

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-20-0418

WADE AYALA,
Plaintiff, Counter-claim Defendant, and Appellee

v.

GAIL STAFFORD,
Defendant, Counter-Claimant, Third-Party Plaintiff, Appellant, and Cross-Appellee,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A.; FEDERAL
NATIONAL MORTGAGE ASSOCIATION, and EQUITY PROCESS
MANAGEMENT, INC.

Third Party Defendants, Appellees, and Cross Appellants,

SADIE LYNN BARRETT, and DOES 1 - 10,

Third Party Defendants and Appellees.

APPELLANT GAIL STAFFORD'S COMBINED RESPONSE AND REPLY
BRIEF

On Appeal from the Second Judicial District

Butte-Silver Bow County,
Montana Case No. DV-18-267
Honorable Ray J. Dayton

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SUMMARY OF THE ARGUMENT

This dispute involves real property (“Property”) foreclosed upon and purported to be sold at a 2012 Trustee’s Sale in violation of the Montana Small Tract Financing Act (“STFA”). Stafford, a tenant of the Property, placed the only and highest bid for the Property, and yet, a Trustee’s Deed was issued to Federal National Mortgage Association (“FNMA”) for a bid lower than Stafford’s. Dkt. 10, ¶28, Exh. I; *see also* Dkt. 10, Exhs. G & H; Dkt. 60, Exh. 7. FNMA later sold the Property to Ayala. Ayala initiated an unlawful detainer action on July 5, 2018 naming Stafford as Defendant. Dkt. 1.

Stafford answered and counter-claimed against FNMA, Bank of America, N.A. (“BANA”), ReconTrust Company, N.A. (“ReconTrust”) (collectively, “TP Defendants”), Equity Property Management (“EPM”) and Ayala. TP Defendants filed a Motion to Dismiss Stafford’s claims. Ayala and EPM each filed Summary Judgment Motions (“MSJ’s”).

On July 23, 2020 the district court issued an “Order on Pending Matters” resolving the motions (“Order”), granting: (1) TP Defendants’ Motion to Dismiss regarding Stafford’s fraud claims; (2) Ayala’s MSJ, stating “Ayala is entitled to Summary Judgment on ... Stafford’s claims to ownership and possession of the property”; and partially granting (3) EPM’s MSJ regarding Stafford’s breach of contract

and fraud claims, leaving intact Stafford's claims for negligence in conducting the Trustee's Sale in violation of the STFA and for violation of the Montana Unfair Trade Practices and Consumer Protection Act. Stafford's Opening Brief, App. A.

Stafford appealed the Order, Ayala Answered Stafford's Appeal and EPM and TP Defendants filed Answers and Cross-Appeals.

STATEMENT OF THE FACTS

Stafford included a comprehensive statement of facts and arguments in her Opening Brief and in her briefs in opposition to TP Defendants' Motion to Dismiss and Ayala and EPM's MSJ's. Dkt. 50. Stafford incorporates by reference the facts and arguments in those briefs. Dkts. 50, 64, & 81. Stafford wishes to emphasize key facts and rebut inaccuracies in her opponents' briefs as set forth below.

Stafford's opponents misconstrue the district court's July 3, 2018 order dismissing the prior related case *FNMA v. Stafford* (hereafter "DV-13-204"). That order explained the only issues considered on the merits were FNMA's unlawful detainer claim and Stafford's request to quiet title under a leasehold for one year. When the district court issued its order, Stafford had occupied the property for over a year since asserting her leasehold quiet title claim and her request was moot. As detailed in Stafford's *res judicata* argument below, it is clear from the district court's dismissal and subsequent affirmation by this court that the judicial objective was to prevent a result

wherein DV-13-204 would be kept alive by an amendment made *after* the Plaintiff's property interest had been extinguished, the original claims became moot, and a Motion to Dismiss had been filed. Instead, the court declined to hear or rule on Stafford's current claims and invited Stafford to pursue them against additional parties in a separate suit, which she did here.

Ayala and TP Defendants attempt to paint Stafford as dilatory by stating that after Ayala filed his July 3, 2018 Complaint in this matter, Stafford waited *5 months* to respond. Ayala failed to admit he did not properly serve Stafford with his Complaint until October 24, 2018. Stafford then executed a Notice and Acknowledgement of Service on November 14, 2018 and timely filed her Answer, Counter-Claims, & Third-Party Complaint on December 5, 2018.

Ayala and TP Defendants imply Stafford's counsel, Adam Owens, violated Montana Rule of Professional Conduct 3.7(a) by testifying about his December 2017 conversations with Ayala and Ayala's counsel regarding Stafford's ownership claims. Dkt. 56, App. H, ¶¶ 9-10; Ayala Response, p. 11, fn. 5. The text of Rule 3.7(a) and Montana caselaw clarify: "A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness. . ." (emphasis added). "Case law construing the rule generally limits disqualification of a lawyer-witness as trial counsel but not

from participating in pretrial matters.” Montana State Bar Ethics Opinion, No. 140519. Should this case proceed, Mr. Owen’s partner may handle the trial.

As his April 26, 2018 affidavit states, Mr. Owens can testify that before Ayala closed on the Property, during 52-minutes of phone conversation on December 20, 2017 he informed Ayala and attorney Jenny M. Jourdonnais that Stafford, not FNMA, was the high bidder at the Trustee’s Sale and Stafford claimed title to the Property. Owens Affidavit, Dkt. 61, ¶¶ 21-25; Exhs. 17-18. Counsel’s Affidavit attaches December 19, 2017 emails between Jourdonnais and Stafford’s former attorney wherein Jourdonnais discussed Ms. Stafford’s ownership claims and the proceedings in DV-13-204. *Id.*, at ¶ 26; Exh. 19.

Mr. Owens will testify that he learned that BANA has been paying FNMA’s legal fees since at least August 2018, as informed by FNMA’s prior counsel Benjamin Mann, and likely throughout DV-13-204. These parties knew Stafford claimed ownership, as evidenced by Ayala and his counsel’s knowledge of DV-13-204, and the liaison between EPM and TP Defendants described in Stafford’s Opposition to MTD. Dkt. 50, pg. 20.

Further, Ayala lied to the district court claiming that based upon his December 2017 pre-bid review of the September 8, 2014 hearing transcript and before he closed on the Property, he was unaware of Stafford’s claim to title; he believed Stafford

claimed only a leasehold interest in the Property. Dkt. 56, App. F. However, Ayala could not have reviewed that transcript prior to the Property bid because it was not transcribed until January 25, 2018. Dkt. 60, Exh. 16, pg. 21; Dkt. 60, pgs. 11-14.

ARGUMENT

The arguments asserted in Ayala, EPM and TP Defendants' appellate briefs are strikingly similar to their district court motions, somewhat suggesting venue shopping. Despite their attempts to recycle their rejected arguments here, Stafford's Opposition to MTD and Response to EPM and Ayala's MSJ's clearly establishes the same principles echoed in the district court's July 23, 2020 Order, which conceded Stafford had "sufficiently argued the statute of limitations is equitably tolled, that the Third-Party Plaintiff has standing, and based on Montana's notice pleading the Defendant may have been owed a duty to the Third-Party Plaintiff Stafford." See Order on Pending Matters, DV-18-267, dated July 23, 2020, pg. 2. For brevity, Stafford incorporates those arguments here.

I. THE STATUTES OF LIMITATIONS FOR ALL OF STAFFORD'S CLAIMS WERE EQUITABLY TOLLED.

As successfully argued in district court, the applicable limitations periods were tolled by the filing of DV-13-204 and commencement of the limitations period for Stafford's fraud claims was delayed by EPM and TP Defendants' fraudulent concealment of the cause of action Dkt. 50, pg. 14-20. Stafford alleged breach of a

written, not oral, contract, which has an 8-year statute of limitations that was not expired.

