

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 5, 2014 at 9:30 a.m.

1. [10-53637](#)-E-13 G./KATHLEEN ULBERG
[11-2122](#)
ULBERG, JR. ET AL V. BANK OF
AMERICA, N.A. ET AL

CONTINUED PRE-TRIAL CONFERENCE
RE: AMENDED COMPLAINT FRAUD,
NEGLIGENT MISREPRESENTATION,
UNFAIR BUSINESS PRACTICES,
INTENTIONAL INTERFERENCE, SET
ASIDE OR RESCIND THE SALE, ETC.
3-15-11 [[11](#)]

Plaintiffs' Atty: John G. Downing

Defendants' Atty:

Adam N. Barasch [Bank of America, N.A.]

Scott A. CoBen [Pacific Crest Partners, Inc.; John Mudgett]

unknown [Recontrust Company, N.A.]

Adv. Filed: 2/22/11

Amd Cmplt Filed: 3/15/11

Answer: 5/10/11 [Pacific Crest Partners, Inc.; John Mudgett]

Counterclaim: 5/10/11

Nature of Action:

Recovery of money/property - other

Injunctive relief - other

Declaratory judgment

Notes:

Continued from 3/19/14. Dispositive Motions, if any, to be filed and served on or before 4/11/14; oppositions filed and served on or before 5/2/14; replies, if any, filed and served on or before 5/9/14; hearings on any dispositive motions to be set for 9:30 a.m. on 6/5/14.

June 5, 2014 at 9:30 a.m.

- Page 1 of 28 -

2. [10-53637-E-13](#) G./KATHLEEN ULBERG
[11-2122](#) SAC-5
ULBERG, JR. ET AL V. BANK OF
AMERICA, N.A. ET AL

MOTION FOR JUDGMENT ON THE
PLEADINGS AND/OR MOTION FOR
SUMMARY JUDGMENT
3-31-14 [[218](#)]

Tentative Ruling: The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, parties requesting special notice, and Office of the United States Trustee on March 31, 2014. By the court's calculation, 66 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Summary Judgment is granted as to the claims in the Complaint and denied as to the claims in the Counter Complaint, for which the court grants partial summary judgment.

Defendants and Counter Complainants, Pacific Crest Partners, Inc. (hereinafter "PCP") and John Mudgett ("Movants"), move the court for judgment on the pleadings or, in the alternative, for summary judgment pursuant to Rules 12(c) and 56(c) of the Federal Rules of Civil Procedure as incorporated by Rules 7012 and 7056 of the Federal Rules of Bankruptcy Procedure. Mr. Mudgett and PCP move for judgment on the basis that this court's ruling on the prior motion for summary judgment resolves all of the remaining causes of action relating to Mr. Mudgett and PCP other than the determination of damages.

Only the fourth, fifth, sixth, seventh and eighth causes of action in the Complaint relate to PCP or Mr. Mudgett. As to the Fourth Cause of Action in the Complaint for Intentional Interference with Contractual Relations, Movants argue that the ruling on the summary judgment resolves

this cause of action as to PCP and Mr. Mudgett because there was no breach of a contract between Bank of America N.A. (hereinafter "BANA") and Plaintiffs to postpone the trustee's sale as no such agreement existed. As to the Fifth, Sixth, Seventh and Eighth Causes of Action in the Complaint to Set Aside, Rescind or Cancel Trustee's, Deed, Quiet Title, Declaratory Relief and Injunction, Movants argue the ruling on the summary judgment resolves this cause of action as to PCP and Mr. Mudgett because all of these causes of action are dependent upon the court finding that the trustee's sale should have been postponed.

The Counter Claim filed by PCP asserts five causes of action. As to the First Cause of Action in the Counter Claim for trespass to real property, the Second Cause of Action for intentional interference with prospective economic advantage, the Third Cause of Action for declaratory relief, Movants state that the court's ruling on summary judgment as to Bank of America, N.A. resolves this cause of action as to PCP because it is dependent upon the court finding the trustee's sale valid. Movants argue that the court can now find that PCP is the lawful owner of the subject real property. Movants seek to vacate the preliminary injunction and state that the only issue that remains is the amount of damages sustained by PCP, which can be satisfied by the funds on hand with the Trustee.

As to the Fourth and Fifth Causes of Action in the Counter Claim for breach of contract and for indemnity as to Bank of America, N.A. and Recontrust, Movants argue that if the court finds that PCP is the lawful owner of the subject property, PCP consents to the dismissal of these causes of action.

BACKGROUND

This Adversary Proceeding was commenced by G. Wendell Ulberg, Jr. and Kathleen M. Ulberg ("Plaintiffs"), who are also Chapter 13 Debtors in a bankruptcy case pending before this court (Bankr. E.D. Cal. No. 10-53637). This Adversary Proceeding centers on the ownership of real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California (the "Property"). Plaintiffs assert that a non-judicial foreclosure sale conducted for BANA on December 27, 2010, was improper and that any transfer of property alleged to have occurred pursuant thereto should be set aside. The Plaintiffs also seek a monetary recovery from the BANA Defendants.

