STATE OF IDAHO )
County of KOOTENAI )ss
FILED 12/4/18
AT 12:50 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**LISA MARIE RAMSEY,**

*Plaintiff,*

vs.

**JPMORGAN CHASE BANK, N.A. et al.,**

*Defendant.*

Case No. **CV 2018 2309**

**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS CHASE'S AND MERS'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT BRECKENRIDGE'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter is before the Court on Defendants', J.P. Morgan Chase Bank, National Association (Chase) and Mortgage Electronic Registrations Systems, Inc. (MERS), Motion for Summary Judgment filed on September 4, 2018. In response, Plaintiff Lisa Ramsey (Lisa) filed Plaintiff's Objection to Defendants' Motion for Summary Judgment on September 17, 2018. On September 26, 2018, Defendant-Counterclaimant Breckenridge Property Fund 2016, LLC (Breckenridge), filed a Motion for Joinder with Defendant Chase's Motion for Summary Judgment and Counterclaimant's Motion for Partial Summary Judgment on its claim against Lisa for unlawful detainer. On October 9, 2018, Defendant Sydney K. Leavitt also filed a Motion for Joinder in Chase's Motion for Summary Judgment. The hearing on these matters took place on Wednesday, October 24, 2018. At that end of that hearing, this Court took those matters under advisement. After considering each party's supporting memoranda, the evidence on record, and

relevant case law, for reasons discussed below, the Court grants Chase's and MERS's Motion for Summary Judgment. The Court also grants Breckenridge's Motion for Partial Summary Judgment.

In April of 1991, prior to her marriage to Walter Ramsey (Walter), Lisa – then Lisa Davis – purchased the property located at 4405 N. Holmes Road, Coeur d'Alene, Idaho, 83815 (the Property). Aff. of Lisa Ramsey in Supp. of Pl.'s Obj. to Defs.' Mot. for Summ. J. (Aff. of Lisa Ramsey), ¶ 4. In 1994, Lisa married Walter and they resided together on the Property. Pl.'s Am. Compl., Ex. 13. In 2005, Hazel Ramsey (Hazel), Walter's mother, moved into the home of Lisa and Walter. *Id.* On March 23, 2006, by way of quitclaim deed, Lisa conveyed her sole interest in the Property to Hazel, Walter, and herself to be shared equally. *Id.* at Ex. 1, p. 18. Thereafter, a decision was made to refinance the Property through Cherry Creek Mortgage Co., Inc. (Cherry Creek). *Id.* at 3, ¶ 17; *see also id.* at Ex. 13. On April 14, 2006, Hazel entered into an agreement with Cherry Creek whereby Hazel received a $135,000.00 loan in exchange for her promise to make monthly payments, plus interest, toward the loan amount until it had been paid in full. *Id.* at Ex. 1, p. 1.

The loan agreement between Hazel and Cherry Creek was set forth in a promissory note (Note) signed by Hazel. *Id.* at Ex. 1, p. 3. The Note provided Hazel with the title of "borrower." *Id.* The Note stated that if the full amount of each monthly payment was not made by the required due date, the Note would be in default. Pl.'s Am. Compl., Ex. 1, p. 2. The Note also stated that Hazel would be in default if the full amount of each monthly payment was not made by its due date, and that the Note Holder could – either then or at a later date – require the entire principal amount be paid in full immediately. Pl.'s Am. Compl., Ex. 1, p. 2. The Note also stated:

> If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations...is also obligated to keep all of the promises made in this this Note.

*Id.* Hazel's signature is the only signature present on the Note. *Id.* at Ex. 1, p. 3. The Note was secured by a Deed of Trust, recorded on April 21, 2006, which encumbered the Property. *Id.* at Ex. 1, p. 5. Under the Deed of Trust, Pioneer Title Company of Kootenai County (Pioneer) was the trustee and MERS was the beneficiary. *Id.* at Ex. 1, p. 4. In the definition section of the Deed of Trust, under the term "borrower," Hazel is listed first, followed by Walter and Lisa. *Id.* However, on the final page of the Deed of Trust, Hazel's signature line is the only one that contains the label of "borrower."[1] Pl.'s Am. Compl., Ex. 1, p. 16. Unlike the Note, Hazel, Lisa, and Walter all signed the Deed of Trust. *Id.* Section 13 of the Deed of Trust contains a provision which specifically addresses the rights and obligations of a person who signed only the Deed of Trust and did not sign the Note. *Id.* at Ex. 1, p. 12. The provision reads:

> [A]ny Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (e) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

*Id.* at Ex. 1, p. 12.

On September 10, 2006, Hazel passed away, but her name continued to remain on the Note. *Id.* at 4, ¶ 26. Lisa asserts that she immediately sent a copy of Hazel's death certificate to Washington Mutual, but she could not "get the bank to acknowledge

[1] The same label is present under the signature lines contained in the Federal Truth-in-Lending Disclosure Statement, as well as the First Payment Letter. Pl.'s Am. Compl. Ex. 1, p. 17; Decl. of Counsel

her death." *Id.* at Ex. 13. Lisa and Walter continued to make the required payments, but ceased making those payments on December 1, 2008.[2] Pl.'s Am. Compl., 4, ¶ 27. On March 5, 2009, Cherry Creek assigned the Deed of Trust to Chase, making Chase the Note Holder. Pl.'s Am. Compl., Ex. 2, p. 1.

On April 27, 2009, Lisa received a Notice of Default. *Id.* at 4, ¶ 28; *id.* at Ex. 12. Lisa asserts that upon receiving the Notice of Default, she immediately contacted Chase and made arrangements to pay the deficient amount. *Id.* at 4, ¶ 28. Approximately one year later, on April 22, 2010, and with the intent to cure the deficiency, Walter purchased a cashier's check in the amount of $8,375.46 and made it payable to Chase. *Id.* at 5, ¶ 29; *id.* at Ex. 4. The check was received by Chase on April 30, 2010, and deposited on May 25, 2010. *Id.* at Ex. 15, p. 37. However, Lisa adamantly claims she was never given credit for that payment. *Id.* at ¶ 30. Pursuant to this motion for summary judgment, Chase is not disputing that this payment was made or that the deficiency was cured by this payment. Reply Mem. in Supp. of Defs.' Mot. for Summ. J., 14; Hr'g on Defs.' Mot. for Summ. J., Oct. 24, 2018. On June 16, 2010, a second Notice of Default was mailed to the Property, addressed only to Hazel. Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. A. The Notice stated that the loan was currently in default, and as of the mailing date, the total amount past due under the terms of the loan totaled $4,179.92. *Id.*

On August 13, 2010, the Property was mistakenly foreclosed upon. *Id.* at Ex. 10. Lisa contacted Chase so she could make a payment on the Note, but Chase informed her that she was not authorized to make payments on the Note. *Id.* at ¶¶ 40–41. On August 19, 2010, Walter passed away. Pl.'s Am. Compl., ¶ 31. Shortly thereafter, Lisa sent the

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in Supp. of Defs.' Mot. for Summ. J., Ex. H.

