The following constitutes the order of the Court.

Signed November 10, 2003.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HAROLD EUGENE O'CONNOR,	§	CASE NO. 99-36662-SAF-7
	§	
DEBTOR(S).	§	

MEMORANDUM OPINION AND ORDER

H. C. Ruparelia and Innovative Asset Group, Inc., filed a proof of claim for $938,511. Daniel J. Sherman, the Chapter 7 trustee of the bankruptcy estate of Harold O'Connor, the debtor; the probate estate of Marie O'Connor; and O'Connor all filed objections to the claim. Ruparelia also asserts claims against the probate estate and O'Connor. Pursuant to the pretrial order, the parties have submitted those claims to this court for adjudication. The court conducted an evidentiary claims allowance hearing on August 26, 2003, August 27, 2003, and October 8, 2003.

The allowance of a claim raises a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a prima facie case against the debtor's assets." In re Fidelity Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to rebut the claim. Id. Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. Id.

Ruparelia concedes that the objecting parties have rebutted the prima facie validity of the proof of claim.

Ruparelia and Innovative assert nine grounds for his claim: (1) the O'Connors breached a contract to sell land to Ruparelia; (2) O'Connor tortiously interfered with Ruparelia's and Innovative's business with respect to real estate purchased from the O'Connors; (3) defamation; (4) trespass; (5) fraud; (6) damages for the trustee's rejection of an executory contract for the sale of land; (7) the return of a $40,000 escrow deposit; (8)

damages for the delay in issuing releases of mortgage; and (9) attorney's fees. The objecting parties contest each ground.

Breach of Contract

The O'Connors and Ruparelia entered an Offer to Purchase agreement dated September 11, 1999, which contemplated that Ruparelia would purchase approximately thirty acres of land from the O'Connors on the island of St. Croix, U.S. Virgin Islands, in two transactions of approximately fifteen acres each.

The Offer to Purchase provides:

> The CONSIDERATION of this offer is the sum of **$705,000.00 (Seven Hundred Five Thousand Dollars 00/100)** equaling **$23,500.00 per acre PURCHASE PRICE** payable as follows:
>
> **First 15 acres:** $5,000.00 (Five Thousand Dollars 00/100) Earnest Money Deposit upon acceptance of this offer and additional Earnest Money Deposits of $5,000.00 (Five Thousand Dollars 00/100) monthly for six months to be held in Broker's Escrow Account as a token of good faith to be applied against the purchase price, with $82,500 (representing the balance on the $117,500.00 down payment) payable in cash at closing, with the balance of $235,000.00 financed by the Seller by Purchase Money Mortgage, payable in sixteen equal amortized quarterly payments of $16,630.00, including principal and interest at 6% per annum.
>
> **Second 15 acres:** Three months after the closing of the First 15 acres, Buyer shall begin making eight monthly Earnest Money deposits of $5,000.00 (Five Thousand Dollars 00/100) prior to closing under same terms and conditions as the first closing.

Offer to Purchase, para. 1 (emphasis in original).

The O'Connors sold approximately fifteen acres to Ruparelia in the first transaction. The parties never completed the second

transaction. Ruparelia asserts that the O'Connors breached the agreement by not selling Ruparelia the second tract. Ruparelia seeks damages for the profits he would have realized by developing the second fifteen acres for residential housing.

The court finds that the Offer to Purchase did not include essential terms for the purchase of the second tract. The court further finds that the parties did not reach a meeting of the minds on the essential terms for the sale of the second tract. As a result, the parties did not having a binding, enforceable contract for the sale of the second tract. Without a contract, obviously, Ruparelia's claim for a breach of contract fails.

Pursuant to the Offer to Purchase, the O'Connors and Ruparelia agreed to terms for the closing of the sale of the first fifteen acres. See supra Offer to Purchase, para. 1. The O'Connors transferred 14.99 acres to Ruparelia for $352,500. Ruparelia paid total cash of $117,500 and executed a note, secured by a mortgage, for $235,000. The parties closed the sale of the first tract on March 30, 2000.

The O'Connors and Ruparelia agreed that Ruparelia intended to subdivide the property, thereby requiring partial releases of the mortgage. See Offer to Purchase, Other Conditions para. 1. The parties agreed that the O'Connors would execute releases upon payment of $24,000 per acre or $30,000 per acre, depending on the location of the acreage within the tract of land. The mortgage

provides that Ruparelia will not transfer any of the property without the O'Connors' prior written approval, which approval may not be unreasonably withheld. However, for individual lot releases, the O'Connors agreed to release the liens on subdivided lots if Ruparelia was current in his mortgage payments, Ruparelia paid the release fee "at or prior to closing of the sale" of the subdivided lot, and Ruparelia paid the O'Connors' costs associated with the release. See Mortgage, para. 17. The mortgage document did not define what constitutes "closing of the sale" of the subdivided lot.

Ruparelia sold subdivided lots by contracts for deed for residential uses to persons who could not afford conventional mortgages. Under a contract for deed, the seller retains the title to the property until the buyer completes the contract payments. The buyer obtains the right to possession of the real estate. After the completion of contract payments, the seller must tender the deed to the buyer. If the buyer defaults in making contract payments, the buyer forfeits any interest in the property and the deed for contract terminates. See Restatement (Third) of Property (Mortgages) § 3.4 (1997).[1] The Restatement

[1] Section 4 of the Virgin Islands Code provides that the "rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." 1 V.I.C. § 4 (2002).

further provides that a contract for deed has the functional attributes of a mortgage.

O'Connor claimed that a "closing" of a "sale" occurred when a buyer entered a contract for deed with Ruparelia. Consequently, to obtain a lien release from the O'Connors, Ruparelia had to tender the release fee at the time of the entry of the contract for deed. Ruparelia contended that the "closing" of a "sale" did not occur until the buyer completed payments under the contract, thereby delaying the time for payment of the lien release fee. While a transfer of an interest in the real estate, at least to the extent of a right to possession, may have occurred upon the execution of a contract for deed, the mortgage provides for payment of the release fee at the closing of a sale. Ruparelia contends that the closing of a sale may occur at a time different from the transfer of an interest in the property. Consistent with that position, Ruparelia did not request lien releases when he entered contracts for deed with subdivided lot buyers. With this dispute unresolved, the O'Connors declared a breach of the mortgage and commenced foreclosure litigation. In response, Ruparelia ultimately paid the balance of the note and mortgage, obtaining a satisfaction of mortgage and release of lien. The foreclosure complaint was dismissed as moot.

But came time for the second transaction. The second tract did not contain fifteen acres. Rather, the second tract

contained 13.721 acres. The O'Connors asserted that the sale price for those acres, under the Offer to Purchase, was $352,500. Ruparelia countered that the purchase price was $322,420. In a series of letters between the attorneys for the O'Connors and Ruparelia, the parties discussed their competing positions on the price. But the parties never negotiated the difference. Indeed, the letters contain no suggestion that the parties ever actually attempted to negotiate the difference; they just repeatedly stated their respective positions.

