THE CIRCUIT COURT OF FRANKLIN COUNTY
STATE OF MISSOURI

BANK OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. 18AB-CC00150
	)	
LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY OF THE CITY OF ST. LOUIS, et al.,	)	Division 1
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY OF THE CITY OF ST. LOUIS AND LCRA HOLDINGS CORPORATION'S MOTION TO DISMISS THE PETITION

Nearly two years after taking $3.3 million from the LCRA Defendants[1] to release certain lien rights for property located in North St. Louis, Plaintiff Bank of Washington (the "Bank") claims that it did not receive what it bargained for, that the LCRA Defendants never intended to perform, and now wants to partially rescind multiple agreements between the parties. The LCRA Defendants have fully performed their obligations and expended more than $114 million in reliance on these agreements. Nothing in the law allows the Bank to undo a transaction where, as here, the other parties have performed, and the status quo cannot be restored.

The agreements the Bank seeks to undo involve real estate for the planned relocation of the National Geospatial-Intelligence Agency's ("NGA") regional headquarters. In 2016, the Bank, the LCRA Defendants and Northside Regeneration, LLC ("NSR") entered into certain agreements where NSR agreed to transfer the property it held in the proposed NGA site to LCRAH and the

[1] Defendants Land Clearance for Redevelopment Authority for the City of St. Louis ('LCRA") and LCRA Holdings Corporation ("LCRAH") are collectively referred for as the ("LCRA Defendants").

Bank agreed to release its liens on that property in exchange for $3.3 million, plus security interests in additional property that was transferred to NSR as part of the transaction. The Bank is fully aware that after the NGA selected North St. Louis as the site of its $1.75 billion facility, the LCRA Defendants embarked on a complicated and expensive path to ready the site for transfer to the NGA, which included demolition of improvements, removal of streets and utilities and remediation of contamination. Closing on the NGA site is just three months away.

For more than two years, the Bank never once mentioned that the LCRA Defendants somehow failed to perform or defrauded the Bank into entering into the agreements. Only after the City of St. Louis declared NSR in default under the City and NSR's Redevelopment Agreement did the Bank claim that it was somehow misled. This lawsuit is nothing more than a thinly veiled attempt by the Bank, on behalf of NSR, to force the City of St. Louis and the LCRA Defendants to excuse NSR's transgressions by filing an action, that if successful, could derail the NGA project. But the Bank's claims are meritless and the Petition must be dismissed on several grounds.

First, the Bank's tort claims must be dismissed because the LCRA Defendants are municipal corporations engaging in governmental functions and therefore are protected from tort liability by their sovereign immunity.

Second, the Bank seeks rescission only as to those portions of the agreements related to the Bank. But the Bank cannot seek equitable relief as it has an adequate remedy at law. Moreover, Missouri law does not allow for partial rescission. Further, rescission is not a proper remedy where, as here, the parties have performed their obligations and cannot be returned to the status quo. The LCRA Defendants have spent millions of dollars acquiring separate parcels within the NGA site and preparing the site for transfer. Regardless of what the Bank offers to give back, the LCRA Defendants cannot be returned to the position they were in before they entered into the

agreements. NSR, the other party to the agreements is not even a party to this action and has not offered to return what it received. As a result, rescission is not permissible.

Third, the Bank's tort claims are contractual in nature and therefore cannot give rise to liability in tort. The claims are also barred by the economic loss doctrine which prohibits a party from seeking tort recovery for purely economic damages that are contractual in nature. Without the ability to rescind, at most the Bank is left seeking money damages for alleged failure to perform under the agreements.

Fourth, the Bank fails to allege all the required elements of fraud and those that are pled do not satisfy the heightened pleading requirements for fraud. Instead, they simply mirror the elements without the who, what, where, when and how that are necessary to survive a motion to dismiss.

Finally, the Bank's claim for unjust enrichment cannot stand, where, as here, there is an express contract covering the very subject for which the Bank seeks recovery.

