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John James Barbier

2018 AUG -8 PM 4:03

J. Y. LEE
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

Ex Officio Clerk
Circuit Court ___ Circuit

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

vs.

JOHN JAMES BARBIER; DEPARTMENT OF TAXATION – STATE OF HAWAII; JOHN DOES 1-20; JANE DOES 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; AND GOVERNMENTAL UNITS 1-20,

Defendants.

CIVIL NO. 18-1-0040(2)
(Foreclosure)

DEFENDANT JOHN JAMES BARBIER'S **MEMORANDUM IN OPPOSITION** TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ETC.; CHART DEPICTING "PLAINTIFF'S ATTEMPTS TO PROVE ITS STANDING TO FORECLOSE" AND "PLAINTIFF'S FAILURES TO PROVE ITS STANDING TO FORECLOSE"; EXHIBITS "A" THROUGH "D"; CERTIFICATE OF SERVICE

DATE: August 15, 2018
TIME: 8:15 a.m.
JUDGE: Peter T. Cahill

No Trial Date Set.

DEFENDANT JOHN JAMES BARBIER'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ETC.

ORIGINAL

COMES NOW Defendant JOHN JAMES BARBIER, by and through his undersigned counsel, and hereby opposes the above-referenced motion, on the basis that this Plaintiff has no standing to foreclosure, which is jurisdictional, based in part on breaks in the chain of ownership of the note and mortgage and the lack of any supporting personal knowledge, in violation of Hawaii case law contained in the published opinions of the Hawaii Supreme Court in Bank of America, N.A. v. Reyes-Toledo, 139 Haw. 361, 390 P.3d 1248 (2017); U.S. Bank v. Mattos, 140 Haw. 26, 398 P.3d 615 (2017); and Wells Fargo Bank v. Behrendt, 2018 Haw. LEXIS 57 (2018), as depicted on the charts on the following pages.

DATED: Honolulu, Hawaii; August 8, 2018.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
MATTHEW K. YOSHIDA
Attorneys for Defendant
John James Barbier

PLAINTIFF'S ATTEMPTS TO PROVE ITS STANDING TO FORECLOSE		PLAINTIFF'S FAILURES TO PROVE ITS STANDING TO FORECLOSE
1. NOTE DATED 10/26/04 FOR $505,600, LENDER INDYMAC, UNDATED ENDORSEMENT BY CLAUDIA SOLIS, ASST. SECRETARY FOR INDYMAC (Exhibit 1)	X	1. VALIDITY OF ENDORSEMENT CONTRADICTED BY ITS EARLIER 12/10/10 ABSENCE IN BANKRUPTCY CASE AFTER ONEWEST BECAME ASSIGNEE (Exhibit "A")
2. MORTGAGE DATED 10/26/04, WITH MERS AS NOMINEE, RECORDED 11/10/04 AT BUREAU OF CONVEYANCES IN REGULAR SYSTEM (Exhibit 2)	X	2. MERS' 6/1/10 ASSIGNMENT OF MORTGAGE WITHOUT NOTE EXECUTED BY LORRIE WOMACK, NEVER OFFICER OF MERS (Exhibit "B")
3. MERS' 6/1/10 ASSIGNMENT OF MORTGAGE WITHOUT MENTION OF NOTE EXECUTED BY LORRIE WOMACK, CLAIMING TO WORK FOR MERS (Exhibit 3)	X	3. MERS' 6/1/10 ASSIGNMENT OF MORTGAGE WITHOUT MENTION OF NOTE EXECUTED BY LORRIE WOMACK, NEVER OFFICER OF MERS (Exhibit "B")

PLAINTIFF'S ATTEMPTS TO PROVE ITS STANDING TO FORECLOSE		PLAINTIFF'S FAILURES TO PROVE ITS STANDING TO FORECLOSE
4. COPY OF NOTE FILED IN BANKRUPTCY COURT BY OWNER ONEWEST 12/10/10 CONTAINED NO CLAUDIA SOLIS ENDORSEMENT (Exhibit "A")	X	4. 12/10/10 NOTE COPY FILED 12/10/10 IN BANKRUPTCY CONTRADICTS ENDORSEMENT CLAIM AS OF 2010 AS INDYMAC NO LONGER OWNER (Exhibit "A")
5. ONEWEST MORTGAGE ASSIGNMENT DATED 11/12/13 RECORDED 6/27/17 BY OCWEN AS POA ASSIGNOR AND AS ASSIGNEE BY JOEL PIRES (Exhibit 4)	X	5. THE 2017 RECORDED ASSIGNMENT WAS BACKDATED AS JOEL PIRES WAS NOT EMPLOYED BY OCWEN AT THAT TIME in 2017 (Exhibit "C")
6. LIMITED POWER OF ATTORNEY WHICH WAS DATED 8/22/13 WAS RECORDED ON 10/22/2013 BY ONEWEST BANK IN FAVOR OF HOLDER OCWEN (Exhibit 6)	X	6. NO EVIDENCE OF RECORDATION AND OCWEN HOLDING POA FOR ONEWEST ASSIGNING MORTGAGE TO ITSELF CONFLICT OF INTEREST (Exhibit 6)

PLAINTIFF'S ATTEMPTS TO PROVE ITS STANDING TO FORECLOSE		PLAINTIFF'S FAILURES TO PROVE ITS STANDING TO FORECLOSE
7. OCWEN DEFAULT NOTICE DATED 3/13/2015 MAILED TO BORROWER BARBIER BY CERTIFIED MAIL, NO RETURN RECEIPT REQUESTED (Exhibit 9)	X	7. DEFAULT NOTICE DEFECTIVE AS INCLUDES EXTRA CHARGES, AND DOES NOT STATE REQUIRED RIGHT TO CURE AFTER ACCELERATION (Exhibit 9)
8. LIMITED POWER OF ATTORNEY WHICH WAS DATED 5/17/17 WAS SAID TO BE RECORDED ON 1/19/17 BY OCWEN BANK IN FAVOR OF CALIBER (Exhibit 7)	X	8. THE LIMITED POA SAID RECORDED BEFORE IT WAS NOTARIZED, AND CALIBER CONFLICTED AS WORKS FOR U.S. BANK, ASSIGNEE (EXHIBIT 7)
9. MSJ'S MOVING MEMORANDUM SAYS THAT "THE NOTE WAS NEGOTIATED TO PLAINTIFF," OMITTING ANY SUCH EVIDENCE HOWEVER IN ITS MOTION (PAGE 3)	X	9. THE MORTGAGE FOLLOWS THE NOTE, AND NONE OF THE EXHIBITED ASSIGNMENTS ASSIGNS THE NOTE, WHICH CANNOT BE TRANSFERRED BY ASSIGNMENT

PLAINTIFF'S ATTEMPTS TO PROVE ITS STANDING TO FORECLOSE

10. PLAINTIFF U.S. BANK'S SOLE SUPPORTING DECLARATION dated 6/18/18 FOR ALL OF ITS EVIDENTIARY BURDEN OF PROOF AS FORECLOSING PLAINTIFF WAS SUBMITTED BY A "MELINA PATTERSON," SELF-DESCRIBING HERSELF AS "AN AUTHORIZED SIGNER OF CALIBER HOME LOANS, INC." AS U.S. BANK'S SERVICING AGENT, ENTITLED "DECLARATION OF INDEBTEDNESS AND ON PRIOR BUSINESS RECORDS," VERIFYING ALL OF THE DOCUMENTS REFERENCED ABOVE, INCLUDING THOSE OF PRIOR LOAN SERVICERS OF THE BARBIER MORTGAGE LOAN, CALIBER HAVING BEEN, AS SHE TESTIFIED IN HER DECLARATION, THE LOAN SERVICER ON THE MORTGAGE LOAN SINCE 12/7/15 (Exhibit "D")

PLAINTIFF'S FAILURES TO PROVE ITS STANDING TO FORECLOSE

10. NO PERSONAL KNOWLEDGE:
a. Testified as to business records of others (hearsay ¶ 4);
b. Testified has possession of note now and before case filed, but not when case filed (¶¶ 6, 7);
c. Testified servicer only from 12/17/14, but there were two prior loan servicers (hearsay ¶¶ 19, 27);
d. Testified not familiarity with prior services record keeping, but only what she understands is "typical" loan servicers do (hearsay, ¶¶ 21, 22, 23, 29);
e. Testified 3/13/15 default notice properly served, yet was before Caliber was servicer (hearsay, ¶25, Exhibit 9;
f. Testified regarding payments she only "reviewed" (hearsay, ¶26; and
g. Testified "relies upon accuracy of Prior Servicers' records" (hearsay, ¶30)
(Exhibit "D")

EXHIBIT "A"

RCO HAWAII, LLLC
DEREK WONG 4155
900 FORT STREET MALL, SUITE 305
HONOLULU, HI 96813
PHONE: (808) 532-0090 FAX: (808) 524-0092
dwong@rcolegal.com

Attorneys for Creditor
OneWest Bank, FSB as purchaser of the loans and other assets of IndyMac Bank, FSB, its successors in interest, agents, assignees, and or assignors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

IN RE: JOHN JAMES BARBIER DEBTOR.	**CASE NO.: 10-00404** **CHAPTER 13** **MOTION FOR RELIEF FROM AUTOMATIC STAY; MEMORANDUM IN SUPPORT OF MOTION; EXHIBITS "A"-"B"; DECLARATION IN SUPPORT OF MOTION FOR RELIEF** Hearing Date: January 5, 2011 Hearing Time: 1:30 pm Honorable Judge Robert J. Faris

OneWest Bank, FSB as purchaser of the loans and other assets of IndyMac Bank, FSB, its successors in interest, agents, assignees, and or assignors, a party in interest in the above-captioned bankruptcy action, respectfully moves this Court for an Order terminating or modifying the automatic stay under 11 U.S.C. § 362 to allow OneWest Bank, FSB as purchaser of the loans and other assets of IndyMac Bank, FSB, its successors in interest, agents, assignees, and or assignors, a secured creditor of Debtor above-named, its agents, successors, assigns, and nominees, to foreclose its Note on real property located at 440 WAINEE STREET, LAHAINA, HI 96761 ("the property").

NOTE

October 26, 2004 *[Date]* | Kahului *[City]* | Hawaii *[State]*

440 Wainee Street, Lahaina, HI 96761 *[Property Address]*

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 505,600.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is IndyMac Bank, F.S.B., a federally chartered savings bank. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 5.875 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay Principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on December, 2004. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on November 1, 2034, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at IndyMac Bank, F.S.B., P.O. Box 78826, Phoenix, AZ 85062-8826 or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 2,990.81

4. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

CERTIFIED TO BE A TRUE AND CORRECT COPY OF ORIGINAL
BY
INDYMAC BANK, F.S.B.

Loan No:

5. **LOAN CHARGES**

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

6. **BORROWER'S FAILURE TO PAY AS REQUIRED**

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

7. **GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

8. **OBLIGATIONS OF PERSONS UNDER THIS NOTE**

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, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

9. **WAIVERS**

I and any other person who has obligations under this Note waive the rights of presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

10. **UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same

Loan No:

date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

John Jesse Barbier (Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

[Sign Original Only]

Loan No:

EXHIBIT "B"

Kalama v. JP Morgan Chase Bank

United States District Court for the District of Hawaii

November 22, 2011, Decided; November 22, 2011, Filed

CIVIL NO. 10-00278 JMS/KSC

Reporter

2011 U.S. Dist. LEXIS 135150 *; 2011 WL 5879432

PAUL DENNIS KALAMA, Plaintiff, vs. JP MORGAN CHASE BANK, individually and as Trustee fka THE CHASE MANHATTAN BANK as Trustee; CAL-WESTERN RECONVEYANCE CORPORATION; and DOES 1-30, Defendants.

Core Terms

Mortgage, subject property, auction, misrepresentations, reckless, summary judgment motion, summary judgment, notice, asserts, foreclosure, disclose, liens, bid, Nondisclosure, bidder, misrepresentation claim, deceptive acts, fail to disclose, encumbrances, unfair, Deed, genuine issue of material fact, doctrine of caveat emptor, second mortgage, caveat emptor, no duty, practices, argues, Reply, foreclosure sale

Counsel: **[*1]** For Paul Dennis Kalama, Plaintiff: Benjamin Ruel Brower, Frederick J. Arensmeyer, Gary Victor Dubin, Long Huy Vu, Dubin Law Offices, Honolulu, HI.

For JP Morgan Chase Bank, individually and as Trustee, formerly known as The Chase Manhattan Bank, Defendant: James B. Rogers, Louise K.Y. Ing, Peter S. Knapman, LEAD ATTORNEYS, Alston Hunt Floyd & Ing, Honolulu, HI.

For Cal-Western Reconveyance Corporation, Defendant: David E. McAllister, Pite Duncan, LLP, San Diego, CA; David B. Rosen, The Law Office of David B. Rosen, ALC, Honolulu, HI.

Judges: J. Michael Seabright, United States District Judge.

Opinion by: J. Michael Seabright

Opinion

`ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANT JP MORGAN CHASE BANK, individually and as Trustee fka THE CHASE MANHATTAN BANK as Trustee's MOTION FOR SUMMARY JUDGMENT; AND (2) GRANTING IN PART AND DENYING IN PART CAL-WESTERN RECONVEYANCE CORPORATION'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On April 5, 2010, Plaintiff Paul Dennis Kalama ("Plaintiff") filed this action in the First Circuit Court of the State of Hawaii asserting that Defendants JP Morgan Chase Bank, individually and as Trustee fka The Chase Manhattan Bank as Trustee ("JPM") and Cal-Western Reconveyance Corporation **[*2]** ("Cal-Western"), (collectively "Defendants"), misled and/or failed to disclose to Plaintiff material facts during a mortgage foreclosure auction at which Plaintiff was the successful bidder. Specifically, Plaintiff believed that the real property he successfully purchased at a foreclosure auction, located at 98-426 Kilinoe Street #307, Aiea, Hawaii 96701 (the "subject property"), was encumbered by one mortgage, when in fact is was encumbered by two mortgages. The action was subsequently removed to this court.

Currently before the court are JPM's and Cal-Western's Motions for Summary Judgment, in which they argue that Plaintiff's own lack of due diligence prevented him from learning of the additional mortgage and that they had no duty to disclose all encumbrances on the subject property. Based on the following, the court GRANTS in part and DENIES in part JPM's and Cal-Western's Motions for Summary Judgment.

II. BACKGROUND

A. Factual Background

Prior to the mortgage foreclosure auction at issue in this case, the subject property was owned by Mark Miho and Lynn Hatakenaka (the "Prior Owners"). Doc. No. 43-4, JPM Ex. 3. On or about March 21, 1994, the Prior Owners entered into a $188,490 mortgage **[*3]** loan (the "First Mortgage") on the subject property with North American Mortgage Company. *Id.* On or about June 25, 2000, the Prior Owners entered into a second mortgage loan (the "Second Mortgage") on the subject property for $35,000 with International Savings and Loan Association, Limited. Doc. No. 43-2, JPM Ex. 1. Both of these mortgages were recorded in the Bureau of Conveyances, *see* Doc. Nos. 43-2, 43-4, JPM Exs. 1, 3, and the Land Court Transfer Certificate of Title for the subject property indicates these encumbrances. Doc. No. 43-3, JPM Ex. 2. The First Mortgage was subsequently assigned to Wells Fargo Bank, N.A., and the Second Mortgage was subsequently assigned to JPM. *See* Doc. Nos. 49-1, 49-2, Cal-Western Request for Judicial Notice ("RJN") Exs. B, C. [1]

[1] Cal-Western requests the court to take judicial notice of several exhibits, including the Prior Owners' First Mortgage with North American Mortgage Company, the assignments of the First Mortgage to GE Mortgage Services and then to Wells Fargo, the Prior Owners' Second Mortgage with International Savings and Loan, the assignments of the Second Mortgage to Residential Funding Corporation and then to JPM, and pleadings and filings **[*4]** from Wells Fargo's foreclosure action. *See* Doc. No. 49, Cal-Western Request for Judicial Notice. Because they are all of public record, the court takes judicial notice of Cal-Western Exs. A-I. *See* ***United States v. 14.02 Acres of Land More or Less in Fresno Cnty., 547 F.3d 943, 955 (9th Cir. 2008)*** ("Although, as a general rule, a district court may not consider materials not originally included

After the Prior Owners failed to make payments on the Second Mortgage, JPN caused to be recorded in the Bureau of Conveyances a Notice of Mortgagee's Intention to Foreclose Under Power of Sale on the subject property on September 18, 2006. Doc. No. 43-5, JPM Ex. 4; *see also* Doc. No. 48-6, Lorrie Womack Decl. ¶ 2. The Notice provided that the Mortgagee will hold a sale of the subject property through public auction, and that the terms of the sale include, among other things:

> (2) Property is sold strictly 'AS IS' and **[*5]** 'WHERE IS' condition; (3) Property is sold without covenant or warranty, either express or implied, as to title, possession or encumbrances; . . . (6) The availability of title or other insurance shall not be a condition of the sale, and the Purchaser shall be responsible for obtaining a certificate of title and title insurance, if so desired . . . . (10) By submitting the Bid, Purchaser acknowledges reading the terms and conditions set forth in this notice and agrees to be bound thereby and sign a written acceptance of all terms herein . . . .

Doc. No. 43-6, JPM Ex. 4 at 2. JPM subsequently published an advertisement for the auction in the Honolulu Star-Bulletin on September 15, 22, and 29, 2006 that reiterated the terms of the sale contained in the Notice. *See* Doc. No. 48-6, Womack Decl. Ex. B.

On April 13, 2007, Cal-Western conducted the foreclosure auction on JPM's behalf. Doc. No. 43, JPM Concise Statement of Fact ("CSF") ¶ 8; [2] Doc. No. 46, Cal-Western CSF ¶ 10. [3] Before the auction, Plaintiff had gone to the courthouse to view other foreclosure auctions, and had carried multiple certified checks approximately ten times over the preceding weeks. Doc. No. 43, JPM CSF ¶ 9. Plaintiff **[*6]** had no prior experience in foreclosure sales, and other than doing brief internet research, he had no formal training and never consulted an attorney or real estate agent. *Id.* ¶ 12.

Plaintiff attended the April 13, 2007 auction with no prior knowledge of the subject property, or even knowledge

---

in the pleadings in deciding a Rule 12 motion, Fed. R. Civ. P. 12(d), It 'may take judicial notice of matters of public record' and consider them without converting a Rule 12 motion into one for summary judgment." (citing Lee v. City of Los Angeles, 250 F. 3d 668, 688 (9th Cir. 2001)).

[2] Where the parties do not dispute a particular fact, the court cites directly to the CSF in question.

[3] Plaintiff objects to (1) Cal-Western's CSF because it does not comply with Local Rule ("LR") 56.1(d) requiring that a CSF be no longer than five pages; and (2) Cal-Western's exhibits because Cal-Western failed to highlight and/or emphasize relevant portions as required by LR 51.1(c). The court agrees that Cal-Western has failed to follow Local Rules. A review of Cal-Western's CSF reveals that it does not comply with the page limitation requirements and contains facts that are not "absolutely necessary for the court to determine the limited issues presented in the motion for summary judgment." LR 56.1(c). Cal-Western could have complied with the page limitation requirement had it included only those facts necessary to its Motion, as opposed to taking a kitchen-sink approach of including fifty-nine separate facts for the court to sift through. With that said, however, the court will nonetheless consider Cal-Western's **[*7]** CSF and exhibits.

that the subject property would be auctioned that day. *Id.* ¶ 13. Although Plaintiff had a general understanding of the market values of homes in the area and the subject property in particular, *see* Doc. No. 48-2, Rosen Decl. Ex. B at 34, Plaintiff did not see any documents relating to the subject property prior to bidding. Doc. No. 43, JPM CSF ¶¶ 11, 14. Plaintiff had, however, previously reviewed other notices of intent to foreclose and admitted that they all contained similar "as-is" language. *See* Doc. No. 43-5, JPM Ex. 5 at 31-32.

