DA 19-0621

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 45

SLADE S. HOUSE,

Plaintiff and Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE MASTER ADJUSTABLE RATE MORTGAGES TRUST 2007-2; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, L.P. F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P.; RECONTRUST COMPANY, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; *et al.,*

Defendants and Appellees.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DA-12-467B
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Darrell S. Worm, Ogle, Worm & Travis, PLLP, Kalispell, Montana

For Appellees:

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Submitted on Briefs: June 24, 2020

Decided: February 23, 2021

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Slade S. House appeals the September 2019 judgment of the Montana Eleventh Judicial District Court, Flathead County, granting various mortgage lenders and trustees summary judgment on his asserted negligence claim and claim for breach of the implied covenant of good faith and fair dealing. We address the following restated issues:

> 1. *Whether genuine issues of material fact precluded summary judgment on House's negligent loan servicing/administration claim?*
>
> 2. *Whether genuine issues of material fact precluded summary judgment on House's bad faith claim?*

We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In 2006, House applied for a refinancing loan from Countrywide Home Loans, Inc. (Countrywide) regarding his residential property near Bigfork, Montana. In November 2006, House and Countrywide closed on various loan documents (including a promissory note and Montana Small Tract Financing Act trust indenture,[1] *inter alia*) granting him a $440,000 adjustable rate interest-only loan, secured by the subject property. The trust indenture named Mortgage Electronic Registration Systems, Inc. (MERS) as nominee of Countrywide. In the midst of the subprime mortgage crisis in 2007-08, Bank of America, N.A. (BOA) acquired Countrywide in 2008 by purchase and merger with Countrywide's corporate parent. In May 2011, BOA formally acquired the House mortgage debt through

[1] See § 71-1-302, MCA, et seq.

a subsidiary on assignment from Countrywide/MERS and subsequently named ReconTrust Company, N.A. (ReconTrust) as the successor trustee under the trust indenture.[2]

¶3 The loan terms required scheduled interest-only payments, due on the first of each month, at an initial fixed rate through November 2009. Beginning on December 1, 2009, and on each December 1st thereafter, the terms provided for annual lender adjustment of the interest rate in accordance with a specified formula applied to the then-prevailing market rate. The loan documents expressly provided, *inter alia*, that any failure to timely pay "the full amount" of a scheduled monthly payment would, unless timely cured, constitute a default subjecting the borrower to acceleration of the loan and non-judicial foreclosure by trustee's sale. The loan documents further granted the lender discretion on a default to reject and return any payment insufficient to bring the loan current.

¶4 The trust indenture included, *inter alia*, a default escrow provision providing for a lender-administered escrow account, funded by an escrow add-in to the borrower's scheduled monthly payments under the promissory note, to serve as the fund from which the lender would pay required homeowners insurance premiums and assessed property taxes, *inter alia*. The terms of the indenture authorized the lender to calculate and assess, as part of the scheduled monthly loan payment due from the borrower, the monthly sums necessary to have sufficient advance funds in the escrow account for lender payment of escrow item costs when due. Under the terms of the note and default escrow provisions,

[2] BOA sold the House mortgage debt to U.S. Bank, N.A. (U.S. Bank) in May 2012 but continued to service the loan until November 2012.

the borrower's scheduled monthly loan payments thus included two components—the monthly interest due under the adjustable rate note and the monthly escrow add-in calculated and assessed by the lender. However, the loan documents also included an escrow waiver agreement (EWA) under which the lender waived enforcement of the default escrow provisions, conditioned on the borrower's timely direct payment of all escrow item costs when and where due. The EWA further conditioned the escrow waiver on the borrower, on the lender's request, timely providing "receipts evidencing" satisfaction of all escrow item obligations. When in effect, the escrow waiver effectively reduced the amount of the borrower's monthly loan payments by eliminating the escrow add-in component. In the event of an escrow item delinquency or lapse by the borrower under the waiver, the lender had the option under the EWA of revoking the waiver (*i.e.*, activating or re-activating the default escrow provisions), curing the delinquency or lapse, and then recouping that amount by charging it to the borrower's escrow account as "additional debt" due under the loan documents. The net effect of the adjustable rate note and trust indenture escrow provisions was that the total amount of House's scheduled monthly payment obligation was subject to frequent lender adjustment—annually under the adjustable rate note and, when in effect, periodically as necessary under the default escrow requirements.