On March 15, 2011, Plaintiffs filed the First Amended Complaint ("FAC"), Dckt. 11, which alleges the following causes of action: (1) fraud as to BANA; (2) negligent misrepresentation as to BANA; (3) unfair business practices as to BANA and Recontrust; (4) intentional interference with contractual relations as to Recontrust, Mr. Mudgett and PCP; (5) set aside, rescind or cancel trustee's deed as to all defendants; (6) quiet title as to all defendants; (7) declaratory relief as to all defendants; and (8) injunction as to Mr. Mudgett and PCP. The complaint prayed for compensatory damages and to set aside the trustee's deed. Dckt. 11.

On March 2, 2011, the court granted the Motion for Preliminary Injunction against PCP and John Mudgett, their agents, servants, employees, attorneys, and all others in active participation with them from taking any action with respect to the December 31, 2010 Trustee's Deed Upon Sale for the Property. Order, Dckt. 41. The court ordered that Plaintiffs shall

provide security in the form of monies held by the Chapter 13 Trustee commencing with April 2011, payments of \$2,000.00 per month to be held subject to further order of this court. *Id.* The court stated that if the court ultimately determines that the Defendants have wrongly been restrained, the monies shall be used for costs and damages, as determined by the court, incurred by defendants. *Id.*

On May 10, 2011, PCP filed a counter claim alleging the following causes of action: (1) trespass to real property as to Plaintiffs; (2) intentional interference with prospective economic advantage as to Plaintiffs; (3) declaratory relief as to Plaintiffs; and (4) breach of contract as to BANA; and (5) indemnity as to BANA and Recontrust. Dckt. 59.

On November 29, 2011, the bankruptcy judge issued a Memorandum Opinion and Decision granting BANA's motion to dismiss with regard to the Third and Seventh Causes of Action, and denying the motion as to all other causes of action. Dckt. 110.

On October 22, 2013, the court issued a ruling granting summary judgment for BANA as to the remaining causes of action and for Recontrust as to all the causes of action. Dckt. 206. The District Court entered an order adopting the bankruptcy court's findings of fact and conclusions of law. Dckts. 213, 214.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] 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 [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc.* (*In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing*

Henderson v. City of Simi Valley, 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

COLLATERAL ESTOPPEL AND RES JUDICATA STANDARD

In describing the five elements for Collateral Estoppel under California law, the Ninth Circuit Court of Appeals stated,

Under California law, collateral estoppel only applies if certain threshold requirements are met:

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001).

Cal-Micro, Inc. v. Cantrell, 329 F.3d 1119, 1123 (9th Cir. 2003). The party asserting collateral estoppel bears the burden of establishing these requirements. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

Collateral Estoppel is a variant of the fundamental Res Judicata Doctrine. The Ninth Circuit Court of Appeals addressed the modern application of this Doctrine in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). The court considers four factors in determining whether Res Judicata applies,

"(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 970, citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

DISCUSSION

Prior Decision Granting Summary Judgment

In the Proposed Memorandum Opinion and Decision issued by this court, and adopted by the District Court, the court made several findings of fact. The parties agreed to the following undisputed facts:

**UNDISPUTED FACTS OR THOSE FOR
WHICH THERE ARE NO GENUINE DISPUTES**

Agreed Undisputed Facts

Fact Number, BANA Defendants' Statement	Undisputed Fact	Disputed Fact
1	Plaintiff G. Wendell Ulberg is and has been a self-employed licensed real estate agent since 1985.	
2	As part of his profession, G. Wendell Ulberg has, on multiple occasions, represented parties purchasing property in foreclosure sales.	
3	G. Wendell Ulberg was responsible for all communications with Defendants and with Sovereign Financial, his loan modification consultant.	
4	Kathleen Ulberg did not take part in the efforts to receive a loan modification or have any communication with BANA.	
5	Plaintiffs owned and resided in the property known as 1382 Mineral Springs Trail, Alpine Meadows, CA 94146 (the "Property") since 1986.	
6	In April of 2004, BANA issued a note (the "Note") to Plaintiffs so that they could borrow \$247,000 for the purpose of repairing and remodeling the Property (the "Loan").	

7	To secure the obligation, Plaintiffs entered into a deed of trust against the Property (the "Deed of Trust"). The Deed of Trust named BANA as beneficiary.	
8		Disputed
9	BANA retained the servicing rights to the loan.	
10	In 2010, Plaintiffs ran into financial difficulties and defaulted on the Loan.	
11	On August 6, 2010, Recontrust issued a notice of default and election to sell under deed of trust (the "Notice of Default").	
12	The Notice of Default was posted on the Property and subsequently recorded on August 9, 2010 in the Placer County recorder's office.	
13	The Notice of Default listed Plaintiffs arrears as \$6,044.34 as of October 6, 2010.	
14	Plaintiffs were aware of their default and that it could lead to the foreclosure of the Property.	
15	In November of 2010, a notice of trustee's sale (the "Notice of Trustee's Sale") was issued and subsequently recorded on November 19, 2010.	
16	The Notice of Trustee's Sale set the sale date for December 13, 2010 at 9:30 a.m.	
17	The Notice of Trustee's Sale was posted on the Property and Plaintiffs received it.	
18	The foreclosure sale was postponed from December 13, 2010 to December 27, 2010.	
19	On December 27, 2010, a foreclosure sale was held by the foreclosure trustee, defendant Recontrust.	
20		Disputed
21	A Trustee's Deed Upon Sale was issued and recorded on January 5, 2011, memorializing the sale.	
22	Around January of 2010, Plaintiffs began discussions with a company doing business under the name of Sovereign Financial ("Sovereign").	
23	Plaintiffs had communications with three different individuals at Sovereign: Candi Cabrera, Jamie Cabrera, and Candy Bronzi.	

