



STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-RE-14-01

OCEANIC INN, INC. and ARMAND VACHON,)
)
Plaintiffs,)
)
v.)
)
SLOAN'S COVE, LLC,)
)
Defendant)
)
and)
)
PETER FESSENDEN, Chapter 13 Trustee, and JEFF CORBIN)
)
Parties-in-Interest)
)

ORDER ON MOTION TO DISMISS OF DEFENDANT SLOAN'S COVE

Pursuant to M.R. Civ. P. 12(b)(6), Defendant Sloan's Cove, LLC has filed a Motion to Dismiss most counts of the Complaint of Plaintiffs Oceanic Inn, Inc. and Armand Vachon, which Complaint alleges: 1) breach of contract (Count I); 2) breach of the duty of good faith and fair dealing (Count II); 3) tortious interference with prospective economic advantage (Count III); 4) slander of title (Count IV); 5) fraud (Count V); 6) negligent misrepresentation (Count VI); 7) violation of Maine's Uniform Fraudulent Transfer Act (UFTA), 14 M.R.S. §§ 3571-82 (2013), (Count VII); 8) violation of Maine's Unfair Trade Practices Act (UTPA), 5 M.R.S. §§ 205-A to 214 (2013), (Count VIII); 9) accounting (Count IX); 10) breach of fiduciary duty (Count X); and 11) negligent infliction of emotional distress (Count XI). The only count Defendants do not seek to dismiss is Count IX.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are drawn from Plaintiffs' complaint and are presumed to be true for the purposes of the motion. *See Johnston v. Me. Energy Recovery Co., Ltd. P'ship*, 2010 ME 52, ¶2, 997 A.2d 741. Armand Vachon is the principal and owner of Oceanic Inn, Inc., a Maine corporation. (Compl. ¶¶ 1-2.) Sloan's Cove, LLC, is a Maine limited liability company wholly owned by Pauline Beale, Vachon's sister. (Compl. ¶¶ 3, 9.) For several years, Vachon and Beale have been involved in litigation surrounding the probate of their mother's estate, of which Beale is the personal representative. (Compl. ¶¶ 10-15.) The relationship between brother and sister is contentious. (*See, e.g.*, Compl. ¶¶ 14-15, 24, 27.)

In 2006, Oceanic Inn executed a mortgage and note on its real property in Old Orchard Beach in favor of TD Bank. (Compl. ¶¶ 6, 39.) In 2009, TD Bank assigned the note and mortgage to Sloan's Cove pursuant to a settlement agreement to satisfy Oceanic Inn's debts. (Compl. ¶ 7.) The settlement agreement called for Oceanic Inn and Vachon to make interest only payments to Sloan's Cove for three years and then a balloon payment. (Compl. ¶ 8.) (Compl. ¶ 16.) All interest only payments were paid in a timely fashion to Sloan's Cove, but in November of 2012, Oceanic Inn and Vachon were unable to make the balloon payment when it became due. (Compl. ¶ 16.)

In December of 2012, Oceanic Inn filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and listed Sloan's Cove as its only secured creditor. (Compl. ¶¶ 17, 19.) The purpose of the filing was to invoke the automatic stay and allow Oceanic Inn time to formulate a plan to pay its debts without apprehension of foreclosure. (Compl. ¶ 18.) Oceanic Inn proposed a plan with the Bankruptcy Court to resolve its debt, but Sloan's Cove blocked the plan, and the case was ultimately dismissed. (Compl. ¶¶ 21-28.) Oceanic then attempted to

refinance its debt, but had difficulty obtaining a payoff amount from Sloan's Cove. (Compl. ¶¶30-35.)

On August 19, 2013, Sloan's Cove sent to Vachon a notice of sale of real estate pursuant to the mortgage and note granted by Oceanic to TD Bank and now held by Sloan's Cove. (Compl. ¶¶38-39.) The notice stated it was regarding Oceanic Inn and was addressed to Vachon, but sent to him at Oceanic Inn's address. (Compl. ¶38.) The sale was scheduled for September 13, 2013. (Compl. ¶36.) During the course of preparing for the auction, counsel for Sloan's Cove learned that since 2009, title to the real estate was held in the name of Vachon, not in the name of Oceanic Inn. (Compl. ¶¶41, 61.) The parties attempted to settle their disputes prior to the scheduled auction, but were unable to do so. (Compl. ¶¶37, 40-42.) Again, Oceanic Inn was unable to get accurate pay off amounts from Sloan's Cove until the one day before the auction. (Compl. ¶ 43.)