Plaintiff asserts that during the auction, he heard the auctioneer, Walter Beh, Esq. ("Beh"), state "there was a mortgage on the property and that the bank [in singular] was owed $53,000 or $54,000." Doc. No. 57-1, Pl.'s Decl. ¶ 14 (alterations in original); *see also* Doc. No. 43, JPM CSF ¶ 10. Plaintiff further asserts that he "relied upon the professional competence, knowledge, good faith, and representations of the auctioneer and its agents in reasonably believing that the subject property was being sold free and clear of any **[*8]** senior liens on the subject property, as obviously did seven other competitive bidders at the auction . . . ." Doc. No. 57-1, Pl.'s Decl. ¶ 19. Plaintiff won the auction with a bid of $231,000, *id.* ¶ 16, and gave Beh two certified checks totaling $40,000, with three weeks to pay the balance. *Id.* ¶ 17.

The day after the auction, Cal-Western sent Plaintiff a letter confirming that the subject property was sold to Plaintiff and providing copies of the unrecorded Mortgagee's Affidavit of Sale and a Grant Deed and Tax Conveyance Form for Plaintiff to record to vest title in his name. *See* Doc. No. 48-6, Womack Decl. Ex. C. The Grant Deed specifically states that the subject property is subject to a "Mortgage dated March 21, 1994, flied [sic] as Document No. 2132131, in favor of North American Mortgage Company, a Delaware Corporation, which was assigned to G.E. Capital Mortgage Services, Inc., a New Jersey Corporation, by instrument flied [sic] as Document No. 2229464." Doc. No. 48-6, Womack Decl. Ex. D; *see also id.* Womack Decl. Ex. E (Mortgagee's Affidavit containing same language regarding First Mortgage as in the Grant Deed).

Plaintiff subsequently spoke with Cal-Western employee Lorrie **[*9]** Womack regarding how the final payment should be made. Doc. No. 57-1, Pl.'s Decl.¶ 21. During this conversation, Plaintiff asked Womack if there were any liens on the subject property and if "the title would be clear," to which Womack replied that there were no other liens and that the title would be clear. [4] *Id.* Womack

[4] Cal-Western argues that Plaintiff's Declaration asserting that Womack assured him there were no liens on the subject property directly contradicts his deposition testimony and should be struck pursuant to the sham affidavit rule. In fact, there is no contradiction of the sort that would invoke **[*10]** the sham affidavit rule. *See Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998-99 (9th Cir. 2009)* ("[O]ur cases have emphasized that the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit."). During his deposition, Plaintiff stated that he did not "recall exactly"

assured Plaintiff that the subject property would be his once he paid the balance of the purchase price and recorded the deed. *Id.* ¶ 22. Other than speaking with Womack, the only act Plaintiff took after the auction to investigate the subject property was to drive by it. Doc. No. 43, JPM CSF ¶ 19. Plaintiff did not (1) have a title search done, speak to a title or escrow company, or attempt to obtain title insurance, *id.* ¶ 20; (2) review the publicly recorded documents in Land Court, *id.* ¶ 21; or (3) determine if real property taxes or association dues were overdue. *Id.* ¶ 22.

After Plaintiff paid the full amount of his bid, he had his cousin record the Grant Deed in Land Court. *Id.* ¶ 23. After Plaintiff paid the full amount due and recorded the deed, Plaintiff alleges that he spent $20,000 on renovations. *Id.* ¶ 25.

Plaintiff was subsequently served with a notice of foreclosure from the First Mortgage lienholder, Wells Fargo. *Id.* ¶ 26; *see also* Doc. No. 48-2, Rosen Decl. Ex. B at 108 (describing that Plaintiff first became aware of the First Mortgage in May 2007 when a third party knocked on his door and told him of the foreclosure action). On October 2, 2007, Wells Fargo filed a Complaint for Foreclosure on the First Mortgage in the First Circuit Court of the State of Hawaii. *See* Doc. No. 46, Cal-Western CSF ¶ 53. On November 3, 2009, the First Circuit Court entered an order confirming the Commissioner's sale of the subject property to a third party with a winning bid of $247,000. *Id.* ¶ 55. As a result, Plaintiff lost possession of the subject property. Doc. No. 43, JPM CSF ¶ 26.

B. Procedural Background

On April 5, 2010, Plaintiff filed this action in the First Circuit Court of the State **[*12]** of Hawaii, asserting claims titled (1) Breach of Contract (Count I); (2) Negligent/Reckless Misrepresentation and Nondisclosure (Count II); (3) Fraud and Deceit (Count III); and (4) Unfair and Deceptive Acts and Practices (Count IV). On May 11, 2010, Cal-Western removed the action to this court on the basis of diversity jurisdiction.

JPM filed its Motion for Summary Judgment on July 11, 2011, and Cal-Western filed its Motion for Summary Judgment on August 31, 2011. Plaintiff filed a Joint Opposition on October 17, 2011, and Defendants filed Replies on October 24, 2011. A hearing was held

whether he specifically asked Womack if there were any other liens on the subject property. *See* Doc. No. 48-2, Cal-Western Ex. B at 105. Although it appears that Plaintiff has suddenly (and conveniently) regained memory of this conversation, "[v]ariations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all." *Tippens v. Celotex Corp., 805 F.2d 949, 954 (11th Cir. 1986)*; *BNSF Ry. Co. v. San Joaquin Valley R. Co., 2009 U.S. Dist. LEXIS 111569, 2009 WL 3872043, at *7 (E.D. Cal. Nov. 17, 2009)* ("[I]nnocent lapses of memory, such as a failure to remember one item to a question calling for many items to be recollected, or lack of memory as to precise dates, would be permissible; however, changes from 'yes' to 'no,' or **[*11]** gross departures from original testimony, would not be legitimate.").

on November 7, 2011. On November 9, 2011, JPM submitted a letter to the court with supplemental authority.

III. STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Rule 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also Broussard v. Univ. of Cal. at Berkeley, 192 F.3d 1252, 1258 (9th Cir. 1999).

"A **[*13]** party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007) (citing Celotex, 477 U.S. at 323); see also Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1079 (9th Cir. 2004). "When the moving party has carried its burden under Rule 56[(a)] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a *genuine issue for trial*." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citation and internal quotation signals omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect **[*14]** the outcome of the suit under the governing law." In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008) (citing Anderson, 477 U.S. at 248). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. Matsushita Elec. Indus. Co., 475 U.S. at 587; see also Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor" (citations omitted)).

IV. DISCUSSION

Defendants argue that summary judgment should be granted on all of Plaintiff's claims for a variety of reasons. The court addresses each claim in turn.

A. Breach of Contract (Count I)

Count I asserts that Defendants "materially breached their contractual obligations to Kalama in consideration therefore, by failing to disclose the First Mortgage lien on the subject property with full knowledge of same . . . ." Doc. No. 1-2, Compl. ¶ 25. Defendants argue that summary judgment should be granted on this claim because, among other reasons, JPM did not breach any term of the agreement between Plaintiff and JPM, and Cal-Western **[*15]** never entered into any contract with Plaintiff. The court agrees.

To prevail on a breach of contract claim, a plaintiff must generally establish that a contract exists, the defendant failed to perform as required under the contract, and that the defendant's failure to perform caused the plaintiff damages. *See Wyndham Vacation Resorts, Inc. v. Architects Haw. Ltd., Grp. Pac. (Haw.), Inc., 703 F. Supp. 2d 1051, 1062 (D. Haw. 2010)* (citing *Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Haw. 286, 303-04, 141 P.3d 459, 476-77 (2006)*). A contract was formed between JPM and Plaintiff to purchase the subject property when Plaintiff was the winning bidder. *See Terr. of Hawaii v. Branco, 42 Haw. 304, 316 (Haw. Terr. 1958)* ("It is elementary in the law of contracts that at an auction an enforceable contract is formed upon the fall of the hammer."); *see also Lee v. HSBC Bank USA, 121 Haw. 287, 295, 218 P.3d 775, 783 (2009)* (acknowledging the principle in *Branco* where an auction is conducted under *Hawaii Revised Statutes ("HRS") § 667-5*). The terms of this contract — *i.e.*, the auction terms — specifically provided that the subject property was being sold in "'AS IS' and 'WHERE IS' condition **[*16]** [and] without covenant or warranty, either express or implied, as to title, possession or encumbrances." Doc. No. 43-5, JPM Ex. 4 at 2.

Given the express terms of the contract in which JPM expressly disclaimed any representations regarding the existence of any encumbrances on the title of the subject property, there is no genuine issue of material fact suggesting that JPM breached any contractual term with Plaintiff by failing to disclose the existence of the First Mortgage. Further, given that this contract was between JPM and Plaintiff only, there is no genuine issue of material fact suggesting that any contract existed between Plaintiff and Cal-Western. Defendants therefore carried their burden on summary judgment, and in opposition, Plaintiff neither argues that JPM violated any particular contractual term, nor suggests that any contract existed between Plaintiff and Cal-Western.

The court therefore GRANTS Defendants' Motion for Summary Judgment on Plaintiff's breach of contract claim.

B. Negligent/Reckless

Misrepresentation and Nondisclosure (Count II)

Count II asserts two different claims — one for negligent/reckless misrepresentation, and one for negligent/reckless nondisclosure. **[*17]** *See* Doc. No. 1-2, Compl. ¶ 27 ("Count II of the Complaint asserts that Defendants negligently and/or recklessly failed to disclose the First Mortgage and/or misrepresented facts to Plaintiff, which caused him to bid on the subject property at auction."). The court addresses these claims in turn.

1. Negligent/Reckless Misrepresentation

A negligent misrepresentation requires a plaintiff to establish that "(1) false information be supplied as a result of the failure to exercise reasonable care or competence in communicating the information; (2) the person for whose benefit the information is supplied suffered the loss; and (3) the recipient relies upon the misrepresentation." *Assoc. of Apartment Owners of Newtown Meadows ex rel. its Bd. of Dirs. v. Venture 15, Inc., 115 Haw. 232, 263, 167 P.3d 225, 256 (2007)*; *see also Blair v. Ing, 95 Haw. 247, 269, 21 P.3d 452, 474 (2001)* (citing *Kohala Agric. v. Deloitte & Touche, 86 Haw. 301, 323, 949 P.2d 141, 163 (1997))* (emphasis deleted).

As explained in *Blair, 95 Haw. at 269, 21 P.3d at 474*, the material elements for this claim are taken from the *Restatement (Second) of Torts § 552*, which describes this tort as follows:

> *§ 552*. Information Negligently **[*18]** Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Thus, implicit in these elements is that the defendant have some duty to supply the information, and that the plaintiff be justified in relying on the information. *See also Lindsey v. CUNA Mut. Ins. Soc., 2010 U.S. Dist. LEXIS 116250, 2010 WL 4397036, at *3 (D. Haw. Oct. 29, 2010)* (describing elements of negligent misrepresentation claim and the Restatement (Second) of Torts to imply a duty element).

Defendants argue that summary judgment must be granted on this claim because they had no duty to disclose the First Mortgage to Plaintiff, they made no misrepresentations, and any reliance by Plaintiff was unreasonable. The court disagrees.

In general, the doctrine of caveat emptor provides that the seller in a foreclosure auction makes "no warranty of title **[*19]** and is generally subject to no duty to investigate or describe outstanding liens or encumbrances.'" *Cadet v. Draper & Goldberg, PLLC, 2007 U.S. Dist. LEXIS 72504, 2007 WL 2893418, at *6 (D. D.C. Sept. 28, 2007)* (citations omitted); *see, e.g., In re Vota, 165 B.R. 92, 93 (Bkrtcy. D. R.I. 1994)* ("The rule of caveat emptor applies to foreclosure sales, *see 55 Am. Jur. 2d Mortgages § 780* (1971), as does the duty of secured creditors to exercise reasonable care and business judgment as part of the bidding process."); *Hill v. Thompson, 564 So. 2d 1, 11 (Miss. 1989)* ("Caveat Emptor still reigns at foreclosure sales."); *Feldman v. Rucker, 201 Va. 11, 109 S.E.2d 379, 385 (Va. 1959)* ("The trustees were under no obligation to disclose to prospective bidders facts about the property which were obvious from inspection, nor were they guilty of any fraud or misrepresentation. In foreclosure sales the rule of *caveat emptor* applies and the trustees are under no duty to make representations or answer questions."); *see also Citibank, N.A. v. Lindland, 131 Conn. App. 653, 27 A.3d 423, 432-33 (Conn. App. 2011)* ("The rule of caveat emptor is generally applicable to judicial sales, and it is incumbent on the purchaser to conduct an independent investigation concerning **[*20]** the title to the property that he acquires at the sale before he consummates the closing." (citation and quotation signals omitted)).

But the doctrine of caveat emptor is not limitless — the Hawaii Supreme Court has specifically recognized that the doctrine of caveat emptor does not apply where there is "fraud and misrepresentation practiced by the vendor." *Yoshida v. Nobrega, 39 Haw. 235, 1952 WL 7339, at *5 (Haw. Terr. 1952)*. In other words, although an auctioner may not have a general duty to disclose encumbrances on a property, he may not make misrepresentations upon which bidders may rely.

Viewing the facts in a light most favorable to Plaintiff, a genuine issue of material facts exists regarding whether Defendants made any misrepresentations that Defendants had a duty to correct. Specifically, Beh stated prior to the auction that "there was a mortgage on the property and that the bank [in singular] was owed $53,000 or $54,000." [5] Doc. No. 57-1, Pl.'s Decl. ¶ 14 (alterations in original); *see also* Doc. No. 43, JPM CSF ¶ 10. This statement implies that there was a single mortgage on the subject property. In other words, Beh's statement falsely suggested that there were no mortgages **[*21]** on the subject

[5] Plaintiff also asserts that after the auction, Womack made misrepresentations that "there were no other liens and that the title would be clear." Doc. No. 57-1, Pl.'s Decl. ¶ 21. Such discussion took place *after* Plaintiff had already won the auction (and was obligated to pay the full purchase amount) such that these statements **[*22]** could not have induced Plaintiff into bidding on the subject property.

property other than the one held by JPM for approximately $53,000. Indeed, Plaintiff interpreted Beh's statement as asserting that "the subject property was being sold free and clear of any senior liens on the subject property . . . ." Doc. No. 57-1, Pl.'s Decl. ¶ 19. Given that the subject property was in fact encumbered by the First Mortgage, Beh's statement can serve as the basis for a misrepresentation claim. *See Cvitanovich-Dubie v. Dubie, 125 Haw. 128, 160, 254 P.3d 439, 471 (2011)* (defining "misrepresentation" as "[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. . . ." (quotations omitted)). Accordingly, it is a question of fact whether Defendants [6] did in fact misrepresent that there were no senior liens on the subject property.

The court further finds that a genuine issue of material facts exists regarding whether Plaintiff reasonably relied on Beh's statement at the auction. "As a **[*23]** general principle . . . the question of whether one has acted reasonably under the circumstances is for the trier of fact to determine." *Matsuura v. E.I. du Pont de Nemours & Co., 102 Haw. 149, 163, 73 P.3d 687, 701 (2003)* (quoting *Richardson v. Sport Shinko (Waikiki Corp.), 76 Haw. 494, 503, 880 P.2d 169, 178 (1994)*). Reliance may nonetheless be determined as a matter of law where reasonable minds would not differ as to the reasonableness of a plaintiff's conduct. *See id.* (citing *Young v. Price, 47 Haw. 309, 317 n.10, 388 P.2d 203, 208 n.10 (1963)*; *see also Honolulu Disposal Serv., Inc. v. Am. Ben. Plan Adm's, Inc., 433 F. Supp. 2d 1181, 1190 (D. Haw. 2006)* ("The question of whether a plaintiff's reliance was justifiable is ordinarily a question for the jury, but may be decided at the summary judgment stage where the facts support only one conclusion.").

Viewed in a light most favorable to Plaintiff, he relied on Beh's statement to mean that the subject property was not subject to any other liens and therefore bid on the subject property. Although Plaintiff could have conducted research on the subject property prior to the auction and learned of the First Mortgage on his own, [7] it **[*24]** is a

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[6] At the November 7, 2011 hearing, JPM argued that Beh's statements do not implicate JPM. In a supplement to the court, JPM argued that it "is not liable for the acts of its independent contractor where the principal does not direct or otherwise exercise control over a contractor with expertise and in whom full discretion and control for conducting the contracted work is vested." Doc. No. 64. The court rejects this argument for two reasons. First, this position runs counter to JPM's express assertion that "for the purposes of summary judgment, JPM will not contest that the statements of Walter Beh may be attributed to JPM." Doc. No. 42-3, JPM Mot. at 10 n.4. Second, JPM has presented no evidence explaining its relationship to Cal-Western and Beh that would allow the court to conclude that JPM is not liable for statements made by Beh.

[7] Although not entirely clear, Cal-Western appears to argue that Plaintiff did not reasonably rely on any statements by Defendants because Plaintiff had constructive knowledge of the First Mortgage through its recording, and Plaintiff was given actual notice of the First Mortgage shortly after the auction. *See* Doc. No. 50, Cal-Western Mot. at 21. The court rejects these arguments. To accept Cal-Western's constructive notice argument would not only endorse a hard and fast rule that prior to an auction any reasonable bidder must perform a title search, but also ignore that the Hawaii Supreme Court has expressly acknowledged that caveat emptor does not

question of fact whether Beh's statement would assuage the concerns of a reasonable bidder. Indeed, seven other individuals bid on the subject property, suggesting that others were not aware of the First Mortgage either.

The court therefore DENIES Defendants' Motions for **[*25]** Summary Judgment on Plaintiff's negligent/reckless misrepresentation claim. [8]

2. Negligent/Reckless Nondisclosure

Similar to a claim for negligent/reckless misrepresentation, a claim for negligent/reckless non-disclosure requires that the defendant have a duty to disclose the information at issue and that the plaintiff reasonably relied on such silence. Specifically, the *Restatement (Second) of Torts § 551* (1977), titled "Liability for Nondisclosure," provides:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

See also Exotics Hawaii-Kona, Inc. E.I. du Point de Nemours & Co., 116 Haw. 277, 284 n.3, 172 P.3d 1021, 1028 n.3 (2007).

Unlike **[*26]** the misrepresentation claim, however, Hawaii courts have not found any exception to the doctrine of caveat emptor as applied to nondisclosure claims. And under the doctrine of caveat emptor, Defendants did not have general affirmative duty to disclose the First Mortgage. *See Cadet, 2007 U.S. Dist. LEXIS 72504, 2007 WL 2893418, at *11* ("[B]ecause the doctrine of *caveat emptor* applies in the foreclosure sale context, defendants and plaintiffs stood in no 'relation of trust' that would impose upon defendants a duty to disclose."); *see also Jacobs v. Bank of Am., N.A., 2011 U.S. Dist. LEXIS 6989, 2011 WL 250423, at *3 (N.D. Cal. Jan. 25, 2011)* (stating that the trustee in a nonjudicial foreclosure is simply "a common agent for the trustor and beneficiary" such that "[t]he scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist" (quotations omitted)). This lack of duty was made explicit by the terms of the auction disclaiming that the subject property was being sold "as is," and any bidder could have readily discovered

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apply where there was fraud or misrepresentation. *See Yoshida v. Nobrega, 39 Haw. 235, 1952 WL 7339, at *5 (Haw. Terr. 1952)*. Further, whether Plaintiff was given actual notice *after* the auction does not affect the analysis — a contract had been formed at the auction.

