalty or fixtures at the Premises. WSFS did not list Stein Corp.'s real property, fixtures or personalty at 330 Rehoboth Avenue in its Security or Landlord's Consent agreements. The only collateral covered in WSFS' security agreement is Chillibilly's inventory, chattel paper, accounts, equipment and general intangibles. WSFS failed to attach or perfect a security interest in fixtures, despite its clear understanding of the need to do so, as evidenced by its proper perfection of a security interest in Chillibilly's inventory, chattel paper, accounts, equipment and general intangibles. Moreover, WSFS did not do what it should have to amend its lack of attachment or perfection by completing a fixture filing to perfect its interest in certain equipment being affixed to the property.

Therefore, WSFS' fraud claim breaks down as follows: First, Mr. Baylis, the only person alleging that Stein fraudulently confirmed WSFS' security interest in fixtures, is uncertain that Jeffrey Stein ever made such statements. Second, even assuming the alleged misrepresentations are true, the Court finds, as a matter of law, that WSFS' reliance on Jeffrey Stein's statements was not justifiable or reasonable. WSFS did not comply with the requirements of the recording system, and its position now results entirely from its own unjustifiable reliance on a third-party's unverified statements and ignorance of the public records. The Court rules, as a matter of law, that WSFS did not have justifiable or reasonable reliance for the extension of its loan to Chillibilly's. Third, because WSFS failed to attach or perfect any interest in the fixtures it now claims, despite its numerous protections in the Code, its damages were brought about by its own inaction, rather than any affirmative action taken by Jeffrey Stein or his corporation.

Finally, public policy requires that WSFS bear the burden of its flawed transaction with Chillibilly's. A decision allowing WSFS to recover against Stein and over WTC would turn Article 9 on its head. The duration of this case and the extensive review by this Court confirms that the Article 9 priority rules are anything but simple. Nonetheless, they are established rules of business practice, of which every lending institution engaged in asset-based lending should be aware. Reversing Delaware's business practices for one bank's failure to comply with those priority rules would be preposterous.

WSFS' inadequate and flawed attachment attempt, its unjustifiable reliance on Jeffrey Stein's alleged misrepresentations and subsequent failure to take the proper filing and perfection steps are the causes of any losses it suffered as a result of Chillibilly's failure. Therefore, the Defendant's motion for summary judgment as to the fraud allegation should be GRANTED.

Promissory Estoppel

WSFS requests that Stein Corp. be estopped from using the WTC "lien as a defense in the present action." This assertion demonstrates WSFS' misunderstanding and mischaracterization of its security interest and the doctrine of promissory estoppel. Stein Corp. cannot use and is not attempting to use WTC's lien as a "defense." The WTC lien priority is a matter of fact and law. Stein Corp. has no power or authority to either invoke or revoke the WTC lien for its benefit. Stein's "I understand that" response may have induced action on WSFS' part, but WSFS' reliance was unjustified. Nor does a finding of Stein's "misrepresentation" entitle WSFS to the striking of WTC's lien in favor of it.

Promissory estoppel is used to penalize a person who has intentionally and improperly induced action on the part of another to their detriment. But, its fundamental purpose is the prevention of injustice.[91] Applying promissory estoppel to ignore the priority of the WTC security interest would unjustly abandon the purpose and efficacy of the recording system and improperly subordinate an innocent third-party's perfected security interest to an unsecured creditor who has failed to attach or perfect any interest in the collateral.

Promissory estoppel is also improper here because Stein Corp. does not have the ability to change the priority on the WTC lien. Stein Corp. was never in a position to subordinate WTC's lien on the collateral listed in WTC's security agreement, nor did he purport to do so. WTC did not consent to the subordination of its interest. Therefore, applying promissory estoppel to Stein Corp. is useless since he was not authorized to subordinate nor prioritize the WTC security interest. WTC has priority, as a matter of legal record. Any judgment against Stein Corp. will have no effect on the WTC lien.

