STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
Docket No. BCD-WB-RE-10-016

Camden National Bank,

Plaintiff

v.

DECISION AND ORDER
(Motions to Dismiss)

D & F Properties, LLC, et al.,

Defendants

This matter is before the Court on the motions to dismiss, filed pursuant to M.R. Civ. P. 12(b)(6), of Defendant Coastal Enterprises, Inc. (CEI) and Third-party Defendant Suzanne Umland, an officer employed by CEI. Through their motions, CEI seeks dismissal of the cross-claims asserted by Defendants D & F Properties, LLC, Dumont's Pit Stop, Inc., Duane J. Dumont, and Frances Dumont (Defendants), and Umland seeks dismissal of Defendants' third-party complaint.

In their cross-claims and third-party complaint, Defendants allege negligent misrepresentation (Count III), intentional misrepresentation (Count IV), breach of the duty of good faith and fair dealing (Count VI), tortious interference with contractual or other advantageous economic relations (Count VII), negligence (Count VIII), intentional infliction of emotional distress (Count IX), negligent infliction of emotional distress (Count X), vicarious liability (Count XI), and punitive damages (Count XII).

Background

Defendants assert as follows: In 2006, Plaintiff Camden National Bank (Camden National), CEI, and the Small Business Administration (SBA), through three loans, funded Defendants' purchase of commercial real estate in Monmouth. CEI loaned Defendants $89,000 to complete the purchase, which loan was secured by a third priority mortgage on the Monmouth property, a third security interest in the business assets of Pit Stop, Inc., an assignment of life insurance, and a third real estate mortgage on the personal residence of the Dumonts. In addition, Pit Stop Inc., Duane Dumont, and Frances Dumont personally guaranteed the debt.

In the summer of 2008, Defendants contacted Camden National about an additional loan to fund renovations on the Monmouth property. Third-party Defendant Diane McManus, a Camden National officer, arranged for a meeting at the property with Defendant Duane Dumont and Umland. At the meeting, Duane Dumont presented his plan for the renovations. According to Defendants, both McManus and Umland represented that they were on board with the proposed $200,000 renovations and financing.

Over the next several months, allegedly in reliance on the representations by McManus and Umland, Defendants prepared a formal business plan, arranged for the necessary surveys, and obtained planning board approval. Camden National issued a commitment letter on June 5, 2009 for the $200,000 loan, but, as a condition to the new loan, required that CEI subordinate its 2006 loan secured by the Monmouth property.

CEI learned of the commitment in mid-September, 2009. On September 25, 2009, Umland informed Defendants that for CEI to agree to subordinate its mortgage interest, CEI"s 2006 loan must be secured by the personal residence of the Dumont, rather than by the

Monmouth property. CEI also conditioned its agreement to subordinate on an updated title search and a new appraisal, the cost of which would be borne by the Dumonts. Defendants did not provide CEI with an appraisal, and CEI did not agree to subordinate the 2006 loan. Defendants closed their business on November 1, 2009.

Discussion

1. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted." *Shaw v. S. Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). When reviewing a motion to dismiss, this Court examines "the [pleading] in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quotation marks omitted).

In addition, each claim in a pleading must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." M.R. Civ. P. 8(a). "Where a Maine Rule of Civil Procedure is identical to the comparable federal rule, '[the courts] value constructions and comments on the federal rule as aids in construing our parallel provision.'" *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680 (quoting *Me. Cent. R.R. Co. v. Bangor & Aroostook R.R. Co., 395 A.2d 1107, 1114* (Me. 1978)) (emphasis added in *Bean*). Rule 8(a) is "practically identical to the comparable federal rule[]." *Id.*

Pleadings do not need to allege specific facts to survive a 12(b)(6) motion to dismiss unless required to do so by Rule 9(b). However, the United States Supreme Court recently observed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original) (citations omitted).