[2] Numerous documents submitted to the Court by Lisa specifically state that she ceased making payments on December 1, 2008. However, a recently-submitted document states that she was mistaken – she actually ceased making payments on December 1, 2009. Suppl. Aff. of Pl. in Supp. of Ex Parte Mot.

death certificates of Hazel and Walter to Chase in an attempt "to get Chase to allow her to continue to make payments, but Chase never replied...nor allowed her to make payments toward the Note." *Id.* at ¶ 35. Lisa alleges that after receiving the death certificates of Hazel and Walter, Chase continued to refuse Lisa's payments on the Note. *Id.* at ¶ 36. Specifically, Chase informed Lisa that because she was not authorized on the loan account, she was not permitted to make payments toward the Note. *Id.* at ¶ 41.

On June 24, 2013, a Notice of Rescission of Trustee's Deed Upon Sale was recorded, rescinding the August 13, 2010, foreclosure and subsequent sale of the Property. Pl.'s Am. Compl., ¶ 51; *id.* at Ex. 12. The Notice stated that the foreclosure sale was conducted in error due to "a failure to communicate timely notice of conditions that would have warranted a cancellation of the foreclosure that did occur on 8-13-2010." *Id.* at Ex. 12. Once again, Lisa continued her efforts to communicate with Chase, requesting they add her as an authorized person on the account. *Id.* at 7, ¶ 53. On March 27, 2014, Chase acknowledged the death of Hazel and provided information to Lisa on how the name-change request on the loan could be completed; Lisa returned the requested documents to Chase about one month later, on April 21, 2014. *Id.* at ¶ 54, 56. However, unbeknownst to Lisa, on April 2, 2014, Chase filed a complaint for judicial foreclosure against Lisa, and an amended complaint for judicial foreclosure on April 24, 2014. Pl.'s Am. Compl, ¶ 57; Defs.' Mem. in Supp. of Mot. for Summ. J., 4; Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. B. Lisa failed to participate in the lawsuit, which resulted in a default judgment and the Note being declared to have been in default for approximately four years. Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. C. The default judgment was later set aside due to Lisa's counsel explaining that they did not participate in the lawsuit because relevant pleadings and other important

documentation pertaining to the lawsuit were misfiled. Defs.' Mem. in Supp. of Mot. for Summ. J., 4; *see* Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. D. Once again, Lisa contacted Chase and demanded that they accept payments on the Note. Pl.'s Am. Compl., 8, ¶ 65. Chase informed Lisa that she would need to show that Hazel and Walter's interest in the Property had passed to her, and that she otherwise had authority to assume the Note. Defs.' Mem. in Supp. of Mot. for Summ. J., 5; *see* Pl.'s Am. Compl., ¶¶ 65, 67–68.

On May 13, 2015, the Court issued a Decree Vesting Estate in Surviving Spouse, stating that Lisa was the sole heir or devisee of Walter. Pl.'s Am. Compl., Ex. 15, p. 43. On June 10, 2015, the Court issued a Determination of Heirs for Hazel's estate and concluded that Hazel intended for her interests in the Property to pass to Walter. *Id.* at Ex. 15, p. 40. With both estate actions completed, the Property was transferred to Lisa pursuant to a Grantor's Deed, dated June 30, 2015. *Id.* at 9, ¶ 69; *id.* at Ex. 15, p. 46.

On December 15, 2015, Chase informed Lisa that they would now allow her to assume the loan upon receipt and approval of her application. *Id.* at ¶ 74. On June 21, 2016, Lisa's loan assumption application was accepted by Chase. *Id.* The final step consisted of Lisa signing the Assumption and Modification Agreement (Agreement). The Agreement stated that the unpaid balance on the Note was now $186,962.55. Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. F. This increase in principal was based on the fact that no payments had been made on the Note since at least April 22, 2010, and since that time, Chase has been paying taxes and insurance in order to preserve its rights to the Property. Defs.' Mem. in Supp. of Mot. for Summ. J., 5, 9. However, Lisa refused to sign the Agreement and demanded she only be required to assume a balance of approximately $128,000.00 – the balance of the Note when Chase allegedly first began

rejecting Lisa's payments. Pl.'s Am. Compl., 10, ¶ 76. Lisa further demanded that Chase waive all interest, taxes, and fees that had accrued on the Note since 2010. *Id.*

After Lisa refused to assume the Note, Chase began foreclosure proceedings. *Id.* ¶ 78. In foreclosing on the Property, Chase asserts it has complied with Idaho's foreclosure statutes, including the applicable notice requirements. *See id.* at Ex. 16. On March 21, 2018, Breckenridge purchased the Property at a trustee sale. *Id.* ¶ 79. Lisa asserts that this ongoing situation has caused her to suffer constant stress, extreme anxiety, and severe depression. *Id.* at 5, ¶ 34; *id.* at 8, ¶ 59.

## II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
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> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

*Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d

475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

*Dunnick* at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

## III. ANALYSIS

The Court will first address Defendants' Motion for Summary Judgment, filed by Chase and MERS. The Court will next address Defendant-Counterclaimant's Motion for Partial Summary Judgment, filed by Breckenridge.

### A. Defendants' Motion for Summary Judgment

Lisa sets forth eight causes of action in her Amended Complaint: declaratory judgment, breach of contract, breach of good faith and fair dealing, equitable estoppel, wrongful foreclosure, injunctive relief, negligence, and intentional and/or negligent infliction of emotional distress. The Court will address each of them in that order.

#### *1. Declaratory Judgment*

Lisa first seeks declaratory judgment on two matters relevant to the foreclosure of the Property: (1) her obligation under the Note and Deed of Trust, and (2) whether the Note was in default.[3] Pl.'s Am. Compl., ¶¶ 84, 87. Lisa asserts that the Note

[3] Lisa also requests the Court clarify the exact amount remaining due on Hazel's loan before the sale of the Property took place. Pl.'s Am. Compl., ¶ 83. A detailed accounting of all payments made on the loan, as well as the interest, taxes, and fees that have accrued over the past eight years, would need to occur.

should not be in default because she attempted to make the required payments on the Note, but the payments were rejected by Chase. *Id.* at ¶ 84. Chase asserts that Lisa was not a borrower under the Note, and was therefore not personally obligated to make payments on the Note. Defs.' Mem. in Supp. of Mot. for Summ. J., 6. Chase further asserts that because no payments were made on the Note since April 22, 2010, the Note was in default, and was still in default at the time of the March 2018 sale of the Property. *Id.* at 8.

Declaratory judgment "is appropriate to declare 'rights, status, and other legal relations, whether or not further relief is or could be claimed.'" *Curtis-Klure v. Ada County Highway Dist.*, No. CVOC0716381, 2008 WL 8832970 (Idaho Dist. Feb. 22, 2008) (quoting Idaho Code § 10-1201). "[D]eclaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006) (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)) (internal quotations omitted). Additionally, a declaratory judgment action is "not a substitute for an action in tort and should not be used to determine if a party has been negligent[,] nor the amount of damages which would flow from such negligence." *Id.* (citing *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951)).

