STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 51-2-11 Wrcv

OneWest Bank, F.S.B.,
Plaintiff

v.

Catherine Reynolds,
Defendant

Decision on Cross-Motions for Summary Judgment

Plaintiff OneWest Bank brought a complaint for foreclosure against Defendant Catherine Reynolds and all other occupants residing at 5038 VT Route 100 South, Stockbridge, Vermont. In its complaint, the Plaintiff alleges that it holds a note executed by Defendant as well as mortgage deed securing the note. The Plaintiff further alleges that the Defendant failed to make payments on the note and consequently that under the terms of the note and mortgage the Plaintiff is entitled to foreclose on the property. The Defendant has filed a motion for summary judgment arguing that Plaintiff is not entitled to enforce the note on both legal and equitable principles. The Defendant has also counterclaimed for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and defamation, and seeks compensatory and punitive damages on these counts. The Plaintiff has filed a motion for summary judgment on the counterclaim, arguing that each count fails as a matter of law. The Court holds as follows.

Background

The following facts are undisputed, except where noted. In July of 2006 Defendant executed a promissory note in favor of IndyMac Bank, F.S.B. (IndyMac). As security for the note, Defendant executed a mortgage deed on her primary residence at 5038 VT Route 100 South, Stockbridge, VT. The mortgage identifies MERS as the "mortgagee" and states that MERS is "acting solely as nominee for Lender and Lender's successors and assigns." The Lender is identified as IndyMac Bank. Regarding MERS' role as mortgagee and nominee for the lender the mortgage states as follows:

> For the purpose and in consideration of the debt, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following property located in the County of Windsor which currently has the address of 5038 Vt Route 100 South, Stockbridge, VT 05772 . . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security instrument, but, if necessary to comply with

> law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, releasing and canceling this Security instrument.

On the last page of the note appears the stamped signature of Tom Green, who is identified as the "assistant secretary" of IndyMac. With its foreclosure complaint, Plaintiff submitted an "Affidavit of Possession," signed by Bessie T. Mensah, which states that Plaintiff is in possession of the original note. The affidavit is dated January 19, 2011 and appears to have been notarized. Bessie T. Mensah is listed as an "assistant secretary" at OneWest. In addition, Plaintiff submitted an "Assignment of Mortgage," which purports to "grant, assign, transfer and setover unto OneWest Bank" the mortgage "dated July 13, 2006, and executed by Catherine Reynolds . . . ." The assignment is from "Mortgage Electronic Registration Systems, Inc., as nominee for Indymac Bank, F.S.B." and is signed via a signature stamp of "JC San Pedro," who is listed as a "Duly Authorized Agent" and an "Authorized Signatory" for MERS as nominee for Indymac. The mortgage assignment is dated July 23, 2009 and appears to be notarized.

By April of 2007, Defendant was suffering from a disability and requested a modification of the note. It is disputed whether Defendant completed a loan modification application at this time. On April 23, 2008 IndyMac's Loss Mitigation Department sent a letter to Defendant, which stated as follows: "Thank you for contacting Indymac Bank regarding the above referenced property. IndyMac Bank will review your request for assistance upon receipt of the following items." It is not clear whether Defendant sent the requested items.

In August of 2008 Defendant completed a loan modification application and on September 15, 2008 the parties entered into a "Forbearance Plan." This Plan stated as follows: "Upon completion of this plan IndyMac Federal Bank will then review your financial situation for a possible loan modification providing your situation displays the affordability to service your debts. (Note: additional current financial information and proof of income will be required at the time of review)." The "terms and conditions" of the Plan provided that the Defendant would make three payments of $1079.57 in September, October and November of 2008. The Plan further provided as follows:

> Indymac Federal Bank will suspend collections activities and/or foreclosure proceedings upon receipt of a signed agreement and the first payment listed above. Upon default under any of the terms or conditions in this Plan, IndyMac Federal Bank retains the right, without further notice, to terminate this Plan, to demand immediate payment of all remaining amounts, and to resume collections activities and/or foreclosure proceedings at the point the servicing was previously suspended. . . . All funds paid under this Plan will be credited to the amounts due on your loan without prejudice to IndyMac Federal Bank's foreclosure proceedings.

In addition, above the Defendant's signature was the following statement:

> I, Catherine Reynolds, acknowledge that IndyMac Federal Bank has agreed to extend this 3-month forbearance for my benefit. Upon acceptance, and subject to completion, of this Plan, IndyMac Federal Bank will review my financial situation for a possible loan modification. A loan modification is not guaranteed and is dependent upon several factors, such as affordability and investor approval. After the completion of this Plan and subject to any potential loan modification, your loan will be serviced normally.

It is not clear whether IndyMac reviewed Defendant's "financial situation for a possible loan modification" but it is undisputed that after the forbearance plan ended there was no permanent modification made to Defendant's loan.

On October 30, 2008, Defendant filed a petition for relief under Chapter 7 of the Bankruptcy Code. The Plaintiff sought relief from the automatic bankruptcy stay but later withdrew this request. On May 7, 2009, the United States Bankruptcy Court entered an Order discharging Defendant from all debts except as preserved in the bankruptcy proceeding and on May 18, 2009 entered a Final Decree of Bankruptcy.

On April 20, 2009, Defendant sent Plaintiff a letter requesting a permanent loan modification and stating that her loan was current "as per the Temporary Loan Modification agreed upon on 9/13/08." Defendant explained that she was suffering from skeletal fibrosis and that her income had been greatly reduced but that she had been able to keep up with payments since the parties began "negotiations to modify in May of 2008." Defendant acknowledged that an IndyMac representative told her that they could not modify without a steady income. The letter concluded as follows:

> It has been almost a year and IndyMac's actions are placing a greater burden on me such as: 1) denying and then delaying the modification when it was necessary, then denying it because I had filed a bankruptcy 18 months after first contacting them about my issues 2) not crediting my escrow account when the payment was sent, creating a deficit and 3) attempting to procure a Relief from state from the court, which was withdrawn.

Defendant states that during this time period she made payments on her loan in accordance with the Forbearance Plan. Plaintiff does not explicitly dispute this fact. Instead, Plaintiff reiterates that the Plan was temporary in nature and did not modify the original note.

On May 13, 2009, IndyMac sent a letter to its regulator, the Office of Thrift Supervision, (OTS) which stated as follows:

> This letter is sent to you in response to the recent inquiry from the State of Vermont, Department of Banking, Insurance, Securities and Health Care Administration regarding Catherine Reynolds and her mortgage with IndyMac Mortgage Services, a division of One West Bank, FSB.