Equitable tolling relieves the plaintiff from a statutory bar “when, possessing several legal remedies [s]he, reasonably and in good faith, pursues one.” *Erickson v. Croft*, 233 Mont. 146, 150, 760 P.2d 706 (1988) (quoting *Addison v. State*, 21 Cal.3d 313, 318, 146 Cal. Rptr. 224, 578 P.2d 941 (1978); see also *Schoof v. Nesbit*, 2014 MT 6, ¶¶34, 38, 373 Mont. 226, 316 P.3d 831). Equitable tolling applies when the following are satisfied:

1. Timely notice to defendant in the first suit within the applicable limitations period;
2. Lack of prejudice to defendant in gathering evidence to defend against the second claim;
3. Good faith and reasonable conduct by plaintiff in filing the second claim.

Erickson, 233 Mont. at 151 (citing *Collier v. City of Pasadena*, 142 Cal.App.3d 917, 925-26, 191 Cal.Rptr. 681 (1983)).

EPM and TP Defendants were on notice of the facts and allegations contained in DV-13-204 through their intertwined agency-relationship and involvement in discovery. In September 2014, FNMA submitted the affidavit of EPM employee Nowakowski in support of the parties’ cross-motions for summary judgment offering

the implausible claim that FNMA placed the only bid at the trustee's sale (FNMA was absent). Nowakowski's affidavit demonstrates that EPM and TP Defendants had notice of the contentions contained in Stafford's DV-13-204 Motion for Summary Judgment because the Stafford Declaration and Kneebone Affidavit reflecting her ownership rights were attached. DV-13-204, Dkt. 15, Exh. D, ¶¶ 11, 14; Exh. E, at 1.

EPM conducted the auction on behalf of FEI, LLC ("FEI"), which was hired by ReconTrust. ReconTrust, the trustee of record, was a fiduciary to the beneficiary of record, BANA. BANA and ReconTrust hired, controlled and directed FEI, who in turn directed EPM with respect to the Trustee's Sale. Thus, ReconTrust was FEI's principal, FEI was EPM's principal, and BANA was ReconTrust's principal in successive agency relationships pertaining to the Trustee's Sale. In all principal-agent relationships, "knowledge of an agent is imputed to the principal." *Williams v. State Medical Oxygen & Supply* (1994), 265 Mont. 111, 117, 874 P.2d 1225. EPM/Nowakowski's knowledge of the facts underlying Stafford's causes of action must be attributed to TP Defendants beginning no later than September 2014.

EPM and TP Defendants' knowledge of DV-13-204 presents a question of fact not susceptible to resolution on a motion to dismiss. See *Hopkins v. Kedzierski*, 225 Cal. App. 4th 736, 170 Cal. Rptr. 3d 551 (2014) ("whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact"); see also

Transport Ins. Co. v. TIG Ins. Co., 202 Cal.App.4th 984, 1012, 136 Cal.Rptr.3d 315 (2012) (“we are hard pressed to think of more fact-specific issues than ‘accrual’ and ‘tolling’”); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993) (equitable tolling presents a “fact-intensive” inquiry).

Adjudicating Stafford’s claims would not prejudice EPM and TP Defendants because this case involves “essentially the same set of facts” as DV-13-204, which Ayala and TP Defendants readily concede in their *res judicata* arguments. Ayala Response, pg. 14; EPM Opening Brief pg. 21; TP Defendant’s Opening Brief, pg.12. Because both cases implicate the facts underlying the Trustee’s Sale, and EPM and FNMA wrongfully concealed key facts from Stafford in Nowakowski’s affidavit and during discovery in DV-13-204, EPM and TP Defendants undoubtedly knew the facts supporting Stafford’s claims. Further, discovery in DV-13-204 prepared them for this case. *Collier*, 142 Cal. App. 3d at 925-926. The similarity of two claims “is less a legal conclusion and more a factual exploration of the contentions and evidence relevant to each claim.” *Cervantes*, 5 F.3d at 1276.

Stafford filed the present action in good faith during the pendency of DV-13-204, satisfying the third element for equitable tolling. *Collier*, 142 Cal. App. 3d at 926; *Lozeau v. GEICO Indem. Co.*, 2009 MT 136, ¶ 20, 350 Mont. 320, 207 P.3d 316

(finding the third element satisfied where plaintiff filed second action “while the [first] action was still pending”).