For the foregoing reasons and the reasons set forth below, the Court should dismiss the First Amended Petition in its entirety. [2]

BACKGROUND

Beginning in the early 2000s, NSR began assembling property in North St. Louis for a proposed redevelopment with the promise that it would transform the area and reverse the pervasive blight that has negatively impacted that area for decades. (First Amended Petition ("Pet."), at ¶13). In 2009, in reliance on NSR's promises and representations, the City of St. Louis

[2] The LCRA Defendants have separately filed a Motion to Transfer on grounds that venue in Franklin County is improper. Because venue is not proper, the Court should not take any action in the case except to transfer the case to the City of St. Louis where venue is proper. *See State ex rel Green v. Neill*, 127 S.W.3d 677, 678 (Mo. banc 2004). As a result, the LCRA Defendants ask that this Court rule on their Motion to Transfer before, if at all, reaching the issues raised in this Motion.

(the "City") approved NSR's development plan and on December 14, 2009, the City and NSR entered into a Redevelopment Agreement. (Id. at ¶15). Despite NSR's promises of big changes to North St. Louis, NSR has failed to deliver.

Hope for the area was resurrected in March 2016, when the NGA selected North St. Louis for its new proposed regional headquarters. The relocation of the NGA to North St. Louis promises a $1.75 billion investment and will keep 3,100 high-skilled, high wage jobs in the City. (Pet. at ¶6). The NGA Project area consists of a 99-acre site at the northeast corner of Jefferson and Cass Avenues (the "NGA Site").[3] (Pet. at ¶20). Of the 99 acres within the NGA site, NSR owned approximately 50 acres or 337 separate parcels (the "NSR NGA Property"). (Id.) One of NGA's requirements for its relocation is that all 99 acres be owned by a single owner and delivered to the NGA free and clear of all liens, claims and encumbrances. (See Purchase and Sale Agreement, attached to the First Amended Petition as Exhibit 3, at Recital I).

In order to satisfy NGA's request, in January 2016, the Bank, the LCRA Defendants and NSR entered into a number of agreements. Among those agreements, the parties entered into a Purchase and Sale Agreement ("PSA") whereby, in exchange for a payment of $3.3 million to the Bank, NSR transferred the NSR NGA Property to LCRAH and the Bank released its liens on that property. (Pet. at ¶ 7; PSA at §4.1). As additional consideration, LCRAH transferred to NSR property outside the NGA Site and assigned the Bank the deeds of trusts for those properties (the "Non-NGA Property") (*Id*). LCRAH will also pay the Bank $2 million in November if the NGA deal closes. (*Id*.). In addition, the parties entered into a Future Assurances Agreement ("FAA") that, among other things, extended certain deadlines for NSR to complete portions of the

[3] The accurate number of acres in the NGA Site is 97 acres of which only 38 acres were owned by NSR; however, for purposes of this Motion, the LCRA Defendants have assumed the truth of the Bank's allegations in the Petition.

redevelopment. (See Future Assurances Agreement, attached to the First Amended Petition as Exhibit 2).

On June 12, 2018, the City notified NSR that it was in default under the Redevelopment Agreement for, among other things, misusing tax credits and for its failure to meet certain development deadlines. (Pet. at ¶ 35(d)). Shortly thereafter, the Planned Industrial Expansion Authority ("PIEA") and Land Reutilization Authority ("LRA"), sent notices of default to NSR under their agreements with NSR. (Id. at ¶ 35(a)).

Just weeks after NSR received the default letters, the Bank filed this lawsuit. Importantly, the LCRA Defendants have not declared NSR in default under the FAA or PSA. Additionally, the LCRA Defendants are not parties to either of the agreements under which the City, PIEA and LRA declared NSR in default.

