Garcia v. JP Morgan Chase Bank NA et al Doc. 278

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Patricia Garcia,

Plaintiff,

v.

JP Morgan Chase Bank NA, et al.,

Defendants.

No. CV-15-01493-PHX-DLR

ORDER

This case involves allegations that Defendants Bank of America NA (BANA) and JPMorgan Chase NA (Chase) broke promises, acted negligently, committed fraud, and otherwise violated the law while evaluating Plaintiff Patricia Garcia for a home loan modification. Defendants' predecessor in interest loaned Garcia $830,000 with which to purchase a home and, in exchange, Garcia promised to repay the money with interest in monthly installments. Garcia later fell upon hard financial times and could not keep up with her monthly payments. Additionally, her home suffered flood damage. Garcia sought and eventually was offered a loan modification to make her monthly payments more manageable. She did not accept it, though, because she could not misrepresent the condition of her home, she was unsatisfied that the offer did not forgive a portion of the loan's principal to reflect her home's current value, or some combination of the two. After Garcia became ill, and at her attorney's request, Defendants agreed to cease default-related communications. Garcia, however, remained in default for several more

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months, triggering foreclosure.[1]

At issue is Defendants' Motion for Summary Judgment. (Doc. 203.) The motion is fully briefed and the Court heard oral argument on February 3, 2017. For the following reasons, the Court grants Defendants' motion.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and, viewing those facts in a light most favorable to the nonmoving party, the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment may also be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id*. at 323. The burden then shifts to the non-movant to establish the existence of a genuine and material factual dispute. *Id*. at 324. The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts," and instead "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal quotation and citation omitted).

Substantive law determines which facts are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Conclusory

[1] Defendants voluntarily postponed foreclosure in response to this litigation. (Doc. 1-1 at 42; Doc. 23 ¶ 5; Doc. 233 at 7 n.1.)

allegations, unsupported by factual material, are insufficient to defeat summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). If the nonmoving party's opposition fails to cite specifically to evidentiary materials, the court is not required to either search the entire record for evidence establishing a genuine issue of material fact or obtain the missing materials. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028–29 (9th Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409, 1417-18 (9th Cir. 1988).

FACTUAL BACKGROUND

On December 13, 2006, Garcia executed a promissory note (Note) in the principal amount of $830,000 in favor of Washington Mutual Bank, F.A. (WaMu) and used the money to purchase residential property in Scottsdale, Arizona. (Doc. 196 ¶ 1; Doc. 1-1 at 20 ¶ 11.) Garcia also executed a deed of trust in favor of WaMu, which secured the Note using the property as collateral. (Doc. 124-2 at 6-10.) BANA purchased the Note from WaMu in 2007, and at all relevant times BANA possessed the Note through Chase, which services the loan on BANA's behalf.[2] (Doc. 196 ¶ 2; Doc. 203 at 2; Doc. 1-1 at 20, 31 ¶¶ 11, 13, 110-11.)

Garcia paid on her loan through July 2012, but missed payments in August and September of that year.[3] (Doc. 196 ¶ 6.) In early October 2012, she applied to Chase for a loan modification, requesting a principal reduction "with impounds included as the

[2] Garcia purports to dispute this fact because BANA inadvertently sold the Note on September 28, 2016 as part of a sale of a pool of loans. (Doc. 234 ¶ 2; Doc. 212.) This is immaterial because none of Garcia's claims allege misconduct on or after September 28, 2016. BANA indisputably possessed the Note at all times relevant to the claims at issue. The Court also notes that BANA promptly repurchased the Note when it discovered the inadvertent sale and, therefore, remains in possession of it. (Doc. 212.)

[3] Garcia purports to dispute this timeline, contending that she first missed payments in September and October 2012. (Doc. 234 ¶ 6.) This dispute is not genuine because no reasonable jury could agree with Garcia's version of the timeline. Garcia relies solely on a letter Chase sent her on October 29, 2012, stating: "You are in default because you have failed to pay the required monthly installments commencing with the payment due September 1, 2012." (Doc. 234-1 at 4.) But she ignores a similar letter Chase sent her on September 28, 2012, explaining that she had also failed to pay her August 2012 payment. (Doc. 254 at 18.) Garcia belatedly made her August 2012 payment on October 9, 2012, (Doc. 196-1 at 81). Accordingly, by the time she received the October 29, 2012 letter, her late payment for August had been processed.

value on my home has substantially decreased." (¶ 12; Doc. 203 at 3; Doc. 1-1 at 22 ¶ 27.) Defendants denied Garcia's application because her debt-to-income ratio was too high.[4] (Doc. 196 ¶ 13.) Garcia submitted additional applications over the next two years, which also were denied. (Doc. 203 at 4; Doc. 1-1 at 22, 24-25 ¶¶ 30, 34, 44, 58-59.) After April 2014, Garcia stopped making payments entirely because "she simply had run out of funds to pay her mortgage[.]" (Doc. 196 ¶ 7.)

