STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS, *Plaintiff/Counterdefendant*, vs. **TIM F. RUPINSKI; TAMMY S. RUPINSKI; and John Does 1-10 as Occupants of the Premises located at 3665 West Evergreen Drive, Coeur d'Alene, Idaho, 83815,** *Defendants/Counterclaimants*.	Case No. **CV 2011 7061** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff Bank of New York Mellon's (BNY) Motion for Summary Judgment.

BNY filed its Complaint on August 31, 2011, seeking post-foreclosure eviction of defendants Tim and Tammy Rupinski (hereinafter collectively "Rupinskis"). Rupinskis were the owners of real property that they had borrowed upon in 2006, giving a promissory note and securing that note with a Deed of Trust to The Lending Connection, Inc. (Defendants' Answer, Affirmative Defenses, Counterclaims and Demand for Jury Trial, Exhibit A), also known as Encore Credit Corporation, (*Id.,* Exhibit B) which was later conveyed to Mortgage Electronic Registration, Inc. (MERS), (*Id.,* Exhibit B), and assigned again to Bank of New York Mellon (BNY). *Id.,* Exhibit D; Complaint, p. 2, ¶ 5; Answer and Counterclaim, p. 1, ¶ 1. BNY was the successful

bidder at a July 11, 2011, trustee's sale of the real property at issue, and was issued a Trustee's Deed. Complaint, p. 2, ¶ 5; Answer and Counterclaim, p. 1, ¶ 1. BNY alleges it was entitled to possession of the property ten days following the sale. *Id.,* ¶ 8. Following Rupinskis' failure to surrender the property, BNY filed suit August 31, 2011.

On November 30, 2011, Rupinskis filed their Answer, Affirmative Defenses, Counterclaims and Demand for Jury Trial. On January 6, 2011, BNY answered the counterclaims, and simultaneously filed its Motion for Summary Judgment and Affidavit of Derrick J. O'Neill (showing BNY as assignee of the Deed of Trust).

In its Motion for Summary Judgment, BNY seeks judgment on its claim for Rupinskis to surrender the subject property, "directing the sheriff of Kootenai County, Idaho to return possession of the premises to Plaintiffs/Counterdefendant", and dismissal of all counterclaims brought by Rupinksis. Memorandum in Support of Motion for Summary Judgment, p. 1. On March 6, 2011, Rupinskis filed their Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and the Affidavit of Tammy Rupinski. In their memorandum, Rupinskis concede summary judgment is appropriate with regard to their first and seventh counterclaims (First: "Plaintiff Lacks Statutory Authority to Maintain a Non-Judicial Foreclosure" and Seventh: "Trustee's Deed is Void for Failure to Fulfill the Statutory Requirements"), but argue the remaining state law claims (for: Second: specific performance; Third: equitable estoppel; Fourth: promissory estoppel; Fifth: fraud/misrepresentation and Sixth: breach of the covenant of good faith and fair dealing) remain. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, pp. 9-18. On March 13, 2012, BNY filed its Reply Brief in Support of Motion for Summary Judgment.

Oral argument was held on March 20, 2012. The motion for summary judgment is now at issue before the Court.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). A trial court's findings of fact will only be set aside if unsupported by substantial, competent evidence, i.e. if clearly erroneous. *Neider v. Shaw,* 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). The Supreme Court freely reviews questions of law. *Id.*

III. ANALYSIS.

As a preliminary matter, Rupinskis' Answer, Affirmative Defenses, Counterclaims and Demand for Jury Trial lists "specific performance" as the second cause of action. Answer, Affirmative Defenses, Counterclaims and Demand for Jury Trial , p. 10. Specific performance is an equitable remedy, not an independent cause of action. "The equitable remedy of specific performance of a contract is unique. A party seeking

specific performance must allege and prove that all conditions precedent to the other party's duty to perform have been satisfied." *Hinkle v. Winey,* 126 Idaho 993, 997, 895 P.2d 594,598 (Ct.App. 1995) (citations omitted). Rupinskis make no argument with regard to their claim for specific performance in their opposition to the motion for summary judgment. BNY is, without question, entitled to summary judgment on Rupinskis' "second" cause of action for specific performance as no entitlement to judgment on this equitable remedy is possible.