¶5 In 2009, with the EWA escrow waiver in effect, House failed to pay the assessed second-half 2008 property taxes ($1,136.73) due on the mortgaged property on May 31, 2009. BOA accordingly notified him in writing in August 2009 of its intent to cure the

property tax delinquency and revoke the escrow waiver unless he timely provided proof of immediate payment of the delinquent property taxes. The notice further warned that activation of the default escrow requirements would "significantly increase" his monthly loan payments in order to reimburse BOA for payments made to cure the property tax delinquency and "to collect for upcoming tax bills." After House failed to act, BOA notified him in writing on October 28, 2009, that it had advanced funds to cure the property tax delinquency[3] and would thereafter enforce the default escrow requirements by:

> establish[ing] an escrow account for your loan to ensure the timely payment of future taxes. [Lender] will increase your monthly mortgage payment to fund the escrow account at a level sufficient to pay your property taxes on the next tax due date . . . [with the resulting new monthly payment amount to be reflected in] [y]our next monthly statement.

From that point forward, it is difficult to discern on the limited M. R. Civ. P. 56 record the actual amount of each of House's monthly payment obligations under the fluctuating annual interest rate and evolving escrow costs calculations made and assessed by BOA, particularly as applied as to the erratic and inconsistent payments made by House, the unexplained manner in which BOA accounted for them, and the resulting extent to which House was or was not in default at any given time.

[3] It is undisputed that BOA made a $1,207.10 property tax payment to cure the property tax delinquency in October or November of 2009.

¶6 It is undisputed, however, that House made no loan payment in December 2009.[4] It is further undisputed that BOA annually adjusted the interest component of his monthly payment obligation three times in the period at issue—from $1,970.83 to $1,283.33 for 2010, from $1,283.33 to $1,100 for 2011, and from $1,100 to $1,145.83 for 2012.[5] In accordance with its October 28, 2009 written notice, BOA paid House's delinquent property taxes in November 2009 and activated the default escrow requirements to recoup the 2009 tax payment and collect for future property tax costs in advance. Regardless of any confusion as to the fluctuating amounts of the monthly add-in, House was thus aware, no later than the monthly payment due January 1, 2010, that his total monthly payment obligation included two components—a base interest-only component calculated by BOA under the terms of the adjustable rate note and a property tax escrow add-in calculated and assessed by BOA under the default escrow provisions of the trust indenture.[6]

¶7 Apart from his apparent belated December 2009 payment in January 2010, House's loan statement indicates that he made a separate $1,300 payment on his January 2010

[4] He asserts, however, that he belatedly made the delinquent December 2009 payment in January 2010 in conjunction with an additional payment made toward his January payment obligation. His loan statement appears to support his assertion.

[5] However, how those adjusted interest-only components correlated to each monthly payment obligation under the loan documents, and the monthly payments made or missed by House thereunder, is unclear on the Rule 56 record.

[6] House's affidavit asserts, and his loan statement reflects, that BOA had earlier activated the default escrow requirement in mid-2009 to recoup required insurance payments made by BOA and to collect in advance for the costs of future insurance premiums. In addition to various assertions of error regarding BOA's handling of his property tax escrow item costs, House also asserts that BOA erroneously paid or credited him for escrow item insurance costs.

payment obligation.[7] He subsequently admitted, however, that the $1,300 payment did not account for the additional property tax escrow add-in due under his January 2010 payment obligation. House's loan statement indicates that he again made no payment in February 2010, but made a $2,600-plus payment in March 2010. By subsequent affidavit, he characterized the extraordinary payment as including a $1,300 interest-only installment for March and a $1,207.10 reimbursement for the property tax payment made by BOA in 2009. He asserts without support that BOA thereafter verbally agreed to reinstate the EWA property tax escrow waiver, thereby eliminating any property tax escrow add-in to his monthly payment obligation.

¶8 House's loan statement next indicates a $2,090.50 payment in April 2010, with $1,283.33 credited by BOA to his monthly interest-only obligation. The statement does not clearly indicate where BOA credited the balance of that payment. Further clouding matters, House asserts that a BOA representative called, apparently in April 2010,[8] and advised him to apply to BOA for a distressed loan modification under the federal Home Affordable Modification Program (HAMP).[9] He asserts that he subsequently applied for

[7] Even that simple fact, not disputed by BOA, is not entirely clear given that House's uninterpreted loan statement shows both "Regular Payments" and unexplained "Misc. Posting[s]."

[8] House's affidavit account of the call is facially ambiguous insofar that it asserts that the call occurred in April 2011, but then describes a subsequent BOA statement and related action in May and June 2010.