2. Negligent Misrepresentation and Intentional Misrepresentation (Counts III and IV)

In a claim for negligent misrepresentation, a party must allege that (1) the defendant supplied false information to the plaintiff; (2) failed to exercise reasonable care or competence in obtaining or communicating this information; (3) the plaintiff justifiably relied on this information; (4) to the plaintiff's detriment. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990) (adopting section 552(1) of the RESTATEMENT (SECOND) OF TORTS).

In their third-party complaint and cross-claims, Defendants identify the false or misleading statement as Umland's 2008 representation that CEI was "on board" with the proposal, and her 2009 statements regarding the conditions of the loan subordination. Although Defendants assert that the statements were false, Defendants do not articulate the manner in which they relied upon the alleged 2009 statements. Instead, Defendants merely make vague assertions of reliance.[1] Defendants cannot, therefore, prevail on a claim that is based on the alleged 2009 statements.

Defendants' claim can be construed, however, to allege (1) that Defendants considered the 2008 statement that CEI was "on board" to be a representation that CEI would subordinate its

[1] *See* Cross-claim ¶¶ 147, 166.

loan without condition, (2) that in reliance on the representation, Defendants took certain action (e.g., obtained surveys, prepared business plan), and (3) that when CEI imposed conditions that Defendants could not satisfy, Defendants were not at that point in a position to obtain alternative financing and were required to close their business. Given the standard that the Court must apply at this stage of the proceedings (i.e., view the pleading in the light most favorable to Defendants), the Court cannot conclude that Defendants have failed to state a claim for negligent misrepresentation. Because Defendants' fraud claim requires similar elements,[2] the Court also cannot conclude that Defendants have failed to state a claim for fraud.

3. Breach of the Duty of Good Faith and Fair Dealing (Count VI)

In Count VI, Defendants assert that "CEI and Umland had a duty to act in care, with honesty, good faith and with fair dealing in the commercial transactions with the Dumonts and in the performance or enforcement of all agreements and/or duties."[3] Defendants allege that they were harmed when CEI and Umland breached the duty by "unjustly denying, stalling and/or failing to timely agree" to subordinate the 2006 loan.[4]

Although Defendants do not assert whether the alleged duty arises under common law or the UCC, in their opposition to the motion to dismiss, Defendants argue that the claim is governed by the UCC. Because the sole security interest in personal property is CEI's third priority interest in the business assets of Pit Stop, Inc, Article 9-A of the UCC is the only provision of the UCC that could arguably apply. *See* 11 M.R.S. § 9-1109(1)(a) (2010) (stating the applicability of Article 9-A to transaction[s] . . . that create[] a security interest in personal

[2] A claim for fraud, or intentional misrepresentation, requires that a party allege that (1) the defendant made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of whether it is true or false; (4) for the purpose of inducing the plaintiff to act in reliance upon it; and (5) the plaintiff justifiably relied upon the representation as true and acted upon it to his or her damage. *See Flaherty v. Muther*, 2011 ME 32, ¶ 45, - A.3d ---, --- (citing *Me. Eye Care Assocs. P.A. v. Gorman*, 2008 ME 36, ¶ 12, 942 A.2d 707, 711).

[3] Cross-claim ¶ 189.

[4] Cross-claim ¶ 191, 193.

property or fixtures by contract"); 11 M.R.S. § 1-203 (2006) ("Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement"). Defendants, however, do not assert a claim based upon CEI's security interest in any personal assets. Instead, Defendants contend that CEI and Umland breached the duty of good faith by refusing to subordinate its loan and mortgage secured by the real property located in Monmouth. The duty imposed by the UCC is thus not applicable.