Moreover, applying promissory estoppel is appropriate where justice can only be done by enforcing the alleged promise. But WSFS' position does not improve with the enforcement of Stein's representation. Stein said "I understand that", indicating that he was agreeing with Baylis' statement. Baylis was the only party laboring under a mistaken impression. Should the Court enforce Stein's alleged consent to WSFS' "first position" priority, WTC's perfected interest in the collateral would be subordinated unjustly to an unsecured creditor.

---

[91] *Chrysler v. Quimby*, 144 A.2d 123, 133 (Del. 1958)

WSFS also fails to satisfy the basic elements of promissory estoppel.[92] Even in a light most favorable to it, WSFS has not met its burden of demonstrating that it *reasonably* relied on Stein's representations in extending the loan. WSFS' imprudence in extending a loan for a half-million dollars on nothing more than a third-party's representations was unreasonable. A court decision rendering WTC liable for Stein's statement agreeing with Baylis' error would create injustice, rather than prevent it.

In *Realty Growth Investors v. Council of Unit Owners*, the Delaware Supreme Court found that a plaintiff claiming promissory estoppel had access to records which revealed certain restrictions on the property he purchased.[93] The Court rejected the promissory estoppel claim because the plaintiff "could have, and should have, discovered that limitation and cannot now use its unreasonable reliance on an unjustified inference to estop the [Defendants] from asserting their statutory rights."[94]

---

[92] In order to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that:

1. a promise was made;
2. it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee;
3. the promisee reasonably relied on the promise and took action to his detriment; and
4. such promise is binding because injustice can be avoided only by enforcement of the promise

Lord v. Souder, 748 A.2d 393, 399 (Del. 1999). The complaining party must also show that it lacked the knowledge or means of obtaining knowledge of the truth. *Burge v. Fidelity Bond and Mortg. Co.*, 648 A. 2d 414, 420 (Del. 1994); *Wilson v. American Insurance Co.*, 209 A.2d 902, 903-04 (Del. 1965).

[93] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 457 (Del. 1982)

[94] *See id.*

WSFS obtained a copy of the lease agreement between Chillibilly's and Stein Corp. before disbursing its funds. Therefore, it knew that fixtures and Utility Installations would become the property of the landlord. It also had access to the recording system to verify the strength and validity of its security interests. It failed to file a fixture filing or monitor Chillibilly's spending to ensure that its funds were used only to fund the collateral covered in its security interest. It could have attempted to obtain a modification of the lease as to the retention of the fixtures and utility installations. Or, WSFS could have 1) sought subordination from WTC or 2) availed itself of the super-priority protection provided in the Code.[95] Instead, WSFS failed to take all reasonable steps of precaution, and should not now be allowed to recover at the expense of Stein Corp. and WTC .

Because WSFS has failed to show that any reliance on Jeffrey Stein's alleged misrepresentations was reasonable and that justice requires the application of the promissory estoppel mechanism, the motion for Summary Judgment as to the promissory estoppel allegation should be GRANTED.

Misrepresentation

WSFS claims that Jeffrey Stein, Stein Corp.'s principal, made fraudulent statements regarding the lien status of the real property and personalty located at 330 Rehoboth Avenue, which resulted in WSFS' damages. Stein has petitioned this Court to grant summary judgment on WSFS' misrepresentation claim. Similar to the fraud and promissory estoppel claims, WSFS fails to establish the necessary elements of a misrepresentation claim to withstand a summary

[95]6 *Del. C.* § 9-334.

judgment motion.[96]

Again, the misrepresentation claim hinges entirely on Jeffrey Stein's alleged statement "I understand that." Per the aforementioned analysis by the Court and the testimony given at the evidentiary hearing, there is no factual basis for this claim. Likewise, from a legal analysis and for the same reasons stated above, WSFS has been unable to demonstrate that its reliance on Stein's statements was reasonable. WSFS is a sophisticated lender who should be aware of the risks involved in using unverified collateral as security for a loan. By failing to properly classify the collateral in its security agreement and financing statement, to check the lien records prior to extending funds or to file a financing statement as to the fixtures attached to the property, WSFS ignored all of the protections that were available to it. It cannot now attempt to protect itself retroactively by pinning its losses on Stein's representations.

