

Dickson

STATE OF VERMONT
WINDSOR COUNTY

Michael J. Sullivan and
Theresa A. Sullivan
Plaintiffs

v.

Debra Ann Carter, Administrator of
the Estate of Garth Meade Carter; and
Jane Susan Carter
Defendants

SUPERIOR COURT
Docket No. 166-3-09 Wrcv

OPINION AND ORDER RE: SUMMARY JUDGMENT

This foreclosure case is before the court on parties' motions for summary judgment, and Defendant Jane Susan Carter's motion for an evidentiary hearing. Plaintiffs Michael and Theresa Sullivan (Sullivans) are represented by Attorney Richard English. Defendant Debra Ann Carter (Debra) is represented by Attorney Ebenezer Punderson. Defendant Jane Susan Carter (Jane) is represented by Attorney Thomas Bixby.

FACTS

Garth Carter (Garth) and Michael Sullivan were friends. In the 1980s, they were loggers and partnered for a logging job in Sandgate, Vermont. For the job, Mr. Sullivan provided Garth with money to buy stumpage; Garth was to sell the logs and pay a share of the proceeds to Mr. Sullivan. There was no written agreement regarding this arrangement, and Mr. Sullivan gave Garth approximately \$33,000 for the stumpage.

On August 27, 1981, Garth purchased about 50 acres of land in Plymouth, Vermont. On May 6, 1987, Garth executed a promissory note (Note) in favor of the Sullivans in the amount of \$33,642 plus interest, payable on demand after November 1, 1987. The Note is secured by a mortgage deed on the property in Plymouth. The Note was given to Mr. Sullivan by Garth for the money Mr. Sullivan gave Garth for the Sandgate job. The Sullivans are now seeking to foreclose on the mortgage deeded to them by Garth.

Additionally, the mortgage deed called for Garth to pay property taxes on the Plymouth land. However, a provision in the mortgage deed allowed the Sullivans to pay property taxes, if Garth did not, and the taxes paid by the Sullivans would be added to the debt owed and secured by the mortgage. Garth stopped paying property taxes on the land in 1990. The Sullivans have paid taxes on the land since, totaling over \$10,000 plus interest. The mortgage also calls for the payment of attorney's fees in the event of foreclosure. The Sullivans have retained an attorney and paid him certain fees in connection with this foreclosure case.

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Garth died on June 1, 1996. Shortly after Garth's death, his daughter, Debra, retained an attorney to investigate whether Garth owned any land and to open an estate, if necessary. The attorney asked the Sullivans about Garth's debt to them. The Sullivans replied to Debra's attorney and stated the amount Garth owed them. After investigating the land records, the attorney erroneously informed Debra that Garth had conveyed his land to the Sullivans. The attorney then indicated that he would not open an estate for Garth because Garth owned no property.

On April 11, 2008, the Sullivans contacted Debra, informed her of Garth's debt, and asked her to sign over Garth's Plymouth property to them. On October 7, 2008, Debra petitioned the Addison District Probate Court to open an estate for Garth. She was later appointed administrator of the estate. She filed an inventory of the estate, listing the Plymouth property as an asset.

On March 3, 2009, the Sullivans sought to collect on the Note from the estate via a demand letter. When the Sullivans received no payment from the estate, they filed suit on March 12, 2009 to foreclose on the property, collect on the Note, and seek reimbursement for property taxes paid pursuant to the mortgage.

Jane is Garth's ex-wife. She claims an interest in the property at issue in this case. Jane and Garth were married in 1961 and divorced in 1986 by order of the Rutland Superior Court. Jane could not be served in person on the divorce complaint and was therefore served by publication. The publication listed the marital home, but not the Plymouth property, as marital property. A divorce judgment was entered by default and all marital property was awarded to Garth. Again there was no mention of the Plymouth property in the final order. Jane did not learn of Garth's interest in the Plymouth property, which he purchased during their marriage, until recently. Jane has counterclaimed, alleging fraudulent conveyance, misrepresentation, conversion, timber trespass, and unjust enrichment.

