UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re: **Larry T. Kimmes, Sr.,** **Debtor.**	**Bankruptcy Case** **No. 11-40045-JDP**
Larry T. Kimmes, Sr., **Plaintiff,** **vs.** **D.L. Evans Bank,** **Defendant.**	**Adv. Proceeding** **No. 12-08067-JDP**

MEMORANDUM OF DECISION

Appearances:

Brent T. Robinson, Rupert, Idaho, Attorney for Plaintiff Larry T. Kimmes, Sr.

Jason R. Naess, Parson, Smith, Stone, Loveland and Shirley, Burley, Idaho, Attorney for Defendant D.L. Evans Bank

Introduction

Plaintiff, chapter 12[1] debtor Larry T. Kimmes, Sr. ("Kimmes"), commenced this adversary proceeding against Defendant D.L. Evans Bank ("Evans"). Adv. Dkt. No. 1. At issue, at least according to a fair reading of the complaint, was whether Kimmes owed Evans any amount on a loan number ending 5225 from Evans to Kimmes.

The Court conducted a four-day trial in this action. At the conclusion of the wide-ranging presentation of evidence and testimony by the parties focusing on all aspects of the parties' former business relationships, the Court took the issues under advisement and the parties filed briefs. Dkt. Nos. 64, 65, and 66. The Court has carefully considered the record, the evidence, and the testimony presented at trial, as well the post-trial arguments of the parties. This Memorandum constitutes the

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 – 9037, and all civil rule references are to the Federal Rules of Civil Procedure, Civil Rules 1 – 86.

Court's findings of fact and conclusions of law, and disposes of the issues. Rule 7052.[2]

Facts[3]

I. Events Leading to Kimmes' Chapter 12 Filing: Loans for Loans

The issues between the parties arose from what became a highly strained relationship between a local bank and its customer. While, at times, Kimmes' treatment by the bank was perhaps less than courteous, diligent, or professional, the Court's challenge is to discern whether the bank's actions during the parties' dealings rose to the level of actionable

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[2] The Court concludes that it has jurisdiction over this action under 28 U.S.C. § 1334(b). This action, and resolution of the issues raised herein, constitute "core" proceedings under 28 U.S.C. § 157(b)(2)(A) and/or (B), (C) and (O). The Court has also determined it has the constitutional authority to enter final judgments and orders in this matter. To the extent it is necessary, the Court finds the parties have both expressly, and through their acquiescence and active participation in the trial of the issues raised in this action, impliedly consented to the entry of a final judgment by this Court. In the alternative, even if one or both of the parties have not consented, they have waived or forfeited any right to object to the Court's authority to finally determine the issues.

[3] The parties disputed many of the material facts. The facts recited in this Memorandum represent those found by the Court after due consideration of the parties' varying positions. These findings also reflect the Court's assessment of the credibility of the witnesses who testified, and the relative weight to be afforded to all of the evidence offered at trial.

wrongdoing.

Kimmes is the president and sole owner of G&L Land and Livestock, Inc. ("G&L"). He owns and operates a farm near Gooding, Idaho. In the late 1990's, because of losses from farming, federal tax liens were lodged against Kimmes' property. Exhs. 100 at 2 and 125. In 2003 and in 2005, Kimmes had state tax liens placed against his property. Exh. 125.

Adding to these financial woes, in 2006, the home owned by Kimmes and his spouse was destroyed by fire. After collecting $160,000 in insurance payments, Kimmes attempted to construct what he referred to as a "foam panel" house. While he spent all the insurance money in this effort, the house was never completed, and what was constructed had to be torn down, he alleges, as the result of the errors and negligence of his contractor. Kimmes was unable to recover any of the amount paid to the builder. After these setbacks, Kimmes and his wife decided to construct a "stick built" house in 2008. The construction expenses they incurred, along with the costs of operating G&L and his farm during this time, set

the stage for the conflict between the parties to this litigation.

While he previously banked elsewhere, in 2000, a neighbor-friend suggested to Kimmes that he bank with Evans. G&L, through Kimmes, initiated a business relationship with Evans. Over the course of the following years, Kimmes and G&L obtained several large loans from, and maintained checking accounts with, Evans, both in his name and for his corporation. Exh. 200. Typically, the proceeds from the loans he received from Evans were deposited in G&L's checking account with Evans. *See id.*

In November 29, 2007, G&L borrowed $50,392 from Evans on Loan Number 4600. Exh. 208 at 2. Soon thereafter, on January 10, 2008, G&L borrowed $100,510 on Loan Number 4656. After exhausting those loan funds, in April, 2008, G&L obtained an operating loan, Loan Number 4814, from Evans for $237,213. Exh. 208 at 1. The proceeds of this loan were used to pay off the amounts due on Loan Numbers 4600 and 4656, together with providing G&L additional operating capital in the amount of $85,098. Exhs. 209 and 225. The promissory note for this loan explained it was a line of credit, and instructed that advances on the credit line could

be requested orally or in writing by Kimmes as G&L's president. Exh. 208 at 2. The note further provided G&L would be obliged to repay "all sums either: (A) advanced in accordance with the instructions of an authorized person or (B) credited to any of [G&L's] accounts with [Evans]." *Id.* As security for Loan Number 4814, Kimmes executed Agricultural Security Agreements in favor of Evans, granting a security interest in a variety of collateral owned by both Kimmes and G&L. Exhs. 226 and 227.