BNY argues the statute of frauds, as set forth in I.C. § 9-505, would bar any purported modification of a three-year loan to purchase real estate. Memorandum in Support of Motion for Summary Judgment, p. 6. BNY states no private cause of action for violation of the Home Affordable Modification Program (HAMP) exists where a lender fails to consider a loan modification application or fails to modify an eligible loan. *Id.,* citing *Marks v. Bank of America,* 2001 WL 2572988. And, BNY concludes, Rupinskis' attempt to characterize HAMP violations as causes of action for estoppel, fraud of breach of the covenant of good faith and fair dealing must also fail. *Id.*, pp. 6-7.

To these argument Rupinskis respond their claims are state law claims and do not seek relief under HAMP. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 9. Rupinskis argue the Bank of America [B of A] representative [as agent for BNY] "specifically told Rupinskis they needed to stop their loan payments and submit financial information as steps necessary to negotiate a loan modification." *Id.,* p. 12. Rupinskis posit B of A promised to consider them for loan modification if they took certain steps and then foreclosed based on facts that came to light only because of B of A's promise to negotiate if Rupinskis took certain steps. *Id.* This "promise" by B of A, upon which Rupinskis acted, forms the basis of Rupinskis' promissory estoppel,

equitable estoppel, quasi-estoppel, breach of covenant of good faith and fair dealing, and fraud arguments. *Id.,* pp. 12, *et seq.* Rupinskis also argue the statute of frauds would not bar their claims because the agreement at issue here was to negotiate a request for a loan modification in good faith, not a promise to loan money in excess of $50,000. *Id.,* p. 16. And, even if the agreement fell within the purview of I.C. § 9-505, Rupinskis argue the doctrine of part performance and equitable and promissory estoppel would bar BNY from raising the statute of frauds as a defense. *Id.*

In its reply, BNY clarifies the fact that no evidence is before the Court to demonstrate any specific promise was ever made to Rupinskis which would have induced them to cease making payments. Reply Brief in Support of Motion for Summary Judgment, pp. 3-5. For its fraud cause of action to stand, Rupinskis must support each element of fraud with particularity, which BNY states they have not done and cannot do. *Id.,* pp. 4-6. BNY argues Rupinksis' alleged reliance on a purported promise made to induce them into no longer paying their mortgage and a purported promise to postpone the sale are simply not borne out by the evidence. *Id.,* pp. 5-6. "Fraud is a serious allegation and it needs to be supported by specific facts." *Id.,* p. 6.

The timing of what occurred is important. On February 22, 2011, a Notice of Default was recorded as instrument 2303729000, Records of Kootenai County, Idaho. Defendants' Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial, p. 6, ¶ 19, Exhibit F. This Notice of Default was for Rupinskis' "failure to pay the monthly payment due on 11/01/2010 of principal, interest and impounds and subsequent installments due thereafter." *Id.* "As of 02/18/2011 this amount is $10,779.84…" *Id.*

On July 11, 2011, the day of the foreclosure, Rupinskis had at that time already been in default for nine months. On July 11, 2011, at 2:46 p.m., Tanesia Coleman

wrote an email in response to Tammy Rupinski: "I did put in a request for a postponement of your foreclosure and also your file has been sent to the underwriter." *Id.,* Exhibit H.

Here, fatal to each of Rupinskis' claims is the lack of an agreement between the parties. In *Lettunich v. Key Bank Nat'l Ass'n,* 141 Idaho 362, 109 P.3d 1104 (2005), the Idaho Supreme Court refused to apply the doctrine of promissory estoppel in a case where a bank declined to fund a buyer's purchase of cattle, even after the bank had issued a written commitment letter. The lack of an enforceable loan agreement also barred the cattle buyer from prevailing on his breach of the covenant of good faith and fair dealing claim. And despite the presence of a commitment letter in *Lettunich,* the Idaho Supreme Court determined the cattle buyer's reliance was not justified and therefore could not support a fraud claim. This Court finds there was much more of an "agreement" in *Lettunich* than there is in the present case.

