STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Windham Unit — Docket No. 221-5-06 Wmcv

Long Beach Mortgage Company vs. Tyson et al

ENTRY REGARDING MOTION

Count 1, Foreclosure (221-5-06 Wmcv)
Count 2, Foreclosure (221-5-06 Wmcv)
Count 3, Foreclosure (221-5-06 Wmcv)
Count 4, Foreclosure (221-5-06 Wmcv)
Count 5, Foreclosure (221-5-06 Wmcv)
Count 6, Lender Liability (221-5-06 Wmcv)
Count 7, Indemnification (221-5-06 Wmcv)
Count 8, Foreclosure (221-5-06 Wmcv)
Count 9, Foreclosure (221-5-06 Wmcv)
Count 10, Foreclosure (221-5-06 Wmcv)
Count 11, Foreclosure (221-5-06 Wmcv)
Count 12, Foreclosure (221-5-06 Wmcv)
Count 13, Fair Debt Collection Practice (221-5-06 Wmcv)
Count 14, Fair Debt Collection Practice (221-5-06 Wmcv)
Count 15, Foreclosure (221-5-06 Wmcv)
Count 16, Foreclosure (221-5-06 Wmcv)
Count 17, Consumer Fraud etc. (221-5-06 Wmcv)

Title: Motion for Summary Judgment (Motion 70)
Filer: Deborah J. Tyson
Attorney: Alexander D. Shriver
Filed Date: March 17, 2014

Response filed on 04/16/2014 by Attorney Heather Rider Hammond for third-party defendant J.P. Morgan Chase Bank, N.A.

Title: Motion for Summary Judgment (Motion 71)
Filer: J.P. Morgan Chase Bank, N.A.
Attorney: Heather Rider Hammond
Filed Date: March 18, 2014

Response filed on 04/28/2014 by Attorney Alexander D. Shriver for Defendant Deborah J. Tyson

J.P. Morgan's motion is GRANTED, and Deborah Tyson's motion is DENIED

So ordered.

Opinion and Order
Granting Summary Judgment to J.P. Morgan Chase and Denying Summary Judgment to Deborah Tyson

Background

By her cross-claim in this foreclosure action, Deborah Tyson sues J.P. Morgan Chase for negligent misrepresentation, intentional misrepresentation, consumer fraud, and intentional infliction of emotional distress. This case originally involved a foreclosure by Long Beach Mortgage Company against Deborah Tyson and Antonia Tyson. While the foreclosure suit was pending, Antonia Tyson received a letter from J.P. Morgan that incorrectly stated J.P. Morgan owned both mortgages on the Tysons' house. Without ever having threatened suit or other enforcement remedies as a holder, J.P. Morgan later admitted this statement was an error. Following proof of transfer of the original note and mortgage by several successor plaintiffs, each attesting under oath to actual possession of the instruments, the Court granted foreclosure to U.S. Bank at the conclusion of a trial in 2013. Deborah Tyson claims arise from her assertion that J.P. Morgan's letter complicated the resolution of these foreclosure proceedings, to her detriment.

While these proceedings have posed as great a challenge to effective case management as any foreclosure proceeding over which the undersigned has exercised authority,[1] the facts associated with this last remaining controversy are straightforward and undisputed. On September 21, 2004, Antonia and Deborah Tyson bought a house in Vernon for $200,000. They executed a mortgage for $190,000. On December 2, 2004, the Tysons refinanced with two notes and mortgages. The first loan was for $180,000 and the second for $45,000. The Tysons completed two payments on their debt after refinancing, and never made another payment while occupying the premises for the last 9 ½ years, until redeeming it out of foreclosure. In May 2006, Long Beach Mortgage Company filed a foreclosure action on the first mortgage, which went to trial in February 2013 leading to a foreclosure decree issued on March 11, 2013.

