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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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RE: Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC
C.A. No. 4119-VCS

Dear Counsel:

Plaintiffs Sunrise Ventures, LLC, DiSabatino Ventures, LLC, and Lawrence J. DiSabatino have moved for reargument of this court's memorandum opinion dismissing the plaintiffs' claims[1] based upon two issues. First, the plaintiffs argue that the 2004 agreement creating Sunrise Ventures (the "2004 Agreement") is a sealed document that is entitled to a twenty-year statute of limitations. Second, the plaintiffs argue that DiSabatino and Kiernan were fiduciaries before the 2004 Agreement was executed and, therefore, DiSabatino need not have been on inquiry notice of a 2002 Phase One environmental study

[1] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845 (Del. Ch. Jan. 27, 2010).

(the "2002 Phase One Study") because DiSabatino was entitled to rely upon Kiernan's obligations as a fiduciary.

Motions for reargument are governed by Court of Chancery Rule 59(f). The standard for such a motion is whether "the Court has misapprehended a material fact or rule of law,"[2] and whether the misapprehension is "such that the outcome of the decision would be affected."[3] But a motion for reargument is "not a mechanism for litigants to relitigate claims already considered by the court,"[4] or to raise new arguments that they failed to present in a timely way.[5] For the reasons discussed below, both of the plaintiffs' arguments are without merit, and the Motion for Reargument is denied.

I.

First, the plaintiffs claim that the 2004 Agreement, which gave DiSabatino a 50% ownership stake in Sunrise Ventures and transferred the property for the Blue Point Phase Two project to Sunrise Ventures, is a sealed document. In the opinion dismissing the plaintiffs' claims, this court held that claims arising from the 2004 Agreement were time-barred under a three-year statute of limitations. But, according to the new argument of the plaintiffs, those claims are not time-barred because they are covered by a twenty year statute of limitations.

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[2] *Cole v. Kershaw*, 2000 WL 1336724, at *3 (Del. Ch. Sept. 5, 2000) (citations omitted).
[3] *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1014 (Del. Ch. 2007) (citations omitted).
[4] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 895 A.2d 874, 877 (Del. Ch. 2005).
[5] *See Oliver v. Boston Univ.*, 2006 WL 4782232, at *1 (Del. Ch. Dec. 8, 2006).

Although they argued that loan and mortgage agreements from 2002, 2003, and 2004 were sealed documents, the plaintiffs failed to raise this argument as to the 2004 Agreement in their briefs or at any point before their Motion for Reargument. This new argument is therefore waived, and the motion must be denied for that reason alone.[6] Moreover, even if this argument was proper grist for a reargument motion, it lacks merit.

The plaintiffs rely on the Supreme Court's recent decision in *Whittington v. Dragon Group, LLC*.[7] In *Whittington*, the Supreme Court established a bright line test for whether a document is under seal — the word "SEAL" appearing next to a signature is sufficient to demonstrate an intent to execute a contract under seal, even if there is no other language demonstrating that intent in the contract.[8] The 2004 Agreement does not contain the word "SEAL" next to the signatures of the parties. Instead, the 2004 Agreement contains a testimonium clause stating "IN WITNESS WHEREOF, the parties have set their Hand and Seal as of the day of

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[6] *See Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *1 (Del. Ch. May. 21, 2008) ("Reargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion." (quoting *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007))); *Am. Legacy Found.*, 895 A.2d at 877 ("[A] motion for reargument is not a proper device for [the losing party] to now advance arguments that it chose not to make [earlier] . . . . There is a value in the conservation of judicial resources that ordinarily precludes this sort of piecemeal litigation of issues." (citations omitted)); *Filasky v. Von Schnurbein*, 1992 WL 187619, at *1 (Del. Ch. July 29, 1992) (denying a motion for reargument where a plaintiff had first raised an argument in their reargument motion and, therefore, had "waived their right to litigate that issue").

[7] __ A.2d __, 2009 WL 4894305 (Del. Dec. 18, 2009).

[8] *Id.* at *8.

the year first above written."[9] The plaintiffs argue that, under *Whittington*, this clause is enough to demonstrate intent to create a sealed contract.

But, as the defendants point out, *Whittington* did not hold that a testimonium clause alone is enough to demonstrate intent under seal. *Whittington* adopted the holding of *In re Beyea's Estate*, a 1940 Orphans' Court case.[10] *Beyea's Estate* held that a promissory note with the word "SEAL" printed next to the signature line was an instrument under seal, although the note did not contain a testimonium clause,[11] and relied upon a holding in *Armstrong v. Pearce*, an 1851 Superior Court case, that:

> A seal upon wax is not necessary; but something designed to answer the purpose of a seal is necessary. *The expression in the body of the note "witness my hand and seal" does not make the seal*; and there is not even anything to leave a jury to show there was ever a seal made to the note.[12]

Whittington did not hold that a contract containing only a testimonium clause creates a contract under seal. In fact, the cases that *Whittington* relies upon suggest otherwise. And, the other case relied upon by the plaintiffs found that a

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[9] Compl. Ex. N (Agreement between Canal Ventures, LLC, Roxy's Real Estate, LLC, DiSabatino Ventures, LLC, and Rehoboth Canal Ventures, LLC for the transfer of Sunrise Ventures, LLC to Roxy's Real Estate and DiSabatino Ventures, and the transfer of the Blue Point property to Sunrise Ventures (Sept. 17, 2004)) ("2004 Agreement") at 17.

[10] *Whittington*, 2009 WL 4894305, at *10 ("In the absence of legislative guidance, we are persuaded by the decision in *Beyea's Estate* and adopt that common law holding as the law of Delaware.").

