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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 R. SCOTT THOMPSON, on his behalf
9 and on behalf of his marital community,
10 Plaintiff,
11 v.
12 FIRST HORIZON HOME LOANS, a
13 division of FIRST TENNESSEE BANK,
14 N.A.,
15 Defendant.
16

NO. CV-12-5018-SAB

**ORDER GRANTING IN PART,
AND DENYING IN PART,
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

17 Before the Court is Defendant's Motion for Summary Judgment, ECF No.
18 25. A telephonic hearing was held on the motion on July 22, 2014, in Yakima,
19 Washington. Plaintiff was present in the courtroom and represented telephonically
20 by Charles Greenberg. Defendant was represented telephonically by Kimberley
21 McGair.

22 **MOTION STANDARD**

23 Summary judgment is appropriate if the "pleadings, depositions, answers to
24 interrogatories, and admissions on file, together with the affidavits, if any," show
25 there is no genuine issue as to any material fact and the moving party is entitled to
26 judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986);
27 Fed. R. Civ. P. 56(c). There is no genuine issue for trial unless there is sufficient
28 evidence favoring the nonmoving party for a jury to return a verdict in that party's

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1 favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving
2 party has the initial burden of showing the absence of a genuine issue of fact for
3 trial. *Celotex*, 477 U.S. at 325. If the moving party meets its initial burden, the
4 non-moving party must go beyond the pleadings and “set forth specific facts
5 showing that there is a genuine issue for trial.” *Id.* at 324; *Anderson*, 477 U.S. at
6 250.

7 In addition to showing there are no questions of material fact, the moving
8 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
9 *Wash. Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is
10 entitled to judgment as a matter of law when the non-moving party fails to make a
11 sufficient showing on an essential element of a claim on which the nonmoving
12 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
13 cannot rely on conclusory allegations alone to create an issue of material fact.
14 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

15 When considering a motion for summary judgment, a court may neither
16 weigh the evidence nor assess credibility; instead, “the evidence of the non-
17 movant is to be believed, and all justifiable inferences are to be drawn in his
18 favor.” *Anderson*, 477 U.S. at 255.

19 **FACTS**

20 The following facts are presented in the light most favorable to Plaintiff, the
21 non-moving party.

22 Plaintiff bought a home in December, 1998 and Defendant financed the
23 purchase. Plaintiff signed a Promissory Note, secured by a deed of trust. The
24 amount of the loan was \$94,543. The payments on the loan included principle and
25 interest, plus taxes and insurance.

26 In 2004, Plaintiff fell behind in making his mortgage payments. ECF No.
27 32. A notice of default was posted at the house. *Id.* After getting this notice, he
28 received a Notice of Foreclosure. *Id.* Consequently, Plaintiff filed for a Chapter 13

1 bankruptcy in February, 2005, and submitted a Chapter 13 Plan. ECF No. 36.
2 Plaintiff then made his monthly mortgage payment of \$877.61 to Daniel Brunner,
3 the Bankruptcy Trustee, who distributed the payment to Defendant. *Id.* The
4 bankruptcy records reflect that, at the beginning of the Plan, Plaintiff owed
5 \$86,967.01 on the mortgage. *Id.*

6 A review of the payment history indicates that, at times, Plaintiff fell behind
7 on his payments but would catch back up. For instance, in October, 2005, he made
8 a \$239.12 payment, but then made this up with a \$1,394.13 payment in December,
9 2005. ECF No. 36. In February, 2006, and April, 2006, Plaintiff made payments of
10 less than \$877.61, but again made up the arrears at a later date. *Id.* He failed to
11 make any payments in May, July, August, 2006; January, June, October, 2007;
12 April, July, August, October, December, 2008; January and March, 2009. *Id.* The
13 missed payments were then caught up by subsequent payments. For instance,
14 Plaintiff made a \$2,435.61 payment in November, 2007, and a \$3,940.06 payment
15 in November, 2008. *Id.* According to the Bankruptcy Trustee, Plaintiff paid
16 \$43,646.08 through the course of his Chapter 13 Bankruptcy Plan. *Id.*

17 Because of the missed payment in March, 2009, Plaintiff's bankruptcy case
18 was dismissed. Plaintiff filed a motion for reconsideration, and the case was
19 reopened. On April 20, 2009, Mr. Brunner issued a check to Defendant for
20 \$2,772.50, which included \$2,585.14 of the current mortgage payment and
21 \$187.36 of pre-petition mortgage arrearage. ECF No. 31-1, Ex. D. Zoila Chavez,
22 Bankruptcy Specialist for Defendant, returned the check with an accompanying
23 letter, stating she was returning the check because the case was dismissed. ECF
24 No. 31-1, Ex. A.

