

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 STEVEN A. SAMET,)
4)
5 Plaintiff,)
6 vs.)
7 BAYVIEW LOAN SERVICING, LLC, et al.,)
8 Defendants.)

Case No.: 2:18-cv-00581-GMN-EJY

ORDER

9 Pending before the Court is Plaintiff Steven A. Samet’s (“Plaintiff’s”) Motion to
10 Dismiss, (ECF No. 40). Defendant Bayview Loan Servicing, LLC (“Defendant”) filed a
11 Response, (ECF No. 42),¹ and Plaintiff filed a Reply, (ECF No. 45).

12 Also pending before the Court is Defendant’s Motion to Enforce Settlement, (ECF No.
13 43). Plaintiff filed a Response, (ECF No. 51),² and Defendant filed a Reply, (ECF No. 53).

14 Also pending before the Court is Defendant’s Motion for Sanctions, (ECF No. 44).
15 Plaintiff filed a Response, (ECF No. 52), and Defendant filed a Reply, (ECF No. 53).³

16 For the reasons discussed below, the Court GRANTS Defendant’s Motion to Enforce
17 Settlement and Plaintiff’s Motion to Dismiss. Defendant’s Motion for Sanctions is DENIED.

18 I. BACKGROUND

19 This case arises from Defendant allegedly wrongfully reporting Plaintiff’s deed of trust
20 debt to credit reporting agencies in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681

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22 ¹ Defendant’s Response to Plaintiff’s Motion to Dismiss, Defendant’s Motion to Enforce Settlement, and
23 Defendant’s Motion for Sanctions, (ECF Nos. 42–44), are within the same document filed multiple times.

24 ² Plaintiff’s Response to Defendant’s Motion for Sanctions and Plaintiff’s Response to Defendant’s Motion to
25 Enforce Settlement, (ECF Nos. 51–52), are within the same document filed multiple times.

³ Defendant replied to Plaintiff’s Responses to the Motion to Enforce Settlement and Motion for Sanctions in the
same document, (ECF No. 53).

1 *et seq.* (See generally Compl., ECF No. 1). Plaintiff alleges that he surrendered his real
2 property located at 2331 Peaceful Sky Drive, Henderson, NV 89044 (“the Property”) to BAC
3 Home Loans Servicing, LLC (“BAC”) in 2014 pursuant to the Confirmation Order in his
4 bankruptcy case. (*Id.* ¶ 19). Defendant, as BAC’s successor in interest, reported an outstanding
5 debt owed on the deed of trust despite the earlier Confirmation Order allegedly discharging the
6 debt. (*Id.* ¶¶ 20, 23–24, 39). Plaintiff alleges that, in so doing, Defendant violated the Fair
7 Credit Reporting Act. (*Id.* 106–08).

8 On September 12, 2018, Plaintiff filed a Notice of Settlement in this case stating that the
9 parties “have reached a tentative settlement.” (Notice of Settlement 1:24–25, ECF No. 35).
10 Defendant alleges that the parties reached a settlement agreement under which Plaintiff agreed
11 not to contest foreclosure on the Property. (Def.’s Resp. to Mot. to Dismiss (“Def.’s Resp.”)
12 3:3–16, ECF No. 42). After the purported settlement, Defendant’s counsel discovered that
13 Plaintiff applied for a loan modification that it argues was inconsistent with the settlement
14 agreement. (Emails re: Application for Loan Modification (“Loan Emails”) at 1, Ex. B to Mot.
15 Enforce Settlement (“MES”), ECF No. 43-2). Plaintiff also filed a Petition for Foreclosure
16 Mediation Assistance in state court on October 19, 2018, seeking an alternative to foreclosure
17 of the Property, and the state court set a mediation for March 5, 2019. (MES at 4:1–5) (*See also*
18 Petition for Foreclosure Mediation Assistance, Ex. C. to Def.’s Resp., ECF No. 42-3). On
19 March 11, 2019, after the mediation, Plaintiff filed a Motion to Dismiss Defendant with
20 prejudice, (ECF No. 40). Defendant opposes the Motion,⁴ and it filed a Motion to Enforce
21 Settlement and a Motion for Sanctions, (ECF Nos. 42–44).

