10-20-2014

Federal Nat. Mortg. Ass'n v. Hafer Respondent's Brief Dckt. 41825

Supreme Court Docket No. 41825-2015
Ada County District Court Docket No. CV-OC-12-01791

IN THE SUPREME COURT OF THE STATE OF IDAHO

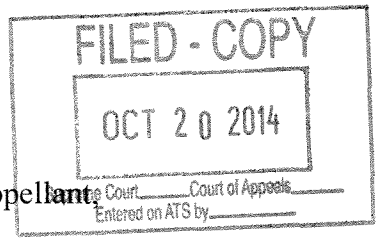
FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff-Respondent,

vs.

RUSSELL HAFER,

Defendant-Third Party Appellant-Appellant,



and

John Does 1-10 as Occupants of the Premises located at 402 South Lodestone Avenue, Meridian, Idaho 83642,

Defendants,

vs.

HOMEWARD RESIDENTIAL, INC. FKA AMERICAN HOME MORTGAGE SERVICING, INC. and Does 1-10,

Third Party Defendants-Respondent.

JOINT BRIEF OF RESPONDENTS HOMEWARD RESIDENTIAL, INC. F/K/A AMERICAN HOME MORTGAGE SERVICING, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION

On Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada The Honorable Timothy Hansen, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

In 2007, Russell Hafer purchased a home and real property located at 402 South Lodestone Avenue, Meridian, Idaho 83642 (the "Property"). **R. p. 203.** Mr. Hafer financed the the Property with a loan memorialized in a promissory note and secured by a deed of trust (the "Loan"). ***Id.*** The Loan was serviced by Homeward Residential Inc. ("Homeward"), formerly known as American Home Mortgage Servicing, Inc. ("AHSMI").

Thereafter, Mr. Hafer modified the Loan twice. **R. p. 45.** The first loan modification took place in 2008, and the second in 2010. ***Id.*** Mr. Hafer defaulted on the Loan when he failed to make required monthly payments under both loan modifications. ***Id.***

Mr. Hafer applied to Homeward for a third loan modification in October 2010 under the Making Home Affordable Modification Program ("HAMP"). **R. p. 203.** In March of 2011, Homeward provided Mr. Hafer with a trial payment plan under HAMP ("TPP"). **R. p. 49.** According to the express terms of the TPP, Mr. Hafer would be eligible to receive an offer for a permanent loan modification (his third one) if he made three timely payments under the TPP and submitted all the required documents. ***Id.***

Mr. Hafer made the three required TPP payments. ***Id.*** Accordingly, on June 28, 2011, Homeward sent Mr. Hafer a proposed home affordable modification agreement ("Modification Agreement"), provided instructions on how to accept the offer for the Modification Agreement, and enclosed a proposed Modification Agreement. **R. pp. 54–66.** Homeward's instructions to Mr. Hafer expressly required that Mr. Hafer sign the Modification Agreement in front of a notary and return the signed, notarized agreement to Homeward by July 13, 2011. **R. pp. 54, 64.** Additionally, the Modification Agreement stated:

> I understand that after I sign and return two copies of this Agreement to the Lender, the Lender will send me a signed copy of this Agreement. This Agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied.

R. p. 57. Section 2 of the Modification Agreement laid out acknowledgments and preconditions to modification:

> I understand that the Loan Documents will not be modified unless and until (i) the Lender accepts this Agreement by signing and returning a copy of it to me, and (ii) the Modification Effective Date (as defined in Section 3) has occurred. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Agreement.