25 Mr. Brunner responded by reissuing another check and informing Defendant
26 that the Order of Dismissal had been vacated and Plaintiff's Chapter 13
27 Bankruptcy Case was complete. ECF No. 36. According to Mr. Brunner's records,
28 he reissued the check four times: April 20, 2009, May 5, 2009, May 21, 2009, and

1 June 9, 2009. In his correspondence accompanying the check, he noted that he
2 believed the payment would bring Plaintiff's home loan post-petition current
3 through April, 2009. The record indicates the fourth re-issued check was posted on
4 June 23, 2009. ECF No. 31-1, Ex. D.

5 In the meantime, on May 22, 2009, Defendant sent Plaintiff a Notice of
6 Default, indicating it would be initiating foreclosure proceedings. ECF NO. 31-1,
7 Ex. B.

8 On June 18, 2009, Terry Preszler, Plaintiff's bankruptcy attorney, sent a
9 cashier's check for \$1,758.04 to McCarthy & Holthus, LLP, Attn. Colleen
10 Campbell.¹ ECF No. 31-1, Ex. E. A follow-up fax was sent by Mr. Preszler to Ms.
11 Campbell, in which he explained that the \$1,758.04 was for the May and June,
12 2009 payments. ECF No. 31-1, Ex. F. It does not appear this check was credited to
13 Plaintiff's account.

14 On June 23, 2009, Defendant sent a letter to Mr. Preszler, indicating it had
15 been notified of a bankruptcy filing by Mr. Thompson, case no. 05-00903, and
16 advising of alternatives that may be available to resolve the default on their
17 account. ECF No. 31-1, Ex. G.

18 This caused Plaintiff to become confused as to the status of his loan. On
19 July 5, 2009, Mr. Preszler's office sent Ms. Campbell "a letter and borrowers
20 financial statement." ECF No. 31-1, Ex. G. Ms. Ahlers, the paralegal, asked Ms.
21 Campbell what was the status of the loan at this time. *Id.*

22 In August, 2009, it appears that Plaintiff was able to speak with one of
23 Defendant's employee, and as a result sent some correspondence to Dallas, Texas.
24 On August 14, 2009, Plaintiff wrote a letter to Diana, who appears to an employee
25 of Defendant. ECF No. 31-1, Ex. I. It stated:

26 We are enclosing the documents you requested. The Discharge
27 of the Bankruptcy on 7/17/09, the new mortgage payment notice and

28 ¹It appears this law firm represented Defendant in the bankruptcy proceedings.

1 annual escrow review, we also paid the irrigation payment for the
2 year in the amount of \$272.11 on 8/14/2009. As soon as we get a
3 statement of the balance we need to pay for our loan we will send
4 payment. We also request that we get a monthly statement to pay. By
5 our calculation the bankruptcy court has paid First Horizon Home
6 Loan \$43,646.08 & \$3,022.00. The original note was \$86,967.01. We
7 are very anxious to get this matter resolved so that from here on our
8 payments will be on time! This letter and documents are being faxed
9 today as requested.

10 *Id.*

11 Attached to the fax were the Notice of Discharge from the Bankruptcy
12 Court; a New Mortgage Payment Notice and Annual Escrow Review dated July 7,
13 2009 that stated the current monthly payment was \$879.02 and the new payment
14 of \$947.99 would be effective 09/01/09; and a receipt for the irrigation payments.

15 *Id.*

16 Plaintiff made payments to McCarthy & Holthus, LLP. in August, 2009²,
17 September, 2009³, and October, 2009⁴. But the correspondence he was receiving
18 from Defendant did not reflect that these payments were being credited to his
19 account. Instead, Defendant continued to send statements that indicated that
20 Plaintiff was behind on his payments. On September 16, 2009, Defendant sent
21 Plaintiff an account summary that indicated he was now \$5,948.24 in arrears. ECF
22 No. 31-2, Ex. M. On October 16, 2009, Defendant issued a Mortgage Account
23 Statement that indicated Plaintiff was now \$6,949.40 in arrears. ECF No. 31-2, Ex.
24 P. Moreover, on October 21, 2009, Defendant sent Plaintiff a notice that he was in
25 arrears, and gave him a phone number to call if he wanted to avoid foreclosure.
26 ECF No. 31-2, Ex. Q. Then, on November 27, 2009, Defendant sent Plaintiff a
27 notice that it had forwarded the necessary required documents to its attorney to

28 ²ECF No. 31-2, Ex. K.

