UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

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In re:

Elana Maria Stevens,
Debtor.

Chapter 7 case
No. 98-11181

Raymond Obuchowski, Trustee,
Plaintiff,

v.

Adversary Proceeding
No. 99-01040

Poulin Grain, Inc., Jeffrey Poulin, Gary Phillips, David Redmond, and Lyndonville Savings Bank,
Defendants.

Counsel:

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MEMORANDUM OF DECISION
DENYING PLAINTIFF'S MOTION FOR ORAL ARGUMENT AND
GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On March 9, 2000, Lyndonville Savings Bank ("the Bank"), Jeffrey Poulin, Gary Phillips and David Redmond, ("the Defendants") filed *Defendants' Motion for Summary Judgment* ("the Summary Judgment Motion")[1] and *Statement of Undisputed Facts* pursuant to Local Rule 7.1(c), seeking judgment

[1] Although styled "Defendants' Motion for Summary Judgment", the motion is filed on behalf of Lyndonville Savings Bank, Jeffrey Poulin, Gary Phillips, and David Redmond only, i.e., Defendant Poulin Grain, Inc. is not a moving party.

in their favor regarding all claims asserted against them in Plaintiff's Amended Complaint[2]. On April 10, 2000, the Plaintiff, Raymond Obuchowski, Trustee ("the Trustee" or "Trustee/Plaintiff") filed *Plaintiff's Opposition to Defendants' Motion for Summary Judgment and Memorandum in Support* and also *Plaintiff's Response to Defendants' Statement of "Undisputed" Facts Regarding Motion for Summary Judgment*. [3]

Thereafter, the Defendants filed a *Sur Reply to Plaintiffs' (sic) Opposition to Defendants' Motion for Summary Judgment and Memorandum in Support on May 8, 2000*[4]. On July 18, 2000, Plaintiff filed a *Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment and Plaintiff's Request for Oral Argument on Defendants' Motion for Summary Judgment*. Defendants filed their *Response to Plaintiff's Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment and Affidavit of Gary Phillips* on August 2, 2000. On August 8, 2000, Plaintiff filed a *Reply Brief to Defendants' Response of August 1,* along with the

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[2] The initial Complaint was filed on June 15, 1999. On July 21, 1999, the original Plaintiffs filed their Motion to Amend Complaint. Pursuant to a hearing on August 9, 1999, the proposed Amended Complaint was allowed as no objections were filed. However, pursuant to its Order dated August 23, 1999, the Court (Krechevsky, J.) sustained the Defendants' objection to the jury trial demand as untimely. Answers to the Amended Complaint were filed by the moving Defendants and Poulin Grain, Inc. on August 4, 1999 and August 9, 1999, respectively. On March 15, 2000, the Amended Complaint was further amended to delete any claims and references regarding two of the original Plaintiffs, Elana Maria Stevens and Pro Paving, Inc., pursuant to *Plaintiffs Motion to Dismiss without Prejudice and to Strike Adversary Proceeding from Docket Based on Lack of Jurisdiction or, In the Alternative, Based on Doctrine of Federal Abstention* dated January 18, 2000, which motion was otherwise denied by this Court (Krechevsky, J.) in its Order dated March 15, 2000. The instant summary judgment motion was filed on March 9, 2000, and Plaintiff's further attempts to file a Second Amended Complaint, other than to delete the two referenced Plaintiffs, was subject to Objection by the Defendants and denied by this Court (Brown, J.) in its Order dated May 25, 2000. Plaintiff's *Restated Motion to Amend Complaint per Court Request Regarding Inappropriate Parties and Amendments to Conform to the Evidence dated June 2, 2000* was likewise denied by this Court (Brown, J.) at the hearing on June 20, 2000, pursuant to its prior Order dated May 25, 2000. As such, the summary judgment motion pertains to the Amended Complaint, as of August 23, 1999, as amended further only to delete Elana Maria Stevens and Pro Paving, Inc. as parties in these proceedings.

[3] Plaintiff did not file a separate Statement of Disputed Facts as required pursuant to Local Rule 7.1(c)(2).

[4] Local Rules require that a Reply Memorandum be filed within 10 days after any opposition brief is filed; no other responses are contemplated in response to a motion without prior leave of court.

Deposition Transcripts of Christie (sic) Ann Scott Gobeil, Gary Phillips, and Elana Maria Stevens (Vol. I and II). Numerous attachments, including loan and related documents, other affidavits, and deposition excerpts were also appended to the various motion papers referenced above, and have likewise been carefully considered by this Court.

For the reasons set forth below, the Motion for Summary Judgment Motion is granted.

JURISDICTION

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334.