R. p. 57.

Mr. Hafer returned the Modification Agreement to Homeward on July 14, 2011. However, the Modification Agreement was not properly notarized and was therefore invalid. **R. p. 45.** On or about July 14, 2011, Homeward sent a second Modification Agreement to Mr. Hafer by overnight delivery, with express instruction that he sign and notarize the Modification Agreement correctly and that it be returned to Homeward no later than July 21, 2011.[1] ***Id.***

Homeward did not receive the signed and notarized second Modification Agreement from Mr. Hafer by July 21, 2011. ***Id.*** When Homeward failed to timely receive the

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[1] Mr. Hafer contends that he received the second Modification Agreement from Homeward on July 30, 2011, and the accompanying letter stated that the Modification Agreement be returned by August 31, 2011. **App. Br. p. 2 (citing R. p. 112).** However, the document Homeward sent to Mr. Hafer on July 30, 2011, was not a loan modification agreement but a new HAMP application offering to restart the loan modification process. ***See* R. pp. 175–92, 194.** The new application Homeward sent to Mr. Hafer on July 30, 2011, required Mr. Hafer to submit tax and income information to determine Mr. Hafer's eligibility for an entirely new HAMP loan modification. ***Id.*** This invitation to apply for HAMP again is clearly not the second Modification Agreement Mr. Hafer signed and had notarized on August 2, 2011, and which Homeward received on August 3, 2011. ***See* R. pp. 56–65.**

Modification Agreement from Mr. Hafer, Homeward repeatedly attempted to contact Mr. Hafer and his spouse, Sandra Hafer, regarding the Modification Agreement. ***Id.*** With the deadline passed and subsequent attempts to contact the Hafers having failed, Homeward closed the loan modification process because no final agreement had been reached. ***Id.*** **at 45–46.** Homeward sent a notice to Mr. Hafer on July 26, 2011, indicating that his loan would not be modified because Homeward "did not receive the executed Home Affordable Modification Agreement by the noticed due date." **R. p. 68.** Homeward then sent Mr. Hafer a new invitation to apply for a new TPP, which included requests for financial documentation on July 30, 2011. **R. pp. 175–92, 194.**

On August 3, 2011, after Homeward had already closed Mr. Hafer's loan modification file, Homeward received the Loan Modification Agreement back from Mr. Hafer. **R. p. 46**. Mr. Hafer did not sign the Modification Agreement until July 26, 2011. **R. p. 63.** Mr. Hafer did not obtain the required notarization until August 2, 2011. **R. p. 64.** Homeward did not agree to and did not sign the late Modification Agreement returned by Mr. Hafer (although it invited Mr. Hafer to reapply for a modification, as noted above).

On August 2, 2011, Northwest Trustee Services, Inc. ("NWTS") executed a notice of default indicating that the Property would be sold in order to satisfy Mr. Hafer's obligation under the deed of trust that secured the Loan ("Notice of Default"). **R. pp. 11–12.** The Notice of Default was then recorded on August 3, 2011, in the official records of Ada County, Idaho as Instrument No. 111062362. On August 16, 2011, NWTS issued a notice of the trustee's sale ("Notice of Sale"). The Notice of Default and Notice of Sale were timely served on the Hafers pursuant to Idaho law.

On December 15, 2011, NWTS, pursuant to its notice, conducted a trustee's sale of the Property. **R. p. 203.** A Trustee's Deed was thereafter issued to Fannie Mae. **R. pp. 11–12.** After the Hafers refused to vacate the Property, Fanny Mae filed a Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property ("Complaint") against Mr. Hafer for possession of the property. **R. pp. 7–9.** The Hafers then filed their answer along with a third-party complaint against Homeward asserting a number of claims, including invalid foreclosure, breach of contract, and breach of implied covenant of good faith and fair dealing. **R. pp. 13–25.**

On February 21, 2013, Homeward and Fannie Mae filed a joint motion for summary judgment. **R. pp. 40–95.** Following oral argument, the district court issued its Memorandum Decision and Order on July 10, 2013, granting summary judgment in favor of Fannie Mae on its claim for ejectment and restitution of property as against the Hafers, and partial summary judgment in favor of Homeward on the causes of action brought against Homeward by the Hafers. **R. pp. 201–17.** The district court subsequently ordered the judgments in favor of Homeward and Fannie Mae be certified as final judgments so that an appeal could be made. **R. pp. 219–24.**

II. RESTATEMENT OF THE ISSUES

1. Whether the district court properly granted summary judgment in favor of Homeward on the Hafers' first, third and fourth causes of action, based on its finding that, as a matter of law, no contract was formed that resolved the Hafers' default of their loan agreement.