24	The purpose of contacting Sovereign was to retain them to attempt to negotiate loan modifications on the Property.	
25	On or around May 24, 2010, Plaintiffs entered into a contract with Sovereign to procure a loan modification on the Property.	
26	Plaintiffs then made an upfront payment of \$900 to engage Sovereign to assist Plaintiffs in obtaining a loan modification.	
27	Around June of 2010, Sovereign informed Plaintiffs by phone and email that they had submitted a loan modification application regarding the Property to BANA.	
28	Sovereign never sent Plaintiffs a copy of the submitted loan modification application.	
29		Disputed
30		Disputed
31		Disputed
32		Disputed
33	An agent employed by BANA came by several times to confirm that Plaintiffs remained in the Property, but never made any representations to Plaintiffs regarding the sale of the Property.	
34	Plaintiffs contacted BANA several times regarding payment issues on their online account.	
35	In November of 2010, Plaintiffs contacted BANA directly by phone around three times.	
36	Plaintiffs never requested the reinstatement balance of their loan directly from BANA. (Plaintiffs qualifying the admission asserting in their Response that it was through Sovereign that such a request was made to BANA.)	
37	BANA never made any representations directly to Plaintiffs regarding postponement of the foreclosure sale or the loan modification application. (Plaintiffs qualifying the admission asserting that any representations were made to Sovereign.)	
38	BANA never sent Plaintiffs anything in writing stating that the foreclosure sale would be postponed.	

39	Plaintiffs relied completely on Sovereign to communicate with BANA Defendants regarding both the loan modification process and the postponement of the foreclosure sale.	
40		Disputed
41	Sometime shortly before December 13, 2010, Sovereign informed Plaintiffs that the foreclosure sale had been postponed, but did not say to what date.	
42	Sovereign representative told G. Wendell Ulberg that they believed they could get the sale postponed due to the loan being reviewed for a modification.	
43	Until December 23, 2010, Plaintiffs were not aware that the sale date had been continued to December 27, 2010.	
44		Disputed
45	On December 23, 2010, Sovereign stated that they would push Defendants to postpone the sale date because Sovereign believed it was highly unlikely that Defendants would foreclose with only a fourteen-day continuance of the sale date.	
46	On December 23, 2010, Sovereign informed Plaintiffs that they would try to get the foreclosure sale postponed.	
47	Sovereign never told Plaintiffs that BANA stated it would postpone the sale date past the December 27, 2010 sale date.	
48	December 24, 2010, Mudgett, a representative of Pacific Crest, went to Plaintiffs' house. He spoke to G. Wendell Ulberg and informed him that he was going to try to purchase the Property on behalf of Pacific Crest and the sale remained set for December 27, 2010.	
49		Disputed
50		Disputed
51	Plaintiffs decided definitively to file for bankruptcy on December 26, 2010.	
52	Early on December 27, 2010, the date of the foreclosure sale, G. Wendell Ulberg left the Property to file his bankruptcy petition with the intent of filing it at 8:00 a.m. - before the foreclosure sale was set to occur.	

53	Sovereign initially informed G. Wendell Ulberg that the proper place to file the petition was in the Placer County Assessor's Office.	
54	G. Wendell Ulberg arrived at the Placer County's Assessor's Office at 8:00 a.m. on December 27, 2010.	
55	Upon arriving at the Placer County Assessor's Office at, G. Wendell Ulberg found that he could not file for bankruptcy there.	
56	Upon finding out he was in the wrong location to file bankruptcy, G. Wendell Ulberg headed to Sacramento to file the petition at the bankruptcy clerk's office.	
57	Upon reaching the United State Bankruptcy Court in Sacramento, G. Wendell Ulberg was further delayed in filing for bankruptcy as Sovereign had not provided him the correct forms to file for bankruptcy.	
58		Disputed
59	Plaintiffs filed for bankruptcy on 11:01 a.m. on December 27, 2010.	
60		Disputed
61	Plaintiffs believed there was a foreclosure moratorium because they thought they read in the news that the State of California had announced one.	
62		Disputed
63	Plaintiffs never directly requested a reinstatement letter from BANA but were informed by Sovereign that Sovereign had requested the reinstatement letter.	
64		Disputed
65		Disputed
66	The sole reliance Plaintiffs plead in their first cause of action for fraud is that "Plaintiffs stopped making payments to allow review of their loan modification and refrained from actions to protect their interest in the Property, including without limitation, using their other resources or borrowing money in order to keep the account current, or filing a Chapter 13 bankruptcy to cure their arrears."	

67	The sole reliance Plaintiffs plead in their second cause of action for negligent misrepresentation is that "Plaintiffs stopped making payments to allow review of their loan modification and refrained from actions to protect their interest in the Property, including without limitation, using their other resources or borrowing money in order to keep the account current, or filing a Chapter 13 bankruptcy to cure their arrears."	
68		Disputed
69		Disputed
70	Plaintiffs never read the HAMP guidelines.	
71	Plaintiffs' cause of action in the FAC for Unfair Business Practices was dismissed as to BANA without leave to amend.	
72	Plaintiffs never communicated directly with Recontrust.	
73	Plaintiffs' belief that Recontrust would continue the sale was based solely on Sovereign's communications to Plaintiffs.	
74	This Court, in ruling on the motion to dismiss the FAC as to the misrepresentation prong of the UCL, found that Plaintiffs had not pled any facts that indicated that BANA made statements that would likely deceive the public. (Memorandum Opinion, Ex. N, 15:21-23)	
75	This Court dismissed Plaintiffs claims in the FAC that BANA's loan modification program constituted an unfair business practice under the UCL because "the First Amended Complaint does not include any allegations about the Bank of America, N.A. loan modification program." (Memorandum Opinion, Ex. N, 16:25-27)	
76	Plaintiffs' cause of action in the FAC for Declaratory Relief was dismissed as to BANA without leave to amend. (Order on Bank of America, N.A.'s Motion to Dismiss Adversary Proceeding, Ex. O Memorandum Opinion, Ex. N, 20:26)	
77	The Note and the Deed of Trust are entirely bare of any provisions that provide that a foreclosure sale must be stayed pending submission of a loan modification application.	
78	The Deed of Trust provides that upon default Recontrust has a power of sale that may be exercised against the Property.	

In the prior Motion for Summary Judgment the court also found additional material facts for which there was no genuine dispute. Memorandum Opinion and Decision, Dckt. 206.

There is no evidence that the BANA Defendants made any representations directly to the Plaintiffs that the foreclosure sale was not being conducted or being postponed from the December 27, 2010 date. Rather, the Plaintiffs testify that all statements were made to Sovereign, as the representative of Plaintiffs. No testimony is provided by Sovereign that anyone at BANA represented that the December 27, 2010 non-judicial foreclosure sale would be postponed.

At best, the Plaintiffs' testimony is that Sovereign told them that the foreclosure would have to be stayed because of the "pending loan modification." With respect to a loan modification, the best the Plaintiffs could provide at their deposition was the statement that Sovereign "intimated" that a loan modification for the 2004 Loan was in process. Jamie Cabrera testifies that the BANA representative stated that the sale should be postponed because a loan modification was under active review - however, there is no testimony that the BANA representative said that the sale would be postponed. With respect to continuance of the non-judicial foreclosure sale, again, the Plaintiffs cannot provide evidence that the BANA Defendants told the Plaintiffs or Sovereign that the sale would be continued from the December 27, 2010 date.

For the contention that the sale "had to be continued under HAMP," Plaintiffs did not present evidence that this loan and foreclosure were subject to a stay pending any decision on a loan modification. Michael Mankarious is provided as a witness to testify concerning the application of HAMP to this loan. No request was made and Mr. Mankarious was not admitted as an expert witness, to the extent that he could provide testimony as to the operation of the HAMP Guidelines. Mr. Mankarious throws to the court a "Handbook for Servicers of Non-GSE Mortgages" in support of his testimony. This exhibit is an excerpt of what appears to a document more than 63 pages in length. (The pages provided by Mr. Mankarious skip from page "3" of the table of contents to page "52.") The court has not been presented with any law or evidence as to why, if there was a loan modification review in process, this loan would be subject to a mandatory postponement of a foreclosure.

What is clear from the Plaintiffs testimony is that any expectation they had that the foreclosure sale would be postponed came from Sovereign, not the BANA Defendants. In the FAC, the Plaintiffs allege that in June 2010, they submitted "a full, complete loan modification request to Bank of America pursuant to the Government's HAMP Program." However, Michael Mankarious now testifies that it was on December 13, 2010, and December 18, 2010, that Sovereign faxed

two 70-page loan modification packages to BANA. No evidence has been presented by Sovereign with respect to an earlier loan modification request having been sent to BANA by Sovereign.

The testimony provided by the BANA Defendants is consistent with that of Mr. Mankarious. Slyapich (BANA Asst. V.P.) testifies and provides information from the books and records of BANA. On October 22, 2010, a telephonic request was made for a loan modification by an unidentified representative of the Plaintiffs. The records reflect that the request for a loan modification failed based on the financial information provided. There is a similar entry for October 25, 2010.

The phone entry for November 18, 2010, is for a conversation with Candy Cabrera (authorized Sovereign third-party representative of the Plaintiffs), which states that Jamie Cabrera was advised that the foreclosure was in process, but a sale date had not yet been set. The entry also states, "Informed 3rd Party that since loan was a FNMA Loan I would need to transfer." This is consistent with Slyapich's testimony that this loan was owned by Fannie Mae, and therefore not subject to any foreclosure moratorium which could have been in place for any BANA owned loans.

At the end of the day, the evidence is uncontradicted that the Plaintiffs relied on their specialist, Sovereign, for any loan modification applications being submitted, the legal effect of any such loan modification applications, and whether the pending foreclosure sale would be postponed. The Plaintiffs did not rely on any representations from the BANA Defendants. Further, the Plaintiffs have not provided the court with any evidence or law as to the December 27, 2010 foreclosure sale had to be postponed.

Id. at 29-31. The court then ruled,

Based on the evidence provided and the undisputed facts and material facts for which there is no genuine dispute, the BANA Defendants are entitled to judgment on all of the remaining causes of action as they apply each of these respective defendants.

Id. at 32.

Causes of Action in Complaint

Only the fourth, fifth, sixth, seventh and eighth causes of action in the Complaint relate to PCP or Mr. Mudgett.