Lettunich involved brothers in a cattle business partnership who agreed to dissolve that partnership. As part of that dissolution, the Court ordered the cattle be sold at auction. 141 Idaho 362, 364, 109 P.3d 1104, 1106. Edward Lettunich sought to resolve the dissolution by buying out his brother's partnership interest and approached Key Bank to secure a loan. *Id.* Key Bank's relationship manager Brian Faulks sent Edward Lettunich three separate commitment letters for each of the contemplated loans, each exceeding $50,000 (the threshold amount for agreements to be in writing under the statute of frauds, I.C. § 9-505(5)), one for real estate, one for cattle, and one for a line of credit. *Id.* The brothers failed to reach a buy-out agreement on the ranch and the deal fell through. 141 Idaho 362, 365, 109 P.3d 1104, 1107. The day before the court-ordered cattle sale, Edward Lettunich had a conversation with Faulks during

which "…Faulks and I decided that I should purchase cattle at the dispersion sale even though the ranch sale had fallen through." *Id.* "Faulks informed me that KeyBank would provide that financing for my purchase of cattle and subsequent cattle operations, and that I should move forward with my plan to purchase cattle at the sale because the cattle would be paid for with the KeyBank loan." *Id.* Edward Lettunich bought cattle that day. That evening, Faulks came to the ranch, and Edward Lettunich asked Faulks if he should continue to purchase cattle. 141 Idaho 362, 366, 109 P.3d 1104, 1108. "Faulks told me to 'keep going' and assured me that KeyBank would fund a term loan and operating line and that I should continue to purchase cattle at the sale." *Id.* Faulks assured Edward Littunich he should continue with the purchase and Key Bank would fund the term loan and operating line of credit. 141 Idaho 362, 366, 109 P.3d 1104, 1108. "[B]ased on this representation from Mr. Faulk, (sic) I [Edward Lettunich] continued to purchase cattle, ultimately buying over $400,000 in registered Angus cows." Several days after Lettunich bought the cattle, Key Bank wrote Lettunich, stating: "We have given your request careful consideration, and regret that we are unable to extend credit to you at this time". *Id.* Lettunich filed suit alleging breach of an oral agreement. *Id.* Key Bank was granted summary judgment by the District Court, which held the statute of frauds barred enforcement of the alleged oral contract, and both part performance by Lettunich and the doctrine of equitable estoppel did not prevent application of the statute of frauds. *Id.* The District Court also held an oral promise to loan was unenforceable and therefore the covenant of good faith and fair dealing did not apply. *Id.*

The Idaho Supreme Court affirmed. The Idaho Supreme Court found the three promises or commitments to extend credit, each over $50,000, was covered by the

statute of frauds and, since it was not in writing, was invalid. 141 Idaho 362, 367, 109 P.3d 1104, 1109. In the present case, BNY writes: "any modification of a 30-year loan to purchase real estate would have to be in writing pursuant to Idaho's statute of frauds as contained in Idaho Code § 9-505." Memorandum in Support of Motion for Summary Judgment, p. 6. Rupinskis do not dispute the application of the statute of frauds and its requirement that this agreement be in writing, and by inference Rupinskis accept that fact as they argue only exceptions to the statute of frauds (estoppel, misrepresentation, fraud, breach of covenant of good faith and fair dealing). In *Lettunich*, the Idaho Supreme Court found there were no exceptions to the statute of frauds (part performance and equitable estoppel) which would apply to permit enforcement of this otherwise invalid oral agreement. 141 Idaho 362, 367, 109 P.3d 1104, 1109. "To be specifically enforced by operation of the doctrine of part performance, an oral agreement 'must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty.'" *Id.*, citing *Bear Island Water Ass'n, Inc. v. Brown,* 125 Idaho 717, 723, 874 P.2d 528, 534 (1994).

The Idaho Supreme Court found there to be no "agreement":

> Even though it could be inferred that Lettunich partially performed by purchasing cattle at the sale, there is no evidence in the record of a complete and enforceable agreement. For example, there is no indication of the amount of the loan, the interest rate, the disbursement schedule, the terms of repayment, the security for the loan, or the parties' rights after default. While none of these terms individually may be determinative, the lack of all of them in this case makes the oral agreement to lend money vague, incomplete and unenforceable. Consequently, the doctrine of part performance does not apply to this case.

Id. In the present case, there is no indication of the amount of the loan to be modified, there is no indication as to the new interest rate, the terms of repayment, the number of

years, or the parties' rights after default of the new modified agreement. In *Lettunich,* the Idaho Supreme Court found that due to the lack of an agreement:

> For the same reason, the doctrine of equitable estoppel does not apply. Equitable estoppel assumes the existence of a complete agreement, which is lacking here.