Furthermore, to the extent that Defendants' claim is based upon a common law implied duty of good faith and fair dealing, the claim fails. Maine has only recognized the existence of the implied duty of good faith and fair dealing in contracts in the limited circumstance of insurance agreements. *See Me. Farms Venison, Inc. v. Peerless Ins. Co.*, 2004 ME 80, ¶ 17, 853 A.2d 767, 770 (stating that "in every insurance contract an insurer owes a duty to act in good faith and deal fairly with its insured in the handling of insurance claims" (quotation marks omitted)). Significantly, Maine has not extended the duty to contracts generally. *See Black v. Black*, 2004 ME 21, ¶ 10 n.5, 842 A.2d 1280, 1285 (stating in dicta that "unlike Maine, Massachusetts recognizes an implied covenant of good faith and fair dealing in contracts"); *Niedojadlo v. Cent. State Moving & Storage Co.*, 1998 ME 199, ¶ 10, 715 A.2d 934, 937 ("We have had the opportunity to extend the implied covenant of objective good faith in contracts not governed by Maine's U.C.C. and we have specifically refused to do so." (citing *First N.H. Banks Granite State v. Scarborough*, 615 A.2d 248, 250 (Me. 1992))).

Even if the Court were persuaded to recognize a duty of good faith, as a review of the Restatement reveals, the duty would not be pertinent to the allegations made in this case. Section 205 of the Restatement (Second) of Contracts provides that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Notably, the

duty does not include the negotiation of contracts or the modification of an existing contract. Restatement (Second) of Contracts § 205 cmt.c (1981). Consistent with this principle, Defendants do not point to any case law in which the court imposed the duty of good faith and fair dealing outside of the context of the UCC. In fact, the sole case cited by Defendants, *Renaissance Yacht Co. v. Stenbeck*, 818 F. Supp. 407 (D. Me. 1993), provides "there is no general implied duty of good faith under Maine law that operates beyond the scope of the mandate of the Maine U.C.C. and the contractual relationship between an insurer and its insured on a policy of casualty insurance." *Id.* at 412; *accord Camden Nat'l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶ 18, 952 A.2d 213, 218 (explaining that there is no implied duty of good faith and fair dealing in a mortgagee-mortgagor relationship because it is not governed by the UCC).

In short, because Defendants rely on the UCC, which is inapplicable in this case, and because Maine law does not impose duty of good faith that would govern the facts of this case, Defendants cannot maintain the claim asserted in Count VI.

4. Tortious Interference with Contract or Advantageous Business Relations (Count VII)

Defendants assert that Umland's representation that she would not agree to the subordination constitutes fraud, intimidation, and/or undue influence that prevented Defendants from receiving funding from Camden National, and that through this statement, Umland interfered with the Dumonts' prospective economic advantage with Camden National and McManus.[5]

"Tortious interference with a prospective economic advantage requires a plaintiff to prove: (1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such

[5] Cross-claim ¶¶ 195-99.

interference proximately caused damages." *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 31, 915 A.2d 400, 408 (quoting *Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d 1104, 1110). Because Defendants allege an interference through Umland's specific statements, allege that the statements were fraudulent or intimidating, and allege that Umland's conduct proximately caused damage, Defendants have satisfied the minimal pleading requirements for such a cause of action.

5. Negligence (Count VIII) and Negligent Infliction of Emotional Distress (Count X)

Defendants assert that CEI and Umland owed a duty of care based on the parties' banking and lending relationship.[6] Because Defendants do not assert that they had a fiduciary or other special relationship with CEI or Umland, Defendants' claim is based solely on the lender-borrower relationship. The Law Court has never recognized a duty of care based solely on the lender-borrower relationship. *See Camden Nat'l Bank*, 2008 ME 113, ¶ 11, 952 A.2d at 216 (noting that a "mortgagee-mortgagor relationship does not, without more, create a duty of care between a bank and a customer"); *Morris v. Resolution Trust Corp.*, 622 A.2d 708, 711-12 (affirming a jury verdict for breach of fiduciary duty between a bank and lender when the evidence supported the finding of a special relationship). In addition, case law from other jurisdictions suggests that there is no generalized duty of care based on the lender-borrower relationship. *See, e.g., Das v. Bank of Am., N.A.*, 112 Cal. Rptr. 3d 439, 450 (Cal. Ct. App. 2010) (stating that "for purposes of a negligence claim, as a general rule, a financial institution owes no 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" (quotation marks omitted)); *Greene v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992) (stating that in the absence of a fiduciary relationship, "a bank and a depositor have a debtor-creditor relationship with no

[6] Cross-claim ¶ 202.

independent duty of care imposes on the bank"). Because Defendants have alleged a relationship that does not generate a duty of care, Defendants cannot prevail on their negligence claim.