WSFS failed to show that its reliance on Stein's alleged misrepresentations was reasonable. The Motion for Summary Judgment as to the misrepresentation claim is GRANTED.

Unjust Enrichment

WSFS claims that Stein Corp. has been unjustly enriched by the improvements it financed through Chillibilly's. Stein has moved for Summary Judgment in its favor on the unjust enrichment claim.

---

[96] In order to properly claim misrepresentation, a plaintiff must show that:

1. a misrepresentation was made by the defendant;
2. the misrepresentation was fraudulent or material;
3. it induced the recipient to enter the contract; and
4. the recipient's reliance on the misrepresentation was reasonable.

Alabi v. DHL Airways, Inc., 583 A.2d 1358, 1361-62 (1990).

"Recovery for unjust enrichment is...dependent upon a finding that the defendant was enriched, through the receipt of a benefit, at the expense of the plaintiff."[97] The defendant's benefit and the plaintiff's detriment must be related and the enrichment must be unjustified.[98] WSFS must prove that it has been deprived of something to which it was entitled, and consequently Stein Corp. received a benefit to which it was not rightfully entitled.[99] In its review of the unjust enrichment claim, the Court regularly has returned to the fact that the cost of remodeling the restaurant to a unique Tex-Mex theme was essentially wasted because the property has since been converted to office space.

WSFS was deprived of its ability to collect on its $500,000 debt. But Stein Corp. is not responsible for that loss. The contract between WSFS and Chillibilly's does not cite any connection or privity with Stein Corp.. Nowhere in its loan agreements or promissory note with Chillibilly's did WSFS indicate an intent to hold Stein Corp. accountable for the loan amount. Stein Corp. never consented in writing to any changes being made to the Premises nor did it express an intent to be held responsible for them.

WSFS cannot claim that Stein Corp. assented to being held liable for the costs of the improvements because the lease specifically holds the tenant "shall pay when due all claims for labor or materials furnished or alleged to have been furnished to or for Tenant . . . ."[100] The failure of Chillibilly's to satisfy its obligations to WSFS does not entitle WSFS to seek satisfaction from Stein Corp., the owner of the property.

---

[97] *Topps Chewing Gum, Inc. v. Fleer Corp.,* 1983 Del. Ch. LEXIS 440 at 5.

[98] *Grace v. Morgan*, 2004 Del. Super. LEXIS 2, 10 (Del. Super. 2004)

[99] *Id.*

[100] Lease Agmt. between Stein Corp. and Chillibilly's of 1/4/2002, at 7.

In *Chrysler Corporation v. Airtemp Corp.*, the Court held that a supplier who contracted with a third party could not thereafter seek satisfaction from the beneficiary of the contract.[101] Holding that a supplier had a pre-existing duty to the party with whom it contracted, the Court rejected the supplier's arguments that a third party becomes liable for the costs of a contract merely through their receipt of its benefits.[102] The Court, granting the summary judgment motion, held that "where a contract exists "no person can be sued for breach of contract who has not contracted either in person or by an agent", and . . . that "the doctrine of unjust enrichment cannot be used to circumvent this principle merely by substituting one person or debtor for another."[103] The Court also found that the supplier was deprived of nothing which it was not bound to give up in its contract and the recipient of the benefits received nothing which it was not entitled to receive under the contract.[104] "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person."[105]

In its opening brief, WSFS contends that "[v]arious courts have ruled that a landlord is unjustly enriched when a tenant makes valuable improvements to real estate, and have awarded damages to the tenant as a result."[106] But WSFS is not a tenant. It is a third-party lender whose

---

[101] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 855-56 (Del. Super. 1980).

[102] *Id. at* 854.

[103] *Id.* at 854, *quoting Roman Mosaic and Tile Co., Inc. v. Vollrath,* 313 A. 2d 305, 307 (Pa. Super. 1973).

[104] *Id.* at 855.

[105] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 855 (Del. Super. Ct. 1980), *quoting* RESTATEMENT OF RESTITUTION § 110.