[8] Neither Defendant has attempted to draw any distinction between a negligent or reckless misrepresentation claim. The court's ruling on negligent misrepresentation thus applies with equal force to reckless misrepresentation.

the First Mortgage through a title search. Thus, although Defendants may have a duty to correct inaccurate statements upon which reasonable **[*27]** bidders may rely (*i.e.*, the negligent/reckless misrepresentation claim), Defendants had no duty on their own to disclose the First Mortgage in the first instance.

The court therefore GRANTS Defendants' Motions for Summary Judgment on Plaintiff's negligent/reckless nondisclosure claim.

C. Fraud and Deceit (Count III)

Count III of the Complaint asserts that Defendants knowingly made misrepresentations and/or failed to disclose the First Mortgage to Plaintiff, causing him damages. Doc. No. 1-2, Compl. ¶ 30. The elements for this claim are similar to those of Count II's negligent/reckless misrepresentation claim — a claim for fraud requires a plaintiff to establish that "(1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them." *Shoppe v. Gucci Am., Inc., 94 Haw. 368, 386, 14 P.3d 1049, 1067 (2000)* (internal quotation marks and citations omitted). As a result, Defendants make the same arguments on this claim as they did on the negligent/reckless misrepresentation claim — that they had no duty to **[*28]** disclose the First Mortgage to Plaintiff, they made no misrepresentations, and Plaintiff's reliance on any statements was unreasonable. The court rejects these arguments for the same reasons described above — caveat emptor does not apply where fraud has occurred and it is a question of fact whether Defendants made any misrepresentations upon which Plaintiff reasonably relied. [9] The court therefore DENIES Defendants' Motion for Summary Judgment on Plaintiff's fraud claim.

D. Unfair and Deceptive Acts and Practices (Count IV)

Count IV asserts that Defendants' misrepresentations and nondisclosures regarding the existence of the First Mortgage constituted unfair and deceptive acts and practices in violation of HRS Ch. 480. Doc. No. 1-2, Compl. ¶ 34. To establish a claim for violation of HRS Ch. 480, Plaintiff must establish **[*29]** that (1) he is a consumer; (2) Defendants engaged in an act or practice that was unfair or deceptive; (3) the unfair or deceptive act or practice occurred in the conduct of trade or

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[9] In addition to the arguments addressed above, Cal-Western argues that Plaintiff failed to plead this claim with the requisite particularity required by *Federal Rule of Civil Procedure 9(b)*. Such argument is inappropriate on a Motion for Summary Judgment, as opposed to a Motion to Dismiss, and in any event Plaintiff has particularly identified the alleged misrepresentations.

commerce; and (4) the unfair or deceptive act or practice caused Plaintiff damages. *See* HRS § 480-13; *Davis v. Wholesale Motors, Inc., 86 Haw. 405, 417, 949 P.2d 1026, 1038 (Haw. App. 1997)*. A deceptive act or practice is: (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances where (3) the representation, omission, or practice is material. *Courbat v. Dahana Ranch, Inc., 111 Haw. 254, 262, 141 P.3d 427, 435 (2006)* (internal citation omitted).

Defendants argue that summary judgment should be granted on this claim because they followed the statutory provisions of HRS Ch. 667 in conducting the auction, JPM conveyed to Plaintiff its entire interest in the subject property, and no misrepresentations were made. [10] Doc. No. 42-3, JPM Mot. at 16-18. But as explained above, it is a question of fact whether Defendants made misrepresentations upon which Plaintiff reasonably relied. The misrepresentations arguably qualify as deceptive acts or practices **[*30]** — misleading Plaintiff about the existence of the First Mortgage (or rather, lack thereof) was material and it is a question of fact whether consumers acting reasonably under the circumstances would have been misled. The court therefore DENIES Defendants' Motion for Summary Judgment on Count IV.

E. Cal-Western's Laches Argument

Finally, Cal-Western argues that Plaintiff's claims are barred by the doctrine of laches. To establish that laches applies, Cal-Western must establish two elements: "First, there must have been a delay by the plaintiff in bringing his claim[ ] and that delay must have been unreasonable **[*31]** under the circumstances. . . . Second, that delay must have resulted in prejudice to defendant." *Adair v. Hustace, 64 Haw. 314, 321, 640 P.2d 294, 300 (1982)*. Although Cal-Western argues that Plaintiff unreasonably delayed in bringing this action, Cal-Western failed to even address how, if at all, it has been prejudiced by this delay. Cal-Western has not carried its burden on summary judgment. *See Venture 15, Inc., 115 Haw. at 277, 167 P.3d at 284* (affirming denial of summary judgment where the defendant "failed to present to this court any evidence of prejudice caused by the claimed unreasonable delay," and instead "merely asserts in conclusory fashion that it has been 'severely prejudiced'").

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[10] For the first time in its Reply, Cal-Western also argues that Plaintiff has not provided any support for his claim of damages. *See* Doc. No. 60 at 11-12. The court does not address arguments made for the first time on Reply. *See, e.g., Hi-Tech Rockfall Constr., Inc. v. Cnty. of Maui, 2009 U.S. Dist. LEXIS 15917, 2009 WL 529096, at *18 n.9 (D. Haw. Feb. 26, 2009)* ("*Local Rule 7.4* provides that '[a]ny arguments raised for the first time in the reply shall be disregarded.'"); *Coos Cnty. v. Kempthorne, 531 F.3d 792, 812 n.16 (9th Cir. 2008)* (declining to consider an argument raised for the first time in a reply brief).

V. CONCLUSION

Based on the above, the court GRANTS in part and DENIES in part JPM's and Cal-Western's Motions for Summary Judgment. Plaintiff's claims remaining in this action include: (1) Count II for negligent/reckless misrepresentation; (2) Count III for fraud; and (3) Count IV for unfair and deceptive acts and practices.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 22, 2011.

/s/ J. Michael Seabright

J. Michael Seabright

United States District Judge

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EXHIBIT "C"

Hilton v. Wells Fargo Bank, N.A.

United States District Court for the Northern District of New York

September 16, 2015, Decided; September 16, 2015, Filed

1:15-CV-0133-GTS

Reporter

539 B.R. 10 *; 2015 U.S. Dist. LEXIS 123191 **

ROBERT A. HILTON, Appellant/Plaintiff, v. WELLS FARGO BANK, N.A., as Trustee for Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2005-AP1, Appellee/Defendant.

Core Terms

Mortgage, Attach, argues, summary judgment, assigned, documents, servicer, defense motion, discovery, genuine, reasons, summary judgment motion, material fact, original note, legal standard, brief-in-chief, provides, endorsed, parties

Counsel: **[**1]** For Appellant/Plaintiff: SANDRA S. POLAND DEMARS, ESQ., OF COUNSEL, OFFICE OF CHRISTIAAN VAN NIEKERK, Schenectady, NY.

For Appellee/Defendant: KHARDEEN I. SHILLINGFORD, ESQ., SCHUYLER B. KRAUS, ESQ., OF COUNSEL, HINSHAW & CULBERTSON LLP, New York, NY.

Judges: Hon. Glenn T. Suddaby, Chief United States District Judge.

Opinion by: Glenn T. Suddaby

Opinion

[*11] DECISION and ORDER

Currently before the Court, in this adversary proceeding filed by Robert A. Hilton ("Appellant" or "Plaintiff") against Wells Fargo Bank, N.A. ("Appellee" or "Defendant"), is Plaintiff's appeal from a Decision and Order of Chief United States Bankruptcy Judge Robert E. Littlefield, Jr., **[*12]** granting Defendant's motion for summary judgment seeking the dismissal of Plaintiff's Adversary Complaint pursuant to *Fed. R. Bankr. P. 7056*. For the reasons set forth below, Plaintiff's appeal is denied, and Chief Bankruptcy Judge Littlefield's decision is affirmed.

I. RELEVANT BACKGROUND

A. Plaintiff's Adversary Complaint

Generally, in his Adversary Complaint, Plaintiff alleges as follows. (Dkt. No. 4, Attach. 1.) At some point after Plaintiff executed a Note and Mortgage for $67,000 with First National Bank of

Arizona on or about August 31, 2004, First National Bank of Arizona transferred **[**2]** the Note to First National Bank of Nevada, which immediately endorsed the Note in blank. (*Id.*) First National Bank of Arizona ceased doing business on June 30, 2008; and First National Bank of Nevada ceased doing business on July 25, 2008. (*Id.*) Despite these facts, on April 17, 2009, Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First National Bank of Arizona, purportedly assigned the Mortgage to GMAC Mortgage, LLC ("GMAC"). (*Id.*) The assignment was executed by Ronald W. Zackem as Assistant Secretary and Vice President of GMAC, despite the fact that, upon information and belief, Mr. Zackem was not an employee of either MERS or First National Bank of Arizona on April 17, 2009. (*Id.*) Moreover, on March 23, 2012, MERS, again as nominee for First National Bank of Arizona, again purportedly assigned the Mortgage to GMAC, the second assignment stating that it is meant to correct and replace the assignment of April 17, 2009. (*Id.*) This second assignment was executed by Erica Lugo, as Assistant Secretary of GMAC, despite the fact that, upon information and belief, Ms. Lugo was not an employee of either MERS or First National Bank of Arizona on March 23, 2012. (*Id.* ***[**3]***) Finally, on February 7, 2014, MERS, again as nominee for First National Bank of Arizona, again purportedly assigned the Mortgage to GMAC as Trustee for Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2005-AP1 ("Nomura Trust"), c/o Ocwen Loan Servicing, LLC. (*Id.*) This third assignment was executed by Joel Pires, Assistant Secretary to GMAC, despite the fact that, upon information and belief, Marti Noriega was not an employee of either MERS or First National Bank of Arizona on February 7, 2014. (*Id.*)[1] Moreover, upon information and belief, the Nomura Trust closed on February 28, 2005, approximately nine years before allegedly acquiring the Mortgage. (*Id.*)

Based on these factual allegations, Plaintiff claims that Defendant's mortgage lien against Plaintiff's real property cannot be enforced for the following reasons: (1) all of the assignments of the Mortgage have been from MERS, as nominee First National Bank of Arizona, even though the Note was endorsed to First National Bank of Nevada; (2) while the assignments of the Mortgage on April **[**4]** 17, 2009, and March 23, 2012, are from MERS to GMAC, there is no assignment of the Mortgage from GMAC to Defendant; (3) moreover, despite having twice assigned the Mortgage to GMAC, MERS again assigned the Mortgage to Defendant on February 7, 2014; and (4) finally, the Note and Mortgage were fatally separated when the Note was transferred to First National Bank of Nevada without the Mortgage, breaking

[1] Plaintiff's Adversary Complaint appears to inadvertently confuse the name of Marti Noriega for that of Joel Pires, or vice versa.