ARGUMENT

I. Standard for Dismissal.

Under Missouri Rule 55.27(a)(6), a party may move to dismiss a count that fails to state a claim upon which relief can be granted. *Fox v. White*, 215 S.W.3d 257, 259 (Mo. App. W.D. 2007). A motion to dismiss under Rule 55.27(a)(6) must be granted where it is clear on the face of the pleadings that the party is not entitled to relief. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. 1993). This rule exists "to permit resolution of claims as early as they are properly raised in order to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *Fox*, 215 S.W.3d at 259 (internal citations omitted). Trial courts will dismiss claims if the petition fails to state a cause of action under the law or fails to state facts entitling the party to relief. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. 1993).

II. The Bank's Tort Claims Must be Dismissed Because the LCRA Defendants are Protected from Tort Liability by their Sovereign Immunity.

The Bank asserts two tort claims against the LCRA Defendants: Fraud (Count I) and Negligent Misrepresentation (Count II). Both of these claims must be dismissed because the LCRA Defendants are municipal corporations that serve a governmental function and are therefore protected from tort liability under the sovereign immunity doctrine. *Halamicek Bros., Inc. v. St. Louis County,* 883 S.W.2d 108, 110 (Mo. App. E.D. 1994) (holding that claims for fraud and negligent misrepresentation are the type of tort claims that are barred by sovereign immunity).

The doctrine of sovereign immunity protects public entities from tort liability absent their consent or waiver of such claims. §537.600;[4] *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 914 (Mo. banc 2016). Municipal corporations that engage in "governmental" functions are protected by sovereign immunity. *See* §537.700.2(3) (defining public entity to include municipal corporations); *Gregg v. City of Kansas City*, 272 S.W.3d 353, 359 (Mo. App. 2008). Missouri courts have long held that the redevelopment of blighted areas is in the public interest and therefore a governmental purpose. *See Parish v. Novus Equities Co.,* 231 S.W.3d 236, 242 (Mo. App. E.D. 2007) (holding that the redevelopment of blighted areas is a governmental function); *see also Schweig v. Maryland Plaza Redev. Corp*., 676 S.W.2d 249, 253 (Mo. App. E.D. 1984) (holding that redevelopment of a blighted area serves a public purpose). Both LCRA and LCRAH fall within the protections of sovereign immunity because they are municipal corporations that perform the governmental functions of redeveloping blighted areas.

Specifically, LCRA is a municipal corporation that performs governmental functions of redeveloping areas in the interest of the public health, safety, morals and welfare of the residents

[4] All references to statutes are to the Missouri Revised Statutes.

of such community. §99.330. *See Pace v. Land Clearance for Redevelopment Auth. of Kansas City*, 713 S.W.2d 34, 36 (Mo. App. W.D. 1986) (finding that a Land Clearance for Redevelopment Authority is a municipal corporation in the context of §434.070).

LCRAH is a public benefit corporation as defined under the Nonprofit Corporation Act and was created to acquire the blighted land within the NGA Site. Public corporations, such as LCRAH, may be municipal corporations when they have a local nature. *See State ex rel Milham v. Rickhoff*, 633 S.W.2d 733, 735 (Mo. banc 1982) (although declining to hold that the Board of Curators for the University of Missouri is a municipal corporation given its statewide focus, the supreme court noted that local entities such as sewer districts, cities or local school boards are municipal corporations). As a result, LCRAH is also a municipal corporation entitled to sovereign immunity. *See Parish*, 231 S.W.3d at 243 (Mo. App. E.D. 2007) (holding that the City of Sunset Hills was protected by sovereign immunity in a negligence action because the city's role of carrying out the governmental mandate of protecting public health, safety and welfare by seeking to rehabilitate blighted areas is a governmental function); *Garrison-Wagner v. City of St. Louis*, 646 S.W.2d 131, 133 (Mo. App. E.D. 1983) (holding that the Land Reutilization Authority of St. Louis which is a public corporation acting in a governmental capacity was immune under sovereign immunity from negligence action); *State ex rel. State Hwy. Comm. V. Hoester,* 362 S.W.2d 519, 523 (Mo. banc 1962) (holding that the State Highway Commission acts for the state as its alter ego in condemning a right of way for highways and as such, the taking was considered to be by the state and the State Highway Commission was accordingly entitled to sovereign immunity protection).

Because the LCRA Defendants cannot be liable in tort, the Bank's fraud and negligent misrepresentation claims must be dismissed.

III. The Bank Cannot Rescind Portions of the FAA and PSA.

Counts IV and V assert claims for equitable rescission based on Failure of Consideration (Count IV) related to the LCRA Defendants' alleged breaches of the agreements and Mutual Mistake (Count V) related to the alleged representation that the LCRA Defendants could negotiate and act on behalf of the City.[5] In its request for relief, the Bank asks this Court to enter a judgment rescinding the portions of the FAA and PSA that relate to the Bank. In exchange, the Bank "offers to tender the return of all consideration received by the Bank at closing." (Pet. at ¶ 59). The Bank cannot rescind portions of the agreements and restore its liens because it has an adequate remedy at law, the LCRA Defendants have fully performed, and because the law does not allow partial rescission, or any rescission where the parties cannot be returned to the status quo.

1. The Bank has an Adequate Remedy at Law.

The Court cannot grant equitable relief where there is an adequate remedy at law. *See e.g., Clevenger v. Oliver Ins. Agency, Inc*., 237 S.W.3d 588, 592 (Mo. banc 2007). The Bank has an adequate remedy at law, an action for damages, as pled in the other counts. Therefore, rescission is not an available remedy.

[5] In addition to the reasons set forth in this section on why the Bank cannot rescind the FAA and PSA, this argument also fails because the Bank cannot claim mutual mistake when, as here, all parties did not operate under the same misconception. *See R & R Land Dev., L.L.C. v. Am. Freightways, Inc.*, 389 S.W.3d 234, 240 (Mo. App. S.D. 2012) ("Mutual mistake is one common to both or all parties where each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.") Even if the Bank claims that it operated under the idea that the LCRA Defendants could bind the City to the agreement, the LCRA Defendants did not operate under this belief. Instead, as embodied in the FAA, the LCRA Defendants operated under the belief that the City could only be obligated if the agreement received the necessary Aldermanic approval. (FAA at § 4.)

2. The Bank Cannot Rescind when LCRA and LCRAH have Performed.

Missouri law is clear that a party cannot rescind or terminate a contract if the other party has fully performed the obligations under that contract. *Union Pac. R. Co. v. Kansas City Transit Co.*, 401 S.W.2d 528, 535 (Mo. App. 1966); *Sun Elec. Corp. v. Morgan*, 678 S.W.2d 410, 412 (Mo. App. W.D. 1984); *Davis v. Cleary Building Corp*., 143 S.W.3d 659, 665 (Mo. App. W.D. 2004).

Under the terms of the PSA, the Bank agreed to release its liens on the NSR NGA Property in exchange for $3.3 million upon transfer, $2 million more if the NGA deal closed, and for security interests in other properties transferred to NSR. The LCRA Defendants have paid the $3.3 million, transferred the other properties, and the $2 million is in escrow pursuant to the terms of the PSA. Therefore, the LCRA Defendants have performed all their obligations under the PSA, which is the only agreement setting forth the terms of the transfer and release of liens. As such the Bank cannot rescind this agreement.

3. The Bank Cannot Seek to Partially Rescind the FAA and PSA.

Even if the Bank asserts that the LCRA Defendants have not performed under the agreements, it still cannot rescind select portions of the agreements because Missouri law does not allow for partial rescission. If rescission is to be had, it must be in total, and must put the other party in the condition he would have been if the contract had not been made. *See Schurtz v. Cushing,* 146 S.W.2d 591, 594 (Mo. 1940); *see also Welles v. Gaty*, 9 Mo. 565 (1845) (holding that where two parties jointly contract with a third an action for rescission and return of the money must be brought by both parties).