A disputed issue of fact remains regarding possible mortgage payments Garth may have made and the disposition of some of his personal property. Specifically, the Sullivans claim that Garth never made any payments on the Note, but a Veterans Affairs financial status report, signed by Garth in 1994, indicates that Garth paid \$300 a month in rent or mortgage payments. No further details are given on the status report. Likewise, the Sullivans claim that they never took possession of any of Garth's property, but Garth's truck and a couple of his chainsaws remain on the Sullivans' property, where Garth left them before he died. Debra claims that the Sullivans "kept" these items, but the Sullivans claim that Garth's children did not take the items when the children came to take Garth's other personal belongings. Furthermore, Theresa Sullivan indicated in her deposition that her husband took Garth's excavating equipment after Mr. Sullivan paid off Garth's debt on the equipment to the bank.

STANDARD OF REVIEW

The Sullivans moves for partial summary judgment on their complaint and Jane's counterclaim. Debra seeks summary judgment on her affirmative defenses, and Jane seeks

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summary judgment on the complaint and her affirmative defenses. Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). The party moving for summary judgment “has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists.” *Price v. Leland*, 149 Vt. 518, 521 (1988). However, “[s]ummary judgment is mandated . . . where, after an adequate time for discovery, a party ‘fails to make a showing sufficient to establish the existence of an element’ essential to his case and on which he has the burden of proof at trial.” *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The court derives the undisputed facts from the parties’ statements of fact under V.R.C.P. 56(c)(2). Facts in the moving party’s statement are deemed undisputed when supported by the record and not controverted by facts in the nonmoving party’s statement which are also supported by evidence in the record. See *Boulton v. CLD Consulting Eng’rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413 (citing *Richart v. Jackson*, 171 Vt. 94, 97 (2000)).

DISCUSSION

The parties have raised a myriad of issues in their motions concerning the validity of the underlying note and mortgage, affirmative defenses, and Jane’s counterclaims. The claims raised in the Sullivans’ complaint will be addressed first. Next, the court will address the defendants’ affirmative defenses. Finally, Jane’s counterclaims will be examined as well as her motion for a hearing.

A. The Sullivans’ Complaint

1. *The Note*

All of the claims and counterclaims in this case are dependent on the underlying promissory note from Garth to the Sullivans, dated March 6, 1987. The document, entitled “Promissory Note,” was signed by Garth Carter with two witnesses and states:

For value received, the undersigned, promises to pay to Michael J. Sullivan and Theresa A. Sullivan . . . the principal sum of thirty-three thousand six hundred forty-two (\$33,642.00) dollars, with interest from date at the rate of ten (10%) per cent per annum, until paid. The said principal and interest shall be payable at such place as the Holder hereof may designate in writing at any date on or after November 1, 1987, on demand.

If default be made in the payment due under this Note, and in the event that this Note is placed in the hands of an attorney for collection, the undersigned agrees to pay any reasonable attorney’s fee, in addition to a late charge of five (5%) per cent, and all other sums and costs allowed by law.

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(Pls.' Ex. 1.)

"A promissory note is a written contract for the payment of money, and, as such, contract law applies." *Antonino v. Johnson*, 966 A.2d 261, 264 (Conn. App. Ct. 2009). "If the terms of the contract are plain and unambiguous, 'they will be given effect and enforced in accordance with their language.'" *O'Brien Bros.' P'ship v. Plociennik*, 2007 VT 105, ¶ 9, 182 Vt. 409 (quoting *KPC Corp. v. Book Press, Inc.*, 161 Vt. 145, 150 (1993)).

In this case, it is clear from the plain and unambiguous language of the Note, that Garth owes the Sullivans \$33,642.00 plus interest. The Note was payable on demand, after November 1, 1987. The Sullivans have since demanded full payment, which they have not received, and they are entitled to recovery subject to the defendants' affirmative defenses. See *MM Arizona Holdings LLC v. Bonanno*, 658 F. Supp. 2d 589, 592 (S.D.N.Y. 2009) (to establish a *prima facie* case of default on a promissory note, plaintiff must provide proof of the valid note and of defendant's failure, despite proper demand, to make payment).

Debra asserts that the Note is unenforceable because the Sullivans' ability to collect on the Note was "extinguished" when Garth died. This is incorrect. "The death of a party to a contract does not necessarily terminate the obligations stated in the agreement, unless those obligations are personal in nature." *Estate of Ladd v. Estate of Ladd*, 161 Vt. 270, 275 (1994). Ordinarily, promissory notes are not discharged by the debtor's death, unless there is explicit language to the contrary. See *Hasemann v. Hasemann*, 203 N.W.2d 100, 102 (Neb. 1972) ("A simple promise to pay money is not made impossible of performance by the death or illness of either the debtor or the creditor."). Neither the language in the Note or the underlying circumstances in this case indicates that Garth's debt to the Sullivans was personal in nature and could not be paid by the estate. Furthermore, "[w]hen, as here, the original note and mortgage were made at the same time, and in relation to the same subject, they are to be construed together as if they were parts of the same instrument, and a defense to one is a defense to the other." *Island Pond Nat. Bank v. Lacroix*, 104 Vt. 282, 294-95 (1932). The mortgage deed in this case makes it clear that Garth intended "his heirs, executors or administrators" to be responsible for the debt if Garth did not pay it. (Pls.' Ex. 2.) As such, Debra's claim that the Note is unenforceable because it was personal to Garth is without merit.

Jane asserts that the Note is unenforceable for lack of consideration. Specifically, Jane suggests that the Note is unenforceable because it is founded on an earlier oral agreement between Garth and the Sullivans. Furthermore, this earlier agreement is not referenced in the Note, which states only that it was given for value received. This line of argument is unavailing. In a case involving the assignment of a promissory note, the Vermont Supreme Court stated: "The words 'for value received' forming a part of the contract of assignment, they must be held to furnish sufficient evidence, *prima facie* at least, of a consideration for the assignment." *Thrall v. Newell*, 19 Vt. 202, 206 (1847). The words "for value received" in the Note at issue here indicate that there was adequate consideration between Garth and the Sullivans, and Jane has offered no evidence to contradict this point. In fact, she concedes that "[t]he 'value received' was for a pre-existing debt . . . between Garth Carter and Michael Sullivan." (Jane's Mot. Summ. J. at 9.) A pre-existing debt of the maker of a note to the payee is good consideration for the note, both as to the maker and as to one signing it as a surety. See *Quinn v. Hard*, 43 Vt.

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375, 377 (1871); see also *Austin v. Curtis*, 31 Vt. 64, 68 (1858) (“where a bill or note is taken as a security, the antecedent debt is a sufficient consideration” (quotation omitted)). In this case, the words on the Note, “for value received,” along with Mr. Sullivan’s deposition, which describes Garth’s earlier debt to him, provide sufficient, uncontroverted evidence of consideration necessary to enforce the Note in this case. As such, Jane’s claim that the Note is unenforceable for lack of consideration is without merit, and the Note is enforceable subject to affirmative defenses.

2. Foreclosure

The Sullivans seek to foreclose on the property in Plymouth and move for a judicial sale. The relevant portion of the mortgage deed from Garth to the Sullivans, dated May 6, 1987, states:

The condition of this Deed is such, that if the said Garth Carter, or his heirs, executors or administrators, shall well and truly pay or cause to be paid to the said Michael J. Sullivan and Theresa A. Sullivan . . . the principal sum of thirty-three thousand six hundred forty-two (\$33,642.00) dollars, as specified in a Promissory Note signed by the said Garth Carter, dated of even date herewith, payable with interest according to the tenor and effect of said Note, . . . and also pay all taxes and assessments upon said premises, then this deed to be null and void, otherwise to remain in full force and virtue. And in case of failure . . . to pay such taxes or assessments, the legal holder of this mortgage shall have the right . . . to pay such taxes or assessments, adding the proper expense thereof to the principal sum secured under this mortgage. It is also expressly agreed that in case this mortgage shall be foreclosed and a decree obtained therein, there shall be included in such decree a reasonable solicitor’s fee in addition to all sums and costs allowed in that behalf by law. A power of sale to foreclose this mortgage pursuant to the provisions of 12 V.S.A. [§§ 4531-4533, both inclusive, is hereby granted . . .