[*13] the concurrent chain of ownership of the Note and Mortgage. (*Id.*)

B. Proceedings in Bankruptcy Court

On April 16, 2014, Plaintiff filed his Adversary Complaint to determine the nature, extent and validity of Defendant's mortgage lien against real property owned by Plaintiff. (Dkt. No. 1, Attach. 2, at 2.)

On November 26, 2014, Defendant filed a motion for summary judgment seeking the dismissal of Plaintiff's Adversary Complaint, pursuant to *Fed. R. Bankr. P. 7056*. (*Id.* at 4.) Generally, Defendant's motion asserted, *inter alia*, two arguments: (1) Defendant has the right to enforce the Mortgage because (a) as an initial matter, Plaintiff's Chapter 13 bankruptcy petition clearly acknowledges the validity of the debt in question by listing, and not disputing, a debt identical to the loan owned to Defendant (including the **[**5]** amount owed and address of the collateral), and (b) in any event, documentary evidence (specifically, the Note endorsed in blank, the Mortgage, the Confirmatory Assignments, the PSA and the Mortgage Loan Schedule) clearly establish that Defendant holds, and was assigned, the Note and Mortgage; and (2) Plaintiff's claim that the Mortgage is void is meritless because (a) a written assignment of Mortgage is not required under New York law, and (b) Plaintiff lacks standing to challenge compliance with a Pooling and Servicing Agreement ("PSA"), such as the one pursuant to which the Mortgage was assigned to GMAC as Trustee for Nomura Trust. (Dkt. No. 4, Attach. 5.)

On December 11, 2014, Plaintiff filed an opposition to the motion. (Dkt. No. 1, Attach. 2, at 4; Dkt. No. 4, Attach. 22.)

On January 6, 2015, Defendant filed a reply memorandum of law. (Dkt. No. 1, Attach. 2, at 5; Dkt. No. 4, Attach. 8.)

On January 8, 2015, Chief Bankruptcy Judge Littlefield heard oral argument on Defendant's motion. (Dkt. No. 2, Attach. 1, at 16-61.)

On January 23, 2015, Chief Bankruptcy Judge Littlefield entered an Order granting Defendant's motion for summary judgment. (Dkt. No. 1, Attach. 2, at 5; Dkt. No. 1, **[**6]** Attach. 1.)

On February 4, 2015, Plaintiff filed a Notice of Appeal.

C. Parties' Arguments on Appeal

1. Plaintiff's Brief-in-Chief

Generally, Plaintiff's brief-in-chief asserts four arguments. (Dkt. No. 7.) First, Plaintiff argues, Chief Bankruptcy Judge Littlefield should not have granted Defendant's motion for summary judgment before ruling on Plaintiff's motion to preclude Defendant from offering evidence (which was based on Defendant's relying on the

original Note despite failing to provide any response to Plaintiff's First Set of Interrogatories and Demand for Documents of August 14, 2014). (*Id.*)

Second, Plaintiff argues, summary judgment cannot be granted based solely upon an affidavit not from Defendant but from the mortgage servicer, which attempted to introduce business records without proper foundation or authentication. (*Id.*)

Third, Plaintiff argues, summary judgment cannot be granted when there are significant questions of fact regarding the validity of the Allonge to the Note, the validity of the assignments of the Mortgage, and whether the Mortgage was ever assigned to Defendant. (*Id.*)

Fourth, Plaintiff argues, summary judgment cannot be granted based solely upon Defendant's **[**7]** agents being currently in possession of the original Note (and especially not by their claiming mere *constructive* possession of the original Note); rather, **[*14]** Defendant must show that it is the *holder* of the Note, which requires a showing that there has been (i) a negotiation of the Note by means of the lender's endorsement and (ii) physical delivery of the Note. (*Id.*) However, Plaintiff argues, here, Defendant's factual affidavit makes no such showing. (*Id.*)

2. Defendant's Response Brief

Generally, Defendant's response brief asserts four arguments. (Dkt. No. 10.) First, Defendant argues, to the extent that Plaintiff's appeal is based on Chief Bankruptcy Judge Littlefield's factual findings, those factual findings are entitled to a clear-error review and clearly survive that review. (*Id.*) Moreover, to the extent that Plaintiff's appeal argues that he was denied adequate discovery before a decision was rendered on Defendant's motion for summary judgment, he has not satisfied the standard for entitlement to such further discovery. (*Id.*)

Second, Defendant argues, based upon the documents adduced by Defendant, Defendant is clearly the holder and the owner of the Note and Mortgage for the following **[**8]** reasons: (a) as an initial matter, it is irrelevant when Defendant received physical possession of the Note and Mortgage because this is not a foreclosure action; (b) in any event, based on the documents (including the Note, the Mortgage, the PSA and the Mortgage Loan Schedule), Defendant clearly became the holder and the owner of the Note and Mortgage on or about February 28, 2005; (c) indeed, Plaintiff's verified Chapter 13 bankruptcy petition acknowledges the validity of the debt owned by Defendant by listing, and not disputing, a debt identical to the loan owned to Defendant (including the amount owed and address of the collateral); and (d) Plaintiff's argument that the Note and Mortgage were "received . . . from the

mortgage servicer, not from the Trustee or Document Custodian of the Trust" is nonsensical (because the servicer and entity serviced are one and the same for purposes of foreclosure) and in any event the argument is unsupported by the documents. (*Id.*)

Third, Defendant argues, Second Circuit precedent (specifically, *Rajamin v. Deutsche Bank Nat'l Tr. Co., 757 F.3d 79 [2d Cir. 2014]*) bars Plaintiff from relying on an alleged violation of the PSA to support his claim, because he has not alleged or established that (a) he is either a party **[**9]** to or a third-party beneficiary of the PSA, (b) he satisfied the Note and Mortgage, or (c) some other entity is seeking payment from him on the same Note. (*Id.*)

Fourth, Defendant argues, Chief Bankruptcy Judge Littlefield's denial of Plaintiff's motion to preclude as moot was proper for the following reasons: (a) as an initial matter, Plaintiff is incorrect that Defendant's uncontroverted evidence of possession of Plaintiff's original Note (endorsed in blank) and Mortgage is insufficient to establish Defendant's right to enforce the Note and Mortgage; (b) moreover, on October 23, 2014, Defendant sufficiently responded to Plaintiff's discovery demands (although Plaintiff dislikes those responses); and (c) finally, further discovery would be of no evidentiary value to Plaintiff because he cannot offer any evidence to support his claims that Defendant cannot enforce the Mortgage (in that he lacks standing to challenge compliance with the PSA). (*Id.*)

3. Plaintiff's Reply Brief

Generally, Plaintiff's reply brief asserts five arguments. (Dkt. No. 11.) First, Plaintiff argues, Defendant's response brief "provides no meaningful response" to Plaintiff s argument that Defendant's motion for summary **[**10]** judgment should not have been granted prior to a ruling on **[*15]** Plaintiff's motion to preclude, and addresses only whether the motion to preclude should or should not have been granted (had it been heard). (*Id.*)

Second, Plaintiff argues, Defendant's response brief "provides no meaningful response" to Plaintiff s argument that summary judgment could not be granted based solely on an affidavit from the mortgage servicer and not from Defendant itself. (*Id.*)

Third, Plaintiff argues, while Defendant may currently be in possession of the Note, a genuine dispute of material fact exists as to whether Defendant was previously in possession of the original Note. (*Id.*)

Fourth, Plaintiff argues, Defendant's response brief "provides no meaningful response" to Plaintiff's argument that summary judgment cannot be granted based solely upon Defendant's attorneys being currently in possession of the original Note. (*Id.*)

Fifth, Plaintiff argues, Defendant is "attempt[ing] to distract the Court with inanities," such as an argument that Plaintiff is alleging a violation of the PSA, which is not the case. (*Id.*) Moreover, "even a first year law student could see that Defendant failed to [adequately] respond to [Plaintiff's discovery **[**11]** demands]." (*Id.*)

II. GOVERNING LEGAL STANDARDS

A. Legal Standard Governing Appeal from Bankruptcy Court Decision

This Court has jurisdiction to hear this appeal under *28 U.S.C. § 158(a)*. *Rule 8013 of the Federal Rules of Bankruptcy Procedure* provides in pertinent part as follows:

> [o]n an appeal, the district court . . . may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree, or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.

Fed. R. Bankr. P. 8013. Thus, the district court must uphold the factual findings of a bankruptcy court unless they are clearly erroneous. *Hudson v. Harris, 09-CV-1417, 2011 U.S. Dist. LEXIS 24544, 2011 WL 867024, at *9 (N.D.N.Y. Mar. 10, 2011)* (Scullin, J.). A district court may find a bankruptcy court's determination to be clearly erroneous when, on consideration of the record as a whole, the court is left with the definite and firm conviction that a mistake has been committed. *Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 168 (2d Cir. 2001)* (quoting *U.S. v. U.S. Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 [1948]*). "[P]articularly strong deference [must be given to] a [bankruptcy] court's findings of fact based on credibility assessments of witnesses it has heard testify." *Pisculli v. T.S. Haulers, Inc. (In re Pisculli), 426 B.R. 52, 59 (E.D.N.Y. 2010)*, *aff'd*, *408 F. App'x 477 (2d Cir. 2011)* (quoting *In re Boyer, 328 F. App'x 711, 716 [2d Cir. 2009]*). Although the bankruptcy court's findings **[**12]** of fact are not conclusive on appeal, the party that seeks to overturn them bears a heavy burden. *H & C Dev. Group, Inc. v. Miner (In re Miner), 229 B.R. 561, 565 (B.A.P. 2d Cir. 1999)* (citation omitted).

The bankruptcy court's legal conclusions, however, are subject to de novo review. *See Asbestosis Claimants v. U.S. Lines Reorganization Trust (In re U.S. Lines, Inc.), 318 F.3d 432, 435 (2d Cir. 2003)*. The court reviews mixed questions of law and fact either de novo or under the clearly erroneous standard depending on whether the question is predominantly legal **[*16]** or factual. *Bay Harbour Mgmt., L.C. v. Lehman Bros. Holdings Inc. (In re Lehman Bros.*

Holdings, Inc.), 415 B.R. 77, 83 (S.D.N.Y. 2009) (quoting Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.), 554 F.3d 300, 316 n. 11 [2d Cir. 2009]).

B. Legal Standard Governing Motion for Summary Judgment

Rule 7056 of the Federal Rules of Bankruptcy Procedure provides, *inter alia*, that "Rule 56 F.R.Civ.P. applies in adversary proceedings . . . ." Fed. R. Bankr. P. 7056.

Under Fed. R. Civ. P. 56, summary judgment is warranted if "the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In addition, "[the moving party] bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the . . . [record] which it believes demonstrate[s] the absence of any genuine issue of material fact." Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). However, when the moving party has met this initial responsibility, the nonmoving **[**13]** party must come forward with specific facts showing a genuine issue of material fact for trial. Fed. R. Civ. P. 56(a),(c),(e).

A dispute of fact is "genuine" if "the [record] evidence is such that a reasonable jury could return a verdict for the novmoving party." Anderson, 477 U.S. at 248. As a result, "[c]onclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) [citation omitted]. As the Supreme Court has famously explained, "[The nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts" [citations omitted]. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

As for the materiality requirement, a dispute of fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* [citation omitted].

C. Legal Standards Governing Plaintiff's Claim and Defendant's Defenses

Because the parties have demonstrated (in their briefs) an accurate understanding of the legal standards governing Plaintiff's claim and

Defendant's defenses, the Court will not recite those legal standards in this Decision and Order, which is intended primarily for the review of the parties.

III. ANALYSIS

After carefully considering **[**14]** Plaintiff's arguments on appeal, the Court rejects those arguments for each of the reasons offered by Defendant in its response brief and the reasons offered by Chief Bankruptcy Judge Littlefield during the parties' oral argument on Defendant's motion. (Dkt. No. 10; Dkt. No. 2, Attach. 1, at 16-61.) To those reasons, the Court adds five points.

First, the Court's analysis in this action is similar to the Court's analysis in the action of *Hilton v. Deutsche Bank*, 14-CV-1463 **[*17]** (N.D.N.Y.). As a result, the Court adopts the reasoning set forth in its Decision and Order on the defendant's motion to dismiss in that latter action. *See Hilton v. Deutsche Bank*, 14-CV-1463, Decision and Order, at Part III (N.D.N.Y. filed September 2015) (Suddaby, J.).

Second, to the extent that Plaintiff's first argument (in his brief-in-chief) asserts that he was given an inadequate opportunity to conduct discovery in this action, the Court finds that argument to be without merit. *Rule 56(d) of the Federal Rules of Civil Procedure* provides as follows:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time **[**15]** to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). This rule has been appropriately characterized as providing as "a narrow exception to the availability of summary judgment in instances where a party cannot fairly respond to a summary judgment motion because of the inability, through no fault of that party, to acquire evidence which is available and would preclude the entry of summary judgment." *Steptoe v. City of Syracuse, 09-CV-1132, 2010 U.S. Dist. LEXIS 132631, 2010 WL 5174998, at *4 (N.D.N.Y. Oct 5, 2010)* (Peebles, M.J.), *adopted by 2010 U.S. Dist. LEXIS 132635, 2010 WL 5185809 (N.D.N.Y. Dec. 15, 2010)* (Mordue, C.J.).[2] To obtain relief under *Fed. R. Civ. P. 56(d)*, a litigant must submit an affidavit showing "(1) what facts are sought to resist the motion and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to

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[2] *Accord*, *Gill v. Calescibetta, 00-CV-1553, 2009 U.S. Dist. LEXIS 128255, 2009 WL 890661, at *7 (N.D.N.Y. March 31, 2009)* (Report-Recommendation by Peebles, M.J., adopted by Suddaby, J.); *Gill v. Hoadley, 261 F. Supp.2d 113, 132 (N.D.N.Y. 2003)* (Peebles, M.J.), *adopted by* Memorandum-Decision and Order (N.D.N.Y. filed Jan. 9, 2004) (Scullin, C.J.).

obtain them, and (4) why the affiant has been unsuccessful in those efforts." *Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003)*.[3] Here, Plaintiff has not met this standard (especially the first and second prongs of it). *See, e.g., Martin v. O'Conner, 225 B.R. 283, 286-87 (N.D.N.Y. 1998)*.

Third, to the extent that Plaintiff's second argument (in his brief-in-chief) assert that summary judgment could not be granted based solely on an affidavit from a mortgage servicer, the Court finds that argument to be without merit. Setting aside the fact that the mortgage servicer was acting on behalf of Defendant in possessing documents (Dkt. No. 2, Attach. 1, at 40-41 [attaching pages "25" and "26" of transcript]; Dkt. No. 4, Attach. 10, at ¶ 1 [Ortwerth Affid.]), it is not the affidavit of the mortgage service that is of particular materiality in this case but the documents attached to it (which the Court finds to have been properly introduced by the affidavit). For example, among those documents is the Mortgage Loan Schedule, which indicates that a Mortgage bearing a loan number ending in "7137" had been **[*18]** assigned to Defendant by February 1, 2005. (Dkt. No. 4, Attach. 17, at 2-3.)

Fourth, to the extent that Plaintiff's first and second arguments (in his brief-in-chief) assert that Defendant should have been precluded from adducing the documents in support of its motion for summary judgment (e.g., the original Note and the "business records" introduced **[**17]** by Defendant's mortgage servicer), the Court finds those arguments to be without merit. As an initial matter, Plaintiff has not shown cause for such preclusion. Not only does the Court find the documents to have been properly introduced by the affidavit of Katherine Ortwerth, the Court also finds no grounds to sanction Defendant for their response to Plaintiff's discovery requests. The Court finds that Defendant sufficiently responded to Plaintiff's discovery requests under the circumstances (*compare* Dkt. No. 4, Attach. 23 *with* Dkt. No. 4, Attach. 7 *and* Dkt. No. 4, Attach. 23), and notes that Chief Bankruptcy Judge Littlefield found that Plaintiff had access to many of the requested documents (Dkt. No. 2, Attach. 1, at 48 [attaching page "33" of transcript]).

In any event, even if the documents were precluded as record evidence for purposes of a motion for summary judgment, they could (under the circumstances) be relied on as evidence for purposes of a dismissal for lack of subject-matter jurisdiction (due to lack of standing) under *Fed. R. Civ. P.*

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[3] *Accord, **[**16]** Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999); Meloff v. N.Y. Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995); Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994); Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414, 422 (2d Cir. 1989); Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 926 (2d Cir. 1985); Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 725 F. Supp. 669, 680 (N.D.N.Y. 1989)* (McCurn, C.J.), *aff'd, 996 F.2d 537 (2d Cir. 1993)*.

12(b)(1) and/or 12(h)(3). At the very least, they could be relied on as documents incorporated by reference in (and/or integral to) the Adversary Complaint (for purposes **[**18]** of a failure-to-state-a-claim analysis). It must be remembered that, to the extent that a motion for summary judgment is based entirely on the factual allegations of the opponent's pleading, dismissal for failure to state a claim is possible. *See Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 273-74 (2d Cir. 1968)* ("Where appropriate, a trial judge may dismiss for failure to state a cause of action upon motion for summary judgment.") [citations omitted]; *Katz v. Molic, 128 F.R.D. 35, 37-38 (S.D.N.Y. 1989)* ("This Court finds that . . . a conversion [of a *Rule 56* summary judgment motion to a *Rule 12(b)(6)* motion to dismiss the complaint] is proper with or without notice to the parties.").

Fifth, to the extent that Plaintiff's third and fourth arguments (in his brief-in-chief) assert that a genuine dispute of material fact exists as to whether Defendant was previously in possession of the original Note, that argument is without merit. For the sake of brevity, the Court will not linger on the record evidence establishing that the Mortgage was in Defendant's possession by February 1, 2005. (*See, e.g.*, Dkt. No. 4, Attach. 17, at 2-3.) Just as important is the fact that Chief Bankruptcy Judge Littlefield's decision was based, in part, on Plaintiff's lack of standing to challenge the Mortgage's enforceability due to a purported **[**19]** break in the chain of title. (*See, e.g.*, Dkt. No. 2, Attach. 1, at 20, 31, 32, 42-43 [attaching pages "6," "16," "17," "27," "28" of Transcript].)

For all of these reasons, Chief Bankruptcy Judge Littlefield's decision is affirmed.

ACCORDINGLY, it is

ORDERED that Appellant/Plaintiff's appeal is **DENIED**, and Chief Bankruptcy Judge Littlefield's decision is **AFFIRMED**.

Dated: September 16, 2015

Syracuse, New York

/s/ Glenn T. Suddaby

Hon. Glenn T. Suddaby

Chief, U.S. District Judge

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EXHIBIT "D"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Plaintiff, vs. JOHN JAMES BARBIER; DEPARTMENT OF TAXATION - STATE OF HAWAII; JOHN DOES 1-20; JANE DOES 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; AND DOE GOVERNMENTAL UNITS 1-20, Defendants.	CIVIL NO. 18-1-0040 (2) (FORECLOSURE) **DECLARATION OF INDEBTEDNESS AND ON PRIOR BUSINESS RECORDS; EXHIBITS "1" – "10"**

DECLARATION OF INDEBTEDNESS AND ON PRIOR BUSINESS RECORDS

I, Melinda Patterson, declare under penalty of law that the following is true and correct:

1. I am authorized to sign this Declaration on behalf of Plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, as an authorized signer of Caliber Home Loans, Inc. ("Caliber"), which is Plaintiff's servicing agent for the subject loan ("the Loan").

2. Caliber maintains records for the loan in its capacity as Plaintiff's servicer. As part of my job responsibilities for Caliber, I am familiar with the type of records maintained by Caliber in connection with the Loan. As such, I am authorized to make this Declaration.

3. Caliber is the current loan servicer for Plaintiff and acts as the exclusive representative and agent of Plaintiff in the servicing and administering of mortgage loans referred to Caliber, including the Loan being foreclosed in this action.

4. The information in this Declaration is taken from Caliber's business records. I have personal knowledge of Caliber's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with knowledge of the information in the business record, or from information transmitted by persons with knowledge; (b) kept in the course of Caliber's regularly conducted business activities; and (c) created by Caliber as a regular practice.

5. On or about 10/26/2004, Defendant JOHN JAMES BARBIER ("Borrower"), for value received, duly made and executed a Promissory Note ("Note") in the amount of $505,600.00. A true and correct copy of the Note is attached as Exhibit "1" and is incorporated herein by reference.

6. Plaintiff has possession of the Note with standing to prosecute the instant action and the right to foreclose the subject Mortgage. The Note has been indorsed in blank. Plaintiff has reviewed the original Note and is entitled to collect on the original Note. In anticipation that the original Note would be required for these foreclosure proceedings, Plaintiff caused the original Note, indorsed in blank, to be delivered to the Plaintiff's attorney, TMLF Hawaii LLLC, as agent for the Plaintiff prior to the filing of the Complaint on 01/23/2018. A true and correct copy of the original Note is attached hereto as Exhibit "1" and incorporated herein by reference.

7. Caliber's records indicate that Plaintiff had possession of the original Note, indorsed in blank, by and through TMLF Hawaii LLLC, before the commencement of this action.

8. The Note is secured by that certain Mortgage ("Mortgage"), encumbering the real property located at 440 Wainee Street, Lahaina, HI 96761, which was recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau") as Document Number 2004-227703 on

11/10/2004. A true and correct copy of the Mortgage is attached as Exhibit "2" and is incorporated herein by reference.

9. An Assignment of Mortgage ("Assignment 1") dated 05/27/2010 was recorded in the Bureau as Document Number 2010-085283 on 06/21/2010. A true and correct copy of Assignment 1 is attached as Exhibit "3" and is incorporated herein by reference.

10. An Assignment of Mortgage ("Assignment 2") dated 11/13/2013 was recorded in the Bureau as Document Number A-63870509 on 06/27/2017. A true and correct copy of Assignment 2 is attached as Exhibit "4" and is incorporated herein by reference.

11. An Assignment of Mortgage ("Assignment 3") dated 08/14/2017 was recorded in the Bureau as Document Number A-64640188 on 09/12/2017. A true and correct copy of Assignment 3 is attached as Exhibit "5" and is incorporated herein by reference. By those Assignments, Plaintiff is now the mortgagee of record.

12. A Limited Power of Attorney ("LPOA 1") executed 08/22/2013 was recorded in the Bureau as Document Number A-50430358 on 10/22/2013. LPOA 1 was used to execute Assignment 2. A true and correct copy of LPOA 1 is attached as Exhibit "6" and is incorporated herein by reference.

13. A Limited Power of Attorney ("LPOA 2") executed 01/05/2016 was recorded in the Office of the Assistant Registrar of the Land Court of the State of Hawaii ("Land Court") as Document Number T-9880311 and in the Bureau as Document Number A-62280910 on 01/19/2017. LPOA 2 was used to execute Assignment 3. A true and correct copy of LPOA 2 is attached as Exhibit "7" and is incorporated herein by reference.

14. A Limited Power of Attorney ("LPOA 3") executed 05/17/2017 was recorded in the Land Court as Document Number T-10249127 and in the Bureau as Document Number A-

65970596 on 01/23/2018. LPOA 2 was used to execute this Declaration. A true and correct copy of LPOA 3 is attached as Exhibit "8" and is incorporated herein by reference.

15. The owner of the Note and Mortgage for a particular a mortgage loan is commonly referred to in the loan servicing industry as the Investor. The Investor for this mortgage loan is the Plaintiff.

16. Caliber maintains all the day to day loan documents, records and accounting of payments on the Loan being foreclosed in this action including all documents and business records acquired by Plaintiff when it purchased the subject mortgage loan.

17. Under the terms of Caliber's servicing arrangement, Plaintiff does not participate in, keep and maintain any of the day to day loan documents, inputting of accounting data, saving of business records and all communications with borrowers.

18. The Plaintiff, as the Investor, has a passive role with the primary emphasis on tracking its return on investment. In terms of routine business records on the Loan, Caliber acts as the sole custodian of Plaintiff's records.

19. Caliber became Plaintiff's loan servicer for the Loan being foreclosed in this action on 12/07/2015.

20. I have been in the mortgage loan servicing industry for 15 years. Based upon my occupational experience, I know that loan servicers follow an industry wide standard on how to keep and maintain business records on the loan services performed in their portfolio which recordkeeping is part of the regularly conducted activity of loan servicers. The only difference between loan servicers is the computer software used and the formatting of reports. The type of and regular maintenance of loan information including the accounting under generally accepted principles for each mortgage loan is standard and computerized.

21. Loan servicers typically engage in the regularly conducted activity of entering payments made on mortgage loans at or near the time the payment is received and use an amortization program that applies the payment received towards accrued interest, principal and in most cases, the balance of any funds is deposited into an escrow account for property related expenses such as real property taxes and property insurance.

22. In addition to logging payments received, loan servicers typically engage in the regularly conducted activity of recording and maintaining records of all disbursements made on each mortgage loan for all sums advanced as authorized for payment under the note and mortgage.

23. Aside from payments and disbursements, loan servicers typically as part of their regularly conducted activity send correspondence to borrowers on mortgage loan such as payment adjustments, responses to borrower inquiries, preparation and sending of default notices.

24. Finally, the loan servicer records, maintains and takes custody of all such daily business records and all loan documents, including taking possession of the note and mortgage records on behalf of the Investor.

25. Borrower defaulted in the performance of the terms set forth in the Note and Mortgage by failing to pay the principal, interest and advances in the manner therein provided. Written Notice ("Notice") was given to Borrower of the default and of mortgagee's intention to accelerate the loan if the default was not cured. A true and correct copy of this Notice is attached as Exhibit "9" and is incorporated herein by reference. Despite the Notice, Borrower failed or neglected to cure the default. As a result, mortgagee exercised its option in accordance with the terms of the Mortgage and Note to accelerate the loan and declare the entire principal balance due under the Note.

26. The Payment History attached as Exhibit "10", which I have reviewed, is a true and correct copy, and is part of the business records described above. It shows that Borrower defaulted, the default has not been cured, and the amount stated below, as tabulated from the business record, is owed on the Loan. The record includes fees and costs that are subject to change based on *inter alia*, a per diem interest accrual for each day after 06/08/2018 until paid.

Principal Balance:	$474,543.40
Interest Amount:	$258,419.86
Interest Due From 03/01/2009 to 06/08/2018 @ 5.875%	
Per Diem: $76.38	
Late Charges:	$6,878.84
Property Inspection Costs:	$1,360.50
Property Preservation:	$100.00
BPO Costs:	$118.50
Windstorm Insurance:	$687.00
Mortgage Insurance:	$14,544.86
County Real Property Taxes:	$17,142.27
Total Due:	$773,795.23

27. The prior loan servicers for this mortgage loan were Ocwen Loan Servicing, LLC and IndyMac Mortgage Services, a division of OneWest Bank, FSB (collectively, "Prior Servicer").

28. Upon becoming Plaintiff's loan servicer, Caliber took custody and control of loan documents and business records of the Prior Servicer and incorporated all such records into the business records of Caliber.

29. Before the Prior Servicer's records were incorporated into Caliber's own business records, it conducted an independent check into the Prior Servicer's records and found them in keeping with industry wide loan servicing standards and only integrated them into Caliber's own

business records after finding the Prior Servicer's records were made as part of a regularly conducted activity, met industry standards and determined to be trustworthy.

30. In performing its services to the Plaintiff, Caliber relies upon the accuracy of the Prior Servicer's records and those records are now a part of and used for all purposes in the conduct of Caliber's regularly conducted activity of keeping and maintaining its own business records.

31. The Prior Servicer's records are regularly used and relied upon by Caliber in all dealings with all the borrowers, in reporting all profit and loss on the mortgage loans to the Plaintiff, in the preparation, filing and payment of income taxes dependent upon such information, and in evaluating Caliber's own job performance.

32. To the extent the Prior Servicer's records are not accurate, Caliber, on its own behalf and on behalf of Plaintiff, has a contractual right of recourse against the Prior Servicer for any loss or damage caused by the Prior Servicer's records.

33. Caliber did review and determine the Prior Servicer's business records were trustworthy otherwise it would not have incorporated it into its own records.

34. Caliber has retained TMLF Hawaii LLLC, to prosecute this foreclosure action on Plaintiff's behalf and is obligated to pay a reasonable fee and reimburse costs incurred in connection with the firm's services. Those attorney's fees and costs are not included in this Declaration. Rather, the above law firm will submit its own Declaration supporting and requesting the fees and costs from this action in accordance with applicable law.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of June, 2018 at San Diego, California
(City, State)

By _____

Name: Melinda Patterson

Title: Authorized Officer

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, by Caliber Home Loans, Inc., as its attorney in fact

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Plaintiff, vs. JOHN JAMES BARBIER; DEPARTMENT OF TAXATION – STATE OF HAWAII; JOHN DOES 1-20; JANE DOES 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; AND GOVERNMENTAL UNITS 1-20, Defendants.	CIVIL NO. 18-1-0040(2) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on the date first written below a true and correct copy of the foregoing document was hand delivered to the offices of the following persons:

PETER T. STONE, ESQ.
DEREK W.C. WONG, ESQ.
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