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CIVIL DIVISION
Case No. 21-CV-01732

Christopher Huber v. Janet Currie, et al

DECISION ON VSECU MOTION FOR SUMMARY JUDGMENT

Plaintiff Christopher Huber loaned Defendant Janet Currie funds to finance her purchase of Defendant 57 Sanford St. LLC ("57 Sanford"), to be secured by a mortgage on the property owned by the LLC. That mortgage, however, was never created or recorded. Subsequently, 57 Sanford conveyed the property to Valley Stock Farm, LLC, which in turn obtained mortgage financing from Defendant Vermont State Employees Credit Union ("VSECU"). Ms. Currie then failed to meet her loan obligations to Mr. Huber. He sued to enforce those obligations; he also seeks to avoid the transfer to Valley Stock Farm and to impose an equitable mortgage on the subject property, superior to the mortgage held by VSECU. VSECU moves for summary judgment on the two counts in which it is named as a defendant. The court grants the motion in substantial part.

As is too often the case, the result here is driven largely by Mr. Huber's failure to perceive and so to meet his burdens on summary judgment. Thus, while those burdens are so familiar as to be almost trite, they bear repeating here. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(2), (4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with

admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Here, in support of its motion, VSECU filed the statement of undisputed material facts required by V.R.C.P. 56(c)(1). After Mr. Huber filed his opposition, VSECU filed a reply, supported again by a supplemental statement of undisputed material facts. VSECU supported each of these statements with competent evidence that sufficiently supported each of its factual assertions.

In response to VSECU's statements, to put it bluntly, Mr. Huber whiffed. He attempted neither to controvert nor to demonstrate the immateriality of any of VSECU's asserted facts. Instead, in response to VSECU's initial filing, he submitted a "Statement of Disputed Material Facts" that does not dispute any of VSECU's factual assertions; rather, it makes numerous assertions of its own. The bulk of those assertions, however, are supported only by Mr. Huber's affidavit. Importantly, there is no showing that he is competent to testify to many of his self-serving, conclusory assertions. In response to VSECU's supplemental statement, Mr. Huber filed a "Further Statement of Disputed Material Facts" that again does not dispute a single one of VSECU's factual assertions, instead making new factual assertions of its own. All three of those assertions are properly supported by competent affidavit. Subsequently, however, Mr. Huber acknowledged that two of the three assertions were false. *See* Clarification to Supp. to Opp. to Def. VSECU's Mot. for Summ. J., 1. The end result is that the court deems all of VSECU's asserted facts to be undisputed, while only those of Mr. Huber's facts that are supported by reference to exhibits that are themselves matters of public record are properly before the court. *See* V.R.C.P. 56(e).

Viewed through this lens, the following facts emerge as undisputed for purposes of this motion. This case arises out of a transaction that is alleged to have occurred on October 25, 2019. At that time, the subject property, 57 Sanford Road in Orwell, was owned by 57 Sanford. 57 Sanford, in turn, appears to have been owned by some combination of Bruce Longtin, Ms. Currie, and Sand Dollar Holdings LLC.[1] Four days earlier, Ms. Currie had filed a mechanic's lien against the property in the amount of $250,000 for services she claimed to have rendered under contract with Sand Dollar Holdings.[2] On October 25, Ms. Currie borrowed $185,000 from Mr. Huber. Her note, however, was not acknowledged, as required by 27 V.S.A. § 341(a); moreover, while the note called for the creation

[1]The precise ownership of 57 Sanford in October 2019 does not fully appear. On November 2, 2018, 57 Sanford filed a "Business Amendment" with the Vermont Secretary of State, indicating that Mr. Longtin, Ms. Currie, and Sand Dollar Holdings were managing members. On October 21, 2019, Ms. Currie filed a mechanic's lien, which suggests that at that time, Sand Dollar Holdings was the sole owner of the business. Moreover, the bill of sale subsequently executed on November 7, 2019, further suggests that Sand Dollar Holdings was then the sole owner.

[2] The mechanic's lien was dated October 20, 2019, but acknowledged (and so, presumably, filed) the next day.

of a security interest in the property, Mr. Huber did not record it in the Orwell land records until nearly 20 months later. On November 7, 2019, Ms. Currie purchased all of the assets of 57 Sanford from Sand Dollar Capital LLC; she subsequently represented to VSECU that the purchase price was $225,000. In connection with this transaction, she borrowed $40,000 from Sand Dollar Capital LLC, secured by a mortgage from 57 Sanford; that mortgage was duly recorded. On May 15, 2020, 57 Sanford filed an annual report with the Vermont Secretary of State, identifying Ms. Currie as its sole owner. Subsequently, 57 Sanford filed a statement of amendment with the Secretary of State, identifying Ms. Currie as "sole proprietor and owner of the business."

