

STATE OF VERMONT

SUPERIOR COURT  
Windsor Unit

CIVIL DIVISION  
Docket No. 538-8-12 Wrcv

Claremont Savings Bank,  
Plaintiff

v.

Arthur O. Stern and Ellen R. Stern,  
Defendants

DECISION

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO ALL COUNTERCLAIMS; AND  
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This action was commenced by Plaintiff Claremont Savings Bank against Defendants Arthur O. Stern and Ellen R. Stern, alleging breach of contract, negligent or intentional misrepresentation, and fraud in connection with a deficiency balance owed on a promissory note issued by Defendants to Plaintiff in exchange for a mortgage loan of \$845,000 on Defendants' property in Sharon, Vermont. The mortgage loan was granted in August 2008. Thereafter, Defendants encountered difficulties in repaying the loan and, by contract entered into in August 2012, the parties agreed that Plaintiff would discharge its mortgage on the property, thereby permitting its sale, in exchange for all proceeds from the short sale, as well as Defendants' agreement that they remained liable for the remaining deficiency on the promissory note.

Shortly after entering into the August 2012 agreement, Plaintiff initiated this action to recover a deficiency balance of \$377,048.22. Defendants then filed three counterclaims, alleging: (1) negligence in Plaintiff's decision to underwrite and originate the mortgage loan in 2008; (2) breach of contract, related to both the 2008 loan and 2012 agreement, in that Plaintiff violated the implied covenant of good faith and fair dealing; and (3) a claim of promissory estoppel.

In June 2013, after discovery was complete on all claims, Plaintiff moved for summary judgment. That motion was fully briefed and, on August 8, 2013, this Court granted the motion on Plaintiff's breach of contract claim but denied Plaintiff's claims of misrepresentation and fraud. This Court did not address the validity of Defendants' counterclaims.

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Now before the Court is a second motion for summary judgment, filed by Plaintiff on October 24, 2013 as to all of Defendants' counterclaims. Defendants filed an opposition to the motion on December 30, 2013, which supports their negligence and breach of contract counterclaims, but is silent as to the promissory estoppel counterclaim. Plaintiff filed a reply in further support of its motion on January 7, 2014.

Also before the Court is a cross-motion for summary judgment filed by Defendants on December 30, 2013. Therein, Defendants seek summary judgment only as to their negligence counterclaim. Plaintiff opposed Defendants' cross-motion by response filed on January 29, 2014. Defendants did not file any additional motion papers.

### ANALYSIS

#### *Negligence Counterclaim*

To prevail on a motion or cross-motion for summary judgment, a movant must demonstrate "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). As is applicable to Defendants' counterclaim of negligence, when both parties move for summary judgment, "each must be given the benefit of all reasonable doubts and inferences when the opposing party's motion is being evaluated." *DeBartolo v. Underwriters at Lloyd's of London*, 2007 VT 31, ¶ 8, 181 Vt. 609.

As set forth in Defendants' initial filings, their counterclaim of negligence is purportedly based on Plaintiff's "failure to act as a reasonably prudent lender in underwriting and originating the loan in question." In its motion for summary judgment on this counterclaim, Plaintiff correctly notes that Defendants are referring to the original 2008 mortgage loan, not the parties' 2012 agreement. The factual circumstances surrounding the original granting of the mortgage loan in 2008 are immaterial to the matters now before the Court. The parties entered into a separate agreement in August 2012 in which Defendants newly agreed to remain liable for the deficiency balance remaining on the promissory note. Defendants further agreed that Plaintiff, at its sole discretion, may pursue them for collection and payment of all or any portion of the deficiency balance at any time, and by any means allowed by law or equity. The 2008 mortgage loan was discharged by the 2012 agreement, leaving only the issue of Defendants' affirmed promise to pay the deficiency balance, which is now being pursued through this action.

Indeed, it should be noted that even if Defendants were alleging some sort of negligence on the part of the 2012 agreement—which they are not—this Court, in ruling on Plaintiff's first summary judgment motion, duly made note of the fact that the parties negotiated over the terms of the 2012 agreement for nearly two years, during which Defendants were represented by counsel. Defendants do not dispute that at the time they executed the 2012 agreement, they understood all of the terms and conditions thereof, including that their obligations under the promissory note were not being discharged.

Defendants also agree that they have no complaints regarding the legal representation they received during the negotiations on the terms and conditions of the 2012 agreement.

Accordingly, Plaintiff is entitled to summary judgment on Defendants' negligence counterclaim, and Plaintiff's cross-motion for summary judgment must be denied.