On November 17, 2014, Chase notified Garcia that she had been approved for a Trial Payment Plan (TPP) under the Chase Home Affordable Modification Program. (Doc. 203 at 4; Doc. 1-1 at 88.) The purpose of the TPP is to demonstrate that the borrower can make consecutive payments. (Doc. 196, ¶ 15.) Here, the TPP required Garcia to make three consecutive monthly payments of $3,310.33 in January, February, and March 2015. (Doc. 1-1 at 88.)

Earlier that month, however, Garcia's home suffered flood damage due to a faulty plumbing fixture. (Doc. 203 at 4; Doc. 1-1 at 27 ¶ 73.) On December 17, 2014, Garcia's attorney, Daniel Cracchiolo, sent a letter to Defendants stating that if they truly were interested in avoiding foreclosure, they would need to offer Garcia a loan "which more appropriately reflects the home's value at the present time[.]" (Doc. 203 at 4; Doc. 1-1 at 98-99.) Cracchiolo also stated that the proposed modification's $888,123.80 principal balance "is so far removed from reality and from the appraisal as to make the modification at that amount an impossibility to perform." (Doc. 203 at 4; Doc. 1-1 at 99.)

It appears that Garcia nevertheless moved forward with the TPP. Garcia made the first TPP payment on January 1, 2015, and the following day Chase employee Toby Moore told Garcia that she could advance to a permanent loan modification without making the final two TPP payments. (Doc. 203 at 4; Doc. 1-1 at 28 ¶¶ 81-82; *Id.* at 105.)

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[4] Garcia objects to the admissibility of Defendants' evidence because the documents cited use the acronym "DTI" instead of the phrase "debt-to-income." (Doc. 234 ¶ 13.) She contends that a lay juror would not know that "DTI" is shorthand for debt-to-income ratio. The Court disagrees. Garcia also contends that this fact is immaterial "except [to] the particular loan application to which it actually applied." (*Id.*) This particular loan application, however, is precisely the context in which Defendants assert the fact. The Court overrules Garcia's objections.

On February 18, 2015, Moore informed Garcia that she had been approved for a permanent loan modification and reviewed its terms with her. Garcia, however, was concerned that the offer did not help with the principal balance.[5] (Doc. 196 ¶¶ 17-18.) She also was concerned that the modification agreement required her to represent that her home was "neither in a state of disrepair, nor condemned" (the Property Condition Clause). (Doc. 203 at 5; Doc. 1-1 at 111.) On February 22, 2015, Garcia notified Chase in writing that she could not sign the proposed modification because she could not make such a representation in light of the flood damage. (Doc. 203 at 5; Doc. 1-1 at 118-119.) Her letter also registered concerns over the property's depreciation. (*Id.*)

Moore responded to Garcia via email, writing: "Please call me today so we can discuss your intention with the final modification as the docs are due. We are not able to move forward with booking till they are signed by you." (Doc. 203 at 4; Doc. 1-1 at 124.) After reading Moore's email, Garcia became physically ill, had a panic attack, and was admitted to the hospital.[6] (Doc. 196 ¶ 33; Doc. 203 at 5; Doc. 1-1 at 29 ¶ 91.)

On February 27, 2015, Cracchiolo communicated to Moore that Garcia had been hospitalized. (Doc. 203 at 5; Doc. 1-1 at 127.) Moore told Cracchiolo that he would place a "cease and desist" in Garcia's file. (Doc. 203 at 5; Doc. 1-1 at 127.) Moore testified that he told Cracchiolo the cease and desist "would stop phone calls [from Chase] until things calmed down a bit" for Garcia.[7] (Doc. 196 ¶ 19.) On March 3, 2015,

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[5] In support of these facts, Defendants cite to excerpts from Chase's Loan Activity Notes. (Doc. 196-2 at 14-16.) Garcia objects to the admissibility of this exhibit on the basis that the document does not reveal who entered the notes for any particular day. (Doc. 234 ¶¶ 16-18.) The Court overrules Garcia's objection. Moore confirmed during his deposition that his user identification number is "3U6." (Doc. 234-1 at 13.) The notes referred to by Defendants in paragraphs 17 and 18 of their separate statement of facts indicate that they were entered by user 3U6, meaning they were entered by Moore.

[6] Garcia purports to dispute paragraph 33 of Defendants' separate statement of facts, which merely states "[Garcia] claims she suffered a panic attack," on the basis that the fact is "jury argument only." This is not a genuine dispute. The statement made at paragraph 33 is a factual statement, not an argument. Further, Defendants cite to an excerpt from Garcia's deposition, in which she states that, after reading Moore's email, "I was rushed to the emergency department because I had a panic attack." (Doc. 196-1 at 75.) Garcia cites no controverting evidence.

[7] Garcia purports to dispute this fact, but cites no evidence contradicting Moore's

Moore told Cracchiolo's assistant that Chase needed written consent from Garcia to implement the cease and desist. (¶ 21.) Cracchiolo then sent a letter to Chase stating: "Pursuant to your conversation today with my assistant . . . I am requesting a CEASE AND DESIST order on the above loan until further notice. All contact for Garcia should be through my office as attorney of record." (¶ 23.) In response, Chase sent Garcia a letter on March 4, 2015, stating in relevant part:

> We'll stop default related communications with you and remove the following telephonic number(s) from our call list, as you requested on 03/03/2015. However we'll continue communication that is required by law.
>
> . . .
>
> If you would like to resume default-related communication, you must complete the enclosed Borrower Authorization Cease and Desist Removal Form.
>
> Also, if you contact us regarding mortgage assistance for your account, we'll consider your request for assistance to be a waiver of this cease and desist, so that we can respond to your request and discuss your options.[8]

(¶ 24.)

According to Moore, at that point Garcia's remaining option was to reapply for a modification once her house was fixed because "the doc[uments] had expired and [Defendants] weren't able to get further information [in] regards to the condition of the property[.]" (Doc. 234-1 at 16.) Garcia, however, did not make any payments on her loan after this latest unsuccessful modification effort, nor did she complete the repairs on

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deposition. She merely cites back to the email confirming that a cease and desist would be placed in Garcia's file. (Doc. 234 ¶¶ 19-21.)

[8] Garcia purports to dispute this fact. She contends that the letter is inadmissible because it was not also sent to Cracchiolo. (Doc. 234 ¶ 24.) Garcia's objection is overruled because she cites no rule of evidence that renders evidence inadmissible under such circumstances, nor is the Court aware of any. Garcia's foundation, materiality, and relevance objections likewise are overruled. First, Garcia merely lists these words without offering any explanation for the objection. Second, a written communication confirming and explaining the nature of the cease and desist certainly is material and relevant, especially in light of the emphasis placed upon the cease and desist in Garcia's verified complaint and response brief. Finally, Garcia's legal arguments concerning the inferences that reasonably may be drawn from the letter do not render the contents of the letter disputed.

her home or reapply for a modification. (*See* Doc. 196 ¶ 7; Doc. 261 at 44.) Consequently, David Cowles, acting as trustee under the deed of trust securing the Note, recorded a Notice of Trustee's Sale on May 6, 2015. (Doc. 1-1 at 134.) The notice indicated that the property would be sold at auction on August 5, 2015 to satisfy the balanced owed on the Note. (*Id.*)

On July 1, 2015, Garcia filed a verified complaint against Defendants in Maricopa County Superior Court, alleging eight claims related to her modification efforts and Defendants' foreclosure-related activities: (1) promissory estoppel, (2) breach of the covenant of good faith, (3) fraud, (4) negligence, (5) negligent performance of an undertaking, (6) violation of the Arizona Consumer Fraud Act (ACFA), (7) violation of the Real Estate Settlement Procedures Act (RESPA), and (8) negligence per se. (Doc. 1-1 at 18-44.) Defendants removed the matter to this Court and the parties proceeded with at times contentious discovery. (Doc. 1; *see* Docs. 46, 77, 192.) Defendants now seek summary judgement in their favor on all of Garcia's claims. (Doc. 203.)

DISCUSSION

The facts material to this case are not genuinely disputed.[9] The same cannot be said about the nature of Garcia's claims. Defendants methodically address each of the eight counts alleged in Garcia's verified complaint. Garcia's response, however, fails to grapple with Defendants' arguments and authorities or with the elements of her own claims. For example, Garcia does not mention the ACFA or RESPA in her response, despite alleging claims under these statutes. Instead, she contends that:

> the single 'dispositive issue' mandating denial of the pending motion may be stated by posing, and then answering, two questions, to wit:

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[9] Footnotes 2-8 of this order explain why Garcia's responses to Defendants' separate statement of facts do not establish genuine factual disputes. Further, Defendants have noted aspects of Garcia's claims for which she will bear the burden of proof at trial and for which they believe she has no admissible evidence. (*See* Doc. 203 at 5, 12; Doc. 254 at 2-3, 5, 7, 8.) Garcia's statement of additional facts, however, states no facts. It merely identifies a list of exhibits. (Doc. 234 at 9 ¶¶ 1-7.) Garcia therefore has not "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586-87.

> 1. Under the particular facts of this case, did Defendants (or either of them) have a 'duty to be fair' to Garcia, in whatever sense the law or equity may require (otherwise stated, to act 'in good faith')?
>
> 2. If so, was that duty breached by Defendants (or by either of them) to her damage?

(Doc. 223 at 5.) This description is not responsive to Defendants' motion because many of Garcia's claims (for example, her promissory estoppel and fraud claims) do not include a breach of a duty of fairness as an element of proof.

Garcia also attempts to assert at least two new claims for the first time in her response brief: (1) a breach of contract claim based on an alleged oral forbearance agreement and (2) a claim for tortious breach of the covenant of good faith and fair dealing. Neither of these claims appears in Garcia's verified complaint. First, the allegations that Garcia contends form the basis of her breach of contract claim actually were pled as a promissory estoppel claim, which is "not a theory of contract liability, but instead a replacement for a contract when parties are unable to reach a mutual agreement." *Johnson Int'l, Inc. v. City of Phx.*, 967 P.2d 607, 615 (Ariz. Ct. App. 1998). Further, Garcia's verified complaint contains no allegations of an oral forbearance offer, an acceptance, or of consideration for the promise. Second, as pled, her breach of the covenant of good faith and fair dealing claim clearly derives from contract and not from tort. (*See* Doc. 1-1 at 34 ¶ 135; Doc. 196 ¶ 32.)

"Courts consistently reject a plaintiff's attempt to raise new claims or theories of liability at the summary-judgment stage because, '[s]imply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.'" *Cass, Inc. v. Prod. Pattern and Foundry Co., Inc.*, 3:13-cv-00701-LRH-WGC, 2017 WL 1128597, at *16 (D. Nev. Mar. 23, 2017) (quoting *Wasco Prod., Inc. v. Southwall Tech., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006)). Accordingly, the Court will not consider the new theories of liability raised by Garcia for the first time in her response brief. Rather, to resolve the pending motion the Court will address the claims that Garcia pled and Defendants briefed.

I. Promissory Estoppel

"To prevail on a claim of promissory estoppel, a plaintiff must prove that the defendant made a promise, that it was reasonably foreseeable that the plaintiff would rely on that promise, and that the plaintiff did rely on that promise to [her] detriment." *Rich v. Bank of Am., N.A.*, 666 Fed. App'x 635, 640 (9th Cir. 2016). "The reliance must result in a 'substantial and material change of position.'" *Id.* (quoting *Weiner v. Romley*, 381 P.2d 581, 584 (Ariz. 1963)).

Garcia alleges that Defendants "promise[d] to cease and desist" on her file "to allow [her] to recover from her hospitalization and repair her home[.]" (Doc. 1-1 at 32 ¶¶ 117, 125.) She further alleges that she "relied on [Defendants'] promise to her detriment," by hiring a public adjuster, to whom she must pay "thousands of dollars even if her home is sold at a trustee sale." (*Id.* ¶¶ 128-29.) Garcia's claim fails as a matter of law, however, because it is undisputed that she hired her public adjuster on January 26, 2015, a month before Defendants represented anything to her about a cease and desist. (Doc. 234-1 at 55; Docs. 231; Doc. 235; Doc. 249.) Garcia therefore could not have relied upon Defendants' representations about a cease and desist when she decided to hire a public adjuster. Defendants are entitled to summary judgment on Count I.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing

Arizona law "implies a covenant of good faith and fair dealing in every contract." *Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986). "The duty arises by virtue of a contractual relationship," and its essence "is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Id.* "[T]he relevant inquiry always will focus on the contract itself, to determine what the parties did agree to." *Id.* at 570. Thus, the covenant "presumes the existence of a valid contract." *Johnson Int'l*, 967 P.2d at 615.

Garcia alleges that Defendants "have a duty to deal fairly with [her]. This duty is implied by law and need not be in writing. This duty requires that neither party do anything that prevents the other party from receiving the benefits of their agreement."

(Doc. 1-1 at 34 ¶ 135.) She testified that the "agreement" referred to in Count II of her verified complaint is the "[l]oan modification agreement."[10] (Doc. 196 ¶ 32.) But it is undisputed that the parties never executed the loan modification agreement. Rather, Garcia's earlier applications were denied and she did not agree to the February 2015 modification offer. Garcia's claim therefore fails as a matter of law because she cannot establish the existence of the contract from which she alleges the implied duty of good faith and fair dealing flowed. *See Campbell v. Cal. Reconveyance Co.*, No. CV-11-00180-PHX-DGC, 2012 WL 5299099, at *4 (D. Ariz. Oct. 25, 2012) (granting summary judgment on good faith and fair dealing claim where plaintiffs failed to show the existence of a contract with Chase to renegotiate their home loan); *Hunter v. CitiMortgage, Inc.*, 2011 WL 4625973, at *2 (D. Ariz. Oct. 5, 2011) (dismissing "any claims alleging a violation of good faith and fair dealing arising from the loan modification negotiations" because plaintiff had not alleged "the existence of a separate enforceable contract to negotiate for a loan modification in good faith"). Defendants are entitled to summary judgment on Count II.

III. Fraud

Under Arizona law, a plaintiff must prove nine elements to succeed on a common law fraud claim:

> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that the information should be acted upon by the hearer and in a manner reasonably contemplated, (6) the hearer's ignorance of the information's falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury.

Rich, 666 Fed. App'x at 640. "In order that a representation constitute actionable fraud, it must relate to either a past or existing fact. It cannot be predicated on unfulfilled promises, expressions of intention or statements concerning future events unless such

[10] Garcia objects to the admissibility of her testimony on this point, arguing that it calls for a legal conclusion. (Doc. 234 ¶ 32.) Her objection is overruled. Garcia may testify as to the factual basis for her complaint.

were made with the present intention not to perform." *Staheli v. Kauffman*, 595 P.2d 172, 175 (Ariz. 1979).

According to Garcia's verified complaint, the allegedly false representation forming the basis of her fraud claim is "Chase's promise to cease and desist." (Doc. 1-1 at 35 ¶ 147.) She alleges that she relied upon Chase's representation and "proceeded to comply with Chase's wishes," namely by hiring a public adjuster to begin the process of repairing her home. (*Id.* at 35-36 ¶¶ 147, 155.) This claim fails for several reasons. First, to the extent her fraud claim is based on Defendants' promise to cease and desist, it fails because actionable fraud "cannot be predicated on unfulfilled promises." *Staheli*, 595 P.2d at 175. Second, Defendants *did* cease default related communications. Garcia has proffered no evidence suggesting that Defendants' promise to cease and desist was false, or that they made it with the present intent not to perform. Finally, Garcia cannot establish reliance because, as previously noted, it is undisputed that her alleged reliance (the hiring of her public adjuster) occurred a month before Defendants represented anything to her about a cease and desist.

In her response brief, Garcia suggests that Defendants committed fraud by offering her a permanent loan modification that required her to represent that her home was not in state of disrepair. She contends that Defendants knew before they made the offer that she could not make such a representation. (Doc.233 at 10, 14.) This theory also fails. Garcia does not explain how the permanent loan modification offer constitutes a false representation, and she cites no authority that an actionable fraud claim may be premised on a defendant proposing a contract that would require a *plaintiff* to knowingly make a false representation. Defendants are entitled to summary judgment on Count III.

IV. Negligence

To succeed on a negligence claim, a plaintiff must show "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007). "The

first element, whether a duty exists, is a matter of law for the court to decide. The other elements, including breach and causation, are factual issues usually decided by the jury." *Id.* (internal citation omitted).

"Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id.* A duty is "an obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 354 (Ariz. 1985). The relevant question "is whether the relationship of the parties was such that the defendant was under an obligation to use some care to avoid or prevent injury to the plaintiff." *Id.* at 356. "No duty exists unless the relationship imposes a legal obligation for the benefit of one party on the other." *Escobar v. Wells Fargo Bank, N.A.*, No. CV-11-285-TUC-DCB, 2011 WL 6794032, at *3 (D. Ariz. Nov. 9, 2011).

Under Arizona law, banks and their customers generally do not share any special relationship beyond that of "a [b]ank and an ordinary depositor." *McAlister v. Citibank*, 829 P.2d 1253, 1258 (Ariz. Ct. App. 1992). Instead, their relationship generally is governed by contract. *Valley Nat'l Bank v. Witter*, 121 P.2d 414, 499 (Ariz. 1942). Accordingly, a threshold question for purposes of the instant motion "is whether or not a financial institution owes a duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Escobar*, 2011 WL 6794032, at *3.

In *Wells Fargo Credit Corp. v. Smith*, the Arizona Court of Appeals reversed a summary judgment on the borrower plaintiffs' negligence claims after finding that there were material questions of fact regarding whether the defendant bank owed the plaintiffs a duty of disclosure and, if so, whether such duty was breached with respect to the amount of monthly payments plaintiffs owed. 803 P.2d 900 (Ariz. Ct. App. 1990). Since then, courts in this District "have routinely held that lenders and loan servicers have a non-contractual duty towards borrowers which can give rise to negligence claims."

McIntosh v. IndyMac Bank, FSB, No. CV-11-1805-PHX-GMS, 2012 WL 176316, at *3 (D. Ariz. Jan. 23, 2012.) This duty, however, "is very narrow and limited only to the duty to disclose." *Narramore v. HSBC Bank USA, N.A.*, No. 09-CV-635-TUC-CKJ, 2010 WL 2732815, at *8 (D. Ariz. July 7, 2010); *see also McMillan v. Wells Fargo Bank*, No. CV-12-01921-PHX-NVW, 2013 WL 11522057, at *6 (D. Ariz. Apr. 11, 2013); *Mukarugwiza v. JPMorgan Chase Bank NA*, No. CV-15-00079-PHX-NVW, 2015 WL 3960889, at *5 (D. Ariz. June 30, 2015).

Garcia does not claim that Defendants breached their duty to disclose amounts due on her loan. Garcia instead relies upon *Martinez v. Cenlar FSB*, No. CV-13-00589-TUC-CKJ, 2014 WL 4354875 (D. Ariz. Sept. 3, 2014), a case in which the court declined to dismiss a plaintiff's claim for tortious breach of the covenant of good faith and fair dealing after concluding that the narrow and limited duty owed by financial institutions could include a duty to correctly service a borrower's account. *Martinez* appears to be an outlier, however, as the Court has found no other case following its lead.[11] In any event, Garcia does not claim that Defendants failed to correctly service her account. Indeed, Garcia fails to specify the precise acts that she believes were negligent. Her verified complaint includes references to allegedly improper training and processing, but her opposition brief and statement of facts are devoid of evidence of improper training or of application processing that was incorrect or inconsistent with Defendants' procedures.[12] Instead, Garcia generally accuses Defendants of not treating her fairly during loan modification negotiations. (Doc. 233 at 9-10.) But she cites no authority, contractual or otherwise, imposing upon financial institutions an amorphous duty of fairness.

[11] Notably, the same court that decided *Martinez* also decided *Narramore*, which emphasized that the duty is limited only to disclosure.

[12] Nor may Garcia rely on the allegations of improper training and application processing in her verified complaint. Garcia's allegations on these points are both conclusory and without foundation. "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Garcia fails to explain how she has personal knowledge of Defendants' training or internal application processing procedures.

Defendants therefore are entitled to summary judgment on Count IV of the verified complaint because Garcia's claim does not fall into the narrow circumstances under which Arizona courts have recognized a limited duty of care owed by financial institutions to their customers.

V. Negligent Performance of an Undertaking

In addition to the limited duty of disclosure gleaned from *Wells Fargo Credit Corp.*, Arizona recognizes a cause of action for negligent performance of an undertaking—also referred to as the "Good Samaritan Doctrine"—which may arise during the loan modification process under a narrow set of circumstances.

> Specifically, a lender may be held liable under the Good Samaritan Doctrine when: (1) a lender, or its agent/representative, induces a borrower to default on his or her loan by promising a loan modification if he or she defaults; (2) the borrower, in reliance on the promise to modify the loan, subsequently defaults on the loan; (3) after the borrower defaults, the lender or its agent/representative negligently processes or fails to process the loan modification, or due to the lender/agent/representative's negligence, the borrower is not granted a loan modification; and (4) based on the default the lender subsequently forecloses on the borrower's property.

Steinberger v. McVey ex rel. Cty. of Maricopa, 318 P.3d 419, 432 (Ariz. Ct. App. 2014). These elements are not present here.

First, Garcia testified that no one from Chase ever promised her that she would receive a loan modification. (Doc. 196 ¶ 11.) Second, Garcia alleges that she first spoke with Chase employees about the possibility of a loan modification on September 11 and 13, 2012, and that she first applied for a modification in early October of that year. (Doc. 1-1 at 21-22 ¶¶ 18-19, 27.) But by this time Garcia had already missed her August and September 2012 payments. She therefore cannot demonstrate that she defaulted on her loan in reliance on promises from Chase. In fact, it is undisputed that Chase employees warned Garcia not to allow her account to fall more than 90 days past due because that could trigger foreclosure. (Doc. 203 at 11; Doc. 1-1 at 23 ¶ 37.) Third, it is undisputed that Chase offered Garcia a permanent loan modification in February 2015. Although

Garcia did not accept the offer, there is no evidence that the expiration of that offer was due to Defendants' negligence. Rather, Garcia could not accept the modification because her home flooded—an occurrence entirely out of Defendants' control. Finally, Garcia's failure to make her August and September 2012 payments did not trigger foreclosure. Rather, Garcia stopped paying on her loan after April 2014 because "she simply had run out of funds to pay her mortgage," and Defendants did not record the Notice of Trustee's Sale until May 6, 2015, when Garcia had failed to make payments on her loan for several months following the unsuccessful February modification effort. Accordingly, Defendants are entitled to summary judgment on Count V.

VI. ACFA

The ACFA "prohibits deception, fraud, misrepresentation, or concealment of a material fact 'in connection with the sale or advertisement of any merchandise.'" *Rich*, 666 Fed. App'x at 638 (quoting A.R.S. § 44-1522). "The elements of a private cause of action [under the Arizona Consumer Fraud Act ("ACFA")] are a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and the hearer's consequent and proximate injury." *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992). Money lending is merchandise for purposes of the ACFA. *See Davis v. Bank of Am. Corp.*, No. CV-12-01059-PHX-NVW, 2012 WL 3637903, at *5 (D. Ariz. Aug. 23, 2012). "An injury occurs when a consumer relies, even unreasonably, on false or misrepresented information." *Kuehn v. Stanley*, 91 P.3d 346, 351 (Ariz. App. 2004).

Garcia does not clearly articulate the promises or representations made by Defendants or how they were false. As the Court understands the verified complaint and Garcia's response brief, she claims that Defendants falsely promised to process her loan modification applications and to cease and desist on her file after she was hospitalized. Of course, Defendants *did* process her modification applications and ultimately extended her a permanent modification offer. To the extent Garcia's ACFA claim is premised on Defendants' failure to offer her a loan modification on her desired terms, her claim fails as matter of law because Defendants were under no obligation to modify her loan. *See*

Barone v. Chase Home Fin. LLC, No. CV 11-08016-PCT-FJM, 2011 WL 3665424, at *2 (D. Ariz. Aug. 22, 2011) ("Chase is under no obligation to grant modifications"); *Riehle v. Bank of Am., N.A.*, No. CV-13-00251-PHX-NVW, 2013 WL 1694442, at *4 (D. Ariz. Apr. 18, 2013) (noting that "no private cause of action exists against a lender for failing to modify a loan"). Indeed, Garcia acknowledged during oral argument that she was aware of no authority requiring financial institutions to forgive principal to reflect depreciation in the collateral. (Doc. 261 at 41-42.) Nor has Garcia identified authority requiring Defendants to absorb the financial consequences of her unforeseeable flood damage.[13]

Defendants also placed a cease and desist on her file. Garcia claims that Defendants' promise to cease and desist was false because she understood "cease and desist" to mean that Defendants would suspend foreclosure-related activities indefinitely until she recovered from her illness and repaired her home. This, however, is a "misunderstanding rather than a false promise or misrepresentation." *Rich*, 66 Fed. App'x at 638. There is no evidence in the record that Defendants promised they would suspend foreclosure-related activities on Garcia's account for an indefinite period of time while she repaired her home, even though she remained in default. Rather, the written letter Chase sent to Garcia clearly stated that the cease and desist would put a stop to "default related communications[.]" Further, Moore testified that he told Cracchiolo the cease and desist "would stop phone calls [from Chase] until things calmed down a bit" for Garcia. Though Garcia might have misunderstood what the cease and desist meant, she offers no evidence that her misunderstanding was the result of a misrepresentation or false promise by Defendants.

Garcia instead argues that Moore admitted during his deposition that the parties had an "understanding" that she would reapply for a modification after her home was

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[13] The only authority the Court is aware of that shifts the burden of such losses from the borrower to the lender is Arizona's anti-deficiency protection, which limits the ability of a lender who forecloses on a qualifying property from recovering a deficiency judgment against the borrower. *See* A.R.S. §§ 33-729(A), -814(G). These provisions, of course, are inapplicable here because no foreclosure has occurred.

fixed. But Garcia cherry-picks portions of Moore's deposition out of context. Moore explained that, at the point Garcia declined to execute the permanent modification offer and requested a cease and desist, "the [modification documents] had expired and we weren't able to get further information [in] regards to the condition of the property . . . the only other option at that point was that once the house was fixed . . . [Garcia] would have to go back and reapply for a mod[ification]." Nothing in the cited portions of Moore's deposition indicates that Defendants promised or represented to Garcia that she could remain in default and take an indefinite amount of time to repair her home without risking foreclosure.[14]

Assuming, however, that a reasonable jury could find Defendants misrepresented the nature of the cease and desist, Garcia's claim fails because she has not proffered evidence of reliance. Garcia claims that she relied upon Defendants' promise to cease and desist by hiring a public adjuster and beginning the process of repairing her home. (Doc. 1-1 at 40 ¶¶ 189-190.) But, as previously noted, it is undisputed that Garcia took these steps a month before Defendants represented anything about a cease and desist. Defendants are entitled to summary judgment of Count VI.