Similarly, without a special relationship between the Dumonts and CEI and Umland, Defendants cannot sustain their claim for the negligent infliction of emotional distress. The Law Court has "recognized a duty to act reasonably to avoid emotional harm to others in very limited circumstances: first, in claims commonly referred to as bystander liability actions; and second, in circumstances in which a special relationship exists between the actor and the person emotionally harmed." *Curtis v. Porter*, 2001 ME 158, ¶ 19, 784 A.2d 18, 26. The facts alleged in this case do not support a claim based on either theory.

6. Intentional Infliction of Emotional Distress (Count IX)

In Maine, in order to prevail on an intentional infliction of emotional distress claim, a Plaintiff must prove that:

> (1) the defendant engaged in intentional or reckless conduct that inflicted serious emotional distress or would be substantially certain to result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable; and (3) the plaintiff suffered serious emotional distress as a result of the defendant's conduct.

Botka v. S.C. Noyes & Co., 2003 ME 128, ¶ 17, 834 A.2d 947, 952 (citing *Curtis v. Porter*, 2001 ME 158, ¶ 10, 784 A.2d 18, 22-23). Under this formulation, "[s]erious emotional distress means emotional distress, created by the circumstances of the event, that is so severe that no reasonable person could be expected to endure it." *Id.*

Defendants allege that: 1) CEI and Umland intentionally or recklessly inflicted emotional distress on the Dumonts; 2) CEI and Umland's "actions were so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious an utterly intolerable in a civilized community"; and 3) those actions caused the Dumonts "emotional distress, so severe

that no reasonable person could be expected to endure it."[7] These assertions, when viewed in the light most favorable to the Defendants, are sufficient to survive a motion to dismiss.

7. Vicarious Liability and Punitive Damages (Counts XI and XII)

CEI alleges that because Defendants have not pled actionable tortious conduct on the part of Umland, the claim against CEI for vicarious liability should also fail. Vicarious liability, however, is not an independent cause of action. "Vicarious liability refers to the imposition of liability on a defendant for a tort committed by another." Simmons, Zillman, & Gregory, Maine Tort Law § 16.02 at 524 (1999 ed. 1999). Because any liability of CEI is premised on the acts of Umland on behalf CEI, vicarious liability has been incorporated into each tort count that survives the motion to dismiss.

The analysis on the claim for punitive damages is similar. A party may recover punitive damages only when the party is awarded compensatory damages for tortious conduct. *See Jolovitz v. Alfa Romeo Distribs. of N. Am.*, 2000 ME 174, ¶ 11, 760 A.2d 625, 629. Although often plead as a separate count, the claim for punitive damages is more properly incorporated in the request for relief in each tort claim. Should Defendants ultimately prevail on any one of their remaining tort claims, they would be entitled to recover punitive damages provided they were able to prove malice. *See Morgan v. Kooistra*, 2008 ME 26, ¶ 29, 941 A.2d 447, 455.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Court grants the Motion to Dismiss as to Counts VI, VIII, and X of the Cross-claim and Third-party Complaint. The Court, therefore, dismisses Counts VI, VIII and X of the Cross-claim and Third-party Complaint.

[7] Cross-claim ¶¶ 207-09.

2. To the extent that Defendants claims for negligent misrepresentation and fraud are based upon statements allegedly made in 2009, the Court grants the Motion to Dismiss as to Counts III and IV of the Cross-claim and Third-party Complaint. The Court otherwise denies the Motion to Dismiss as to Counts III and IV of the Cross-claim and Third-party Complaint.

3. The Court denies the Motion to Dismiss as to the remaining Counts of the Cross-claim and Third-party Complaint, provided that Counts XI and XII do not constitute separate causes of action, but are requests for relief that the Court incorporates into Defendants' substantive claims.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 5/3/11

Justice, Maine Business & Consumer Docket