In an attempt to stop the auction, Oceanic Inn filed a second voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code, again listing Sloan's Cove as the only creditor, and alerting Sloan's Cove of the filing before the auction began. (Compl. ¶¶44-47.) Counsel for Sloan's Cove alerted the bidders at the auction that a bankruptcy case had been filed, but stated he anticipated he would be able to consummate a sale. (Compl. ¶48.) Plaintiffs allege the announcement had a chilling effect at the auction, at which Jeff Corbin was the highest bidder for \$455,000. (Compl. ¶50.) Sloan's Cove proceeded with the auction despite the bankruptcy filing because title to the property was held by Vachon, not Oceanic Inn. (Compl. ¶56.)

Plaintiffs assert that the notice of sale was insufficient to put Vachon on notice that his property would be sold because the notice only references Oceanic Inn's property. (Compl. ¶62.) Plaintiffs sought injunctive relief from the Bankruptcy Court to prevent Sloan's Cove

and Corbin from closing on the sale on this ground, but the Bankruptcy Court denied the motion for preliminary injunction. (Compl. ¶¶65-68.)

Plaintiffs filed suit in York County Superior Court on September 24, 2013. The case was approved for transfer to the Business and Consumer Docket on October 24, 2013.

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 Cmty. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). “The complaint is viewed ‘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.’” *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶6, 54 A.3d 710 (quoting *McCormick v. Crane*, 2012 ME 20, ¶ 5, 37 A.3d 295). “The purpose of a complaint in modern notice pleading practice is to provide defendants with fair notice of the claim against them.” *Shaw*, 683 A.2d at 503 (quotation marks omitted). “A complaint is properly dismissed when it is beyond doubt that the plaintiff is entitled to no relief under any set of facts that might be proven in support of the claim.” *Richardson v. Winthrop Sch. Dep’t*, 2009 ME 109, ¶5, 983 A.2d 400 (quotation marks omitted).

DISCUSSION

I. Breach of contract (Count I)

In this claim, Plaintiffs assert that Sloan’s Cove failed to hold a commercially reasonable auction and notice the sale of the property. (Compl. ¶¶70-71.) Sloan’s Cove asserts that these claims amount to a failure to comply with the foreclosure statute, not a breach of the contract. Although labeled as breach of contract action, the failure to comply with the notice provisions of 14 M.R.S. § 6203-A (2013) is a claim upon which relief can be granted. Accordingly,

Plaintiffs have alleged “facts that would entitle [them] to relief pursuant to some legal theory.” *Ramsey*, 2012 ME 113, ¶6, 54 A.3d 710 (quotation marks omitted).

II. Breach of the duty of good faith and fair dealing (Count II)

Plaintiffs allege that pursuant to Maine’s adoption of the Uniform Commercial Code (UCC) and the common law, Sloan’s Cove had a duty to act in good faith and deal with Plaintiffs in an objectively fair and commercially reasonable manner with respect to the note and mortgage. (Compl. ¶74.) Plaintiffs assert that Defendants breached this duty by refusing to submit accurate pay off information, failing to hold a commercially reasonable auction, and failing to properly notice the sale of the property. (Compl. ¶75.) The claim is thus premised on the sale of the real estate.¹

To the extent Plaintiffs rely on the UCC, this claim fails to state a cause of action. The relationship between Oceanic Inn and Sloan’s Cove “is that of a mortgagor to a mortgagee of real estate and is not governed by the Uniform Commercial Code.” *Camden Nat’l Bank v. Crest Constr., Inc.*, 2008 ME 113, ¶18, 952 A.2d 213; *accord* 11 M.R.S. § 9-1109(4)(k) (2013) (“This Article does not apply to . . . [t]he creation or transfer of an interest in or lien on real property . . .”). Because the UCC does not apply to the relationship, the implied covenant of good faith and fair dealing in UCC transactions does not apply.