Both the O'Connors and Ruparelia invoked the ambiguous provision of the consideration for the two tracts in the Offer to Purchase. The Offer to Purchase stated, "The CONSIDERATION of this offer is the sum of $705,000.00 (Seven Hundred Five Thousand Dollars 00/100) equaling $23,500.00 per acre PURCHASE PRICE. . . ." Offer to Purchase, para. 1. Seven hundred five thousand dollars equals $23,500 multiplied by thirty acres. The Offer to Purchase contemplates a sale of "approximately 30 U.S. Acres more or less." The parties agreed that the sale would be "in two 15-acre parts." But they further recognized that after the sale of the first fifteen acres, the second tract would contain the balance, "ca. 15 acres."

Thus, the parties in the Offer to Purchase recognized that the second tract might not include a full fifteen acres. The purchase price formula works only if there are thirty acres. As

the parties recognized that the second tract might not include a full fifteen acres, the parties necessarily knew that their purchase price formula was ambiguous as to its application to the second tract, thereby requiring further negotiations.

Both parties took a reasoned position. The O'Connors took the position that they would sell the entire parcel for $705,000. Having received $352,500 for the first tract, they insisted on the remaining $352,500 for the second tract. Ruparelia, in turn, took the position that he agreed to purchase based on the number of acres actually sold. As 13.721 acres remained to be sold, Ruparelia offered to pay $23,500 multiplied by 13.72 acres.

The trustee contends that the conditions for financing the two tracts resolves the purchase price issue in favor of the O'Connors' position that the price was $352,500. The parties agreed in the Offer to Purchase to precise terms for earnest money, cash at closing, and purchase money mortgage for the first tract. Ruparelia paid $35,000 in seven $5,000 monthly payments before closing. Ruparelia paid an additional $82,500 cash at closing. Ruparelia financed the remaining $235,000 by a purchase money mortgage. Thus, the total purchase price for the first tract was $352,500. The trustee contends that the Offer to Purchase applies those same terms to the second tract.

The trustee misreads the Offer to Purchase. With regard to the second tract, the Offer to Purchase provides: "Second 15

acres: Three months after the closing of the First 15 acres, Buyer shall begin making eight monthly Earnest Money Deposits of $5,000.00 (Five Thousand Dollars 00/100) prior to closing under same terms and conditions as the first closing." Offer to Purchase, para. 1. The provision is ambiguous. The prepositional reference "under same terms and conditions as the first closing" may be read to apply to the earnest money payments. With that reading, the parties agreed that Ruparelia would pay $5,000 three months after closing the first fifteen acre tract, and then make "additional Earnest Money Deposits of $5,000.00 (Five Thousand Dollars 00/100) monthly for six months . . . ." That covers the terms for the earnest money payment but does not establish the remaining amount of down payment due at closing or the amount of any purchase money mortgage for the second tract.

Bruce Wilson, the real estate broker, testified that the parties did not know the exact acreage for sale at the time they entered the Offer to Purchase. Wilson understood that O'Connor wanted to sell the land he had. Without knowing the exact acreage, Wilson testified that the parties negotiated a price per acre. According to the Offer to Purchase, the parties acknowledged that Wilson was the real estate agent who rendered professional services in the transaction as the O'Connors' agent. Offer to Purchase, para. 8. The O'Connors, as sellers, agreed to pay Wilson's commission at the time of closing. Nevertheless,

Wilson understood his role to be a middleman between the two parties. Ruparelia and the O'Connors never engaged in direct discussions. Wilson drafted the Offer to Purchase. The Offer to Purchase does not state that the price is a fixed amount of money per actual acre being sold. Rather, it provides the ambiguous formula. Accepting Wilson's testimony of his understanding of the purchase price, the parties did not incorporate that understanding into the contract.

The parties agreed on the purchase price for the first tract, but left the purchase price of the second tract open under ambiguous terms and thus subject to further negotiations. The parties never agreed on the purchase price for the second tract and, consequently, never entered a binding, enforceable contract for the sale of the second tract.

The parties argue case law regarding the interpretation of ambiguous contracts involving "in gross" or "per acre" purchases of real property. The parties premise their invocation of this case law on the existence of an ambiguous contract requiring judicial construction. Because the parties never entered a contract for the second tract, the court does not engage in the judicial exercise of attempting to ascertain whether they intended a sale by gross acres or per acre. They intended to negotiate.

In addition, because of their dispute about how to apply the

mortgage release provision in the Offer to Purchase, the parties never agreed to the terms for the mortgage release for a purchase money mortgage for the second tract. The O'Connors had declared a default in the purchase money mortgage for the first tract because of the dispute. Thus, on January 24, 2001, Ruparelia's attorney, Arturo Watlington, Jr., wrote to the O'Connors' attorney, Samuel T. Grey, stating that, in the sale of the second tract, the parties had to resolve their problems with the mortgage releases for lot transfers. Ruparelia asserted that he had to be able to conduct business using contracts for deed. In a letter dated January 29, 2001, Grey responded stating that the second mortgage should contain the same lien release provisions as the first mortgage. But, in a letter dated February 14, 2001, Watlington replied that the parties would then have the same dispute about when the release fees were due. By letter dated February 19, 2001, Grey informed Watlington that he did not agree with Ruparelia's position. By letter dated March 19, 2001, Watlington informed Grey that the parties continued to disagree on the mortgage release provision. The parties never bridged that gap. Indeed, again, despite the exchange of letters, the parties never did more than state their respective positions. Neither party offered compromises or alternative suggestions.

As the parties agreed in the Offer to Purchase that Ruparelia intended to subdivide the property and that there would

be partial lien releases from the purchase money mortgage upon payment of fees, the failure to agree on the terms to implement this results in the failure to reach a meeting of the minds on an essential term for the sale of the second tract.

As with the purchase price, the parties each took reasoned positions regarding the lien release. The O'Connors expressed a concern with foreclosure procedures in the event Ruparelia defaulted on the purchase money mortgage after entering several contracts for deed. Grey, the O'Connors' attorney, opined that changes in Virgin Islands law would make foreclosure notice and procedures difficult where buyers of subdivided lots entered contracts for deed and took possession of the subdivided lots but had not completed contract payments. To avoid the difficulty, the O'Connors insisted on the payment of the lien release fees at the time Ruparelia entered the contracts for deed transactions. Ruparelia, on the other hand, countered that payment of the fee upon executing a contract for deed was not feasible. Ruparelia took the position that he did not need the lien release until he had an obligation to deliver title to the subdivided lot buyer, which would not occur until the buyer completed payments under the contract for deed. The parties presented no evidence to suggest that Ruparelia could subdivide with sales by contracts for deed economically if required to pay the lien release fee upon entering a contract for deed. The parties never reconciled

their differences for the second tract through negotiations. As Ruparelia's intent to subdivide the property was at the heart of the transaction, the parties failed to reach a meeting of minds with regard to lien releases for the second tract.