Id. The Idaho Supreme Court also found promissory estoppel was simply a substitute for consideration, not a substitute for agreement among the parties. 141 Idaho 362, 367-68, 109 P.3d 1104, 1109-10. The Idaho Supreme Court found promissory estoppel's substitute for consideration might consist of a "detriment to the promissee or a benefit to the promisor", and "In this case, Lettunich clearly suffered a detriment when he purchased cattle without a way to pay for them." *Id.* Certainly, buying $400,000 in cattle with no way to pay for them is a detriment. And, while not on the same scale, forbearing on paying their loan could be a detriment to the Rupinskis. But that does not create an agreement. In the present case, just as the Idaho Supreme Court held in *Lettunich*:

> The doctrine of promissory estoppel is of no consequence in this case because there is evidence of adequate consideration. What is lacking is a sufficiently definite agreement.

Id. In *Lettunich*, the Idaho Supreme Court next held the implied covenant of good faith and fair dealing "arises only regarding terms agreed to by the parties." *Id., citing Taylor v. Browning,* 129 Idaho 483, 490, 927 P.2d 873, 880 (1996), in turn, citing *Idaho First Nat'l Bank v. Bliss Valley Foods,* 121 Idaho 266, 288, 824 Pl.2d 841, 863 (1991). Finally, the Idaho Supreme Court held there could be no fraud by Key Bank because Edward Lettunich knew the agreements had to be in writing, and he knew he did not have a written agreement. *Id.*

Here, there is simply no agreement. Rupinskis, as argued by BNY, have presented the Court with no evidence of a promise. That is, regardless of whether Rupinksis define the promise they allege to have received as one that BNY's predecessor (B of A) would negotiate a modification loan in good faith, or whether the promise was to make the modification loan outright if conditions precedent were met, there is no evidence before the Court to demonstrate any promise, any agreement, was ever made. The mere act of making application for a loan modification certainly imposes no duty upon BNY or its predecessor to *approve* the loan modification. And, as set forth in *Lettunich,* the covenant of good faith and fair dealing arises "only regarding terms agreed to by the parties." 141 Idaho 362, 368, 109 P.3d 1104, 1110, quoting *Taylor v. Browning,* 129 Idaho 483, 490, 927 P.2d 873, 880 (1000). The covenant of good faith and fair dealing requires parties to perform the obligations imposed by their agreement in good faith, but because no oral agreement existed between Lettunich and Key Bank, "there are no obligations imposed by the agreement that the parties are required to perform in good faith." *Lettunich*, 141 Idaho 362, 368, 109 P.3d 1103, 1110. The same applies in the present case. At the time Rupinskis submitted their application for a loan modification, no agreement between the parties had been reached which imposed any sort of requirement that BNY or its predecessors were required to perform in good faith. Similarly, to be enforced by part performance or the doctrine of equitable estoppel, a complete enforceable agreement is necessary. *Lettunich* requires: "part performance is best understood as a specific form of the more general principle of equitable estoppel" and "[t]o be specifically enforced by operation of the doctrine of part performance, an oral agreement 'must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of

being reduced to certainty.'" 141 Idaho 362, 367, 109 P.3d 1104, 1110. (citations omitted). Here, there was no definitive oral agreement. And, in any event, part performance would have required paying on the modified loan, not merely providing paperwork so that a loan modification decision could be reached.

For purposes of their promissory estoppel argument, Rupinskis are similarly in a position where they cannot demonstrate for the Court that there existed a complete promise to even be enforced here. What is lacking here, as had been lacking in *Lettunich,* is a "sufficiently definite agreement." *See, Lettunich,* 141 Idaho 362, 368, 109 P.3d 1104, 1110. And finally, in the absence of a writing, Rupinksis have not demonstrated for the Court the reasonableness of their reliance on any alleged promise made that a loan modification would be forthcoming. Any promise or commitment to lend money in excess of $50,000 must be in writing to satisfy the statute of frauds. I.C. § 9-505. Any alleged promise to consider approving an application for a loan modification is speculative and cannot amount to an agreement sufficiently complete, definite, and certain in all material terms, so as to entitle Rupinskis to the relief they seek. If a written letter of commitment, as in *Lettunich,* is insufficient for a grant of equitable relief, certainly a much more vague statement inviting Rupinskis to make application for a loan modification is insufficient for any relief here as well.

