



Robin Siebold v. CitiMortgage, Inc. et al

**DECISION ON MOTION  
(Index #4 and #6)**

This is a civil action.

Plaintiff's home was foreclosed in a previous action. Plaintiff contends in foreclosing on her home, Defendants CitiMortgage and its attorneys Bendett & McHugh engaged in unfair business practices, "egregious acts" and violated the law. She seeks compensatory and punitive damages. Both Defendants move to dismiss alleging the complaint fails to state a claim against them.

Plaintiff opposes the motion.

Each motion to dismiss is denied for the reasons set forth below.

**Background**

The complaint alleges that Plaintiff was in negotiations with Defendants to redeem her property when she learned that it had been sold to a third party. Plaintiff claims that "Defendant represented to Plaintiff and to the Court that they were going to work with Plaintiff to redeem the property." Defendant continued to communicate with Plaintiff's attorney regarding an offer letter and "required extensive financial documentation . . . that was submitted repeatedly and never responded to." Acting in good faith to maintain the property during these negotiations, Plaintiff expended \$6,600 to replace the roof and \$2,800 to replace the furnace. She also hired attorneys to represent her, submitted an offer letter in November 2017, and repeatedly submitted documentation required by Defendant. Defendant continued to communicate with her former attorney regarding the offer, which was resubmitted at least twice, but never received a response. At a June 15, 2020 hearing, Plaintiff learned the property had been sold. Plaintiff identifies the proceeding regarding her property as Case # 300-8-11 Bncv.

Plaintiff further alleges that Defendant broke into her home without a writ of possession and removed her belongings; violated federal and State executive orders pertaining to COVID-19; failed to contact her as required by the CARES Act and Regulation X, 12 C.F.R. § 1024.39; and has not provided her with accountings.

The complaint alleges that Defendants' unfair business practices, egregious acts and violations of law caused Plaintiff to incur damages and unnecessary pain and suffering.

## Legal Standard

The standard for determining a Rule 12(b)(6) motion to dismiss for “failure to state a claim upon which relief can be granted” is well established. Courts must “tak[e] all of the nonmoving party’s factual allegations as true,” and will dismiss a claim only when “it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” *Davis v. American Legion, Dept. of Vermont*, 2014 VT 134, ¶ 12, 198 Vt. 204 (quoting *Alger v. Dep’t of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309). With certain exceptions described below, matters outside the pleadings are not considered; if they are considered, the court must treat the motion as one for summary judgment. V.R.C.P. 12(b).

Vermont is a notice pleading state, and this pleading standard is “exceedingly low.” *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575. A pleading must only set forth “a short and plain statement of the claim showing that the pleader is entitled to relief” and a demand for judgment. V.R.C.P. 8(a). A plaintiff is not required to *prove* her claim at the pleading stage. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 9, 184 Vt. 1. A complaint must only put a defendant on notice of the plaintiff’s general claim. *Bock*, 2008 VT 81, ¶ 8. “Motions to dismiss for failure to state a claim are disfavored and should rarely be granted.” *Id.* ¶ 4.

### Motion by CitiMortgage, Inc.

CitiMortgage’s March 4, 2022 motion contends that the foreclosure was completed before the CARES Act was implemented, and that it quitclaimed the property to a third party on March 2, 2020, and therefore it was not involved in denying her access or taking her belongings. CitiMortgage also contends Plaintiff’s claims are barred by *res judicata*.

#### I. Material Outside the Complaint

The court must first determine whether the parties’ exhibits to these motions should be considered at this stage of the litigation. Defendant attaches to its motion a declaration by its attorney, Hale Yazicioglu Lake of Hinshaw & Culbertson LLP, and Exhibits A through O. The exhibits are court records pertaining to the foreclosure action, *CitiMortgage, Inc. v. Siebold et al.*, 300-8-11 Bncv, obtained by counsel from the Vermont Judiciary Public Portal; Supreme Court records relating to an appeal in *CitiMortgage, Inc. v. Siebold et al.*, Case No. 2091-395; Town of Dorset land records; records of a Chapter 13 bankruptcy proceeding filed by Plaintiff’s husband, obtained from the federal courts’ Case Management/Electronic Case Files (CM/ECF) system; and business records of CitiMortgage’s foreclosure counsel, Bendett & McHugh, P.C. Defendant contends the court can take judicial notice of court decisions and documents referenced in the complaint and that the court can consider these documents in this motion to dismiss without converting the motion to one for summary judgment.