Wilson testified that he discussed Ruparelia's development plans with O'Connor, including Ruparelia's intention to sell subdivided lots by contracts for deed. He drafted the lien release provisions to preserve sufficient collateral value to protect the O'Connors. He testified that he understood that Ruparelia would request a release of lien "in order to give deeds to people who have paid off or paid in cash." Wilson Dep., p.55. Thus, Wilson understood that a release would be due when Ruparelia had an obligation to deliver a deed to the buyer of the subdivided lot, not when he executed a contract for deed.

Yet, Wilson conceded Grey's dilemma. Wilson recognized the foreclosure complications if the mortgaged land became encumbered by persons in possession under contracts for deed. Those persons would have claims against the land that would have to be addressed in mortgage proceedings. Wilson knew of two cases that resulted in prolonged litigation. Wilson further conceded that a judge, in foreclosure proceedings brought by O'Connors, would not likely remove persons in possession. Grey took a reasoned approach to try to eliminate the possibility of similar litigation or addressing persons in possession should Ruparelia

default on the mortgage payments after executing several contracts for deed. Wilson suggested to O'Connor that the mortgaged property would increase in value by the subdivision development and sales of lots by contracts for deed, thereby offsetting the potential costs of noticing persons in possession in foreclosure proceedings.

Wilson prepared the Offer to Purchase, after acting as the middleman in the parties' negotiations. He gave the draft to Ruparelia to review and then to O'Connor. The parties executed the Offer to Purchase. The Offer to Purchase, as discussed above, acknowledges that Ruparelia would develop the land, thereby requiring partial releases. The Offer to Purchase provided the fees for the partial releases but did not address specific provisions for the releases. The mortgage document itself, at paragraph 17 in the mortgage for the first fifteen-acre transaction, addressed the specific provisions for the partial releases. Wilson played no role in the negotiations or drafting of the mortgage document. The parties' disagreement following the first transaction concerned the lien release provisions in the mortgage. Both parties sought to resolve the issue. However, the parties could not reach a meeting of the minds concerning those provisions for the second transaction.[2]

[2] Wilson had been paid a commission for the sale of the first tract. He claims that a commission is due for the second tract. He holds $40,000 of escrow payments for the second

Curiously, Ruparelia argues that the language "under same terms and conditions as the first closing" in the Offer to Purchase applies to all the provisions for the first tract, not just to the earnest money payments. Ruparelia argues that provision compels that the mortgage for the second tract have the same terms as the mortgage for the first tract. That reading results in a purchase price of $352,500, which is directly contrary to Ruparelia's position. Furthermore, Watlington recognized the dispute under the first mortgage that had to be resolved.

With two essential terms unresolved, the parties did not have a binding, enforceable contract for the sale of the second tract. Without a contract, Ruparelia's claim for a breach of contract fails. The court will, therefore, disallow Ruparelia's claim based on breach of contract.

The parties presented other evidence concerning an earth change permit and other proposed changes to the form of the mortgage for the second tract. Those disputes do not inform the court's decision. Rather, the court's decision turns on the failure to achieve a meeting of the minds on two essential terms for the sale of the second tract.

The trustee raises an issue that Ruparelia was not develop-

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transaction. Wilson claims an interest in those funds for a commission if the parties entered a contract. Wilson therefore may have a financial interest in the outcome of this dispute.

ing the property consistent with Virgin Islands law. That issue does not affect the court's conclusion regarding the contract. If the parties had reached a meeting of the minds for the second tract, the O'Connors would have had a binding contractual obligation to sell the second tract. On the other hand, the O'Connors' concern about the issue supports their reasoned position with regard to the lien releases. The trustee also argues that a contract for deed, under the Restatement, amounts to the functional equivalent of a mortgage. The court first observes that a contract for deed is not a mortgage. But the court secondly observes that the Restatement supports the position the O'Connors took concerning lien releases. The court does not address which side had the better of the two reasoned positions. Rather, the court finds that the handling of lien releases where the parties agreed in the Offer to Purchase that Ruparelia intended to subdivide the property amounted to an essential term for a contract. The parties never reached a meeting of the minds on that essential term for the second tract of land.

For purposes of completion, the court addresses the question of damages. In the event a reviewing court disagreed with the court's conclusion on the breach of contract claim and found that a contract existed and the O'Connors breached the contract, the parties agree that the general rule is that damages would be

measured by the difference between the agreed purchase price of the property and the actual value of the property at the time of breach. However, Ruparelia argues that he would also be entitled to consequential damages, including lost profits, in the calculation of damages. Ruparelia relies on Spangler v. Holthusen, 378 N.E.2d 304, 309 (Ill. App. Ct. 1978) and Crown Life Ins. Co. v. Am. Nat'l Bank & Trust Co. of Chicago, 830 F.Supp. 1097, 1100 (N.D. Ill. 1993) for the argument that he is entitled to recovery of lost profits.

The trustee contends, and Ruparelia concedes, that there was no change in value in the property. Ruparelia testified that the actual value of the land was less than the amount he agreed to pay. Thus, if there were a breach of contract, Ruparelia would not be entitled to any damages under the change-in-value measurement.

Ruparelia testified that he expected profits from the development of the second 13.7 acre tract to be $482,000, plus or minus two to four percent. Ruparelia believed that the stable market conditions on St. Croix would have generated sales of lots at $22,000-22,500 per lot. He anticipated developing and selling forty-six lots. After deducting acquisition, development, marketing and financing expenses, he projected his profits. Ruparelia testified that his experience with the first fifteen-acre tract supports those projections.

Ruparelia further testified that he anticipated selling the lots under contracts for deed. He calculated that the contracts would yield an income stream of ten percent per year, for a total of $235,000 to $255,000. Ruparelia requests that the court award these lost profits and income as compensatory damages.

Ruparelia has not met his burden of establishing those damages. The court accords no weight to Ruparelia's testimony to support damages of approximately $750,000. While Ruparelia testified that he made that level of profits from the first fifteen-acre tract, he produced no supporting actual financial evidence for the first tract. Furthermore, Ruparelia's failure to offer compromises in the dispute regarding the purchase price and the mortgage releases for the second tract belies his claim of damages exceeding a third of a million dollars. If Ruparelia believed, at the time the parties were exchanging positions on the purchase price and release provisions of the mortgage, that he would make profits of $750,000, he would have conceded the difference of $30,080 in the purchase price. He would have offered alternative protection for the O'Connors to address the complicating costs of foreclosure proceedings with persons in possession under contracts for deed. The court, therefore, finds that if lost profits and income constitute the correct measure of damages, Ruparelia has failed to meet his burden of proof.

The trustee argues that damages for lost interest should be

denied because the ten percent rate of interest that Ruparelia charged on the outstanding balances on contracts for deed violates the Virgin Islands' usury statutes. While the trustee cannot recover excessive interest charged to subdivision lot buyers, the trustee argues that Ruparelia should not obtain an allowed claim against the bankruptcy estate including that interest.