At oral argument, counsel for Rupinskis claimed BNY's predecessors at B of A promised Rupinskis they were entitled to cure their default up until the time of the sale, and that while B of A was working on the loan modification, the B of A agreed they would not foreclose on Rupinskis. Evidence of such "promise" is found nowhere in the documents submitted to the Court. Evidence of such "promise" is not even found in the evidence submitted by the Rupinskis regarding *verbal* conversations. Tammy Rupinski states that sometime in May 2011, apparently some unidentified person at B of A

verbally stated: "Bank of America assured me if I timely submitted the information requested that my loan modification request would be processed prior to any foreclosure." Affidavit of Tammy S. Rupinski in Support of Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 2, ¶ 5. That is *not* the same "promise" as put forth at oral argument by Rupinskis' attorney, that B of A promised Rupinskis that while B of A was working on the loan modification the B of A agreed they would not foreclose on Rupinskis. All Tammy Rupinski says is *someone* in: "Bank of America assured me if I timely submitted the information requested that my loan modification request would be processed prior to any foreclosure." *Id.* Assuming for the moment that this "someone" was a person within B of A authorized to make such a statement, *what does that statement mean*? What does "processed" mean? Does it mean the loan modification would be "processed" until either an acceptance or a denial? Does "processed" mean B of A will look at what Rupinskis submit and nothing more? Tammy Rupinski states that on May 20, 2011, she began the loan modification process with Taneisa Coleman at B of A. *Id.,* ¶ 7. On May 31, 2011, June 21, 2011, and June 29, 2011, at B of A's request, Rupinskis submitted additional information to B of A. *Id.,* p. 3, ¶¶ 8, 9, 10. Isn't the loan modification being "processed" by B of A at this time? Where was the promise by B of A to Rupinskis that "processed" meant a favorable loan modification decision?

What is entirely unclear is when Rupinskis knew that the foreclosure sale was going to be held on July 11, 2011. What is clear is that the Rupinskis knew before July 11, 2011, at least on July 8, 2011, as Tammy Rupinski wrote to Tanesia Coleman in an email on July 11, 2011, at 1:26 p.m.: "I have been waiting since Friday for a postponement to come through ReconTrust. Today is the sale date and I am at a loss."

Defendants' Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial, pp. 7-8, ¶ 25, Exhibit H. While it is unclear how much advance notice Rupinskis had as to the date of the foreclosure sale, that issue is also not relevant.

What is relevant, and dispositive, is the fact that there was no "agreement" between Rupinskis and BNY or its predecessor B of A. Because there was no agreement, there is no merit to Rupinskis' remaining causes of action (or affirmative defenses): Third: equitable estoppel; Fourth: promissory estoppel; Fifth: fraud/misrepresentation and Sixth: breach of the covenant of good faith and fair dealing. Because there was no agreement, Rupinskis are not entitled to a dismissal of the Complaint, Rupinskis are not entitled to an injunction preventing anyone from interfering with Rupinskis' right to quiet enjoyment of the real property, Rupinskis are not entitled to a declaration that the Trustee's Deed was void *ab initio*, and Rupinskis are not entitled to monetary damages to be proven at trial. Defendants' Answer, Affirmative Defenses, Counterclaim and Demand for Jury Trial, p. 14. Because there was no agreement, BNY is entitled to summary judgment on all of its claims. BNY is entitled to immediate possession of its property. The Court specifically finds this to be a commercial transaction under I.C. § 12-120(3), and further finds BNY to be the prevailing party. *Lettunich,* 141 Idaho 362, 368-69, 109 P.3d 1104, 1110-11.

At oral argument, counsel for Rupinskis claimed that BNY's misconduct here is exactly the type of conduct that caused the legislature to enact Idaho Code § 45-1506C. Even if that were true, that statute went into effect on September 1, 2011, after the foreclosure in the instant case. Such argument is simply not applicable.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiff Bank of New York's Motion for Summary

Judgment is GRANTED. Defendant Rupinskis' Counterclaims are DISMISSED with prejudice, and their Affirmative Defenses are without merit. Counsel for plaintiff Bank of New York shall prepare a judgment consistent with this memorandum decision and order.

IT IS FURTHER ORDERED this is a commercial transaction under I.C. § 12-120(3), and plaintiff Bank of New York is the prevailing party.

IT IS FURTHER ORDERED the trial scheduled for September 10, 2012, is VACATED.

Entered this 22nd day of March, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Derrick J. O'Neill	208-854-3998	Kenneth L.Huitt/Susan Weeks	664-1684

_____
Jeanne Clausen, Deputy Clerk