In April 2008, Evans obtained an advance of $42,000 under Loan Number 4814; an additional $43,000 was advanced in May 2008. *Id.* Kimmes used these funds, in large part, to pay for materials and services associated with the construction of his new home. *See* Exh. 200 at 4-5.

Kimmes testified that, in addition to obtaining Loan Number 4814, he talked with Chad Brown, his loan officer with Evans, about securing a long-term mortgage loan for his new house. In the meantime, Kimmes, as an individual, signed a promissory note for Loan Number 4921 on July 17, 2008. Exh. 201. It was a variable interest rate, twenty-year term loan. *Id.* The purpose of the loan, as stated on the associated "Disbursement

Request Authorization," was a "Term Real Estate Closed End Single Advance." *Id.* Evans secured a ninety percent guarantee on Loan Number 4921 from Farm Service Agency (FSA) as a "Farm Ownership" loan. Exh. 120. After loan fees, a total of $616,310.50 was paid to Kimmes from this loan. Exh. 201. From these funds, Kimmes paid Land Title & Escrow, Inc. $334,859.61 in satisfaction of amounts remaining due for the purchase of real estate on which the home was being built. Exh. 202. Kimmes also used Loan Number 4921 funds, on July 21, 2008, to pay off a $50,610.27 balance on a short-term loan from Evans. Exh. 202 at 4-5. The remaining loan proceeds of $231,300.89 were deposited into the G&L checking account with Evans. Exh. 200 at 9.

While Kimmes testified that Loan Number 4921 funds were used to pay for his house, bank records show only $146,650.75 was spent on the house during the period of time the loan proceeds were on deposit in the G&L checking account. *See* Exhs. 127 and 200 at 9-12. Kimmes testified that Brown told him he should use the Loan Number 4921 proceeds to pay for constructing his home, pending receipt of a long-term, conventional

mortgage loan. However, Kimmes' testimony was unclear as to exactly when the conversation with Brown occurred, whether it was at the time Loan Number 4921 was funded in July 2008, or at some much earlier time. Further, Kimmes testified that Brown told him any funds spent on construction of the home would be reimbursed from the proceeds of the anticipated conventional home loan Kimmes would obtain, and that loan would have at least a twenty-year repayment term with a rate of interest of no more than six percent. However, Kimmes acknowledged that no specific loan terms, including the exact interest rate, were agreed upon by he and Brown.

Acting on Brown's instructions, Kimmes submitted a construction budget for the house to Evans' residential loan officer. Kimmes did not follow up with the officer after doing so, purportedly assuming his loan application was in process. However, it is undisputed that Kimmes did not submit any formal loan application for a residential loan with Evans. Kimmes also testified that Brown told him not to worry about certain insufficient funds fees that were being levied against the G&L checking

account for payments being made for construction costs because Evans would not require Kimmes to pay them. As things turned out, Evans did not provide Kimmes with a conventional home loan as he thought it would.

In contrast to Kimmes' testimony, Brown testified that he did not recall the purpose of Loan Number 4921, nor did he recall how the proceeds were to be used. Indeed, Brown recalled surprisingly little about his conversations with Kimmes. Moreover, Brown was not asked whether he promised Kimmes that Evans would forgive any insufficient funds fees that were accumulated on the G&L account, totaling approximately $6,000. Brown also could not recall telling Kimmes that Evans would reimburse the funds being used from Loan Number 4921 to build his house with funds from a conventional home loan. While he remembered facilitating Kimmes' submission of a house construction budget to Evans' residential loan officer, he stated that was the extent of his involvement in Kimmes' attempt to obtain a mortgage loan from Evans.

From August 2008 to December 2008, Evans also advanced funds

from Loan Number 4814 to the G&L checking account. At the end of December 2008, Loan Number 4814's principal balance was $236,738.70, which remained unchanged through May 19, 2009. Exh. 212.

In November 2008, Brown left Evans, and Don Maier became Kimmes' new contact. Kimmes testified that Brown, before leaving his employment with Evans in November 2008, authorized him to make a December 2008 construction payment to Larry Brown and promised that payment would be "covered" with loan proceeds. By making this payment, Kimmes insists, the G&L checking account was over-drafted by $35,000 because loan proceeds were not timely advanced by Evans to cover the check.

