

VERMONT SUPERIOR COURT

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 on Motion for Summary Judgment

Factual Background

Plaintiff has sued Defendants for breach of contract (Count I), negligent or intentional misrepresentation (Count II), and fraud (Count III). Defendants filed counter-claims for negligence, breach of contract, and promissory estoppel. On June 5, 2013, Plaintiff moved for summary judgment. On July 5, 2013, Defendant opposed the motion for summary judgment. Plaintiff responded to the opposition on July 18, 2013.

The underlying facts concern a failed lending transaction. On August 25, 2008, Plaintiff lent Defendants \$845,000. To obtain that loan, Defendants provided information about their assets. Plaintiff claims Defendants stated they possessed liquid assets of \$1,619,273.00, and total assets of \$3,440,273.00. Further, Plaintiff believes Defendants did not disclose that approximately \$300,000 of those assets were held in trust for the Defendants' grandchildren. Defendants counter they provided all relevant information, including the amounts held in trust. Further, Plaintiff's employee admitted Plaintiff's software jumbled the amounts held in each account and created an inaccurate picture of Defendant's finances.

In return for the loan, Defendants gave Plaintiff a promissory note and mortgage. Defendants had difficulty maintaining their payments. In August 2012, Defendants short sold the property for \$475,000. Prior to the short sale, Plaintiff stated it would release the mortgage if Defendants gave Plaintiff \$500,000 in proceeds plus agreed to pay a \$50,000 in deficiency. Defendants rejected this offer, but later negotiated with Plaintiff for a similar deal. Defendants' counsel asked if Plaintiff's offer was still open and later if the Plaintiff had finalized the agreement. In response, one of Plaintiff's employee indicated she would "have a final answer on Wednesday after our board meeting." After the board meeting, Plaintiff decided not to go forward with accepting a \$50,000 deficiency. In 2012, shortly before the sale, Defendants and Plaintiff signed an agreement where Defendants would be liable for the entire deficiency.

Defendants claim they signed the 2012 agreement under duress. Defendants assert Plaintiff changed its plans last minute and could have blocked the closing. Defendants also

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assert Plaintiff wrongfully threatened to foreclose on another piece of property owned by Defendants. Finally, Defendants were distracted because Ms. Stern received treatment for cancer during this period. Defendants do not claim they have paid the deficiency on the loan.

### 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.

### Discussion

#### 1. *Enforceability of Deficiency Negotiations (Count I)*

The Court first considers whether Defendants must pay the deficiency judgment under the 2012 agreement. Defendants argue they are not obligated to pay the full deficiency because Defendants and Plaintiff had an enforceable preliminary agreement where Defendants would only pay a \$50,000 deficiency. The Court will enforce an agreement where it finds that both parties intended to be bound. *See Bixler v. Bullard*, 172 Vt. 53, 58 (2001). Intent to be bound must be evaluated by objective criteria, such as the words and deeds of the parties. *See id.* Normally, intent to be bound is a question of fact for the jury. *See id.* at 57.

No enforceable agreement to limit the deficiency to \$50,000 exists in this case. The emails indicate Plaintiff made an offer, but Defendants rejected the offer. Rejection of an offer destroys the offer. Restatement (Second) of Contracts § 38; *see also Benya v. Stevens and Thompson Paper Co.*, 143 Vt. 521, 525 (1983) (indicating a counter-offer also destroys and offer). The later communications did not form an agreement. Plaintiff’s representatives always stated they needed approval from the board before going through with an agreement. Accordingly, there is no evidence of an intent to be bound and no contract.

#### 2. *Duress (Count I)*

Defendants next state the agreement to pay the deficiency on the loan is unenforceable because they signed it under duress. Defendants allege Plaintiff exerted economic duress by threatening not approve the short sale of the home.

[T]o prevail on the issue of economic duress (1) the coercion must be directed toward economic interests; (2) one side must have involuntarily accepted the terms of another; (3) the coercive circumstances must have been the result of the acts of the opposite party; and (4) there must be some threat to do something harmful which the threatening party has no legal right to do.

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*Kokoletos v. Frank Babcock & Son, Inc.*, 149 Vt. 33, 36 (1987). In this case, Plaintiff demanded Defendants accept liability for the full deficiency of their loan. There can be no duress because Defendants were obligated to repay the entire loan under the original lending agreement.

Defendants also claim they signed the agreement under duress because Plaintiff threatened to foreclose on another piece of Defendants' property. An improper threat can void a contract. *See* Restatement (Second) of Contracts, § 175. A threat is improper when "what is threatened is the use of civil process and the threat is made in bad faith." *See id.* § 176(c). In this case, there is no evidence that Plaintiffs threatened to foreclose on Defendant's other property in bad faith. In the 2010 complaint, Plaintiff states it sent Defendants notice of an intent to foreclose on both properties because it believed the two properties had merged. Plaintiff also provided a report from the Town of Sharon, in which both properties lie, that indicates that properties had merged. Even making all inferences in favor of Defendants, the Court finds no evidence of bad faith.<sup>1</sup> Accordingly there was no duress in the transaction.

The Court grants summary judgment to Plaintiffs on the breach of contract claim (Count I). The parties do not dispute Defendants are obligated under the agreement to pay the full deficiency of the loan. The parties also do not dispute Defendants have not paid the deficiency. For the reasons discussed above, Defendants' defenses to the formation of the agreement lack merit. There are no disputed material facts and Plaintiff is entitled to judgment as a matter of law on Count I. *See* V.R.C.P. 56(a).

### 3. *Negligent or Intentional Misrepresentation (Count II)*

Plaintiff also claims negligent or intentional misrepresentation (Count II). Plaintiff claims Defendants misrepresented facts by failing to disclose that over \$300,000 of their liquid assets were held in trust for their grandchildren.

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(1); *see also Silvia v. Stevens*, 156 Vt. 94, 103 n.2 (1991) (citing the Restatement for the elements of negligent misrepresentation).

An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was

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<sup>1</sup> The Court also notes it appears Plaintiff sent Defendants notice of the foreclosure nearly two years before Defendants sold the property. During these two years, Defendants were represented by counsel and the parties negotiated over the obligations. It is difficult to imagine that a mistake made in a complaint, which was sent but not filed, would have caused Defendants to involuntarily accept the terms offered by Plaintiff.

not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage.

*Silvia*, 156 Vt. at 102 (quoting *Union Bank v. Jones*, 138 Vt. 115, 121 (1980)).

Plaintiff is not entitled to summary judgment on Count II because there are disputed facts about what information Defendants provided. Defendants claim they provided accurate information and noted some of the assets where held in trust. Further, Plaintiff admitted it jumbled Defendants' financial information. On a motion for summary judgment, the Court cannot determine Defendants intended to deceive Plaintiff or even that Defendants were negligent. Plaintiff may have caused the problem by incorrectly entering Defendants' information. Plaintiff is not entitled to summary judgment on the claim for negligent or intentional misrepresentation (Count II).

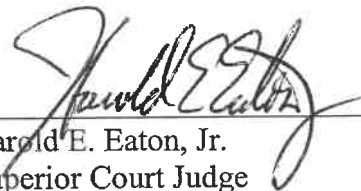
#### 4. *Fraud (Count III)*

Finally, the Court considers Plaintiff's claim for fraud. As stated above, an action for fraud can lie in an intentional misrepresentation that affects the essence of a transaction. *See Silvia*, 156 Vt. at 102. Nevertheless, making all inferences in favor of Defendants, Defendants did not intend to provide false information and may not have provided any false information. Plaintiff is not entitled to summary judgment on its claim for fraud.

### Order

The Court *grants in part* and *denies in part* Plaintiff's motion for summary judgment. The Court *grants* Plaintiff's motion in regard to the breach of contract claim (Count I). The Court *denies* Plaintiff's motion in regard to the misrepresentation (Count II) and fraud (Count III) claims. The Court does not address the validity of Defendant's counter claims.

Dated at Woodstock, Vermont on August 8, 2013.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

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