[9] HAMP was "a federal program introduced in 2009 in response to the subprime mortgage crisis." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 4, 390 Mont. 12, 407 P.3d 692. Its purpose was to assist qualified homeowners to avoid mortgage foreclosure by restructuring their monthly loan payments to more affordable levels. *Anderson*, ¶ 4; *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 11, 375 Mont. 38, 324 P.3d 1167. "The program require[d] participating loan servicers to

the loan modification, but "did not qualify because [he was] self-employed." He further asserts that, based on his failure to qualify for the loan modification, BOA advised him that "it had no choice but to reinstate [his property tax] escrow" requirement. With an insufficient balance indicated on his escrow account, BOA accordingly paid the property tax bill due on May 31, 2010, thus resulting in a negative escrow balance as indicated on House's loan statement. The statement further indicates, however, that BOA subsequently credited his escrow account for the May 31, 2010 tax payment on June 14, 2010.[10]

¶9 House's loan statement shows that he again made no loan payment in May 2010. It further indicates that he then made six payments of $1,544.71 in June through November 2010, with $1,283.33 credited by BOA each time to his monthly interest-only obligation. However, according to the loan statement, House made only two payments in the three-month period of December 2010 through February 2011, each in the amount of $1,497.73, with $1,283.33 credited by BOA to his monthly interest-only obligation. The statement indicates that he next made a $1,567.73 payment in March 2011, and a $1,497.73 payment

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execute a servicer participation agreement and service eligible loans according to a uniform modification process" prescribed by federal regulations. *Morrow*, ¶ 11. To qualify for a HAMP loan restructuring, homeowners had to "satisfy various threshold eligibility requirements and then make lower mortgage payments on a trial basis for three consecutive months." *Anderson*, ¶ 4. "Upon successful completion of the trial period, the [loan] modification [would become] permanent." *Anderson*, ¶ 4.

[10] It is not clear from House's affidavit if BOA credited his escrow account because had already paid the tax bill directly, or because he subsequently reimbursed BOA for doing so. His loan statement indicates similar escrow account activity regarding BOA property tax payments and escrow credits for the taxes due in October 2010 and May 2011.

in April 2011, with $1,283.33 credited by BOA to his monthly interest-only obligation in each case.

¶10 According to the loan statement, House made a $1,300 loan payment in May 2011, with $1,100 initially credited by BOA to monthly interest. However, BOA subsequently reversed the May payment as deficient and thereafter refused to accept any further payments on the loan. House asserts that he was "willing and able to make payments in the correct amount at all times after May 2011," and that BOA subsequently refused to accept an attempted $6,500 phone payment "of the estimated amount [he] owed."

¶11 In December 2011, the mortgage trustee (ReconTrust) issued a notice of trustee's sale for non-judicial foreclosure on House's property on the stated ground that he was in default due to failure to make sufficient payments for January 2011 and thereafter. The trustee later cancelled the sale, however, without explanation. On May 2, 2012, BOA issued a written "Reinstatement Calculation" notice informing House that, based on asserted payment deficiencies on 17 different monthly payment obligations, the amount due and owing to cure the default and obtain reinstatement of the loan was $25,840.66.

¶12 In August 2012, with no trustee's sale then pending, House filed a district court action against BOA, ReconTrust, and their predecessors in interest in which he ultimately asserted four distinct claims for compensatory and declaratory relief—negligent loan supervision/administration, breach of the implied contract covenant of good faith and fair dealing, anticipatory declaratory judgment that any subsequent trustee's sale would be procedurally invalid, and quiet title to the mortgaged property. The negligence claim

essentially alleged that BOA, "as [House's] lender and loan servicer," breached its legal duty:

> to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting[,] and servicing of loan records, [*inter alia*] including . . . accurate crediting of payments made.

The asserted bad faith claim distinctly alleged that BOA:

> did not act in good faith and did not deal fairly with [House under the loan and trust indenture terms] . . . when they refused to properly apply the payments to the loan and thereafter proceeded to foreclose on the [mortgaged property] and . . . refused to resolve the mistake [made by BOA] in an equitable fashion.