The documentary exhibits tell another story, however, concerning this overdraft. They show Kimmes wrote the subject $40,000 check to Larry Brown on December 15, 2008, and that this check cleared the G&L checking account two days later, and did not result in an overdraft. *See* Exhs. 200 at 20-21 and 216 at 2. Further, the bank statements indicate that the checking account had experienced a negative balance frequently

between the time when Chad Brown allegedly authorized Kimmes to pay Larry Brown, and when Kimmes wrote that check in the middle of December 2008. *See* Exh. 200 at 19-21. While the G&L checking account did eventually reach a negative balance of approximately $35,000, it was not until late January 2009. Exh. 200 at 23. Kimmes' testimony was vague at best about the G&L checking account balances, or the amount he owed to Evans on the various loans he obtained throughout the time line referenced above. However, Kimmes acknowledged that during the relevant times, Evans provided G&L, though Kimmes, monthly checking account statements that clearly identified all funds deposited into and disbursed from the account. These statements also showed the various overdraft fees being charged to the account. *See generally* Exh. 200.

Kimmes testified that the continuing insufficient funds fees being generated on the G&L account were an on-going concern to him, and to his bookkeeper, but he insists Brown told him he need not worry about them because Evans would remove all the fees on the account. When this conversation occurred is unclear, as was the timing of the conversation

when Brown allegedly told Kimmes that he would be able to obtain a conventional home loan from Evans. In Brown's testimony, however, he did not recall making either promise.

In March 2009, G&L, through Kimmes, obtained yet another line of credit from Evans, this one in the amount of $334,868 on Loan Number 5161. Exh. 220. Loan Number 5161 was used by Kimmes to pay for personal living expenses, farm operating expenses, the purchase of cattle, feed and veterinarian services, among other purposes. Exh. 221.

In the spring of 2009, loan officer Shane Hamblin became Kimmes' contact with Evans. Kimmes obtained two additional loans from Evans in May 2009. Of particular import in this action, Kimmes and his wife signed a promissory note for Loan Number 5225 on May 1, 2009. Exh. 203. Loan Number 5225 was a closed end, single advance, variable rate, ten year term loan for $297,000. Exh. 205. The purpose of the loan was stated in related paperwork as "Refinance Home loan construction." *Id.* Its proceeds were used to pay off Loan Number 4814, which was the primary source of funds in the G&L checking account during this time and used by

Kimmes to build the home. Exhs. 203 at 2 and 205. Evans had extended Loan Number 4814 several times to allow Kimmes to get the loan current. Exhs. 210 and 211. Loan Number 5225 was offered by Evans in order to extend Kimmes' repayment term for ten years, an approach the Kimmes endorsed at the time. Exhs. 203 and 205. As security for Loan Number 5225, Kimmes and his wife granted a deed of trust on their real property known as 1819 South 2200 East, Gooding, Idaho, to Evans. Exh. 204. The deed of trust has several unremarkable default provisions, including one providing that a default would result from the "failure of [Kimmes] within the time required by this deed of trust to make payments for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien." *Id.* at 3. Kimmes and his wife also expressly agreed that they "shall pay when due . . . all taxes, special taxes, [and] assessments . . . ." *Id.* at 2. Upon default Evans had the option to foreclose the deed of trust by notice and sale. *Id.* at 4.

The other loan obtained by Kimmes in May 2009, was Loan Number 5234. It was an FSA-guaranteed, revolving operating line of credit for

$298,000, the balance coming due on May 5, 2010. Proceeds from Loan Number 5234 of $282,870.97 were used to pay the outstanding balance on Loan Number 5161. Exh. 213 and 220.

In 2008 and 2009, Kimmes failed to timely pay his real property taxes. Exhs. 113, 115, and 192. In addition, by June 2010, Kimmes was past due on several of the loans from Evans. Exh. 164 at 12-13. In response, Evans commenced a foreclosure on the deed of trust for Loan Number 5225, and provided notice to Kimmes of its actions. Exhs. 204 and 218. Evans also began a judicial foreclosure in September 2010 on the mortgages on the farm ground granted by Kimmes to secure Loan Numbers 4921 and 5234, which were in arrears at the time. Exhs. 187 and 164 at 16.

II. Kimmes' Chapter 12 Case and the Objection to Evans' Proof of Claim

In response to Evans' collection actions, Kimmes filed a chapter 12 petition on January 11, 2011. Bankr. No. 11-40045-JDP, Dkt. No. 1. On February 11, 2011, Evans filed a proof of claim in the bankruptcy case in

the amount of $1,375,990.60. Claim No. 2-1. Evans included in its proof of claim amounts due on Loan Numbers 4921, 5225, 5234, and 4617. *Id.*

Kimmes filed an objection to the Evans proof of claim on April 8, 2011. Bankr. Dkt. No. 20. The bare-bones objection states: "[t]he basis for this objection is that, although the debtor agrees that an indebtedness is owed [to Evans], he objects as to the amount owed. It is believed that the amount owed is less than $1,175,000." *Id.* Evans filed a response to the Kimmes objection insisting it was owed the amount stated in its proof of claim. Bankr. Dkt. No. 27. A hearing on the objection was scheduled for July 13, 2011, Bankr. Dkt. No. 47, however, when the parties indicated to the Court they had reached an agreement resolving the objection, the hearing was continued to August 30, 2011. Bankr. Dkt. No. 56. After yet another continuance, the parties advised the Court on September 28, 2011, that the issues raised by the objection had not been settled. Bankr. Dkt. No. 67.

