Commonwealth of Virginia

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JAMES A. CALES, JR.
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THIRD JUDICIAL CIRCUIT
CIRCUIT COURT OF THE CITY OF PORTSMOUTH
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February 22, 2011

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Re: *Environmental Staffing Acquisition Corp. v. Beamon Enterprises, Inc., et al.*, CL09-2688

Dear Counsel:

Having had the opportunity to review the parties' briefs and the arguments presented by Counsel, the Court hereby SUSTAINS Counterclaim Defendant's Demurrer to Counts I and II of Counterclaim Plaintiff's Second Amended Counterclaim for the reasons that follow.

Factual and Procedural History

Defendant, B & R Construction Management, Inc. ("B & R Construction"), a Virginia corporation, entered into a contract with Cornerstone Jeffry Wilson, LLC to be the general contractor for the Portsmouth Redevelopment and Housing Authority's ("PRHA") project to demolish Jeffry Wilson Housing ("the Project"). B & R Construction then contracted with Defendant and Counterclaim Plaintiff, Beamon Enterprises, Inc. ("Beamon"), also a Virginia corporation, for environmental abatement and demolition during the performance of the Project. Beamon in turn contracted with

Plaintiff and Counterclaim Defendant, Environmental Staffing Acquisition Corporation ("En-Staff"), a North Carolina corporation, to provide labor for asbestos abatement.

On March 3, 2009, B & R Construction procured a performance and payment bond from Genesis Capital Corporation ("Genesis"), a Virginia corporation, to secure payment to subcontractors, laborers, and materialmen for the Project, as mandated by the Virginia Public Procurement Act ("VPPA"). *See* Va. Code § 2.2-4337. The VPPA requires that surety companies, such as Genesis, be authorized to do business in Virginia. *Id.* at § 2.2-4377(B). Genesis, however, is presently out of business and not licensed to provide insurance or bonding in Virginia.

On August 24, 2008, Beamon executed an "Agreement for the Provision of Temporary Technical Personnel By Environmental Staffing" ("Staffing Agreement"), which was signed by representatives of both parties. On March 13, 2009, En-Staff sent Beamon a proposal that incorporated the Staffing Agreement, and Beamon agreed to its terms.

In its Complaint, En-Staff claimed that it provided qualified staff to Beamon and fully performed under the contract; therefore, Beamon owes full payment for the services provided by En-Staff. To collect on the payment owed, En-Staff provided notice to B & R Construction that it intended to initiate an action on the bond pursuant to the VPPA. As such, En-Staff's Complaint came in four Counts: Count I was an action on the bond pursuant to the VPPA, demanding that Genesis pay the amount due; Count II alleged a breach of contract claim against Beamon; Count III alleged a breach of contract claim against B & R Construction with En-Staff as an intended third-party beneficiary to the contract between B & R Construction and the PRHA; and Count IV alleged negligence per se against B & R Construction for failing to perform its duty under the VPPA.

Beamon, on the other hand, alleged in its Counterclaim that En-Staff did not provide qualified staff for the Project because the asbestos supervisor "did not know what to do on the job" and "was not familiar with a substantial amount of the equipment and procedures used in asbestos abatement work." Furthermore, Beamon alleged that representations by one of En-Staff's employees and a resume sent to Beamon before the signing of the proposal were misleading and amounted to fraud. As such, Beamon's Counterclaim against En-Staff came in three Counts: Count I alleged intentional fraud; Count II alleged constructive fraud; and Count III alleged a breach of contract for failing to provide qualified personnel.

En-Staff filed its initial Complaint on August 31, 2009 and the Court granted leave to file an Amended Complaint on March 4, 2010. B & R Construction filed a Demurrer to Counts III and IV of En-Staff's Amended Complaint on March 19, 2010 and filed a brief in support of the Demurrer at the hearing on May 7, 2010. En-Staff filed an Opposition to the Demurrer on May 4, 2010.

Beamon filed its Counterclaim on October 23, 2009 and the Court granted leave to file an Amended Counterclaim of February 24, 2010. En-Staff filed a Demurrer to Counts I and II of Beamon's Amended Counterclaim on March 9, 2010. Beamon filed an

Opposition to the Demurrer on April 7, 2010. En-Staff then filed a Reply to Beamon's Opposition on April 20, 2010.

Both Demurrers were before the Court for argument on May 7, 2010, at which time the Court took them under advisement. In an Opinion dated October 5, 2010, the Court sustained B & R Construction's Demurrer to Counts III and IV of En-Staff's Amended Complaint with prejudice. Relevant to the current proceedings, the Court overruled En-Staff's Demurrer to Count II of Beamon's Amended Counterclaim and sustained En-Staff's Demurrer to Count I of Beamon's Amended Counterclaim with leave to amend.