BOA subsequently sought summary judgment pursuant to M. R. Civ. P. 56 on the asserted grounds that: (1) the quiet title and anticipatory declaratory judgment claims were prematurely unripe; (2) BOA owed House no legal duty of care other than in contract under the terms of the loan documents; and (3) BOA properly administered the loan in accordance with the terms of the loan documents.[11] House conceded that the quiet title and anticipatory declaratory judgment claims were unripe, but asserted that a genuine issue of material fact, as to whether BOA advised him to skip a loan payment in order to apply for a HAMP-restructured loan, precluded summary judgment on the negligence claim. He

[11] As a seemingly distinct but nonetheless intermixed predicate for the bad faith claim, the amended complaint further alleged that the successor trustee (ReconTrust) and/or BOA further acted in bad faith by noticing a trustee's sale in 2011 based on House's allegation that BOA did not acquire the loan and mortgage by "valid[] and proper[]" assignment from Countrywide/MERS, and thus had no authority to appoint ReconTrust as the successor trustee or otherwise institute the sale. This additional assertion of bad faith went by the wayside below in the wake of House's subsequent discovery admission that BOA properly acquired the loan and his resulting failure to further contest the issue in opposition to BOA's motion for summary judgment.

asserted that a related genuine issue of material fact also remained, as to whether BOA properly refused to accept further loan payments after April 2011, thus similarly precluding summary judgment on the contract bad faith claim.

¶13 In September 2019, the District Court granted summary judgment to BOA across the board. The court granted summary judgment on the anticipatory declaratory judgment and quiet title claims based on House's concession that they were not ripe for adjudication under the circumstances. The court concluded on the negligence claim that, regardless of any alleged error by BOA in the servicing and administration of the loan, House failed to make a responsive factual showing sufficient to demonstrate a genuine issue of material fact as to whether BOA had a special fiduciary relationship with him which would give rise to attendant fiduciary duties. On the breach of the implied covenant of good faith and fair dealing claim, the court concluded that there was no genuine issue of fact that House was in default when BOA declined to accept further payment on his loan and that he further failed to make a responsive factual showing that BOA breached any applicable standard of commercial reasonableness under the terms of the contract documents and circumstances of record. House timely appeals.

STANDARD OF REVIEW

¶14 We review summary judgment rulings de novo for conformance to M. R. Civ. P. 56. *Alexander v. Mont. Developmental Ctr.*, 2018 MT 271, ¶ 10, 393 Mont. 272, 430 P.3d 90 (citation omitted). Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ.

P. 56(c)(3). A genuine issue of material fact is an issue of inconsistent fact, material to the elements of a claim or defense at issue, and not amenable to judgment as a matter of law. *Davis v. Westphal*, 2017 MT 276, ¶ 12, 389 Mont. 251, 405 P.3d 73 (citations omitted). The party seeking summary judgment has the initial burden of showing the complete absence of any genuine issue of material fact on the Rule 56 record and that the party is thus entitled to judgment as a matter of law. *Davis*, ¶ 12. The burden then shifts to the opposing party to either make an affirmative showing of the existence of a genuine issue of material fact on the Rule 56 record, or demonstrate that the moving party is not otherwise entitled to judgment as a matter of law on the facts of record not subject to genuine material dispute. *Davis*, ¶ 12 (citations omitted); *Phelps v. Frampton*, 2007 MT 263, ¶ 16, 339 Mont. 330, 170 P.3d 474; *Koepplin v. Zortman Min., Inc.*, 267 Mont. 53, 58, 881 P.2d 1306, 1309 (1994).[12] Mere denial, speculation or conclusory assertion, or subjective interpretation of an otherwise clear set of facts are insufficient to raise a genuine issue of material fact under M. R. Civ. P. 56. *Phelps*, ¶ 16; *Koepplin*, 267 Mont. at 61, 881 P.2d at 1311 (citing *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466-67, 830 P.2d 103, 105 (1992)). While it must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable inferences in favor thereof, *Weber v. Interbel Tel. Coop., Inc.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88, the court has "no duty to anticipate or speculate" regarding the existence of contrary material facts. *Gamble Robinson Co. v.*

[12] The Rule 56 record generally consists of "the pleadings, the discovery and disclosure materials on file, and any [supporting] affidavits." *See* M. R. Civ. P. 56(c)(3).

Carousel Properties, 212 Mont. 305, 312, 688 P.2d 283, 287 (1984). Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law subject to de novo review for correctness. *Davidson v. Barstad*, 2019 MT 48, ¶ 17, 395 Mont. 1, 435 P.3d 640 (citing *Ereth v. Cascade County*, 2003 MT 328, ¶ 11, 318 Mont. 355, 81 P.3d 463).