On August 29, 2011, J.P. Morgan wrote a letter to Antonia Tyson. The letter responded to a claim Mr. Tyson made to the Vermont Attorney General. J.P. Morgan wrote: "We have thoroughly reviewed your accounts and Chase has determined that we hold the notes for these loans. However, both mortgage loans have been charged off due to their delinquency for non-payment." J.P. Morgan later admitted the August 29, 2011 letter was incorrect. On July 25,

[1] In substantial part, responsibility for the lengthy delay in finally adjudicating the claims lies with inexplicable decisions by the successive holders of the note and mortgage to reassign them while these proceedings were pending, making inevitable procedural stalls involving substitution of the real party in interest as plaintiff. In addition, however, Deborah Tyson has vigorously participated in litigation strategies in support of her defenses and claims, including inordinate demands for discovery as compared to that typically associated with foreclosure proceedings. Much of the resulting dense fog still emanating from 8 years of pleadings, filling multiple bankers' boxes, was self-induced by holders seemingly uninterested in vigorously or efficiently pursuing relief in foreclosure. To the extent Ms. Tyson abetted the fog-making, she can hardly be faulted, since opposing parties provided her with ample materials for the exercise, and in the end she obtained a highly favorable result by the stipulation for redemption at far less that the face amount of the foreclosure judgment. Her cross-claim against J.P. Morgan was all that remained of the case after the March 11, 2013 judgment in favor of U.S. Bank. This claim, also raised as an affirmative defense against U.S. Bank, has long been a volatile ingredient in the fog-making. As described herein, the claim has never had more substance than wisp.

2012, J.P. Morgan wrote a letter to Mr. Tyson that stated it had discharged the second loan for $44,967.75, but never owned the first loan for $180,000. The discharge of the second note was filed in the Vernon land records.

Deborah Tyson invoked J.P. Morgan's August 29, 2011 letter to defend against the foreclosure of the first loan, asserting that it raised doubt as to who actually owned the obligation with the right of enforcement. Deborah Tyson continued using this strategy even after J.P. Morgan admitted the letter was an error and acknowledged it never owned the first loan. In its March 11, 2013 opinion and order, the Court rejected Deborah Tyson's argument that J.P. Morgan owned the loan, or that the August 29, 2011 letter raised sufficient doubt so as to preclude U.S. Bank from proving its ownership. The Court observed U.S. Bank produced the originals of the note and mortgage, which was sufficient to show ownership and enforce the loan. After the Court issued a judgment to U.S. Bank, Ms. Tyson did not seek leave to appeal. Rather, she worked out an agreement with U.S. Bank and redeemed the property. At the time of judgment, the Tysons owed $285,192.79 on the first loan. Deborah Tyson redeemed for $127,000.

By her cross-claim filed in these proceedings, Deborah Tyson also sued J.P. Morgan based on the August 29, 2011 letter. She alleged the letter prevented any clear understanding as to who owned her first loan, which therefore hindered her from settling her case with U.S. Bank. Failing to settle the case caused her to incur additional attorney's fees. She also alleges the letter caused her emotional distress.

On March 17, 2014, Deborah Tyson moved for summary partial summary judgment. She seeks a determination that J.P. Morgan is liable for consumer fraud and also seeks attorney's fees. On March 18, 2014, J.P. Morgan filed a motion for summary judgment. On April 16, 2014, J.P. Moran opposed Deborah Tyson's motion for partial summary judgment. On April 28, 2014, Deborah Tyson opposed J.P. Morgan's motion for summary judgment.

Discussion

Standard of Review

The Court grants summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Lamay v. State*, 2012 VT 49, ¶ 6, 191 Vt. 635. Nevertheless, the non-moving party cannot rely solely on the pleadings to rebut credible evidence. *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413.

Consumer Fraud

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices incommerce, are hereby declared unlawful." 9 V.S.A. § 2461. Consumers may sue for "false or fraudulent representations or practices prohibited by section 2453." 9 V.S.A. § 2461(b). To succeed in a claim for consumer fraud, a plaintiff must show: (1) a misrepresentation that is likely to mislead the consumer; (2) the consumer must reasonably interpret the misrepresentation; and, (3) the misrepresentation must be material in that it influences the consumer's conduct. *Peabody v. P.J. Auto Village, Inc.*, 153 Vt. 55, 57 (1989).

The Vermont Supreme Court recently considered the application of the Consumer Fraud Act under circumstances similar to this case. *See Dernier v. Mortg. Network*, 2013 VT 96, ¶ 54. In *Denier*, borrowers took out a loan and fell behind on the mortgage. *Id.* ¶¶ 3, 5. After the owner of the note and mortgage brought a foreclosure action, U.S. Bank, which did not own the note or mortgage, sent the borrower a letter indicating it possessed the note and mortgage. *Id.* ¶ 5. The borrowers sued U.S. Bank for consumer fraud. *Id.* ¶ 6.