### *Breach of Contract Counterclaim*

With respect to Defendants' counterclaims of breach of contract and promissory estoppel, only Plaintiff moves for summary judgment. Under these circumstances, the Court must make all reasonable inferences and resolve all doubts in favor of Defendants, the non-moving parties. See *Lamay v. State*, 2012 VT 49, ¶ 6, 191 Vt. 635. The Court will also consider "all allegations made by the nonmoving party as true." *Richart v. Jackson*, 171 Vt. 94, 97 (2000).

In support of their breach of contract counterclaim, Defendants allege in conclusory fashion that Plaintiff's conduct "constitutes a breach of the agreements between the parties, including but not limited to the breach of the implied covenant of good faith and fair dealing." In their opposition to Plaintiff's motion for summary judgment, they admit that Plaintiff has "completed all of its duties as they appeared in writing," and proceed to limit their counterclaim solely to the allegation that Plaintiff breached the covenant of good faith and fair dealing. In establishing such a claim, it is incumbent upon Defendants to demonstrate that Plaintiff "breached an implied-in-law promise not to do anything to undermine or destroy [Defendants'] right to receive the benefit of the parties' [ ] agreement." *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 3, 179 Vt. 167 (citing *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208 (1993)).

The first point of evidence cited to in support of Defendants' counterclaim is Plaintiff's alleged negligence in issuing and administering the 2008 mortgage loan. However, again, and as explained more fully above, the liabilities of the 2008 loan were effectively supplanted by the terms of the 2012 agreement, which now govern the parties' rights and responsibilities. Moreover, neither Plaintiff's conclusory allegations nor any other evidence in the record supports a claim that Plaintiff breached the 2012 agreement or any duties arising therefrom. In fact, whereas Defendants may not view them as "benefits," per se, they nonetheless admit to having promptly received the technical benefits of the 2012 agreement—to wit, discharge of the 2008 mortgage loan, which permitted a sale of Defendants' property and a reduction in the financial obligations to Plaintiff in an amount equal to the sale proceeds.

The second point of evidence cited in support of Defendants' breach of contract counterclaim is Plaintiff "trumping up a fraud claim against [Defendants], after they had the temerity to file a counterclaim." Defendants do not point to any actual evidence, though, demonstrating that Plaintiff's filing of a fraud claim is in any way indicative of its having breached the implied covenant of good faith and fair dealing. It is well settled that an opponent of summary judgment cannot rely upon conjecture or speculation. See *Richards v.*

*Nowicki*, 172 Vt. 142 (2001); see also *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981) ("Allegations alone cannot create triable issues of fact."). Therefore, Plaintiff is also entitled to summary judgment on Defendants' breach of contract counterclaim.


### *Promissory Estoppel Counterclaim*

In their initial papers, Defendants raise a counterclaim of promissory estoppel, alleging they "reasonably relied on representations of Plaintiff in continuing to make certain payments and otherwise alter their position detrimentally." Under Vermont law, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Foot v. Simmonds Precision Products Co., Inc.*, 158 Vt. 566, 573 (1992) (quoting *Restatement (Second) of Contracts* § 90(1) (1981)). Here, Defendants claim they relied on "representations" of Plaintiff in continuing to make "certain payments," but at no point have they identified what these "representations" or "certain payments" were.<sup>1</sup> As is properly explained in Plaintiff's motion papers, any "payments" made by Defendants were remitted as per the requirements of the 2008 mortgage loan. There can be no promissory estoppel when Defendants merely acted to satisfy their obligations to repay the entire loan under the original lending agreement. Defendants admit that they have not made any payments per the terms of the parties' 2012 agreement—however, if they had, this Court has already found in ruling on Plaintiff's first motion for summary judgment, as well as herein, that the 2012 agreement was validly entered into and that Defendants have breached the terms of that contract. Thus, Plaintiff is entitled to summary judgment on the counterclaim for promissory estoppel.

### ORDER

Plaintiff's Motion for Summary Judgment as to All Counterclaims is **GRANTED**. Defendants' Cross-Motion for Summary Judgment is **DENIED**. The Clerk is requested to schedule a status conference regarding the remaining claims. The parties may participate in the conference by telephone.

Dated this 28 day of July, 2014.

  
Harold E. Eaton, Jr.  
Superior Court Judge

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WINDSOR UNIT

<sup>1</sup> Notably, as mentioned above, Defendants' opposition to Plaintiff's motion for summary judgment is silent as to any argument in defense of their promissory estoppel claim.