DISCUSSION

¶15 *1. Whether genuine issues of material fact precluded summary judgment on House's negligent loan servicing/administration claim?*

¶16 Negligence is a common law claim in tort, distinct from a claim for relief in contract. *Dewey v. Stringer*, 2014 MT 136, ¶¶ 8 and 22, 375 Mont. 176, 325 P.3d 1236; *Garden City Floral Co. v. Hunt*, 126 Mont. 537, 543-44, 255 P.2d 352, 356 (1953); *Maronen v. Anaconda Copper Mining Co.*, 48 Mont. 249, 262-64, 136 P. 968, 971 (1913); *Nelson v. Great N. Ry. Co.*, 28 Mont. 297, 311-12, 72 P. 642, 646 (1903). The essential elements of a negligence claim are: (1) a legal duty owed by the alleged tortfeasor to the claimant; (2) breach of that duty; (3) harm caused by the breach; and (4) resulting damages. *Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 278-79 (1989). The predicate legal duty for a negligence claim may arise from statutory or common law. *Maryland Cas. Co. v. Asbestos Claims Court*, 2020 MT 70, ¶ 26, 399 Mont. 279, 460 P.3d 882 (citations omitted). Apart from an applicable statutory duty, all individuals have a general common law duty to use reasonable care under the circumstances to avoid reasonably foreseeable risks of harm to the person or property of others. *Maryland Cas. Co.*, ¶ 26 (citations

omitted).[13] Within that framework, reasonable care is the general standard of care that arises when one owes a common law duty of care to another under the circumstances of a particular case. *Maryland Cas. Co.*, ¶ 26 (citations omitted). "Threshold questions regarding the existence and scope of [a common law] duty in a particular case are generally questions of law for judicial determination." *Maryland Cas. Co.*, ¶ 27 (citations omitted).

¶17 In the consumer mortgage loan context, "the nature of the relation between lender and borrower is generally a non-fiduciary, arms-length contractual relationship limited to express contract duties and the implied [contract] duty of good faith and fair dealing." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 10, 390 Mont. 12, 407 P.3d 692 (citing *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶¶ 34-35, 375 Mont. 38, 324 P.3d 1167); *Richland Nat. Bank & Tr. v. Swenson*, 249 Mont. 410, 418, 816 P.2d 1045, 1050 (1991) (internal citations omitted). Unless otherwise provided by contract, a lender generally has no duty to modify, renegotiate, waive, or forego enforcement of the terms of a mortgage loan in order to assist a borrower to avoid a default or foreclosure. *Anderson*, ¶ 10 (citing *Morrow*, ¶¶ 34 and 39). A lender may therefore refuse to do so for any legitimate business reason in accordance with the contract terms. *See Morrow*, ¶ 36. Alleged errors or omissions by a lender in the servicing or administration of a mortgage loan is thus generally

[13] As a threshold matter, "[o]ne generally owes a common law duty of care to another in a particular case only if the harm at issue is of a type reasonably foreseeable under the circumstances and, if so, imposition of such duty and liability comports with public policy under those circumstances." *Maryland Cas. Co.*, ¶ 27 (citations omitted).

compensable only in contract on a claim for breach of express contract terms or the implied covenant of good faith and fair dealing. *Anderson*, ¶ 10.

¶18 However, extraordinary circumstances or interaction evidencing a special relationship between a lender and borrower may nonetheless independently give rise to a special common law fiduciary duty of care owed by the lender to the borrower. *Anderson*, ¶ 11 (citations omitted). Due to the common disparity in pertinent knowledge and expertise between commercial lenders and residential mortgage loan borrowers, the otherwise arms-length relationship between a mortgage lender and homeowner may ripen into a special fiduciary relationship of trust and confidence, with attendant common law fiduciary duties, if the lender gives extraordinary advice, upon which the borrower reasonably relies, beyond that customary in arms-length lending and loan servicing transactions. *Morrow*, ¶¶ 34-36; *Lachenmaier v. First Bank Sys., Inc.*, 246 Mont. 26, 33, 803 P.2d 614, 619 (1990) (no fiduciary duty in commercial lending context where the lender does not provide extraordinary financial advice, the borrower does not rely on such advice, or the borrower acts on third-party advice such as that of legal counsel); *First Bank (N.A.) Billings v. Clark*, 236 Mont. 195, 208, 771 P.2d 84, 92 (1989) (fiduciary relationship between commercial lender and borrower requires proof that lender "act[ed] as a financial advisor in some capacity, other than that common in the usual arms-length debtor/creditor relationship, in addition to requiring a long history of dealings with the [lender]"), *overruled on other grounds by Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649 (parasitic emotional distress damages standard); *Deist v. Wachholz*, 208 Mont. 207,