On November 1, 2010, Beamon filed its Second Amended Counterclaim. En-Staff subsequently filed a Demurrer to Counts I and II, alleging Intentional Fraud and Constructive Fraud respectively, on November 17, 2010. Beamon then filed an Opposition to En-Staff's Demurrer on December 14, 2010, and En-Staff in turn filed a Reply to Beamon's Opposition on December 22, 2010. En-Staff's Demurrer was before the Court on January 7, 2011, at which time the Court took the Demurrer under advisement.

Standard of Review

The purpose of a demurer is to test whether the plaintiff has stated a cause of action on which relief can be granted. Code § 8.01-273(A). A demurrer, by necessity, "admits the truth of all properly pleaded material facts." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 131–32, 575 S.E.2d 858, 861 (2003) (quoting *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997)). Furthermore, "[a]ll reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading." *Id.* "However, a demurrer does not admit the correctness of the pleader's conclusions of law." *Dodge v. Trs. of Randolph-Macon Woman's College*, 276 Va. 1, 5, 661 S.E.2d 801, 803 (2008) (quoting *Fox v. Custis*, 236 Va. 69, 71, 372 S.E.2d 373, 374 (1988)). Finally, "a circuit court 'considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.'" *Id.* (quoting *Ward's Equip., Inc.*, 254 Va. at 382, 493 S.E.2d at 518). With these principles in mind, the Court considers the parties' arguments.

Fraud

Before analyzing the facts alleged in Beamon's Counterclaim, the Court now outlines the relevant case law in Virginia regarding both actual and constructive fraud.

To prevail on a cause of action for actual fraud, the plaintiff "bears the burden of proving by clear and convincing evidence the following elements: '(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.'" *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 557–58, 507 S.E.2d 344, 346 (1998) (quoting *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)). "Constructive fraud differs from actual fraud in that the misrepresentation of material fact is not made with the intent to mislead, but is made

innocently or negligently although resulting in damage to the one relying on it. However, as with actual fraud, the elements of constructive fraud also must be proved by clear and convincing evidence." *Evaluation Research Corp.*, 247 Va. at 148, 439 S.E.2d at 390 (citations omitted).

As a general rule, "[b]ecause fraud must involve a misrepresentation of a present or pre-existing fact, fraud ordinarily cannot be predicated on unfulfilled promises or statements regarding future events." *SuperValu, Inc. v. Johnson*, 276 Va. 356, 367, 666 S.E.2d 335, 342 (2008) (citing among others *Tate v. Colony House Builders*, 257 Va. 78, 82, 508 S.E.2d 597, 599 (1999)). "Nevertheless, if a defendant makes a promise that, when made, he has no intention of performing, that promise is considered a misrepresentation of present fact and may form the basis for a claim of actual fraud." *Id.* at 368, 666 S.E.2d at 342 (citing *Richmond Metro. Auth.*, 256 Va. at 559–60, 507 S.E.2d at 348; *Colonial Ford Truck Sales v. Schneider*, 228 Va. 671, 677, 325 S.E.2d 91, 94 (1985)); *see also Elliot v. Shore Stop, Inc.*, 238 Va. 237, 245, 384 S.E.2d 752, 756 (1989); *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 351, 297 S.E.2d 647, 651–52 (1982).

However, "[u]nder no circumstances . . . will a promise of future action support a claim of constructive fraud. The rationale underlying this rule is plain. If unfulfilled promises, innocently or negligently made, were sufficient to support a constructive fraud claim, every breach of contract would potentially give rise to a claim for constructive fraud." *SuperValu, Inc.*, 276 Va. at 367, 666 S.E.2d at 342 (citations omitted).[1] The Supreme Court of Virginia has oft warned against this risk of transforming every breach of contract claim into a claim for fraud. *See, e.g.*, *Richmond Metro. Auth.*, 256 Va. at 560, 507 S.E.2d at 348 ("In ruling as we do today, we safeguard against turning every breach of contract into an actionable claim for fraud."); *Boykin v. Hermitage Realty*, 234 Va. 26, 29, 360 S.E.2d 177, 178 (1987) (quoting *Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 365 (1928)); *cf. Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 537 (4th Cir. 1988) (quoting *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940)).