FACTUAL BACKGROUND

Due to the nature of the pending claims filed by Raymond Obuchowski, Trustee, on behalf of the estate of the Debtor, Elana Maria Stevens ("Ms. Stevens") against each of the Defendants in the Amended Complaint, a rather detailed account of the factual history of this dispute is necessary[5]. Prior to April, 1996,

[5] This factual background is derived from the *Defendants' Statement of Undisputed Facts and Plaintiff's Response to Defendants' Statement of "Undisputed" Facts Regarding Motion for Summary Judgment*, as well as the matters filed of record. Pursuant to Local Rule 7.1(c), a movant for summary judgment is required to submit a "separate, short, and concise statement of *undisputed* material facts" in conjunction with the motion, or face denial of the motion. L.R. 7.1(c)(1)(emphasis in original). An opponent is required to file a "separate, short, and concise statement of *disputed* material facts" along with opposing papers. L.R. 7.1(c)(2). The Local Rules expressly provides that "all material facts in the movant's statement of undisputed facts are deemed to be admitted unless controverted by the opposing party's statement." L.R. 7.1(c)(3). The foregoing statements are in addition to the requirements of L. R. 7.1(a) and Rule 56 FRCP. These requirements are designed to facilitate "the just, speedy, and inexpensive determination of every action" envisioned by the Federal Rules of Civil Procedure, *see* Rule 1, and to advance judicial economy, clarity, and an expeditious determination of disputes on the merits. In this instance, Plaintiff did not file the requisite "separate, short, and concise statement of *disputed* facts" and merely relied upon its *Response to Defendants' Statement of Undisputed Facts*. The difficulty of determining which *material* facts are disputed by the parties is exacerbated by "responses" that do not contain short and concise statements of disputed facts, but rather assert that certain items are (i) "disputed' without any record support (*see e.g.s*, Items 4, 11, 22, 24, 25, 33, 36), (ii) disputed "as phrased" (*see* Items 19, 35), (iii) "undisputed" as to restated portions of a statement (*see* Items 9, 10, 12, 13, 14, 23, 28, 29, 32, 39), or (iv) simply indicated to be "unknown" (*see* Item 41). Only Plaintiff's responses to Items 5, 28, 29 and 38 approach compliance with L.R. 7.1(c)(2). As such, the Plaintiff's response, by design or effect, hinders rather than advances the determination of undisputed facts envisioned by the Local Rule. To the extent the *Defendants' Statement of Undisputed Facts* is not properly or clearly controverted by the Plaintiff, the material facts presented by Defendants are deemed to be admitted in accordance with L.R. 7.1(c)(3). The court's statement of facts

Dan Scott, an owner of various businesses including a construction company in the Newport, Vermont area, approached Ms. Stevens regarding the possibility of forming a new paving company to be operated by Ms. Stevens, who was then an employee of Pike Industries. As a result of those discussions, Pro Paving, Inc. ("Pro Paving") was formed in April, 1996, with Ms. Stevens owning 40 percent of the stock and Mr. Scott's daughter, Kristi Scott, owning the remaining 60 percent interest. One of the purposes of having the women shareholders was to enable Pro Paving to qualify as a minority owned business. Thereafter, Rene Patenaude was hired by Pro Paving as its road foreman and paver based upon his experience as an employee of Pike Industries. Renee Patenaude and Elana Maria Stevens were the only full-time employees of Pro Paving. Ms. Stevens served as President and was responsible for the corporation's management and daily operations.

In April, 1996, Ms. Stevens and Mr. Scott approached Lyndonville Savings Bank ("the Bank") to obtain financing for Pro Paving. The transaction was completed primarily by Defendant Gary Phillips on behalf of the Bank, and Ms. Stevens as representative of Pro Paving. On April 26, 1996, Pro Paving obtained a line of credit loan from the Bank in the initial amount of $50,000. The loan was personally guaranteed by its shareholders, viz., Ms. Stevens and Kristi Scott. Subsequently, the line of credit was increased and renewed on four separate occasions, with the last renewal occurring on March 26, 1998 in the amount of $130,000. This final line of credit was guaranteed by Ms. Stevens and Mr. Patenaude. Mr. Patenaude had become an owner of 30% of the shares of Pro Paving in February, 1998, shortly after Kristi Scott had resigned from Pro Paving and transferred her shares to the corporation.

During 1996, its first year of operation, Pro Paving owned no machinery or equipment; it leased machinery and equipment from Dan Scott and others. On April 11, 1997, Pro Paving obtained an

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is formulated accordingly.

equipment purchase loan from the Bank in the amount of $191,260. This loan was personally guaranteed by Mr. Scott, his daughter Kristi Scott, and Ms. Stevens. It appears that Pro Paving purchased most of its machinery and equipment from Mr. Scott.

Pro Paving's 1997 tax return reflects a loss of $20,368; its 1998 tax return reflects a loss of $84,634. Prior to the final line of credit renewal in March, 1998, Pro Paving had accumulated significant trade debts, including a $61,775 debt to Pike Industries dating back to 1997. Pike Industries provided Pro Paving with paving product necessary to its operations. Upon receipt of its final line of credit renewal from the Bank in the amount of $130,000 on March 26, 1998, Pro Paving made payment upon its outstanding trade debts, including Pike Industries. By May 19, 1998, the line of credit had an available balance of $12,800, less than 10% of the amount borrowed.

The Poulin Grain project undertaken by Pro Paving in late 1997 is central to the claims ultimately filed by the Trustee/Plaintiff against the various Defendants. In September, 1997, Poulin Grain, Inc. ("Poulin Grain") accepted Pro Paving's bid to pave its parking lot at the Newport, Vermont facility; the work was to commence in spring, 1998. The contract price was $65,000. Rene Patenaude was the road foreman at Pro Paving at the time the bid was accepted. Preparations for the Poulin Grain paving project commenced during the week of May 4, 1998, with actual paving underway on May 11, 1998. At the time the paving commenced, Rene Patenaude was no longer road foreman at Pro Paving. On May 13, 1998, representatives of Poulin Grain began complaining to Pro Paving of Rene Patenaude's absence and the poor quality of the paving work. On Friday, May 15, 1998, Ms. Stevens contacted a Vermont bankruptcy attorney to discuss her financial options, and on Monday, May 18, 1998, she provided him with a $800 retainer which constituted his total fee for handling her chapter 7 bankruptcy case.

Also on May 18, 1998, after discussing various options with representatives of Poulin Grain, Ms. Stevens, as President of Pro Paving, reduced the contract price for the Poulin Grain paving job from $65,000 to $55,000. She also informed Poulin Grain that Pro Paving wished to receive its full payment of $55,000 for the project upon completion on May 19, 1998. Under the terms of the equipment purchase loan with the bank , Pro Paving was in technical default on May 19, 1998, having failed to submit the monthly payment of $5,427.23 due on May 11, 1998. Pro Paving was also in technical default on its line of credit note with the bank as of May 18th, for its failure to tender its monthly payment of $815.37 as due on April 25, 1998. Thus, it needed the money from Poulin Grain as soon as possible.

During the morning of May 19, 1998, the foreman of Poulin Grain informed Defendant Jeffrey Poulin, owner of Poulin Grain, that Ms. Stevens had stated that Pro Paving was going out of business. Later that same day, the President and Senior Lending Officer of the Bank, Charles Buckman and Defendant David Redmond, visited Defendant Jeffrey Poulin at his business location in Newport, Vermont to discuss the terms of a pending loan by the Bank to Poulin Grain. Defendant Poulin is also a director of the Bank. During this visit, Defendant Poulin advised Messrs. Buckman and Redmond of his earlier conversation with his foreman about Pro Paving's apparent intent to go out of business. There is no evidence of any further discussions between Defendant Poulin and Messrs. Buckman and Redmond concerning Pro Paving's alleged plan to go out of business or Pro Paving's relationship with the Bank.

On May 19th, after this meeting with Defendant Poulin, Defendant Redmond telephoned Defendant Gary Phillips, the Bank's loan officer, and advised him of the statement of Defendant Poulin regarding Pro Paving's imminent demise. Defendant Phillips contacted Ms. Stevens that same day and inquired whether the statement that Pro Paving was going out of business was indeed true, and she confirmed that it was. After speaking with Ms. Stevens, Defendant Phillips telephoned Defendant Poulin and advised him that the

Bank had a first lien on all receivables due Pro Paving, and requested that a joint check be issued in favor of the Bank and Pro Paving for the $55,000 receivable due upon completion of the Poulin Grain project. Defendant Poulin agreed to do so if the request was submitted in writing and if Ms. Stevens agreed. In addition to the approximately $277,000 claimed by the Bank, Pro Paving also owed a trade debt of approximately $42,000 to Pike Industries at this time. Pro Paving had no other paving jobs under contract for the rest of 1998, with the exception of a single bid to the Town of Hardwick, Vermont, and other small jobs that totaled approximately $16,000.

Following his telephone conversation with Defendant Poulin, Defendant Phillips telephoned Ms. Stevens that same day and indicated that the Bank was calling the loan and requested her consent to the proposed joint check and the delivery of certain collateral equipment to the Bank. It appears Ms. Stevens acquiesced to the requests for a joint check by Poulin Grain and the delivery of the collateral equipment. On May 22, 1998, the joint check was delivered to the Bank and Ms. Stevens endorsed the check at the Bank. The Bank asserts that Ms. Stevens endorsed the check willingly, while she contends that she did so under duress. Nonetheless, the joint check in the amount of $55,000 and later, the proceeds from the sale of the collateral equipment and machinery, were applied to Pro Paving's line of credit obligation to the Bank. Ms. Stevens filed for relief under chapter 7 of the Bankruptcy Code on August 7, 1998 represented by the same bankruptcy attorney she had consulted in May, 1998.

In this adversary proceeding, the Trustee/Plaintiff has filed a multi-count Amended Complaint against several Defendants involved in the foregoing events. The various counts seek relief pursuant to claims of lender liability, contractual bad faith, breach of contract, negligence, punitive damages, equitable subordination and violation of the duty of a secured creditor to act in a commercially reasonable manner. The Trustee/Plaintiff also contends that Pro Paving was current on its loan payment obligations at the time

the Bank declared the default.