(Pls.’ Ex. 2.)

“[F]oreclosure actions are by their nature equitable actions, [and] it is proper for the court to weigh the equities of the circumstances in determining whether to grant foreclosure.” *New England Educ. Training Serv., Inc. v. Silver St. P’ship*, 156 Vt. 604, 612 (1991). “The power of sale is a cumulative remedy, and does not deprive the mortgagee of the right to foreclose.” *Herrick v. Teachout*, 74 Vt. 196, 202 (1902). In a mortgage foreclosure action, to make out its *prima facie* case, the foreclosing party must prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the mortgagee defaulted on the note. See *Franklin Credit Mgmt. Corp. v. Nicholas*, 812 A.2d 51, 57 (Conn. App. Ct. 2002). “[O]nce the condition of a mortgage is broken, ‘the mortgagee becomes at law the absolute owner of the property and is entitled to immediate possession’” *Rassman v. Am. Fid. Co.*, 142 Vt. 623, 626-27 (1983) (quoting *Kelly v. Clement Nat’l Bank*, 111 Vt. 65, 67 (1940)). “A mortgagee may assert its right to possession by peaceable entry, by eviction, or by seeking a foreclosure judgment in [the superior] court.” *In re Canney*, 284 F.3d 362, 369 (2d Cir. 2002) (footnotes omitted) (applying Vermont law); see 12 V.S.A. §§ 4523(a), 4526, 4528.

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In this case, the Sullivans have demonstrated that they own both the Note and the mortgage deed, and as discussed above, Garth's failure to pay off the Note after demand was made was a breach of the Note and therefore a breach of a mortgage condition. This breach made the Sullivans, as mortgagees, the absolute owners of the Plymouth property, entitling them to take possession by obtaining a foreclosure judgment. Their right to foreclosure and judicial sale is subject to the defendants' affirmative defenses.

B. Affirmative Defenses

1. *Statute of Limitations on the Note*

Both Debra and Jane assert the statute of limitations as a defense to the Sullivans' action to collect on the Note. The parties in this case do not agree on what limitations statute is applicable to the Note. The Sullivans argue that the Note is a negotiable instrument under the Uniform Commercial Code (UCC), see 9A V.S.A. § 3-104(a)(2), and therefore the UCC's ten-year statute of limitations applies. See *id.* § 3-118(b) ("If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years."). Under this statute, the Sullivans' claim would be barred after October 31, 1997.

Jane, on the other hand, argues that the Note, which was signed by two witnesses, is subject to a 14-year limitations period pursuant to 12 V.S.A. § 508. That statute states: "An action brought on a promissory note signed in the presence of an attesting witness shall be commenced within fourteen years after the cause of action accrues, and not after." *Id.* However, Jane wrongly assumes that the Sullivans' action accrued on November 1, 1987, the day on which demand may have been sought on the Note.

The general rule in such case is, that no action accrues to the creditor until request or demand. The general rule also is that the statute of limitations does not commence to run in such case until demand is made, although the debt is absolute and only requires a demand of payment to perfect the right of action.

Thrall v. Mead's Estate, 40 Vt. 540, 544 (1868). The *Thrall* Court recognized, however, that a creditor who waits to demand on a note may cause hardship for a debtor, and "in such case the creditor may be guilty of such unreasonable neglect in omitting to make demand as will set the statute in operation without demand." *Id.* The Court held that six years is a reasonable time in which to make demand on a note payable on demand, and the statute of limitations begins to run after that date. See *id.* at 547. Therefore, under 12 V.S.A. § 508, the Sullivan's claim would be barred after October 31, 2007.