To further prevent every breach of contract from turning into a claim for fraud, the Court must determine the source of the duty alleged to be breached. If the duty breached arises solely out of the contract, it cannot be the basis of a claim for fraud, but if the duty breached is separate from the contractual duties, a claim for fraud may lie:

> If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a

[1] The Supreme Court explicitly overruled any suggestion in *Edens v. Weight*, 265 Va. 398, 578 S.E.2d 769 (2003) that implied that "an action for constructive fraud may lie if the evidence demonstrates a present intent not to fulfill a promise of future action . . . ." SuperValu, Inc., 276 Va. at 368 n.2, 666 S.E.2d at 342 n.2.

> duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.

Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 399–400 (1976); *see also Richmond Metro. Auth.*, 256 Va. at 559, 507 S.E.2d at 347 ("A tort action cannot be based solely on a negligent breach of contract.").

However, the existence of a contractual duty is not futile to a claim for fraud. Where the fraud is in the inducement of the contract, a cause of action for fraud may lie, as the inducement precedes the formation of the contract. *See, e.g.*, *White v. Nicholas L. Potocska, P.C.*, 589 F. Supp. 2d 631, 643–44 (E.D. Va. 2008); *McKesson Med.-Surgical, Inc. v. Kearney*, 271 F. Supp. 2d 827, 829 (E.D. Va. 2003) ("[T]he United States Court of Appeals for the Fourth Circuit has continuously held that when a fraud precedes the formation of a contract, the duty breached is not contractual in nature, and thus, the economic loss rule does not apply." (citing *City of Richmond v. Madison Mgmt. Group*, 918 F.2d 438, 446–47 (4th Cir. 1990))).

As to what statements by a defendant may be the basis of a claim for fraud, the Court must be careful to distinguish between matters of opinion and misrepresentations of material fact. The Supreme Court has said:

> It is well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion. The mere expression of an opinion, however strong and positive the language may be, is no fraud. Such statements are not fraudulent in law, because . . . they do not ordinarily deceive or mislead. Statements which are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them.

Mortarino v. Consultant Eng'g Servs., Inc., 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996) (quoting *Saxby v. S. Land Co.*, 109 Va. 196, 198, 63 S.E. 423, 424 (1909)). Specifically, sales talk or "puffing" cannot be the basis of a claim for fraud.[2] *See, e.g.*, *Lambert v. Downtown Garage, Inc.*, 262 Va. 708, 713, 553 S.E.2d 714, 717 (2001) ("Merely stating that property is in excellent condition, without more, is clearly a matter of opinion in the manner of puffing.").

However, there is no "bright line test to ascertain whether false representations constitute matters of opinion of statements of fact." *Mortarino*, 251 Va. at 293, 467 S.E.2d at 781. "Rather 'each case must in large measure be adjudged upon its own facts,

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[2] "Puffing is 'the expression of an exaggerated opinion—as opposed to a factual representation—with the intent to sell a good or service.'" Lowell A. Stanley, P.C. v. Danka Bus. Sys. & Gen. Elec. Capital Corp., 57 Va. Cir. 290, 293, 2002 Va. Cir. LEXIS 210 at *8 (Norfolk 2002) (quoting Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 110, 540 S.E.2d 134, 142 (2001)).

taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances.'" *Id.* (quoting *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 562, 95 S.E.2d 207, 211 (1956)).

Nevertheless, there are rare cases where an opinion can be the basis of a claim for fraud. "Even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other." *Nationwide Ins. Co. v. Patterson*, 229 Va. 627, 631, 331 S.E.2d 490, 493 (1985) (quoting *Cerriglio v. Petit*, 113 Va. 553, 541, 75 S.E. 303, 307 (1912)); *see also Fensom v. Rabb*, 190 Va. 788, 797, 58 S.E.2d 18, 23 (1950) (quoting *Grim v. Byrd*, 73 Va. 293, 301 (1879)); *Mears v. Accomac Banking Co.*, 160 Va. 311, 321–22, 168 S.E.740, 743 (1933). Thus, in situations where the defendant is a sophisticated party or has information not equally open to plaintiff and the plaintiff is an unsophisticated party or does not have equal access to information, a Court may be able to base a cause of action for fraud on statements of opinion rather than misrepresentations of fact.

In this case, En-Staff introduces an additional wrinkle in the law of fraud, focusing on the element of reliance by the plaintiff.[3] When a plaintiff fails to investigate "ordinary and accessible means of information," a claim of fraud is precluded. *DeJarnett v. Thomas M. Brooks Lumber Co.*, 199 Va. 18, 29, 97 S.E.2d 750, 758 (1957). The Supreme Court stated the "established doctrine" as follows:

> [W]here the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations; that if, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another.

