Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-230

MARCH TERM, 2021

Federal National Mortgage Association v. Susan Graham* & Eric Graham*	} } } } } }	APPEALED FROM: Superior Court, Washington Unit, Civil Division DOCKET NO. 331-6-14 Wncv Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

This case originated as a residential foreclosure action brought by plaintiff Federal National Mortgage Association against defendants Susan and Eric Graham in 2014. The Grahams conceded default and filed a third-party complaint against Bank of America, NA (BANA), the originator of the loan and its servicer until 2013. The trial court granted summary judgment to BANA, concluding that the Grahams had failed to provide sufficient evidence to support their claims. On appeal, the Grahams argue that there were disputes of material fact that precluded summary judgment. We affirm.

The Grahams' original complaint contained six claims, and the trial court dismissed all but two for failure to state claim.[1] The remaining claims alleged violation of the Vermont Consumer Fraud Act (VCFA), 9 V.S.A. §§ 2451-2483b, and violation of the covenant of good faith and fair dealing. In general, the Grahams alleged that BANA did not negotiate fairly in response to their requests to modify the loan terms and engaged in deceptive practices during the modification process.

BANA moved for summary judgment on the two remaining claims. BANA provided the following undisputed facts. Susan Graham applied for a loan refinance through BANA. In 2008, she executed a note in the amount of $320,000. In 2011, she requested loss mitigation assistance and BANA initiated a loan modification review. She was eventually denied on the ground that she did not provide the necessary documents. In August 2013, she again applied for loan modification. BANA several times requested additional documents and information. In October 2013, BANA declined her request on the ground that she was not eligible because BANA was unable to create an affordable payment within the terms of the program. She appealed this decision, it was resubmitted for review, and denied. She stopped making payments on the loan in November 2013.

BANA asserted that the claim for breach of the implied covenant of good faith and fair dealing failed because it was predicated on the note and mortgage and there was no obligation

[1] The Grahams did not appeal dismissal of those four claims.

under those documents to modify the loan. BANA also argued that there was no evidence that BANA made a false or fraudulent promise to the Grahams that they reasonably and detrimentally relied on.

The Grahams filed an opposition, but it did not comply with the procedures outlined in Vermont Rule of Civil Procedure 56. The trial court provided the Grahams with an additional opportunity to oppose summary judgment. In response, the Grahams filed a new memorandum and a statement of disputed facts along with an affidavit by Susan Graham. The court concluded that the affidavit contained argument, hearsay, and conclusory assertions and indicated that it would only consider material cited and adequately supported in the parties' statements of facts. The court concluded that the undisputed facts failed to support the Grahams' claims as a matter of law and subsequently entered judgment for BANA. The Grahams appeal.

This Court reviews motions for summary judgment de novo. Clayton v. Unsworth, 2010 VT 84, ¶ 15, 188 Vt. 432. Summary judgment is appropriate when there is no dispute of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(a). "While the nonmoving party is entitled to all reasonable doubts and inferences, he or she may not 'rest on allegations in the pleadings to rebut credible documentary evidence or affidavits.' " Clayton, 2010 VT 84, ¶ 16.

On appeal, the issue is whether BANA was entitled to summary judgment on the Grahams' claims for breach of the implied covenant of good faith and fair dealing as related to the note and mortgage and for violation of the VCFA.

We begin with the covenant of good faith and fair dealing, which is implied in every contract. Downtown Barre Dev. v. C & S Wholesale Grocers, Inc., 2004 VT 47, ¶ 18, 177 Vt. 70. "It is an implied promise that protects against conduct which violates community standards of decency, fairness or reasonableness." Harsch Props., Inc. v. Nicholas, 2007 VT 70, ¶ 14, 182 Vt. 196 (quotation omitted). To carry their burden, the Grahams needed to produce evidence that could lead a reasonable jury to conclude that BANA breached an implied promise not to do anything to undermine or destroy the Grahams' rights under the parties' contract. R & G Props., Inc. v. Column Fin., Inc., 2008 VT 113, ¶ 46, 184 Vt. 494.

