

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

1  
2  
3 ANTHONY M. TRACY, )

4 )  
5 Plaintiff, )

6 vs. )

Case No.: 2:14-cv-02202-GMN-GWF

**ORDER**

7 US BANK, HOME MORTGAGE, )  
8 NATIONAL DEFAULT SERVICING )  
CORPORATION, DOES I-X, inclusive and )  
9 ROE CORPORATIONS I-X, inclusive, )

10 Defendants. )

11 Pending before the Court is the Motion for Summary Judgment (ECF No. 62) filed by  
12 Defendant National Default Servicing Corporation (“NDSC”). Plaintiff Anthony M. Tracy  
13 (“Plaintiff”) filed a Response (ECF No. 70), and NDSC filed a Reply (ECF No. 74). For the  
14 reasons discussed below, NDSC’s Motion for Summary Judgment is **GRANTED**.

15 **I. BACKGROUND**

16 This case arises out of foreclosure proceedings against Plaintiff’s property located at 106  
17 Boysenberry Lane, Henderson, Nevada 89074. In December 2014, Defendant US Bank,  
18 National Association (“US Bank”) removed the instant action to this Court. (Pet. Removal,  
19 ECF No. 1). Shortly thereafter, Plaintiff filed an Amended Complaint asserting the following  
20 claims against NDSC and US Bank: (1) breach of contract; (2) fraud; (3) specific performance;  
21 (4) breach of the implied covenant of good faith and fair dealing; and (5) intentional infliction  
22 of emotional distress. (Am. Compl. ¶¶ 52–78, ECF No. 11).

23 **II. LEGAL STANDARD**

24 The Federal Rules of Civil Procedure provide for summary adjudication when the  
25 pleadings, depositions, answers to interrogatories, and admissions on file, together with the

1 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant  
2 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that  
3 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
4 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
5 jury to return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if  
6 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
7 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th  
8 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
9 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11         In determining summary judgment, a court applies a burden-shifting analysis. “When  
12 the party moving for summary judgment would bear the burden of proof at trial, it must come  
13 forward with evidence which would entitle it to a directed verdict if the evidence went  
14 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing  
15 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*  
16 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
17 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
18 moving party can meet its burden in two ways: (1) by presenting evidence to negate an  
19 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving  
20 party failed to make a showing sufficient to establish an element essential to that party’s case  
21 on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–  
22 24. If the moving party fails to meet its initial burden, summary judgment must be denied and  
23 the court need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*,  
24 398 U.S. 144, 159–60 (1970).

1           If the moving party satisfies its initial burden, the burden then shifts to the opposing  
2 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*  
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,  
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is  
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
9 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
10 beyond the assertions and allegations of the pleadings and set forth specific facts by producing  
11 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

12           At summary judgment, a court’s function is not to weigh the evidence and determine the  
13 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.  
14 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn  
15 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is  
16 not significantly probative, summary judgment may be granted. See *id.* at 249–50.

### 17 **III. DISCUSSION**

18           As a preliminary matter, Plaintiff has conceded that summary judgment should be  
19 entered in NDSC’s favor with respect to the following claims: (1) breach of contract; (2)  
20 specific performance; and (3) breach of the implied covenant of good faith and fair dealing.  
21 (Response 4:1–3, 6:1–8; ECF No. 70). Accordingly, the Court will enter summary judgment  
22 on these conceded claims and consider the following remaining claims against NDSC: (1) fraud  
23 and (2) intentional infliction of emotional distress.

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1           **A. Fraud**

2           To succeed on a claim for fraud, a plaintiff must show, by clear and convincing  
3 evidence, that: (1) a defendant made a false representation; (2) the representation was made  
4 with the defendant’s knowledge or belief that the representation was false (or knowledge that it  
5 had an insufficient basis for making the representation); (3) the defendant intended to induce  
6 the plaintiff to act or refrain from acting in reliance upon the misrepresentation; (4) the plaintiff  
7 justifiably relied upon the misrepresentation; and (5) the plaintiff suffered damage as a result of  
8 the reliance. *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992).

9           Plaintiff argues that NDSC is not an authorized debt collector in the state of Nevada,  
10 sent Plaintiff letters bearing the number of a closed foreclosure file, and violated “numerous  
11 laws under the FDCPA,” which Plaintiff does not explicitly specify. (Response 4:4–5:26).  
12 However, these arguments, along with the evidence presented by Plaintiff, do not establish that  
13 NDSC made a representation with the knowledge or belief that the representation was false,  
14 that NDSC intended for Plaintiff to act or refrain from acting in reliance upon the  
15 representation, that Plaintiff justifiably relied upon the representation, or that Plaintiff suffered  
16 damage as a result of the reliance. Accordingly, the Court finds that Plaintiff has not presented  
17 sufficient evidence to establish that a genuine issue of material fact exists as to whether NDSC  
18 committed fraud and grants summary judgment in favor of NDSC as to Plaintiff’s fraud claim.

19           **B. Intentional Infliction of Emotional Distress**

20           To establish a claim of intentional infliction of emotional distress (“IIED”), a plaintiff  
21 must demonstrate that: (1) a defendant engaged in “extreme and outrageous conduct with either  
22 the intention of, or reckless disregard for, causing emotional distress; (2) [the plaintiff] suffered  
23 severe or extreme emotional distress; and (3) actual or proximate causation.” *Posadas v. City of*  
24 *Reno*, 851 P.2d 438, 444 (Nev. 1993). “[E]xtreme and outrageous conduct is that which is  
25 outside all possible bounds of decency and is regarded as utterly intolerable in a civilized

1 community”; however, this description does not encompass acts which are merely  
2 “inconsiderate” or “unkind.” *Maduik v. Agency Rent–A–Car*, 953 P.2d 24, 26 (Nev. 1998).

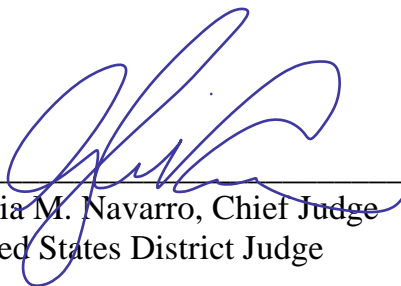
3 Plaintiff bases his IIED claim on the fact that “NDSC has committed fraud, fraudulent  
4 practices, and used fraudulent documents to destroy [P]laintiff’s health.” (Response 6:15–16).  
5 As explained above, Plaintiff has not presented sufficient evidence to establish that a genuine  
6 issue of material fact exists as to whether NDSC committed fraud. Additionally, Plaintiff has  
7 not presented sufficient evidence to establish that a genuine issue of material fact exists as to  
8 whether NDSC engaged in conduct that is outside all possible bounds of decency and is  
9 regarded as utterly intolerable in a civilized community. See *Maduik v. Agency Rent–A–Car*,  
10 953 P.2d 24, 26 (Nev. 1998). Accordingly, the Court grants summary judgment in favor of  
11 NDSC as to Plaintiff’s IIED claim.

12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that NDSC’s Motion for Summary Judgment (ECF No.  
14 62) is **GRANTED**. Accordingly, NDSC is granted summary judgment as to all of Plaintiff’s  
15 claims.

16 The Clerk of the Court shall enter judgment accordingly.

17 **DATED** this 8 day of September, 2016.

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Gloria M. Navarro, Chief Judge  
United States District Judge