To the extent Plaintiffs rely on the common law, the claim also fails to state a cause of action. The Law Court has declined repeatedly “to extend the implied covenant of objective good faith in contracts not governed by Maine’s U.C.C.” *Niedojadlo v. Cent. State Moving & Storage Co.*, 1998 ME 199, ¶ 10, 715 A.2d 934; *accord Crest Constr.*, 2008 ME 113, ¶18, 952 A.2d 213; *Haines v. Great N. Paper Inc.*, 2002 ME 157, ¶15, 808 A.2d 1246 (“We have declined to impose a duty of good faith and fair dealing except in circumstances governed by specific

¹ The mortgage at issue also granted a security interest in personal property to TD Bank (*see* Cummings Aff. Exh. 1), but there is no allegation regarding wrongdoing with respect to personal property.

provisions of the Uniform Commercial Code.”). Count II must be dismissed for failure to state a claim upon which relief can be granted.

III. Tortious interference with economic advantage (Count III)

Plaintiffs assert that Sloan’s Cove’s commencement of the power of sale foreclosure, the related publication of the notice of the sale, and conduct at the auction constitutes false statements concerning Plaintiffs that “wrongfully interfered with the Plaintiff’s existing or prospective contracts and/or economic advantage.” (Compl. ¶¶78-80.)

A claim for “[t]ortious 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 interference proximately caused damages.” *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶31, 915 A.2d 400 (quoting *Rutland v. Mullen*, 2002 ME 98, ¶13, 798 A.2d 1104, 1110). To interfere with the advantageous relationship by fraud, a plaintiff must also demonstrate (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 another party to act in reliance upon it; and (5) the other party justifiably relied upon the representation as true and acted upon it to the detriment of the plaintiff. *See id.* ¶14. Finally, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” M.R. Civ. P. 9(b).

Plaintiffs’ allegations fall short of these standards. Notably, Plaintiffs have failed to identify any false statement made by Sloan’s Cove that would induce a third party to rely upon the statement or any third party who did in fact rely upon the statement to Plaintiffs’ detriment. Count III accordingly will be dismissed.

IV. Slander of title (Count IV)

Plaintiffs assert that Sloan's Cove's commencement of the power of sale foreclosure, the related publication of the notice of the sale, appearance in bankruptcy proceedings, and conduct at the auction constitutes false statements concerning Plaintiffs' title to the property. (Compl. ¶¶ 83-85.)

“‘[S]lander of title’ is a form of the tort of injurious falsehood that protects a person's property interest against words or conduct which bring or tend to bring the validity of that interest into question.” *Colquhoun v. Webber*, 684 A.2d 405, 409 (Me. 1996). To make out a claim for slander of title requires allegations that: “(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.” *Rose v. Parsons*, 2013 ME 77, ¶ 13, 76 A.3d 343 (quoting *Colquhoun*, 684 A.2d at 409).

The only statements alleged to have been made by Sloan's Cove are 1) in the course of the first bankruptcy filing when Sloan's Cove stated that Oceanic Inn owned the property, and 2) at the auction when Sloan's Cove's counsel stated that Oceanic Inn had filed for bankruptcy. (Compl. ¶¶ 26, 48.) The latter statement is admittedly true, and the former statement has not been alleged to cause any actual or special damages to Plaintiffs. Count IV will accordingly be dismissed.

V. Fraud (Count V)

Plaintiffs' fraud claim is based on alleged false statements of material fact made by Sloan's Cove to Plaintiffs and failure to disclose material facts to Plaintiffs in connection with the foreclosure and auction. (Compl. ¶ 87.) More specifically, Sloan's Cove alleged “failure to

disclose the actual title holder of the property prior to auction and failure to give accurate pay off amounts prior to auction.” (Compl. ¶88.)

Typically, a fraud claim involves an affirmative misrepresentation of a material fact by the defendant to the plaintiff that the plaintiff justifiably relies upon to his or her damage. *See Flaherty v. Muther*, 2011 ME 32, ¶45, 17 A.3d 640. In this case, Plaintiffs have alleged fraud both affirmative misrepresentation and through omission. “When a plaintiff alleges a failure to disclose rising to the level of a misrepresentation, the plaintiff must prove either (1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose.” *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995). Plaintiffs’ fraud claim does not allege a special relationship,² and thus the Court focuses the “active concealment of the truth” prong, i.e. “steps taken by a defendant to hide the true state of affairs from the plaintiff.” *Kezer v. Mark Stimson Assocs.*, 1999 ME 184, ¶24, 742 A.2d 898. To prove fraud by active concealment, the defendant’s omission must be an omission of a material fact, and “the plaintiff must justifiably rely on the omission of the material fact” to his or her damage. *Id.* ¶26. Further, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” M.R. Civ. P. 9(b).