Although EPM and TP Defendants appealed the Order with respect to equitable tolling, Ayala did not appeal. Thus, he cannot avail himself of statute of limitations defenses.

II. STAFFORD’S CLAIMS ARE NOT BARRED BY *RES JUDICATA* BECAUSE THEY WERE NEVER HEARD ON THEIR MERITS AND THE NOTION THAT STAFFORD “COULD HAVE” LITIGATED HER CLAIMS IN DV-13-204 IS UNREASONABLE AND DISINGENUOUS

Ayala argues that *res judicata* is “dispositive” in Stafford’s appeal despite *res judicata* appearing nowhere in Stafford’s Opening Brief or in the district court’s Order. TP Defendants join Ayala’s *res judicata* argument. They cite the *res judicata* standard from *Poplar Elem. Sch. Dist. No. 9 vs. Froid Elem. Sch. Dist. No. 65*, 2020 MT 216, ¶132, 401 Mont. 152, 471 P.3d 57: (1) the parties or their privies are the same; (2) the subject matters of the present and past actions are the same; (3) the issues are the same; (4) the capacities of the persons are the same; and (5) final judgment was entered on the merits in the first action. Stafford disputes that these five elements are present between this case and DV-13-204.

The only issues considered in DV-13-204 were FNMA’s unlawful detainer claim and Stafford’s request to quiet title for one year based on her 2009 lease. By the time the district court issued its Order, Stafford had occupied the Property for almost ten

years and FNMA had sold the Property. The district court ruled: “There is no longer a justiciable controversy between Plaintiff and Defendant as the result of Plaintiff’s intervening act of transferring its interest in the subject real property to a third party” and “Defendant’s request to amend her pleadings came only after Plaintiff filed its motion to dismiss. The liberal freedom to amend pleadings contemplated by Rule 15, M.R. Civ. P., does not afford any relief to Defendant under the circumstances.” DV-13-204, Dkt. 57, p. 1-4. The court dismissed the case saying, “*Defendant is free to file a separate action against any party or parties presently claiming an interest in the subject real property.*” *Id.*, p. 4 (emphasis added). On appeal, this Court affirmed, emphasizing FNMA’s claims had become moot as of the Property’s sale and FNMA would be prejudiced if Stafford amended *after* FNMA filed its motion to dismiss. DA-18-0439, May 14, 2019 Order, p. 5-8. Neither court suggested Stafford’s additional claims had been adjudicated or that Stafford should be precluded from bringing them elsewhere. Stafford alleged her claims against EPM, Ayala and TP Defendants here, while her appeal in DA-18-0439 was pending.

Given the express language of the district court’s July 3, 2018 order, the assertion that judgment on Stafford’s claims was entered on the merits in DV-13-204 is patently false. Neither that order nor this Court’s affirming order discuss the claims Stafford made here, and this Court’s order confirms that Stafford’s current claims

were *not* adjudicated by the district court. See Sup.Ct. May 14, 2019 Order, pp. 8-9. This Court also found FNMA did not consent to try [the claims in the present case], proving that Stafford's current claims were not tried on the merits in DV-13-204. *Id.*, at 9.

Stafford could *not* have brought her current claims in DV-13-204 because: (1) Ayala was not involved in DV-13-204; (2) Stafford's ability to assert her causes of action was impeded by misrepresentations of EPM and TP Defendants and violation of discovery orders by FNMA when they concealed the identities of culpable parties and the nature of potential claims; (3) Stafford *did* state ownership-related claims to the extent possible with the facts she had; and (4) the district court in DV-13-204 blocked Stafford's attempt to amend and suggested she file a separate action.

Following the Trustee's Sale in 2012, Stafford knew despite hers was the only bid, Nowakowski ended the sale stating "they" needed \$238,000+ and a "Trustee's Deed" was issued purporting to sell the Property to FNMA for less than Stafford's bid. DV-13-204, Dkt. 52, pg. 3. At the time Stafford did not know how this occurred and it is unreasonable to expect her to have concluded that she was defrauded by well-established financial institutions.