In response, all Defendants deny liability and the Bank essentially asserts that it and its directors and employees were justified in determining to enforce the various default and remedy provisions of the loan documents under the circumstances. The Bank contends that the incidents of default under the subject loan documents include: (1) that Pro Paving failed to make a payment on time or in the amount due, (2) that the borrower became insolvent either because its liabilities exceeded its assets or it was unable to pay its debts as they become due, and (3) because the borrower did something or failed to do something which caused the Bank to believe that it would have difficulty collecting the amount owed, i.e., it felt insecure. Consequently, the Bank responds that it was entitled to pursue its contractual remedies by demanding immediate payment of all sums owed and to the use of any remedy the Bank had under state or federal law. The issues thus joined, the Defendants, Lyndonville Savings Bank, Jeffrey Poulin, Gary Phillips and David Redmond, have filed for summary judgment concerning all allegations of wrongdoing.

ISSUE

The issue presented is whether the record shows that there is no genuine issue as to any material fact regarding the various claims asserted by the Plaintiff against these Defendants, and whether the moving party is entitled to judgement as a matter of law pursuant to Rule 56, Fed.R.Civ.P.; Bankr. R. 7056.

SUMMARY JUDGMENT STANDARD

It is axiomatic that summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record plaintiff's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Factual disputes that are irrelevant or unnecessary are not material. Id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id.

The court must view all the evidence in the light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. den.*, 484 U.S. 977 (1987), and draw all inferences in the nonmovant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). However, if the evidence is merely colorable, or is not significantly probative or merely raises "some metaphysical doubt as to the material facts," summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. Lastly, the court is not obligated in our adversary system to "scour the record" in search of a factual dispute on behalf of a nonmoving party. *See* Waldridge v.

American Hoechst Corp., 24 F.3d at 922; *see also* Monahan v. New York City Department of Corrections, 214 F.3d 275, 292 (2d Cir. 2000)(while trial court has discretion to conduct an assiduous review of the record in determining if summary judgment warranted, "it is not required to consider what the parties fail to point out").

DISCUSSION

At the outset, it should be noted that there are legal claims and contentions referenced in the various legal memoranda that are not plead in the Amended Complaint. For example, while the Plaintiff raises the issues of fraud and fraud in the inducement in the responsive memoranda, there is no such claim asserted in the pleadings[6]. Similarly, the Plaintiff raises course of conduct between the parties in the summary judgment memoranda to suggest that the payment and default terms of the loan documents were modified accordingly, yet there is no such claim in the Amended Complaint[7].

Additionally, while the Plaintiff seeks to have this court hold the various Defendants liable pursuant to a "conspiracy" theory, there is no cause of action for civil conspiracy[8], or tortious interference with contract

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[6] In order to recover for fraud, the complaint must meet certain particularity requirements and must "(1) detail the statements (or omissions) that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." Heathcote Associates v. Chittenden Trust Company, 958 F.Supp. 182, 187 (D. Vt. 1997), *quoting* Harsco Corp. v. Segui, 91 F.3d 337, 347 (2d Cir. 1996). Because the Amended Complaint lacks these requisite allegations of fraud, no claim of fraud will be considered.

[7] At a minimum, a complaint should contain allegations of "repeated occasions for performance" and facts sufficient to show a pattern of conduct because "[a] single occasion of conduct does not fall within" the course of conduct provision of the Vermont Uniform Commercial Code. *See 9A VSA §§ 2-208 (Official Comment No. 4); see also* Success Universal, Ltd. v. CWJ International Trading, Inc. 1996 WL 535541, Caso No. 95 Civ 10210 (S.D.N.Y., Sept. 20, 1996). While the issue of course of conduct is not properly plead, it should be noted that Plaintiff has nonetheless failed to raise a genuine issue of material fact in this regard necessary to overcome the non-waiver provision in the remedies section of the promissory note.

[8] In order to hold the various Defendants liable for a civil conspiracy, a plaintiff must plead and prove that a defendant and at least one other person combined to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *See* TransTexas Gas Corp., 881 F.Supp. 268, 270 (S.D.Tex. 1994); *see also* Herrmann v.

or advantageous business relations alleged in the Amended Complaint[9]. To the extent Plaintiff alleges that the Defendants "conspired to put [Pro Paving] out of business" with the "particular mechanism" as described in the Amended Complaint (Amended Complaint, para. 10), this Court nonetheless has examined the material facts pertaining to the Defendants, acting alone or together, to assess "whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case" regarding each of the claims asserted against each of the Defendants in the Amended Complaint. Because this Court has determined that Defendants have demonstrated the absence of a genuine issue of material fact regarding the alleged wrongdoing by these Defendants, the "conspiracy" allegation is unavailing[10].