First, the Court will discuss Lisa's obligations under the Note and Deed of Trust. On April 14, 2006, Hazel received a loan in the amount of $135,000.00, as evidenced by the Note, and was given the title of "borrower." As stated above, Hazel was the only signatory to the Note. The Note specifically states that "[i]f more than one person signs this Note, each person is fully and personally obligated to keep all of the promises

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The Court has not received sufficient documentation that would allow it to make such a determination at this time.

made in this Note, including the promise to pay the full amount owed." Therefore, because Hazel was the only signatory to the Note, Hazel was the only party personally obligated to make payments on the Note. Because Walter and Lisa did not sign the Note, they were not personally obligated to make payments on the Note.

As further evidence that Hazel was the only borrower under the Note, the Note, Deed of Trust, Federal Truth-in-Lending Disclosure Statement, and First Payment Letter all contain the term "borrower" under Hazel's signature line. In each of those documents, the signature lines for Walter and Lisa do not contain that descriptor. Additionally, in the Stipulation and Order for Dismissal, filed on March 30, 2016, both Lisa and Chase agreed that Lisa was not a party to the Note. Therefore, it is clear that Hazel was personally obligated to pay the sum secured by the Note, while Lisa was not.

The Note was secured by a Deed of Trust, which encumbered the Property until the loan was fully satisfied. Section 13 of the Deed of Trust specifically states that a borrower who co-signed the Deed of Trust, but not the Note, was deemed a cosigner. The Deed of trust explained that a co-signer was not personally obligated to pay the sum secured by the Note. As previously stated, the signatories to the Deed of Trust were Hazel, Walter, and Lisa. Because Walter and Lisa co-signed the Deed of Trust, and did not execute the Note, their signatures on the Deed of Trust meant only that they were allowing their interest in the Property to be encumbered – nothing more.

Additionally, contained in the Deed of Trust under the definition of "borrower," Hazel, Walter, and Lisa are all listed. Lisa asserts that this means she was a borrower under the Note. However, though the particular language in Section 13 refers to borrowers who sign the Deed of Trust who do not also sign the Note, the language in Section 13 is quick to explain that people who fall into that specific "borrower" category are considered "co-signers." In other words, being labeled a borrower under the Deed

of Trust is the equivalent of being labeled a co-signer under the Deed of Trust. Therefore, the Court finds that Hazel, as borrower under the Note, was the only party personally obligated to pay the sum secured by the Note, while Walter and Lisa, as mere co-signers under the Deed of Trust, were not.

Second, the Court will discuss whether the Note was in default as it relates to the October 2017 Notice of Default and the March 2018 sale of the Property. In this regard, Lisa claims that she made payments on the Note, but Chase continuously rejected her payments. Lisa argues that if Chase had accepted her payments, the Note would not have gone into default, and the Property would not have been foreclosed upon. Based on the evidence contained in the record, the last payment made on the Note occurred on April 22, 2010, in the amount of $8,375.46. Chase received the payment on April 30, 2010, and deposited it on May 25, 2010. No evidence of any subsequent payments to Chase, in the form of a cashier's check receipt, cancelled checks, bank statements, or otherwise, has been submitted to the Court. Additionally, no evidence of any rejected or refused payments have been submitted to the Court. Therefore, because no payment has been made on the Note since April 22, 2010, the Court finds that the Note has been in default for approximately eight years.

### *2. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing*

Lisa next alleges breach of contract and breach of the implied covenant of good faith and fair dealing against Chase. These two separate causes of action will be analyzed together, as Lisa puts forth the exact same set of facts for each claim. Under the breach of contract action, Lisa claims she performed as required under the Note and Deed of Trust by making the required payments on the loan. Pl.'s Am. Compl., ¶ 90. Lisa alleges that Chase breached its contractual duty by later refusing to accept

those payments. *Id.* at ¶ 93. Lisa further alleges that Chase breached its contractual duty by proceeding with foreclosure of the Property, despite her having brought the Note current with the April 22, 2010, payment in the amount of $8,375.46. *Id.* at ¶¶ 94–5. Under the breach of the implied covenant of good faith and fair dealing action, Lisa does not provide the Court with specific information as to how or when this breach occurred. Lisa merely alleges that Chase's conduct constituted a breach of the covenant of good faith and fair dealing implied in the Note and Deed of Trust.

> The elements of a claim for breach of contract are as follows:
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> (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages. *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991) (plaintiff has the burden of proving the existence of a contract and the fact of its breach); *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985) (the damages recoverable must be caused by the breach); *Watkins Co., LLC v. Storms*, 152 Idaho 531, 539, 272 P.3d 503, 511 (2012) (the amount of damages must be proved).

*Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013). Additionally, good faith and fair dealing are implied obligations of every contract. *Luzar v. Western Surety*, 107 Idaho 693, 696, 692 P.2d 337,340 (1984). The implied covenant of good faith and fair dealing "requires that the parties perform, in good faith, the obligations imposed by their agreement, and a violation of the covenant occurs only when either party violates, nullifies or significantly impairs any benefit of the contract." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004). Further, a breach of the implied covenant of good faith and fair dealing does not occur when one party is "merely exercising its express rights under the...agreement." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991) (citing *First Security Bank of Idaho v. Gaige,* 115 Idaho 172, 176, 765 P.2d 683, 687(1988)). Lastly, "[n]o covenant will be implied which is contrary to the terms of

the contract negotiated and executed by the parties." *Id.* (citing *Gaige* at 176, 765 P.2d at 687).

First, the Court will discuss whether there existed a contractual relationship between Lisa and Chase under the Note and Deed of Trust. The Court has established that Lisa did not sign the Note, was not considered a borrower under the Note, and was not personally obligated to make payments on the sum secured by the Note. Further, evidence submitted by both parties indicates that Lisa was not authorized to make payments on the Note.[4] Based on this information, Lisa and Chase did not have a contractual relationship under the Note. Therefore, because the first element cannot be met, a breach of contract action will not succeed as it relates to the Note.

Next, the Court has established that Lisa was a co-signer to the Deed of Trust. As discussed above, the Deed of Trust contained a section explicitly stating that a co-signer was only conveying his or her interest in the Property and was not personally obligated to pay the sum secured by the Note. No other provision contained in the Deed of Trust pertained to a co-signer. Thus, while Lisa and Chase had a contractual relationship in the sense that she expressly allowed her interest in the Property to be encumbered by the Deed of Trust, Lisa and Chase did not have a contractual relationship under the Deed of Trust that would indicate Lisa was personally obligated to pay the sum secured by the Note. Therefore, a breach of contract action will not succeed as it relates to the Deed of Trust.