³ECF No. 31-2, Ex. N.

⁴ECF No. 31-2, Ex. T.

1 initiate foreclosure proceedings. The attorney listed was McCarthy & Holthus.

2 Another notice issued the same day informing Plaintiff of the following:

3 Foreclosure proceedings will result in your home being sold at public
4 auction and your family being forced to vacate the premises. This
5 delinquency and foreclosure action will be noted on your credit
6 records and may effect your ability to obtain future loans.

6 ECF No. 31-2, Ex. R.

7 On December 8, 2009, Plaintiff received a Notice of Default from Quality
8 Loan Service Corporation of Washington. ECF No. 31-2, Ex. Y. At some point
9 during this time, Notices of Default were posted on Plaintiff's home.

10 Because it was not clear to Plaintiff or his bankruptcy attorney why his
11 payments were not being credited and why he was receiving default notices when
12 he was making payments to McCarthy & Holtus, they attempted on a number of
13 times to get an update on the status of the loan, payment history, or an accounting
14 so Plaintiff could verify the amounts owing and due. ECF Nos. 31-1, Exs. C, F, G;
15 31-2, Exs. L, O, Q, S.

16 Finally, in December, 2009, the payment problem was identified. On
17 December 15, 2009, Teresa Fauria from McCarthy & Holthus, LLP sent an email
18 to the Preszler Law office indicating that it figured out it was sending the checks
19 to the incorrect address and Defendant never received or applied the payments.
20 ECF No. 31-2, Ex. T. She asked that Plaintiff put stop payments on the August and
21 September, 2009 checks. *Id.* She also indicated that Defendant received a check
22 for \$948.23, which was dated on October 7, 2009. *Id.* Ms. Fauria offered to have
23 the law firm reimburse any overnight charges, and any costs for the requested stop
24 payments. *Id.* Plaintiff complied and sent a cashier's check for \$1,758.04. ECF No.
25 31-2, Ex. Y.

26 This did not clear up the confusion, however, because the parties disagreed
27 as to the amount that needed to be paid to get the loan up to date. Because of the
28

1 misdirected payments, Plaintiff was charged late fees and attorneys' fees that he
2 believed he should not have to pay. His bankruptcy attorney completed an
3 accounting and determined that he owed \$106.24. Plaintiff sent a check for this
4 amount, and Defendant returned the check, indicating that the amount was
5 insufficient to reinstate the loan. ECF No. 31-2, Ex. BB. It also indicated that the
6 loan has been referred to McCarthy & Holthus for foreclosure. *Id.*

7 On December 22, 2009, Mr. Preszler sent a Formal Notice of Dispute to
8 Quality Loan Service Corporation of Washington in which he explained that the
9 loan was defaulted due to the attorneys' error in sending the payments to the
10 wrong address. ECF No. 31-2, Ex. Y. By March, 2010, Mr. Preszler had not
11 received a response from the Bank. ECF No. 32-1, Ex. BB.

12 According to a July 28, 2010 email from Courtney Pybas, paralegal for
13 Quality Loan Services, to Craig Walker, Plaintiff's attorney, the foreclosure action
14 was placed on hold pending resolution of the accounting issues. ECF No. 32-1,
15 Ex. BB. The September 10, 2010 sale date was cancelled. *Id.* Sometime in mid-
16 2011, Plaintiff received an accounting. ECF No. 32-1. However, it did not make
17 any sense to him so he retained a credit counselor who tried to communicate with
18 the bank and he submitted a loan modification to the bank. The parties have been
19 unable to resolve their dispute, and Plaintiff filed suit in Benton County Superior
20 Court. Defendants removed the action to the Eastern District of Washington.