VII. RESPA

"RESPA is a consumer protection statute intended to ensure consumers receive information about settlement costs and to protect them from high settlement fees and potentially abusive practices of providers." *Parker v. Midwest Loan Servs., Inc.*, No. 15-11708, 2016 WL 1242440, at *3 (E.D. Mich. Mar. 30, 2016). RESPA does not "impose[] a duty on a servicer to provide any borrower with any specific loss mitigation option." 12 C.F.R. § 1024.41(a). Nevertheless, if a borrower submits a completed loss mitigation (loan modification) application before foreclosure proceedings have commenced, the loan servicer may not institute foreclosure unless certain conditions have transpired. *Id.* § 1024.41(f)(2). As relevant here, a loan servicer may initiate foreclosure

[14] Indeed, as of February 3, 2017—the date the Court held oral argument on the instant motion and over two years after her home sustained flood damage—Garcia still had not completed her home repairs. (Doc. 261 at 44.)

if the borrower rejects the loss mitigation options offered to her. *Id.* §1024.41(f)(2)(ii).

Garcia alleges that Defendants violated these rules by initiating foreclosure while her loan modification application was still pending. (Doc. 1-1 at 41 ¶ 203.) The undisputed evidence, however, does not support her claim. Defendants offered Garcia a permanent loan modification in February 2015, but Garcia notified Defendants in writing that she could not accept the offer because of the condition of her home. The offer then expired. (Doc. 234-1 at 16.)

There is no evidence in the record that Garcia thereafter made payments on her loan, nor is there evidence that she repaired the damage to her home and reapplied for a loan modification. In May 2015, after Garcia failed to make payments for several more months, Defendants took the first step toward foreclosure by noticing a trustee's sale of the property. By that time, Garcia had notified Defendants that she could not agree to the permanent modification offered to her in February and she had no other pending modification applications. Defendants therefore are entitled to summary judgment on Count VII because Garcia has proffered no evidence that Defendants initiated foreclosure while her loan modification application was pending. *See Parker*, 2016 WL 1242440, at *3 (noting that "[t]here is no provision found in RESPA under which Plaintiff can seek to have foreclosure proceedings nullified, or force Defendants to negotiate a loan modification," and "[t]herefore a borrower may not bring an action for violation of the loss mitigation rule if the borrower has previously availed [herself] of the loss mitigation process") (internal quotations and citations omitted).

VIII. Negligence Per Se

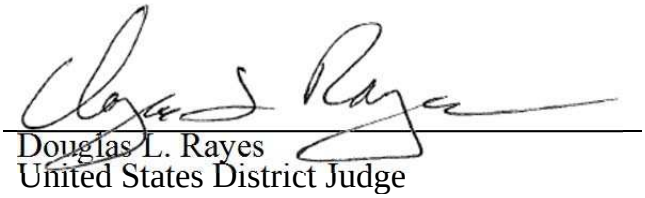
"A person who violates a statute enacted for the protection and safety of the public is guilty of negligence per se." *Good v. City of Glendale*, 722 P.2d 386, 389 (Ariz. Ct. App. 1986). Garcia alleges that Defendants committed negligence per se by violating the ACFA. Because the Court has concluded that Defendants are entitled to summary judgment on Garcia's ACFA claim, Garcia's negligence per se claim necessarily fails as a matter of law. Defendants are entitled to summary judgment on Count VIII.

CONCLUSION

Garcia asserted eight claims against Defendants related to her loan modification efforts, but has not proffered evidence creating triable issues on essential elements of those claims for which she will carry the burden of proof at trial. For the foregoing reasons, the Court finds that there are no genuine disputes of material fact and Defendants are entitled to judgment as a matter of law on all claims against them.[15]

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 203) is **GRANTED**. The Clerk of the Court is directed to enter judgment accordingly and terminate this case. If deemed appropriate, Defendants may move for attorneys' fees consistent with LRCiv 54.2.

Dated this 5th day of April, 2017.



Douglas L. Rayes
United States District Judge

[15] Because the Court concludes that Garcia cannot demonstrate the existence of certain elements essential to her case, it is unnecessary for the Court to address the parties' arguments concerning damages, including their requests to preclude the admission of allegedly untimely disclosed damages-related evidence. (*See* Docs. 99, 102, 122, 140, 145, 276.)