Further, even if a contractual relationship between Lisa and Chase could be established under the Note and Deed of Trust, which then obligated Lisa to make

[4] Evidence contained in the record, as well as statements made during oral arguments at the motion hearing on October 24, 2018, show that Chase worked with Lisa during the loan assumption process, but when it came time for Lisa to sign the Assumption and Modification Agreement, she declined to do so. Evidence contained in the record also shows that Chase was willing to decrease the total amount due on

payments on the Note, Chase did not commit a breach by exercising its right to foreclose on the Property. The Deed of Trust makes clear that if the borrower under the Note were to stop making the required monthly payments on the loan, the Note would be in default. If a default were to occur, the Property would be foreclosed upon, and the proceeds of the subsequent sale would be applied to the outstanding loan amount. Evidence contained in the record shows that no payment has been made on the Note since April 22, 2010, as the record is void of any documentation showing that a payment was made to Chase after that date. Therefore, because the Note was in default, Chase did not commit a breach by foreclosing on the Property, as Chase was simply exercising its express rights under the Note and Deed of Trust. Additionally, because Chase was merely exercising its express rights under the Note and Deed of Trust by foreclosing on the Property, a breach of the implied covenant of good faith and fair dealing did not occur.

In conclusion, the absence of evidence on multiple elements that Lisa would be required to prove at trial has been established. Therefore, there is no genuine issue of material fact as it relates to the breach of contract claim. Further, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on the breach of the implied covenant of good faith claim. Therefore, there is no genuine issue of material fact as it relates to that matter. Summary judgment will be granted in favor of Chase.

***3. Equitable Estoppel***

Lisa next alleges an equitable estoppel action against Chase. Lisa believed – based on Chase's representation – that she was a borrower under the Note. Pl.'s Am. Compl., ¶ 123. Lisa states that if the Court finds that she was not a borrower under the

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the loan, which would lower her monthly payments. Lisa declined this offer.

Note, then Chase's representation that she was a borrower was false. *Id.* at ¶ 124. Further, Lisa alleges that Chase either knew its representation of Lisa as a borrower was false, or acted with a reckless disregard as to the truth. *Id.* Lisa asserts that she relied on Chase's misrepresentation to her detriment, but does not provide with the Court with any further information. *Id.* at 15, ¶ 125. Lisa lastly asserts that Chase should be equitably estopped from any future attempts at foreclosure. *Id.* at 15, ¶ 27. Chase has consistently stated that Hazel was the only borrower under the Note, and argues that it has never represented to Lisa that she was a borrower under the Note. Defs.' Mem. in Supp. of Mot. for Summ. J., 7. Additionally, at the motion hearing on October 24, 2018, Chase pointed out that they did not draft the Note or Deed of Trust – Cherry Creek did. Therefore, any discrepancy caused by the language contained in either of those documents should not be attributed to Chase.

For equitable estoppel to be an appropriate remedy, the following elements must be present:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

*Ogden v. Griffith*, 149 Idaho 489, 495, 236 P.3d 1249, 1255 (2010) (quoting *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 126 Idaho 532, 534, 887 P.2d 1039, 1041 (1994)).

The Court previously found that Lisa was not a borrower under the Note, but merely a co-signer to the Deed of Trust. This conclusion was based on the specific language contained within the Note and Deed of Trust, the agreement contained in the Stipulation, and additional supporting documentation. Therefore, the Court finds that

the language contained in the above-mentioned documents do not represent Lisa to be a borrower under the Note.

Additionally, Lisa's own Amended Complaint contains specific statements showing that Chase knew Lisa was not a borrower under the Note. Paragraph 41 states that Chase informed Lisa that she was not an authorized person on the account and therefore they could not accept payments from her. Paragraph 54 states, "[o]n March 27, 2014, Chase acknowledged the death of Hazel Ramsey and provided an application for [Lisa] to begin the process of assuming the Note." Paragraph 65 states that Chase "informed [Lisa] that she would be required to probate the estates of Hazel and Walter in order to have authority to address the Note and assume the same." Paragraph 72 states that Chase informed Lisa that it would be "moving forward with [her loan] assumption application." Lastly, paragraph 74 states that Chase accepted Lisa's loan assumption application and thereafter sent the official assumption and modification agreement to Lisa for her to sign. These statements clearly show that Chase did not consider Lisa to be a borrower under the Note, and therefore did not falsely represent her as such. Because the first element of equitable estoppel cannot be met, the remaining elements also cannot be met. Therefore, the imposition of equitable estoppel is not appropriate at this time.

In conclusion, the absence of evidence on multiple elements that Lisa would be required to prove at trial has been established. Thus, there is no genuine issue for trial on the claim of equitable estoppel. Summary judgment is granted in favor of Chase.

***4. Wrongful Foreclosure***

Lisa next alleges that Chase's foreclosure of the Property was wrongful. Pl.'s Am. Compl., ¶ 137. Specifically, Lisa alleges that Chase failed to comply with Idaho

Code Section 45-1505(2) because Lisa asserts there has been no default on the loan.[5] *Id.* Chase argues that it fully complied with Idaho foreclosure laws as it relates to notice, foreclosure, and sale of the Property. Defs.' Mem. in Supp. of Mot. for Summ. J., 5, 10 –11; *see* Pl.'s Am. Compl., Ex. 16. Further, Chase makes clear that Lisa was provided the opportunity to assume Hazel's loan, but declined to do so. Therefore, foreclosure of the Property was proper in that respect, as well.

Idaho Code Section 45-1505 governs the foreclosure of a trust deed. This section states that a "trustee may foreclose a trust deed by advertisement and sale under this act" if the following four requirements are met. First, "the trust deed, any assignments of the trust deed..., and any appointment of a successor trustee" must be recorded in the mortgage records in the appropriate county. Idaho Code § 45-1505(1). Second, there must be "a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed..." Idaho Code § 45-1505(2). In other words, "there must be a default in order to sell the real property secured by a deed of trust." *Taylor v. Just*, 138 Idaho 137, 142, 59 P.3d 308, 313 (2002). Third, the three-part subsection discussing the notice requirement must be satisfied. It reads as follows:

> The trustee or beneficiary shall have **(a)** filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and **(b)** mailed a copy of such notice by registered or certified mail, return receipt requested, to any person

[5] Lisa also alleges that Chase failed to comply with Idaho Code Section 45-1502(3) based on the claim that she was not given credit for the payment made on April 22, 2010. *Id.* However, Section 45-1502 only provides definitions of common words used throughout Chapter 15. Specifically, Section 45-1502(3) provides readers with the definition of a "trust deed," and does not particularly relate to Lisa's claim. Therefore, the Court will not address Lisa's claim under this section.