Plaintiffs’ fraud allegations fall short of these standards. The allegations amount to a bare recitation of the elements of the cause of action for fraud by affirmative misrepresentation; there is no reference to any steps taken to actively conceal information from Plaintiffs. Moreover, even the delay in receiving pay off information of the debt is not actionable because the absence of payout information is not a misrepresentation, and because Plaintiffs did not rely on the lack of information to their detriment. Because Plaintiffs have failed to allege facts that would constitute fraud, the Court must dismiss Count V.

² Plaintiffs have asserted a cause of action for breach of fiduciary duty, but as discussed later in this order, that cause of action fails for failure to state a claim upon which relief can be granted. *See* M.R. Civ. P. 12(b)(6).

VI. Negligent misrepresentation (Count VI)

Plaintiffs allege the same misrepresentations and omissions in their negligent misrepresentation claim as in their fraud claim. (Compl. ¶¶93-94.) Plaintiffs also assert they relied on Sloan's Cove's false statements regarding who owned the property in choosing to file a bankruptcy case for Oceanic Inn instead of Vachon. (Compl. ¶95.)

A claim for negligent misrepresentation requires allegations 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). "A person may justifiably rely on a representation without investigating the truth or falsity of the representation unless the person knows that the statement is false or the falsity is obvious." *Francis v. Stinson*, 2000 ME 173, ¶39, 760 A.2d 209.

Based on the allegations in the Complaint, it is less than clear upon what statement made by Sloan's Cove that Plaintiffs intend to rely in support of this cause of action. As with Plaintiffs' fraud claim the allegations amount to a bare recitation of the elements of the cause of action for negligent misrepresentation. To the extent that Plaintiffs assert that they justifiably relied upon a representation by Sloan's Cove regarding which of the Plaintiffs owned the real estate, such reliance is not justifiable. *Cf. Francis*, 2000 ME 173, ¶42, 760 A.2d 209 ("As a matter of general contract law, parties to a contract are deemed to have read the contract and are bound by its terms."). Accordingly, the Court will dismiss this count.

VI. UFTA violation (Count VII)

Plaintiff Vachon asserts that Sloan's Cove's sale of the property for an inadequate amount is a violation of UFTA. (Compl. ¶¶99-101.) Plaintiffs however misapprehend the nature of UFTA. UFTA provides a cause of action for a *creditor* when a debtor transfers property in an attempt to avoid paying his or her debts. *See* 14 M.R.S. § 3575(1). UFTA does not provide a cause of action for debtors, and Plaintiffs have failed to allege facts that would qualify them for relief pursuant to UFTA.

VIII. UTPA violation (Count VIII)

UTPA declares that “[u]nfair methods and unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful. 5 M.R.S. § 207. UTPA provides a cause of action for “[a]ny person who purchases or leases goods, services or property, real or personal, primarily for *personal, family or household purposes* and thereby suffers any loss of money or property, real or personal” as a result of unfair methods, acts, or practices. 5 M.R.S. § 213(1) (emphasis added).

Plaintiffs assert that Sloan's Cove violated UTPA “as a result of its actions and conduct and concealing of information in the foreclosure process” and that “Vachon is a consumer within the meaning of UTPA.” (Compl. ¶¶104-05.) Defendants assert, however, that the statute does not apply because this was not a consumer transaction. Rather, the note and mortgage were for commercial purposes, not for “personal, family or household purposes.”