In the context of a quiet title analysis, the Virgin Islands' Territorial Court has held, pursuant to the Restatement cited above, a contract for deed acts as a mortgage. Andrews v. Nathaniel, No. 759/1994, 2000 WL 221937, at *4 (Terr. V.I. Jan. 26, 2000). Under title 11, section 951 of the Virgin Islands Code, the maximum rate of interest per year on first priority mortgage loans on real estate where the amount of the first priority mortgage loan is $100,000 or less is "not more than one and one-half percentage points above the Federal Home Loan Mortgage Corporation's posted yield . . ." 11 V.I. Code Ann. § 951(b)(2) (2002). The trustee's Exhibit 12 shows the allowable interest rates for first priority mortgages of $100,000 or less for January 1987 through August 2003. For the year 2000, the year that Ruparelia and the O'Connors closed the sale of the first tract, all the months except June allowed maximum interest rates under ten percent. In June 2000 the maximum allowable interest rate was ten percent.

Ruparelia charged ten percent interest on the contracts for deed that he executed. Ruparelia argues that the contracts for deed on the second tract would not be first priority mortgages because the O'Connors' mortgage would have remained on the land until after the deed was delivered to the purchaser and the lien released. Therefore, Ruparelia argues, because the contracts for deed would not be first priority mortgage loans under § 951(b)(2), they would not be subject to the maximum interest rates provided under that section. If the O'Connors' lien was partially released upon execution of a contract for deed, then Ruparelia would have to agree that the contract for deed would be considered a first priority mortgage loan and, thus, would be subject to the maximum allowable interest under § 951(b)(2).

If the court concluded that the contracts for deed constitute a first priority mortgage loan under the circumstances and if the court awarded compensatory damages, the court would not award lost profits because Ruparelia was charging ten percent interest, to which he would not be entitled under § 951, except possibly for June 2000.[3] The court would thereby honor, as a matter of comity, the public policy adopted in the Virgin Islands, irrespective of whether this court agrees with the Andrews decision that a contract for deed constitutes a mortgage.

[3] Interest of ten percent in June 2000 would have met the statutory maximum under § 951 for that month.

Ruparelia argues that the trustee cannot assert this position because he did not plead usury as an affirmative defense. Because the trustee cannot recover interest paid by subdivision lot buyers and because this dispute does not involve enforcement of contracts for deed, that pleading requirement does not apply.

The trustee also contends that Ruparelia cannot recover for lost sales because he would enter contracts for deed before obtaining subdivision approval, which would violate Virgin Islands law. The trustee argues that lost profits should not be based on unlawful activity. For sales of the first tract, Ruparelia's marketing corporation, Innovative, obtained preliminary subdivision approval in December 1999. The court does not read the testimony of Randolph Boschulte of the Virgin Islands Planning and Natural Resources Department to preclude Ruparelia's development practice. Violation of the Virgin Islands subdivision law in developing the second tract is speculative. Consequently, Ruparelia's method of development would not preclude compensatory damages, if otherwise established.

The court addresses two other points. Ruparelia contends that O'Connor intended to breach the Offer to Purchase to retain the remaining acres to develop the land himself. Wilson testified that he and O'Connor discussed the prospect of O'Connor developing the land before O'Connor decided to sell the property.

Like persons on the Grassy Knoll in Dallas, Ruparelia finds a conspiracy behind every fact. Absent a meeting of the minds by the parties on two essential terms for the second tract, whatever motivated either the seller or buyer does not inform the court's decision.

Ruparelia's marketing company, Innovative, asserts a claim based on the same theories asserted by Ruparelia. Innovative was not a party to the Offer to Purchase. Innovative has no interest in the land purchased and developed by Ruparelia. Innovative can have no claim against the bankruptcy estate.

Defamation

Ruparelia and Innovative assert a claim of defamation against O'Connor. "A statement is defamatory if it tends to so harm the reputation of another that his standing in the community is lowered and it deters third persons from associating or dealing with that person." Flanders v. ShellSeekers, Inc., No. CIV. 94/93, 1998 WL 667782, at *3 (Terr. V.I. Aug. 11, 1998). To recover on a claim of defamation, a plaintiff must prove the following:

> (1) that defendant made a false and defamatory statement concerning another;
> (2) that said communication was an unprivileged publication to a third party;
> (3) that the defendants were at fault amounting to at least an act of negligence; and
> (4) that the publication caused harm to the plaintiff.

Id. Defenses to defamation include truth and privilege. Id. at

*4.

Ruparelia claims that O'Connor made a slanderous statement or statements to Carlos Cintron, one of the contract for deed purchasers of a plot on the first tract of land that Ruparelia purchased from the O'Connors. Ruparelia claims that the statement or statements harmed his reputation in his community to the point that it deterred potential purchasers from dealing with Ruparelia or from inquiring into contracts for deed with Ruparelia.

Cintron and his wife, Brenda Cintron, entered into a standard land contract dated February 27, 2000, with Innovative for a plot of land that is approximately one-fourth of an acre. Cintron testified at his deposition that he was planting some trees on the land one day when O'Connor approached Cintron and asked him what he was doing on the land. Cintron testified that he explained to O'Connor that he had bought the land. Cintron testified that O'Connor angrily told Cintron to get off the property and told him that O'Connor was the owner. O'Connor asked Cintron to show him his sales contract, which Cintron did not do. At his deposition, Cintron did not recall the date of the encounter with O'Connor. Cintron testified that about two weeks later O'Connor approached him on the land again and told Cintron to call him because he could offer Cintron a better price for the same land.

After the first encounter with O'Connor, Cintron contacted Catherine I. Allen, the realtor who arranged for Cintron to purchase the plot. Cintron told Allen about the statements that O'Connor had made and told her he wanted his money back. Cintron also contacted Britain H. Bryant, a lawyer for whom Cintron worked as a gardener, to ask him to assist with any problems associated with Cintron's purchase of the plot. Cintron stated that he also told his wife and some friends about the encounter with O'Connor.

When Cintron entered into the contract with Innovative in February 2000, neither Innovative nor Ruparelia had a legal interest in the land because the closing of the sale of the land from the O'Connors to Ruparelia did not occur until March 30, 2000. After the closing on March 30, 2000, neither the O'Connors nor Innovative owned the property. Ruparelia owned the property. The O'Connors held a security interest in the land as of March 30, 2000. In his deposition, Cintron testified that before he entered the contract, no one had told him that Innovative did not own the land he was buying, no one had told Cintron that there would be a master mortgage on the property, and no one had told Cintron that if for any reason final subdivision approval was not received, then Cintron would not be able to get a deed to the property.

At trial, the trustee did not dispute that O'Connor had

spoken to Cintron on the property. Although there was no express testimony regarding the exact date of the encounter between O'Connor and Cintron, the court infers that it occurred after March 30, 2000, the date of the closing of the sale of the property from the O'Connors to Ruparelia.[4]

The trustee argued that the statement from O'Connor was not that he, O'Connor, owned the property at the time of the encounter, but that he, O'Connor, owned the property when Cintron entered the contract. The trustee argues that such statement is true, that truth is a defense to slander, and that, accordingly,

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[4] A letter written by Bryant to G. Hunter Logan, an attorney acting on behalf of the O'Connors, dated April 29, 2000, contains the statement: "Your client has deeded the property to Mr. Ruparelia. I have a copy of the deed. Mr. O'Connor has no right to tell my client or anybody else that they cannot go on that property and to get off the property." This evidence indicates that the encounter between O'Connor and Cintron occurred after O'Connor no longer owned the land – after March 30, 2000. See Exhibit 6 of Bryant's deposition.