> requesting such notice of record as provided in section 45-1511, Idaho Code. Service by mail in accordance with this subsection (3) shall be deemed effective at the time of mailing. **In addition**, the trustee shall mail the notice required in this section to any individual who owns an interest in property which is the subject of this section.[6]

Idaho Code § 45-1505(3) (emphasis added). Fourth, for the trustee to foreclose on the deed of trust by advertisement and sale, no action or lawsuit to recover the remaining debt could be ongoing. Idaho Code § 45-1505(4). If an action or lawsuit had previously been instituted, it must have been dismissed beforehand in order for the trustee to properly foreclose on the deed of trust. *Id.*

Chase has complied with all four of the requirements presented in Idaho Code Section 45-1505. First, the Notice of Default, dated October 17, 2017, which describes the Property, was recorded in the mortgage records in Kootenai County, the county where the Property is situated, on October 18, 2017. Pl.'s Am. Compl., Ex. 16, p. 1. The Deed of Trust, each assignment of the deed of trust, and each appointment of successor trustees have all been filed in Kootenai County, as well. *Id.* at Ex 1, p. 4; *id.* at Ex. 2, pp. 1–2. Second, it has been established that the Note was in default, and no payments have been made on the Note since April 22, 2010. Therefore, the second requirement of Section 45-1505 has been satisfied. Third, a notice of default containing each of the requirements in part three was properly filed in the office of the recorder in

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[6] The notice reads as follows:

> NOTICE REQUIRED BY IDAHO LAW
> Mortgage foreclosure is a legal proceeding where a lender terminates a borrower's interest in property to satisfy unpaid debt secured by the property. This can mean that when a homeowner gets behind on his or her mortgage payments, the lender forces a sale of the home on which the mortgage loan is based. Some individuals or businesses may say they can "save" your home from foreclosure. You should be cautious about such claims. It is important that you understand all the terms of a plan to "rescue" you from mortgage foreclosure and how it will affect you. It may result in your losing valuable equity that you may have in your home. If possible, you should consult with an attorney or financial professional to find out what other options you may have. Do not delay seeking advice, because the longer you wait, the fewer options you may have. Under Idaho law, you have five (5) days to rescind or undo certain contracts or agreements that relate to transferring interests in property or money in a foreclosure situation. An attorney or financial professional can tell you more about this option.

Kootenai County, and a copy of the notice was mailed to Lisa. Pl.'s Am. Compl., Ex. 16, p. 1–4. Therefore, the third requirement contained in Section 45-1505 has been satisfied. Lastly, the fourth requirement of Section 45-1505 has been satisfied because the prior action that was instituted to recover the debt secured by the deed of trust had been dismissed prior to issuing the notice of default. Decl. of Counsel in Supp. of Defs.' Mot. for Summ. J., Ex. B, C, D, E. Therefore, Chase has complied with Section 45-1505 in its entirety.

In conclusion, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on this matter. Summary judgment will be granted in favor of Chase.

***5. Injunctive Relief***

Lisa next alleges that she is entitled to injunctive relief against all named defendants. Pl.'s Am. Compl., ¶¶ 145–157. Lisa asserts that because Chase did not accept her payments, Chase is the root cause of the deficiency on the Note. *Id.* at ¶ 148. Based on that allegation, the sale of the Property should be set aside, and all defendants should be prohibited from making any future foreclosure attempts on the Property. *Id.* at ¶¶ 152, 154. Additionally, at the hearing on the motion for summary judgment, which occurred on October 24, 2018, Lisa argued that the sale should be set aside because Chase did not strictly comply with Idaho foreclosure laws. Hr'g on Defs.' Mot. for Summ. J., Oct. 24, 2018. Specifically, Lisa asserted that because Chase listed an inaccurate numerical amount on the Notice of Default, Chase failed to strictly comply with Idaho foreclosure laws; though Lisa did not point out which specific law Chase allegedly failed to comply with. *Id.* The inaccurate amount stems from Chase not providing credit to Lisa for the $8,375.46 payment made on April 22, 2010. *Id.*

Chase argues that the foreclosure sale was properly carried out and that it cannot be set aside. Defs.' Mem. in Supp. of Mot. for Summ. J., 10. Chase states that Lisa had proper notice of the foreclosure sale, as required under Idaho Code Section 45-1506. *Id.*; *see* Pl.'s Am. Compl., Ex. 16. Therefore, under Idaho Code Section 45-1508, the sale of the Property foreclosed and terminated all interest Lisa had in it. *Id.* Further, at the hearing on October 24, 2018, Chase argued that even if Section 45-1506 was not complied with, the sale of the Property is still valid and cannot be said aside because Breckenridge purchased the Property in good faith for value, pursuant to Section 45-1508. Hr'g on Defs.' Mot. for Summ. J., Oct. 24, 2018. The Court will first discuss whether the Notice of Trustee's Sale complies with the requirements set out in Section 45-1506. If it does not, the Court will next discuss whether the error will have any effect on the outcome of the trustee's sale that occurred March 21, 2018.

Lisa's Amended Complaint is void of any specific assertions alleging Chase violated Idaho Code Section 45-1506. However, because Section 45-1506 was specifically addressed by Chase and Breckenridge at the hearing on Chase's and MERS's Motion for Summary Judgment, the Court will briefly discuss the subsection relevant to the current issue. Section 45-1506(4) contains a list of six requirements that must be included in the notice of sale. The specific requirement at issue is part (e) – the sum owing on the obligation secured by the trust deed. Lisa's asserts that the amount contained in the Notice of Trustee's Sale is inaccurate, as it fails to reflect the $8,375.46 payment made by Lisa on April 22, 2010. Because Chase does not dispute that this payment was made on the Note, thereby agreeing that Lisa was not provided credit for the payment, the Court finds that the Notice of Trustee's Sale contains an inaccurate amount regarding the sum owing on the obligation secured by the Deed of Trust.

However, the inaccurate amount contained in the Notice of Trustee's Sale does not change the outcome of the trustee's sale that occurred on March 21, 2018. Idaho Code Section 45-1508 states:

> A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom **notice is given under section 45-1506**, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have **no right to redeem the property from the purchaser** at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, **any failure to comply with the provisions of section 45-1506**, Idaho Code, **shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale**, or any successor in interest thereof.

Idaho Code § 45-1508 (emphasis added). "[B]y its terms [Idaho Code Section 45-1508] only applies to sales challenged because of a failure to comply with the provisions of Idaho Code [Section] 45–1506."[7] *Taylor v. Just*, 138 Idaho 137, 142, 59 P.3d 308, 313 (2002). Breckenridge, Chase, and Lisa have all submitted to the Court evidence of the valid Notice of Default, Notice of Foreclosure, and Notice of Trustee's Sale provided to Lisa, in compliance with Sections 45-1505 and 45-1506. Pl.'s Am. Compl., Ex. 16, pp. 1–4. However, as established above, it has been determined that the Notice of Trustee's Sale contains an inaccurate amount in regards to the sum owing on the obligation. Section 45-1508 addresses the finality of a sale when provisions of Section 45-1506 are not fully complied with. Emphasized above, if there is a failure to fully comply with the provisions of Section 45-1506, that failure will not affect the validity of the sale in favor of a good faith purchaser for value.

[7] As discussed above, the record is void of any allegation that Chase specifically violated Section 45-1506. However, in the interest of justice, the Court is treating Lisa's allegation of noncompliance by Chase as if she had cited to Section 45-1506, as only it contains the provision that relates to Lisa's assertion that the amount contained in the Notice of Trustee's Sale is inaccurate.