> Ms. Reynolds explained her recent financial hardship and her difficulty making monthly mortgage payment. She explained she applied for a home loan modification with IndyMac in May of 2008 and was denied due to the lack of steady and verifiable income. She later filed for bankruptcy protection under Chapter 7. She is requesting IndyMac review her mortgage for a permanent loan modification.
>
> In response, our options for working with Ms. Reynolds are constrained by the circumstances of her bankruptcy filing. When Ms. Reynolds filed for bankruptcy protection under Chapter 7 on October 30, 2008, she had two choices with respect to the referenced mortgage debt. One option was to request that the debt be discharged. The other option was to reaffirm the debt. Ms. Reynolds chose the former option, and her debt was discharged. A loan modification involves an agreement to modify the terms of a mortgage note. Ms. Reynolds Note was voided with the discharge of her debt under Chapter 7. Accordingly, there is no legal mechanism by which we can arrange an enforceable modification of the terms of this Note.
>
> While we certainly understand that this outcome is disappointing, it is not the result of any absence of good faith on the part of IndyMac but a consequence of Ms. Reynolds earlier decision with respect to her Chapter 7 bankruptcy . . .
>
> IndyMac Mortgage Services considers this request to be fully addressed and resolved. Please be assured all options were considered in every effort to assist you with this matter . . . .

On May 21, 2009, Plaintiff sent Defendant a letter notifying her that her loan was in "serious default" due to missed payments. The letter explained that for Defendant to cure the default she had to pay $9,264.47 plus any additional monthly payments by June 22, 2009. On May 22, 2009, Plaintiff notified Defendant that it was returning her check for $1080.00 dated 5/04/2009 because it was not a cashier's check and it was not for the total amount due.

On August 17, 2009 Plaintiff sent Defendant a letter regarding a Home Affordable Modification Trial Period Plan. The parties entered into this plan on September 1, 2009. According to the plan, if Defendant complied with its terms and her representations about her inability to afford her mortgage payments remained true, she would be offered a Home Affordable Modification Agreement, which would permanently modify her loan and waive any unpaid late charges.

The trial period plan required Defendant to make three payments of $776.24 in the months of September, October and November of 2009. If Defendant made these payments in a timely fashion, the plan would be extended by one month. The trial period plan provided that it was "not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and

(iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan."

Defendant made timely payments under the trial period plan, which allowed the plan to be extended by one month. Defendant made an additional payment of the reduced trial period plan amount in January 2010. After this point, Defendant continued to make reduced monthly payments, which were rejected by the Plaintiff. It is not entirely clear whether Defendant made these payments every month but it is undisputed that reduced payments were made after January 2010 that were rejected by Plaintiff.

On May 19, 2010 Plaintiff offered Defendant a Home Affordable Modification and sent her a Modification agreement that reflected the proposed terms of the modified mortgage. The offer specified that for Defendant to accept it she had to (1) complete and return the agreement by 6/26/2010; and (2) continue to make any remaining trial period payments in a timely fashion. The Modification Agreement provided that Defendant's loan documents would be automatically modified on 7/1/2010 provided that her representations about her inability to afford the mortgage remained true and that she had received a copy of the fully executed agreement. On July 15, 2010 Plaintiff sent Defendant a letter stating its concern that Defendant had not returned the signed final modification documents recently mailed to her. On August 30, 2010 Plaintiff informed Defendant that it was unable to offer her a Home Affordable Modification because she had not provided the requested documentation.

Plaintiff initially filed a foreclosure complaint on August 4, 2009. This complaint alleged breach of both the note and the mortgage and sought immediate payment of all amounts due, as well as foreclosure on the property. Plaintiff dismissed this foreclosure complaint without prejudice. Plaintiff filed another foreclosure complaint on February 8, 2011, which is the subject matter of this lawsuit.

There is a factual dispute as to Plaintiff's relationship with IndyMac, the original lender on the note. Plaintiff was formed in March of 2009. According to Plaintiff, it did not succeed to the liabilities of IndyMac with respect to Defendant's loan nor is it a successor in interest to IndyMac. Defendant, citing the loan purchase agreement between IndyMac and OneWest, claims that Plaintiff is a successor in interest to IndyMac and succeeded to IndyMac's liabilities.

Conclusions of Law

1. Defendant's Motion for Summary Judgment

In her motion for summary judgment, Defendant argues that the Plaintiff cannot enforce the note and mortgage on the following grounds: (1) Plaintiff has failed to allege and prove the authority of Assistant Secretary Tom Green to endorse the note; (2) MERS, in its status as "nominee" for the original lender, did not have the authority to assign the mortgage; (3) the note was modified; and (4) Plaintiff has exhibited "bad faith" in its treatment of Defendant and consequently the doctrine of unclean hands should work to bar enforcement of the mortgage.

A. Endorsement Authority

The note in this case was endorsed in blank by Tom Green, an assistant secretary for IndyMac. The foreclosure complaint does not contain any allegations or offers of proof as to the secretary's authority to make this endorsement. The Defendant contends that absent this proof, Plaintiff has not shown it is entitled to enforce the note.

Pursuant to 9A V.S.A. § 3-308, the signature on an instrument is "presumed to be authentic and authorized." The comments to § 3-308 explain that "presumed . . . means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid." *Id.*, comment 1. Section 3-308 explains that "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings."

Here, the Defendant has not introduced any evidence to suggest that the endorsement was unauthorized or forged. The Defendant does not even argue that the signature was actually unauthorized. Instead, Defendant contends that it is the Plaintiff's burden to demonstrate—through a power-of-attorney or similar documentation—the endorser's authority. This proposition is directly contrary to the presumption outlined in § 3-308. Section 3-308 makes clear that the burden is first on Defendant to "specifically deny" the signor's authorization to endorse the note. See *In Re Mead*, 2013 WL 122671 (Bkrtcy. D. Vt. 2013) (concluding that the defendant did not "specifically deny" the validity of the signatures at issue where plaintiff produced the signed documents and defendant alleged that she did not remember signing them but did not allege they had been forged). After this "specific denial" the burden shifts to the Plaintiff to establish the "validity" of the signature. 9A V.S.A. § 3-308 ("If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized . . . ."). Since the Defendant has not "specifically denied" the validity of the endorsement—nor submitted any evidence to suggest that it was unauthorized—the validity of the Assistant Secretary's signature is presumed.

In support of her argument, Defendant cites *In Re Parker*, 445 B.R. 301 (Bkrtcy. D. Vt. 2011). In *Parker*, the note was endorsed by the original lender's attorney-in-fact. *Id.* at 303. The *Parker* Court explicitly noted that the plaintiff had not provided proof—such as a power of attorney or other documentation—of the attorney's authority to endorse the note for the lender but found that the signature had later been ratified by the original lender and such ratification related back to the date of endorsement. *Id.* at 305. The Court declined, however, to grant summary judgment for the bank because there was no date on the endorsement and thus it was not clear that the bank had the authority to enforce the note when the complaint was filed. *Id.* 305–06. Here, the note was endorsed in blank by the original lender itself, through its assistant secretary. Thus, while proof of authority to endorse might make sense under the *Parker* facts where the endorsement is made by an "attorney-in-fact," such proof is not necessary here, where the original note holder endorsed the note. Moreover, the UCC presumption, which is not mentioned in *Parker*, makes clear that the authority to endorse, as well as the authenticity of the signature, is presumed absent the defendant raising evidence to the contrary. See 7 Hawkland UCC Series § 8-105 ("In any action on a security . . . each signature on the security or necessary endorsement is admitted;" and "the signature is presumed to be genuine or authorized"). No such evidence has been brought here and the Court concludes that for the purposes of summary judgment, the endorsement was authorized and valid.