O'Connor did not testify. The court draws an inference adverse to O'Connor as a result.

The court accords no weight to exhibit 27e, which is an undated, unsigned document that was a subject of an objection by the trustee that it should not be admitted into evidence because of attorney-client privilege. The court finds that the doctrine of attorney-client privilege does not apply to this document because there is nothing to show that this document actually was authored by O'Connor, signed by O'Connor or that it was ever sent to or received by O'Connor's attorney. It is simply a document that came from a file in a computer to which O'Connor had access. If the court were to find that it could accord weight to the document, however, it might find significance in the statement purportedly from O'Connor that "I met Carlos Cintron on the property (purely by accident) a day or so after we closed with Ruparelia." This statement would provide another indication that the encounter between O'Connor and Cintron occurred after the closing of the property – after March 30, 2000.

there was no slanderous statement made. The trustee, however, did not call any witness to testify or present any deposition testimony to refute Cintron's testimony regarding the content of O'Connor's statement. Remarkably, O'Connor never was called to testify. O'Connor could have provided testimony about the content of his statements to Cintron and the nature of the encounter. The court finds that the statements made by O'Connor were as Cintron testified.

The statement that O'Connor made to Cintron, then, was false. When O'Connor told Cintron that he, O'Connor, owned the land, O'Connor did *not* own the land. The statement concerned another – Ruparelia and Innovative. In saying that he, O'Connor, owned the land, he was, in effect, saying that Ruparelia and Innovative did not own the land. There was no assertion from the trustee that O'Connor was privileged in communicating the statement to Cintron, a third party. And the statement was further communicated to Allen, Bryant, Mrs. Cintron, and others.

However, the publication did not cause harm to Ruparelia. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). Also, if a statement is concerning a corporation, it may be defamatory if "the corporation is one for profit, and the matter tends to

prejudice it in the conduct of its business or to deter others from dealing with it. . . ." Restatement (Second) of Torts § 561(a) (1977).[5]

Ruparelia did not present evidence showing that he lost any sales of property because of the statement or statements made by O'Connor. After negotiations, Cintron did not terminate the contract and Ruparelia did not return his money. There is no evidence that Ruparelia was not able to sell lots on the first tract. Ruparelia entered into contracts with buyers for all the subdivided plots on the first tract. Ruparelia has failed to show that his reputation or Innovative's reputation were lowered such that people were deterred from dealing with him or Innovative.

Ruparelia and Innovative further assert defamation based on two letters written by G. Hunter Logan, one of the O'Connors' attorneys, to Bryant in response to Bryant's questions about ownership of the property that Cintron possessed. In a letter from Bryant to Allen, and copied to the O'Connors, dated April 18, 2000, Bryant wrote about Cintron's encounter with O'Connor. Bryant stated that he would be interested in meeting with Allen, Ruparelia, the Cintrons, and the O'Connors to "try to figure out

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[5] The court does not find *slander per se*. If a reviewing court were to conclude that O'Connor is liable under *slander per se*, then Ruparelia would be entitled to nominal damages of $1,000.00.

just what is going on here, what representations have been made, and what the Innovative Asset Group does or does not own either outright or under contract." Bryant Dep., Ex. 4. Logan responded to Bryant's April 18, 2000, letter to Allen on behalf of the O'Connors. In the letter, Logan explained that the first tract was conveyed to Ruparelia on March 30, 2000, and that the O'Connors were given a mortgage on the property. He then described that the O'Connors' position was that Ruparelia was:

> not permitted to sell any temporary subdivision plots or final subdivision plots without first paying the lot release fee to Mr. & Mrs. O'Connor and otherwise complying with the provisions of Section 17 of the mortgage and that this prohibition applies to the signing of a contract for deed/installment sales contract. It is also the position of Mr. & Mrs. O'Connor that Virgin Islands law prohibits the sale of a subdivision lot without first obtaining final subdivision approval and that this prohibition applies to the signing of a contract for deed/installment sales contract.

Bryant Dep., Ex. 5.

Bryant responded to Logan in a letter dated April 29, 2000, in which he told Logan that "[y]our client has deeded the property to Mr. Ruparelia. . . . Mr. O'Connor has no right to tell my client or anybody else that they cannot go on that property and to get off the property." Bryant Dep., Ex. 6. Logan replied to Bryant in a letter dated May 4, 2000, in which he stated he would "clarify Mr. & Mrs. O'Connor's position." Bryant Dep., Ex. 7. Logan wrote that Ruparelia had not obtained final subdivision approval and that "[u]nder Virgin Islands law,

he can not sell plots in a subdivision without obtaining final subdivision approval. Doesn't Mr. Cintron care that he is paying for a parcel of property that is not a valid subdivision lot. [sic]" Bryant Dep., Ex. 7. Logan also described the O'Connors' position on the lot release fees.

Ruparelia contends that the two letters from Logan, dated April 25, 2000, and May 4, 2000, "falsely represented that Ruparelia was violating Virgin Islands law" and are actionable defamation. See Memorandum of Law and Arguments in Support of the Claims of H.C. Ruparelia and Innovative Asset Group, Inc. and Response to the Objections of the Trustee, the Probate Estate of Marie O'Connor and Harold E. O'Connor, pp. 38-39.

The letters written by Logan to Bryant were in response to letters and inquiries from Bryant. The statements are not "false" because Logan was stating the O'Connors' position on the handling of lot releases and the subdivision of the property. These statements were followed by Logan's legal opinion that the practices violate Virgin Islands law and the mortgage. The Restatement (Second) of Torts § 566 provides that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts § 566 (1977). Ruparelia and the O'Connors had a reasoned dispute on

the payment of the lien release fees, as found above. In the letters, Logan based his legal opinion on the facts of that dispute. His legal opinion was not defamatory.

Based on these findings, the court will disallow Ruparelia's and Innovative's claims based on defamation.

Tortious Interference

Ruparelia and Innovative claim that O'Connor tortiously interfered with their business relations with buyers. The Restatement (Second) of Torts defines tortious interference with a contract as:

> [O]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Restatement (Second) of Torts § 766 (1979).

"A claim for tortious interference requires 'the third person's failure to perform.'" Mahogany Run Condo. Ass'n., Inc. v. ICG Realty Mgmt. Corp., No. CIV. 97-185, CIV 96-85, 1999 WL 112826, at *2 (D.V.I. Feb. 16, 1999) (quoting Gov't Guarantee Fund v. Hyatt Corp., 955 F.Supp. 441, 452 (D.V.I. 1997)).

O'Connor's statements to Cintron that he, O'Connor, owned the land and that Cintron should not be on the land caused a series of events that ultimately led to Ruparelia's securing a letter of credit at the request of Bryant, Cintron's attorney,

for assurances of performance under the contract for deed. O'Connor's statement to Cintron that O'Connor owned the land was untrue. O'Connor had no ownership interest in the plot of land at the time he made the statement to Cintron. The statement had the effect of interfering with the contract that Cintron had entered.