The Grahams alleged that BANA violated this covenant during the period when they were seeking to modify the terms of their mortgage. Their particular assertions of how BANA breached an implied promise to them under the mortgage or note have varied over the course of the litigation but in general they claim that BANA failed to negotiate honestly with the Grahams, failed to provide sufficient help to them when they were seeking a modification, and concealed the fact that the Grahams had actually been approved for a loan modification, instead declining to modify the loan.[2] The trial court concluded that the Grahams had no right to loan modification under the mortgage or loan and that the Grahams had presented insufficient facts to support this claim.

We agree. The undisputed facts do not demonstrate that BANA breached any promise not to undermine or destroy the Grahams' rights under the mortgage or note. BANA had no duty to negotiate for loan modification and the Grahams had no right to a loan modification under the parties' contract. "Generally, an implied duty of good faith and fair dealing is not understood to

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[2] The trial court also addressed the Grahams' arguments that BANA violated the covenant of good faith and fair dealing by engaging in a bait-and-switch practice during the loan origination and in dual tracking and concluded that the undisputed facts did not support either claim. On appeal, the Grahams do not challenge these conclusions and therefore we do not address those issues.

interpose new obligations about which the contract is silent, even if inclusion of the obligation is thought to be logical and wise." Downtown Barre Dev., 2004 VT 47, ¶ 18. Even accepting the Grahams' assertion that BANA provided the Grahams with unclear and contradictory information and did not do enough to help them during the modification process, the Grahams have failed to create a triable issue because BANA did not have a duty under the parties' contract to negotiate for a modification.

The Grahams' arguments on appeal do not alter the conclusion that the Grahams failed to allege facts to support their claims. They argue that the trial court erred in its treatment of Susan Graham's affidavit and that the court failed to view the evidence in the light most favorable to them as the nonmoving party. As to the affidavit, the trial court characterized it as consisting of "argument, references to other evidence, hearsay, and conclusory assertions" and therefore considered "only the materials specifically cited and adequately supported in the parties' statements of fact." The Grahams argue generally that the statements in the affidavit were admissible as made within Susan's personal knowledge or as admissions of a party-opponent.

As an initial matter, it is important to note that there were two issues with Susan Graham's affidavit identified by the trial court. In addition to the conclusory statements, the court noted that the affidavit contained many assertions that were not included in the Grahams' statement of undisputed facts and therefore indicated that it would confine its analysis to the facts included in the statement of facts. The trial court did not abuse its discretion in indicating that it would consider only the materials specifically cited and adequately supported in the parties' statements of fact. A party seeking to show that a fact cannot be or is disputed at summary judgment must delineate that fact in a statement of undisputed facts and the party seeking to object must also do so in a statement of undisputed facts with references to the record. V.R.C.P. 56(c). The court is not required to consider material not cited in the statement of facts. V.R.C.P. 56(c)(3). Much of the material in Susan Graham's affidavit was not included in the Grahams' statement of undisputed facts. The court on summary judgment was not required to sift through Susan Graham's affidavit to determine if it contained disputed facts. See Webb v. Leclair, 2007 VT 65, ¶ 6, 182 Vt. 559 (mem.) (explaining that in assessing motion for summary judgment court is not required to "sift through nearly fifty pages of narrative in order to find contested and uncontested facts"). Here, the court gave the Grahams ample notice of what was expected and acted within its discretion in not considering facts beyond what was included in the statement of undisputed facts. See Gallipo v. City of Rutland, 2005 VT 83, ¶ 33, 178 Vt. 244 (concluding that trial court acted within its discretion in deeming as admitted facts that plaintiff did not controvert in defendant's statement of fact where court first gave plaintiff opportunity to comply with provisions of Rule 56).