Id. at 29–30, 97 S.E.2d at 758 (quoting *Lake v. Tyree*, 90 Va. 719, 724–25, 19 S.E. 787, 789 (1894)). Furthermore, when a plaintiff does make "'his own investigation, whether complete or not, into the subject matter at hand' he may not say that he relied on the representations of another. *White*, 589 F. Supp. 2d at 642 (quoting *Harris v. Dunham*, 203 Va. 760, 767, 127 S.E.2d 65, 70 (1962)).

Beamon, on the other hand, emphasizes the part of the passage in *DeJarnett* that states that the doctrine is inapplicable if "concealment [of a material fact] is made or attempted." *DeJarnett*, 199 Va. at 30, 97 S.E.2d at 758. Specifically, a "'seller must not

[3] For sake of thoroughness, the Court acknowledges En-Staff's and Beamon's arguments concerning the failure to investigate and its relationship with the law of fraud. However, because the Court finds *infra* that the Demurrer can be disposed of on other grounds, an in depth analysis will not be had on this point.

say or do anything to throw the purchaser off his guard or to divert him from making the inquiries and examination which a prudent man ought to make.'" *Van Deusen v. Snead*, 247 Va. 324, 329, 441 S.E.2d 207, 210 (1994) (quoting *Armentrout v. French*, 220 Va. 458, 466, 258 S.E.2d 519, 524 (1979)). "Thus, one who undertakes an investigation is bound by all that he *could have* learned. However, if he is prevented from learning facts because of actions of the other party, an action for fraud may lie." *White*, 589 F. Supp. 2d at 643 (emphasis in original).[4]

As a final note regarding the law of fraud in Virginia, the Supreme Court has stated that a claim for fraud must be plead with specificity "so that the defendants may have the opportunity of shaping [their] defense accordingly." *Ciarochi v. Ciarochi*, 194 Va. 313, 315, 73 S.E.2d 402, 402 (1952). Thus, in the present case, there must be some specific fact alleged that would, if proved, suggest that the defendants did not have the present intention to perform when the promise was made. *See Koch v. Seventh St. Realty Corp.*, 205 Va. 65, 71, 135 S.E.2d 131, 135 (1964) ("Fraud is a conclusion of law from facts, and 'it is a well settled rule of pleading both at law and in equity, that the facts out of which the fraud arises must be alleged as well as proved to justify relief.'" (quoting *Va. Passenger & Power Co. v. Fisher*, 104 Va. 121, 132, 51 S.E.198, 202 (1908))).

Contents of Beamon's Counterclaim

The Court now turns to Beamon's Counterclaim. In order to rule on the Demurrer, it is important for the Court to outline Beamon's specific allegations against En-Staff. They are as follows:

1. Before signing the Proposal, Ramashani Bakari of Beamon told Dwayne Bannett[5] of En-Staff that time was of the essence, as B & R Construction required the work to be done within 90 days. (Countercl. ¶ 1.)
2. Before signing the Proposal and because time was of the essence, Bakari explained to Bannett that "Beamon needed both a large number of qualified

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[4] Beamon also cites *Nationwide Insurance Company v. Patterson*, which states, "the cases are clear that, in Virginia, one cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the misrepresentation was made was negligent in failing to learn the truth." 229 Va. at 631, 331 S.E.2d at 492. This passage stands for the idea that failure to investigate the truth cannot serve as an absolute defense to fraud. Thus, in *Nationwide*, the insurance agent that explained the meaning of the policy cannot escape liability because the plaintiff had "the means of acquiring the correct information about the meaning of the policy." *Id.* at 630, 331 S.E.2d at 492. There, because Nationwide directed the plaintiff to rely on its agent and the plaintiff did so rely on the agent's false representations, a cause of action for fraud was available. *Id.* at 631, 331 S.E.2d at 492. The plaintiff was not expected to investigate further nor had any reason to believe that the agent's representations were false. *See id.*

The cases cited by En-Staff, on the other hand, go to negate the element of reliance of the party misled. For example, if a salesman states that the car is red when in fact it is blue and the customer is standing in front of the blue car, the customer cannot state that he relied on the representations of the salesman. In effect, the Supreme Court no more wants to reward plaintiff's voluntary blindness than it does let the defendant off the hook for misleading the plaintiff simply because the plaintiff could have done more to discover the truth. Thus, the above stated doctrine represents a balance between the two extremes.

[5] Beamon refers to En-Staff's employee as Dwayne "Bannett". In En-Staff's Demurrer, the name was corrected to "Burnett"; however, in En-Staff's Reply to Beamon's Opposition, the name was corrected to "Barrett". For the purpose of this Opinion, the Court will refer to the employee as "Bannett".

asbestos workers and a supervisor qualified to supervise asbestos abatement workers." (Countercl. ¶ 2.)