Furthermore, while the Plaintiff alleges liability directly against the directors and agents of the Bank for the actions taken on behalf of the Bank as the lender, there are no allegations of "alter ego", excessive control, sham, or otherwise in order to pierce the corporate veil and hold the individual Defendants liable for the conduct undertaken on behalf of the Bank. *See* Winey v. Cutler, 678 A.2d 1261, 1262, 165 Vt. 566, 568 (1996); *see also* Keir v. Robinson & Keir Partnership, 560 A.2d 957, 151 Vt. 358 (1989). Thus, in the absence of allegations or evidence sufficient to allow a piercing of the corporate veil, this Court

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Moore, 576 F.2d 453 (2d Cir. 1978).

[9] Elements of tortious interference with business relations are that defendant intentionally and improperly induced or caused a third person not to perform under its contract with plaintiff. *See* In re Kelton Motors, Inc., 127 B.R. 548, 552 (D.Vt. 1991). Similarly, unconscionability is raised in Plaintiff's briefs, but not plead. No such causes of action are plead in the Amended Complaint or properly before this Court, and accordingly will not be considered.

[10] The foregoing factual background, related evidence filed of record and allegations of wrongdoing also indicate that the pertinent actions of these Defendants were undertaken in their capacities as agents and directors of the Bank. However, there is a "familiar doctrine that there is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." Herrmann v. Moore, 576 F.2d 453, 459 (2d Cir. 1978). As such, there can be no liability to the extent Plaintiff seeks to recover for an intracorporate conspiracy involving these individual Defendants (who are principals of or on the board of the Bank) and the Bank.

will not disregard the particular status of each legal entity involved in this dispute.

Count I - Lender Liability

Presumably the claim of lender liability is directed solely at Lyndonville Savings Bank, and not the remaining Defendants, based upon its status as the lender and the related allegations of wrongdoing. In order to establish lender liability, the borrower must show that the lender either dominated, controlled, and/or actively participated in the management of Plaintiff's financial affairs. *See*, Cosoff v. Rodman, 699 F.2d 599, 610-11 (2d Cir. 1983). In this instance, the Plaintiff alleges that the Bank's involvement "related to the paving business and in particular the creditor pay-off described above, including but not limited to taking advantage of Plaintiffs necessitous circumstances." (Amended Complaint, para. 35). Furthermore, Plaintiff alleges that based upon the foregoing, Plaintiff and Pro Paving became an "instrumentality" of the Bank in relation to the referenced pay-offs and that the Bank is obligated to compensate the Debtor's estate for loss of business value, profits, lost wages, and related damages accordingly.

Summary judgment is warranted regarding the lender liability claim because the Defendants have demonstrated the absence of a genuine dispute of material fact regarding the requisite involvement, control or management by the Bank of Pro Paving's business or her own personal financial affairs. Generally, courts have insisted upon a strong showing of control. See e.g., Cosoff v. Rodman, 699 F.2d 599, 610-11 (2d Cir. 1983)(creditor's monitoring of operations and proffering management advise, without more, does not show control); Krivo Industrial Supply Co. v. National Distillers & Chemical Corp., 483 F.2d 1098, 1105 (5th Cir. 1973)(merely taking an active part in the management of the debtor corporation does not automatically constitute control); James E. McFadden, Inc. v. Baltimore Contractors, Inc., 609 F.Supp. 1102, 1105 (E.D.Pa. 1985)(creditor must assume absolute and total control not just take steps to minimize risk). By merely asserting its default rights under the subject loan documents and pursuing its lawful

remedies by obtaining an assignment of the Poulin Grain receivable and the return of certain collateral, the Bank did not exercise the requisite control or otherwise subject itself to lender liability based upon the evidence filed of record.

In granting summary judgment in favor of Defendants, this Court relies upon the similar case of Cyprus Copper Marketing Corp. v. Swiss Bank Corp., 222 B.R. 213 (S.D.N.Y. 1998), *affirmed by* In re Minpeco, USA, Inc., 199 F.3d 1322, 1999 WL 758846 (2d Cir. 1999) (unpublished). In Cyprus Copper Marketing Corp., creditors filed an involuntary chapter 7 petition against Minpeco, USA ("Minpeco") upon its demise. During the bankruptcy proceedings, the creditors initiated an adversary proceeding against Swiss Bank alleging various theories of lender liability based upon the following causes of action: (1) breach of the duty of good faith and fair dealing; (2) breach of contract; (3) fraud; (4) negligent misrepresentation; (5) equitable subrogation; (6) interference with contractual relations; (7) turnover of property; (8) constructive trust; and (9) conversion. Summary judgment was granted by the Bankruptcy Court regarding all claims.

In affirming summary judgment, both the District Court and the Second Circuit Court of Appeals discussed factual circumstances and legal principles applicable to this dispute. In Cyprus Copper Marketing Corp., Swiss Bank determined that an event of default had occurred, which resulted in its termination of a credit arrangement with Minpeco and other actions, including imposing a "block" on Minpeco's account so that only approved disbursements could be made, offsetting funds in Minpeco's account, notifying Minpeco's creditors of its default, and directing them to submit any amounts owing Minpeco directly to Swiss Bank. The creditors filed the adversary proceeding essentially alleging that these actions were wrongful and led to the financial demise of the debtor.