Here, the Bank has asked only to rescind the portions of the PSA and FAA that relate to the Bank and return only the consideration it received. NSR is not a party to this action and has not sought to rescind the FAA or PSA, nor has it offered to return the consideration it received

such as the Non-NGA Property. Moreover, as alleged by the Bank in Paragraph 27 of the First Amended Petition, there are a number of amendments to the FAA, and other inter-related agreements with other entities, such as LRA and PIEA, that have been executed in connection with the FAA and PSA. Those agreements would also need to be rescinded. Notably, the Bank makes no mention of rescinding those agreements in its First Amended Petition, and instead wants to pick and choose which agreements and which provisions get undone. That is simply not permitted under the law.

Further, even if the Bank and NSR offered to return all consideration and undo all agreements, rescission is an improper remedy because it would materially and adversely affect the LCRA Defendants such that they cannot be returned to the status quo. *See Davis v. Cleary*, 143 S.W.3d 659, 666-67 (Mo. App. W.D. 2004) (holding that the plaintiff was not entitled to rescind a contract where it was impossible to restore the defendant to its former position).

Here, merely returning the $3.3 million will not come close to returning the LCRA Defendants to the status quo. The purpose of the transaction was to satisfy NGA's request that all property in the NGA Site be owned by one party. (See PSA, at Recital I). As a result of the actions taken under the agreements, NGA selected North St. Louis for its new facility and the property is now owned by one party, LCRAH. (Pet. at ¶ 20). If the Bank (or NSR) is allowed to rescind the agreements and the Bank's liens are restored, NGA may not move forward with closing on the NGA Site in November which would leave LCRAH holding not only the former NSR NGA Property subject to the liens, but the remaining 59 acres that it acquired within the NGA Site.

Further, as the Bank was well aware, LCRAH embarked on a complicated and expensive path to ready the site for transfer to the NGA after it was transferred. This included the demolition of improvements, removal of streets and utilities and remediation of any environmental

contamination. The Bank knew that the LCRA Defendants would need to issue bonds of at least $88 million to fund the acquisition costs and work on the NGA Site. (See Term Sheet at Ex. B, attached to First Amended Petition as Exhibit 1). The LCRA Defendants did in fact issue bonds in an amount well over the expected $88 million. Therefore, the Bank's offer to return its $3.3 million does not come close to putting the LCRA Defendants back into the position they were in before the agreements. Because rescission would materially and adversely affect the LCRA Defendants, such that they cannot be returned to the status quo, rescission is not a proper remedy. *Goldiluxe v. Abbott*, 306 S.W.3d 613, 616 (Mo. App. S.D. 2010) (holding rescission was not a proper remedy where the other party could not be restored to status quo and rescission would have materially impoverished the defendant).

IV. The Banks' Tort Claims Must Be Dismissed Because They Are Nothing More than Masked Breach of Contract Claims.

The Bank's tort claims must also be dismissed because the alleged misrepresentations that form the basis of its claims are merely alleged breaches under the FAA and PSA, which cannot form the basis of a fraud or negligent misrepresentation claim. Missouri courts have repeatedly made clear that a "mere failure to perform under a contract cannot serve as a basis of tort liability. *Wages v. Young*, 261 S.W.3d 711, 715 (Mo. App. W.D. 2008). To ascertain whether an action is premised on contractual or tort liability, it is necessary to determine the source of the duty claimed to have been violated, and when the duty alleged to have been breached stems from a contract, the breach does not amount to a tort." *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. 1987).

Here, a plain reading of the First Amended Petition makes clear that the gravamen of the Bank's tort claims is that the LCRA Defendants made certain promises or representations in the FAA and PSA that they have since breached. (See Pet. at pg 10 setting forth "The City Parties

Breach of the New Agreements"). Indeed, with the exception of its claim that the LCRA Defendants represented that they were authorized to negotiate and agree on behalf of the City, which is addressed below, the Bank alleges in the First Amended Petition that the same representations set forth in Paragraph 43, were part of the parties' agreements under the FAA and PSA. (Compare Pet. at ¶ 31 identifying what the parties agreed to in the PSA and FAA with ¶ 43 setting forth the alleged representations).