21 **PLAINTIFF'S CLAIMS**

22 In his Complaint, Plaintiff asserts eight claims: (1) predatory
23 lending/inappropriate lending violations; (2) bad faith/predatory lending practices;
24 (3) fraud in misrepresentation; (4) unconscionable behavior; (5) breach of good
25 faith; (6) violation of the Consumer Protection Act; (7) infliction of emotional
26 distress; and (8) specific performance.

27 The Court finds that Plaintiff has not met his burden of establishing genuine
28 issues of material fact and Defendant is entitled to judgment as a matter of law

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1 with respect to the following claims: (1) predatory lending/inappropriate lending
2 violations; (2) bad faith/predatory lending practices; (3) fraud in
3 misrepresentation; and (4) Consumer Protection Act violations. As such, the Court
4 grants summary judgment in favor of Defendant on these claims.

5 Defendant argues that summary judgment is appropriate because the only
6 remedy available to Plaintiff is reinstatement of the loan. This position, however,
7 ignores Plaintiff's claims for outrage (unconscionable behavior); violation of good
8 faith and fair dealing; and negligent infliction of emotional distress. For these
9 claims, the facts viewed in the light most favorable to Plaintiff show that he was
10 making payments toward his mortgage, yet Defendant refused to credit those
11 payments. Instead, Defendant took steps to foreclose on his house, even though
12 Plaintiff took significant steps to communicate with Defendant over the disputed
13 payments.

14 In its briefing, Defendant maintains that Plaintiff was in default by May,
15 2009. A reasonable jury could conclude, however, that to the extent Plaintiff was
16 in default, it was because Defendant refused to accept payment from the
17 Bankruptcy Trustee. Under that scenario, a reasonable jury could infer it would
18 have been pointless to pay the May, 2009 payment until the April, 2009 payment
19 was resolved. The facts bear this out. Shortly after Defendant accepted the Trustee
20 payment, Plaintiff made the May and June, 2009 payments. Notably, however, it
21 does not appear that Defendant properly credited the payments.

22 The record supports a conclusion that Defendant was proceeding with
23 foreclosure at the same time it was rejecting payments from the Bankruptcy
24 Trustee, even after the Trustee notified it at least three times that the bankruptcy
25 had been reinstated. Moreover, as a creditor and participant in the bankruptcy
26 proceedings, the Court is confident Defendant received notice from the
27 Bankruptcy Court that the dismissal was vacated; it would have been put on notice
28 to accept the payments, regardless of whether the Trustee notified it that this was

1 the case. There is nothing in the record to suggest why Defendant failed to accept
2 the payments. A reasonable jury may infer that Defendant was negligent in
3 handling the Trustee's and Plaintiff's payments. Or, it may infer that Defendant
4 intentionally refused the payments so it could foreclose on Plaintiff's home. A
5 reasonable jury may conclude that having a Notice of Default posted on a house,
6 even though the homeowner was making payments toward the mortgage, would
7 cause emotional distress.

8 Consequently, a reasonable jury could find as outrageous Defendant's
9 conduct in rejecting payments at the same time it was proceeding with foreclosure.
10 Throughout the bankruptcy, Plaintiff paid over \$40,000 to Defendant. Yet, as
11 Plaintiff was on the verge of completing his bankruptcy plan, Defendant refused to
12 accept the payment and instead, proceeded to foreclose on the property, including
13 posting Notices of Default on Plaintiff's house.

14 Moreover, a reasonable jury could find that Defendant may have breach its
15 covenant of good faith and fair dealing when it failed to credit Plaintiff's mortgage
16 payments and continued to threaten foreclosure, especially in light of the efforts
17 Plaintiff and his bankruptcy attorney took to alert Defendant to the problem. As a
18 mortgage lender, Defendant has a duty of good faith and fair dealing to accurately
19 account for payments made on the mortgage, and not reject the payments in order
20 to proceed with foreclosure. Whether this happen is a question for the jury to
21 decide.

22 Finally, it will be up to the jury to determine whether Plaintiff's severe
23 anxiety, asthma, nervousness, depression, fear, and extreme emotional distress
24 were caused by Defendant's actions.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Defendant's Motion for Summary Judgment, ECF No. 25, is
27 **GRANTED**, in part, and **DENIED**, in part.

28 ///

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1 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
2 file this Order and provide copies to counsel.

3 **DATED** this 23rd day of July, 2014.



7 *Stanley A. Bastian*

8 **STANLEY A. BASTIAN**
9 United States District Judge