The issue of whether an enforceable modification agreement between Mr. Hafer and Homeward existed was properly before the district court. The district court did not err in concluding, as a matter of law, that mutual assent between the parties did not exist and that no enforceable agreement to modify Mr. Hafer's loan was formed.

2. Whether the district court properly granted summary judgment in favor of Fannie Mae on its claim for possession.

The issuance of the Trustee's Deed carries the prima facie showing of compliance by Fannie Mae with Idaho's non-judicial foreclosure statutes. The statutory presumptions created under Idaho Code § 45-1510 and the finality afforded to a Trustee's Deed under Idaho Code § 45-1508 entitle Fannie Mae to summary judgment as a matter of law.

III. STANDARD OF REVIEW

An appeal from summary judgment is reviewed under the same standard a district court uses when granting a motion for summary judgment. *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 544, 314 P.3d 593, 599 (2013). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Under this standard "all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Kootenai Cnty. v. Harriman–Sayler,* 154 Idaho 13, 16, 293 P.3d 637, 640 (2012). Summary judgment is not appropriate "[i]f the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions." *Peterson v. Romine,* 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998). "The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (internal citations omitted).

The nonmoving party may not rest upon the mere allegations or denials contained in their pleadings; instead, the nonmoving party must come forward with admissible evidence establishing specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). In

order to defeat summary judgment, the admissible evidence presented by the nonmoving party "must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue." *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117 (1990). Further, "[s]ummary judgment should be granted if the evidence in opposition to the motion 'is merely colorable' or 'is not significantly probative.'" *Id.* (internal citations omitted).

IV. ARGUMENT

In its July 10, 2013 Memorandum Decision, the district court granted summary judgment in favor of Homeward on the Hafers' first, third, fourth, fifth, eighth, ninth, tenth and eleventh causes of action, and to Fannie Mae on its claim for possession, based on the court's conclusion that, as a matter of law, no contract was formed that resolved the Hafers' default.[2] Specifically, the court held, as a matter of law, that no modification agreement was formed because Homeward never signed and returned the Modification Agreement to the Hafers. **R. p. 205**. It is undisputed that the issue of whether an enforceable agreement existed between the Hafers and Homeward to resolve the Hafers' default was before the court when it ruled on Homeward and Fannie Mae's joint motion for summary judgment. Accordingly, the Court did not err in deciding this issue, as a matter of law, based on the undisputed fact that Homeward never signed and returned the agreement to the Hafers. Moreover, the decision of the district court may also be upheld based on Homeward and Fannie Mae's argument below that no agreement was formed between Homeward and the Hafers because Homeward did not receive a fully executed Modification Agreement from the Hafers by the noticed deadline.

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[2] Respondents appeal the dismissal of their first, third and fourth causes of action.

A. The district court correctly dismissed the Hafers' first, third and fourth causes of action based on the absence of a contract between Homeward and Mr. Hafer resolving Mr. Hafer's default.

The Hafers appeal the dismissal of the following claims against Homeward: (1) no default; (2) breach of contract; and (3) violation of the covenant of good faith and fair dealing. **App. Br. pp. 5–11.** Each of these claims turns on the existence of an agreement or contract between Mr. Hafer and Homeward resolving Mr. Hafer's default. **R. pp. 18–21**; *see Mosell Equities, LLC v. Berryhill & Co., Inc.,* 154 Idaho 269, 278, 297 P.3d 232, 241 (2013) (first element of breach of contract claim is "existence of a contract"). In its summary judgment motion, Homeward established that "no permanent modification was entered into because Mr. Hafer failed to return the loan modification agreement by the designated due date and Homeward did not agree to a permanent loan modification." **R. p. 77.** The issue of whether an enforceable agreement to modify the Hafers' loan existed and whether Homeward accepted such an agreement was clearly before the district court when it ruled on Homeward's summary judgment motion. Because Homeward did not sign the agreement and the district judge could reasonably infer that Homeward did not intend to be bound until the document was signed, the district judge did not err in concluding that the parties lacked mutual assent to be bound and that no enforceable agreement to modify Mr. Hafer's loan was formed. **R. p. 205.**

1. The issue of whether an agreement was formed between Mr. Hafer and Homeward was properly before the district court.

The district court did not raise an issue *sua sponte* in determining that no contract was formed because Homeward did not return a signed copy of the Modification Agreement. The issue that Homeward raised in its motion, and that the Hafers responded to, was whether an enforceable modification agreement was entered into. The district court was well within its

discretion to decide the issue of mutual assent based on the fact that Homeward did not sign and return the Modification Agreement to the Hafers as the plain language of the offer required for any modification to occur.

A court can only decide a summary judgment motion based on issues or grounds raised in the moving party's motion. *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 887 P.2d 1034 (1994); *Sales v. Peabody*, No. 41446, 2014 WL 4656522 (Idaho Sept. 19, 2014). The reasoning behind this rule is that when "the moving party fails to challenge an element of the nonmovant's case, the initial burden placed on the moving party has not been met and therefore does not shift to the nonmovant." *Thomson*, 126 Idaho at 531, 887 P.2d at 1038.

In *Thomson,* the defendants sought to dismiss the plaintiff's negligence claim based on the plaintiff's failure "to raise disputed material factual issues with respect to the elements of duty and breach." *Id.* at 530, 887 P.2d at 1037. In granting summary judgment, however, the trial court concluded that the plaintiff "had not shown sufficient material facts from which the court could find a genuine issue regarding the element of proximate causation." *Id.* This Court held that the trial court erred in addressing the proximate cause issue *sua sponte*. Because defendants did not raise the issue of proximate cause in their motion and supporting evidentiary material, the burden never shifted to the plaintiffs to provide evidence of proximate causation. *Id.* at 531, 887 P.2d at 1038.

Similarly, in *Peabody* this Court held that the district court improperly granted summary judgment based on an affirmative defense not raised in the moving party's motion. *Sales v. Peabody*, 2014 WL 4656522, at *6. That case involved a negligence claim alleging that the plaintiff contracted an infection in her foot while receiving a pedicure due to the plaintiff's failure to maintain sanitary instruments. The defendant's motion for summary

judgment raised the issues of duty, breach, and whether there was any evidence of a causal link between the failure to clean a foot basin and plaintiff's alleged injury. Accordingly, the district court could not decide the issue of cause based on a superseding, intervening cause theory, an affirmative defense that was never argued or pled by the defendant. *Id.* Because superseding, intervening cause is an affirmative defense, the burden is on the defendant to plead and prove this theory. *Tapadeera, LLC v. Knowlton*, 153 Idaho 182, 186, 280 P.3d 685, 689 (2012) ("[T]he defendant has burden of pleading and proving affirmative defense"). Accordingly, because the defendant in *Peabody* never raised the issue of superseding, intervening cause, the burden of showing a material issue of fact as to this affirmative defense never shifted to the plaintiff.

In contrast, Homeward's summary judgment motion raised, and the district court decided, the issue of whether a loan modification agreement existed that resolved the Hafers' default. More specifically, both the Hafers and Homeward argued as to whether there was a meeting of the minds sufficient to establish the existence of a contract. **R. pp. 99, 147.** The Hafers argued that a binding contract arose between Homeward and Mr. Hafer as soon as he paid the three trial period payments and returned the executed Modification Agreement. **R. p. 99.** The district court disagreed with the Hafers and held that under the plain language of the Modification Agreement, an additional step was required for there to be a binding agreement—Homeward had to sign and return the agreement Mr. Hafer executed. **R. p. 205.** The district court did not *sua sponte* raise another issue or grounds as in *Peabody* and *Thomas*. Rather, the district court was asked to look at the proposed Modification Agreement and decide, as a matter of law, whether Homeward agreed to a permanent loan modification. ***See* Homeward's Mem. in Support of Joint Motion for Summary Judgment, R. p. 77**

("Homeward did not agree to a permanent loan modification"). The burden of showing that an issue of material fact existed as to the creation of a contract properly shifted to the Hafers, and the district court did not err in deciding that no contract existed based on Homeward's never signing the Modification Agreement.

2. By the express terms of the Modification Agreement, Mr. Hafer's loan documents would not be modified until he complied with all of the Agreement's terms and Homeward accepted the Agreement by signing it and returning it to Mr. Hafer.

"The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has burden of pleading and proving affirmative defenses, which legally excuse performance." *Tapadeera*, 153 Idaho at 186, 280 P.3d at 689. When the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984). Conversely, where the evidence relating to contract formation is undisputed and unambiguous, the trial court must decide as a matter of law whether the contract was formed. *See id.*; *Gray v. Tri-Way Const. Servs., Inc.*, 147 Idaho 378, 384, 210 P.3d 63, 69 (2009).

"Formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer and acceptance." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007). In a dispute over contract formation, the plaintiff must prove a distinct and common understanding between the parties. *Inland Title Co. v. Comstock,* 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). An offer "is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Intermountain Forest Mgmt., Inc. v.*

Louisiana Pac. Corp., 136 Idaho 233, 237, 31 P.3d 921, 925 (2001) (quoting Restatement (Second) Contracts § 24). However, a "manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." *Id.* (quoting Restatement (Second) Contracts § 26). This distinction was illustrated in *Intermountain Forest.* In that case, the plaintiff argued that defendant's presentation of the contract for plaintiff's signature was an "offer" and his unconditional acceptance formed a binding contract. *Id.* However, defendant did not sign the contract and indicated that "she was going to take it back for signature and mail [plaintiff] a copy." *Id.* In upholding the district court's grant of summary judgment, the Court stated:

> The undisputed facts in the record reasonably support the district judge's conclusion that the presentation of the contract to [plaintiff] for a signature was not an offer and [plaintiff] was not justified in assuming his assent would conclude the bargain, especially considering that [defendant] specifically told [plaintiff] a further manifestation of assent was necessary.

Id. at 237, 31 P.3d at 925. Accordingly, the Court held that because defendant did not sign the document, and the undisputed facts showed defendant did not intend to be bound until the document was signed, a contract was never formed. *Id.* at 238, 31 P.3d at 926.

As in *Intermountain Forest*, the undisputed facts show that Homeward did not intend to be bound by the Modification Agreement until it had received a timely and appropriately executed Agreement from Mr. Hafer and until it had then signed and returned the Agreement to Mr. Hafer. Both the first and the second proposed Modification Agreement Homeward sent Mr. Hafer included the provision: "I understand that the Loan Documents will not be modified unless and until (i) the Lender accepts this Agreement by signing and returning a copy of it to me, and (ii) the Modification Effective Date (as defined in Section 3) has

occurred." **R. p. 57.** Based on this language, Mr. Hafer had reason to know that Homeward did not intend to conclude a bargain until Homeward had made a further manifestation of assent. Therefore, the Modification Agreement did not ripen into an operative offer until Homeward signed and returned it to Mr. Hafer. *See Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 561 (7th Cir. 2012) (observing that "[u]nder contract law principles, when 'some further act of the purported offeror is necessary, the purported offeree has no power to create contractual relations, and there is yet no operative offer'") (internal citations omitted).

It is undisputed that Homeward did not sign and return the improperly executed first Modification Agreement that it received from Mr. Hafer on July 14, 2014. Accordingly, no binding agreement to modify the Hafers' loan was formed at that time. Rather, Homeward sent a second Modification Agreement to Mr. Hafer with instructions for him to sign, notarize, and return it to Homeward no later than July 21, 2011. **R. p. 45**. Mr. Hafer also failed to properly accept this second agreement when he did not return it by the July 21, 2011 deadline. ***Id.***; *Thompson v. Burns,* 15 Idaho 572, 595, 99 P. 111, 118 (1908) (holding that offers do not stay open indefinitely, and an offer is only open for a reasonable time). Accordingly, Homeward did not manifest its assent to the second Modification Agreement in the mode required by the Agreement's express terms. ***See*** **R. p. 57** ("This agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied." Section 2(B) explains that the Loan Documents will not be modified unless and until "the Lender accepts this Agreement by signing and returning a copy of it to me."). Homeward's failure to sign and return either the first or the second Modification Agreement indicates that it did not intend to be bound by either agreement and no contract was formed.

The Hafers contend that Homeward's failure to sign and return the Modification

Agreement cannot act as a condition precedent precluding formation of a binding agreement because signing and returning the Agreement is solely within Homeward's control. **App. Br. p. 13.** In order for the requirement that Homeward sign and return the Modification Agreement to be a condition precedent as the Hafers contend, a contract must have already been formed. *Dallas v. Am. Gen. Life & Accident Ins. Co.,* 709 F.3d 734, 738 (8th Cir. 2013) (A condition precedent is "an act or event that must be performed or occur, after the contract has been formed, before the contract becomes effective."). Even if the requirement that Homeward sign and return the agreement was a condition precedent rather than a manifestation of Homeward's acceptance, the Hafers' argument still fails.

Because a condition precedent must be satisfied before the contract becomes effective—and it is undisputed that Homeward did not sign and return the Modification Agreement—the Hafers must show that Homeward waived the condition. *See id.* "When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract. Where a party is the cause of the failure of a condition precedent, he cannot take advantage of the failure." *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005) (internal citations omitted). Any duty Homeward may have had to sign and return the Modification Agreement it received from Mr. Hafer was premised on Mr. Hafer's properly accepting the Modification Agreement and sending it to Homeward by the stated deadline. Here, Mr. Hafer did not properly accept the first Modification Agreement and did not timely accept the second Modification Agreement. Thus, Mr. Hafer bears the blame for the nonoccurrence of the alleged condition precedent.

The federal circuit cases that the Hafers rely on in arguing that a binding agreement to modify Mr. Hafer's loan was formed despite Homeward's not signing and returning either

Modification Agreement are distinguishable either procedurally or factually. First, the majority of cases where the court has held that a TPP or a proposed loan modification agreement was an enforceable contract were at the pleading stage under Federal Rules of Civil Procedure 12(b)(6), and thus the courts were required to assume the truth of the allegations in the complaint. *See Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 885 (9th Cir. 2013) ("[W]e must reiterate that the district court granted Wells Fargo's motion to dismiss the complaints under Rule 12(b)(6), so we therefore must accept the allegations of the complaints"); *Wigod,* 673 F.3d at 555, 559 n. 3. Conversely, this case was before the district court on a motion for summary judgment, and the Hafers could not rest upon mere allegations or denials in the pleadings. The Hafers failed to present evidence raising a genuine issue of material fact as to their compliance with all of the conditions in the Modification Agreement.

Second, the facts of the cases cited in the Hafers' appellant brief are distinguishable. For example, in *Corvello*, the Ninth Circuit held that a bank is required to offer a permanent modification or rejection after a plaintiff has successfully completed a trial period plan. *Id.* at 880. Despite following the TPP, the *Corvello* plaintiffs were never offered a permanent loan modification by Wells Fargo. In this case, however, Homeward offered Mr. Hafer a permanent loan modification, twice. Both times Mr. Hafer failed to to comply with the terms of the offer. Thus, Homeward had no obligation to sign and return either Modification Agreement to Mr. Hafer.

Likewise, in *Wigod v. Wells Fargo Bank,* the Seventh Circuit held that the plaintiff raised a valid breach-of-contract claim based on a TPP similar to the one Homeward sent Mr. Hafer. 673 F.3d 547. The plaintiff in *Wigod* alleged that she had complied with all of the

TPP's requirements, which the court was required to assume as true. Unlike the case at hand, however, the lender in *Wigod* returned an executed copy of the TPP to the plaintiff. The court acknowledged that the lender could condition the permanent modification offer on its further approval, and in such a situation there would be no binding offer. It concluded, however, that once the lender signed the TPP agreement and returned it to the plaintiff, the lender had no more discretion as to whether to offer the plaintiff a permanent loan modification. 673 F.3d at 561–63. The court found that after the lender signed the TPP, the only conditions remaining were to be satisfied by the borrower, and noted that when a promise is conditioned on the performance of some act by the promisee (in this case, the borrower), there can be a valid offer that the promisor is obligated to follow through on in the event the promisee fulfills the conditions. *Id.* at 562. Unlike the lender in *Wigod*, Homeward never signed and returned either Modification Agreement to Mr. Hafer. Thus, Homeward conditioned its offer of loan modification on its further approval, which it never gave.

Indeed, where the plaintiff did not allege that they received a signed copy of the TPP from the lender, courts have held that the TPP never ripened into an offer, and the plaintiffs' breach-of-contract claim failed. *See, e.g., Helmus v. Chase Home Fin., LLC*, 890 F. Supp. 2d 806, 815 (W.D. Mich. 2012); *Pennington v. HSBC Bank USA, N.A.*, 493 F. App'x 548, 555 (5th Cir. 2012), *cert. denied,* 133 S. Ct. 1272 (U.S. 2013).

B. This Court can uphold the district court's decision based on Mr. Hafer's failure to properly execute the Modification Agreement.

If the Court determines that the district court erred in concluding that no enforceable agreement was formed because Homeward did not sign the agreement, the Court can still uphold the district court's decision based on Mr. Hafer's failure to properly accept either the

first or second Modification Agreement he received. "Where the lower court reaches the correct result by an erroneous theory, this Court will affirm the order on the correct theory." *Edged In Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 321 P.3d 726, 731 (2014) (quoting *Grazer v. Jones,* 154 Idaho 58, 64, 294 P.3d 184, 190 (2013)).

There is no genuine issue of material fact that Mr. Hafer failed to return a properly executed loan modification agreement by the clearly stated deadline. Mr. Hafer had two prior loan modifications, and defaulted under both. **R. p. 45.** Homeward offered Mr. Hafer a third loan modification and, after Mr. Hafer completed trial period payments, Homeward sent Mr. Hafer a permanent modification agreement with instructions that in order to accept the proposed agreement Mr. Hafer was required to return the signed, notarized agreement on or before July 13, 2013. ***Id.*** When Homeward determined that the loan modification agreement Mr. Hafer returned was defective, Homeward did not simply proceed with foreclosure. Rather, Homeward provided Mr. Hafer with yet **another** opportunity and sent him a new loan modification agreement with the instruction that Mr. Hafer return a signed, notarized agreement on or before July 21, 2011. ***Id.*** Hafer failed to return the signed, notarized loan modification agreement on or before July 21, 2011, as expressly required. ***Id.*** The Hafers concede this fact, but contend that the second Modification Agreement was actually sent on July 26, 2011, and that the Hafers were not required to return it until August 31, 2011. **App. Br. p. 2.** The only evidence in the record supporting the Hafers' assertion that the second loan modification needed to be returned by August 31, 2011, is Mr. Hafer's self-serving affidavit, which is directly contradicted by the record. There is a document in the record that was sent on July 30, 2011, with a return deadline of August 31, 2011; however, this document is an invitation to apply for a new TPP, **R. pp. 175–95**, not the second

Modification Agreement that Mr. Hafer had notarized on August 2, 2011, **R. pp. 54–66.** The Hafers' attempt to confuse the date when he was supposed to return the second Modification Agreement with the date on the invitation to apply for a new TPP is insufficient to establish an issue of material fact. *See Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 524, 272 P.3d 491, 496 (2012) ("A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely"); *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 314, 647 P.2d 766, 770 (Ct. App. 1982) (holding that self-contradictory and unsupported allegation in an affidavit as to the date that all work was completed did not raise a genuine issue of fact when opposing affidavits set forth specific and otherwise uncontroverted facts).

While the Hafers strain to show that the notarization was done correctly on the loan modification agreement received by Homeward on July 13, 2011, whether or not the notarization was in fact valid is not determinative to the Court's summary judgment analysis. In their Complaint, the Hafers allege Homeward told Mr. Hafer that the loan modification agreement Homeward received on July 13, 2011, was "notarized in the wrong place." **R. p. 17.** Therefore, even assuming the Hafers are correct (which the evidence demonstrates they are not), and the Modification Agreement was in fact signed and notarized correctly (which it was not), such a finding would still not be sufficient for them to overcome summary judgment. There was no binding contract because, simply, there was no meeting of the minds. *Inland Title Co. v. Comstock,* 116 Idaho at 703, 779 P.2d at 17 (a valid contract requires a meeting of the minds).