Here, though there was a failure to comply with Section 45-1506(4)(e), as the amount printed on the Notice of Trustee's Sale was inaccurate, that failure will not affect the validity of the sale in favor of a good faith purchaser for value. The record is void of any allegation that Breckenridge was not a good faith purchaser, and evidence submitted by Breckenridge shows that it purchased the Property for value and obtained valid title to the Property. Therefore, the inaccurate amount contained in the Notice of Trustee's Sale does not have an effect on the outcome of the Trustee's Sale that took place on March 21, 2018 – the sale to Breckenridge remains final. Pursuant to Section 45-1508, Lisa's interest in the Property, covered by the Deed of Trust, was terminated by the valid sale of the Property to Breckenridge.

In conclusion, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on this matter. Summary judgment will be granted in favor of all named defendants.

***6. Negligence***

Lisa next alleges that Chase's rejection of payments toward the Note constituted negligence. Pl.'s Am. Compl., ¶ 159. Lisa further alleges that Chase had a duty to "not declare default and foreclose against the [P]roperty without [Lisa] failing to make the contractual payments." *Id.* Chase first points out that Lisa's allegations under this claim are the same allegations she asserted under the breach of contract claim. Defs.' Mem. in Supp. of Mot. for Summ. J., 13. Chase asserts that Lisa has failed to identify any legal duty owed to her by Chase that falls outside of the claim for breach of contract. *Id.* at 14.

In *Cumis Ins. Soc'y, Inc. v. Massey*, the Supreme Court of Idaho stated, "[a]lthough the breach of a contract does not itself give rise to an action sounding in tort, a legal duty independent from the contract may arise when one voluntarily undertakes

to perform an act." 155 Idaho 942, 948, 318 P.3d 932, 938 (2014) (citing *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008)). "The mere negligent breach or non-performance of a contract will not sustain an action sounding in tort..." *Baccus* at 350, 179 P.3d at 313 (quoting *Steiner Corp. v. American Dist. Telegraph*, 106 Idaho 787, 790, 683 P.2d 435, 438 (1984)). "Instead, 'active negligence or misfeasance is necessary to support an action in tort based on a breach of contract; mere nonfeasance, even if it amounts to a willful neglect to perform the contract, is not sufficient.'" *Id.* (quoting *Steiner Corp.* at 790, 683 P.2d at 438) (emphasis removed).

Here, Lisa has alleged the same facts against Chase under both the breach of contract action and this negligence action. It has been established that Chase did not have a contractual relationship with Lisa regarding the Note, as she was not personally obligated to pay the sum secured by the Note. Additionally, it has been established that the Note was in default, as the record is void of any documentation showing that a payment was made to Chase after April 22, 2010. Further, it has been established that Chase was merely exercising its express rights under the Note by foreclosing on the Property. Lastly, Lisa does not assert that Chase engaged in any "active negligence" separate and distinct from the breach of contract claim. Each allegation against Chase under the negligence claim is merely a repeat of the allegations made under the breach of contract claim. Based on this information, the Court need not perform an analysis of whether the elements of negligence can be satisfied.

In conclusion, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on this matter. Summary judgment will be granted in favor of Chase.

### *7. Intentional and Negligent Infliction of Emotional Distress*

Lisa next alleges both intentional and negligent infliction of emotional distress against Chase, arising from the allegation that Chase rejected payments made by Lisa. Pl.'s Am. Compl., ¶ 167. Lisa asserts that she was very worried about her child, who suffers from Asperger syndrome, and felt that an eviction would be extremely detrimental to him. *Id.* at ¶ 168. Stemming from the concern Lisa had about her son, Lisa alleges that she experienced extreme stress and severe depression, which ultimately led to an emotional breakdown. *Id.* at ¶ 169. Lisa does not elaborate on what her emotional breakdown consisted of. Chase asserts that Lisa's Amended Complaint does not contain any facts that could reasonably be regarded as sufficient enough to recovery for either type of emotional distress. Defs.' Mem. in Supp. of Mot. for Summ. J., 14.

To establish a claim of intentional infliction of emotional distress in Idaho, it is necessary for the plaintiff to show: (1) that the conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that there is "a causal connection between the wrongful conduct and the emotional distress;" and (4) that the emotional distress was severe. *Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003) (citing *Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 751 (1993)). The Court's focus is not on "whether distress was actually suffered by a plaintiff, but rather [on] the quantum of outrageousness of the defendant's conduct." *Id.* (citing *Brown v. Fritz*, 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985)). "Even if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of 'atrocious' and 'beyond all possible bounds of decency' that would cause an average member of the community to believe it was 'outrageous.'" *Id.* at 180, 75 P.3d at 741 (quoting

*Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 888 P.2d 1375 (Ariz.App.1994)). Further, "[w]here the defendant has done no more than to insist upon his rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress, liability for intentional infliction of emotional distress does not lie." *Id.* (citing Restatement § 46, comment g). Therefore, "[s]ummary judgment is proper when the facts allege conduct of the defendant that could not reasonably be regarded as so extreme and outrageous as to permit recovery for intentional or reckless infliction of emotional distress." *Id.* at 180, 75 P.3d at 741.

Here, the few facts presented by Lisa fail to satisfy the elements required to establish a claim of intentional infliction of emotional distress. Lisa has not provided any evidence showing that a payment was made after April 22, 2010, or that a payment was rejected by Chase. This could be shown by way of cashier's check receipt, cancelled checks, bank statements, or otherwise. Further, Lisa has not presented evidence showing that Chase's conduct at any point during the past eight years was in any way intentional or reckless. The facts presented in Lisa's Amended Complaint show that Chase actually worked with Lisa and aided her in the process of assuming the Note. *See supra* footnote 4 and accompanying text. When she ultimately declined to assume the Note, Chase merely exercised its express rights under the Note and Deed of Trust by pursuing with foreclosure of the Property. Therefore, the allegations made by Lisa do not come close to the level of "atrocious" and "beyond all bounds of decency" that would cause an average member of the community to believe it was extreme intentional or reckless conduct. In conclusion, summary judgment is proper because Chase's conduct could not reasonably be regarded as so extreme as to permit recovery for intentional infliction of emotional distress.

Additionally, in order for a plaintiff to recover damages for negligent infliction of emotional distress, he or she must show that some physical manifestation of injury accompanied the emotional distress. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 838, 801 P.2d 37, 45 (1990); *see also Gill v. Brown*, 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985). "It is beyond dispute that in Idaho[,] no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff." *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989) (citing *Hathaway v. Krumery*, 110 Idaho 515, 716 P.2d 1287 (1986)). The requirement that a physical injury be present alongside the emotional distress "is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined." *Id.* (citing *Hatfield v. Max Rouse & Sons Nw.*, 100 Idaho 840, 849, 606 P.2d 944, 953 (1980). In *Brown v. Matthews Mortuary, Inc.*, the plaintiff suffered from "a variety of physical symptoms including loss of sleep, headaches, and stomach pains." 118 Idaho 830, 837, 801 P.2d 37, 44 (1990). In *Czaplicki v. Gooding Joint School Dist. 231*, the plaintiffs "describe various emotional injuries that have manifested themselves in physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite." 116 Idaho 326, 332, 775 P.2d 640, 646 (1989). In both cases, the multiple physical manifestations described by each plaintiff were sufficient to prove a supplemental physical injury necessary to pursue the claim of negligent infliction of emotional distress. In contrast to *Brown* and *Czaplicki*, the plaintiff in *Summers v. Western Idaho Potato Processing Co.* sought damages for pain, suffering, mental anguish, and nervous shock. 94 Idaho 1, 1, 479 P.2d 292, 292 (1970). The Supreme Court of Idaho held that a plaintiff could not

recover for pure emotional distress absent an accompanying physical injury. *Id.* at 2, 479 P.2d at 293.