In the summer of 2020, Ms. Currie applied to VSECU for an $80,000 business loan for Valley Stock Farm LLC. She was to be a guarantor of the loan, which was to be collateralized by the subject property. On the personal financial statement she submitted with the application, she identified herself as the owner of the property. In her email transmittal, however, she stated, "[t]he property is currently in the name of 57 Sanford St LLC and I need to change it over to Valley Stock Farm LLC asap." Also on her personal financial statement, she disclosed personal income of $65,000–$85,000 per year.[3] She also disclosed total assets of $493,000, with the following note:

> Recently, through mediation, I aquired [sic] the "real" property of a hemp business, which included 7000 dried plants with an approximate conservative value of $300,000.00 along with a new Centurion Trimmer a value of $25,000.00 in addition to new Rigid tool kit, 500 pound winches, and thousands of pounds of biomass. Plus many other accouterments that are neccessary [sic] for hemp processing.

In neither her personal financial statement nor the "Business Loan/Credit Card Application," to the accuracy of both of which she attested, did Ms. Currie list either the note to Mr. Huber or any mortgage or loan other than the $40,000 Sand Dollar mortgage.[4] VSECU hired a lawyer to do a title search and prepare a title opinion for the property. That report did not return any information on the loan from Mr. Huber. Thus, VSECU had no knowledge of Mr. Huber's alleged interest in the property.

On September 23, 2020, 57 Sanford conveyed the property to Valley Stock Farm LLC. Contemporaneously, Valley Stock Farm LLC granted VSECU a mortgage interest in the property. The mortgage was recorded the next day. As noted above, nine months later, on June 24, 2021, Mr. Huber recorded his note.

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[3] In his papers, Mr. Huber makes much of the fact that Ms. Huber disclosed income of only $20,000–$40,000 per year. Whether deliberately or through simple inattention, however, Mr. Huber omitted from his calculation Ms. Currie's listing of $45,000 of income from work as a hemp broker.

[4] While the mortgage was held by Sand Dollar Capital, LLC, in the application Ms. Currie listed Sand Dollar Holdings as the mortgage holder. The precise relationship between Sand Dollar Capital and Sand Dollar Holdings does not appear; evidently Ms. Currie viewed them as one and the same.

On these facts, Mr. Huber asserts that he has an equitable mortgage on the subject property. At least for purposes of this motion, that is not controversial; neither is the fact that his claimed lien was prior in time to VSECU'S mortgage. Priority in time, however, is not automatically priority in right. In Vermont, as elsewhere, a mortgage is unenforceable against anyone but the mortgagor unless it is both "acknowledged and recorded." 27 V.S.A. § 342. As noted above, Mr. Huber's note was not acknowledged, and was not recorded until long after VSECU recorded its mortgage. Thus, the statute makes clear that Mr. Huber's claimed interest in the property is not superior to VSECU's.

Mr. Huber insists, nevertheless, that his lien is superior. "Under Vermont law, . . . there is a 'constructive notice' exception to the general rule that a mortgage deed must be recorded to be valid: the mortgage deed is valid as against a bona fide purchaser with constructive notice of the lien, even if it has not been recorded." *In re Bosley*, 446 B.R. 79, 86 (Bankr. D. Vt. 2011). Mr. Huber argues that VSECU was on constructive notice of his lien, "based on inconsistencies in Defendant Currie's disclosures." Opp. to Def. VSECU's Mot. for Summ. J., 6. This argument fails, for several reasons.

First, and most fundamentally, Mr. Huber's argument ignores the fatal defect in his note. As noted above, his note was neither acknowledged nor recorded; Vermont law requires that it be both to be effective against anyone other than Ms. Currie. Even if VSECU was on constructive notice of the note, that would avoid the impact of only the latter defect. "[U]nder Vermont jurisprudence, notice of an unrecorded deed is equivalent to a record of the deed as against those having such notice." *Bosley*, 446 B.R. at 86. Thus, at best, VSECU had constructive notice of a note that could not be enforced against its interests.