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25 ⁴ Defendant only opposes the Motion to Dismiss to the extent that it argues the Court “should hold Samet to the terms of the settlement agreement, and only then dismiss Bayview from the case.” (Def.’s Resp. 2:18–21).

1 **II. LEGAL STANDARD**

2 **a. Motion to Enforce Settlement**

3 “It is well settled that a district court has the equitable power to enforce summarily an
4 agreement to settle a case pending before it. However, the district court may enforce only
5 *complete* settlement agreements.” *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) (citations
6 omitted). “Whether the parties *intended* only to be bound upon the execution of a written,
7 signed agreement is a factual issue.” *Id.* at 890-91. “In addition to the intent of the parties to
8 bind themselves, the formation of a settlement contract requires agreement on its *material*
9 *terms.*” *Id.* at 891. “Because a settlement agreement is a contract, its construction and
10 enforcement are governed by principles of contract law.” *May v. Anderson*, 119 P.3d 1254,
11 1257 (Nev. 2005) (footnote omitted).

12 Under Nevada law, “[b]asic contract principles require, for an enforceable contract, an
13 offer and acceptance, meeting of the minds, and consideration.” *Id.* (footnote omitted). “A
14 valid contract cannot exist when material terms are lacking or are insufficiently certain and
15 definite.” *Id.* (footnote omitted). “A contract can be formed, however, when the parties have
16 agreed to the material terms, even though the contract’s exact language is not finalized until
17 later.” *Id.* (footnote omitted). Ordinarily, “[w]here a complete contract was made orally, the
18 fact that it was expected that a written contract would afterwards be signed, embodying the
19 terms of the oral contract, does not prevent the oral contract from taking effect.” *Micheletti v.*
20 *Fugitt*, 134 P.2d 99, 104 (Nev. 1943).

21 “In the case of a settlement agreement, a court cannot compel compliance when material
22 terms remain uncertain.” *May*, 119 P.3d at 1257 (footnote omitted). “The court must be able to
23 ascertain what is required of the respective parties.” *Id.* (footnote omitted). “[T]he question of
24 whether a contract exists is one of fact.” *Id.* A settlement contract is formed “when the parties
25 have agreed to its material terms;” accordingly, a party’s refusal to later execute a written

1 settlement agreement containing the agreed upon terms “does not render the settlement
2 agreement invalid.” *Id.* at 1256.

3 **b. Motion for Sanctions**

4 District courts have inherent power to sanction a party for improper conduct. *Fink v.*
5 *Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). The court may only issue sanctions under its
6 inherent power upon finding “bad faith or conduct tantamount to bad faith.” *Id.* at 994. Bad
7 faith or conduct tantamount to bad faith encompasses “a variety of types of willful actions,
8 including recklessness when combined with an additional factor such as frivolousness,
9 harassment, or an improper purpose.” *Id.* Upon a finding of bad faith, the decision to issue
10 sanctions is within the court’s discretion. *Air Separation, Inc. v. Underwriters at Lloyd’s of*
11 *London*, 45 F.3d 288, 291 (9th Cir. 1995).

12 **III. DISCUSSION**

13 The Court’s below discussion addresses whether the parties executed an enforceable
14 settlement contract, and, if the parties have an enforceable settlement contract, whether
15 Plaintiff’s subsequent conduct justifies imposition of sanctions.

16 **a. Settlement**

17 Defendant argues that the parties reached an enforceable settlement contract because
18 Plaintiff accepted Defendant’s offer, which was supported by consideration and contained all
19 the requisite material terms. (MES 4:19–5:8, ECF No. 43). Plaintiff suggests that (1) there is
20 no enforceable settlement contract because it was not executed in a writing; (2) the agreement
21 lacks material terms because there was no choice of law provision; and (3) the emails between
22 the parties show that they did not agree upon the meaning of a material term: what constitutes
23 contestation of foreclosure. (Resp. to MES 2:15–22, 4:8–22, ECF No. 51). Plaintiff also
24 contends that, even if there is an enforceable settlement contract, the Plaintiff’s availment of
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1 foreclosure mediation did not violate the agreement because the proceedings did not “contest”
2 foreclosure. (*Id.* 3:1–4:7).