On October 17, 2011, the Court confirmed Kimmes' second amended chapter 12 plan. Dkt. No. 69. The confirmed plan refers to the Kimmes-

Evans dispute, and provides that Kimmes will pay all amounts owed to Evans as determined by the Court thereafter. Dkt. No. 68 at 5-6. Evans did not contest Kimmes' plan.

III. The Adversary Complaint and the Trial

Kimmes commenced this adversary proceeding against Evans on August 10, 2012. Adv. No. 12-08067-JDP, Dkt. No. 1. Kimmes' complaint consists of ten "counts." *Id.* The complaint is inartfully drafted, and as discussed below, the relief sought is limited.

Count One of the complaint alleges, in total, that "[Kimmes] is authorized to incorporate in an adversary action his objection to a proof of claim. That basis for objection is for the reason specified hereafter as to the indebtedness referred to in Loan No. . . . 5225/04 owed to [Evans.]" *Id.* at ¶ 5.

Count Two provides, in summary, that because a loan officer at Evans allegedly promised Kimmes a "regular home loan," but did not follow through on this promise, Kimmes was required to pay a higher interest rate on the loan he was eventually provided. Adv. Dkt. No. 1 at

¶ 6. Count Two further alleges Evans breached an unspecified agreement it made with Kimmes and FSA, because Evans "had [Kimmes] use FSA guaranteed operating loan funds" inappropriately to build his house. *Id.* at ¶ 7. Kimmes alleges he "incurred significant damages" on account of Evans' actions. *Id.* at ¶ 9.

Count Three focuses upon the insufficient funds fees in the amount of $6,760 charged to Kimmes, which he alleges, Evans "represented that it would remove" but did not do so. *Id.* at ¶¶ 10 and 11.

Count Four alleges that Evans' loan officer, Chad Brown, failed to honor his promise to cover an unspecified "$40,000 check" written on the G&L checking account, which caused an overdraft in the account. *Id.* at ¶¶ 12 and 13.

Count Five alleges that Evans failed to cover a check Kimmes wrote to pay insurance premiums sometime in January 2009 to keep "the property" insured. *Id.* at ¶ 14. As a result, Kimmes had to use "personal funds" to cover a $2,313 bill. *Id.* at 16.

Count Six alleges, like Count Two, that Evans promised a "house

loan" with better terms than Loan Number 5225, and failed to provide such a loan. *Id.* at ¶ 18. Remarkably, Count Six candidly admits Kimmes found it "impossible . . . to determine how much in fact at any give time was owed to [Evans,]" and he attributes this difficulty to the "change in Bank personnel," which was "all to [Kimmes'] further damage." *Id.* at ¶ 19.

Count Seven deals again with the insufficient funds fees, and alleges "further damages" were incurred by Kimmes due to Evans' failure to pay a $14,000 check for replacement of a roof of "the shop." *Id.* at ¶¶ 20- 22.

Count Eight alleges that Evans failed to timely respond to his requests for an operating loan "in the Year 2010," and thus, Kimmes was required to obtain the loan from another bank. *Id.* at ¶ 23.

Count Nine contends that Evans failed to send him a "demand letter or acceleration letter with respect to any loans," thereby depriving him of any opportunity to "cure a claimed default." *Id.* at ¶ 24. This Count also alleges that Kimmes gave Evans $2,484.13 "to pay insurance and a pickup payment" but Evans failed to apply those funds appropriately, which

resulted in Evans filing a legal action against Kimmes even though he was "current." *Id.* at ¶ 25.

Finally, Count Ten alleges that Evans inappropriately commenced a non-judicial foreclosure on his house for failure to timely pay real property taxes without giving Kimmes any "written demand" for the payment of the taxes, which caused Kimmes to incur "foreclosure fees." *Id.* at ¶ 27. The final numbered paragraph of the complaint then states, "[t]hat all of the damages referred to above with respect to the one loan should be found to be not owed and that this obligation shall be extinguished." *Id.* at ¶ 28.

After all of these allegations, Kimmes' complaint "prays that the Court find that nothing is owed with respect to [Loan Number 5225] and, that the [c]hapter 12 [p]lan should be modified accordingly." *Id.* at 6.