The general rule is that on a motion to dismiss, the court may not consider matters outside the pleading unless the court converts the motion to a motion for summary judgment. V.R.C.P. 12(b). However, there are exceptions. One exception is that the court may consider a document if the complaint relies upon it. *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4, 186 Vt. 605. Another exception is the court may consider “matters subject to judicial notice, such as statutes and regulations, and matters of public record.” *Kaplan*, 2009 VT 78, ¶ 10 n.4. In *Kaplan*, the court properly considered a

“summary plan description” regarding plaintiff’s retirement plan which plaintiffs had referred to in their complaint. See also *In re Russo*, 2013 VT 35, ¶ 16 n.4, 193 Vt. 594 (in action for post-condition relief, court could consider a hold-without-bail order referenced in the complaint). Matters “integral to the claim” may also be considered. *Russo*, 2013 VT 35, ¶ 16 n.4 (quoting 5B Wright & Miller, Federal Practice & Procedure: Civil § 1357 (3d ed.)). Since Plaintiff’s complaint pertains to the way Defendants handled her foreclosure action and subsequent sale of her property, the court will consider court records from the foreclosure action and deeds that have been publicly recorded in the Town land records. The publicly recorded court records are the foreclosure complaint (Ex. B), the judgment of foreclosure (Ex. C), a confirmation order (Ex. F), and a certificate of non-redemption (Ex. G). The deeds are Exhibits L and M. Finally, the court takes judicial notice of Exhibits I and O which are decisions issued in the foreclosure action. The court orders are considered for purposes of evaluating CitiMortgage’s *res judicata* defense.

CitiMortgage’s other exhibits are excluded from consideration in this motion to dismiss because they were not specifically referenced in Plaintiff’s complaint and are not integral to Plaintiff’s claim.<sup>1</sup>

In her opposition to these motions, Plaintiff submits 96 exhibits and makes allegations not found in the complaint. Her written opposition references potential pattern evidence regarding CitiMortgage’s practices. This information cannot be considered on this motion to dismiss because these matters are outside the complaint. Plaintiff’s exhibits include correspondence with CitiMortgage, transcripts of court proceedings, and bankruptcy documents. While Plaintiff’s complaint generally identifies documents that she will use to substantiate her claims, including “court minutes, e-mail exchanges, court documentations, letters from Defendant, pictures and other documentation,” the court exercises its discretion to exclude the exhibits for purposes of these motions. The focus on a motion to dismiss is the allegations in the complaint, not evidence. The proper method for adding facts to a complaint is to amend the pleading under Rule 15. *Bates v. Green Farms Condo. Ass’n*, 958 F.3d 470, 483–84 (6th Cir. 2020). See also *Dernier v. Mortg. Network, Inc.*, 2013 VT 96, ¶ 25, 195 Vt. 113 (discussing impropriety of additional material on a motion to dismiss).

## II. Unfair or Deceptive Acts or Practices

The Consumer Protection Act prohibits “unfair or deceptive acts or practices in commerce.” 9 V.S.A. § 2453(a). There are three elements to a deceptive act or practice claim: (1) there was a representation, practice, or omission likely to mislead consumers; (2) the consumer interpreted the message reasonably under the circumstances; and (3) the misleading effects were “material,” meaning that “the conduct influenced [her] conduct regarding the transaction.” *Alpine Haven Prop. Owners’ Ass’n, Inc. v. Deptula*, 2020 VT 88, ¶ 44 (citation omitted). Whether an act is “unfair” or “deceptive” is considered objectively. *Dernier*, 2013 VT 96, ¶ 55. A mortgagor is a consumer within the meaning of 9 V.S.A. § 2451a(a), and a mortgage lender is a seller of goods or services under § 2451a(c).