Second, Mr. Huber posits a duty of inquiry unknown in Vermont law. "A 'reasonably diligent inquiry' at the very least requires a potential purchaser to examine the record of title." *Id.* at 87. It is undisputed that VSECU undertook a title search, which did not disclose Mr. Huber's claimed interest in the property. Nor does Mr. Huber suggest that there was anything in the record of title that should have prompted further inquiry. This distinguishes his case from the sole authority he cites that bears in any way on the scope of "reasonable inquiry." *See 2000 Presidential Way, LLC v. Bank of New York Mellon*, 326 So. 3d 64, 69–70 (Fl. Dst. Ct. App., 2021) ("Crucial to this case is whether the recorded mortgage contained information that triggered Presidential's obligation to make further inquiry."). He cites no other authority for an inquiry beyond what diligent search of the land records would have yielded. Nor has the court found any such authority.

Third, in the absence of Vermont caselaw suggesting a duty of inquiry beyond what would have been suggested by a diligent title search, Mr. Huber has nothing but his own bald, self-serving

assertion that "[t]here are sufficient discrepancies in Defendant Currie's loan application materials to suggest that VSECU should have inquired further, and, if it had, could have learned of Plaintiff's interest in the Premises." Aff. of Christopher Huber, ¶ 2. There is no showing, however, that Mr. Huber is in any way qualified to offer this observation. Moreover, many of the "facts" he recites to support his conclusion are deceptively counterfactual. For example, he asserts that, at the time of Ms. Currie's loan application, "[c]ontemporaneous filings with the Vermont Secretary of State demonstrate that Bruce Longtin, Janet Currie, and Sand Dollar Holdings, LLC, were then the members of 57 Sanford Street, LLC." *Id.* ¶ 4. In fact, the filing on which he relied was far from "contemporaneous"; it was filed over 18 months earlier. More "contemporaneous" would have been the filing just over two months prior to the loan application, which showed Ms. Currie as the sole member of the LLC. Similarly, he asserts that

> Defendant Currie indicated that she had a "mortgage balance" of $40,000 owed to Sand Dollar Holdings, but the title search that VSECU commissioned would reveal in fact, that Janet Currie had filed a Mechanic's Lien in the amount of $250,000 dated October 20, 2019 on behalf of 57 Sanford St. LLC and Sand Dollar Holdings, LLC (not the $40,000 mortgage Defendant Currie claimed on her Personal Financial Statement).

Id. ¶ 8. In fact, the mechanic's lien was asserted not "on behalf of" the two LLCs but against property of the LLCs for services performed under an agreement with the LLCs. *See id.*, Ex. 4. Further, as Mr. Huber's counsel acknowledged only many months later, VSECU's title search would indeed have found the $40,000 mortgage—just as Ms. Currie had indicated in her application papers. In short, the only "discrepancies" that appear are not in Ms. Currie's application but in Mr. Huber's treatment of the facts.

Finally, Mr. Huber has failed entirely to demonstrate what inquiry, beyond a title search, was required on the facts of this case, much less what that inquiry would have turned up. The principle of inquiry notice in Vermont has deep roots:

> [T]he courts of equity are vigilant . . . to see that [a] purchaser shall not be allowed to take any benefit resulting from any want of care and watchfulness. If there exist any circumstance of suspicion, whereby he might be said to be fairly put upon his guard, and he neglects to follow out the inquiry, he is affected with notice of all facts, which such inquiry would have brought to his knowledge, and if he purchases with his eyes shut, he acquires only the title of his grantor impeded with its attendant equity.

Richart v. Jackson, 171 Vt. 94, 97 (2000) (quoting *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252, 264–65 (1860)). "When a man has no certain knowledge of a fact, but is only put on inquiry, he is held to have notice of all such facts as reasonable diligence in prosecuting his inquiry in the proper direction

would bring to his knowledge." *Passumpsic Sav. Bank v. First Nat'l Bank*, 53 Vt. 82, 89 (1880). "When determining inquiry notice, the question is what a reasonable person would have done when presented with the information." *Jadallah v. Town of Fairfax*, 2018 VT 34, ¶ 18, 207 Vt. 413 (2018). A party's experience and intentions weigh in the determination of the scope of inquiry required. *See Pomfret Farms Ltd. P'ship v. Pomfret Assoc.*, 174 Vt. 280, 287 (2002) (considering Plaintiff's managing partner's experience as a real estate developer and intention to develop the purchased property at issue into residential homes as important factors in finding he had inquiry notice as to the availability of electricity).