Stated differently, the Hafers cannot, on the one hand, allege a binding contract existed on July 13, 2011, when, on the other hand, they allege that Homeward told them that

the loan modification was "notarized in the wrong place" and, as a result, Hafer agreed to sign and send to Homeward a new agreement. The parties agree there was no meeting of the minds, and the Complaint alleges as much. **R. p. 17.** Thus, there is no disputed fact.

It was for the very reason that there was no meeting of the minds that Homeward sent another Modification Agreement. **R. pp. 17, 45.** That fact is not disputed. Hafer signed, had notarized, and returned the second Modification Agreement on August 3, 2011. That fact is not disputed. **R. pp. 18, 45–46**. The loan modification was due no later than July 21, 2011. **R. p. 45–46**. However, Hafer did not timely accept and was thus ineligible for a loan modification under HAMP. ***Id.***

Mr. Hafer did not enter into a permanent loan modification agreement; he was *offered* a permanent loan modification agreement, but he failed to accept the same when he failed to return a properly signed and notarized Modification Agreement to Homeward by the designated due date. Accordingly, the Hafers' claims alleging no default, breach of contract, and breach of the covenant of good faith and fair dealing fail as a matter of law.

C. This Court can uphold the district court's decision to grant summary judgment in favor of Fannie Mae.

The issue of whether an enforceable agreement existed between the Hafers and Homeward was before the court when it ruled on Homeward and Fannie Mae's motion for summary judgment. As shown herein, the court did not err in deciding the issue, ruling that, as a matter of law, a modification agreement was never formed between the Hafers and Homeward. In turn, then, the court properly entered summary judgment in favor of Fannie Mae.

Idaho Code section 45-1510(1) provides, in pertinent part, as follows:

> When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506(7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits.

Here, a copy of the Trustee's Deed was recorded in favor of Fannie Mae on December 22, 2011. **R. 11–12.** The Trustee's Deed contains recitals which indicate that the notice and default requirements set forth in the Idaho Trust Deeds Act were complied with in connection with the sale of the subject property. ***Id.*** These recitals are prima facie evidence of the truth thereof. I.C. § 45-1510(1). The Hafers asserted that Fannie Mae failed to comply with the Idaho Trust Deed Act, but provided no evidence, by way of affidavit or otherwise, to rebut the statutory presumption. Mere assertions are insufficient to overcome summary judgment. I.R.C.P. 56(c). Additionally, as this Court has noted in *Spencer v. Jameson*, 147 Idaho 497, 504, 211 P.3d 106, 113 (2009), under the Idaho Trust Deeds Act, the legislature did not intend for a sale to be set aside once a trustee accepts a bid as payment in full "unless there are issues surrounding the notice of the sale." Such "interpretation promotes the legislature's interest in preserving the finality of title to real property." *Id.*

Identical to lack of notice issues that the court noted were "admittedly not present" in *Spencer v. Jameson,* there are admittedly no notice issues involved in the present matter. Because the issuance of the Trustee's Deed carries the prima facie showing of compliance with the Idaho's non-judicial foreclosure statutes and because of the finality afforded to a trustee's sale, the district court correctly determined that summary judgment in favor of Fannie Mae was appropriate and that Fannie Mae was entitled to immediate possession of the property.

V. CONCLUSION

The district court correctly granted summary judgment in favor of Homeward on the Hafers' first, third and fourth causes of action, and to Fannie Mae on its claim for possession based on its finding that, as a matter of law, no contract was formed that resolved the Hafers' default of their loan agreement. The issue of whether an enforceable modification agreement between Mr. Hafer and Homeward was properly before the district court. The district court did not err in concluding, as a matter of law, that the parties lacked mutual assent to be bound and no enforceable agreement to modify Mr. Hafers' loan was formed. Accordingly, summary judgment in favor of Fannie Mae, and partial summary judgment in favor of Homeward, should be affirmed.

Respectfully submitted this 20th day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20th, 2014, I served a true and correct copy of the foregoing upon the following individuals, pursuant to I.A.R. 34 and 34.1:

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