In granting and affirming summary judgment by the Bankruptcy Court on the foregoing claims, the

District Court and Second Circuit Court of Appeals emphasized that the bank's termination of the credit arrangements and other actions were authorized by the express terms of the credit agreement in light of the actual and suggested events of default. The courts found, as here, that Swiss Bank violated no implied duty of good faith when it merely acted in accordance with the terms of its contract with the borrower. Because the creditors had failed to raise a genuine issue of material fact to substantiate the various claims of wrongdoing, summary judgment on all counts was affirmed.

Similarly, there is no evidence filed of record by the Plaintiff in this case to create a genuine issue of material fact necessary to recover from the Bank for alleged lender liability. As noted above, we are concerned here only with any liability of the Bank as it pertains solely to Debtor's estate. Pro Paving is not a party to this proceeding and the Debtor's estate may not recover on Pro Paving's behalf. The material facts are undisputed that upon determining that certain events of default existed, the Bank proceeded to exercise its rights under the subject loan documents. In short, the Bank took no action that it was not permitted to take under the relevant credit and security agreements. In summary, Plaintiff has failed to demonstrate a genuine issue of material fact that the Bank was dominating, controlling or otherwise actively participating in the management of Plaintiff's or the borrower's financial affairs to warrant lender liability.

In addition to the foregoing reasoning, additional grounds exist for granting summary judgment concerning the remaining causes of action being alleged by the Plaintiff and will be addressed separately.

Count II – Contractual Bad Faith

Under Vermont law, there is an implied covenant of good faith and fair dealing in every agreement. Shaw v. E.I. DuPont De Nemours and Co., 126 Vt. 206, 209, 226 A.2d 903, 906 (1966); Davis v.

Liberty Mutual Insurance Co., 19 F.Supp.2d 193, 203 (D.Vt. 1998). The implied covenant exists to ensure that the parties act faithfully to an agreed common purpose and in consistency with the justified expectations of the other party. See Carmichael v. Adirondack Bottled Gas Corp., 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993). The burden of showing a breach of the covenant is on the plaintiff. See Davis v. Liberty Mutual Insurance Co., 19 F.Supp.2d at 203. While the existence of bad faith may often constitute a factual issue, it remains incumbent upon a claimant to demonstrate a genuine issue of material fact in this regard in order to defeat a motion for summary judgment.

In this instance, there is no evidence that the Bank violated the covenant of good faith and fair dealing in exercising its default rights and remedies under the loan documents. *See* Hartford Fire Insurance v. Federated Department Stores, 723 F.Supp. 976, 991 (S.D.N.Y. 1989)(mere exercise of contractual rights, without more, does not breach duty of good faith [citations omitted]). Moreover, there was no contract between the Plaintiff's Debtor and the various individual Defendants and, therefore, no cause of action in contract exists against them, individually, for an alleged breach of the covenant of good faith. *See* McHugh v. University of Vermont, 758 F.Supp. 945 (D.Vt. 1991)(no cause of action under Vermont law for breach of implied covenant of good faith in absence of a contract between the plaintiff and defendant). Absent a genuine issue of material fact, summary judgment is appropriate. *See* Clark v. World Cable Communications, Inc., 166 F.3d 1199, 1998 WL 907904 (2d Cir. 1998)(unpublished); Logan v. Bennington College Corp., 72 F.3d 1017 (2d Cir. 1995); Morton v. Allstate Insurance Co., 58 F.Supp.2d 325 (D.Vt. 1999).

Count III – Breach of Contract

Similarly, Plaintiff has failed to support a claim for breach of contract against any of these

Defendants. The essential elements for breach of contract are the making of an agreement, due performance by plaintiff, breach by defendant, and damage to plaintiff as a legal cause of the breach. *See* Raine v. Lorimar Productions, Inc., 71 B.R. 450, 454 (S.D.N.Y. 1987). In addition to the shortcomings noted above, Plaintiff has not demonstrated a genuine issue of material fact regarding the breach of contract action against the Bank or the other Defendants. Pro Paving is not a party to these proceedings having withdrawn voluntarily to pursue its remedies against these Defendants in state court, and the only contract issue is the enforcement of the personal guaranty between the Debtor and the Bank. No genuine issues of material fact exist to establish a breach of either the subject promissory note, security agreement or personal guaranty.

Plaintiff has not provided material facts to dispute that one or more default events had occurred[11], or that the Bank was not entitled to exercise its rights and remedies under the circumstances. Nor do the material facts reflect that the Bank breached the subject Security Agreement by seeking payment of the Poulin Grain receivable or custody and sale of the collateral[12]. Additionally, it is a long established doctrine

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[11] As indicated above, the Bank contends that the incidents of default under the subject loan documents include: (1) that Pro Paving failed to make a payment on time or in the amount due having missed the May 11, 1998 equipment loan payment and the April 25, 1998 line of credit note full payment, *and* (2) that the borrower became insolvent either because its liabilities exceeded its assets or it was unable to pay its debts as they become due, *and* (3) because the borrower did something or failed to do something which caused the Bank to believe that it would have difficulty collecting the amount owed. It is undisputed that Ms. Stevens admitted that the borrower's liabilities exceeded its assets on May 19, 1998 and that it was unable to pay its bills in the ordinary course of business as they came due without using the line of credit. While the Plaintiff contends that the Bank had waived its rights to timely payment by Pro Paving and that the payments were otherwise current, the remaining events of default lack material dispute. Moreover, a single statement by a Bank employee at a prior attachment hearing that he "believed" that Pro Paving was current does not constitute a statement sufficient to create a genuine issue of material fact in this regard, especially in light of his subsequent deposition testimony, the Bank documents filed of record without objection, the testimony of other Bank employees, and Ms. Stevens' testimony in this regard.

[12] Upon default, the Bank was entitled under the terms of the Promissory Note and Security Agreement dated April 11, 1997 *inter alia* to demand immediate payment of all monies owed and to use any remedy the Bank has under state and federal law. In addition to the foregoing remedies, the Security Agreement granted a security interest in favor of the Bank concerning all inventory, equipment, accounts, and other rights to payment of the Borrower, with related rights to obtain the security.

that one does not have a cause of action against another contracting party for a "conspiracy" to breach the contract between them. *See* Bereswill v. Yablon, 6 N.Y.2d 301, 306, 160 N.E.2d 531 (1959). Similarly, because the Plaintiff has not alleged the existence of a contract between the Debtor and any individual Defendant, other than her personal guaranty with the Bank, no liability exists in favor of the Plaintiff against the individual Defendants for breach of contract. *See* Blue Line Coal Co. v. Equibank, 683 F.Supp. 493, 496 (E.D.Pa. 1988). Therefore, summary judgment on the breach of contract claim is warranted.

Count IV- Negligence

The same shortcomings that infect the above-referenced claims afflict the Plaintiff's negligence cause of action. To prevail in a common law negligence action, a plaintiff must demonstrate that a defendant owed a legal duty to the plaintiff, that the duty was breached, that the breach constituted the proximate cause of plaintiff's harm, and that the plaintiff suffered loss or damage as a result. *See* Rubin v. Town of Poultney, 721 A.2d 504, 506, 168 Vt. 624 (1998). The existence of a duty is a question of law. *See* O'Connell v. Killington, Ltd., 665 A.2d 39, 42, 164 Vt. 73, 76 (1995); *see also* Smith v. Day, 538 A.2d 157, 158, 148 Vt. 595, 597 (1987)(legally cognizable duty is the first prerequisite in any negligence proceeding); McGee v. Vermont Federal Bank, 726 A.2d 42, 44 (Vt. 1999)(existence or nonexistence of a fiduciary duty is question of law to be decided by the court). Absent a duty of care, an action in negligence must fail. Behn v. Northeast Appraisal Co., 483 A.2d 604, 607, 145 Vt. 101, 106 (1984). Moreover, Vermont law generally does not recognize the existence of a fiduciary relationship between a lender and its customers. *See* Capital Impact Corp. v. Munro, 642 A.2d 1175, 1176 162 Vt. 6 (1992)(regardless of personal friendship between lender's president and guarantors, no fiduciary relationship existed between the debtor and creditor regarding a clearly documented loan made at arm's

length); *see also* McGee v. Vermont Federal Bank, 726 A.2d 42, 44 (Vt. 1999)(generally no fiduciary relationship between bank and its customers).

It is also well-settled under Vermont law that negligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm. *See* Gus' Catering, Inc. v. Menusoft Systems, ___A.2d ___, 2000 WL 1072380, Case No. 99-283 (Vt., July 25, 2000) and cases cited therein. Essentially, Plaintiff's negligence claim is a contract claim masquerading as a tort claim. The duty that Plaintiff asserts in Count IV is nothing more than the same claim of entitlement to receive that which is due under the contract and, as noted above, is legally deficient. *See* Gus' Catering, Inc. v. Menusoft Systems, *supra*; *see also* Logan v. Bennington College Corp., 72 F.3d 1017, 1029 (2d Cir. 1995); Breslauer v. Fayston School District, 659 A.2d 1129, 1132-33, 163 Vt. 416 (1995)(breach of contractual obligation does not create an independent tort).

In this instance, no material facts are presented to demonstrate a duty, fiduciary or otherwise, a breach of duty or legally cognizable negligence on the part of the Bank, or its agents and directors. *See* McGee v. Vermont Federal Bank, 726 A.2d 42, 44 (Vt. 1999)(no legally cognizable duty giving rise to common law duty of care between bank and mortgagors' assignees). No duty or damages independent of the breach of contract claim has been alleged or presented. Nor has the Plaintiff demonstrated a genuine issue of material facts regarding a negligent supervision claim against the Bank. *See* Haverly v. Kaytec, Inc., 738 A.2d 86, 169 Vt. 350 (1999). In addition to the reasons stated in the lender liability discussion above, Defendants are entitled to summary judgment regarding the claim of negligence.

Count V – Punitive Damages

Under Vermont law, punitive damages are generally not recoverable in actions for breach of contract, absent extraordinary circumstances in which a breach has the character of a willful and wanton or fraudulent tort. *See* Murphy v. Stowe Club Highlands, ___A.2d.___, 2000 WL 802928, Case No. 99-019 (Vt., June 23, 2000); Meadowbrook Condominium Ass'n, 565 A.2d 238, 152 Vt. 16 (1989). Hence, punitive damages are not appropriate unless a breach has the character of a willful and wanton or fraudulent tort accompanied by actual malice. *See* Murphy v. Stowe Club Highlands, *supra*. The claim for punitive damages fails not only because Plaintiff has not demonstrated contractual or tortious liability on the part of any of these Defendants, but also because the matters filed of record do not show that extraordinary circumstances exist for the imposition of such damages. Even assuming *arguendo* that this Court accepts Plaintiff's description of Defendants' conduct, none of Plaintiff's theories of why punitive damages are appropriate meet the standard established by Vermont case law.

Count VI - Equitable Subordination

Plaintiff also seeks to have the Bank's claim disallowed or equitably subordinated to the claims of all other creditors pursuant to 11 USC §510(c)(1). Equitable subordination is a long-standing doctrine that enables a Bankruptcy Court, as a court of equity, to subordinate the claims of one creditor to those of other creditors in circumstances when the creditor charged has engaged in some type of inequitable conduct that has secured for it an unfair advantage or that has resulted in injury to either creditors or the debtor. *See generally,* Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939). The doctrine has been recognized in the Bankruptcy Code, 11 USC §510(c), but its delineation has been left to the courts. From existing case law, it appears that the following conditions must exist to warrant equitable subordination: (1)

the claimant in question must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to a creditor of the debtor or conferred an unfair advantage to the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code. In re Mayo, 112 B.R. 607, 649-50 (Vt. 1990)(cases omitted); *see also* In re Vermont Electric Generation & Transmission Cooperative, Inc., 240 B.R. 476 (Vt. 1999). Moreover, it is "an unusual remedy which should be applied only in limited circumstances." Id. at 482 (citations omitted).

In consideration of the foregoing criteria, case law and the record, this Court does not find inequitable conduct on the part of the Bank to warrant equitable subordination. As previously indicated, the undisputed material facts show that upon determining that certain events of default existed, the Bank proceeded to exercise its rights under the subject loan documents and took no action that it was not permitted to take under the relevant loan and security agreements. The Bank did not dominate or control the Debtor. *See* In re Vermont Electric Generation & Transmission Cooperative, Inc., *supra*. Furthermore, the action taken by the Bank did not constitute "inequitable conduct" or "misconduct" and to grant equitable subordination under these circumstances would entail relief inconsistent with the Bankruptcy Code. Therefore, summary judgment is likewise granted regarding the claim for equitable subordination.

Count VII - Violation of Duty of Secured Creditor to Act in Commercially Reasonable Manner

This Court has also considered Plaintiff's claim that the Bank has violated its duty as a secured creditor to act in a commercially reasonable manner pursuant to 11A VSA§§ 14.01-14.20, and comparable Uniform Commercial Code provisions applicable to various types of collateral. Based upon the allegations of the Amended Complaint and the matters filed of record, Plaintiff has failed to raise a

genuine issue of material fact in this regard. For the reasons set forth above, there is no indication that the Bank proceeded in a commercially unreasonable or improper manner in exercising its rights and remedies under the various loan documents and the Security Agreement. The allegations set forth in the Amended Complaint are sparse and there is no material factual dispute concerning the manner in which the Bank obtained and disposed of the collateral. Moreover, this Court has determined that the Bank did not exercise domination or control over the financial affairs of either Pro Paving or the Debtor to warrant legal responsibility or liability for the demise of Pro Paving. Thus, the motion for summary judgment regarding Count VII is granted.

CONCLUSION

Plaintiff's request for oral argument is denied as unnecessary because the parties have had an adequate and generous opportunity to submit their various legal arguments through numerous legal memoranda (filed in excess of the briefs permitted by the local rules). This Court has discretion as to whether to entertain oral argument and declines to grant oral argument in this matter.

Based upon the foregoing, Defendants' motion for summary judgment is granted regarding all causes of action set forth in the Amended Complaint as against Jeffrey Poulin, Gary Phillips, David Redmond, and Lyndonville Savings Bank.

October 24, 2000
Rutland, Vermont

/S/ Colleen A. Brown
Hon. Colleen A. Brown
United States Bankruptcy Judge