Whether a seller *intends* to mislead a consumer is immaterial. Intent is not an element of the cause of action. *Poulin v. Ford Motor Co.*, 147 Vt. 120, 126 (1986). “The purpose of our Consumer Fraud Act

---

<sup>1</sup> The court notes that some of the exhibits attached to the Lake Declaration are purportedly the business records of Bendett & McHugh. The business records exception to the hearsay rule, V.R.E. 803(6), “requires testimony of the custodian or other qualified witness (1) that the record is ‘kept in the course of regularly conducted business activity,’ (2) that it was ‘made at or near the time by, or from information transmitted by, a person with knowledge,’ and (3) that it ‘was the regular practice of that business activity to make’ the record.” *Unifund CCR Partners v. Zimmer*, 2016 VT 33, ¶ 13, 201 Vt. 474. Counsel for Hinshaw & Culbertson is not qualified to testify as to the business records of Bendett & McHugh.

is to protect consumers by adding ‘a claim for relief that is easier to establish than is common law fraud.’” *Id.* (quoting *Dunlop v. Jimmy GMC of Tuscon, Inc.*, 666 P.2d 83, 88–29 (Az. App. 1983)).

Consumers sustaining damages or injury as a result of a violation of the Consumer Protection Act may sue for damages and attorneys’ fees. 9 V.S.A. § 2461(b). Exemplary damages are available when the evidence shows malice, ill will, or wanton conduct. *L’Esperance v. Benware*, 2003 VT 43, ¶¶ 17–18, 175 Vt. 292; *Bruntaeger v. Zeller*, 147 Vt. 247, 252 (1986).

Here, Plaintiff alleges a misleading representation, that Defendant told Plaintiff that it would work with her to redeem the property, and that Defendant maintained communications with her regarding the property. While CitiMortgage was under no obligation to accept a settlement offer, the court cannot say at this time that there are no facts or circumstances that would entitle Plaintiff to relief. Plaintiff’s complaint contends that Defendants’ representations influenced her conduct. Plaintiff’s interpretation and responses to Defendants’ representations and conduct, including the investment of funds to maintain the property, may very well have been reasonable. The complaint also alleges damages or injury resulting. Since motions to dismiss are disfavored, and there are factual disputes between the parties, the court holds that Ms. Siebold’s complaint allegations sufficiently state a claim under the Vermont Consumer Protection Act.

Nothing in Defendant’s arguments or exhibits rebuts Plaintiff’s cause of action. CitiMortgage contends it quitclaimed its interest in this property on March 2, 2020, before the CARES Act was implemented, and no longer held title when Plaintiff was denied access and her belongings were taken. Exhibit L is a deed, recorded on March 6, 2020, showing that CitiMortgage conveyed the property to Freddie Mac on March 2, 2020. Another public document, Exhibit M, shows that Freddie Mac sold the property to Christopher Powell Gilbert by a deed executed on April 2, 2020, and recorded on May 7, 2020.

The Coronavirus Economic Stabilization Act (CARES Act), 15 U.S.C. § 9056, imposed a foreclosure moratorium and gave mortgagors a right to request a forbearance on federally backed mortgage loans. The Act was effective March 27, 2020. It provided that the “servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.” 15 U.S.C. § 9056(c)(2).

There is a need for more factual development on this issue because the extent and duration of CitiMortgage’s involvement with Ms. Siebold and her property is in dispute. Plaintiff did not learn the property had been sold until June 15, 2020. She had been dealing with CitiMortgage and its attorneys. While CitiMortgage apparently transferred title to Freddie Mac in March 2020, the CARES Act provision binds the conduct of loan servicers, not owners. It is possible that CitiMortgage retained servicing rights or that its employees and agents continued to operate as if CitiMortgage were still owner or servicer after the sale to Freddie Mac. Plaintiff is entitled to have her facts taken as true, and it cannot be determined conclusively at this stage of the litigation that CitiMortgage did not violate the CARES Act or that it was not responsible for removing Plaintiff’s belongings from the property.<sup>2</sup>

---

<sup>2</sup> Even if the deeds conclusively established that CitiMortgage had nothing to do with denying Plaintiff access to the property and removing her belongings, Plaintiff would still have a cause of action based on her claim pertaining to maintenance she performed on the house.

Defendant's other argument is that Plaintiff's claims have already been adjudicated in the foreclosure action, and the complaint is barred by res judicata.

"Res judicata bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the 'parties, subject matter and causes of action are identical or substantially identical.'" *Pomfret Farms Ltd. Partnership v. Pomfret Assocs.*, 174 Vt. 280, 284, (2002) (citation omitted). "The doctrine applies both to affirmative defenses that could have been raised before, and to compulsory claims that should have been raised." *Pomfret Farms*, 174 Vt. at 284. In *Pomfret Farms*, the court ruled that claims of fraud and negligent misrepresentation by a purchaser-mortgagor were a compulsory counterclaim in a foreclosure action brought by seller-mortgagee. "A single transaction serves as the basis for both suits; the mortgage and note sued on by [seller] secured the Pomfret property which [purchaser] claims to have purchased in reliance upon misrepresentations made by PA." *Id.* The Supreme Court has also held in another case that a challenge to the "validity of the notes and mortgages" is barred by res judicata after the trial court has awarded a final judgment of foreclosure. *Stowe Ctr., Inc. v. Burlington Sav. Bank*, 141 Vt. 634, 636 (1982).<sup>3</sup>

Ms. Siebold's complaint does not raise any issue regarding the validity of the note or mortgage, the amount of indebtedness, or even the judgment. While an allegation that a real estate sales and financing transaction was fraudulent calls into question the validity of a mortgage, as in *Pomfret Farms*, here there is no claim that the mortgage was not valid or that Ms. Siebold did not owe the debt. And, the CPA is not a defense to foreclosure. Rather, Ms. Siebold contends Defendants engaged in unfair and deceptive acts during the process of foreclosing on her, in violation of a State law that expressly provides her with a private right of action to redress this type of abuse. Deceptive practices and mortgage foreclosure are distinct and separate causes of action involving completely different elements for the cause of action and legal issues. Neither the subject matter nor the causes of action are identical. If Ms. Siebold were to succeed on her CPA claim, the foreclosure judgment and status of the property would not be impacted.

The foreclosure court's orders demonstrate that a Consumer Protection Act counterclaim was never interposed in the foreclosure action. In the foreclosure, the undersigned judicial officer ruled that Plaintiff could *not* assert a post-judgment counterclaim for unfair or deceptive practices and wrongful eviction. (Decision on Motion dated July 12, 2021, Def. Ex. O.) An earlier decision in the case, issued by Judge Barra on October 3, 2019, held that Plaintiff's grievances about post-judgment improprieties did not provide a basis for vacating the judgment of foreclosure. (Entry Regarding Motion, October 3, 2019, Def. Ex. I.) Thus, the court presiding over the foreclosure action *twice* specifically declined to allow Plaintiff to litigate her post-judgment grievances. These decisions show the CPA claims have not been adjudicated, and the claims cannot be barred by res judicata.

Defendant also contends Plaintiff's claims *should* have been raised in the foreclosure action and are barred because she did not do so. This cannot be true because Plaintiff's claims under the CPA, and for wrongful eviction and the removal of her belongings, arose after a default judgment of foreclosure was entered on August 20, 2012. These claims did not exist when CitiMortgage filed the foreclosure

---

<sup>3</sup> The court does not have access to the Countrywide decision cited by CitiMortgage. Court records for Countrywide Home Loans, Inc. v. Young, 557-10-08 Wmcv, reflect that the court issued an entry order on July 22, 2015, denying a foreclosure defendant's motion to vacate a judgment and stay proceedings. Nothing in the records or CitiMortgage's brief suggests that the borrower in that case sought to raise Consumer Protection Act claims. Rather, CitiMortgage indicates the borrower sought to challenge the right to foreclose or the accounting of amounts due, which is very different from what Plaintiff seeks to challenge here. Ms. Siebold does not contest that she defaulted on the loan or the amount of indebtedness.

action or even when Ms. Siebold defaulted in that action. They are not compulsory counterclaims under V.R.C.P. 13(a), and again they are not defenses to foreclosure.<sup>4</sup>

CitiMortgage's motion to dismiss is denied.

### **Motion by Bendett & McHugh, P.C.**

The motion by CitiMortgage's foreclosure counsel, Bendett & McHugh, contends that the proper use of legal process is not actionable, and Plaintiff has not stated a claim for abuse of process or malicious prosecution. Defendant does not address Plaintiff's allegations of deceptive practices.

"[A] plaintiff alleging the tort of abuse of process must plead and prove: 1) an illegal, improper or unauthorized use of a court process; 2) an ulterior motive or an ulterior purpose; and 3) resulting damage to the plaintiff." *Jacobsen v. Garzo*, 149 Vt. 205, 208 (1988). The complaint does not sufficiently state a claim for this cause of action because there is no allegation of an ulterior motive or purpose and no "improper or unauthorized use of legal process." *Jacobsen*, 149 Vt. at 208. The proper use of legal process is not actionable. *Weinstein v. Leonard*, 2015 VT 136, ¶ 22, 200 Vt. 615.

The complaint also does not state a claim for malicious prosecution. Malicious prosecution requires the plaintiff to prove "that defendant initiated or continued the case without probable cause, that defendant acted with malice, and that the earlier case terminated in plaintiff's favor." *Bacon v. Reimer & Braunstein, LLP*, 2007 VT 57, ¶ 4, 182 Vt. 553 (citing *Anello v. Vinci*, 142 Vt. 583, 586–87 (1983)). Here, Plaintiff's allegations do not challenge the merits of the earlier foreclosure action and that action did not terminate in her favor.

There is also a question, however, whether Plaintiff has stated a claim against foreclosure counsel under the Attorney's General's debt collection rules. Section 2453 of the Consumer Protection Act authorizes the Attorney General to adopt rules relating to unfair or deceptive acts or practices in commerce. 9 V.S.A. § 2453(c). "Violation of a rule adopted by the Attorney General is prima facie proof of the commission of an unfair or deceptive act in commerce." *Id.* § 2453(d).

Consumer Protection Rule 104.04 prohibits deceptive practices by debt collectors and their agents: "The use of any false, fraudulent, deceptive, or misleading representation or means to collect or attempt to collect any debt arising out of a consumer transaction . . . constitutes an unfair and deceptive trade practice in commerce under 9 V.S.A. Section 2453(a)." Consumer Protection Rules of the Attorney General, Rule 104.04, Code of Vt. Rules 3-2-103 (WL). CP Rule 104.04(e) specifically prohibits "[a]ny false representations, or any representation which tends to create in the mind of the ordinary debtor a false impression, of the character, extent or amount of a claim against a debtor, or of its status in any legal proceeding." Bendett & McHugh qualifies as a debt collector because the rules define that to mean "any person engaging or aiding directly or indirectly in enforcing claims, and includes creditors and their agents when they are so acting." CP Rule 104.07(1).

---

<sup>4</sup> Even if Ms. Siebold asserted that CitiMortgage's unfair and deceptive practices occurred prior to the entry of a judgment of foreclosure, the claim is likely not be compulsory given that questions about unfair servicing practices typically involve very different issues from whether a mortgagor defaulted on her loan and, if so, the amount of the indebtedness. Even when it comes to a claim that a lender failed to provide an accounting required by law, that claim is very different from a borrower's defense that a lender's accounting of the amount owed is incorrect.

Plaintiff's allegations of deceptive representations by Defendants suffice to state a claim against Bendett & McHugh under the Consumer Protection Act and Attorney General's debt collection rules. At this stage of the litigation there is a need for factual development and the court cannot say that there are no facts or circumstances that would entitle Plaintiff to relief.

The motion is denied.

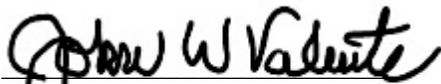
### **Order**

The motions to dismiss are denied for the foregoing reasons.

Defendants shall file answers to the complaint within 21 days of this order's entry.

The parties are to submit an agreed to discovery schedule, including deadlines for discovery, substantive motions and mediation no later than 30 days after the entry of this order.

Electronically Signed 6/9/2022 10:56 AM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink that reads "John W. Valente". The signature is written in a cursive, flowing style.

John W. Valente  
Superior Court Judge