Even crediting the assertions in the affidavit that the Grahams highlight on appeal and viewing the facts in the light most favorable to the Grahams, the Grahams have not presented issues of material fact. The Grahams assert that they sent in completed loan modification applications but the trial court credited BANA's assertions that the Grahams on many occasions failed to provide necessary documentation or to respond to BANA's communication. BANA's statement of undisputed facts delineated the history of communication between BANA and the Grahams. The facts were supported by an affidavit from an Assistant Vice President and Senior Operations Manager for BANA and exhibits of documents.[3] BANA detailed the Grahams' attempts to obtain loss mitigation assistance, first in 2011 and then in 2013. The facts that the

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[3] We do not address the Grahams' argument that the affidavit was not based on personal knowledge because it was not raised below. See Openaire, Inc. v. L.K. Rossi Corp., 2007 VT 120, ¶ 14, 182 Vt. 636 (mem.) (concluding that by not objecting to affidavit in trial court, party had not preserved argument for appeal).

Grahams highlight from Susan Graham's affidavit do not conflict with BANA's chronology of the events leading to BANA's denial of the Grahams' request for modification in 2013. Both agree that once BANA received an application that it considered complete, it reviewed the application and, ultimately, BANA sent the Grahams a letter declining the request for loan modification. The letter explained that the Grahams were denied loan modification because BAMA was unable to create an affordable payment within the terms allowed by the modification program. BANA confirmed its denial following an additional review pursuant to Susan Graham's appeal.

The Grahams have not presented facts to dispute that whatever the cause of the delays, the loan modification application was reviewed on its merits, that the loan modification was denied, and that the denial was based on the fact that Susan Graham's income disqualified her from the program. Given these undisputed facts, the Grahams cannot support a claim that BANA violated the covenant of good faith and fair dealing related to the loan and mortgage.

The Grahams make additional assertions on appeal, which were either not properly presented below or do not alter the legal analysis. First, the Grahams assert that BANA failed to inform them that they may have been eligible for help from the Fannie Mae Mortgage Help Center. This fact was not included the Grahams statement of undisputed facts and was not included below as a basis for the Grahams' claim. In any event, BANA had no obligation under the contract to provide such information to the Grahams.

Next, the Grahams assert that there is a factual question as to whether BANA had authority to send them a notice of default in December 2013 and this notice put pressure on the Grahams to cure the default. This factual allegation does not create any dispute as to whether BANA violated the covenant of good faith and fair dealing. The Grahams do not dispute that they stopped making monthly payments after October 2013 and were in default on the loan. In December 2013, BANA sent a letter notifying the Grahams that servicing of the loan would transfer to another entity and a separate letter noticing the default and information her of how it could be cured. The Grahams assert that this notice pressured them to cure the default but do not explain how the letter created a triable claim for violation of the covenant of good faith and fair dealing.

The Grahams also assert that there is a dispute of material fact as to whether BANA initially internally granted the modification and then denied it. Again, even accepting that someone within BANA internally at one point indicated the loan modification would be granted, the Grahams do not explain how this would create a violation of the covenant of good faith and fair dealing. BANA ultimately denied the modification on an undisputedly legitimate basis. Moreover, as explained above, BANA had no obligation under the parties' contract to grant a modification, even if warranted.

Next, we turn to the Grahams' claim under the VCFA. To avoid summary judgment, the Grahams had to demonstrate that "(1) there was a representation, practice, or omission by [BANA] that was likely to mislead consumers; (2) [the Grahams] interpreted the message reasonably under the circumstances; and (3) the misleading effects were material, meaning that the conduct influenced [the Grahams'] conduct regarding the transaction." Ianelli v. U.S. Bank, 2010 VT 34, ¶ 10, 187 Vt. 644 (mem.). The undisputed facts do not show that BANA engaged in a misleading practice that the Grahams reasonably interpreted in a way that influenced their conduct regarding a transaction with BANA.

On appeal, the Grahams assert that BANA made misrepresentations regarding when foreclosure would occur and did not negotiate honestly with the Grahams. Even assuming that

BANA falsely indicated when foreclosure would take place in its notice of default, the Grahams have not demonstrated how this influenced their conduct.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice