

VERMONT SUPERIOR COURT

SUPERIOR COURT  
Windsor Unit

CIVIL DIVISION  
Docket No. 237-4-12 Wrcv

Bank of America, N.A.,  
Plaintiff

v.

Michelle Deverux, Robert W. Friedrich,  
River Valley Credit Union,  
State of Vermont,  
Department of Taxes, and  
Citibank (S. Dakota), N.A.,  
Defendants.

Decision on Motion for Summary Judgment

This case concerns a foreclosure and modification plan. In 2002, Bank of America lent Deverux and Freidrich \$240,000.00. In return, Deverux and Freidrich signed a promissory note and mortgage. Deverux and Friedrich were in a personal relationship, but that relationship ceased in 2003. Since 2003, Friedrich has lived on the property. On March 11, 2011, Deverux gave Friedrich a quitclaim deed on her interest in the property.

In 2010, Freidrich allegedly stopped making payments on the mortgage. On October 16, 2010, Plaintiff sent Freidrich a letter indicating he might be eligible to participate in the Home Affordable Modification Program. After much paperwork, Plaintiff determined Freidrich was eligible for trial period payment plan. Plaintiff sent Freidrich a letter on May 12, 2011, indicating he must make three monthly payments of \$1,457.43 between June and August of 2011. Freidrich claims he made those payments.

On October 31, 2011, Plaintiff sent Freidrich a letter stating: "We are pleased to let you know that your mortgage is approved for a Home Affordable Modification." The letter also instructed Friedrich to sign the modification agreement and return it Plaintiff by November 10, 2011. Friedrich alleges he signed and sent this agreement before the deadline. Friedrich provided a signed copy of the agreement, dated on November 9, 2011, and an overnight shipping receipt from FedEx. On December 30, 2011, Plaintiff sent Friedrich a letter that indicated it cancelled the modification because Friedrich "notified us on December 16, 2011 that [Freidrich] did not wish to accept the offer." Friedrich denies he rejected offer.

On June 14, 2012, Plaintiff moved for summary judgment on the foreclosure. Plaintiff's ground for foreclosure is default. Plaintiff did not mention the modification in its statement of undisputed facts. On July 30, 2013, Freidrich opposed the motion for summary judgment.

**FILED**

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Freidrich raised the defense that he was not in default because Plaintiff agreed to modify his mortgage. Plaintiff has not responded to the opposition.

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.

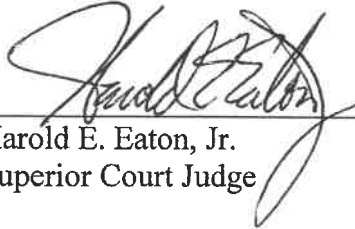
The issue in this motion is whether Freidrich is in default. Generally, a modification to a contract is enforceable, and the Court will read the contracts together if it appears the later contract is intended to only supersede part of the original contract. *See Prue v. Royer*, 2013 VT 12, ¶ 37. Freidrich's claims, supported by appropriate exhibits, suggest he entered into an agreement with Plaintiff to modify his mortgage. Plaintiff has not responded to Freidrich's defense, although Plaintiff will presumably argue Freidrich rejected its offer on December 16, 2011. At the minimum, Friedrich's assertions and exhibits create a disputed fact on whether he is in default. *See* V.R.C.P. 56. Accordingly, the Court must deny summary judgment.

The Court also notes Freidrich may be entitled to summary judgment but Freidrich has not moved for summary judgment. The Court has discretion to enter summary judgment for a non-moving party under V.R.C.P. 56(f). The Court will not enter summary judgment for either party at this point because it is unclear if Freidrich rejected Plaintiff's offer on December 16, 2011.

### Order

The Court *denies* Plaintiff's motion for summary judgment. In light of this ruling, the Clerk shall set this case for telephone status conference.

Dated at Woodstock, Vermont on August 12, 2013.

  
Harold E. Eaton, Jr.  
Superior Court Judge

**FILED**

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