Cintron's attorney, Bryant, inquired into the interests various parties had in the plot of land occupied by Cintron and discovered that the land was owned by Ruparelia. Bryant understood that Cintron entered a contract for deed with Innovative and that Innovative was Ruparelia's marketing corporation, owned by Ruparelia. Bryant understood that Cintron was purchasing the land from Ruparelia through Innovative. The letters from Logan to Bryant describing the O'Connors' position contained statements that built upon O'Connors' statements that interfered with Innovative's contract with Cintron. The O'Connors had an interest in the procedures involved in receiving lot release payments, so their attorney was representing their interests in his letter to Bryant addressing their position on the lot release payments. However, the O'Connors' position as mortgagee had no impact on whether or not Ruparelia obtained subdivision approval. Therefore, Logan overstated his clients' interests when he described in his May 4, 2000, letter to Bryant the consequences of Ruparelia's possible failure in obtaining

subdivision approval. The O'Connors' mortgage was not affected by Ruparelia obtaining or not obtaining subdivision approval.

Logan furthered O'Connor's interference in Innovative's contract with Cintron when he addressed what would be in Cintron's best interests in the May 4, 2000, letter to Bryant. Logan wrote:

> [I]f Mr. Ruparelia wants to sell a subdivision lot, by deed or installment sales contract, then he has to obtain final subdivision approval from the Government and pay the lot release price to Mr. & Mrs. O'Connor and obtain a partial mortgage release for your client's lot. This is the type of protection that Mr. Cintron should insist upon prior to paying money to Mr. Ruparelia. This eliminates the possibility that he pays the purchase price to Mr. Ruparelia and thereafter Mr. Ruparelia cannot thereafter deliver good, marketable and insurable fee simple title to the subdivision lot to Mr. Cintron because he has defaulted under the loan from the O'Connors and the O'Connors have foreclosed their mortgage.

Bryant Dep., Ex. 7.

O'Connor's statements to Cintron, reinforced and perpetuated by the letters to Bryant from Logan, improperly interfered with the performance of the contract between two other parties – Cintron and Innovative. Bryant informed Ruparelia that Cintron was unwilling to go forward with the contract as it was when he first signed it. By letter dated December 28, 2000, to Ruparelia, Bryant wrote, "I think you and your attorney should have a talk with me now about you either returning Mr. Cintron's money or getting clear title to his plot and giving him a warranty deed for a mortgage." Bryant Dep., Ex. 9. To protect

Cintron, Ruparelia obtained a letter of credit for $50,000. Cintron remains in possession of the property.

For tortious interference, the third party must fail to perform. Cintron insisted that the contract either be terminated with a return of his money or he receive protections. Thus, O'Connor's interference resulted in Cintron's refusal to perform under the contract as originally contemplated, compelling the parties to modify the contract to include a letter of credit for protection. Without O'Connor's interference with the contract, Cintron would have performed the contract as it was when the parties entered it. Instead, O'Connor interfered, causing Ruparelia to enter a modified agreement with Cintron. Ruparelia incurred costs in obtaining a letter of credit to modify the contract.

The trustee argued that the letter of credit was a result of the way Ruparelia structured the deal with Cintron and that Bryant would have sought security on behalf of Cintron whether or not O'Connor made the statement or statements. However, O'Connor's statement ultimately caused Ruparelia to have to purchase the letter of credit. Logan's letters to Bryant only served to continue the interference by O'Connor.

Ruparelia presented no evidence that O'Connor's statements, alone or as perpetuated by Logan, resulted in any other third party not performing a contract with him.

Ruparelia is thus entitled to the cost of obtaining the letter of credit for Cintron's protection and his legal fees incurred in obtaining the letter of credit. Ruparelia testified that he spent $1,200 in fees and expenses to obtain the letter of credit. Innovative has not established any damages. The court will allow Ruparelia a claim against the bankruptcy estate of $1,200 and will disallow Innovative's claim.

Trespass

Ruparelia and Innovative assert a claim of trespass against O'Connor stemming from O'Connor's entry on the plot of land on which Cintron was working after the sale of the land to Ruparelia. Under the Restatement (Second) of Torts, adopted as law in the Virgin Islands, a person is liable for trespass:

> irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters the land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.

Restatement (Second) of Torts § 158 (1965). See also Harthman v. Texaco, Inc. (In re Tutu Wells Contamination Litigation), 909 F. Supp. 991 (D. V.I. 1995).

Ruparelia testified that the tract of land that he purchased from the O'Connors was open to the public for sales of the subdivided lots. Ruparelia testified that people were free to enter the land to inspect the lots without permission from or the

accompaniment of Ruparelia. O'Connor, as a member of the general public, was free to enter the land without Ruparelia's permission. Because O'Connor was privileged to enter the land, there was no trespass. The court will therefore disallow the claims based on trespass.

Fraud

Ruparelia claims that the O'Connors' conduct in connection with the sale of the two tracts of land amounts to fraud. The plaintiff must prove "(1) a specific false representation of material fact; (2) knowledge by the person who made it that it was false; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage.'" Financial Trust Co., Inc. v. Citibank N.A., 268 F.Supp.2d 561, 575 (D. V.I. 2003) (quoting Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992)).

Ruparelia contends that the O'Connors:

> intended to dishonor their agreement with Ruparelia by scheming to come up with some pretext or subterfuge for cheating him out of the cash portion of the price of the first tract, his land, his development work, marketing efforts and profit, had no intention to close on the second tract, and had every intention of attempting to convert his earnest money on the second tract. By entering into a the contract and executing the closing documents the O'Connors expressly and impliedly represented that they had the intention to honor their contract obligations with Ruparelia. Such representations were entirely false and concealed the O'Connors' true larcenous intentions. Such conduct represented fraud in the inception, on which Ruparelia

relied to his detriment.

Memorandum of Law and Arguments in Support of the Claims of H.C. Ruparelia and Innovative Asset Group, Inc. and Response to the Objections of the Trustee, the Probate Estate of Marie O'Connor and Harold E. O'Connor, p. 32.

Ruparelia has failed to meet his burden of proving that the O'Connors had fraudulent intent in executing the Offer to Purchase. The parties closed on the sale of the first tract and never reached a meeting of minds on the second tract. That Ruparelia established that O'Connor tortiously interfered with the Cintron transaction does not establish fraud with regard to the Offer of Purchase. The court will disallow the claims based on fraud.

Rejection of executory contract

Ruparelia contends that he may assert damages from the trustee's rejection of an executory contract. Under § 365 of the Bankruptcy Code, if the trustee rejects an executory contract, the rejection is deemed to be a breach of contract giving rise to a claim as of the date of the filing of the bankruptcy case. 11 U.S.C. § 365(g)(1). The trustee rejected the Offer to Purchase. But the Offer to Purchase is not an executory contract with regard to the second tract of land, for the reasons found above. Consequently, the trustee's act is meaningless. If there is no contract, then obviously there is no executory contract to

reject. The court will disallow Ruparelia's rejection claim.