V. The Bank's Tort Claims are Barred by the Economic Loss Doctrine.

As discussed above, the Bank cannot rescind the agreements, and therefore it is left with seeking only money damages. As a result, the Bank's tort claims are also barred by the economic loss doctrine. "The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature." *Captiva Lake Investments, LLC v. Ameristructure, Inc*., 436 S.W.3d 619, 628 (Mo. App. E.D. 2014). In Missouri, recovery in tort for purely economic damages are limited only to cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence. *Id*; *Wilbur Waggoner Equip. and Excavating Co. v. Clark Equipment Co.,* 668 S.W.2d 601, 603 (Mo. App. E.D.1984).

Because the Bank can only seek money damages, and the source of the duty claimed to be violated arises solely out of the FAA and PSA, the fraud and negligent misrepresentation claims are barred by the economic loss doctrine. *See Captiva Lake Investments*., 436 S.W.3d at 628 (affirming economic loss doctrine barred plaintiffs' negligence claim where it sought economic losses related to contract); *see also Shaughnessey, Kniep, Hawe Paper Co. v. Fettergroup*, 2015 WL 1456993 (E.D. Mo. Mar. 30, 2015) (applying Missouri law) (dismissing negligent misrepresentation claim on grounds that it was barred by the economic loss doctrine where the alleged misrepresentation was simply a failure to perform under the parties' contract).

VI. The Alleged Misrepresentations Cannot Form the Basis of a Fraud or Negligent Misrepresentation Claim.

The alleged misrepresentations underlying the Bank's tort claims are set forth in Paragraph 43 of the First Amended Petition, which states:

> "During the negotiations associated with the FAA and related agreements, and in the agreements themselves, LCRA and LCRAH represented (i) that they were authorized to negotiate and agree to the promises and conditions contained in the agreements on behalf of all themselves and the City (ii) that all the City Parties intended to and would abide by the promises and conditions, including the promise that LCRA and LCRAH could and did bind the City (iii) that the City, LCRA and LCRAH would not declare a default under their respective agreements so long as NSR met the New Minimum Development Threshold Requirements, (iv) that all the City Parties would support NSR's redevelopment of north St. Louis, including but not limited to, in the ways promised in the City's Parties' agreements, and (v) that the City would agree to a draft a of a Second Amended Redevelopment Agreement consistent with the FAA and would present that agreement to the City's Board of Aldermen."

(Pet. at ¶ 43). The alleged misrepresentations cannot form the basis of the Bank's fraud and negligent misrepresentation claims because they either are in direct conflict with the terms of the agreements, such that they cannot be relied on, or they are merely statements of future actions or promises by the LCRA Defendants or a third-party to the agreements, the City, which are not actionable.

Missouri law is clear that only present, existing facts are representations that can form the basis of a fraud or negligent misrepresentation claim. *See, e.g. Comp & Soft, Inc. v. AT&T Corp*., 252 S.W.3d 189, 197 (Mo. App. E.D. 2008) (defendant's assurances that AT&T would not hire plaintiffs' consultants in the future could not form the basis of a negligent misrepresentation claim); *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 174 (Mo. App. E.D. 1998) (defendant's alleged misrepresentation regarding the future development of a site could not form the basis of a negligent representation claim). Statements and representations about expectations and predictions for the future, even if false, do not constitute fraudulent misrepresentation. *See Bohac*

v. Walsh, 223 S.W.3d 858, 863 (Mo. App. E.D. 2007); *see also Massie v. Colvin*, 373 S.W.3d 469, 472 (Mo. App. S.D. 2012) ("As a matter of law, Plaintiff had no right to rely on any representation by the individual Defendants as to what [one] might do in the future."). Additionally, a statement that an independent third person will do some particular thing is not actionable. *Bohac*, 223 S.W.3d at 863; *see also Arthur v. Medtronic*, 123 F. Supp.3d 1145, 1150 (E.D. Mo 2015) (applying Missouri law and affirming dismissal of plaintiff's fraud claim for among other reasons because a statement about the future actions of third parties cannot support a fraud claim).

Here, nearly all of the representations identified in Paragraph 43, relate to future intent, promises or action, or future actions of an independent third party, the City of St. Louis, which cannot support a fraud or negligent misrepresentation claim. For example, the Bank asserts that the LCRA Defendants represented that the City, LCRA and LCRAH would not declare a default under their respective agreements, that the City parties would support NSR's redevelopment of North St. Louis and that the City would agree to a draft of a Second Amended Redevelopment Agreement. (Pet. at ¶ 43(iii)-(v). As such, these alleged representations cannot form the basis of a fraud or negligent misrepresentation claim.

The alleged misrepresentations related to the LCRA Defendants' ability to negotiate and bind the City also fail because they are contradicted by the terms of the agreement and therefore are barred by the parol evidence rule. That rule prohibits evidence of agreements that merely tend to vary or contradict the terms of an agreement. *Hamilton v. Massengale*, 481 S.W.3d 128, 135 (Mo. App. S.D. 2016). While parol evidence may be used in some circumstances to prove fraud, a party cannot rely on statements made outside the agreement that are expressly contradicted by the terms of the agreement itself. *Colonial Bank v. Ratican*, 806 S.W.2d 460, 463 (Mo. App. E.D.

1991) (affirming dismissal of fraudulent inducement claim where purported representations of what the defendant said and was going to do were not reflected in the agreement signed).

Section 4 of the FAA states:

> "Northside and LCRA, on behalf of the City, shall promptly and in good faith negotiate the terms of an amendment and restatement of the Existing Redevelopment Agreement (the "Second Amended Redevelopment Agreement") . . . ***The parties shall further cooperate diligently and in good faith pursue and obtain all necessary aldermanic and other approvals*** required in connection with the authorization and execution of the Second Amended Redevelopment Agreement, at the earliest feasible time."

(FAA at §4). This provision makes clear that the LCRA Defendants could not negotiate or agree on behalf of the City, and at most could only try with best efforts to obtain the necessary aldermanic approval. The Bank clearly understood this and agreed to such a provision. Indeed, this provision is consistent with the law that requires a redevelopment authority to obtain local governing approval for all substantive exercise of statutory powers. §99.330; *Conlon Group Inc., v. City of St. Louis*, 980 S.W.2d 37, 40 (Mo. App. E.D. 1998) (holding that the provision of a redevelopment agreement requiring Board of Aldermen approval was not satisfied merely by approval of the LCRA and St. Louis Development Corporation regardless of how extensive the negotiations were because the redevelopment agencies required City approval for all substantive exercises of statutory powers). Therefore, even if such a representation was made, the Bank had no right to rely on any statements that the LCRA Defendants could negotiate or agree to any promises in the FAA or PSA on behalf of the City because it is contrary to the terms of the agreement.

For these reasons, any alleged representations in the First Amended Petition cannot form the basis of its fraud claim.

VII. The Bank's Fraud Claim Must Be Dismissed Because the Petition Does Not Allege All Elements of Fraud and Does Not Allege the Circumstances of the Alleged Fraud with the Particularity Required by Rule 55.15.

Under Missouri law, a party claiming fraud or fraud in the inducement must plead and establish the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. banc 2007); *see Scott Salvage Yard, LCC v. Gifford*, 382 S.W.3d 134 (Mo. App. E.D. 2012) (applying the same elements to fraudulent inducement). A "plaintiff must plead every essential element of fraud, and failure to plead any element renders the claim defective and subject to dismissal." See *Hess*, 220 S.W.3d at 765 (holding that in order to make a submissible case of fraudulent misrepresentation, a plaintiff must prove the nine essential elements).

Missouri law also requires that each of the elements of fraud be pled with particularity. Sup. Ct. R. 55.15. The fraud must be clear from the allegations of fact and independent of conclusions. *Morrison v. Jack Simpson Contractor, Inc*., 748 S.W.2d 716, 719 (Mo. App. E.D. 1988). A plaintiff must allege what representations were made to it, when they were made, by whom they were made, and in what form they were made. *Miller v. Ford Motor Co.,* 732 S.W.2d 564, 566 (Mo. App. E.D. 1987). If the petition does not comply with Rule 55.15, no claim is stated, and should be dismissed. *See Bohac*, 223 S.W.3d at 863.

Count I should be dismissed because it fails to plead all the required elements of fraud. For example, the Bank does not plead the eighth element, that it had the right to rely on any alleged

representations by the LCRA Defendants. Instead, it asserts only that it reasonably relied on the LCRA Defendants' representations without stating, and more importantly without explaining, how it had the right to rely. (Pet. at ¶ 46). Because the First Amended Petition fails to allege a required element of fraud, the claim must be dismissed. *See Hoag*, 967 S.W.2d at 174 (granting defendants' Motion to Dismiss when plaintiffs merely concluded in their petition that they had the right to rely on defendants' alleged misrepresentation but failed to include any facts in their petition that support this conclusion.)

The Bank also failed to plead the elements with the requisite specificity. For the alleged misrepresentations, the Bank does not allege who made these statements, when the statements were made, or in what form they were made. *See Miller*, 732 S.W.2d at 566 (affirming a dismissal because the plaintiff's petition did not indicate when or under what circumstances the representations were made or which representations the plaintiff relied on).

The Bank's other allegations simply mirror the elements of fraud without any actual support. For example, for the speaker's knowledge of the falsity, the Bank merely asserts that "LCRA and LCRAH representations were false, false when made and known to be false when made." (Pet. at ¶ 44). Similarly, the Bank alleges that "LCRA and LCRAH knew that the Bank would rely upon their fraudulent representations and intended the Bank to do so." (Pet. at ¶ 48). The Bank's bare legal conclusions are not sufficient to sustain its burden to plead fraud with particularity. *See Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 537 (Mo. App. E.D. 2011) (affirming dismissal of fraudulent misrepresentation claim where a party's allegations of fraud merely mirror the requisite elements). Because the Bank has failed to plead each required element of fraud with the requisite particularity, its fraud claim must be dismissed.

VIII. The Bank's Claim for Unjust Enrichment Must Be Dismissed Because Express Contracts Exist Between the Parties.

To prevail on an action for unjust enrichment, the plaintiff must prove four elements: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted or retained the benefit under inequitable or unjust circumstances. *Howard v. Turnbill*, 316 S.W.3d 431, 436 (Mo. App. W.D. 2010). "However, there can be no unjust enrichment if the parties receive what they intend to obtain." *Howard*, 316 S.W.3d at 436. Significantly, "if the plaintiff has entered into an express contract for the very subject for which for which he seeks recovery, unjust enrichment ***does not apply***, for the plaintiff's rights are limited to the express terms of the contract." *Id.* (emphasis added).

Here, Count III asserts a claim for unjust enrichment on grounds that "by its release of its lien rights against the NSR NGA property and its consent to NSR's transfer of the EATS[6] at the request and insistence of the LCRA Defendants, the Bank conferred a benefit upon the LCRA Defendants. Under these circumstances, LCRA and LCRAH's retention of the benefit would be unjust." (Pet. at ¶ 57). However, the Bank agreed to release its liens and consented to NSR's transfer of the EATS pursuant to and consistent with the terms of the FAA and PSA and received consideration for those transfers. Because there are express contracts covering the very subject that forms the basis of the Bank's unjust enrichment claim, Count III must be dismissed.

CONCLUSION

For all of these reasons, the First Amended Petition should be dismissed in its entirety for failure to state a claim.

[6] "EATS" stands for the Economic Activity Taxes referenced in ¶ 21 of the First Amended Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of August, 2018, the foregoing was filed with the Clerk of Court electronically, to be served by operation of the Court's electronic filing system upon all parties of record.

/s/ Gerard T. Carmody