Here, Lisa's Amended Complaint has not provided the Court with a description of any physical symptoms that would accompany her emotional distress. Lisa provides that she has suffered from severe stress, depression, and mental anguish. Under *Summers*, these would not qualify as physical manifestations or physical symptoms. Acceptable physical symptoms that stem from emotional injuries include, but are not limited to, headaches, stomach pains, and loss of sleep. Therefore, Lisa has not provided the Court with sufficient factual allegations that she has suffered from some physical symptom that would entitle her to recover under the theory of negligent infliction of emotional distress.

In conclusion, the absence of evidence on multiple elements that Lisa would be required to prove at trial has been established. Therefore, there is no genuine issue of material fact as it relates to either emotional distress claim. Further, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on either emotional distress claim. Summary judgment will be granted in favor of Chase.

***8. Garn-St. Germain Depository Institutions Act of 1982***

Lastly, in the Objection to Chase's and MERS's Motion for Summary Judgment, Lisa argues that Chase – pursuant to the Garn-St. Germain Depository Institutions Act of 1982 (Act) – was required to inform her that she could assume the Note if she wished to do so. Pl.'s Obj. to Defs.' Mot. for Summ. J., 6. Lisa specifically states that when a borrower has passed away, leaving behind heirs, and the lender has been notified of the borrower's passing, the Act "requires [the] lending institution to notify the heirs as to their ability to assume the Note..." *Id.* at 9. Lisa cites to *Lance v. Green*

*Tree Servicing, LLC*, No. 3:15-CV-00387-MO, 2016 WL 3647330, at *1 (D. Or. July 7, 2016), *appeal dismissed* (Sept. 12, 2016), in support of her position. *Id.* Lisa does not provide any further information as to how the cited case is relevant to the facts of her case, or how the Act itself applies to the facts of her case.

In *Lance v. Green Tree Servicing, LLC*, the United States District Court for the District of Oregon provided a brief history and explanation of the Act. No. 3:15-CV-00387-MO, 2016 WL 3647330, at *4 (D. Or. July 7, 2016), *appeal dismissed* (Sept. 12, 2016).[8] Generally, contracts are freely assignable under the common law, and include "contracts to pay mortgage obligations." *Id.* When interest rates were on the rise, it became commonplace for existing homeowners to "assign their mortgage contracts to the new homeowner and require the new homeowner to assume the mortgage obligations." *Id.* "For a variety of reasons, lenders became wary of allowing new homeowners with whom they had no previous relationship assume mortgage contracts." *Id.* Subsequently, "in an effort to restrict a third party assuming the borrower's rights and responsibilities, lenders began to include due-on-sale clauses in mortgage contracts." *Id.* The due-on-sale clauses "provided that if the homeowner assigned the mortgage or transferred the property without the lender's consent, the mortgage came due."[9] *Id.* Stemming from the imposition of those clauses, the Act came to fruition as follows:

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[8] The entire history and explanation of the Garn-St. Germain Depository Institutions Act of 1982 within *Lance v. Green Tree Servicing, LLC*, was pulled from a law review article put forth by the plaintiff in support of his position. No. 3:15-CV-00387-MO, 2016 WL 3647330, at *1 (D. Or. July 7, 2016), *appeal dismissed* (Sept. 12, 2016). The article is from the Pepperdine Law Review, written by Sarah Bolling Mancini and Alys Cohen, and called *Surviving the Borrwer: Assumption, Modification, and Access to Mortgage Information After a Death or Divorce*, 43 Pepperdine Law Review 345 (2016). *Id.* However, for the sake of clarity, the Court has omitted all citations included in this portion of the case, including references to the law review article.

[9] "Due on sale clauses give the lender the right to accelerate the mortgage loan and foreclose upon transfer of the rights and responsibilities of the borrower." *Lance* at *4.

> State courts and legislatures across the country viewed due-on-sale clauses with suspicion and largely rejected the exercise of such clauses. In 1982, however, Congress enacted the Garn–St. Germain Act, which preempted state laws forbidding the enforcement of due-on-sale clauses. After the enactment of the Garn–St. Germain Act, as a general rule, a borrower could not transfer a property subject to a mortgage without the lender's consent if that mortgage contained a due-on-sale clause. Congress did, however, create several exceptions to this general rule.

*Lance v. Green Tree Servicing, LLC*, No. 3:15-CV-00387-MO, 2016 WL 3647330, at *5 (D. Or. July 7, 2016), *appeal dismissed* (Sept. 12, 2016) (all citations omitted); *see also* 12 U.S.C. § 1701j–3(b)(1) (2012).

In *Lance v. Green Tree Servicing, LLC*, the plaintiff's mother obtained a loan, which was secured by a deed of trust encumbering their property. The deed of trust included a provision that "in order for a third party to assume the loan, the lender must approve of the assumption in writing." *Id.* at *2. After numerous attempts to pay the past-due amount on the loan and numerous attempts to assume the loan, all of which were unsuccessful, the plaintiff eventually received a notice of foreclosure. *Id.* The plaintiff brought suit to prevent the property from being sold at the upcoming trustee's sale. *Id.* The plaintiff argued that because the Act prevents lenders from exercising due-on-sale clauses that could affect potential "assumers of mortgages in protected positions," other clauses that restrict the ability to assume a loan, "like the written lender approval clause," should be subject to the same prohibitions. *Id.* at *5. The defendant-lender argued that the plaintiff was not a borrower under the loan, and therefore had no standing to assert a breach of contract claim related to the loan. *Id.* at *3. The defendant-lender also argued that the clause requiring written lender approval before the property can be transferred is valid and enforceable. *Lance* at *3. The Court found that "deed of trust clauses requiring written lender approval before an heir can assume a deceased family member's mortgage are valid and enforceable." *Id.* at *3. In order to

assume his mother's loan, the plaintiff was required to receive written approval from the lender before being able to assume the loan. *Id.* Because the plaintiff had not received written approval from the lender, he could not assume the loan. *Id.* The Court further found that the Act only prohibits lenders from exercising due-on-sale clauses if a circumstance arises that falls within one of the nine enumerated exceptions contained in the Act. *Id.* at *5. The Court stated "the language of the Garn-St. Germain Act says nothing about written lender approval requirements." *Id.*