Regardless of which statute is applied, the Sullivan's suit, filed on March 12, 2009, is barred under either statute. However, Garth died on June 1, 1996, and this tolled the limitations period to collect on the Note because the death occurred before the expiration of the limitations under both 9A V.S.A. § 3-118(b) and 12 V.S.A. § 508. See *id.* § 557(a). "After the issuance of

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letters testamentary or of administration, such action, if the cause of action survives, may be commenced by or against the executor or administrator within two years, and not after.” *Id.*

In this case, although Garth died in 1996, no administrator for his estate was appointed until December 3, 2008. The Sullivans’ commencement of this suit the following March brings this case within the applicable limitations period pursuant to 12 V.S.A. § 557(a). The operation of the statute of limitations is suspended during the time intervening between the death of the debtor and the appointment of his administrator. See *Briggs v. Thomas’ Estate*, 32 Vt. 176, 177 (1859). A long and unreasonable delay in having an administrator of a decedent’s estate appointed does not bar the application of a statute allowing additional time, after the issuance of letters of administration, to bring an action against representatives of one who died before the expiration of the initial statute of limitations. See *Clark v. George*, 234 P.2d 844, 846-47 (Utah 1951). As such, the Sullivans’ action on the Note is not barred by the statute of limitations, and they are entitled to summary judgment on this affirmative defense.

2. *Statute of Limitations on the Foreclosure*

The defendants assert that the Sullivans’ action to foreclose on the property is also barred by the statute of limitations. “A person having right or title of entry into houses or lands shall not enter after fifteen years from the time such right of entry accrues.” 12 V.S.A. § 502. This limitations period is not affected by the death of the person in possession of the property. See *id.* § 559; *Cameron v. Bailey*, 117 Vt. 158, 159-60 (1952) (where mortgagor died before 15-year period of limitation had run, 15-year period limiting right or title of entry under mortgage from time such right of entry accrued continued to operate).

The case of *Cameron v. Bailey* is of particular relevance to the instant case. In *Cameron*, the decedent died in 1929, and her heirs conveyed her property to the plaintiff in 1947. 117 Vt. at 159. The decedent mortgaged the property to a third party to secure a demand note in 1914. The note and mortgage were later endorsed and assigned to the defendant, and the defendant claimed a right of entry to the land by virtue of a mortgage secured by a demand note. The plaintiff then sued the defendant for trespass. The Vermont Supreme Court essentially held that the defendant’s claimed right to the land was barred by the 15-year statute of limitations. The Court held that decedent’s note had become overdue 60 days after it was made, and “the mortgagee’s right of entry accrued at that time and the defendant, as assignee of the mortgage, not having entered within the time prescribed by the statute, lost his right of entry.” *Id.* at 160.

The parties agree that the Sullivans’ right to foreclose on the property was barred after December 31, 2002 (15 years plus 60 days after the Note became payable) pursuant to 12 V.S.A. § 502. However, a voluntary part payment of a debt implies a promise to pay and prevents the operation of the statute of limitations. See *Putnam v. Swain*, 102 Vt. 90, 93 (1929). In this case, a disputed issue of fact exists regarding whether Garth made any mortgage payments to the Sullivans. Garth’s financial status report to the Department of Veterans Affairs indicates that he made at least some rent or mortgage payments to someone. If these payments were voluntarily made to the Sullivans, then the statute of limitations would be inapplicable to the Sullivans’ foreclosure action. Summary judgment on this issue is DENIED.

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3. *Laches*

The defendants claim that the equitable doctrine of laches bars the Sullivans from foreclosing on the property. Because foreclosure actions arise in equity they are subject to the equitable defense of laches. See *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989) (citing *Phinney v. Levine*, 381 A.2d 735, 737 (N.H. 1977)). "The doctrine of laches rests on the premise that there was a failure to assert a right for an unreasonable and unjustified length of time resulting in loss and prejudice to the adverse party and rendering the enforcement of the right inequitable." *Id.* The Sullivans assert that they were justified in waiting to file their action because they believed Garth's children would pay off his debt. The defendants assert that it was unreasonable for the Sullivans to wait to file suit when they knew in 1996 that Debra's attorney was investigating Garth's estate's debts. "[E]ven if there is no dispute concerning the underlying historical facts, it is ordinarily for the trier of fact to decide a question requiring an appraisal of the reasonableness or quality of a person's behavior or actions . . ." *Fila v. Spruce Mountain Inn*, 2005 VT 77, ¶ 15, 178 Vt. 323 (quoting *Davidson v. Baker-Vander Veen Constr. Co.*, 192 N.W.2d 312, 318 (Mich. Ct. App. 1971)). In this case, it would be inappropriate for the court, at this stage of the proceeding, to determine whether the Sullivans' delay in filing suit was reasonableness or justified. As such, summary judgment is DENIED on the laches defense.