[11] *In re Beyea's Estate*, 15 A.2d 177, 180 (Del. Orphans' Ct. 1940).

[12] 1851 WL 614, at *1 (Del. Super. 1981) (emphasis added).

contract was under seal where it contained *both* a testimonium clause and the word "SEAL" printed next to the signature line.[13]

The plaintiffs also claim that the contracts which released Kiernan from his obligations to Sunrise Ventures are under seal (the "2006 Agreement" and "2006 Release"). In the 2006 Agreement, the word "SEAL" is written next to only Kiernan's name as "purchaser" on behalf of Sunrise Ventures, but not Kiernan's name as "seller" on behalf of Roxy's Real Estate, or DiSabatino's name.[14] And, in the 2006 Release, "SEAL" is written only next to the signatures of certain of the signing parties.[15] But, whether the 2006 Agreement and Release are under seal has no effect on this court's conclusion that rescission was not available. Rescission of the 2006 Agreement and Release was denied because the request for rescission relied solely on time-barred claims of prior fraud in 2004, and because the plaintiffs did not allege that any fraud had occurred in 2006.[16]

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[13] *See Peninsula Methodist Homes & Hosp., Inc. v. Architect's Studio, Inc.*, 1985 WL 634831, at *1-2 (Del. Super. 1985).
[14] Compl. Ex. Q (Agreement between Roxy's Real Estate, DiSabatino Ventures, and James Kiernan (July 2006)) at 12.
[15] Compl. Ex. R (Release by and between DiSabatino Ventures, Eastern States Development Company, Inc., Lawrence DiSabatino, Francis Julian, Wilmington Trust, Roxy's Real Estate, James Kiernan, Veronica Kiernan, and Kathy Newcomb (July 31, 2006)) at 3.
[16] *Sunrise Ventures*, 2010 WL 363845, at *8 ("The request for rescission of the 2006 Agreement and Release also fails because it relies entirely on claims of prior fraud in 2004. The complaint does not claim that any fraud occurred in 2006, or that any misstatement was made by Kiernan that would create a basis for rescission for that agreement.").

Therefore, the 2004 Agreement was not a sealed contract, whether the 2006 Agreement and Release are sealed is of no moment, and the Motion for Reargument is denied.

II.

The plaintiffs next argue that their Motion for Reargument should be granted because Kiernan and DiSabatino were engaged in a joint venture before the 2004 Agreement was executed. Therefore, the plaintiffs claim, Kiernan was under an obligation to disclose the contents of the 2002 Phase One Study to DiSabatino, and that, contrary to the conclusion of the court's opinion, DiSabatino should be entitled to equitable tolling of the statute of limitations.

First, this argument was expressly considered in footnote 39 of the memorandum opinion, which found that before the 2004 Agreement was executed, "Kiernan was neither a joint venturer with DiSabatino nor DiSabatino's co-partner in Sunrise Ventures — in other words, no basis for a fiduciary relationship existed."[17] A joint venture is created where there is: "(1) a community of interest in the performance of a common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in the losses which may be sustained."[18] Also, joint

[17] *Id*. at *7 n.39.
[18] *Wah Chang Smelting and Refining Co. of Am., Inc. v. Cleveland Tungsten Inc*., 1996 WL 487941, at *4 (Del. Ch. Aug. 19, 1996) (citing *Warren v. Goldfinger Bros., Inc.*, 414 A.2d 507, 509 (Del. 1980)).

venture status is established only where an express or implied contract is created.[19] Nothing in the complaint suggests that Kiernan and DiSabatino were engaged in a joint venture before executing the 2004 Agreement; instead, they were simply in negotiations over how and whether to form such an agreement. The memorandum opinion made no mistake that I discern as to this point.

Furthermore, the doctrine of equitable tolling only tolls the statute of limitations until the plaintiff is "objectively aware of the facts giving rise to the wrong, *i.e.*, on inquiry notice."[20] DiSabatino received notice of the 2002 Phase One study before the 2004 Agreement was executed, when he received an August 2004 email from Kiernan proposing a term for the 2004 Agreement that "all studies on the subject parcel *including but not limited to the Phase One conducted on the . . . Brown Parcel*" be made available.[21]

Indeed, DiSabatino received even further notice, notice that also further demonstrates why the motion for reargument should be denied. The 2004 Agreement itself expressly stated that "all studies on the property, including without limitation, Phase One environmental studies" would be made available to DiSabatino after the 2004 Agreement closed.[22] This not only gave DiSabatino

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[19] 46 AM. JUR. 2D *Joint Ventures* (2009) § 9.
[20] *In re Am. Intern. Group, Inc.*, 965 A.2d 763, 812 (Del. Ch. Feb. 10, 2009) (emphasis omitted).
[21] Compl. Ex. N (email from James Kiernan to Steve Ellis, Esquire (Aug. 8, 2004)) (emphasis added).
[22] 2004 Agreement at 2.

further clear notice of the existence of the 2002 Phase One study, but also contradicts DiSabatino's argument, which is not supported by pled facts, that Kiernan was his fiduciary before the 2004 Agreement was entered. Instead, it illustrates the reality pled in the complaint and the documents it incorporates, which is that DiSabatino and Kiernan were bargaining at arms length to form a joint venture. It was because of that reality that DiSabatino demanded contractual protections such as the representations and warranties made in the 2004 Agreement. Therefore, because Kiernan and DiSabatino were not fiduciaries before the 2004 Agreement was executed, and because DiSabatino was on inquiry notice as early as August 2004, equitable tolling is not available.

III.

For the foregoing reasons, the Motion for Reargument is denied. IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor