COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
Civil Action No. 10-1072

JUDY FREDENBERG,

Plaintiff,

v.

AMERICAN HOME MORTGAGE SERVICING, INC., individually and as successor-in-interest to Citi Residential Lending and DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee in trust for the Registered Holders of AMERIQUEST MORTGAGE SECURITIES INC Asset Backed Pass-Through Certificates, Series 2005-R2,

Defendants.

**MEMORANDUM IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS**

**INTRODUCTION**

Plaintiff Judy Fredenberg ("Ms. Fredenberg") hereby submits this Memorandum in Opposition to the Partial Motion to Dismiss ("Motion") submitted by Defendants American Home Mortgage Servicing, Inc. ("AHMSI") and Deutsche Bank National Trust Company, as Trustee in Trust for the Registered Holders of Ameriquest Mortgage Securities, Inc. Asset Backed Pass-Through Certificates, Series 2005-R2 ("Deutsche Bank"). The Defendants seek to dismiss Counts I, III, IV, V, and VI of the Verified Complaint and Request for Injunctive Relief

("Complaint"). Ms. Fredenberg opposes the Partial Motion to Dismiss for the reasons set forth below.

## LEGAL STANDARD

In considering a motion to dismiss under Massachusetts Rule of Civil Procedure 12(b)(6), the Court should accept as true all allegations in the complaint, as well as any inferences that may be drawn from the complaint. See e.g., Lantner v. Carson, 374 Mass. 606 (1978); Jones v. Brockton Public Markets, Inc., 369 Mass. 387 (1975). A motion to dismiss should not be granted for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98 (1977) (emphasis added). The criteria required for a plaintiff to defeat a motion to dismiss under Rule 12(b)(6) are generous and viewed as a "minimal hurdle" for the plaintiff. Richards v. Arteva Specialties S.A.R.L., 66 Mass.App.Ct. 726 (2006) (quoting Bell v. Mazza, 394 Mass. 176, 184 (1985)). This standard was clarified following the Supreme Court's decision in Bell Atl. Corp. v. Twombly (550 U.S. 544 (2007)) to state that a complaint should include factual allegations suggesting an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (quoting Bell Atl. Corp. v. Twombly, 127 S.Ct. at 1969). Nevertheless, "dismissals on the basis of pleadings, before facts have been found, are discouraged." Gennari v. City of Revere, 23 Mass.App.Ct. 979 (1987).

## ARGUMENT

Ms. Fredenberg's Complaint is clearly sufficient to withstand the Defendants' motion to dismiss. The allegations in the Complaint support Ms. Fredenberg's claim that she entered into an enforceable contract with the Defendants, when Defendants promised they would not conduct a foreclosure sale while Ms. Fredenberg's application for a loan modification was being

evaluated. Viewing all facts set forth in the Complaint as true and in a light most favorable to the plaintiff, Defendants have failed to meet their burden of showing that Ms. Fredenberg is not entitled to any relief. The Defendants' motion also asks the Court to determine conclusions of law that are more appropriately addressed by a finder of fact.

## I. Breach of Contract Claim

Ms. Fredenberg has clearly established that a contract existed between her and the Defendants. The Defendants argue that Ms. Fredenberg did not give consideration in exchange for their offer to postpone the foreclosure, and therefore the offer was not enforceable. In the formation of a contract, the consideration requirement is satisfied if there has been a benefit to the promisor or detriment to the promisee. See Graphic Arts Finishers Inc. v. Boston Redev. Authy., 357 Mass. 40, 43 (1970). In considering the adequacy of consideration, courts have consistently stated that any consideration, however small, is sufficient. "The law is not concerned with the adequacy of consideration, as long as it is 'valuable'." Vasconcellos v. Arbella Mut. Ins. Co., 67 Mass.App.Ct. 277 (2006), citing V. & F.W. Filoon Co. v. Whittaker Corp., 12 Mass.App.Ct. 932 (1981), quoting from Barnett v. Rosen, 235 Mass. 244, 249 (1920).

In the instant case, the Defendants made an offer to postpone the foreclosure sale and process a loan modification. In reliance of this promise Ms. Fredenberg complied with all of Defendants' requests, including to provide ongoing documents and information (such as faxing multiple sets of documents at her own expense); to change her home insurance policy; to make a lump sum payment towards the mortgage arrears, which funds she saved and set aside; and to forbear from taking any other action to try to prevent foreclosure.

The Defendants assert that if a contract existed between them and Ms. Fredenberg it was oral, and therefore barred by the statute of frauds. This argument cannot be sustained because of

the estoppel doctrine. It is a well-established principle of Massachusetts law that "where a party against whom enforcement of an oral contract is sought has made a material misrepresentation, that party may be estopped from raising the statute of frauds defense." Frederick v. Conagra Inc., 713 F.Supp. 41 (1989), quoting Greenstein v. Flatley, 19 Mass.App.Ct. 351, 356 (1985). In this case, the Defendants made extensive oral statements to Ms. Fredenberg, including assuring her that the foreclosure sale would be postponed, and specifying the terms of her new, modified mortgage. Ms. Fredenberg clearly relied on the statements that her home would not be foreclosed on and her mortgage would be modified, to her detriment. Because of those misrepresentations, Ms. Fredenberg did not take other action that could have stopped the foreclosure, such as restructuring her debt under the bankruptcy codes, or selling her home. Therefore, the Defendants' statute of frauds claim should be defeated. Even if the Defendants deny that their oral representations were sufficient to invoke the estoppel doctrine, these are genuine issues of material facts that are in dispute.[1]

## II. Negligent Misrepresentation Claim

Ms. Fredenberg has clearly alleged each and every element of negligent misrepresentation in her Complaint, including a claim for pecuniary loss. Complaint, ¶66. The Defendants imply that Ms. Fredenberg failed to describe the pecuniary losses she suffered, or to request monetary relief, in her Complaint. Motion, p. 7. The Defendants define pecuniary loss as "loss of money," Black's Law Dictionary, 6th Ed. A more complete definition of pecuniary loss is "loss of money or of something of monetary value." Black's Law Dictionary, 8th Ed. (emphasis added). The Complaint clearly shows that Ms. Fredenberg has suffered pecuniary loss. Complaint, ¶¶40-41, 55, 66, 70. Ms. Fredenberg lost ownership of her home and equity

[1] Ms. Fredenberg, in her Complaint, has asserted a claim for promissory estoppel. Defendants have not moved to dismiss that claim in their Motion.

she had in the home, and she is now liable for all the costs and fees associated with the foreclosure process. If Ms. Fredenberg and her family are evicted from the home, she may also be liable for costs and fees associated with the summary process matter, and any moving expenses she incurs. Complaint, ¶48. The absence of an actual dollar value claim in Ms. Fredenberg's Complaint does not preclude recovery for her losses, which are clearly described.

The Defendants cite Ratner v. Noble to support their claim that neither emotional distress nor loss of reputation damages constitutes monetary loss. That case, however, is not relevant here. In the Ratner case, the parties had already stipulated that the plaintiff had not suffered any pecuniary loss, and the court was asked to consider whether she might still recover for damage to her reputation. The Ratner court made clear that non-economic damages, such as emotional distress, may be recovered so long as the cause of action for pecuniary loss is first made out. In the instant case, Ms. Fredenberg has asserted a claim for negligent misrepresentation and has satisfied each element of that claim. Complaint, ¶¶ 62-67. She is entitled to recover for pecuniary loss as well as for emotional distress as a result of the negligent misrepresentation.

**III. Breach of the Implied Covenant of Good Faith and Fair Dealing**

The Defendants' claim that Ms. Fredenberg has failed to state a claim for breach of the implied covenant of good faith and fair dealing is based primarily on their assertion that an enforceable contract did not exist between the parties. Ms. Fredenberg has clearly demonstrated that an enforceable contract did exist. This Court, however, does not need to reach such a conclusion at this stage. There is sufficient dispute between the parties as to the material facts needed to establish a contract claim that a dismissal of the claim would not be appropriate. Therefore, the claim for breach of the covenant of good faith and fair dealing should not be dismissed.

If the Court should ultimately find that a contract existed, the present facts demonstrate the very definition of a breach of the covenant of good faith and fair dealing. As the owner and servicer of her home loan, the Defendants clearly owed a duty of care to Ms. Fredenberg.[2] The disparity in bargaining power between the two parties is immense. The Defendants' cite T.W. Nickerson, Inc. v. Fleet National Bank to define the covenant, stating that "the covenant of good faith and fair dealing requires that 'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to the fruits of the contract." 456 Mass. 562, 570 (2010) citing Anthony's Pier Four, inc. v. HBC Assocs., 411 Mass. 451, 471-472 (1991). Taking all facts in the Complaint as true and in the light most favorable to Ms. Fredenberg, the Defendants' actions in this case – assuring that a foreclosure would not go forward then proceeding with foreclosure – effectuated a full destruction of Ms. Fredenberg's rights. Following foreclosure of her home, Ms. Fredenberg was left with no remedy other than the filing of a suit to enforce her rights.

Even if the Court determines that an enforceable contract did not exist between the parties, Ms. Fredenberg's claim that Defendants breached the covenant of good faith and fair dealing should endure a motion to dismiss. Courts have found that the covenant attaches in instances of promissory estoppel. See Loranger Const. Corp. v. E.F. Hauserman Co., 376 Mass. 757 (1978). The Defendants do not presently seek to dismiss Ms. Fredenberg's promissory estoppel claims; therefore, her claim for breach of the covenant of good faith and fair dealing should not be dismissed.

[2] Courts have enumerated a standard that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.... Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Cadle Co. v. Vargas, 55 Mass.App.ct. 361 (2002) (internal citations omitted).

## IV. Wrongful Foreclosure

Massachusetts courts have long recognized a cause of action for wrongful foreclosure, based on a variety of factual circumstances. "It has become settled by repeated and unvarying decisions that a mortgagee in executing a power of sale contained in the mortgage in [sic] bound to exercise good faith and put forth reasonable diligence. Failure in these particulars will invalidate the sale even though there be literal compliance with the terms of the power." Sandler v. Silk, 292 Mass. 493, 496 (1935), citing Krassin v. Moskowitz, 275 Mass. 80, 82 (1931) and cases cited; Dexter v. Aronson, 282 Mass. 124, 127 (1933); Boyajian v. Hart, 284 Mass. 557, 558 (1933); Cambridge savings Bank v. Cronin, 289 Mass. 379 (1935) (emphasis added). The mortgagee's duty to exercise good faith and reasonable diligence in the foreclosure process exists "for the benefit and is available for the protection ... of the mortgagor." Id. There is no more fundamental violation of this duty than to promise a mortgagor that a foreclosure will not go forward, then proceed with foreclosure. This, however, is a question for the finder of fact. Ms. Fredenberg's claim of wrongful foreclosure should not be dismissed.

Even if a claim for wrongful foreclosure did not already exist in caselaw, the claim should nonetheless stand. A complaint should not be dismissed merely because it asserts a "novel legal theory of recovery". Bell v. Mazza, 394 Mass. 176, 183-184 (1985). Ms. Fredenberg must be allowed an opportunity to assert her claim of wrongful foreclosure.

## V. Unfair and Deceptive Business Practices Against Deutsche Bank

Defendant Deutsche Bank is clearly liable under G.L. c. 93A. Deutsche Bank argues that it is not liable under G.L. c. 93A because it is a trust which was not engaged in "trade or commerce" because it served a principally private function. This argument does not provide a proper basis for dismissal of a G.L. c.93A claim. See Schinkel v. Maxi-Holding, Inc., 30

Mass.App.Ct. 41, 565 (1991) (question of whether act was within trade or commerce under c.93A should be decided on record of facts rather than on a motion to dismiss); Squeri v. McCarrick, 32 Mass.App.Ct. 203, 207 (1992) ("[t]here was an error in removing from the jury the question whether the defendants, in all of the circumstances, were engaged in trade or commerce with respect to the conduct of which the plaintiffs complained. That question in this case was one of fact."); Republic of Turkey v. OKS Partners, 797 F.Supp. 64, 68 (D. Mass. 1992) (court cited Schinkel case for principle that question of whether act was within trade or commerce should be decided on a record of facts); Poznik v. Massachusetts Medical Professional Ins. Ass'n, 417 Mass. 48, 52 (1994) ([t]he question of whether a transaction takes place in a business context must be determined by the facts of each case).

Deutsche Bank's assertion that it is shielded from liability under G.L. c.93A simply because it operates as a trust misconstrues the cases Deutsche Bank cited in support of its Motion. The first, Office One, Inc. v. Lopez, 437 Mass. 113 (2002), is a case involving a private, voluntary condominium trust and individual condominium owners, relating directly to the condominium building. The other case cited, Edinburg v. Cavers, 22 Mass.App.Ct. 212 (1986) relates to allegations of misconduct in the handling of a family trust in the operation of the family business. In those situations, the nature of the trust was limited in scope and not related to any transaction involving the public. The notion that a private trust cannot be liable under G.L. c. 93A was specifically rebutted in Quinton v. Gavin, 64 Mass.App.Ct. 792 (2005). In that case, the court considered a trustee who sold financial management services to the public and found that the trustee was liable under G.L. c. 93A. "We fail to see why his use of trust arrangements in the conduct of his enterprise converted these commercial dealings into private relationships. We also fail to see why, having sold his trustee services in the marketplace to

consumers, Gavin should be treated any differently from similarly situated business professionals who are subject to the reach of G.L. c. 93A, s.9." Id. at 799, citing Guenard v. Burke, 387 Mass. 802, 809 (1982); Darviris v. Petros, 442 Mass. 274, 279 (2004); Barron v. Fidelity Magellan Fund, 57 Mass.App.Ct. 507, 513-514 (2003).

The facts in this case will demonstrate that Deutsche Bank's claim that it is a private trust and therefore not engaged in trade or commerce is disingenuous. Deutsche Bank cannot claim to be shielded from 93A liability merely because it is titled a 'trust company'. It would be questionable, at best, to assert that Deutsche Bank serves a 'principally private function' consistent with the caselaw Defendants cite. Deutsche Bank is one of the world's largest financial services corporations. Deutsche Bank was engaged in every aspect of the foreclosure of Ms. Fredenberg's home required by law, including sending the notice of default of mortgage; sending the notice of foreclosure; advertising the foreclosure sale in a newspaper of local circulation; conducting the foreclosure sale; and purchasing the home at the foreclosure sale. Following its purchase of the home from itself, Deutsche Bank initiated a summary process action to evict Ms. Fredenberg from the home. Deutsche Bank regularly performs these activities for the purpose of profiting itself, its partners and its investors.

Deutsche Bank is very clearly engaged in trade or commerce in Massachusetts, and to the extent that its claim that it is exempt from the reach of G.L. c. 93A can be asserted, additional discovery is required. Ms. Fredenberg's claim against Deutsche Bank should be allowed to go forward.

## CONCLUSION

The Defendants have failed to meet their burden sufficient to sustain dismissal. For the reasons stated above, the Plaintiff, Ms. Fredenberg, respectfully requests that the Defendants' Partial Motion to Dismiss be denied for all counts.

Respectfully Submitted
JUDY FREDENBERG
By her attorneys,

Date: June 28, 2010

Andrea Park, BBO# 667141
Ray Mestre, BBO# 558821
Legal Assistance Corporation
of Central Massachusetts
405 Main Street, 4th Floor
Worcester, MA 01608
Tel: 508-752-3718
Fax: 508-752-5918
apark@laccm.org
rmestre@laccm.org

CERTIFICATE OF SERVICE

I, Andrea M. Park, hereby certify that on this date I served the foregoing document via first-class mail to:

Attoney Jennifer S. Bunce
Attorney Maura K. McKelvey
Hinshaw & Culbertson LLP
One International Place, 3rd FLoor
Boston, MA 02110

Dated: June 28, 2010

Andrea M. Park