Earnest Money Deposit

Ruparelia paid $40,000 as an escrow deposit for tract two. Ruparelia claims he is entitled to a refund of that money. The trustee contends that the funds belong to the estate. The trustee proposes to pay $20,000 to the real estate broker involved in the transaction and retain the remaining $20,000.

As the parties did not enter a binding, enforceable contract for the second tract, neither the trustee, O'Connor nor the probate estate has an interest in the escrow funds. As among the parties to this contested matter, Ruparelia is entitled to a return of the $40,000. The court will enter an order releasing any claim of the trustee, O'Connor or the probate estate to the $40,000 and, as to these parties, will order the return of the $40,000 to Ruparelia, but without prejudice to any claim that Wilson may assert against the funds under Virgin Islands law. With this judgment, Ruparelia will have no further claim against the bankruptcy estate.

Because of this decision, the court does not address whether the doctrines of res judicata or collateral estoppel preclude the trustee from asserting any claim to the earnest money.

Delay in lien releases

Ruparelia contends that the trustee and the Marie O'Connor probate estate failed to timely deliver partial and final

mortgage releases, thereby causing damages to Ruparelia's business.

Ruparelia sold by contracts for deed several subdivided lots from the first tract. The O'Connors held a mortgage on the property. As discussed above, the mortgage at para. 17 provided for partial releases. The O'Connors agreed to "execute and deliver partial releases of individual Subdivision Lots comprising the Property from the lien of this Mortgage within fifteen (15) business days of receipt of" Ruparelia's request "as long as the following conditions have been fully satisfied." Mortgage, para. 17.1. Those conditions require that Ruparelia be current in mortgage payments and not commit any default under the mortgage, that Ruparelia pay the requisite release fee, and that Ruparelia pay the O'Connors' costs. Mortgage, para. 17.

Ruparelia did not receive executed releases within fifteen business days of receipt of his request for releases. Nevertheless, under the circumstances, that does not amount to a breach of contract.

By letter dated March 20, 2002, Ruparelia's attorney informed the trustee's attorney that one of his purchasers had paid the contract for deed, requiring Ruparelia to deliver title. Ruparelia requested that the trustee release the lien for that lot and provided a proposed release form. H. DeWayne Hale, the trustee's attorney, responded by letter dated March 21, 2002,

that the trustee requested that his Virgin Islands' attorney review the request. The trustee was not certain whether a lien release fee was due under the mortgage or whether mortgage payments covered the fee.

By letter dated May 1, 2002, Warren B. Cole, the trustee's Virgin Islands' attorney, informed Watlington that the trustee had authorized the execution of the release. However, Marie O'Connor had died in January 2002. The trustee observed that Ruparelia would have to obtain a release of her interest from her probate estate. The execution of the release by the trustee was delayed because of a legal description error which was corrected by Greg Gutman, Ruparelia's attorney, by letter dated May 21, 2002.

Three weeks later, on June 12, 2002, Ruparelia advised the trustee that Ruparelia needed five more releases for lots sold by contract for deed. By letter dated June 13, 2002, Gutman forwarded release forms for the five additional lots to the trustee.

On June 17, 2002, Cole referred the release requests to Grey, the O'Connors' attorney, for an opinion regarding application of principal mortgage payments to the lien release fee. The court questions why the trustee made this referral. Grey was not disinterested from a bankruptcy perspective. The trustee and Cole could read the mortgage provisions and calculate

payments made by Ruparelia.

In any event, by August 5, 2002, the trustee had executed all six releases. On August 5, 2002, Ruparelia requested that the trustee execute partial releases of the lis pendens as well. The trustee agreed. By letter dated August 6, 2002, Cole informed Gutman that the trustee would deliver the executed releases upon entry into a stipulation to release funds deposited with the Territorial Court. Ruparelia agreed to release the funds on August 6, 2002. Ruparelia received the releases from the trustee on August 6, 2002.

Meanwhile, to resolve the pending foreclosure lawsuit, Ruparelia had tendered funds to pay the mortgage in full. As a result, he was entitled to a full release of lien. Following an exchange of letters on August 19, 2002, and August 21, 2002, the parties agreed on the final mortgage payout amount. On August 22, 2002, Ruparelia made the final payment. On August 29, 2002, the trustee informed Ruparelia that he was prepared to execute the full releases and would deliver them upon receipt of the mortgage payment. On September 18, 2002, Watlington authorized the transfer of the mortgage payment. The trustee executed the full release. Ruparelia received the full release on September 25, 2002.

The court finds that the trustee acted timely and did not unreasonably delay delivering the releases. The bankruptcy case

had been filed by O'Connor in Dallas, Texas. The trustee is in Dallas, Texas. The property is on the island of St. Croix. The trustee had to consult with Cole, his attorney in St. Croix. Cole had to review the transaction. O'Connor had initiated a foreclosure lawsuit before the trustee was appointed. Ruparelia had deposited funds with the Territorial Court. The trustee was entitled to his share of the lien release fee. Under these circumstances, a reasonable business person engaged in a real estate transaction would expect that the execution of lien releases by a bankruptcy trustee would take several weeks. A legal standard for a reasonable time of performance must facilitate the expectations of reasonable commercial practices. The court must impose a legal standard that had the parties anticipated a bankruptcy case in Dallas, Texas, they would have varied the fifteen-day provision of the mortgage to reflect a reasonable expectation for performance by a bankruptcy trustee. Any other standard would not foster long-term commitments.

With regard to the first request, the trustee authorized execution of the release by May 1, 2002, approximately two months after Ruparelia submitted the request. With regard to the other five requests, the trustee authorized execution of the releases by August 5, 2002, less than two months after those requests. Ruparelia had the releases on August 6, 2002. With regard to the full release, the trustee authorized the execution of the full

release a week after receiving the request, conditioned, naturally, on actual payment of the mortgage. Ruparelia had the full release less than one month after the request. The trustee acted timely. As the trustee acted timely, the trustee did not breach the contract.

Ruparelia complains that the trustee coerced him into agreeing to release funds deposited with the court. The evidence does not support an inference of duress by the trustee. On the contrary, the parties had competing interests which they resolved through negotiations. The trustee was entitled to mortgage payments in exchange for the lien releases. Ruparelia had an obligation to deliver title on the completed contracts for deed. On August 6, 2002, the parties entered into a consensual stipulation for the release of the funds. The stipulation allowed both parties to perform their respective obligations. Less than three weeks later, Ruparelia elected to satisfy the entire mortgage.

Ruparelia also complains that the Marie O'Connor probate estate did not timely deliver the lien releases. Marie O'Connor died in January 2002. O'Connor claimed to be her sole heir. When Ruparelia requested the first lien release in early March 2002, probate proceedings had not been initiated. Neither the trustee, O'Connor nor the probate estate introduced any evidence explaining why O'Connor did not commence a probate proceeding at

that time. Marie O'Connor's estate had a contractual obligation to deliver a lien release. O'Connor, as sole heir, had an obligation to initiate a probate proceeding to perform that contractual obligation.