Fourth Cause of Action

As to the Fourth Cause of Action in the Complaint for Intentional Interference with Contractual Relations, Movants argue that the ruling on

the summary judgment resolves this cause of action as to PCP and Mr. Mudgett because there was no breach of a contract between BANA and Plaintiffs to postpone the trustee's sale, as no such agreement existed.

A claim for intentional interference with contractual relations requires that Plaintiffs establish the following elements: (i) Plaintiffs had a valid and existing contract; (ii) Defendant had knowledge of the contract and intended to induce its breach; (iii) contract was in fact breached by contracting party; and (iv) Plaintiffs suffered damage. *Savage v. Pacific Gas & Electric Co.*, 21 Cal. App. 4th 434, 448 (Cal. App. 1st Dist. 1993).

Here, the court has found that Plaintiffs failed to provide evidence in support of the second, third, and fourth elements for this cause of action in the prior motion for summary judgment. There was no evidence that Recontrust was involved in the alleged loan modification requests, the decision-making by BANA as to any requests for loan modifications, or taking any action to induce BANA to have the non-judicial foreclosure sale conducted or not conducted.

Similarly, there is no evidence in support of this cause of action that, Movants, the party asserting that it purchased the Property at a foreclosure sale and the real estate agent employed by it, breached a contract they were a party to; rather, the uncontradicted evidence presented is that a non-judicial foreclosure sale was conducted based on the defaults in payments on the note by Plaintiffs and at the direction of BANA. No evidence was presented that there was any other contract, such as to postpone the December 27, 2010 non-judicial foreclosure sale. Further, no evidence is presented that Movants had any involvement in deciding when to enforce the note and deed of trust.

There being no disputed factual issues and Plaintiffs being unable to provide evidence of the intentional interference with a contract by Movants, the motion is granted as to the fourth cause of action against Movants.

Fifth and Sixth Causes of Action

Summary judgment is also granted for the Movants on the remaining causes of action for Cancellation of Trustee's Deed (Fifth Cause of Action), Quiet Title (Sixth Cause of Action), and Declaratory Relief (Seventh Cause of Action) because the Plaintiffs' claims are dependent upon prevailing on the court rendering the non-judicial foreclosure sale invalid. The court finds that collateral estoppel and res judicata resolve these causes of action asserted by Plaintiffs against Movants in the Complaint, as the court determined that the non-judicial foreclosure sale was valid.

The court made several findings of fact and conclusions of law that are fatal to all of the above causes of action asserted by Plaintiffs against Movants in the prior motion for summary judgement. The issues decided in the motion for summary judgment as to BANA and Recontrust are identical to the issues against Movants, centering around the validity of the Trustee's sale. The prior motion for summary judgment was actually litigated and opposed by Plaintiffs. In the prior motion for summary judgment, the court decided that the sale was not invalid. The same

necessary parties are involved in this case, namely the Plaintiffs, and the decision on summary judgment has been made final. A separate judgment for BANA and against the Plaintiffs has been entered by the court, from which no appeal has been taken. Dckt. 206.

Furthermore, the rights of BANA established in the prior summary judgment would be impaired if a contrary result occurred in the action against PCP. The summary judgment established that the trustee's sale was not invalid. The prior summary judgment and this matter involve the alleged infringement of the same right that being possession of the subject property. Both matters also arise out of the same transaction that being the trustee's sale. The court finds that collateral estoppel and res judicata resolve these causes of action asserted by Plaintiffs against Movants in the Complaint, as the court determined that the non-judicial foreclosure sale was valid.

Therefore, there being no disputed factual issues, collateral estoppel and res judicata applying to the remaining claims against Movants, and Plaintiffs being unable to provide evidence to the contrary, the motion is granted as to the remaining causes of action against Movants.

Causes of Action in Counter Complaint

On May 10, 2011, PCP filed a counter claim alleging the following causes of action: (1) trespass to real property as to Plaintiffs; (2) intentional interference with prospective economic advantage as to Plaintiffs; (3) declaratory relief as to Plaintiffs; and (4) breach of contract as to BANA; and (5) indemnity as to BANA and Recontrust. Dckt. 59.

Trespass

The First Cause of Action in the Counter Complaint for trespass to real property as to Plaintiffs. Trespass to property is the unlawful interference with its possession. 5 Witkin, Summary 10th Torts, § 693 (2014). The essence of the cause of action for trespass is an "unauthorized entry" onto the land of another. Such invasions are characterized as intentional torts, with the only intent requires is an intent to enter, regardless of the actor's motivation. *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal. App. 3d 1, 17 (Cal. App. 2d Dist. 1977). This tort has always given rise to nominal damages even where there was no proof of actual damage. *Id.* Whether Movants would be entitled to more than nominal damages, should trespass be established, is for the trier of fact.

While the court has determined that the foreclosure sale was not invalid, no evidence or factual contentions have been presented by the Movant regarding "unlawful interference." It appears that Debtors were asserting their believed rights as to the ownership of their home when they were in possession of the real property after the Trustee's Sale. Plaintiffs attempted to assert their right to possession of the subject Property based on a belief of the invalidity of the Trustee's Deed of Sale. This does not appear to be an "unlawful" interference. The court had not made a determination of whether Defendant PCP or Plaintiff was the rightful owner of the Property.

Therefore, summary judgment on the first cause of action is denied.

The court notes that any trespass damages would be the same as those being sought in the Motion to Vacate Preliminary Injunction, from the funds being held by the Chapter 13 Trustee. These monies have been deposited for the court to award as appropriate for Federal Rule of Civil Procedure 65(c) wrongful injunction damages. The monies were deposited in lieu of requiring the posting of a bond.

Intentional Interference with Prospective Economic Advantage

The Second Cause of Action in the Counter Complaint for intentional interference with prospective economic advantage as to Plaintiffs. The elements of a cause of action for intentional interference with contractual relations are:

- (1) a valid contract between plaintiff and a third party;
- (2) defendant's knowledge of this contract;
- (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship;
- (4) actual breach or disruption of the contractual relationship; and
- (5) resulting damage.

Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118 (1990). The elements of a cause of action for intentional interference with prospective economic advantage differ only to the extent that this tort presupposes "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff..." *Id.* at n.2. Further distinctions may be found in the area of affirmative defenses: ". . . a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." *Id.* at 1126.

Here, Movants argue that a valid contract existed between them and BANA for the purchase of the subject Property at the Trustee's sale. Movant argues that Plaintiffs actions in refusing to vacate the property to allow Movant to obtain possession and then commencing this litigation were intentional and designed to disrupt the contract and not allow Movant to take possession of the property.

While Movant has been unable to obtain possession of the property it purchased at the Trustee's sale, the court cannot grant summary judgment when it must ascertain intent. The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978).

Additionally, there has been no evidence presented to this court that Plaintiffs induced BANA or the Trustee under the Deed of Trust to breach its contract with Movant.

Furthermore, Movant's contention appears to be based on Plaintiff's Complaint seeking to assert that Plaintiffs' rights were superior to those of Movant pursuant to the trustee's deed with Plaintiff's disputed. Movant has not provided the court with any basis for concluding that Plaintiff's commencing this Adversary Proceeding and asserting what they believe to be their rights to constitute the tort of interference with prospective

economic advantage.

Therefore, summary judgment on the second cause of action is denied.

Declaratory Relief

The Third Cause of Action in the Counter Complaint is for declaratory relief as to Plaintiffs regarding the ownership of the subject real property. Plaintiffs claim title to the property alleging the Trustee's sale was void, and Defendants argue that PCP has title by way of a valid Trustee's Deed.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. §2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

Here, the court determines that there is an actual controversy as to the priority of ownership of the Plaintiffs and Defendant PCP regarding the subject real Property. The court determined that the Trustee's Sale was not invalid in the Memorandum Opinion and Decision on the Motion for Summary Judgment, Dckt. 206.

Based on the undisputed facts, the court's prior determination that the Trustee's Sale was not invalid, and Defendant PCP having purchased the Property as evidenced by a Trustee's Deed Upon Sale was issued and recorded on January 5, 2011, the court concludes that Defendant PCP is the owner of the subject Property. Defendant and Counter Claimant Pacific Crest Partners, LLC is the lawful owner of the real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California and summary judgment is granted it and against Plaintiffs on this Cause of Action.

Breach of Contract and Indemnity

As to the Fourth Cause of Action for breach of contract as to BANA and the Fifth Cause of Action for indemnity as to BANA and Recontrust, the court denies summary judgment, as the court determined that the non-judicial foreclosure sale was not invalid in the prior summary judgment motion. The court having made these findings of fact and conclusion of law in the Memorandum Opinion and Decision, these causes of action have no basis in law or fact.

Furthermore, Movants agree that provided the sale of the subject property stands, they consent to the dismissal of these causes of action. Therefore, summary judgment on the fourth and fifth causes of action is denied. The court has further addressed these causes of action in the Cross-Defendant's Motion for Summary Judgment. Motion for Summary Judgment, DCN SK-5.

Termination of Preliminary Injunction

The court notes that Movant has filed a separate motion to vacate the injunction and for damages arising thereunder. The court will make its findings of fact and conclusions of law regarding the preliminary injunction thereunder.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Summary Judgment filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Summary Judgment is

granted, and judgment shall be entered for Defendants Pacific Crest Partners, Inc. and John Mudgett and against Plaintiffs G. Wendell Ulberg, Jr. and Kathleen M. Ulberg, and each of them as to all causes of action in the Complaint.

IT IS FURTHER ORDERED that Summary Judgment is granted as to the third cause of action for declaratory relief requested in the Counter Complaint, and judgment shall be entered for Defendant and Counter Claimant Pacific Crest Partners, LLC adjudicating it to be the owner of the real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California.

IT IS FURTHER ORDERED that Summary Judgment is denied as to the first, second, fourth and fifth causes of action in the Counter Complaint.

3. [10-53637-E-13](#) G./KATHLEEN ULBERG
[11-2122](#) SW-5
ULBERG, JR. ET AL V. BANK OF
AMERICA, N.A. ET AL

MOTION FOR JUDGMENT ON THE
PLEADINGS AND/OR MOTION FOR
SUMMARY JUDGMENT
4-11-14 [[224](#)]

Tentative Ruling: The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Counter Claimant, parties requesting special notice, and Office of the United States Trustee on April 11, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule

9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Summary Judgment is granted.

Counter Defendants Bank of America, N.A. ("BANA") and Recontrust Company, N.A. ("Recontrust") (collectively "Counter Defendants") move the court for judgment on the pleadings or in the alternative, summary judgment against Counter Claimant Pacific Crest Partners, Inc. ("PCP"), pursuant to Federal Rule of Civil Procedure 12(c) as incorporated by Federal Rule of Bankruptcy Procedure 7012 as it has failed to state a claim upon which relief can be granted, or in the alternative pursuant to Federal Rule of Civil Procedure 56 as incorporated by Federal Rule of Bankruptcy Procedure 7056, as there are no genuine issues of fact and Counter Defendants are entitled to judgment as a matter of law.

PCP's Cross Complaint brings two causes of action against Counter Defendants: (4) Breach of Contract (as to BANA); and (5) Indemnity (as to BANA and Recontrust). Counter Defendants argue that the court has determined that the non-judicial foreclosure sale was not invalid and found for Counter Defendants in the prior summary judgment motion brought against Plaintiffs G. Wendell Ulberg, Jr. and Kathleen M. Ulberg ("Plaintiffs"). As such, PCP's claim for relief under Breach of Contract and Indemnity are moot and BANA is entitled to judgment to this claim.

RESPONSE

Defendant and Counter Complainant, PCP, submitted a response to the motion, stating that it agrees with Counter Defendants that the Trustee's sale was valid and the cross complaint was filed against Counter Defendants for the sole purpose of recovering damages in the unlikely event that the court rules in Plaintiffs' favor. PCP states that if they are granted their Summary Judgment motion (SAC-5), then it consents to the dismissal of the fourth and fifth causes in the counter claim which related to Counter Defendants.

BACKGROUND

This Adversary Proceeding was commenced by G. Wendell Ulberg, Jr. and Kathleen M. Ulberg ("Plaintiffs"), who are also Chapter 13 Debtors in a bankruptcy case pending before this court (Bankr. E.D. Cal. No. 10-53637). This Adversary Proceeding centers on the ownership of real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California (the "Property"). Plaintiffs assert that a non-judicial foreclosure sale conducted for BANA on December 27, 2010, was improper and that any transfer of property alleged to have occurred pursuant thereto should be set aside. The Plaintiffs also seek a monetary recovery from the BANA Defendants.

On March 15, 2011, Plaintiffs filed the First Amended Complaint ("FAC"), Dckt. 11, which alleges the following causes of action: (1) fraud as to BANA; (2) negligent misrepresentation as to BANA; (3) unfair business practices as to BANA and Recontrust; (4) intentional interference with contractual relations as to Recontrust, Mr. Mudgett and PCP; (5) set aside,

rescind or cancel trustee's deed as to all defendants; (6) quiet title as to all defendants; (7) declaratory relief as to all defendants; and (8) injunction as to Mr. Mudgett and PCP. The complaint prayed for compensatory damages and to set aside the trustee's deed. Dckt. 11.

On March 2, 2011, the court granted the Motion for Preliminary Injunction against PCP and John Mudgett, their agents, servants, employees, attorneys, and all others in active participation with them from taking any action with respect to the December 31, 2010 Trustee's Deed Upon Sale for the Property. Order, Dckt. 41. The court ordered that Plaintiffs shall provide security in the form of monies held by the Chapter 13 Trustee commencing with April 2011, payments of \$2,000.00 per month to be held subject to further order of this court. *Id.* The court stated that if the court ultimately determines that the Defendants have wrongly been restrained, the monies shall be used for costs and damages, as determined by the court, incurred by defendants. *Id.*

On May 10, 2011, PCP filed a counter claim alleging the following causes of action: (1) trespass to real property as to Plaintiffs; (2) intentional interference with prospective economic advantage as to Plaintiffs; (3) declaratory relief as to Plaintiffs; and (4) breach of contract as to BANA; and (5) indemnity as to BANA and Recontrust. Dckt. 59.

On November 29, 2011, the bankruptcy judge issued a Memorandum Opinion and Decision granting BANA's motion to dismiss with regard to the Third and Seventh Causes of Action, and denying the motion as to all other causes of action. Dckt. 110.

On October 22, 2013, the court issued a ruling granting summary judgment for BANA as to the remaining causes of action and for Recontrust as to all the causes of action. Dckt. 206. The District Court entered an order adopting the bankruptcy court's findings of fact and conclusions of law. Dckts. 213, 214.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] 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 [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc.* (*In re Barboza*), 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*,

477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (*citing Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (*citing Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (*citing Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

As to the Fourth Cause of Action for breach of contract as to BANA and the Fifth Cause of Action for indemnity as to BANA and Recontrust, the court grants summary judgment, as the court determined that the non-judicial foreclosure sale was not invalid in the prior ruling granting summary judgment. Dckt. 206. The District Court entered an order adopting the bankruptcy court's findings of fact and conclusions of law. Dckts. 213, 214. The court having made these findings of fact and conclusion of law, these causes of action against Counter Defendants have no basis in law or fact. The breach of contract claim and indemnity claim were based on the premise that the trustee's deed was invalid. Counter Complaint, Dckt. 59, ¶ 19, 21. The court specifically found that the Trustee's Sale was not invalid. Furthermore, PCP agrees that provided the sale of the subject property stands, they consent to the dismissal of these causes of action. Therefore, summary judgment on the fourth and fifth causes of action is granted in favor of Counter Defendants and against Counter Complainant PCP.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Summary Judgment filed by Counter Defendants having been presented to the court, and upon

move this Court for an order vacating the injunction because (1) Plaintiffs have failed to pay ongoing property taxes as ordered, (2) a settlement is not possible, and (3) Pacific Crest Partners, Inc. continues to be harmed.