217-18, 678 P.2d 188, 193-94 (1984) (existence of fiduciary duty to a loan customer depends on proof of a special relationship of trust, confidence, and reliance). *Accord Anderson*, ¶ 11 (citing *Morrow*). When a special fiduciary duty to a borrower arises under the extraordinary circumstances of a particular case, the ensuing question of whether the lender breached the duty is generally a question of fact based on the prevailing standard of care as established by expert testimony, any pertinent regulatory guidelines, and the pertinent facts of the case. *Anderson*, ¶ 12 (citations omitted). However, as pertinent here, merely offering, administering, or providing general information regarding program eligibility, requirements, or process for a distressed loan modification under the HAMP program is insufficient alone to give rise to a special fiduciary relationship or duty between a lender and borrower. *See Anderson*, ¶ 10 (citing *Morrow*, ¶¶ 34-40).[14]

¶19 In *Morrow*, prior to defaulting on their home mortgage loan, financially distressed homeowners applied to BOA for a HAMP loan modification. *Morrow*, ¶¶ 10-13. BOA preliminarily approved the application and, for over a year thereafter, accepted BOA-specified reduced mortgage payments from them. *Morrow*, ¶¶ 16-21. Upon further review, BOA later withdrew its preliminary loan modification approval and noticed the mortgaged property for foreclosure sale. *Morrow*, ¶ 21. The homeowners countered with

[14] *Inter alia*, HAMP guidelines recommended that lenders: (1) provide complete and accurate information to assist borrowers in understanding and avoiding confusion regarding HAMP services, processes, and requirements; (2) timely respond and resolve borrower inquiries and complaints; and (3) provide prompt eligibility determinations and notifications. *Morrow*, ¶¶ 40-41 (citing U.S. Treas. Dept. rules). However, though insufficient to give rise to an express or implied duty of care, pertinent HAMP guidelines may be relevant, *inter alia*, to the attendant standard of care owed under the duty and the alleged breach thereof. *Anderson*, ¶ 12 (citing *Morrow*, ¶ 39).

a lawsuit asserting various contract and tort claims against BOA including breach of contract, negligence, and tortious breach of the implied covenant of good faith and fair dealing, *inter alia.* *Morrow*, ¶ 22. The couple supported their claims with allegations that BOA: (1) advised them to intentionally skip loan payments to become eligible for the HAMP program; (2) subsequently advised them that they were "locked" for the loan modification subject only to execution of the transaction documents and their payment of the BOA-specified reduced loan payments on a trial basis; (3) advised them to ignore subsequent BOA loan default and acceleration notices in the interim; (4) later gave them written assurance that final approval was still pending and foreclosure would not occur as long as they continued to make the reduced trial payments; and (5) thereafter again advised them to continue to ignore subsequent BOA default and acceleration notices. *Morrow*, ¶¶ 14-21. However, the district court ultimately granted summary judgment to BOA on the asserted negligence claim on the grounds that the homeowners failed to make a factual showing sufficient to demonstrate the existence of a special fiduciary relationship between them and BOA under the circumstances. *Morrow*, ¶¶ 22-23. We later reversed, however, holding that a genuine issue of material fact remained as to whether the lender gave advice to the borrowers beyond that customary in arms-length lending and loan servicing transactions. *Morrow*, ¶¶ 32-42.[15]

[15] We held further that related genuine issues remained as to whether the advice given by BOA breached the applicable standard of care and whether the borrowers detrimentally relied on it in any event. *Morrow*, ¶¶ 32-42.