B. The Mortgage Assignment

As discussed, the mortgage was assigned to the Plaintiff by MERS who was listed on the mortgage deed as "mortgagee" and "nominee" for the original Lender, IndyMac. Defendant argues that as a "nominee," MERS did not have the authority to assign the mortgage and that Plaintiff cannot foreclose without obtaining a valid assignment of the mortgage.

MERS' authority to assign mortgages has been litigated all over the country with somewhat inconsistent results. Compare *Powers v. Aurora Loan Services*, 2011 WL 4428713 (N.H. Super. Ct. 2011) (concluding that MERS had the authority to assign the mortgage as nominee for the lender) with *LaSalle Bank Nat. Ass'n. v. Lamy*, 2006 WL 2251721, at *2 (N.Y. Sup. Ct. 2006) ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee."). Central to the analysis of this issue, has been a struggle to define the rights of a "nominee." See e.g., *Landmark Nat. Bank v. Kesler*, 216 P.3d 158, 166 (Kan. 2009). The Vermont Supreme Court has yet to define "nominee" or rule on MERS' authority to assign a mortgage as "nominee" for the lender.

In this case, the Plaintiff has properly demonstrated that it is entitled to enforce the note. Vermont has adopted the Uniform Commercial Code, applicable to negotiable instruments, such as a promissory note. See 9A V.S.A. § 3-104(e). To enforce a note the plaintiff must show that it was the "holder" of the note at the time the complaint was filed. *U.S. Bank National Ass'n v. Kimball*, 2011 VT 81, ¶ 13, 190 Vt. 210. The *Kimball* Court explained that "[a] person becomes the holder of an instrument when it is issued or later negotiated to that person" and negotiation "requires transfer of possession of the instrument." *Id.* ¶ 14. Under the UCC, if the note "is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." 9A V.S.A. § 3-201. A note endorsed in blank, is payable to bearer. 9A V.S.A. § 3-205(b). Here, the Plaintiff has produced the note, endorsed in blank, coupled with an affidavit of possession, predating the complaint, stating that it is in possession of the original note. Thus, Plaintiff has shown it was the holder of the note at the time the complaint was filed and consequently that it has the authority to enforce the note. *Kimball*, ¶ 13.

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While courts and scholars may disagree as to MERS' authority to assign a mortgage, there is general agreement that "[w]here a promissory note is secured by a mortgage, the mortgage is incident to the note." *Id.* ("While a plaintiff in a foreclosure should also have assignment of the mortgage, it is the note that is important because where a promissory note is secured by a mortgage, the mortgage is incident to the note.") (quotations omitted). See also, *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 275 (1872) ("All the authorities agree that the debt is the principal thing and the mortgage an accessory."). Under the UCC, the transfer of an obligation secured by a lien on personal property also transfers the lien. 9A V.S.A. § 9-203(g). Comment 9 of section 9-203 explains that "[s]ubsection(g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lean." Similarly, section 5.4 of the Restatement recognizes that "a transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Restatement (Third) of Property (Mortgages) § 5.4(a); see also *id.* at cmt. b ("The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note [under the UCC]).[1] It follows that a mortgage can only be enforced by a person entitled to enforce the obligation that the mortgage secures. *Id.* § 5.4(c). (check cite).

Here, the Plaintiff has demonstrated that it is entitled to enforce the note and that the mortgage was assigned to it by MERS, as "nominee" for the lender. The Court concludes that on these facts, the issue of MERS' authority to assign the mortgage is not a defense to foreclosure. The Plaintiff has shown that it is entitled to enforce the note and the underlying mortgage, which, regardless of MERS' authority to assign, has been transferred to Plaintiff by virtue of the valid transfer of the note. See 9A V.S.A. § 9-203(g). This is sufficient proof to allow the Plaintiff to move forward with its foreclosure complaint, regardless of whether MERS had the authority to assign the mortgage.

As discussed, this result is consistent with the UCC, which aims to "preclude situations in which the obligation and the lien that secures it can diverge, with at times nonsensical results." Hawkland § 9-203:16. Further, one of the main cases relied on by the Defendant, *MERS v. Johnston*, deals with the distinct factual circumstance where the plaintiff is not the holder of the note and therefore cannot show it is entitled to enforce it. See *MERS v. Johnston*, Doc. No. 420-6-09 Rdcv, slip. op. at 8 (Vt. Super. Ct. Oct. 28, 2009) (Cohen, J.) available at http://www.vermontjudiciary.org/20062010%20TC decisioncvl/2009-11-3-1.pdf. Judge Cohen explained as follows: "MERS does not assert to 'hold' the Note, nor does it assert that it can otherwise enforce the Note. Therefore MERS cannot enforce the underlying obligation, and may not enforce the mortgage deed it holds in its name." *Johnston* actually supports the result in this case by stating that "it is a legal maxim that the mortgage depends on the note for enforceability" and concluding that "if a loan is to be foreclosed MERS could assign the mortgage in order to allow for a foreclosure action." *Id.* at 15 (quoting Phyllis K. Slesinger & Daniel

[1] Vermont trial court opinions have similarly recognized this principle. See *CitiMorgage, Inc. v. Bischioff*, Docket No. 255-4-09 Rdcv, slip op. at 3 (Vt. Super. Ct. Oct. 28, 2009) (Cohen, J.) available at http://www.vermontjudiciary.org/20062010%20TCdecisioncvl/2009-10-29-2.pdf; *HSBC Bank USA v. John Burnor, Sr.*, Docket No. 646-08 Fc, (Vt. Super. Ct. May 23, 2012) (Maley, J.).

Mclaughin, *Mortgage Electronic Registration System,* 31 IDAHO L. REV. 805, 808 (1995)).

Another case relied on by the Defendant, *In Re Agard*, has been overruled as to its conclusion that MERS does not have the authority to assign a mortgage. *Agard v. Select Portfolio Servicing, Inc.*, 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012). The Eastern District found that the portion of the Bankruptcy Judge's opinion discussing MERS' authority to assign constituted an unconstitutional advisory opinion. *Id.* * 4. This is not to say that there is no authority to support the Defendant's position. See *LaSalle*, 2006 WL 2251721. Nor is the Court concluding that MERS, as nominee for the lender, has the authority to assign the mortgage. Rather, the Court concludes that where, as here, the Plaintiff shows that it is entitled to enforce the note, and that the mortgage has been assigned to it—at least ostensibly—the authority of MERS to assign the note is not a defense to foreclosure.

C. Modification

The Defendant argues that the note has been modified and consequently that Plaintiff cannot enforce it. As discussed, the parties entered into two temporary modification agreements: the forbearance plan (9/15/2008) and the HAMP trial period plan (9/1/2009). It is undisputed that the Defendant made her payments as required under both plans. It is also undisputed that in May of 2010 Plaintiff offered Defendant a permanent Home Affordable Modification. On August 30, 2010, Plaintiff informed Defendant that it could no longer offer a Home Affordable Modification because she had not provided the requested documentation.

The Defendant's summary judgment motion does not specify which plan actually modified the note, nor does she provide any explanation as to the missing documentation that would have entitled her to a Home Affordable Modification.

As laid out above, the forbearance plan by its terms was temporary and did not guarantee Defendant a permanent loan modification. To modify a contract, the parties must satisfy the same requirements necessary for a valid original contract—including "mutual assent" or a "meeting of the minds." Am. Jur. Contracts § 507 (2013) ("Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract."). Thus, one party cannot "unilaterally" modify the original contract. *Id.* See also *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 505, 81 A.2d 155 (2002) ("An enforceable contract must demonstrate a meeting of the minds of the parties . . . ."). To determine the intent of the parties, courts "must look to [their] words and deeds. *Catamount Slate Products, Inc. v. Sheldon*, 2003 VT 112, ¶ 17, 176 Vt. 158. (quotation omitted). Here, the Plaintiff expressed a clear intent not to modify the original note. The forbearance plan explicitly stated that "[u]pon completion of this plan IndyMac Federal Bank will then review your financial situation for a possible loan modification providing your situation displays the affordability to service your debts." In addition, the plan made clear that IndyMac did not "guarantee" a permanent loan modification. Thus, there was no mutual assent or "meeting of the minds" as to a permanent loan modification and consequently, the plan did not and could not modify the original note. See Am. Jur. Contracts § 507 (2013).

Similarly, the HAMP trial period plan expressly stated that it was "not a modification of the Loan Documents and that the Loan Documents will not be modified" until three conditions were met, including Defendant meeting all requirements for modification and receiving a fully executed copy of a Home Affordable Modification Agreement. Thus, by its terms, the trial period plan did not modify the note. Further, courts have consistently agreed that entering the HAMP trial plans does not modify the original note. See *Vida v. One West Bank, F.S.B.*, 2010 WL 5148473, at *6 (D. Or. Dec. 13, 2010) ("The Trial Period Plan is explicitly not an enforceable offer for loan modification"); see also *Short v. Chase Home Finance L.L.C.*, 2011 WL 9160941, at *4 (Dist. Ariz. Aug. 22, 2011) ("Moreover, the trial period plan makes clear that it is not a modification of the loan documents, and those documents will not be modified unless [the lender] provides [the borrower] with fully executed copies of the plan and the loan modification agreement.").

In support of her modification argument, Defendant cites *BAC Home Loans Servicing, LP v. Bogar*, 2010 WL 5774599, Docket No. 19-1-09 Oscv (Vt. Super. Ct. Oct. 6, 2010) (Cashman, J.). There, Judge Cashman granted the homeowner's motion to enforce a HAMP trial period plan, concluding that the lender was required under the plan and the HAMP guidelines to offer the homeowner a permanent HAMP modification after she complied with the terms of the trial plan. Defendant relies on *Bogar* to argue that "the appropriate equitable remedy for failure to comply with HAMP, or to abide by a forbearance agreement, or to convert a temporary modification to a permanent one, is dismissal with prejudice of the foreclosure." Judge Cashman did not, however, dismiss the foreclosure complaint with prejudice but rather stated that if the lender failed to provide the homeowner with a permanent modification within 30 days of the order, the foreclosure complaint would be dismissed. *Bogar* thus speaks only to the lender's obligation to offer a permanent Home Affordable Modification after compliance with the trial period plan. Here, however, it appears that Plaintiff offered Defendant a Home Affordable Modification but that the parties never fully executed the agreement due to Defendant's failure to submit the necessary documentation. Specifically, it seems that Defendant never returned a signed copy of the agreement to Plaintiff. Thus, Defendant has not shown how Plaintiff failed to comply with the HAMP plan and in fact does not seem to dispute that she did not submit the required documentation. Consequently, this case is markedly different from *Bogar*.[2]

[2] The Court notes that *Bogar* goes against the weight of authority in other jurisdictions which have consistently found that entering the trial period plan does not obligate lender to provide a permanent modification. *Bourdelais v. J.P. Morgan Chas Banke, N.A.*, 2011 WL 1306311, at *3 (E.D. Va. April 1, 2011) ("Plaintiff is not the first federal-court claimant to assert entitlement to a permanent HAMP modification. These actions have taken a variety of forms based on different legal theories, none of which have fared well in the courts.").

The Court concludes that the note was not modified by either the forbearance plan or the trial period plan, both of which were explicitly temporary in nature. Further, Defendant has not shown any failure on the Plaintiff's part to offer a permanent Home Affordable Modification. Thus, summary judgment or dismissal of the foreclosure complaint on this ground is not warranted.

D. Unclean Hands

It is undisputed that the note was discharged in Defendant's Chapter 7 bankruptcy proceeding. As recognized by the Defendant, however, a mortgage lien survives a Chapter 7 bankruptcy discharge. See *Johnson v. Home State Bank*, 501 U.S. 78, 82–83 (1991) (noting that a Chapter 7 discharge of a debt "extinguishes *only* 'the personal liability of the debtor'" and that "the Code provides that a creditor's right to foreclose on the mortgage survives or passes through bankruptcy") (quoting 11 U.S.C. § 524(a)(1)); see also 11 U.S.C. § 522(c)(2). Defendant, however, argues that the doctrine of unclean hands bars the Plaintiff from enforcing the note and foreclosing on the property. Specifically, Defendant relies on the May 13, 2009 letter from IndyMac to its regulator, Office of Thrift Supervision, in which it stated that "Ms. Reynolds Note was voided with the discharge of her debt under Chapter 7. Accordingly, there is no legal mechanism by which we can arrange an enforceable modification of the terms of this Note." Defendant argues that this statement "exploited" the discharge as "justification for refusing to honor its agreement to enter into a modification of the loan." Defendant further argues that Plaintiff exhibited bad faith by bringing multiple foreclosure complaints in this Court without disclosing the alleged modification agreements and seeking deficiency judgments against Defendant despite the discharge of the note in bankruptcy. Lastly, Defendant asserts that Plaintiff has engaged in general misconduct that caused OTS to issue a Consent Order requiring Plaintiff to take specific steps to remedy its problematic practices.

As discussed, a mortgage securing a debt survives the discharge of the debt in a Chapter 7 bankruptcy proceeding. *Johnson*, at 82–83; *Owen v. Owen*, 500 U.S. 305, 308–310 (1991). This principle has been recognized and followed in Vermont. *In re McKinstry*, 56 B.R. 191, 193 (Bkrtcy. D. Vt. 1986) ("Although the debt is discharged, the lien survives the discharge under 11 USC Section 524."). The question for the Court is whether Plaintiff's conduct should bar foreclosure under the principles of unclean hands.