Evans filed an answer to the complaint denying all of its material allegations and disputing Kimmes' right to any relief. Adv. Dkt. No. 8. After discovery and other non-dispositive proceedings, the adversary proceeding came on for trial before the Court. Notably, and despite the

language in his complaint, focusing solely on "the one loan;" in his pretrial brief, Kimmes asked this Court to make an affirmative award of money damages to Kimmes, rather than to simply determine whether anything was owed by Kimmes to Evans on Loan Number 5225. Adv. Dkt. No. 42 at 8. This request to recover an unstated amount of damages, made only two weeks before the trial, understandably took Evans by surprise. When the trial commenced on September 5, 2013, Evans' counsel objected to Kimmes' apparent efforts to amend the relief he had sought in the complaint, not in an amended complaint, but informally through the pretrial brief. Counsel for Kimmes, seemingly recognized the problem, then made an oral motion to amend the complaint. The Court denied the motion, ruling that under these circumstances, Kimmes would be limited to the relief stated in the complaint.

The trial in this action consumed most of four days during which the Court heard the testimony of 10 witnesses; hundreds of pages of documentary exhibits (many of which were unrelated to the real issues in the action) were submitted by the parties. At the conclusion of the trial,

the issues were taken under advisement, and the parties filed post-trial closing arguments. Undeterred by the Court's ruling before the trial began,[4] Kimmes, in the conclusion to his rebuttal brief[5] argues that Evans "had notice that Kimmes might object to a larger portion of his indebtedness [beyond Loan Number 5225] and should have been prepared to defend such. Therefore, [Kimmes] still requests that this Court grant him an offset toward Defendant in the amount of $640,299.29." Adv. Dkt. No. 66 at 8.[6]

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[4] Kimmes has never filed a motion to amend the complaint as required by Rule 7015/Civil Rule 15, nor has he ever submitted a proposed amended complaint. He also never asked the Court for relief from its order denying the his motion to amend made at the beginning of the trial.

[5] Kimmes's"rebuttal brief" was filed three days later than ordered by the Court at the conclusion of the trial. *See* Dkt. No. 63. Though no excuse or explanation for this tardy submission was offered by Kimmes' counsel, the Court exercises its discretion to consider the late-filed brief, even though counsel should properly have requested an extension of time to file the brief.

[6] Kimmes' $640,299.29 claim for an "offset" was not mentioned in either the complaint, nor at trial. This figure was computed for the first time in Kimmes' proposed findings of fact and conclusions of law and brief filed several weeks after the trial concluded. Dkt. No. 64 at 10. The figure includes, among other components, "insufficient financing to farm [Kimmes'] ground [of] $255,780," as well as a loss "due to inability to use commercial fertilizer in 2011, 2012, 2013 [of] $142,000." *Id.* at 10, ¶ 70.

Analysis and Disposition

I. Pleading Standards and Amendments to Conform Pleadings to Proof at Trial

As an initial matter, the Court hereby reiterates its intention and decision to confine the issue to be decided in this action to only that properly pled in Kimmes' complaint: whether Kimmes is indebted to Evans on Loan Number 5225.

Civil Rule 8(a) applies in adversary proceedings via Rule 7008; it provides,

> Claims for Relief. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought . . . .

Civil Rule 8(a)(2) requires "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Civil Rule 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However,

the complaint "'must contain something more . . . than . . . a statement of facts that merely creates a suspicion of legally cognizable right of action.'" *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)).

Applying these well-established principles in this case, Kimmes' complaint failed to give Evans notice of the legal grounds upon which he intended to show he was entitled to the relief requested under any of the counts of the complaint. Beyond this, the complaint failed to adequately disclose, or even mention, several of the factual positions Kimmes would later argue in his post-trial brief. Finally, the complaint's prayer for relief did not inform Evans that Kimmes would seek anything other than an offset against amounts owed on Loan Number 5225 as a remedy for Evans' alleged wrongs.

Kimmes, or more precisely, his counsel, argues that Kimmes' prayer for expanded relief should be allowed because he only became aware of the "true extent" of Kimmes' damages during the trial. *See* Plaintiff's Rebuttal Brief, Adv. Dkt. No. 66 at 3 ("As the true extent of the harm done

to Kimmes became clear at trial, he should be able now to claim an offset for the entire extent of his damages.").

There is some support for Kimmes' position. After all, Evans did not challenge Kimmes' complaint under Civil Rule 12 before the trial commenced, a trial was conducted, and Civil Rule 54(c)[7] instructs that the Court may award relief to which a party is entitled, regardless of whether the relief was plead, so long as the failure to request the appropriate relief does not prejudice the opposing party. *See Channel Ltd. P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991); *Hopkins v. D.L. Evans Bank (In re Fox Bean Co.)*, 287 B.R. 270, 289 (Bankr. D. Idaho 2002). However, prejudice exists if the opposing party would have submitted additional evidence at trial not relevant to the issues raised by the heedless pleader. *In re Fox Bean Co.*, 287 B.R. at 289. And as the Ninth Circuit Bankruptcy

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[7] Civil Rule 54(c), incorporated by Rule 7054, provides, in relevant part:

> Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

Appellate Panel has discussed, there are limits to a trial court's discretion under Civil Rule 54(c):

> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. "Unless all parties in interest are in court and have voluntarily litigated some issues not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded."

Delaney-Morin v. Day (In re Delaney-Morin), 304 B.R. 365, 370-71 (9th Cir. BAP 2003) (quoting *Sylvan Beach Inc. v. Koch*, 140 F.2d 852, 861 (8th Cir. 1944)).

Here, Evans made it clear at the beginning of the trial it objected to Kimmes' analysis of the issues and scope of relief discussed in his pretrial brief, and that Evans would not consent to an expansion of the claims, issues, or relief beyond that requested by Kimmes in his complaint. Further, after the trial, Evans disputed (and refuted) the computation of damages set forth for the first time by Kimmes in his post-trial brief. *See* Defendant's Response Brief, Adv. Dkt. No. 65 at 12-13 ("While [Kimmes']

proposed findings of fact in his post-trial brief identify nine different sources of damages . . . his Complaint only pleads two of those sources of damages . . . [t]hose [actually pled sources of damage] are the only damages and claims [Kimmes] pled sufficiently to allow [Evans] adequate notice to respond to the allegations through its answer, discovery, and other trial preparations.”).

All things considered, the Court concludes, in an exercise of its discretion, that Evans would be severely prejudiced were the Court to entertain Kimmes’ amended, indeed enhanced, claims for offsets and damages beyond that relief specifically requested by Kimmes in his complaint. Clearly, Evans did not voluntarily agree to litigate Kimmes’ claims to recover damages addressed for the first time in his post-trial brief. According to the complaint, while Kimmes asserted several distinct claims, and alleged that Evans engaged in a variety of wrongful conduct, Kimmes’ prayer for relief makes clear that he was solely concerned with disputing the amounts Evans claimed to be due on only one of several of his outstanding loans: Loan Number 5225. The Court will therefore

evaluate below only those claims Kimmes asserts that may be offered to offset amounts he otherwise owes to Evans on Loan Number 5225.

II. Statute of Frauds, Promissory Estoppel, Good Faith, and the Remaining Counts of the Complaint

The Court will first address the legal theories enunciated by Kimmes in his briefs. It will then analyze the other "counts" of Kimmes' complaint, even though no arguments were advanced concerning many of these claims at trial, or in Kimmes' briefs.[8]

While Kimmes' complaint neglects to discuss any legal basis or authority for his claims, in his pretrial brief, Kimmes invokes the doctrine of promissory estoppel to support his claims targeting Evans' agents' alleged unfulfilled promises regarding the insufficient funds fees and to provide Kimmes with an acceptable "conventional mortgage." Adv. Dkt.

[8] Kimmes seems to have abandoned these other counts of the complaint in his post-trial filings with the Court. Even so, to be comprehensive, the Court will consider them, based upon the proffered evidence and testimony, to determine if any relief is warranted.

No. 42 at 5-6.[9] In addition, the pretrial brief argues Evans breached a covenant of good faith and fair dealing because Evans violated an agreement with FSA and because "Evans should have allowed [Kimmes] to obtain a normal mortgage for his home construction." *Id.* at 8. Kimmes' post-trial brief again focuses on the alleged breach by Evans of the covenant of good faith and fair dealing arguing that Evans' agents instructed him inappropriately to use FSA-guaranteed loan proceeds to build his house, and because Evans allegedly did not follow its own internal policy on servicing troubled loans. Adv. Dkt. No. 64.

Of course, there are no writings to evidence the promises Kimmes alleges were made to him by Evans' representatives, which he asserts were subsequently breached. This is a problem for Kimmes. Idaho Code § 9-505, Idaho's Statute of Frauds, provides:

> In the following cases the agreement is invalid, unless the

[9] Kimmes also claims he is entitled to relief based on Evans' "promise," through Brown, to cover his $40,000 check to Larry Brown. However, as discussed above, the Court finds, as a matter of disputed fact, that the $40,000 check did not result in an overdraft of the G&L checking account as argued by Kimmes. *See supra*, Fact Section; *see also* Exhs. 200 at 20-21 and 216 at 2.

> same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: . . . (5) A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.

In order to avoid the operation of this statute, Kimmes relies on the doctrine of promissory estoppel. Adv. Dkt. No. 42 at 6.

"Promissory estoppel, generally speaking, means that 'a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *Bank of Commerce v. Jefferson Enters., LLC*, 303 P.3d 183, 194 (Idaho 2013) (quoting *Smith v. Boise Kenworth Sales, Inc.*, 625 P.2d 417, 421-22 (Idaho 1981)). However, promissory estoppel is not properly invoked as an exception to the statute of frauds in cases dealing with a bank promising to lend money above the statutory amount. *See Bank of Commerce*, 303 P.3d at 194 (holding promissory estoppel was not

applicable to save a borrower from the effect of the statute of frauds even though the bank orally committed to a mortgage for borrower because the agreement was not in writing); *Lettunich v. KeyBank Nat. Ass'n*, 109 P.3d 1104, 1109 (Idaho 2005) (holding that an oral agreement by a bank to lend to the borrower was unenforceable due to the statue of frauds and that promissory estoppel did not compel a different result).[10] Applying these principles to this case, Kimmes' position lacks merit.

First, with respect to the purported Evans promise to remove the

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[10] Kimmes likely intended to argue equitable estoppel because it is a recognized exception to the statute of frauds. *Ogden v. Griffith*, 236 P.3d 1249, 1254-55 (Idaho 2010) (stating "we find that equitable estoppel is an appropriate ground for avoidance of the statute of frauds . . . ."). Promissory estoppel and equitable estoppel, although perhaps occasionally confused, "are distinct concepts with distinct uses and effects." *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 918 (9th Cir. 2001). "Promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have . . . [p]romissory estoppel is a sword, and equitable estoppel is a shield." *Id.* (quoting *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981) (internal quotation marks omitted)). Kimmes' possible error in nomenclature is of no consequence in this case, however, since even applying equitable estoppel to the facts, Kimmes' claims fail. Kimmes never proved Evans made any false representations, nor that Evans concealed any material facts with actual or constructive knowledge of the truth. *See Old Cutters v. City of Hailey (In re Old Cutters)*, 488 B.R. 130, 148 (Bankr. D. Idaho 2012) (stating the elements of equitable estoppel in Idaho).

insufficient funds fees on the G&L checking account, the Court concludes Kimmes has not adequately proven such a promise was ever made. Kimmes testified that he was promised by Brown that the fees would be removed; Brown did not recall ever making that promise. On balance, the Court believes Brown.

Next, with respect to the purported Evans promise to give Kimmes a “conventional mortgage” for funds spent from other loans to build his home, the Court similarly concludes that evidence of the details of the alleged promise is lacking. Kimmes testified Evans’ promised, through Brown, to assist him in applying for a “conventional mortgage,” but the proof is inadequate that Evans promised anything more – *i.e.* to actually make him such a loan. There was no discussion of the terms of such a loan, and certainly an agreement was never reached as to those terms. Again, Brown testified that, beyond agreeing to submit Kimmes’ cost figures to an Evans mortgage loan officer, he did not recall making any promises or discuss specific mortgage terms with Kimmes. Even were those terms settled, which they were not, Idaho Code § 9-505(5) renders

such an agreement unenforceable, because the amount of that loan would clearly have exceeded $50,000, and it was not reduced to a writing signed by the party to be charged, Evans. Moreover, as noted above, promissory estoppel does not overcome the barrier statute of frauds. *See Bank of Commerce*, 303 P.3d at 194; *Lettunich*, 109 P.3d at 1109.

Kimmes argues that Evans also breached the implied covenant of good faith and fair dealing justifying relief. The Court disagrees. "Idaho law 'implies a covenant of good faith and fair dealing when doing so is consistent with the express terms of an agreement between contracting parties . . . .'" *Bank of Commerce*, 303 P.3d at 190 (quoting *Noak v. Idaho Dep't of Correction*, 271 P.3d 703, 707 (Idaho 2012)). However, "[s]uch a claim may only be asserted by parties to a contract. 'Even then, one can maintain a claim for breach of the covenant only when he or she is denied the right to the benefits of the agreement the parties entered into.'" *Id.* (quoting *Idaho Power Co. v. Cogeneration, Inc.*, 9 P.3d 1204, 1214 (Idaho 2000)). And "[t]he covenant requires that the parties perform, in good faith, the obligations imposed by their agreement." *Id.* Here, the Court

concludes there was no agreement between the parties, and certainly no formal contract, whereby Evans agreed to finance Kimmes via a "conventional mortgage." Further, Kimmes has identified no other contractual provisions in the parties' other various contracts that Evans ignored. Instead, the Court finds Evans generally acted in accordance with the parties' various agreements, and thus, Kimmes' claim fails.

Finally, Kimmes' cryptic reference in his briefs to Evans' alleged breach of an unspecified agreement between FSA, Kimmes, and Evans, by encouraging him to inappropriately use operating loan proceeds is not supported by the evidence. Even assuming there was such an agreement, Kimmes does not establish how his use of FSA-guaranteed operating loan proceeds, allegedly based on Evans' recommendation, caused him any quantifiable loss. Indeed, Kimmes was never defaulted on the FSA loan because he improperly used the proceeds.

Similarly, Kimmes cites no legal basis for his claim that, in its collection actions taken again him, Evans' alleged failure to conform to its internal policies in dealing with troubled loans should inure to his benefit.

In aggressively seeking to collect from him without affording him the courtesy of more or different demands that he comply with his loan agreements, perhaps Evans treated Kimmes poorly, but this is not a basis for affirmative relief. While Evans' alleged failure to give him "extra" notices about his defaults, and its other hardball tactics toward him, may have justified his cessation of business with Evans, its tactics did not amount to grounds to sue the bank.