In August 2013 when Stafford filed her Answer and Counterclaims in DV-13-204, Stafford alleged what she knew at that time – that she had a tenancy interest in

the Property and that FNMA could not possibly own the Property. DV-13-204, Dkt. 3, ¶ 5. Stafford named “Does 1 through 50” in addition to FNMA and alleged “that each of the Doe defendants claims, or may claim, some interest in [the Property]” and that she would add them later. *Id.*, at ¶ 3. This approach is reasonable.

In her Counterclaims, Stafford stated that FNMA “has no right, title, estate, lien, or interest in the real property.” *Id.*, at ¶ 5. On May 6, 2014, Stafford moved for summary judgment in DV-13-204 and submitted her Declaration and the Affidavit of Kneebone (DV-13-204, Dkt. 15, Exhs. D & E; *see also* Third-Party Compl., Exh. “L”), which stated that (1) Stafford had “bid one dollar more, in the sum of \$190,852.90,” (2) “[t]here was no representative from FNMA present at the sale” (DV-13-204, Dkt. 15, Exh. D, ¶¶ 11, 14), and (3) that Stafford placed the highest bid (*Id.*, Exh. E, at 1). Stafford argued that ReconTrust’s “[l]ack of strict compliance with the [STFA] ... void[ed] [the] trustee’s foreclosure ... and any interest in title claimed thereafter.” *Id.*, at 5-7. In June 2014, FNMA acknowledged that Stafford “claims that she was the highest bidder at the Trustee’s Sale” and that her claim “impl[ies] that she should be the owner.” DV-13-204 Dkt. 16 at 2. Thus, Stafford *did* appropriately allege ownership of the Property and EPM and TP Defendants’ wrongdoing to the extent possible with the information she had.

FNMA's further abuse of discovery robbed Stafford of necessary information for additional claims. Stafford served FNMA with discovery in 2014. DV-13-204, Dkt. 14. She asked FNMA to "identify the bidder and list the facts and circumstances which support FNMA's [ownership] claim" and also asked, "Who are the witnesses. . . what are their names and how do we get ahold of them?" *Id.*; September 8, 2014 MSJ Hearing Transcript, p. 8. FNMA ignored Stafford's discovery despite the court's order compelling answers. DV-13-204, Dkt. 14, 17, 26, 35. On September 8, 2014, the district court heard the parties' cross-motions for summary judgment. The same day, Stafford filed a Motion to Dismiss FNMA's Complaint and for Entry of Default based on FNMA's discovery abuses. Four years passed without the court ruling on the motions. *Id.*

One cannot genuinely argue that Stafford "could have" asserted her present claims given FNMA's willful concealment of facts about culpable parties and the nature of potential claims. Given FNMA's discovery obstruction, Stafford *could not* viably allege additional causes of action.

Stafford alleged facts supporting FNMA was not a *bona fide* owner of the Property and additional facts underlying her ownership claim in her motion for summary judgment. Then she waited for the district court to rule. This is reasonable. Instead, Notices of Issue were filed and ignored by the district court. When FNMA

sold the property, Stafford sought new counsel. On March 5, 2018, Stafford's present counsel filed a substitution of counsel in DV-13-204. Thereafter, in a phone conference between Mr. Owens and Jason Henderson, then counsel for FNMA, Owens informed Henderson that he would Amend Stafford's Counter-Claim and add claims and parties. DV-13-204, Dkt. 56, Owens Affidavit. However, before Owens could do so, FNMA quickly filed its Motion to Dismiss on March 13, 2018. DV-13-204, Dkt. 50. Ten days later, on March 23, 2018 Stafford filed her Motion for Leave to Amend, seeking to join Ayala, EPM, ReconTrust and BANA. DV-13-204, Dkt. 51-52; App. A, Ex.9. However, by then the district court dismissed the action and declined to rule on the merits of her present claims. Dkt. 57. Thus, it is misleading to say Stafford "could have" amended to add parties or claims; she was not permitted to do so.

City of Bozeman v. AIU Ins. Co. (1995), 262 Mont. 349, 900 P.2d 929, cited for the notion that Stafford "could have" brought her present claims in DV-13-204, is not on point. In that case, this Court found that the insurance coverage claim originally asserted in AIU2 was *res judicata* via AUI1, which alleged only failure to defend, because (1) the decision in AIU1 was premised on this Court's conclusion that there was no duty to defend because there was no coverage, and (2) City of Bozeman failed to appeal the district court's denial of its request to add a duty to defend claim in

AIU1. Thus, the claim at issue in AIU2 had been finally adjudicated in AIU1. (*Id.*, at pp. 5, 8-9). Likewise, *Poplar* is distinguished here because in the second round of litigation, *Poplar* brought the *identical* challenge that was summarily dismissed in the first under both the doctrines of res judicata and collateral estoppel. See *Poplar*, 2020 MT at ¶¶ 35, 40.

III. LACHES WILL NOT BAR STAFFORD'S CLAIMS

This Court should disregard Ayala's laches argument because the district court did not address laches, and Ayala did not cross-appeal. We address it only briefly.

The elements of laches are: (1) the party against whom the defense is asserted lacked diligence in asserting the claim; and (2) that lack of diligence resulted in prejudice to the party asserting the defense. Ayala Response Brief, p. 35-36. Ayala claims he was prejudiced by the death of Nowakowski on August 1, 2018, *years after* FNMA refused to respond to discovery and *months after* Ayala and Jourdonnais learned that Stafford claimed ownership. In truth, FNMA and Ayala simply chose not to depose Nowakowski before his death.

Ayala claims he was prejudiced by investing money and labor into the Property and, should Stafford be awarded the Property she would be unjustly enriched. However, Ayala knew before he closed on the Property that the Property was embroiled in litigation over its ownership. Thus, any prejudice to Ayala was

caused by his choice to close a property transfer with questionable title and further sink resources into a property currently embroiled in litigation.

IV. AN ENFORCEABLE WRITTEN CONTRACT TO PURCHASE THE PROPERTY FORMED, GIVING STAFFORD THE RIGHT TO PURCHASE, AND INVALIDATING FNMA AND AYALA'S SUBSEQUENT TITLES

Stafford disputes Ayala, EPM and TP Defendants' arguments asserting that no contract was formed, including that (1) Nowakowski did not "accept Stafford's bid", (2) no consideration was exchanged, and (3) Stafford was unqualified to bid.

The Order denied Stafford's contract claims on the basis that, "the parameters of the Trustee's Sale ... gives great latitude to the trustee to make determinations regarding [acceptance of] the bid." App. A, pg. 3; Dkt. 56, Ex. 13. However, trustees' sale instructions are not dispositive. Opening Brief, pgs. 36-41. The STFA controls trust indenture foreclosures in Montana, and Ayala, EPM and TP Defendants cite no authority refuting this.

A. *STFA Established a Trustee's Sale is an Auction Without Reserve.*

The STFA dictates that the Trustee's Sale was **without reserve**: "the trustee or the trustee's attorney *shall sell the property at public auction to the highest bidder*" and "the purchaser at the trustee's sale shall be entitled to possession of the property on the 10th day following the sale." (emphasis added) STFA, §§ 71-1-315(3); 71-1-319, M.C.A. The STFA gives the auctioneer no discretion to refuse the highest bid. See

Midfirst Bank v. Ranieri (1993), 257 Mont. 312, 318, 848 P.2d 1046, 1052 (“shall,” in section 71-1-315(3), MCA, “describes the requisite procedures a trustee must follow”). Therefore, the Trustee’s Sale was without reserve.¹ *Garden v. Cent. Neb. Hous. Corp.*, 719 F.3d 899, 904 (8th Cir. 2013); Dkt. 64, pg. 12.