C. Jane's Counterclaims

1. *Fraudulent Conveyance*

Jane first alleges that Garth's conveyance of a mortgage deed to the Sullivans was fraudulent because Garth intended to deprive Jane of property she would have been entitled to in her divorce proceeding. The parties have failed to present sufficient evidence concerning Garth's intent, the value of the Plymouth property in relation to the value of the Note, Garth's solvency, or the Sullivans' good faith. See 9 V.S.A. §§ 2285-2295. Furthermore, the parties have failed to adequately brief the court on this issue and have therefore failed to show that one of them is entitled to judgment as a matter of law. As such, summary judgment is DENIED on Jane's fraudulent conveyance counterclaim.

2. *Misrepresentation*

Count II of Jane's counterclaim alleges that Debra's first attorney misrepresented Garth's interest in the Plymouth property to Debra. Specifically, Jane alleges that Debra's first attorney stated that Garth did not own the Plymouth property, when in fact he did. This count is not directed at the Sullivans, and Jane has failed to offer any evidence that the Sullivans made any misrepresentations to her or Debra. Therefore, the Sullivans are entitled to summary judgment on Jane's misrepresentation counterclaim.

3. *Conversion*

Jane alleges that the Sullivans converted her interest in the Plymouth property. Conversion is the appropriation of property to one's own use and beneficial enjoyment, the destroying of it, the exercise of dominion over it to the exclusion of the owner's right, or the

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withholding of possession from the owner under a claim of title inconsistent with his title. See *Economou v. Carpenter*, 124 Vt. 451, 453-54 (1965). However, “[a]n action for conversion and trover will not lie to recover real property.” *Levenson v. Word*, 668 S.E.2d 763, 765 n.2 (Ga. App. Ct. 2008); see also *Garelick v. Carmel*, 529 N.Y.S.2d 126, 128 (N.Y. App. Div. 1988) (“An action sounding in conversion does not lie where the property involved is real property.”). Because Jane’s complaint alleges that the Sullivans converted her interest in Garth’s real property her claim must fail, and summary judgment is GRANTED in favor of the Sullivans on count III of the counterclaim.

To the extent that Jane’s conversion claim might be interpreted to apply to Garth’s personal property, Jane has failed to argue as such, and she has failed to present any evidence that she has an ownership interest in any of the personal property Garth owned before he died. As such, the Sullivans are entitled to summary judgment on this counterclaim.

4. *Timber Trespass*

Jane next claims that the Sullivans logged trees on the Plymouth property and removed them without her consent. A property owner may recover damages from a person who cuts down, destroys or carries away any tree belonging to the owner, without leave from the owner. See 13 V.S.A. § 3606. In this case, the Sullivans have denied cutting down or removing any trees from the Plymouth property. (Michael Aff. ¶¶ 19-23.) According to Mr. Sullivan, Garth had completely logged the property shortly after Garth bought it in 1981. See *id.* After an adequate time for discovery, Jane has offered no evidence to the contrary. As a result, the undisputed facts show that the Sullivans did not take trees from Garth’s land, and they are entitled to summary judgment on count IV of Jane’s counterclaim.

5. *Unjust Enrichment*

Count V of Jane’s counterclaim alleges that the Sullivans were unjustly enriched by their use of the Plymouth property, which deprived Jane of her use and enjoyment of the property. “The equitable doctrine of unjust enrichment rests upon the principle that a person should not be allowed to enrich himself unjustly at the expense of another. Examining whether defendants were unjustly enriched entails determining whether the defendants received a benefit for which plaintiff should be compensated.” *Morrisville Lumber Co., Inc. v. Okcuoglu*, 148 Vt. 180, 184 (1987) (citations omitted). When determining whether the court should find unjust enrichment, the court should consider whether “it is against equity and good conscience to allow defendant to retain what is sought to be recovered.” *Legault v. Legault*, 142 Vt. 525, 531 (1983). “Unjust enrichment focuses on the value of the benefit actually conferred upon the defendant” as opposed to the reasonable value of the plaintiff’s service. *In re Elliott*, 149 Vt. 248, 253 n.2 (1988), quoted in *DJ Painting, Inc. v. Baraw Enters., Inc.*, 172 Vt. 239, 242 n.2 (2001).