In his May 1, 2002, letter, Cole reminded Watlington that he would have to look to the Marie O'Connor probate estate for a release of her interest in the lien. On May 2, 2002, O'Connor's attorney, Gerrit M. Pronske, wrote to Gutman stating that O'Connor, as sole heir, would sign the release. But, by letter dated May 3, 2002, Gutman questioned whether O'Connor could execute the release for a probate estate.

Ruparelia initiated a proceeding. The court appointed Eric Chancellor, a Virgin Islands' attorney, as the administrator of the probate estate. By letter dated June 28, 2002, Watlington requested that Chancellor execute the lien releases. The court infers from Chancellor's testimony that he executed the first release but then declined to execute or deliver releases, on advice of counsel. His attorney, Ellen G. Donovan, informed Ruparelia's attorney, by letter dated August 19, 2002, that a special administrator in the Virgin Islands lacked authority to discharge the obligations of the deceased and, therefore, could not execute the releases. She advised Ruparelia that an executor had to be appointed to execute the releases. Ruparelia's attorney did not agree with that position.

On September 12, 2002, the Territorial Court admitted Marie O'Connor's will to probate and issued letters testamentary to O'Connor. Less than a week later, on September 18, 2002, the parties executed a stipulation for full release of the mortgage payment to the trustee and the probate estate. On September 18, 2002, O'Connor executed a full release on behalf of the probate estate. By letter dated September 20, 2002, O'Connor informed Ruparelia that he had executed the full release of the mortgage and the lis pendens. Ruparelia received the full release on September 25, 2002.

With regard to the probate estate, Ruparelia did not receive the full release until September 25, 2002, six and one half months after making the first request for a partial release. For part of that time, no probate proceeding had been initiated. After Ruparelia initiated a proceeding, the court-appointed administrator, Chancellor, declined to execute releases on advice of counsel that he lacked authority as an administrator to discharge the deceased's obligations. Eventually, O'Connor, as executor, executed the full release. O'Connor executed the full release eight days after the court issued letters testamentary to him. Ruparelia had the executed release thirteen days after the court issued the letters testamentary. Once empowered, O'Connor acted timely as the executor.

Ruparelia complains that O'Connor unreasonably delayed the

probate by waiting from Marie's death in January until September 12, 2002, when the court admitted the will to probate. The record does not establish why O'Connor waited nine months. Further, as of March 2002, O'Connor knew that Ruparelia was entitled to a partial release. Marie had died three months before. O'Connor, as sole heir, did not present the will for probate until September. A reasonable business person engaged in a real estate transaction where a person with an interest in the real estate had died would expect a reasonable delay for probate proceedings. The unexplained delay from March until September was not reasonable. Because the delay was not reasonable, O'Connor breached the contract. As sole heir of Marie O'Connor, O'Connor stood in her stead until he presented the will for probate. The court, therefore, finds that O'Connor breached the contract by unreasonably delaying necessary acts to permit the issuance of the lien release.

Ruparelia incurred unnecessary expenses because of that delay. Ruparelia granted a $1,000 credit to one buyer, Johnson, and a $500 credit to another buyer, Peterson, because of the delay in delivering title to them. Ruparelia also testified that he incurred $300 of additional filing fees attributable to the delay.

Ruparelia testified that he incurred legal fees to secure the releases. He did not testify about the amount of fees paid.

Legal fees for drafting the releases and for corresponding with the trustee and his attorneys and the probate estate would not be compensable as damages for the breach of contract by O'Connor. Rather, those fees would be the customary and ordinary business costs of implementing the transactions. Fees incurred solely because of the delay in the probate proceedings would be compensable as damages, but the court has no evidence of the amount of those fees.

Ruparelia paid $5,600.00 in fees for Chancellor's appointment. While that process did not result in the execution of the releases by the probate estate, Ruparelia incurred those costs in an effort to resolve the impasse. Had O'Connor acted within a reasonable time, Ruparelia would not have incurred those costs.

Ruparelia also testified that the delay damaged his reputation. Ruparelia had been engaged in the residential development business in St. Croix since 1989. He testified that he developed twelve housing projects, selling 500 lots, mostly by contract for deed. He testified that his success depended in part on his ability to timely deliver title to the lots upon a buyer's completion of payments under a contract for deed. He stated that the delay in obtaining the mortgage releases caused him to delay delivering title, thereby harming his reputation.

Beyond his own testimony, Ruparelia presented no evidence of

any damage to his reputation. He had to compensate two buyers with credits, which the court has found to be compensable damages. But with that compensation, Ruparelia has been made whole. He presented no evidence of any lost or even delayed sales. He testified that he successfully sold the lots developed on the subject fifteen acres. Ruparelia has failed to meet his burden of proving damages to his reputation.

Consequently, the court finds damages caused by O'Connor's breach of the contract to total $7,400.00. Ruparelia shall have a judgment against O'Connor for $7,400.00.

The court will disallow Ruparelia's claims against the bankruptcy estate and the probate estate but grant a judgment against O'Connor for $7,400.00.

Attorney's Fees

Based on the above findings of fact and conclusions of law, Ruparelia will have an allowed claim against the bankruptcy estate for $1,200.00 and a judgment against O'Connor for $7,400.00. Ruparelia will also have a judgment declaring that the bankruptcy estate, the probate estate and O'Connor do not have any interest in the $40,000.00 escrow fund. The parties shall submit briefs addressing whether Ruparelia may, under applicable non-bankruptcy law, recover attorney's fees for these adjudications.

Order

Based on the foregoing,

IT IS ORDERED that the court disallow the claims of H.C. Ruparelia and Innovative Asset Group, Inc., against the bankruptcy estate of Harold O'Connor, the debtor; the probate estate of Marie O'Connor; and Harold O'Connor except that the court allows Ruparelia a claim against the bankruptcy estate for $1,200.00 and a judgment against O'Connor for $7,400.00.

IT IS FURTHER ORDERED that the bankruptcy estate, the probate estate and O'Connor do not have an interest in the $40,000.00 escrow fund, and the escrow funds shall be returned to Ruparelia, without prejudice to any claim that Bruce Wilson may assert against the funds under Virgin Islands law.

IT IS FURTHER ORDERED that Ruparelia shall file a brief, within fourteen days from the date of service of this order, addressing whether he may recover attorney's fees under applicable non-bankruptcy law. Ruparelia shall include a compensation request applying the lodestar standard for the allowed claim and judgment. The objecting parties shall serve and file their responses within fourteen days after service of Ruparelia's brief. Ruparelia may serve and file a reply with seven days of service of a response. After consideration of the pleadings, the court may set an evidentiary hearing on the amount

of attorney’s fees.

In the pretrial order, Ruparelia raises a setoff issue. To address that issue,

IT IS FURTHER ORDERED that the parties shall address whether that issue is ripe for consideration and, if so, the merits of that issue following the briefing schedule for the attorney’s fee issue.

###END OF ORDER###