The other claims in Kimmes' complaint are set forth in Counts Five, Seven, Eight, Nine, and Ten. As stated above, Kimmes has apparently abandoned these claims, as they were not supported at trial by the submission of evidence and testimony, nor were these counts even mentioned in Kimmes' post-trial briefs. In the interests of economy, however, the Court will review these counts to determine if Kimmes is entitled to any relief.

Count Five alleges that a Kimmes' check to pay insurance premiums, written in January 2009, was not covered by Evans, which required Kimmes "to indicate for the insurance company that there had been no

losses during the time in question." Adv. Dkt. No. 1, at ¶ 16. Evans' refusal to honor the check also allegedly caused Kimmes to use "personal funds" to cover the payment and these facts resulted in "further damage" to Kimmes. *Id.* at ¶ 16-17. There is no legal theory stated in the complaint on which Kimmes relies, or that the Court can conceive of, that would allow the Court to grant any relief as to this count. Notably, the Evans bank statements for the G&L checking account dated January 30, 2009, shows a balance of negative $34,842.21. Exh. 200 at 22. The fact that Evans did not cover a check written on an overdrawn account is not surprising, and under these facts, certainly not actionable.

Count Seven deals again with insurance, focusing on Evans' purported failure to allow Kimmes to make a payment of $14,000 on an insurance policy that covered his shop, which caused "further damages" to Kimmes. *Id.* at ¶ 22. Kimmes again provides no legal theory that would entitle him to recovery here, and the Court is not aware of one. Moreover, proof of any damages Evans caused Kimmes is lacking. The Court finds Kimmes is not entitled to relief under this count of the complaint.

In Count Eight, Kimmes in essence alleges he was forced to obtain an operating line of credit from Magic Valley Bank in 2010 because Evans would not provide him with adequate credit. Again, no legal theory is alleged that would entitle Kimmes to relief, and the Court is once again not aware of one. Further, it was clear that Kimmes' financial position had deteriorated considerably in 2010. That Evans was not willing to provide further loans to Kimmes at this point is unremarkable and should have been predictable. Therefore, the Court concludes Kimmes is not entitled to relief under this count of the complaint.

Count Nine deals primarily with a payment of $2,484.13 made by Kimmes to Evans for insurance coverage and as a payment on a his pick-up loan that Evans allegedly did not apply to the loan. *Id.* at ¶ 25. Evans purportedly then commenced an action to repossess the vehicle, and this caused Kimmes to incur legal fees. *Id.* Again, no legal theory is advanced by Kimmes that would entitle him to any relief, although viewed liberally, the count might state a claim against Evans for simple breach of contract. However, the claim fails because Evans appears to have acted properly in

suing to collect the loan upon Kimmes' default, even though it might have accommodated his efforts to resolve this issue. Kimmes may have incurred legal costs in resolving Evans' claim, which was arguably unnecessary, however, Kimmes has not established any right to recover from Evans.

Finally, Count Ten deals with Evans' actions to foreclose on the real property that secured the various loans it made to Kimmes due to his failure to timely pay property taxes. *Id.* at ¶ 27. Kimmes alleges that Evans foreclosed without providing a written demand for him to pay the taxes. *Id.* As pointed out above, Kimmes' failure to pay taxes is an event of default according to the loan documents, and Evans was within its legal rights in acting to foreclose. While this is yet another example of how Evans declined to offer Kimmes courtesies that would have more easily resolved his default, Kimmes has not disputed that he failed to timely pay the taxes as required by his mortgages. Kimmes therefore is not entitled to recover from Evans any of the foreclosure costs he was required to pay to stop the foreclosure process.

Conclusion

Reading his complaint fairly, Kimmes sought to defend against Evans' right to collect sums remaining due on his Loan Number 5225 based on the acts and omissions of Evans' agents. Kimmes' additional claims for relief, including his request for an award of damages from Evans, clearly were not adequately or timely asserted, and were the Court to consider them, it would severely prejudice Evans' right to defend against those claims. Moreover, even if Kimmes' various claims are considered, he has not shown that he is entitled to any relief. In short, the Court concludes that Kimmes has proven no right to relief in general, and specifically, that Kimmes failed to establish any reason why Evans should not collect the amounts due to it on Kimmes' various loans as identified in Evans' proof of claim.[11]

The Court concludes that judgment should be granted in favor of Evans in all respects. Counsel for Evans shall prepare and submit an

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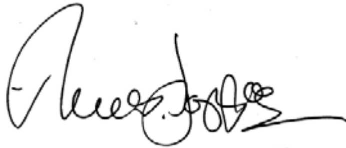
[11] Of course, as mentioned above, Kimmes' obligation to pay Evans' claims is governed by the terms of the confirmed chapter 12 plan in this case.

appropriate form of judgment consistent with this Memorandum for entry by the Court. Counsel for Kimmes shall approve the form of judgment.

Dated: February 10, 2014



Honorable Jim D. Pappas
United States Bankruptcy Judge