Like the timber trespass allegation above, the Sullivans deny using the Plymouth property at all. (Michael Aff. ¶¶ 19-23.) According to Mr. Sullivan, the only time he or his wife ever went to the property was to walk it over with Garth prior to Mr. Sullivan’s acceptance of the mortgage deed. See *id.* After an adequate time for discovery, Jane has offered no evidence to the contrary. As such, the Sullivans, as counterclaim-defendants, have demonstrated that they

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have not benefitted at all because they have not used the Plymouth property. Therefore, summary judgment is GRANTED in favor of the Sullivans on Jane's unjust enrichment claim.

6. *Respondeat Superior*

Jane's final claim is that the law firm Ryan, Smith & Carbine, Ltd. employed Debra's former attorney who allegedly misrepresented Garth's interest in the Plymouth property. Jane asserts that Ryan, Smith & Carbine are liable, as Debra's attorney's employer, for the attorney's misrepresentation. Like the misrepresentation claim, this count is not directed at the Sullivans, and Jane has failed to offer any evidence that the Sullivans are responsible for anyone else's misrepresentations to Jane or Debra. Therefore, the Sullivans are entitled to summary judgment on Jane's respondeat superior counterclaim.

D. Jane's Motion for a Hearing

Jane has requested a hearing on her counterclaims and an evidentiary hearing on her motion for summary judgment.

An opportunity to present evidence shall be provided, if requested, unless the court finds there to be no genuine issue as to any material fact. The request for an opportunity to present evidence shall include a statement of the evidence which the party wishes to offer. In any case, the court may decline to hear oral argument and may dispose of the motion without argument.

V.R.C.P. 78(b)(2). The ability of a court to dispose of a motion without a hearing extends to summary judgment motions. See *Blake v. Nationwide Ins. Co.*, 2006 VT 48, ¶ 21, 180 Vt. 14.

In this case, Jane has failed to explain to the court what evidence she wishes to offer at a hearing that she could not include in her motion papers. The court has determined that there is no genuine issue of material fact regarding many of the issues presented in the parties' motions, and therefore a hearing is unnecessary for those issues.

For those issues in which a genuine issue of material fact does exist, a final merits hearing will be scheduled in due course to address those matters. "It is not the function of the trial court to resolve disputed issues of fact when ruling on a motion for summary judgment." *Quinn v. Grimes*, 2004 VT 89, ¶ 7, 177 Vt. 181. "The function of the court, at a Rule 56(c) hearing, is solely to determine whether such an issue exists." *State v. Heritage Realty of Vt.*, 137 Vt. 425, 428 (1979). Because the parties' filings already show that a genuine issue of material fact exists for some issues, it is appropriate to deny the parties' motions without a preliminary hearing and proceed to a final merits hearing in due course. Jane's motion for a hearing is DENIED WITHOUT PREJUDICE.

ORDER

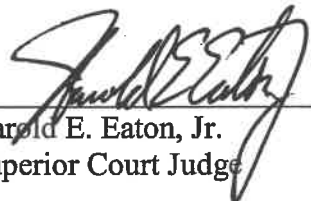
For the reasons given above, the parties' motions for summary judgment are GRANTED in part and DENIED in part. Specifically, the parties' motions for summary judgment on the

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Sullivans' complaint are DENIED. Summary judgment is GRANTED in favor of the Sullivans on the defendants' statute of limitations defense of the Note. Summary judgment is DENIED on the remainder of the defendants' affirmative defenses. Summary judgment is DENIED on count I of Jane's counterclaim, and summary judgment is GRANTED in favor of the Sullivans on the remainder of Jane's counterclaims. Jane's motion for a hearing is DENIED WITHOUT PREJUDICE.

Dated at Woodstock, Vermont this 9 day of March, 2010.



Harold E. Eaton, Jr.
Superior Court Judge

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