The Law Court has not defined the scope of “personal, family or household purposes,” but has consistently referred to UTPA as a consumer protection statute. *See State v. Weinschenk*, 2005 ME 28, ¶11, 868 A.2d 200, 205 (“Maine’s UTPA provides protection for *consumers* against unfair and deceptive trade practices.” (emphasis added) (citation omitted)); *Jolovitz v. Alfa Romeo Distribs. of N. Am.*, 2000 ME 174, ¶9 n.1, 760 A.2d 625 (stating that the

UTPA “provides a private remedy to *consumers* of personal, family or household goods, services or property” (emphasis added); *Bangor Publ’g Co. v. Union St. Mkt.*, 1998 ME 37, ¶7, 706 A.2d 595 (explaining that unlawful practices under UTPA “must not be outweighed by any countervailing benefits to *consumers* or competition that the practice produces; and it must be an injury that *consumers* themselves could not reasonably have avoided” (emphasis added)); accord 5 M.R.S. § 214 (“Any waiver by a *consumer* of the provisions of this chapter . . . shall be void.” (emphasis added)). Moreover, the Law Court recently affirmed a trial court decision that concluded a transaction between two businesses was not protected by UTPA because the transaction was not primarily for personal purposes. See *Seacoast RV, Inc. v. Sawdran, LLC*, 2013 ME 6, ¶¶2, 5, 58 A.3d 1135.

Fairly read, Plaintiffs’ complaint portrays a commercial dispute between two business entities regarding a debt and resulting foreclosure of real estate. See *America v. Sunspray Condo. Ass’n*, 2013 ME ¶15 (analyzing substance of the overall complaint). The fact that Oceanic Inn is a family business does not alter that it is in fact a *business*. Vachon’s conclusory assertion that he is a “consumer” is insufficient absent any other allegations substantiating the nature of the note and mortgage as for “personal, family, or household purposes.” Accordingly, the Court will dismiss Count VIII.

IX. Breach of fiduciary duty (Count X)

Plaintiffs assert that Beale owes fiduciary duties to Vachon as the personal representative of the estate of Vachon and Beale’s mother, including the duty to account for disposition of assets, and this duty was breached by failing to keep Plaintiffs informed about the sale of the real estate. (Compl. ¶¶110-11.)

The Court does not question that a cause of action for breach of fiduciary duty can be brought by a beneficiary against a personal representative regarding distribution of estate

assets. “Personal representatives of an estate are fiduciaries, and pursuant to 18–A M.R.S. § 3-703(a) (2013), they must observe the same standards of care that apply to trustees of an express trust as set out in specified provisions of the Maine Uniform Trust Code. Among the standards of care that apply to personal representatives are the duties of loyalty and impartiality.” *In re Estate of Greenblatt*, 2014 ME 32, ¶12, -- A.3d ---.

Pauline Beale, however, is not a named defendant in this case.

“The salient elements of a” fiduciary or confidential relationship “are the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the action.” *Morris v. Resolution Trust Corp.*, 622 A.2d 708, 712 (Me. 1993) (quoting *Ruebsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975)). “Standing alone, a creditor-debtor relationship does not establish the existence of a confidential relationship. To demonstrate the necessary disparity of position and influence in such a bank-borrower relationship, a party must demonstrate diminished emotional or physical capacity or . . . the letting down of all guards and bars.” *Crest Constr.*, 2008 ME 113, ¶13, 952 A.2d 213 (quotation marks omitted).

As alleged, the facts in the complaint do not support a fiduciary or confidential relationship between Oceanic Inn and Sloan’s Cove because there is no facts to support a great disparity of position or the actual placing of trust in confidence by the Plaintiffs in Sloan’s Cove. Accordingly, the Court will dismiss the claim for breach of fiduciary duty.

X. Negligent Infliction of Emotional Distress (Count XI)

Finally, Plaintiff Vachon asserts a claim for negligent infliction of emotional distress based on Sloan’s Cove’s breaches of fiduciary duty. (Compl. ¶¶ 116-118.) 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 present dispute does not implicate the bystander line of cases. The Court has already stated that the complaint does not allege the elements of a special or confidential relationship, and accordingly, Vachon has failed to state a cause of action for negligent infliction of emotional distress. *See id.* ¶21, 784 A.2d 18.

CONCLUSION

Based on the foregoing, the Court GRANTS the motion to dismiss as to Counts II, III, IV, V, VI, VII, VIII, X, and XI, and DENIES the motion to dismiss as to Count I. The dismissal of the aforementioned counts is without prejudice, and Plaintiffs may move to amend their complaint should facts develop to support further theories through the course of discovery.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order into the docket by reference.

Dated: *April 2, 2014*



A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: *4/2/14*
Copies sent via Mail Electronically