¶20 In contrast, in *Anderson*, a couple who lost their home to mortgage foreclosure later asserted various contract and tort claims against BOA on the asserted grounds that it caused them to default on their mortgage by granting preliminary approval of a HAMP loan modification (conditioned on them making only partial payments on their existing mortgage for 3-4 months) and repeatedly assuring that they qualified and that the conditional approval would preempt the then-scheduled foreclosure on their home. *Anderson*, ¶¶ 3-5. They further alleged, *inter alia*, that BOA strung them along by repeatedly losing or misplacing their loan application materials and thwarting their attempts to resolve the issue by requiring them to speak with bank representatives unfamiliar with the situation. *Anderson*, ¶¶ 16-17. However, as pertinent here, the district court dismissed the couple's asserted negligence claim on the ground that it failed to state sufficient facts that, if taken as true, would give rise to a special fiduciary relationship, and attendant fiduciary duties, between them and BOA. *See Anderson*, ¶¶ 6 and 17. We affirmed, holding that, unlike in *Morrow*, the negligence claim did not allege that the lender gave the couple "any advice beyond basic information about HAMP and whether they qualified for loan modification under the program," nor did it "allege or imply that [BOA] advised or otherwise induced them to default on their mortgage." *Anderson*, ¶ 17. We noted that the complaint allegations were "similarly devoid of any assertion" that the homeowners would have "timely cured their default and avoided foreclosure" but for "their reliance on the alleged bank error." *Anderson*, ¶ 17.

¶21 Here, unlike in *Morrow* and similar to the complaint allegations in *Anderson*, House has made no affirmative responsive factual showing sufficient to demonstrate that BOA gave him any extraordinary advice beyond that customary in typical arms-length lending and loan servicing transactions. His assertion that BOA "advised him to . . . skip a payment in order to qualify" for the HAMP program is unsupported on the Rule 56 record. His pertinent affidavit assertion merely states that:

> BOA . . . advised me to apply for the HAMP program. I now understand HAMP was a program to help homeowners get a modification of their loan. I applied and did not qualify because I am self-employed. . . . BOA [then] advised me that as a result of my applying it had no choice but to reinstate the escrow [requirement] and it paid the taxes due in May 2010.

House has thus made no record factual showing that BOA either advised him to skip a loan payment to qualify for a HAMP loan modification in 2010-11, or that it gave him any advice beyond basic information about HAMP program guidelines and whether he might qualify if he applied.[16] His out-of-context affidavit assertion that a BOA representative told him in 2010 to at least make a payment in the amount of $1,283.33 "no matter what" similarly falls short without more, even if taken as true. Nor has House made any affirmative factual showing that he would or could have timely cured any delinquency or

[16] In his affidavit in opposition to summary judgment, House asserts that, upon contacting "Countrywide and then BOA to re-negotiate my loan" in 2007-08, one of the three "loan specialists" he spoke with "advised [him] to fall 30 days behind on [his] mortgage" to qualify for "a special program they were recommending . . . that could help." He further explained, however, that, though he then "fell behind one month," he thereafter immediately "caught up with [his] payments" upon "[finding] out no such program was available." His affidavit assertions thus neither demonstrate any detrimental reliance on the advice allegedly received from Countrywide or BOA in 2007-08, nor that the alleged advice had any bearing on his subsequent failure to make required loan payments in 2010-11, even if taken as true.

default asserted by BOA but for his reliance on that cherry-picked statement. While we agree that various factual issues remain as to whether, when, and to what extent, if any, BOA may have erroneously given House conflicting or inaccurate information regarding his monthly payment obligations and loan status, those questions have no bearing on the limited Rule 56 record as to whether BOA gave him any special advice in 2009-11 beyond that customary in typical arms-length lending and loan servicing transactions, as required to give rise to a special fiduciary relationship and attendant legal duties. We hold that the District Court did not erroneously grant BOA summary judgment on House's asserted negligence claim.

¶22 2. *Whether genuine issues of material fact precluded summary judgment on House's bad faith claim?*

¶23 Implied by law in every contract is a covenant of good faith and fair dealing that requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Section 28-1-211, MCA;[17] *Story v. City of Bozeman*, 242 Mont. 436, 449-50, 791 P.2d 767, 774-75 (1990), *overruled in part on other grounds*, *Arrowhead School Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 54, 318 Mont 103, 79 P.3d 250 (in re liquidated damages). By definition, the implied covenant applies only in relation to the express terms of an underlying, independently enforceable contract. *Beaverhead Bar Supply, Inc. v. Harrington*, 247 Mont. 117, 124, 805 P.2d 560, 564 (1991). The covenant

[17] *See also* §§ 30-1-201(2)(u) and -203, MCA (UCC recognition of implied covenant of good faith).

derives from the "justified expectation" of each party "that the other will act in a reasonable manner in its performance or efficient breach." *Story*, 242 Mont. at 450, 791 P.2d at 775. The extent of the implied covenant thus depends upon the justified expectations of the parties under the circumstances of each particular case within the framework of the express contract terms. *Hardy v. Vision Service Plan*, 2005 MT 232, ¶ 13, 328 Mont. 385, 120 P.3d 402.