3. Before signing the Proposal, Bannett repeatedly told Bakari that "'I have exactly what you are looking for' in the way of 'qualified' personnel to work as an asbestos abatement supervisor for the [Project]." (Countercl. ¶ 3.)
4. Before signing the Proposal, Bannett sent Bakari a resume of Earl F. Spangler and Bannett "specifically and repeatedly told Bakari [Spangler] was qualified to serve as an asbestos abatement worker supervisor for the Project both before and after the resume was sent to Beamon." (Countercl. ¶ 4.)
5. "En-Staff had a duty to know the truth or falsity of the aforementioned misrepresentations made for the purpose of inducing Beamon to agree to the Proposal." (Countercl. ¶ 5.)
6. Spangler was not qualified to serve as an asbestos abatement supervisor and Spangler readily admitted that he was not qualified. (Countercl. ¶¶ 6–7.)
7. Spangler also told Beamon "he had only been associated with En-Staff for a very short period of time." (Countercl. ¶ 8.)
8. En-Staff had the present intent not to perform the Contract because "it either knew that Spangler was not qualified or recklessly disregarded the truth or falsity of the representation . . . ." (Countercl. ¶ 10.)
9. Beamon reasonably relied on Bannett's misrepresentations of material facts, which induced it to enter into the Proposal. (Countercl. ¶ 11.)
10. In the alternative, En-Staff innocently or negligently made the above representations to induce Beamon to sign the Proposal. (Countercl. ¶ 17.)
11. These misrepresentations of material facts caused Beamon significant damages. (Countercl. ¶ 12.)

Along with the allegations in the Counterclaim, Beamon attached and incorporated by reference the resume En-Staff provided to it. (Countercl. Ex. A.) Spangler's experience included: 1) Senior Technician for an asbestos abatement project; 2) Asbestos Supervisor; 3) Environmental Consultant, specifically listing human resource development as a position duty; 4) Environmental Technician; 5) Assessment Coordinator, specifically stating, "[a]ccountable for scheduling and overseeing all field work and related scientific tasks," followed by a paragraph more of position duties; 6) Environmental Technician/Asbestos Worker; 7) EPA ERS Contractor; and 8) Water Treatment and Tank Cleaner. (Countercl. Ex. A.) Along with these position titles, Spangler listed eight certifications from various states, including a current Virginia Asbestos Supervisor License. (Countercl. Ex. A.)

In this Court's October 5, 2010 Opinion, it sustained the Demurrer to Count I because Beamon did not include factual assertions, which, if proved, would provide a basis for recovery in a cause of action for fraud. (Op. 14.) Specifically, there were no factual allegations tending to show that En-Staff acted intentionally or recklessly in making the above-named statements. (Op. 14.) After carefully reviewing Beamon's Second Amended Counterclaim, the Court is still of the opinion that Beamon has not met

its burden for pleading a cause of action for fraud, actual or constructive,[6] for the reasons that follow.

The Parties' Arguments and Analysis of Beamon's Counterclaim

The focus of this analysis is whether the statement from Bannett, an employee of En-Staff, that "I have exactly what you are looking for," subsequent statements that Spangler was qualified, and the delivery of Spangler's resume to Beamon in response to Beamon's request for a qualified asbestos abatement supervisor may be the basis for a claim of fraud. "The circumstances of the parties, the negotiations leading to the execution of the contract, and the nature of the contract itself, are relevant matters to be considered . . . ." *Fensom*, 190 Va. at 795, 58 S.E.2d at 20. Thus, the Court, taking as true all properly pleaded facts, acknowledges that En-Staff was aware that time was of the essence in Beamon's contract with B & R Construction. The Court also, at this stage in the proceedings, recognizes that Spangler was not qualified for the Project, informed Beamon of this fact, and had only been associated with En-Staff for a short period of time. These, along with the attached resume, are the facts pleaded and admitted as true for the purpose of this Demurrer. *See Fuste*, 265 Va. at 131–32, 575 S.E.2d at 861 (quoting *Ward's Equip., Inc.*, 254 Va. at 382, 493 S.E.2d at 518). As for the rest of the allegations in the Counterclaim, they are conclusions of law, which the Court is not required to admit as true. *Dodge*, 276 Va. at 5, 661 S.E.2d at 803 (quoting *Fox*, 236 Va. at 71, 372 S.E.2d at 374).