3 In support of its position, Defendant provides an exchange of emails between the
4 parties’ counsel. (*See* Emails Agreeing to Settlement Terms (“Settlement Emails”), Ex. A to
5 MES, ECF No. 41-1); (*See also* Loan Emails, Ex. B to Def.’s MES, ECF No. 43-2). The
6 emails demonstrate that the parties began engaging in settlement negotiations via email on
7 September 11, 2018. (Settlement Emails at 6) (“Bayview offers each of your clients \$1000
8 (total \$2000).”). After Plaintiff’s counsel rejected the offer via counteroffer, (*Id.*), Defendant
9 increased its monetary offer and stated that “[it] would also like the settlement agreement to
10 confirm your clients will not attempt to contest foreclosure to the extent not already part of the
11 confirmation order.” (*Id.* at 5). After several more rounds of negotiation culminated in the
12 parties agreeing to the monetary term, \$7,000, Defendant still sought to have Plaintiff agree not
13 to contest foreclosure. (*Id.* at 2–5) (“When you get a chance let me know about the consent to
14 foreclose term. But for now, as discussed, i’ll [sic] let my client know the deposition is off.”).
15 Plaintiff’s counsel then informed Defendant on September 12, 2018, “I’m advised that the
16 language you suggested won’t be a bar to settlement. So we’ll get notices of settlement on, and
17 we’ll wait for the SA. Glad we could work these cases out.” (*Id.* at 1). That day, the parties
18 filed the Notice of Settlement indicating that the parties had reached a tentative agreement.
19 (Notice of Settlement, ECF No. 35).

20 On November 1, 2018, Plaintiff’s counsel reached out to Defendant’s counsel saying,
21 “We settled [this case] on 9/12/2018. Approximately 50 days have passed since this matter was
22 settled. Please forward our office your client’s proposed form settlement agreement for the
23 Plaintiff to review and sign.” (Loan Emails at 2). In response, Defendant’s counsel explained,
24 “As part of the settlement agreement, they were to agree to consent to foreclosure. After Mr.
25 Clark and I reached that agreement, we learned that your clients were simultaneously seeking

1 an agreement to modify their loan the intention to enter an agreement to modify the loan is
2 inconsistent with the agreement to foreclose.” (*Id.* at 1).

3 The Court concludes that the parties reached an enforceable settlement contract despite
4 the agreement not being executed in a signed writing. Defendant made an ascertainable
5 settlement offer: \$7,000 in exchange for dismissal with prejudice and an agreement not to
6 contest foreclosure. (*See* Settlement Emails at 1–2) (*see also* Notice of Settlement) (explaining
7 that dismissal with prejudice was a term of the settlement contract). Plaintiff accepted the
8 offer. (*See* Settlement Emails at 1). The promised exchange supplied sufficient consideration
9 to make the contract enforceable. The negotiations indicate the agreement had only three
10 material terms: the monetary offer to Plaintiff, the agreement to dismiss the case with prejudice,
11 and an agreement not to contest Defendant’s foreclosure of the Property. (*See id.*); (*see also*
12 Notice of Settlement).

13 Ordinarily, the Court would hesitate to enforce an agreement the parties described as
14 “tentative” in the Notice of Settlement. (*See* Notice of Settlement). However, the subsequent
15 communications between the parties’ counsel persuades the Court that any outstanding issues
16 regarding settlement did not concern the material terms of the agreement. The emails indicate
17 Plaintiff intended to be bound by the agreement prior to filing the Notice of Settlement because
18 Plaintiff’s counsel confirmed that it believed that the matter was “settled” on the September 12,
19 2018—the date of Plaintiff’s counsel’s acceptance email—and Plaintiff merely requested a
20 written settlement agreement memorializing the contract. (*See* Loan Emails at 2) (explaining
21 that counsel considered the case settled as of September 12, 2018); (*see also* Settlement Emails
22 at 1 and Notice of Settlement) (describing the material terms of the agreement); *see, e.g.*,
23 *Micheletti*, 134 P.2d at 104 (“[w]here a complete contract was made orally, the fact that it was
24 expected that a written contract would afterwards be signed, embodying the terms of the oral
25 contract, does not prevent the oral contract from taking effect.”). Plaintiff provides no evidence

1 that the parties intended to be bound by the agreement only after its reduction to a signed
2 writing.