[106] Pl.'s Opening Br. at 4.

debtor proved insolvent. WSFS ignores the fact that the majority of applicable case law on this topic addresses servicemen who contract with a third party, usually a tenant, and later seek restitution from the property owner or recipient of the benefits.

WSFS relies on *Paschall v. Dozier*, a Tennessee case, to support its contention that unjust enrichment can be found against a landlord when a tenant defaults on contracts for repairs or improvements.[107] In that case, a contractor furnished materials and labor used in the construction of a bathroom addition to the defendant's house.[108] The renovations were made at the specific request of the defendant's daughter, who resided in the defendant's house.[109] When the contractor failed to collect from the daughter, with whom he contracted, he sought a mechanic's lien and personal judgment for the cost of labor and materials against the defendant.[110] The Tennessee Supreme Court found that unjust enrichment was a valid claim against a non-contracting third party despite the lack of privity between the parties.[111] The Court held that the lack of privity between the parties is not an obstacle to recovery under quasi-contract for a materialman.[112] But the contractor must have exhausted his remedies against the person with whom he contracted and still not have received the reasonable value of his services.[113] But the Court did not reach a decision on the merits and instead remanded the case for decision.[114]

---

[107] *Id*. at 4-5.
[108] *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 151-52 (Tenn. 1966).
[109] *Id.*
[110] *Id*.
[111] *Id*. at 154.
[112] *Id*.
[113] *Id*. at 155.
[114] *Id*. at 156.

Paschall's is not a comparable case to the one before the Court. The primary difference is that *Paschall's* provides a remedy for a workman who furnished services that benefitted a non-contracting third party. A notable element of the fact patterns in *Paschall's* and the other case law discussed within the decision is that the defaulting party was usually a family member, which indicates an agency relationship between the benefitting party and the contracting party. There is no such relationship in the facts before the Court.

WSFS is a third party lender. It is not the materialman who furnished services that directly benefitted Stein Corp.. Its only benefit was conferred to Chillibilly's, who used the loan funds at its discretion, and eventually defaulted on its obligations to WSFS. WSFS' position as a third party lender weakens its unjust enrichment claim because it failed to present an additional reason, such as agency, as to why Stein Corp. should be responsible for Chillibilly's outstanding obligations to WSFS.

The commercial lease between Stein Corp. and Chillibilly's is the only tie between the two corporations. Chillibilly's is not sufficiently related to Stein Corp. to implicate an agency relationship. Although the *Paschall's* court did not rest its decision on agency grounds, this Court believes that the close relationship between the father and daughter in that case weighed heavily in finding an unjust enrichment. There is no agency or other factor in the facts before the Court that indicate Stein Corp.'s responsibility for Chillibilly's obligations. This Court finds that no material issue of fact exists that would allow a reasonable jury to find that the retention of any benefit conferred upon Stein Corp. by WSFS' poor loan decisions is unjust.

WSFS also relies on *Andy's Glass Shops, Inc. v. Leelanau Realty*, which involved a

workman's claim of unjust enrichment against a landlord.[115] The action arose when a tenant failed to pay for a window repair for which he agreed to pay. The lease agreement between the landlord and the tenant included a provision requiring the tenant to replace all damaged or broken windows throughout the duration of the lease.[116] The Court found that replacing the window "made the lessor's building secure and habitable, and the installer would have otherwise lost the value of the labor and materials which it invested in the subject repairs."[117] Finding that the landlord would have had to replace the broken window "upon [his] subsequent repossession of the property"[118] and that the lease language required the tenant to make certain repairs, the Court found the landlord responsible for the unpaid bill.

Comparing *Andy's Glass* to WSFS' petition, the two are clearly distinguishable. Stein Corp. made no renovation requirements in the lease with Chillibilly's. Instead, Stein Corp. leased the building to Chillibilly's in "as is" condition. Nor did Stein Corp. require the conversion of the restaurant in the lease like the landlord in *Andy's Glass* required the replacement of broken windows. Stein would not have had to make the renovations contracted by Chillibilly's to maintain the value of his property. The nature of the renovations were discretionary to suit the theme of Chillibilly's restaurant, rather than necessary to ensure the habitability of the building. Chillibilly's was not directed by their lessor to replace anything, and Stein Corp. renounced any responsibility for the cost of repairs. The court's findings in *Andy's Glass Shops* are inapplicable to WSFS' unjust enrichment claim.