En-Staff first argues that because the statements of its employees are those regarding future performance and not present fact, and because there is no factual evidence that En-Staff did not have the present intent to perform when the contract was made, there can be no claim of fraud. Essentially, while not admitting the truth of the allegation, Beamon's Counterclaim, according to En-Staff, only amounts to a negligent breach of contract with no evidence of intent to defraud. Beamon, on the other hand, argues that there was more than sufficient evidence that En-Staff did not intend to perform the contract and deliberately made false representations of Spangler's qualifications to induce Beamon to sign the contract. Beamon summarizes his argument as follows:

> En-Staff did not simply suggest to Beamon that they had an individual that "might" be qualified and that Beamon would need to conduct its own investigation. Instead, knowing that time was of the essence for Beamon, on a large-scale project and that Beamon did not have time to locate, interview or otherwise investigate potential asbestos abatement supervisors, En-Staff repeatedly misrepresented to Beamon that Spangler was a qualified asbestos

[6] While the Court did overrule En-Staff's initial Demurrer to Count II alleging constructive fraud, a closer look at the law and the logic behind the rule articulated in *SuperValu* convinces the Court that it was in error in so overruling En-Staff's initial Demurrer in its October 5, 2010 Opinion. That rule, as a reminder, states, "[u]nder no circumstances . . . will a promise of future action support a claim of constructive fraud." *SuperValu, Inc.*, 276 Va. at 367, 666 S.E.2d at 342. Thus, only when there is a present *intent* not to perform a contract, will a claim for *actual* fraud lie.

> abatement supervisor to appease and throw Beamon off its guard and to otherwise divert Beamon from further investigation.

(Countercl. Pl.'s Br. 2–3.)

The Court agrees with En-Staff that the facts alleged do not evince a present intent not to perform the contract by purposely or recklessly providing unqualified workers to Beamon. Specifically, Beamon does not allege any fact suggesting that any En-Staff employee had any reason to believe that Mr. Spangler was not qualified or that the resume provided to Beamon was false in any way. The Counterclaim instead states that En-Staff knew that Beamon needed someone in a hurry and it thought it had someone who was qualified. Fraudulent intent simply cannot be inferred from these allegations.

To illustrate why Beamon's Counterclaim is not sufficient, one can compare the facts alleged here with the facts alleged in *Flip Mortgage*. There the plaintiff alleged, similar to the allegations in this case, that the defendants "never intended to abide by the terms of [the] contract and promised to do so merely to lure [plaintiff] into a relationship in which it would be cheated . . . ." *Flip Mortgage Corp.*, 841 F.2d at 537. However, an additional fact alleged in that case was that the defendants "began submitting false revenue reports almost from the moment the contract was signed." *Id.* And the Court determined that "[a] rational trier of fact could conclude from this that [the defendants] never intended to abide by the terms of the contract." *Id.* Thus, there was an allegation that the defendants did "more than not pay their bills . . . ." *Id.* Rather, they "undertook a course of deception intended to make their wrongs seem right, to lead [plaintiff] to believe that nothing was amiss, and to lure it into sleeping on its rights. It is just such deception that the law of fraud is intended to punish." *Id.* at 537–38. In other words, submitting false revenue reports almost immediately after the contract was signed showed that the defendants in *Flip Mortgage* began an active course of deception and never intended to abide by the terms of the contract.

There is no analogy to the false revenue reports in Beamon's Counterclaim, which would evince an active course of deception and the present intent not to perform the contract. Rather, it appears that all that Beamon alleges is En-Staff's failure to provide qualified personnel. This amounts to a breach of contract and nothing more, and a simple breach of contract is not the type of "deception that the law of fraud was intended to punish." *Id.*

In addition to Beamon's omission of any fact that could prove a present intent not to perform the contract, the actual statements are not ones that can provide the basis for a claim of fraud. Here, the Court assumes arguendo that the basis of the claim for fraud is not En-Staff's present intent to perform the contract in the future, but rather En-Staff's present-time assertions that Mr. Spangler was qualified to perform the work. The issue then becomes whether a statement about one's qualifications in the manner stated by Bannett, "I have exactly what you are looking for," is a statement of fact or opinion. If it is one of opinion, then it is not actionable. *See, e.g.*, *Mortarino*, 251 Va. at 293, 467 S.E.2d at 781 (quoting *Saxby*, 109 Va. at 198, 63 S.E. at 424).