Foreclosure is an equitable proceeding and "thus the maxim that a party seeking an equitable remedy must come to court with clean hands is fully applicable." *Garbitelli v. Town of Brookfield*, 2011 VT 122 ¶ 15, 91 Vt. 76 (concluding that "the maxim" was applicable to tax abatement proceedings after finding that they were equitable proceedings); see also *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989) (noting that foreclosures are equitable proceedings). The unclean hands doctrine "requires that a party coming into a court of equity must have acted in good faith as to the subject matter of the lawsuit. The doctrine is not one of absolutes, however, but can be utilized in the discretion of a court of equity." *Nelson v. Emmert*, 105 S.W.3d 563, 568 (Mo. Ct. App. 2003) (quoted by the Vermont Supreme Court in *Peck v. Shatuck*, 2013 VT 1, ¶ 22)

(Robinson, J., dissenting). The *Nelson* Court explained further that the doctrine "does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff" and that it "should be applied when it promotes right and justice by considering all of the facts and circumstances of a particular case." *Nelson*, at 568. (quotations omitted). In addition, unclean hands is inapplicable where the conduct alleged "did not injure the party defendants." *Id.* (citing *Price v. Ridler*, 373 S.W.2d 59 (Mo. 1963)) ("The party to a suit, complaining that his opponent is in court with 'unclean hands' . . . must show that he himself has been injured by such conduct, to justify the application of the principle to the case. *The wrong must have been done to the defendant himself and not to some third party*.") (emphasis added).

As a starting principle, the alleged misconduct must pertain to the subject matter of the lawsuit to warrant application of the unclean hands doctrine. See *Basil v. Vincello*, 553 N.E.2d 602, 607 (Ohio 1990) ("The maxim, he who seeks equity must come with clean hands, requires only that the party must not be guilty of reprehensible conduct with respect to the subject matter of his suit."). Thus, unrelated misconduct, however troubling, does not support application of the doctrine. Here, Defendant argues that "company wide bad conduct for years as found by the OTS" is one example of Plaintiff's "unclean" conduct. The 2011 OTS Consent Order to which Defendant refers found that Plaintiff engaged in troubling foreclosure practices including seeking foreclosure on notes or mortgages without first ensuring that they were properly endorsed or assigned and submitting affidavits in federal and state court that were not based on personal knowledge. While this conduct is concerning, it is general in nature and, more importantly, does not concern this lawsuit or the Plaintiff's behavior towards Defendant. Consequently, the misconduct detailed in the Consent Order cannot be used to support application of the unclean hands doctrine. *Id.*

The May 13, 2009 letter to OTS also does not warrant application of the doctrine. Regarding the letter, Defendant asserts that Plaintiff misrepresented its ability to modify the loan and deceptively used the bankruptcy discharge to its advantage to "deter" OTS from "further investigation." The alleged misrepresentation, however, was directed to a third party, not to Defendant and the Defendant has not shown that the statements prevented OTS from taking any specific action. The letter stated that Defendant's loan could not be modified because the note had been discharged in bankruptcy. The letter also indicated that BISHCA had contacted OTS about Defendant's loan and the possibility of modification. It may be that OTS was investigating whether IndyMac could modify Defendant's loan and that IndyMac was deceptive and perhaps untruthful in its response: asserting that the loan could not be modified because of the bankruptcy discharge. It follows, that it is possible that this alleged deception stopped OTS from further investigation that potentially could have lead to a loan modification for Defendant. The Court, however, has not been given enough evidence to support such allegations and at this point they are speculative. Moreover, it is not clear that the letter had any affect whatsoever on Defendant or her loan. In this regard, the Court notes that after this date Defendant was offered a HAMP trial period plan and eventually a permanent Home Affordable Modification. Thus, since the Defendant has not shown that the letter caused her any injury, it cannot be used to bar Plaintiff's foreclosure complaint pursuant to the unclean hands doctrine. See *Nelson*, 105 S.W.3d at 568.

The fact that Plaintiff's foreclosure complaints have not disclosed the "agreements to forbear and modify" does not support a finding of unclean hands. As discussed above, neither plan modified the original note. Thus, the Plaintiff could seek foreclosure by alleging that it was entitled to enforce the original note without mention of the temporary modification agreements, which for the Plaintiff may have had little relevance to the foreclosure complaint. In addition, here the Plaintiff has not sought a deficiency judgment, as discussed below.

2. Plaintiff's Summary Judgment Motion on Defendant's Counterclaim

A. The Counterclaim

The Defendant has counterclaimed for fraud, breach of contract, breach of the covenant of good faith and fair dealing, and defamation. Defendant seeks punitive and compensatory damages on these counts. The specific allegations are as follows.

In the fraud count, Defendant alleges that Plaintiff and its predecessor made false statements upon which Defendant reasonably relied to induce Defendant to make certain payments. According to the counterclaim, these statements included telling Defendant that she would receive a loan modification if certain requirements were met and then not following through once Defendant complied with the requirements; failing to convert the temporary modification agreement into a permanent one; telling the U.S. Bankruptcy Court that Defendant was in violation of her loan agreement without disclosing the fact that the loan had been modified and Defendant was in compliance with such modification; telling this Court that it was entitled to foreclose Defendant's equity redemption rights without disclosing the alleged modification and Defendant's compliance therewith; and telling OTS that Defendant's debt was discharged and that consequently Plaintiff could not offer Defendant a loan modification. In the breach of contract count, Defendant alleges that Plaintiff breached both the original loan and the temporary loan modification by rejecting compliant payments; seeking relief from the Bankruptcy stay; instituting a foreclosure action in this Court; failing to convert the temporary loan modification to a permanent modification agreement and mishandling escrow funds. In her third count, Defendant alleges that Plaintiff's conduct in handling Defendant's loan, discussed above, constitutes a breach of its contractual duty of good faith and fair dealing. Lastly, Defendant alleges that recording its initial foreclosure complaint in which Plaintiff failed to disclose the alleged modification agreement constitutes personal slander and libel as well as slander of title. In addition, count 4 generally alleges that Plaintiff's conduct constitutes slander, libel and slander of title.

Plaintiff seeks summary judgment on all of Defendant's claims. Each shall be addressed in turn.

B. Count 1: Fraud

Plaintiff argues that it is entitled to summary judgment on the fraud count because Defendant has either failed to allege specific false statements, or, where she has, the statements do not constitute a misrepresentation. As to the statement made to OTS, however, Plaintiff argues that it does not go to the essence of any transaction—but does not explicitly contend that the statement was true.

The required elements of a fraud claim are: "(1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party's knowledge; (4) that the defrauded party acts in reliance on that fact; and (5) is thereby harmed." *Estate of Alden v. Dee*, 2011 VT 64, ¶ 32, 190 Vt. 401; see also *Bennington Housing Authority v. Bush*, 2007 VT 60, ¶ 8, 182 Vt. 133 "(An action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction . . .). Reckless indifference regarding the truth of the statement can also support a fraud claim. *Follo v. Florindo*, 2009 VT 11, ¶ 29, 185 Vt. 390. Essential, then, to a cognizable fraud claim is a misrepresentation of material fact.

Fraud can arise from a party's failure to disclose certain information. See *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852 (1991) ("Fraudulent concealment [or nondisclsoure] involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud."). Here, however, the note was never permanently modified. Thus, failing to inform the courts of a non-existent permanent modification agreement was not fraudulent. Similarly, failing to inform the courts of the temporary modification does not constitute a "fraudulent nondisclosure." *Id.* First, these agreements were not necessarily relevant to a foreclosure complaint, or a petition for relief from a bankruptcy-stay, as in both pleadings the Plaintiff was presumably focused on alleging a cognizable claim for the relief sought. Thus, in the foreclosure complaint, Plaintiff had a duty only to allege the facts supporting foreclosure such as entitlement to enforce the underlying note and Defendant's default on the note. See V.R.C.P. 80.1. Moreover, the existence of the temporary agreements was within the Defendant's knowledge. Thus, Defendant could, as she did, allege the temporary or permanent loan modifications as a defense to foreclosure. The Plaintiff simply had no duty to inform the courts of the temporary modification agreements, and its failure to do so was not fraudulent.

Defendant alleges that Plaintiff fraudulently induced her to make payments on her loan by repeatedly telling her that a loan modification would be granted if certain conditions were met and then failing to offer the modification once Defendant met the conditions. A fraud claim can be based on an "intentional misrepresentation of future action." See *Union Bank v. Jones*, 138 Vt. 115, 121 (1980) ("As an extension of [fraud] rule, we have stated that an intentional misrepresentation of future action may constitute a misrepresentation of existing fact because insofar as the actor presently intends to act differently in the future, he has misrepresented his present situation."). Thus, a fraud claim can be founded on "false promises if these promises can be shown to be essential to a scheme to defraud." *Id.* Here, however, the record does not contain any specific statements in which the Plaintiff told Defendant that she would receive a permanent loan

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modification should she comply with certain requirements. Rather, Plaintiff seemed to repeatedly state that a modification was not guaranteed and was dependant on affordability and receipt of sufficient financial documentation. For example, the forbearance plan explicitly stated that "[u]pon completion of this plan IndyMac Federal Bank will then review your financial situation for a possible loan modification providing your situation displays the affordability to service your debts. (Note: additional current financial information and proof of income will be required at the time of review)."

Even assuming Plaintiff is responsible for making a promise to modify the note, Defendant has failed to show that such a statement would constitute a "misrepresentation" or that there was any "scheme to defraud." Under *Jones*, for a statement about future action to be fraudulent the speaker must "presently intend[] to act differently in the future" so as to render the statement false at the time it was made. *Id.* There is nothing in the allegations to suggest that Plaintiff was promising Defendant modifications knowing it would never offer such modification. Rather, the record suggests that eventually Plaintiff did offer a permanent loan modification and that statements regarding future modifications were contingent in nature and explicitly did not guarantee the modification. Further, should Plaintiff have made an unqualified promise to modify, it may very well have intended to keep the promise at the time it was made. Consequently, the Defendant has not established that Plaintiff made a specific and false promise to modify the note.

The record is not clear as to whether the statement to OTS constituted a misrepresentation. Again, in the May 13, 2009 letter Plaintiff told OTS that Defendant's loan could not be modified because it had been discharged in bankruptcy. Months after sending this letter, Plaintiff offered Defendant the trial period plan and later a Home Affordable Modification. This suggests that the OTS letter may have contained a misrepresentation. As discussed above however, the Defendant has not shown that she—the "defrauded party"—acted in reliance on the statement or that she was specifically harmed by it. See *Estate of Alden*, ¶ 32. First, this statement was made to a third party, OTS, and it is not at all clear that action was taken, or not taken, by OTS as a result of the statement. Second, since Defendant was offered the HAMP plan after this letter was sent, there is nothing to suggest that the letter caused her actual injury. Thus, as with the other alleged conduct, the letter does not support a fraud claim. *Id.*

C. Count 2: Breach of Contract

Plaintiff argues that the breach of contract claim fails as a matter of law because Defendant has not identified a provision of the original note or the temporary modification agreements that Plaintiff breached. Specifically, Plaintiff argues that it had the right to reject partial payments under the terms of the original note and that the forbearance plan did not obligate Plaintiff to permanently modify the loan.

"An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other." *Star Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 505 (2002) (mem.). According to the

Restatement of Contracts, "[a] breach of contract is a non-performance of any contractual duty of immediate performance. A breach may be total or partial, and may take place by failure to perform acts promised, by prevention or hindrance, or by repudiation." Restatement (First) Contracts § 312. A failure by one party to "perform all or any part of what is promised in a contract" constitutes a breach of that contract. *Id.* § 314. Implicit in these definitions is that for conduct to constitute a breach, it must either violate the terms of the contract or constitute a failure to act in accordance with such terms.

Here, Defendant has failed to make out a breach of contract claim on any of the loan agreements. First, by its terms the forbearance plan did not require Plaintiff to permanently modify Defendant's loan and Defendant's argument to the contrary is without legal or factual support. The language of the plan was explicit: entering the plan did not constitute a permanent modification of the loan and did not guarantee such modification. Rather, after compliance with the plan the Plaintiff agreed to review Defendant's "financial situation for a possible loan modification" with the caveat that "[a] loan modification is not guaranteed and is dependent upon several factors, such as affordability and investor approval." The Court notes that during the 3 month period when the plan was in effect Defendant filed for bankruptcy—which may have persuaded Plaintiff that a permanent loan modification was not "affordable" for the Defendant at that time. Regardless, Plaintiff was under no obligation to modify Defendant's loan and in fact never permanently modified the loan. Courts have agreed that the failure to convert a temporary forbearance agreement to a permanent loan modification does not support a breach of contract claim. See *Singha v. BAC Home Loans Servicing*, LP, 2012 WL 3904345, at *4 (E.D. Tex. Aug. 7, 2012) (concluding that "under the language of the [Forbearance Agreement], Defendants were under no obligation to modify Plaintiffs' loan . . . [m]oreover, the loan was never modified, which means that Plaintiffs cannot assert an anticipatory breach of contract claim"). As the *Singha* court aptly stated, "[s]ince Defendants had no obligation to modify the loan and there was no contract to modify the loan, there is no way for Defendants to repudiate the alleged agreement." *Id.* Similarly, here, since Plaintiffs had no obligation to permanently modify Defendant's loan, either under the forbearance plan or generally, and since there was no permanent modification agreement, "there is no way" for Plaintiffs to have breached an "alleged" agreement. See also, *Bond v. Wells Fargo Bank, N.A.* 2013 WL 1345110, at *4 (W. D. TX, April 01, 2013) (granting summary judgment on breach of contract claim in part because plaintiff failed to allege that the loan had been permanently modified).

Similarly, Defendant has not alleged a viable breach of contract claim arising from the HAMP trial period plan. As discussed above, the trial plan did not modify the original loan. Further, many courts agree that a lender's failure to offer a permanent loan modification after compliance with the HAMP trial period plan will not support a breach of contract claim. See e.g., *Bourdelais v. J.P. Morgan Chase*, 2011 WL 1306311, at *4 (E.D. Va. April 01, 2011) ("Even if she could, Plaintiff has not stated a plausible claim for breach of contract. Plaintiff alleges that homeowners who execute the TPP Agreement and fulfill its documentation and payment requirements are entitled to permanent modification. The plain language of the TPP Agreement, however, belies her claim."). In *Bourdelais*, the court began by discussing the well-established notion that there is no private right of action under HAMP. *Id.* at *3 ("Courts universally have rejected" claims of "entitlement to permanent modifications under HAMP itself . . . on the ground that HAMP does not create a private right of action for borrowers against lenders and servicers.") The *Bourdelais* court went on to find that the contract claim was not in any way distinct from HAMP and that even if it was, it failed as a matter of law based on the terms of the trial period plan. See also *Stovall v. SunTrust Mortgage, Inc.*, 2011 WL 4402680, at *11 (D. Md. Sept. 20, 2011) (concluding that plaintiff's breach of contract claim for failure to provide a permanent Home Affordable Modification after entering into a HAMP trial period plan failed as a matter of law). There is authority to the contrary—concluding that failure to provide either a Home Affordable Modification or a decision regarding permanent modification after compliance with a trial period plan sufficiently alleges a breach of contract claim. See *Bosque v. Wells Fargo N.A*, 762 F.Supp. 342 (D. Mass. 2011) (concluding that the temporary trial plan met all the requirements for a valid contract but postponing consideration of whether the plan entitled borrowers to a permanent modification or merely obligated lender to review borrower's loan for such modification). Here, however, it is undisputed that Plaintiff offered Defendant a Home Affordable Modification. Thus, even if Defendant had a cognizable breach of contract claim under the theory that the trial period plan entitled Defendant to a permanent loan modification, such a claim would fail on the facts of this case.

Plaintiff's decision to reject Defendant's partial payments did not breach any of the agreements. Plaintiff had the right to accept or reject partial payments by Defendant under the explicit terms of the mortgage:

> Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted.

Entering the forbearance plan did not alter this right. The plan was temporary—providing for reduced monthly payments for a 3-month period. The plan made clear that "[a]fter completion of [the] plan and subject to any potential loan modification, your loan will be serviced normally." Thus, once the plan had expired the Plaintiff once again had all its rights under the mortgage, including the right to reject partial payment. See *Memmott v. OneWest Bank*, 2011 WL 1560985, at *13 (D. Or. Feb. 9, 2011) ("OneWest retained the right to accept or reject partial payments notwithstanding any forbearance of modification, as well as the right to proceed with foreclosure proceedings, notwithstanding any forbearance or modification.").

As discussed below, it is not exactly clear what happened between the conclusion of the HAMP trial period plan and the Plaintiff's May 19, 2010 Home Affordable Modification offer. Defendant alleges that during this time period she tendered payments in accordance with a temporary modification agreement and that the payments were rejected. This rejection does not support a breach of contract claim. The trial period plan was temporary in nature and made clear that Defendant's loan would not be modified unless and until she received a fully executed Modification Agreement from Plaintiff. She received a permanent modification offer in May 2010. In the meantime, she was obligated under the original note and mortgage to make compliant payments and Plaintiff maintained its rights under the mortgage to reject partial payment.

The mortgage also gave Plaintiff the explicit right to foreclose on the property should default occur. Both the forbearance plan and the trial period plan made clear that entering the plans would not prejudice Plaintiff's right to foreclose on the property, if warranted. Thus, Plaintiff had the right to file its foreclosure complaints and such action cannot constitute a breach of any of the agreements.

Lastly, Defendant has failed to explain how Plaintiff "mishandled" the escrow funds. Her counterclaim states that Plaintiff failed "to pay for flood insurance with escrow funds provided for that purpose." There is nothing in the note or mortgage that requires Plaintiff to purchase flood insurance and Defendant has failed to sufficiently allege a breach of contract with regards to escrow funds.

D. Count 3: Contractual Duty of Good Faith and Fair Dealing

In its motion for summary judgment, Plaintiff argues that the alleged conduct does not make out a breach of the covenant of good faith and fair dealing. Rather, Plaintiff contends that it merely was exercising its rights under the various loan documents.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205. The Vermont Supreme Court has explained that "[t]he definition of the covenant of good faith and fair dealing is broad" and that "'[a] complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.'" *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208–09, 635 A.2d 1211 (1993) (quoting Restatement (Second) Contracts § 205 comment e). The Restatement also explains that "bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty." *Id.* comment d. Further, "t]o carry its burden for the good-faith-and-fair-dealing claim, borrower must produce evidence that could lead a reasonable jury to conclude that [Plaintiff] breached an implied-in-law promise not to do anything to undermine or destroy [borrower's] rights to receive the benefit of the parties agreement." *R & G Properties, Inc v. Column. Financial, Inc.*, 2008 VT 113, ¶ 46, 184 Vt. 494. In *R & G Proprieties*, the Court rejected borrower's argument that the lender's foreclosure complaint was in retaliation to the borrower filing suit against the lender. *Id.* ¶ 54. The Court concluded that "the record shows that borrower has merely alleged bad faith while presenting no factual evidence to show that the foreclosure was [anything] more than standard procedure in a case of mortgagor default." *Id.* ¶ 55 (quotations omitted). The *R & G* trial court specifically found that the "[lenders] had no obligation to amend the terms of the note simply because [borrower] considered amendment desirable, and [lenders were] free to seek foreclosure following default. Foreclosure in not retaliatory merely because [borrower] filed its lawsuit first." *Id.* ¶ 15.

Here, the Defendant has failed to "produce evidence . . . that [Plaintiff] breached an implied-in- promise not to do anything to undermine . . . [borrower's] rights" by filing its foreclosure complaint. *Id.* ¶ 46. Not only was Plaintiff within its rights in filing the foreclosure complaint but it did so after offering Defendant a Home Affordable Modification. Thus, Plaintiff has not—as Defendant contends—failed to offer her a permanent loan modification. Plaintiff's decision to institute a foreclosure action after offering Defendant a Home Affordable Modification simply does not constitute bad faith. In addition, as in *R&G Properties*, Defendant has offered no factual support for her allegation that Plaintiff's initial foreclosure complaint was filed in retaliation for Defendant filing a lawsuit against OneWest.

Similarly, the May 13, 2009 letter to OTS does not rise to the level of bad faith. The most that is alleged regarding the letter is that OTS and/or BISCHA was investigating modification of Defendant's loan and that Plaintiff may have deceptively persuaded OTS that such investigation was futile. Plaintiff, however, did not have a duty under any agreement to modify Defendant's loan and thus this conduct, while perhaps not entirely admirable, did not "undermine [Defendant's] rights to receive the benefit of the parties agreement." *Id.* Further, the Court fails to see how Defendant was adversely impacted by this letter—especially given the fact that the letter was sent Defendant was offered a HAMP trial period plan and then later a Home Affordable Modification.

Lastly, the Court concludes that the delay in offering Defendant a permanent Home Affordable Modification did not constitute a breach of the good faith covenant. The trial period plan ended in December of 2009. In January of 2010 Defendant made a payment, presumably at the reduced plan amount, that was accepted by Plaintiff. After this point, Plaintiff accepted no further payments although it appears Defendant continued to make reduced plan payments. Plaintiff extended the Home Affordable Modification offer on May 19, 2010. While it may have been unclear to Defendant what amount to tender during this time period, she had a contractual obligation under the original note to make compliant payments. The trial period plan explicitly conditioned permanent modification on receipt of a fully executed modification agreement. Consequently, during this time period Plaintiff maintained its right to reject noncompliant payments. Thus, while Plaintiff's conduct in delaying the modification offer did not display the utmost diligence, it also did not amount to "slacking off" or an "abuse of power." *Carmichael*, 161 Vt. at 208. Further, Plaintiff did not "interfere" or fail "to cooperate in [Defendant's] performance" as made clear by the May 19, 2010 Home Affordable Modification offer. Quite to the contrary, in extending this offer Plaintiff attempted to help Defendant successfully meet her loan obligations. Thus, Plaintiff's conduct did not rise to the level of bad faith and it therefore did not breach the covenant of good faith and fair dealing.

E. Count 4: Defamation

Plaintiff argues that Defendant's counterclaim for slander and libel fails as a matter of law because Defendant has failed to allege that Plaintiff made specific false statements. Plaintiff further contends that Defendant has failed to state a cause of action for slander of title based on the foreclosure complaint. Specifically, Plaintiff argues that recording the complaint does not constitute a false publication and that Defendant has not alleged any facts that support a finding of malice or special damages. The Court agrees.

According to the Vermont Supreme Court, "[t]o prove slander of title, plaintiff must show that: (1) defendants published a false statement concerning plaintiff's title; (2) the statement caused special damages; and (3) defendants acted with malice." *Sullivan v. Stear*, 2011 VT 37, ¶ 9, 189 Vt. 442. (citing *Wharton v. Tri–State Drilling & Boring*, 2003 VT 19, ¶ 14, 175 Vt. 494 (mem.). "'The essence of the tort is the publication of an assertion that is derogatory to the plaintiff's title to property in an effort to prevent others from dealing with the plaintiff.'" *Id.*

There is no doubt that filing and recording the complaints constitutes a "publication." See *Id.* The issue for the Court is whether the complaints contain a false statement. Defendant alleges that the complaints contain the following false statements: (1) that Plaintiff had a right to recover any deficiency against Ms. Reynolds and (2) that Defendant had not made payments in compliance with the original note. Defendant argues that the first statement is false because Defendant's note was discharged in bankruptcy and that the second statement "misrepresents the true state of the agreement between the parties" as it does not mention the subsequent modification of the note and Defendant's tender of payments in accordance with the modification agreements.

As discussed in detail above, the note was never permanently modified and as such Defendant had an obligation to make payments in compliance with the note or with the two temporary modification agreements during the time they were in effect. Thus, the allegations in the foreclosure complaint regarding Defendant's failure to make payments in compliance with the note were true. In addition, since the note was never modified, Plaintiff did not misrepresent the nature of the agreement between the parties.

Further, in the foreclosure complaint filed in this case Plaintiff does not seek a deficiency judgment on the balance of the note.[3] Rather, the complaint requests that the Court order Defendant to redeem her interest in the property by paying amounts due on the note and mortgage. The complaint further requests that the Court grant Plaintiff a writ of possession on the property should Defendant fail to redeem her interest. In addition, while the complaint does allege that Plaintiff is entitled to enforce the note, these allegations are necessary to bring a cognizable foreclosure complaint. See generally V.R.C.P. 80.1. There is nothing deceptive or impermissible in the allegations

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[3] Defendant does not allege that the two foreclosure complaints were distinct in any way but rather generally bases her slander of title claim on both complaints. The Court will therefore focus on the complaint filed in this case.

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of the complaint or the relief sought. Further, a lender is entitled to bring a foreclosure complaint after the relevant note has been discharged in bankruptcy. See *Drew v. Chase Manhattan Bank, N.A.*, 185 B.R. 139 (S.D.N.Y. 1995) ("The foreclosure action does not violate the discharge that the plaintiff received. While a mortgage note represents a personal obligation of the mortgagor, the mortgage is merely security for such obligation."). The *Drew* court explained that where, as here, a bankruptcy stay has been terminated, "a foreclosure action in which the mortgage does not seek a deficiency judgment . . . may be brought without violating the terms of the debtor's discharge." *Id.* (citing *Citibank v. McGuirl*, 888 F.Supp. 39, 41 (S.D.N.Y. 1991)). The Court concludes that Defendant has not alleged a false publication necessary to support a slander of title claim. Thus, it is unnecessary to address the elements of malice and special damages other then to note that the allegations present insufficient factual support as to both these elements. See *Wharton*, 2003 VT 19, ¶ 14 (noting that "an essential element of the cause of action for slander of title is special damages," concluding that Plaintiff had established special damages through proof of a lost sale and defining malice as "conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights"). (quotations omitted).

Defendant's slander and libel claims are similarly unsupported by the allegations. The elements of defamation are "(1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages." *Russin v. Wesson*, 2008 VT 22, ¶ 5, 183 Vt. 301. As discussed above, most of Defendant's allegations actually pertain to truthful statements. The only potentially false statement alleged—that Defendant's loan could not be modified due to the bankruptcy discharge—was made in the May 13, 2009 letter to OTS. Defendant has failed to allege that this statement caused her damages or actual harm. Notably, after this statement was made the parties entered into the trial period plan and eventually Defendant was offered a permanent modification.

F. Punitive Damages

Defendant alleges that the Plaintiff's conduct warrants an award of punitive damages. In Vermont, "punitive damages require a showing of essentially two elements. The first is wrongful conduct that is outrageously reprehensible . . . . The second is malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like." *Fly Fish Vermont, Inc. v. Chapin Hill estates, Inc.*, 2010 VT 33, ¶ 18, 187 Vt. 541. Here, the alleged conduct does not rise to the level of "outrageously reprehensible" to support a claim for punitive damages. Specifically, the alleged conduct was, at most, deceptive and careless, but was not "outrageous" nor indicative of malice. See *Follo v. Florindo*, 2009 VT 11, ¶ 44, 185 Vt. 390 (noting Vermont case law "limits the availability of punitive damages to cases where the evidence shows that defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime") (quotations omitted). Thus, Defendant has not made out a proper claim for punitive damages.

Conclusion

Based on the foregoing, Defendant's motion for summary judgment is *denied* and Plaintiff's motion for summary judgment is *granted*. Clerk's accounting to issue upon receipt of necessary affidavits and documentation. All information for the clerk's accounting is to be filed before May 15, 2013.

SO ORDERED.

Dated at Woodstock this 11th day of April, 2013.

Harold E. Eaton, Jr.
Civil Division Judge

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