The facts in *Lance* bear a striking similarity to the facts in Lisa's case. Similar to *Lance*, where the deed of trust contained a written lender approval clause, here the Deed of Trust also contains a written lender approval clause. Section 18 of the Deed of Trust requires the Lender's prior written consent before the Property can be sold or transferred. Also similar to *Lance*, Lisa is not asserting that Chase improperly chose to exercise the due-on-sale clause once the Property was transferred to Lisa; Lisa is asserting that because her situation may fall under one of the enumerated exceptions contained in the Act, Chase was required to inform Lisa that she could assume Hazel's loan if she wanted to. As stated in *Lance*, the language of the Act does not say anything about written lender approval requirements; the Act, codified as 12 U.S.C. § 1701j-3, is completely void of any such requirement. The Act, as it relates to this discussion, merely states that "[w]ith respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, [...], a lender may not exercise its option pursuant to a due-on-sale clause" upon the existence or occurrence of any one of the nine enumerated circumstances. 12 U.S.C. § 1701j-3(d)(1)–(9). For example, if the real property at issue is transferred "to a relative resulting from the death of a borrower," the lender may not exercise the due-on-sale clause contained in the

contract at that point in time based solely on the occurrence of that event. *See* 12 U.S.C. § 1701j-3(d)(5)–(6). A prohibition on a lender's right to exercise a due-on-sale clause is an issue separate and distinct from requiring a lender to notify a deceased borrower's heir that they can – if they want to – assume the borrower's loan. Where the Act contains the former prohibition, it does not contain the latter requirement. In summary, the Act does not require a lender to notify and inform persons, such as heirs of the borrower, that they are able to assume the borrower's loan. Because there is no notice requirement imposed by the Act, the Court finds that the Act did not require Chase to inform Lisa of her ability to assume the Note.

Additionally, even if Chase was required to inform Lisa of her ability to assume the Note, Chase fulfilled that requirement by responding to Lisa's loan-assumption inquiries and informing her that she was permitted to assume Hazel's loan. Chase provided her with the required loan assumption documents, approved her loan assumption application, and drafted the loan assumption agreement. It was Lisa who ultimately chose not to sign the loan assumption agreement. Therefore, there is no genuine issue of material fact as it relates to this matter.

**B. Defendant-Counterclaimant's Motion for Partial Summary Judgment**

Breckenridge filed a Motion for Partial Summary Judgment and supporting memorandum on September 26, 2018, on its claim of unlawful detainer against Lisa. Breckenridge relies on Idaho Code Sections 45-1506, 45-1508, and 6-310. Lisa did not file a response to Breckenridge's motion. However, at the hearing on Breckenridge's Motion for Partial Summary Judgment, which took place on October 24, 2018, counsel for Lisa stated that she does object to Breckenridge's Motion for Partial Summary Judgment. Counsel for Lisa further stated that her memorandum objecting to Chase's and MERS's Motion for Summary Judgment will also serve as her response

memorandum objecting to Breckenridge's Motion for Partial Summary Judgment. Hr'g on Defs.' Mot. for Summ. J., Oct. 24, 2018.

The Trustee under the Deed of Trust commenced non-judicial foreclosure proceedings and sold the Property to Breckenridge at the trustee's sale on March 21, 2018. Def.-Counterclaimant's Mot. for Partial Summ. J., ¶ 5. Breckenridge purchased the Property for $187,900.00. *Id.* On April 5, 2018, the Trustee issued a Trustee's Deed conveying the Property to Breckenridge. *Id.* at ¶ 6. The Trustee's Deed was recorded in Kootenai County on April 5, 2018. *Id.* Breckenridge asserts that at all times relevant to its purchase of the Property, it was unware of the lis pendens filed by Lisa on March 14, 2018. *Id.* at ¶¶ 4, 7.

"The purpose of a lis pendens is simply to give notice of the pendency of a lawsuit affecting the title or the right to possession of real property." *Benz v. D.L. Evans Bank*, 152 Idaho 215, 223, 268 P.3d 1167, 1175 (2012). From the time the lis pendens is recorded, a purchaser of the property addressed in the lis pendens is "deemed to have constructive notice of the pendency of the action..." Idaho Code § 5-505. Lastly, "[a] lis pendens does not create a lien." *Benz* at 223, 268 P.3d at 1175. Here, the lis pendens provided Breckenridge with constructive notice that a lawsuit had commenced that could affect the title to the Property. Therefore, Breckenridge's purchase of the Property is essentially subject to the outcome of the original lawsuit brought by Lisa against Chase, MERS, Pioneer, Cherry Creek, and the successor trustees. As established in the decision regarding Chase's and MERS's Motion for Summary Judgment, summary judgment will be granted in their favor.

Regarding Breckenridge's claim for unlawful detainer, Idaho Code Section 45-1506 explicitly states that the purchaser of property at a trustee's sale shall be entitled

to possess the property ten days after the date of sale. I.C. § 45-1506(11). It also states that any person who continues to possess the property after it has been sold is deemed to be a tenant at sufferance. *Id.* A tenancy at sufferance is defined as "[a] tenancy arising when a person who has been in lawful possession of property wrongfully remains as a holdover after his or her interest has expired." Tenancy at sufferance, *Black's Law Dictionary* (7th ed. 1999). Section 45-1508 states that the purchase of a property at a trustee's sale will foreclose and terminate any interest in the property covered by the deed of trust of those persons who were given notice under Section 45-1506.

As established in Chase's and MERS's Motion for Summary Judgment, Lisa was properly provided with notice under Section 1506. Her interest in the Property was then terminated upon Breckenridge's purchase of the Property. Ten days after its purchase of the Property, Breckenridge was entitled to possess the Property. Because Lisa continued to possess the Property after it had been sold to Breckenridge, Lisa became a tenant at sufferance.

In conclusion, Lisa has failed to properly support her assertions with specific facts showing there is a genuine issue for trial on this matter. Partial summary judgment is granted in favor of Breckenridge on their claim for unlawful detainer.

## IV. CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED Defendants' J.P. Morgan Chase Bank, National Association (Chase) and Mortgage Electronic Registrations Systems, Inc. (MERS), Motion for Summary Judgment Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that due to their joinder in Defendants' J.P. Morgan Chase Bank, National Association (Chase) and Mortgage Electronic Registrations

Systems, Inc. (MERS), Motion for Summary Judgment Motion for Summary Judgment, summary judgment is also GRANTED in favor of Defendant-Counterclaimant Breckenridge Property Fund 2016, LLC (Breckenridge) and in favor of Defendant Sydney K. Leavitt.

IT IS FURTHER ORDERED Defendant-Counterclaimant Breckenridge Property Fund 2016, LLC's (Breckenridge's) Motion for Partial Summary Judgment on its claim against Lisa for unlawful detainer is GRANTED.

IT IS FURTHER ORDERED that counsel for defendants are ordered to prepare a judgment or judgments, consistent with this Memorandum Decision and Order.

IT IS FURTHER ORDERED that the trial scheduled for June 10, 2019, is VACATED.

Entered this 4th day of December, 2018.

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 4th day of December, 2018, 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 # |
|---|---|---|---|
| Henry Madsen | 208 664-6258 | Theron DeSmet | 208 664-5884 |
| Jon A. Stenquist | 208 522-5111 | Lewis Stoddard | 858 726-6254 |

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Jeanne Clausen, Deputy Clerk