Before addressing the fact/opinion issue in this case, the Court examined a survey of some of the Supreme Court cases that have distinguished between the two. In *McMillion v. Dryvit Systems, Inc.*, the plaintiffs alleged that the defendants made misrepresentations about the quality of a synthetic stucco product, upon which they relied. 262 Va. at 470, 552 S.E.2d at 368. These representations contained in the advertising brochure were:

> Damaging water penetration is avoided. Rain finds its way into the wall structure when insulation is placed inside. Conventional insulation absorbs water over a period of time and eventually becomes inefficient. With Outsulation, there are not routes for water to enter. . . . The entire wall remains dry and insulation values stay constant; . . . Interior finishes remain stable.

Id. at 470–71, 552 S.E.2d at 368. The Supreme Court held that these representations were "merely statements of opinion about how [the product] would perform in the future if utilized in constructing a home." *Id.* at 471, 552 S.E.2d at 369. The Supreme Court compared this statement to the statement in the brochure stating that the defendant only uses 100 percent acrylic polymer formula in its finish coating. *Id.* The Supreme Court opined that this would be a "misrepresentation of existing fact because it pertains to the present quality or character of [the product]." *Id.*

In *McMillion*, the Court cites *Tate v. Colony House Builders, Inc.*, 257 Va. 78, 508 S.E.2d 597 (1999) as another case distinguishing between statements of the present quality or character of the subject and statements about future events. *Id.* In *Tate*, the Supreme Court listed the following representations as statements of the present quality or character of the property and thus statements of fact: 1) "the new dwelling house was free from structural defects"; 2) "the new dwelling house was constructed in a workmanlike manner"; and 3) "the new dwelling house was fit for habitation." 257 Va. at 83–84, 508 S.E.2d at 600. The following statement, on the other hand, were found to be statements based upon future events and thus matters of opinion: "[T]he plaintiffs 'would enjoy quiet possession in the sense that apart from minor corrective work, no significant work would be required by way of restoration, rebuilding, or extensive repair' . . . ." *Id.* at 84, 508 S.E.2d at 600. Finally, the following statements were found to be opinions because they were sales talk or puffing: 1) "the new dwelling house was competently designed commensurate with the consideration of $345,000.00"; and 2) "the design and construction [of the dwelling were] of the highest quality." *Id.* The Supreme Court explained that sales talk such as this could not reasonably be relied on when the parties are on equal terms.[7] *See id.*

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[7] Beamon argues on this point that the two parties were not on equal terms because En-Staff is "legally presumed to have[ ] means of information about its employees not equally open to Beamon." The Court does not find this argument convincing. While it is true that statements of opinion may be the basis of a fraud action when the deceived party is unsophisticated or when one party has information not readily available to the other, *see, e.g.*, Nationwide Ins. Co., 229 Va. at 631, 331 S.E.2d at 493, this is not such a case. An example of an unsophisticated party can be found in *Mears* where the plaintiff is described as an "unlettered farmer." 160 Va. at 318, 168 S.E. at 741. An example of a party who has more information

Because counsel for En-Staff relied heavily on *Lambert v. Downtown Garage*, the Court will address it here. In *Lambert*, the defendant represented to the plaintiff that the vehicle plaintiff intended to purchase was in "excellent condition." 262 Va. at 710, 553 S.E.2d at 715. The Supreme Court held that "[e]ven in the light most favorable to Lambert, Johnson's statement that the vehicle was in 'excellent' condition cannot be viewed as anything more than opinion . . . in the manner of puffing." *Id.* at 713, 553 S.E.2d at 717. More tellingly, the defendant also represented to the plaintiff that the vehicle had not been "seriously damaged or totaled" when the defendant knew that it had "sustained extensive damage." *Id.* Even then, the Supreme Court held that because plaintiff was "knowledgeable on the subject of vehicle repair" and was "fully aware that the particular vehicle had been damaged," the plaintiff "should have recognized that [defendant's] statement was part of a sales pitch and merely expressed an opinion that the damage, because it was repairable, was not 'serious.'"[8] *Id.*

It appears to the Court that Bannett's assertion that he had "exactly what [Beamon was] looking for" is no more than sales talk along the lines of a vehicle being in "excellent condition" or the building design being of the "highest quality." Furthermore, Bannett's statements that Spangler was qualified during contract negotiations is, as the Supreme Court held in *McMillion*, "merely [a] statement of opinion about how [the product] would perform in the future . . . ." 262 Va. at 471, 552 S.E.2d at 369. En-Staff's "product" in this case is Spangler's expertise in asbestos personnel supervision. Beamon was provided this "product" for review during contract negotiations by way of a resume.