Moreover, it is impossible for the Trustee’s Sale to have been “with reserve” given that EPM and TP Defendants failed to produce a single document² setting a reserve price, and neither have explained how FNMA bought the Property for less than Stafford’s bid, which they claim failed to satisfy the alleged reserve price.

B. Stafford’s High Bid at the Trustee’s Sale Accepted the Trustee’s Offer to Sell the Property and Formed an Enforceable Contract

As described in Stafford’s Opening Brief, in an auction “without reserve,” the “agreement to sell to the highest bidder constitutes the offer, with each bid creating a mutual assent between the seller and the bidder, provided no higher bid is received.” *St. Paul Oil & Gas Corp.*, 872 S.W.2d at 28; see also *Pyles*, 674 A.2d 35, 40 (Md. Ct. App. 1995). In such case, the seller “may not refuse to accept a bid.” *Zuhak v. Rose*, 58 N.W.2d 693, 696 (Wis. 1953).

¹ TP Defendants admit in response to Stafford’s discovery that they do “not contend that this foreclosure sale was a “with reserve” auction.”

² Ayala inconsistently argues that the Notice of Trustee’s Sale sets a reserve price of \$233,729.41 and the Sales Instructions set a minimum bid of \$190,851.90 and the auctioneer was authorized by the beneficiary to enter a final bid of \$238,564.88, yet he fails to explain how a sale can have three reserve prices.

Stafford placed the only and highest bid at the Trustee's Sale which was one dollar over FNMA's credit bid. However, EPM persistently and dubiously claims FNMA's bid was "the only bid at the sale" (Dkt. 56, Ex. E) and which the Trustee's Deed fraudulently states was the highest bid (*Id.*, Ex. A(4)).³

Since the Trustee's Sale was without reserve, the publicized Notice of Trustee's Sale to sell the Property to the highest bidder constitutes the offer to Stafford. *St. Paul*, 872 S.W.2d at 28; See also *Pyles*, 674 A.2d at 40. Stafford's "highest bid" constituted acceptance, creating an enforceable contract. *Id.* Thereafter, TP Defendants conveyed fraudulent title to FNMA, which it transferred to Ayala. *Zuhak*, 58 N.W.2d at 696. As such, Stafford's claims for declaratory judgment, unjust enrichment, constructive trust and quiet title should have survived summary judgment. *Howard*, 901 P.2d at 119.

C. The Sales Script Establishes the Trustee's Sale Was Without Reserve

The sales script lists only four scenarios under which a trustee may reject a high bid, none of which involve a reserve price. App. A, pg. 3; Dkt. 56, Ex. 13. Assuming Nowakowski could have made a lawful bid⁴, his only option would have been to do

³ Ayala fails to explain how FNMA placed the supposedly "winning bid" of \$190,851.90 listed in the Trustee's Deed when it had no representative at the sale and three witnesses testified that Stafford placed a higher bid.

⁴ The STFA excluded Nowakowski, as the trustee's agent, from bidding.

what he did not: outbid Stafford. The district court erred in determining that the auctioneer could reject Stafford's bid.

D. Ayala, EPM and TP Defendants' Additional Theories Lack Merit

The parties opposite Stafford offer a variety of other unsupported theories and allegations. As summarized by TP Defendants:

“Stafford has no standing to challenge a completed foreclosure sale, she has not alleged the elements of an enforceable contract, Stafford has no standing to enforce a [deed of trust-related] claim under the STFA, Stafford has no quiet title claim against Bank Defendants because Bank Defendants do not claim an interest in the Property, Stafford has failed to allege any duty owed to her in negligence by Bank Defendants, and Stafford has not alleged an ascertainable loss of money or property to support a UTPA claim. . . Stafford does not allege that Fannie Mae or BANA was involved in this alleged contract. . .” (TP Defendants' Response and Cross-Appeal, p. 10, 28).

These claims fail for the following reasons:

TP Defendants, Ayala and EPM allege alternatively, that no contract formed and that if an executory contract was formed it was not consummated because Stafford tendered no consideration. However, it is sufficient for Stafford to show she was “ready and able to perform,” which she has shown. *King Resources, Inc. v. Oliver*, 2002 MT 301, ¶ 25, 59 P. 3d 1172. This Court has held that when a party to a contract materially breaches the contract, the injured party may unilaterally suspend performance without undermining her claim for breach. *Id.* at ¶ 25, 31 – 32.

EPM claims the “Rules of the Auction” required Stafford to be prepared to pay at least \$238,565.88 for the Property or be disqualified.⁵ EPM quotes the rules: “The maximum amount that the bidder may contemplate bidding at the sale (may not be less than one dollar over the beneficiary's maximum bid)” and then bizarrely suggests that “maximum amount” really means “minimum amount.” It does not.

Stafford does not seek to enforce the Deed of Trust issued to previous owner Colin Caffrey or the Trustee’s Deed to FNMA. She seeks to enforce the STFA. As a member of the public that the STFA was designed to protect, she has standing to enforce it. Dkt. 50, 32–35. TP Defendants claim Stafford cannot challenge the Trustee’s Sale or claim a right to the Property because she does not own the property. TP Defendants’ Response and Cross-Appeal, pp. 23–24. The circularity of this argument suggests that fraudulent trustee’s deeds may never be challenged. This absurd conclusion, together with the arguments in Stafford’s Opposition to MTD, prompted the district court to find standing. Order on Pending Matters, p. 2.

Stafford’s Opposition to MTD explained the duty owed to her. Stafford’s Opp. to MTD, 39-41. Furthermore, negligence *per se* can be found outside the public safety

⁵ Contradicting EPM’s discovery responses wherein they claimed the “reserve price” was \$233,729.41.

context. See *In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, MDL DOCKET NO. 2583, 13-14 (N.D. Ga. May. 17, 2016).

Stafford's statement of damages (below) defeats TP Defendants' claim that she cannot recover under the UTPA for failure to allege a "loss of money or property." (TP Defendants' Cross-Appeal, 10).

Agency relationships between BANA, FNMA, ReconTrust and EPM existed when the contract was formed. Dkt., 20. Agency law permits the victim to recover from the principal or the agent. *Yellowstone Livestock v. Dupuis* (1958), 133 Mont. 454, 458, 325 P.2d 691.

V. STAFFORD'S CLAIMS FOR FRAUD, CONSTRUCTIVE FRAUD AND NEGLIGENT MISREPRESENTATION SATISFY RULE 9(B) M.R.CIV.P.

Stafford's Opening Brief established she satisfied the requirements of Rule 9(b) M.R.Civ.P., which allows a party to allege *generally* "malice, intent, knowledge, and other conditions of a person's mind." The plaintiff must allege only "that the defendant knew the statement was false" which Stafford did. See *Irving v. Valley Cnty. Sch. Dist.* (1991), 248 Mont. 460, 467, 813 P.2d 417; see also Dkt. 10, pg. 25, ¶77.

Paragraphs 63, 72, 85, 88, 94, 102, 103, 107, and 112, of Stafford's First Amended Complaint describe Stafford's damages, including (i) being prevented from purchasing the Property; (ii) incurring significant attorney's fees, expenses, and costs to defend against fraudulent and invalid titles and to perfect her own title; and (iii)

loss of quiet enjoyment of the Property. Inherent in item (i) is the loss of return on investment since 2012. The above statements satisfy pleading standards for fraud.

CONCLUSION

Stafford respectfully asks this Court to reverse the district court's Order with respect to granting Ayala's MSJ and granting in part TP Defendants' MTD and EPM's MSJ, restoring all of Stafford's claims in Case No DV-18-267.

DATED this 31st day of March 2021.

/s/ Adam H. Owens
Adam H. Owens

CERTIFICATE OF SERVICE

I, Adam H. Owens, certify that a true and accurate copy of the foregoing document was served to the following on March 31st, 2021 through the Montana Supreme Court Electronic Filing System and via email:

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Pursuant to Rule 11(4)(e) of the Montana Rule of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Goudy Old Style text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 4,993 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Appendices, and Certificate of Service.

By: _____/s/ Adam H. Owens

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