The "reasonable person" is not a conspiracy theorist, following pseudo-facts to fantastical conclusions. Here, the actual facts—as distinguished from Mr. Huber's fantastical distortions—would not lead a reasonable lay person to suspect that anyone other than 57 Sanford and Sand Dollar Capital had an interest in the property, or that anyone other than Ms. Currie had an interest in 57 Sanford. Those interests were all well documented in the public record. That Ms. Currie acquired the "real" property of 57 Sanford's hemp business in a mediation, with one of the owners taking back a $40,000 mortgage, raises no red flags; after all, she had asserted a $250,000 lien against that property. Likewise, her identifying herself rather than 57 Sanford as the owner of the property in her personal financial statement raises no suspicions; in her transmittal email she had made clear that the record owner of the property was 57 Sanford, and her application materials made clear that to all intents and purposes she and her LLCs were one and the same. She had certified in the application that apart from the $40,000 mortgage, there were no other liabilities, and nothing in the public record suggested otherwise. In short, there is nothing in the record that would suggest to a lay person that things were not as Ms. Currie had represented.

It may yet be, however, that someone with specialized knowledge and experience—a commercial loan officer or real estate title expert, for example— would discern irregularities in these facts that would not be apparent to a lay person. In such event, VSECU would certainly be chargeable with whatever knowledge that person would have discovered on further inquiry. *See id.* For this reason, the court invited further briefing from the parties addressing "both any legal requirement for expert proof and the existence of such evidence." Entry Regarding Mot., Oct. 5, 2022. In response, Mr. Huber again whiffed; he argued that it was VSECU, not he, that bore any burden of adducing expert testimony. Plf's Brief Regarding the Reas. Scope of Inquiry of a Commercial Lender, 2–3. He thereby completely misapprehended the burden-shifting regime set forth above. Clearly, in this case, it is Mr. Huber who bears the burden of proving that VSECU was on inquiry notice. VSECU's motion papers

sufficiently establish that he has no evidence to carry this burden, and the court's entry fairly put him on notice that expert testimony might be required. This fairly shifted the burden to Mr. Huber to come forward with such evidence. *See Burgess*, 2016 VT 31, ¶ 17. To respond that any burden in this regard instead fell on VSECU'S shoulders is the same as "rest[ing] upon the allegations in the pleadings." *Gross*, 2018 VT 80, ¶ 8. That, of course, is insufficient. *Id.*

The conclusion, then, is that Mr. Huber has evidence neither of what inquiry a reasonable commercial lender would have undertaken nor what that inquiry would have uncovered. The second half of this conclusion is as telling as the first. Nowhere in his motion papers does Mr. Huber make a meaningful attempt to demonstrate what any further inquiry would have uncovered; admittedly, he uses the word, "would," but never suggests how, so his assertions are meaningless *ipse dixit*. In his final submission, the true nature of his argument emerges: had VSECU only inquired, it "could" have discovered his lien. *See* Supplemental Opp. to Mot. for Summ. J., 5–6, 8. There is, of course, a world of difference between "would" and "could": the former bespeaks probability, while the latter suggests only possibility. At best, Mr. Huber has shown only a possibility. That is insufficient to meet his burden. *See Lewis v. Vt. Gas Corp.,* 121 Vt. 168, 179 (1959) ("Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise or suspicion, is an insufficient foundation for a verdict.").

This leaves only Mr. Huber's claim against VSECU for fraudulent transfer (Count VI). In his opposition to VSECU's motion, Mr. Huber effectively concedes that VSECU was not a party to any allegedly fraudulent transfer. He argues, instead, that VSECU is properly named as an interested party. In response, VSECU acquiesces in its joinder under V.R.C.P. 19(a), but exclusively as an interested party. Thus, VSECU is properly named in this count, but only to the extent that the count seeks a declaration voiding the transfer of the property from 57 Sanford to Valley Stock Farm LLC. Any claim for damages arising out of that transfer lies only against Valley Stock Farm LLC.

ORDER

The court grants the motion in part. VSECU is entitled to judgment as a matter of law on Count V. It is also entitled to judgment as a matter of law on any claims for damages in Count VI. It remains a nominal defendant in that count only as an interested party under V.R.C.P. 19(a).

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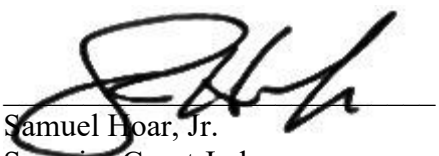

Samuel Hoar, Jr.
Superior Court Judge