Just as the Supreme Court did in *McMillion*, the Court will provide an example of what may be a misrepresentation of present fact in this case, as opposed to opinion. *See id.* at 471, 552 S.E.2d at 369. A doctoring of the resume could be considered a misrepresentation of the present quality or character of the product, as En-Staff would be misrepresenting Spangler's qualifications. In that instance, a cause of action for fraud

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than the other is in *Nationwide* where the Court stated, "Huffman was an insurance professional, a longtime Nationwide agent, while Patterson, his customer, was a layman. On this record, Huffman must be presumed to have means of information about the policy not equally available to Patterson." 229 Va. at 631, 331 S.E.2d at 493. In this case, Beamon is not an unsophisticated party unaware with the qualifications of an asbestos supervisor. Rather, it is in the business of environmental abatement and presumably has knowledge of the requirements for an asbestos supervisor, unlike the lay customer in *Nationwide*. Furthermore, En-Staff provided the resume to Beamon so it cannot be said that En-Staff attempted to hide Spangler's qualifications.

[8] Beamon relies heavily on *Packard Norfolk, Inc. v. Miller* where the Supreme Court held, in light of all the surrounding circumstances, that "[a] statement asserting the then perfect condition of a new car is a representation as to the present quality or character of the article and is clearly a representation of fact and not a promise as to something to be done in the future." 198 Va. at 563, 95 S.E.2d at 211. The Court mentions this case here because it appears to be similar to *Lambert*, as both involve the quality of vehicles. However, the Supreme Court continued in *Packard* stating "[u]nder the circumstances, it is clear that the representation was intended to be *understood* as a statement of an existing fact . . . ." *Id.* (emphasis added). The circumstances in *Packard* were such that the customer had previously received poor cars from the dealer and made the dealer promise that the new car he was purchasing would be in perfect condition before purchasing it. *See id.* at 559, 95 S.E.2d at 208–09. Thus, the representations were *understood* to be ones of existing fact, not opinion. In *Lambert* and, as the Court explains *infra*, in this case, the representations cannot and probably were not *understood* to be ones of existing fact under the circumstances.

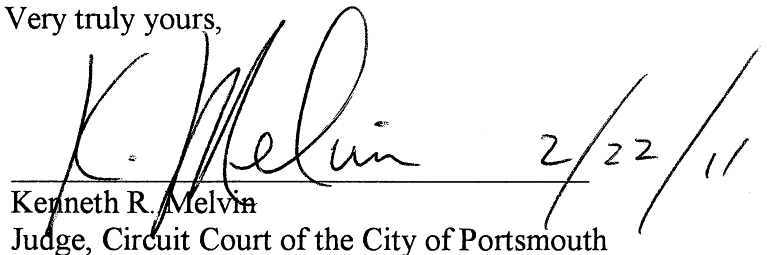
may lie because the truth or falsity of the resume could be determined factually. Here, however, there is absolutely no allegation that the resume was false in any way. Rather, Bannett's statements are matters of opinion in that they pertain to how Spangler may perform in the future when employed by Beamon.[9]

Conclusion

En-Staff's Demurrer to Counts I and II of Beamon's Second Amended Counterclaim are SUSTAINED. Counsel for En-Staff is instructed to prepare and deliver to the Court an Order consistent with this Opinion.

IT IS SO ORDERED.

Very truly yours,



Kenneth R. Melvin
Judge, Circuit Court of the City of Portsmouth

[9] Beamon relies on *Woodrick v. Hungerford*, 800 F.2d 1413 (5th Cir. 1986) in its brief and during oral argument for the proposition that a statement that someone is qualified to do a job is a statement of fact. In *Woodrick*, the plaintiff was told that he was qualified to serve in the Air Force after a medical examination, but later found out that he was not because he had congenital colorblindness, which should have been detectable in the initial examination. 800 F.2d at 1414–15. While not the issue on appeal, the district court held that the statement that Woodrick was "medically qualified to be a pilot candidate was a material misrepresentation of fact upon which Woodrick justifiably relied . . . ." *Id.* at 1415.

The present case is unlike *Woodrick* in at least two ways. First, Beamon could not justifiably rely on the statement "I have exactly what you are looking for" because, as the Court has now determined, this statement is one of opinion in the form of puffing. Second, the qualifications for fitness to perform a job during a medical exam can be determined with precision and accuracy by scientifically trained doctors. In other words, it can be factually proven. However, a statement that someone is qualified to do a job because of past experiences, briefly summarized in a resume, is anyone's guess. While En-Staff , and Beamon for that matter, may have been justified in predicting that Spangler would do a good job based on his experiences, it is only possible to tell with any accuracy whether someone is qualified to do a job at the time that they start the job. Thus, a statement of qualification here can only be considered an opinion on how Spangler would perform in the future; therefore, it is not a statement of fact as it might have been in *Woodrick.*