The Supreme Court dismissed the claim for consumer fraud because the borrower could not show an injury. *Id.* ¶ 62. Even if the letter was deceptive, the borrower must show damages. *Id.* ¶ 56. Courts must dismiss consumer fraud claims where the claimant has no damages. *Id.* The borrowers failed to show any damages and, because they were still liable on the note and mortgage, could not show any damages. *See id.* ¶¶ 58–59. Without any showing of damages, the borrower could not sustain a charge for consumer fraud. *Id.* ¶ 62.

Anderson v. Johnson is also instructive as to the application of the Consumer Fraud Act in this case. *See* 2011 VT 17, ¶ 13, 189 Vt. 603 (mem.). In *Anderson*, the plaintiffs sued the defendants for misrepresenting the amount of land included in a sale. *See id.* ¶¶ 1–2. The plaintiffs knew of the mistake before closing and did not seek to renegotiate the purchase price. *Id.* ¶ 2. A jury found the defendants committed consumer fraud but awarded no damages. *Id.* ¶ 5. The Supreme Court determined attorney' fees were not appropriate because there was no public harm. *Id.* ¶ 9. The Court reasoned that where there are no damages, interpreting the Consumer Fraud Act to allow attorney's fees would turn the remedial statutory scheme "into a lawyer's relief act." *Id.*

The holdings in *Dernier* and *Anderson* control the outcome here. Deborah Tyson cannot sustain a claim for consumer fraud because she was not harmed by J.P. Morgan's August 29, 2011 letter. Ms.Tyson argues she was harmed because she declined settlements and was forced to incur additional attorney's expenses. This argument is predicated on her unreasonable decision to use the letter as a defense to suit from U.S. Bank even after J.P. Morgan admitted its error. The claim of continued reliance is rendered more unreasonable since Ms. Tyson persisted in advancing it with knowledge that the Court had approved as sufficient to establish standing the sworn representations by substituted plaintiffs that they owned the note and mortgage. There was never a reasonable basis for Ms. Tyson to claim detrimental reliance on the letter.

Indeed, the letter has never been material to any legal issue in this case. The foreclosure started five years before the Tyson's received the letter, and J.P. Morgan never threatened any legal action against the Tysons before or after sending the letter. Except for the statement in the letter, there is no evidence that J.P. Morgan ever owned the first mortgage note, or that the Tysons ever had reason to believe it did. Exactly as in *Denier*, the Tysons remained obligated under the first loan, as they were in no position to deny, since they had only made two payments toward the amounts of principal and interest used to purchase their home. *See* 2013 VT 96, ¶¶ 58–59. Deborah Tyson's assertion that somehow she would have arranged an earlier settlement, but for the confusion as to the actual holder, is entirely disingenuous. Further, even crediting such "confusion", the hypothesis of an earlier and more favorable settlement is too speculative to support any proof of damages.

In sum, the elements of a consumer fraud claim are wholly unmet here. The letter does not meet the definition of a deceptive act because Ms. Tyson cannot show that she reasonably interpreted the letter as misleading, or that she reasonably relied on any misrepresentation in a material fashion that affected her conduct as a consumer. Furthermore, she cannot demonstrate any causal relationship between the statements made in the letter and any harm she suffered. *See Denier*, 2013 VT 96, ¶ 62; *Anderson*, 2011 VT 17, ¶ 19. For these reasons, the Court will grant summary judgment to J.P. Morgan on the consumer fraud claim.

Negligent Misrepresentation

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) of Torts § 552; *see Pearson v. Simmonds Precision Prods., Inc.,* 160 Vt. 168, 170 (1993) (adopting the Restatement.) As with consumer fraud, a plaintiff seeking recovery for negligent misrepresentation must be able to show damages. *See Pearson*, 160 Vt. at 173.

Deborah Tyson's claim for negligent misrepresentation fails because she cannot show damages. *See id.* As with her allegations in support of her consumer fraud claim, Ms. Tyson claims the representation made by J.P. Morgan in its August 29, 2011 letter forced her to change her litigation strategy. Plaintiff's unreasonable use of this information, even after J.P. Morgan admitted its error, is not enough to show damages, and her assertion that she would have settled the claim is speculative. Therefore, the Court rejects Ms. Tyson's claims for negligent misrepresentation for a lack of damages. *See id.* J.P. Morgan is entitled to summary judgment.

Intentional Misrepresentation

Deborah Tyson also claims intentional misrepresentation. Intentional misrepresentation is part of a claim for fraud. *See Union Bank v. Jones*, 138 Vt. 115, 121 (1980). To make a claim for fraud, the plaintiff must show the defendant knew the misrepresentation was false when made, the misrepresentation must have related to a transaction, the misrepresentation must have changed the plaintiff's knowledge, and the plaintiff must have acted on the misrepresentation. *Id*.

Deborah Tyson cannot satisfy most of the elements of fraud. *See id.* There is no evidence J.P. Morgan knew its letter was false when it sent the letter. The letter did not relate to a transaction between Ms. Tyson and J.P. Morgan, because there is no proof that there ever was such a transaction. Finally, as with the absence of proof as to the same essential element of her consumer fraud claim, Ms. Tyson cannot show any reasonable reliance or damages based on the misrepresentation. Ms. Tyson's claim of fraud fails, and JP Morgan is entitled to summary judgment.

Intentional Infliction of Emotional Distress

"The elements of an IIED claim are: (1) conduct that is extreme and outrageous, (2) conduct that is intentional or reckless, and (3) conduct that causes severe emotional distress."

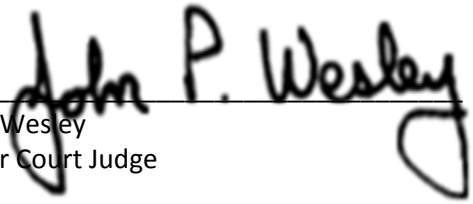
Baptie v. Bruno, 2013 VT 117, ¶ 24. To satisfy the element of outrageousness, the behavior must surpass the bounds of decency that can be tolerated in a civilized society. *See Fromson v. State*, 2004 VT 29, ¶ 15, 176 Vt. 395. Insult, indignities, and annoyances are not extreme and outrageous conduct. *Id.* (quoting *Denton v. Chittenden Bank*, 163 Vt. 62, 66–67 (1994)).

The claim that J.P. Morgan's August 29, 2011 letter constitutes outrageous behavior is itself outrageous, unsupported by any authorities discussing analogous acts. *See id.* The letter politely informed Antonia Tyson that J.P. Morgan owned both loans and that it had charged them off. Although incorrect as to the claim of ownership of the first mortgage note, the letter contained neither abusive language nor threats of enforcement. As a matter of law, the letter cannot give rise to a claim of intentional infliction of emotional distress.

ORDER

WHEREFORE, it is hereby **ORDERED:** The Court **GRANTS** J.P. Morgan's motion for summary judgment. The Court **DENIES** Deborah Tyson's partial motion for summary judgment. Judgment shall enter in favor of JP Morgan as to all of Deborah Tyson's cross-claims, which are **DISMISSED WITH PREJUDICE.**

Electronically signed on May 13, 2014 at 02:15 PM pursuant to V.R.E.F. 7(d).



John P. Wesley
Superior Court Judge

Notifications on 5/14/14:
Joshua B. Lobe (ERN 2066), Attorney for Plaintiff Long Beach Mortgage Company
Defendant Antonia Tyson
Alexander D. Shriver (ERN 1115), Attorney for Defendant Deborah J. Tyson
~~Defendant Long Beach Mortgage Company~~
~~Defendant Beneficial Massachusetts Inc.~~
Melissa A.D. Ranaldo (ERN 2630), Attorney for Defendant United States of America
~~Neutral Mediator/Arbitrator/Evaluator John J. Kennelly~~
Andrew H. Montroll (ERN 5290), Attorney for Intervenor DB Structured Products, Inc
Andrew H. Montroll (ERN 5290), Attorney for Plaintiff Arch Bay Holdings, LLC
Heather Rider Hammond (ERN 3938), Attorney for third-party defendant J.P. Morgan Chase Bank, N.A.
Andrew H. Montroll (ERN 5290), Attorney for Plaintiff U.S. Bank, N.A.
~~Neutral Mediator/Arbitrator/Evaluator Michael F. Hanley~~