---

[115] *Andy's Glass Shops, Inc. v. Leelanau Realty,* 363 N.E.2d 601, 602 (Ohio App. 1977).
[116] *See id.*
[117] Pl.'s Opening Br. at 5.
[118] *Andy's Glass Shops,* 363 N.E.2d at 602.

WSFS argues that Stein Corp. was enriched by the improvements made with its loan funds because it has since entered into a ten year lease with Ocean Atlantic Agency. However, Stein Corp. countered that argument by demonstrating that Stein Corp.'s new lease will earn it less over a ten (10) year lease than the potential earnings from Chillibilly's over the same lease period. Furthermore, any retention of benefits by Stein Corp. is diminished when the Court considers the fact that the new lease houses an office building rather than a restaurant. Many of the changes to the Premises that Chillibilly's requested were unique to the facility as a restaurant, and serve no purpose now.

Each of the cases WSFS cited relies on a factor independent of the actual unjust enrichment. WSFS did nothing to benefit Stein Corp. or his property directly. It did not complete the work on the Premises. It was simply the financing lender. While it has been admitted by the parties that the majority, if not all, of the WSFS funds were invested in improving the property, WSFS is not the electrician who furnished hours of labor for the benefit of Stein Corp.'s building. WSFS imprudently furnished funds to Chillibilly's to use at their discretion in opening the restaurant. The benefit and burden of the loan agreement should be isolated to Chillibilly's and WSFS.

WSFS argues that justice and equity require Stein Corp. to be held responsible for the repairs requested by Chillibilly's. The problem with this argument is that WSFS extended its loan to Chillibilly's based on the knowledge that it had no interest in any fixtures or improvements made to the Premises. WSFS had a copy of the lease agreement between Stein Corp. and Chillibilly's, which reserved improvements and fixtures to Stein Corp.. WSFS was therefore aware of that risk before it made its loan to Chillibilly's. A greater injustice would

result if this Court were to ignore the lease agreement between Stein Corp. and Chillibilly's and award unjust enrichment damages to WSFS. WSFS was in the better position to protect itself by claiming other collateral, or in the alternative, refusing to loan its funds to Chillibilly's. Finding otherwise would be inequitable.

WSFS had an opportunity created by the Landlord's Consent agreement to mitigate its damages. WSFS was permitted to step into the shoes of Chillibilly's and relet the Premises to another tenant. Stein Corp. advised WSFS of this opportunity, but WSFS failed to act. This is yet another example of WSFS' failure to protect itself or limit its damages and demonstrates why unjust enrichment is inappropriate in this case.

WSFS was able to prove that it was deprived of something to which it was entitled and Stein Corp. has to a degree been partially enriched. But WSFS has been unable to prove that Stein Corp. is responsible for its loss. Since the law clearly states that unjust enrichment cannot be used to circumvent basic contract principles requiring that a person not a party to the contract cannot be held liable to it, the motion for Summary Judgment as to unjust enrichment should be GRANTED.

With all legal remedies having failed, WSFS seeks quasi-equitable relief. It seeks to turn the commercial lending world upside down in order to recover the $500,000 it loaned to Chillibilly's. Commercial dealings rely upon commercial agreements to minimize risk. To hold that a commercial bank can recover its loan from the pockets of a third party under these facts would create commercial chaos. It would create another layer of paperwork whereby third parties would have to obtain releases from commercial lenders before contracting with their debtors. This result is unnecessary and unwarranted by this fact situation. "[A]n underlying

principle of the Commercial Code is that the person best able to avoid damage should be responsible when that damage occurs."[119] WSFS had protection available to it in the Code, but it did not take advantage of any protective measure. This Court refuses to hold that a lazy lender shall be entitled to a recovery of unjust enrichment from a third party.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary

[119] *Delaware Trust Co. v. Adams*, 1988 Del. Super. LEXIS 442 (Del. Super. 1988)