3 The parties' omission of a choice of law provision in the contract is not fatal. There is
4 no indication that a choice of law provision was a material term because the parties never
5 negotiated for its inclusion. A choice of law provision is optional; it is not a material term
6 unless the parties condition the agreement on its inclusion. *See* 15 Corbin on Contracts § 83.9
7 (2019) (explaining that parties often agree to choice of law provisions, but that state law will
8 fill the gap in the absence of an agreement).

9 The Court concludes that the parties agreed upon the meaning of the provision
10 consenting not to "contest" foreclosure. Plaintiff argues that "contest" is ambiguous because
11 the Black's Law Dictionary definition of "contested case" is one that is "opposed by another
12 person or interested party." (Resp. to MES, 3:10–4:7). He argues that because mediation does
13 not necessitate opposition, the state court proceedings did not contest foreclosure. (*Id.*)
14 Plaintiff's use of the definition of "contested case" does not persuade the Court that the parties
15 did not agree upon the meaning of "contest."⁵ In Defendant's final email preceding Plaintiff's
16 acceptance, Defendant indicated that the term required Plaintiff to "consent to foreclosure."
17 (Settlement Emails at 1). It seems obvious to the Court that Plaintiff's agreement to consent to
18 foreclosure would not allow Plaintiff to ensnare Defendant into a judicial proceeding that has
19 the goal of seeking an alternative to foreclosure.⁶ Likewise, seeking to modify the loan upon
20 which Defendant sought to foreclose necessarily contests Defendant's right to do so. The
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22 ⁵ In fact, Black's explains that the verb, to "contest," includes "to oppose, resist, or dispute," which would
23 include Plaintiff resisting Defendant exercising its right to foreclose either by seeking alternatives to foreclosure
24 through mediation or trying to modify its loan upon which Defendant sought foreclose. *See* Black's Law
Dictionary Online (2d ed.)

25 ⁶ The Nevada Foreclosure Mediation Program's rules indicate that the purpose of the program is to "exchange
information and proposals that may avoid foreclosure." (Def.'s Reply 4:12–14, ECF No. 53) (quoting Nev.
Foreclosure Med. R. 1(2)).

1 consent to foreclosure term cannot reasonably be disputed just because Plaintiff breached that
2 provision of the settlement contract.

3 Accordingly, the parties have an enforceable contract, which the Court has the power to
4 enforce. Pursuant to its authority to enforce the contract, the Court orders Plaintiff to refrain
5 from taking any actions, including seeking alternatives to foreclosure through mediation or
6 modification of his loan, that frustrate Defendant's right to foreclose on the Property.

7 **b. Sanctions**

8 Defendant argues that Plaintiff acted in bad faith by taking conflicting positions in this
9 case and in state court regarding the status of the Property, by filing this (allegedly frivolous)
10 case, and by seeking and receiving attorney fees in the state court mediation. (Mot. for
11 Sanctions 6:21-28, ECF No. 44). Plaintiff contends that Defendant's argument is conclusory
12 and fails to allege any facts demonstrating that Plaintiff acted in bad faith. (Resp. to Mot. for
13 Sanctions, 6:12-7:2, ECF No. 52). The Court agrees that Defendant has failed to satisfy its
14 burden to demonstrate that Plaintiff acted in bad faith. The Court therefore declines to award
15 sanctions against Plaintiff.

16 **IV. CONCLUSION**

17 **IT IS HEREBY ORDERED** that Defendant's Motion to Enforce Settlement, (ECF No.
18 43), is **GRANTED**. Plaintiff must comply with the parties' settlement by refraining from
19 acting inconsistently with the agreement to consent to foreclosure of the Property. The Court
20 finds that seeking modification of the loan encumbering the property or alternatives to
21 foreclosure are inconsistent with the parties' settlement contract.

22 **IT IS FURTHER ORDERED** that Defendant's Motion for Sanctions, (ECF No. 44), is
23 **DENIED**.

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