Defendants state that Plaintiffs were ordered by the court to continue to pay on going property taxes. At this time, they are delinquent a total of \$3,121.43 in property taxes that have come due on April 10, 2014.

Defendants argue that because Plaintiffs have failed to pay the property taxes as ordered by the court, PCP will be forced to pay the taxes and the penalties and the attorney fees for filing this motion. Furthermore, because PCP is in the business of buying and selling properties, PCP has been deprived of access to the funds used to purchase this property. Defendants state that the lack of access to these funds has prevented PCP from buying and selling other properties resulting in very substantial lost profits.

BACKGROUND

This Adversary Proceeding was commenced by G. Wendell Ulberg, Jr. and Kathleen M. Ulberg ("Plaintiffs"), who are also Chapter 13 Debtors in a bankruptcy case pending before this court (Bankr. E.D. Cal. No. 10-53637). This Adversary Proceeding centers on the ownership of real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California (the "Property"). Plaintiffs assert that a non-judicial foreclosure sale conducted for BANA on December 27, 2010, was improper and that any transfer of property alleged to have occurred pursuant thereto should be set aside. The Plaintiffs also seek a monetary recovery from the BANA Defendants.

On March 15, 2011, Plaintiffs filed the First Amended Complaint ("FAC"), Dckt. 11, which alleges the following causes of action: (1) fraud as to BANA; (2) negligent misrepresentation as to BANA; (3) unfair business practices as to BANA and Recontrust; (4) intentional interference with contractual relations as to Recontrust, Mr. Mudgett and PCP; (5) set aside, rescind or cancel trustee's deed as to all defendants; (6) quiet title as to all defendants; (7) declaratory relief as to all defendants; and (8) injunction as to Mr. Mudgett and PCP. The complaint prayed for compensatory damages and to set aside the trustee's deed. Dckt. 11.

On March 2, 2011, the court granted the Motion for Preliminary Injunction against PCP and John Mudgett, their agents, servants, employees, attorneys, and all others in active participation with them from taking any action with respect to the December 31, 2010 Trustee's Deed Upon Sale for the Property. Order, Dckt. 41. The court ordered that Plaintiffs shall provide security in the form of monies held by the Chapter 13 Trustee commencing with April 2011, payments of \$2,000.00 per month to be held subject to further order of this court. *Id.* The court stated that if the court ultimately determines that the Defendants have wrongly been restrained, the monies shall be used for costs and damages, as determined by the court, incurred by defendants. *Id.*

On May 10, 2011, PCP filed a counter claim alleging the following causes of action: (1) trespass to real property as to Plaintiffs; (2) intentional interference with prospective economic advantage as to Plaintiffs; (3) declaratory relief as to Plaintiffs; and (4) breach of

contract as to BANA; and (5) indemnity as to BANA and Recontrust. Dckt. 59.

On November 29, 2011, the bankruptcy judge issued a Memorandum Opinion and Decision granting BANA's motion to dismiss with regard to the Third and Seventh Causes of Action, and denying the motion as to all other causes of action. Dckt. 110.

On October 22, 2013, the court issued a ruling granting summary judgment for BANA as to the remaining causes of action and for Recontrust as to all the causes of action. Dckt. 206. The District Court entered an order adopting the bankruptcy court's findings of fact and conclusions of law. Dckts. 213, 214.

The court granted summary judgment for Defendants and Counter Complainants, Pacific Crest Partners, Inc. and John Mudgett and against Plaintiffs G. Wendell Ulberg, Jr. and Kathleen M. Ulberg, and each of them as to all causes of action in the Complaint.

DISCUSSION

The court having granted summary judgment for Defendants and against Plaintiffs on all causes of action rendering Plaintiffs incapable of prevailing on the merits, Plaintiffs failing to pay the property taxes, and Defendants continuing to be harmed by the injunction, the court terminates the preliminary injunction issued on May 4, 2011, Dckt. 41.

Furthermore, the court will allow Defendants to file a motion for the costs and damages on or before July 10, 2014, in order to authorize the Chapter 13 Trustee to disburse the monies paid by Plaintiffs by order of this court. Dckt. 41. The Chapter 13 Trustee shall provide the court with an accounting of the amounts held to date.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Vacate Preliminary Injunction filed by Defendants having been presented to the court, the court having ordered the Plaintiffs to provide security pursuant to Federal Rule of Civil Procedure 65(c) and Federal Rule of Bankruptcy Procedure 7065, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the preliminary injunction against Defendants Pacific Crest Partners and John Mudgett, and each of them, and their respective agents, assigns, employees, officers, attorneys, and representatives, as stated in the Civil Minute Order dated May 4, 2014, Dckt. 41, is hereby terminated, effective upon the entry of this order.

IT IS FURTHER ORDERED that the Defendants shall file and serve a motion for costs and damages, any, pursuant to Federal Rule of Civil Procedure 65(c) and Federal Rule of

Chapter 7 Trustee Alan Fukushima filed a non opposition to the Motion on May 8, 2014.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$478,295.06, secured by Movant's first deed of trust, as stated in the Hanak Declaration and Schedule D filed by Martha Masiel Ramirez ("Debtor"). The value of the Property is determined to be \$270,000.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust, By Caliber Home Loans, Inc. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust, By Caliber Home Loans, Inc., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 946 North Oak Avenue, Lindsay, California, California.

No other or additional relief is granted.