¶24 While the justified expectations of a party may not contradict or exceed the express terms of the contract, *Farris v. Hutchinson*, 254 Mont. 334, 338-39, 838 P.2d 374, 376-77 (1992), breach of the implied covenant of good faith does not require or depend on the breach of an express contract term. *Story*, 242 Mont. at 450, 791 P.2d at 775. Proof of an alleged breach of the implied covenant of good faith and fair dealing requires proof that the offending party acted under the contract terms in a manner that was a dishonest or unreasonable deviation from prevailing commercial standards of reasonableness in the trade, thereby denying the non-breaching party the benefit of the bargain. *See Story*, 242 Mont. at 448-50, 791 P.2d at 774-75. *Accord Phelps*, ¶ 29; *Hardy*, ¶ 13; *Weldon v. Montana Bank*, 268 Mont. 88, 94-95, 885 P.2d 511, 515 (1994). As a breach of the underlying contract from which it arises, a breach of the implied covenant is generally compensable only in contract by contract damages. *Hardy*, ¶ 13; *Story*, 242 Mont. at 450, 791 P.2d at 775.

¶25 However, a breach of the implied covenant of good faith and fair dealing is also independently compensable in tort, as a claim for tortious bad faith, if the subject breach

of the covenant occurred in the context of a special relationship between the contracting parties. *Story*, 242 Mont. at 451-52, 791 P.2d at 776 (prescribing general five-element test for existence of a special relationship). As a threshold matter here, House did not plead his asserted bad faith claim as a tortious bad faith claim, whether by nomenclature or stated constituent facts. For the same reasons that his asserted negligence claim was insufficient to withstand summary judgment, he has similarly failed to make a responsive Rule 56 factual showing sufficient to demonstrate a genuine issue of material fact as to whether BOA had a qualifying special relationship with him under the circumstances of this case. His asserted bad faith claim was thus insufficient to withstand summary judgment as a tortious bad faith claim regardless of outstanding issues of fact as to how BOA serviced his loan.

¶26 The lack of a qualifying special relationship for tort liability, however, does not necessarily preclude liability in contract for breach of the implied covenant of good faith and fair dealing. In that regard, House asserts that the District Court erroneously granted summary judgment because genuine issues of material fact remain as to whether he was actually in default when BOA refused to accept further payments on his loan in May 2011. He further asserts that related genuine issues of material fact similarly remain as to the correct amount of his monthly payment obligations for December 2009 and February 2010, as they relate to various miscellaneous postings indicated on his loan statement for those months. As a preliminary matter, we agree with House that questions of fact remain on the limited Rule 56 record as to the precise accounting of his total monthly payment obligations

under the contract documents and payments made in the period of January 2010 through May 2011. However, in addition to his discovery admission that the payments he made in early 2010 did not timely account for his monthly escrow add-in obligation after December 2009 and his failure to make a responsive showing that his $1,300 payment in May 2011 was not similarly deficient, House's loan statement clearly manifests that he made no timely "regular payment" in December 2009, no payment whatsoever in February 2010 and May 2010, and only two payments in the period of December 2010 through February 2011.

¶27 Despite lingering questions of fact regarding the monthly payment obligations calculated and assessed by BOA, and how it accounted for the inconsistent and erratic payments he did make in 2010-11, there is no genuine issue of material fact on the limited Rule 56 record provided that House was in default of his monthly payment obligations under the loan documents to some degree, albeit precisely indeterminable on this record, when BOA refused to accept further payments from him in May 2011.[18] He has further made no responsive factual showing in any event that, beyond possible administrative error, BOA serviced or administered his loan in any manner that was dishonest or not commercially reasonable in accordance with applicable standards and practices in the

[18] As recognized by the District Court, the fact questions lingering on the limited record here regarding BOA's accounting of the erratic and inconsistent payments made by House are further immaterial because no trustee's sale was pending of record at the time of judgment below, nor did his asserted contract bad faith claim, as pled and prosecuted, require or depend on a precise determination of each of his monthly payment obligations under the loan documents, a precise accounting of his erratic payments, or his resulting degree of default.

commercial home mortgage lending and servicing industry under similar circumstances. We hold that the District Court did not erroneously grant BOA summary judgment on House's asserted claim for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

¶28 On the limited Rule 56 record here, we hold that the District Court did not erroneously grant BOA summary judgment on House's asserted negligence and breach of the implied covenant of good faith and fair dealing claims. Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON