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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Jeffrey C. Stone, Inc., d/b/a Summit) No. CV-09-01218-PHX-ROS
10 Builders,

11 Plaintiff, **ORDER**

12 vs.

13 MidFirst Bank, et al.,

14 Defendants.

15 _____)

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17 Defendant MidFirst Bank seeks dismissal of one count in Plaintiff’s second amended
18 complaint. For the following reasons, the motion will be denied.

19 **BACKGROUND**

20 Summit is a general contractor that entered into a contract with ICP D200, LLC
21 (“ICP”) to construct a condominium project. ICP financed the project with a construction
22 loan from MidFirst. Summit is still owed approximately \$1.4 million for its work on the
23 project. Count one of Summit’s second amended complaint alleges MidFirst negligently
24 failed to disclose the fact that ICP had defaulted on the construction loan. MidFirst argues
25 the amended complaint was not filed by the deadline and should be stricken. MidFirst also
26 seeks dismissal of the failure to disclose cause of action on the basis that MidFirst did not
27 have a duty to disclose to Summit the financial condition of ICP.

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1 ANALYSIS

2 **I. Timeliness of Amended Complaint**

3 The Court ordered Summit to file its amended complaint “no later than January 18,
4 2010.” Because January 18, 2010 was a federal holiday, Summit did not file its amended
5 complaint until approximately 2 a.m. on January 19, 2010. MidFirst argues the amended
6 complaint is untimely and must be stricken.

7 Federal Rule of Civil Procedure 6 provides for an extension of time when “the last day
8 for filing” a document falls on a legal holiday. MidFirst is correct that this rule does not
9 apply when a court provides a date certain. *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1018-
10 1019 (6th Cir. 2005). But it is well-established that district courts have “broad inherent
11 powers to manage their own affairs so as to achieve the orderly and expeditious disposition
12 of cases.” *Sherman v. United States*, 801 F.2d 1133, 1135 (9th Cir. 1986). Here, nothing
13 would be gained by requiring Summit file a formal request that its second amended
14 complaint be accepted. Instead, in an exercise of its discretion, the Court will deem
15 Summit’s filing timely and proceed to the merits. *See Bailey v. United Airlines*, 279 F.3d
16 194, 203 (3d Cir. 2002) (affirming district court’s decision to accept filing one day after
17 deadline when deadline fell on holiday).

18 **II. Standard for Motion to Dismiss**

19 “[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual
20 content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim
21 entitling the plaintiff to relief.” *Moss v. United States Secret Service*, 572 F.3d 962, 969 (9th
22 Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). Under this standard,
23 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
24 statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. While “legal conclusions can provide
25 the framework of a complaint . . . they must be supported by factual allegations” sufficient
26 for the court to conclude the plaintiff has stated a plausible claim. *Id.*

1 **III. Summit Has Adequately Pled a Negligent Failure to Disclose**

2 Summit’s first cause of action is that MidFirst negligently failed to disclose to Summit
3 the financial condition of ICP (MidFirst’s customer). Generally, banks do not have a duty
4 to disclose a customer’s financial condition to a third party. *Kesselman v. Nat’l Bank of*
5 *Ariz.*, 937 P.2d 341, 343 (Ariz. Ct. App. 1996). A bank may, however, have a duty to
6 disclose if there is a “special relationship” between the bank and the third party. A “special
7 relationship” can exist under a variety of circumstances. For example, a “special
8 relationship” exists if the bank was “directly involved with the third part[y] in the
9 transactions that [are] the subject of litigation.” *Id.* at 345. A special relationship also exists
10 when the third party “place[s] trust or confidence in the bank” based on the bank’s conduct.
11 *Id.*

12 According to the second amended complaint, Summit originally was paid according
13 to the following process. First, ICP would submit a pay request to MidFirst. Second,
14 MidFirst’s inspector would then “walk the site with Summit’s superintendent and/or project
15 manager to verify the completed work.” (Doc. 49 at 4). Finally, assuming the inspector
16 approved the work, MidFirst would provide ICP with the funds to disburse to Summit. In
17 August 2008, Summit expressed to ICP and MidFirst its displeasure with the amount of time
18 it was taking to receive payment. Thus, “MidFirst, [ICP], and Summit engaged in *direct[]*
19 negotiations and discussions to establish payment procedures that would ensure timely
20 payment [from] MidFirst to Summit.” (Doc. 49) (emphasis added). Ultimately, MidFirst
21 removed ICP from the payment process and substituted First Arizona Title to act as an
22 escrow agent to process the payments from MidFirst to Summit. MidFirst also imposed new
23 requirements on Summit regarding documentation.

24 After additional delays in receiving payment, Summit “started making inquiries of
25 MidFirst and First Arizona Title.” On December 2, 2008, MidFirst sent an email to First
26 Arizona Title confirming that MidFirst would fully fund the balance of the loan.” This email
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1 was forwarded to Summit.¹ Summit continued working on the project based on MidFirst's
2 statements in the email. Finally, in January 2009, MidFirst's inspector approved Summit's
3 work. The inspector stated he "would instruct MidFirst to release the payment."

4 MidFirst argues that these facts are not sufficient to establish that MidFirst had a duty
5 to disclose to Summit that ICP had defaulted on the construction loan. MidFirst examines
6 the facts in isolation. For example, MidFirst correctly points out that MidFirst's involvement
7 in payments to Summit is not enough, standing alone, to establish a special relationship. *See,*
8 *e.g., Giles Const., Inc. v. Commercial Fed. Bank*, 2006 WL 2711501 (D. Ariz. 2006) (merely
9 issuing checks did not establish special relationship). The allegations of the relationship
10 between MidFirst and Summit cannot, however, be viewed in a vacuum. The facts recited
11 in the complaint must be viewed as a whole. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950
12 (2009) (stating court must assume the veracity of the factual allegations "and then determine
13 whether they plausibly give rise to an entitlement to relief"). Taken together, the complaint
14 alleges MidFirst was in direct contact with Summit on multiple occasions, MidFirst's
15 inspector assured Summit payment would be forthcoming, and MidFirst affirmed in writing
16 that the entire loan balance would be funded. In combination, these are sufficient allegations
17 to establish a "special relationship."

18 Accordingly,

19 **IT IS ORDERED** the Motion to Strike and Motion to Dismiss (Doc. 60) is
20 **DENIED.**

21 DATED this 29th day of April, 2010.

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Roslyn O. Silver
United States District Judge

¹ It is unclear who forwarded this email to Summit.