

VERMONT SUPERIOR COURT
Washington Unit
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CIVIL DIVISION
Case No. 26-CV-02568

Justin Blake, et al v. Melisa Mahony

ENTRY REGARDING MOTION

Title: Motion to Dismiss Plaintiffs' Complaint (Motion: 1)
Filer: Cristina L. Dulay
Filed Date: May 26, 2026

The motion is GRANTED.

Catastrophic flooding in the summer of 2023 completely destroyed Plaintiffs Justin and Heather Blake's Barre, Vermont house. In this case, they seek to impose liability for the loss of the house and related damages on a residential appraiser, Defendant Melisa Mahony, who was hired to appraise their property by Green Mountain Credit Union (GMCU) roughly two years before the flood, when Plaintiffs applied for a home equity line of credit (HELOC). The Blakes believe that Ms. Mahony conducted the appraisal in a negligent or otherwise deficient manner that did not reveal a significant hazard to their property—a culvert running directly underneath their house—causing them to proceed with the HELOC and to not take steps to remediate the hazard before the flood.

The Blakes frame their claims as: (1) negligent undertaking; (2) professional negligence/malpractice; (3) gross negligence/recklessness; (4) negligent misrepresentation; (5) fraudulent misrepresentation; (6) breach of contract; (7) unjust enrichment; (8) violation of the Consumer Protection Act (CPA), 9 V.S.A. §§ 2451–2466d; (9) negligent infliction of emotional distress; (10) loss of consortium; and (11) negligence per se.

Ms. Mahony has filed a Rule 12(b)(6) motion to dismiss arguing that she never owed the Blakes a contractual or tort duty that could have been breached, and the circumstances fall outside the scope of the CPA.

1. Procedural standard

The Vermont Supreme Court has described the familiar standard for Rule 12(b)(6)

motions to dismiss for failure to state a claim as follows:

“A motion to dismiss . . . is not favored and rarely granted.” This is especially true “when the asserted theory of liability is novel or extreme,” as such cases “should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations.” In reviewing a motion to dismiss, we consider whether, taking all of the nonmoving party’s factual allegations as true, “‘it appears beyond doubt’ that there exist no facts or circumstances that would entitle the plaintiff to relief.” We treat all reasonable inferences from the complaint as true, and we assume that the movant’s contravening assertions are false.

Alger v. Dep’t of Labor & Indus., 2006 VT 115, ¶ 12, 181 Vt. 309 (citations omitted); see also 5B A. BENJAMIN SPENCER, ET AL., FED. PRAC. & PROC. CIV. § 1357 (4th ed.) (“Ultimately, the burden is on the moving party to prove that no legally cognizable claim for relief exists.”).

2. Factual allegations

The Blakes allege as follows. They bought their house in 2020. The seller disclosed that a watercourse of some kind ran underneath the house. They were aware of that. They claim that they did not understand that the situation presented any hazard, they had no relevant expertise that would have caused them to recognize the risk, and they consequently took no steps to mitigate the risk. The watercourse in fact was a publicly documented culvert that, at least by the time of their HELOC application, was in disrepair.

In 2021, the Blakes applied for a HELOC from GMCU. GMCU hired Ms. Mahony to conduct an appraisal of the property to determine its value as security for the loan. Ms. Mahony visually inspected the interior and exterior of the property. The Blakes were not present for the inspection, and they had no communication with Ms. Mahony at any relevant time.

After the inspection, Ms. Mahony produced an appraisal report for GMCU, and GMCU paid her the contract amount (\$500). The report identified the watercourse (as a stream rather than a culvert) on the property but did not value it as a hazard. Rather, the report described it as a positive feature of the property modestly increasing its value. GMCU approved the HELOC. At the closing, GMCU treated the \$500 fee it had paid to Ms. Mahony as a closing cost, which

the Blakes paid.

At some point, at or before the closing, the Blakes obtained a copy of the appraisal report. They do not identify the source or their purpose for obtaining the report. They allege that if the report had accurately indicated that the house sat upon a culvert (as opposed to the watercourse of which they already were aware), or accurately described the grave risk presented by either, that they would not have gone forward with the HELOC and would have taken steps to mitigate the risk. Without that information, they proceeded with the HELOC and did nothing about the culvert.

In the summer of 2023, catastrophic flooding struck many communities in Vermont, including parts of Barre. The Blakes' house was completely destroyed. An engineer has concluded that "the failure to maintain the culvert substantially contributed to the flood impact and material damage during the July 2023 flooding event." Complaint ¶ 38.

Nowhere in the complaint do the Blakes assert allegations that might reasonably support any inference that, at any relevant time, GMCU ever stepped out of its limited role as an ordinary lender to the Blakes or that Ms. Mahony ever stepped out of her limited role as an appraiser hired by GMCU to produce an appraisal for GMCU's purposes.

3. Analysis

The most obvious duties undertaken by Ms. Mahony during the underlying events were contractual. The court thus addresses the contract claim first.

a. The contract claim

The Blakes recognize that they were not parties to the contract between GMCU and Ms. Mahony. They argue, however, that they were intended third party beneficiaries to the contract and thus have enforceable rights under it. They see themselves as such because the appraisal report reflected Ms. Mahoney's awareness that Mr. Blake was the applicant for the HELOC; Ms. Mahoney inspected their property; they in fact obtained a copy of the report; they compensated GMCU for her fee at the closing; and they relied on the contents of the report.

An *intended* third party beneficiary must be intended by the contracting parties to have

that status, else the third party is merely an incidental beneficiary without any contract rights. According to Section 302 of the Restatement (Second) of Contracts, in relevant part:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . .

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

As the Vermont Supreme Court recently summarized:

Contracting parties may agree to create obligations to a third party, which the third party may enforce against the promisor—the party obligated to perform for the third party—if the promisor breaches. In other words, “[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.” Whether a party is an intended beneficiary, and thus has a right to enforce the contract, “*is based on the original contracting parties’ intention,*” and “[a]s with any contract provision, we first look to the language of the contract provision” to determine what that intent was. If the contract “language is unambiguous, there is no need to consider evidence outside of the writing.” The fact that a contract would benefit a third party does not mean the third party has a right to enforce it. Many contracts benefit third parties, but those third parties are treated as incidental beneficiaries unless the contract language specifically indicates an intent to benefit them.

Sutton v. Vermont Regional Center, 2019 VT 71A, ¶ 64, 212 Vt. 612 (citations omitted; emphasis added); accord *Vermont State Auditor v. OneCare Accountable Care Organization*, 2022 VT 29, ¶¶ 13–14, 216 Vt. 478 (not a third-party beneficiary “unless the contract language demonstrates that the contracting parties intended to benefit that specific third party”); *Hemond v. Frontier Communications of America, Inc.*, 2015 VT 67, ¶ 20, 199 Vt. 272 (determination of third-party status “is based on the original contracting parties’ intention” (internal quotation omitted)); *Ferrisburgh Realty Investors v. Schumacher*, 2010 VT 6, ¶ 12, 187 Vt. 309 (similar).

In their complaint, the Blakes point to nothing in the contract between GMCU and Ms.

Mahony that might reasonably imply that either (much less both) contracting party intended that the Blakes would have enforceable rights under the contract. Rather, the allegations are clear enough that GMCU hired Ms. Mahony for its own purposes in determining whether to approve the HELOC, and GMCU paid Ms. Mahony for that service even if the Blakes reimbursed GMCU at the closing. That is it. Even the fact that the Blakes obtained a copy of the appraisal appears to be an incidental event that as the Blakes admit was not part of the loan or closing process.

The Blakes are not intended third party beneficiaries with rights under the contract. Ms. Mahony's motion is **Granted** as to this claim.

b. The tort claims

The Blakes' attempt to fashion a viable claim under tort law fares no better. The claimed torts range from negligent undertaking and misrepresentation to general negligence or professional malpractice to negligent infliction of emotional distress and negligence per se.

As for a negligent undertaking, Restatement (Second) of Torts § 323 applies to "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things." Ms. Mahony rendered no services to the Blakes, much less any service intended to protect their property. Section 324A can apply when the harm affects a third party to the undertaking, but that provision nevertheless contemplates that the tortfeasor should recognize that the undertaking was "necessary for the protection of a third person or his things" for the protection from "physical harm." Again, there was no such undertaking in this case. Ms. Mahony was hired to determine the fair value of the Blakes' property, not to do anything necessary to protect them from physical harm.

Negligent misrepresentation contemplates that the misrepresentation was made "for the guidance" of the tort-plaintiff. RESTATEMENT (SECOND) OF TORTS § 552(1). Fraudulent misrepresentation contemplates that the misrepresentation was made for "the purpose of inducing another to act or to refrain from action in reliance upon it." Ms. Mahony made no representations—accurate or not—to the Blakes, much less with any intent to guide or induce them.

More generally, Ms. Mahony is not alleged to have done anything outside her limited role of providing, by contract with GMCU, her professional appraisal opinion to GMCU. The circumstances triggered no general negligence or professional negligence duty to the Blakes. See *Webb v. Leclair*, 2007 VT 65, ¶ 16, 182 Vt. 559.

“To establish a claim for negligent infliction of emotional distress, a plaintiff must make a threshold showing that he or someone close to him faced physical peril” caused by the tort-defendant. *Zeno-Ethridge v. Comcast Corp.*, 2024 VT 16, ¶ 6, 219 Vt. 121. Ms. Mahony’s appraisal opinion did not cause the flood that happened 2 years later, the only relevant source of physical peril.

The negligence per se rule is not an independent claim. It refers to the violation of a safety statute, which gives rise to an evidentiary presumption of negligence that shifts the burden of production to the defendant. The rule is predicated on a pre-existing duty. See *Sheldon v. Ruggiero*, 2018 VT 125, ¶ 24, 209 Vt. 33 (“Where a party has an existing legal duty to another, a safety statute may serve as rebuttable evidence that the defendant breached the applicable standard of care, thereby shifting the burden of production to the defendant.”). The rule itself does not supply the duty.

“[A] claim for ‘loss of consortium is a derivative action,’ [that] is dependent upon the success of the underlying tort claim.” *Derosia v. Book Press, Inc.*, 148 Vt. 217, 220 (1987). Because there is no viable tort claim in this case, there can be no viable consortium claim.

Based on the foregoing, the Court finds no basis as a matter of law for any tort liability between Ms. Mahony and the Blakes. For these reasons, Ms. Mahony’s motion is **Granted** as to all tort claims for lack of any apparent duty.

c. The statutory claim

The Blakes claim that in rendering her report to GMCU, Ms. Mahony somehow violated Vermont’s Consumer Protection Act (CPA), 9 V.S.A. §§ 2451–2466d, with regard to them. This claim fails for several reasons, not least of which is because, at most, the Blakes merely claim that Ms. Mahony’s performance of her contract obligations was deficient, a claim that has no resonance under the CPA. See *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 28, 181 Vt. 513

(allegations of “poor construction” insufficient to support a CPA claim); *Winey v. William E. Dailey, Inc.*, 161 Vt. 129, 136 (1993) (“We have cautioned against confusing principles of contract with principles of fraud so that the elements of fraud are made out by a mere breach of contract.”); *Bevins v. King*, 147 Vt. 203, 204 (1986) (independent cause of action for fraud must be predicated on fraud that is “extrinsic” to the contract). There is no allegation that Ms. Mahony did anything extrinsic to the contract that could have violated the CPA. There is no evidence of the type of deceptive, unfair, or false business practice by Ms. Mahony toward the Blakes that might give rise to a consumer protection claim.

Based on the foregoing, Ms. Mahony’s motion is **Granted** as to the CPA claim.

d. The equitable claim

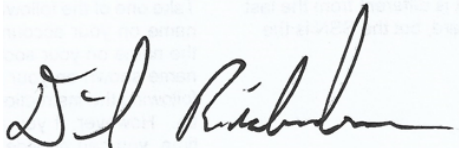
Barring the other claims, the Blakes seek restitution for “unjust enrichment.” “To succeed on a claim for unjust enrichment, a ‘plaintiff must prove that (1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.’” *Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 68, 218 Vt. 144 (citation omitted). The only “benefit” conferred on Ms. Mahoney was payment for her appraisal. The appraisal was performed for and paid by GMCU. The Blakes did not confer that benefit on Ms. Mahony and no unjust enrichment could warrant its return to them.

Ms. Mahony’s motion is **Granted** as to the unjust enrichment claim.

ORDER

For the foregoing reasons, Ms. Mahony’s motion to dismiss is **Granted** as to all claims. The present matter is **Dismissed** as a matter of law.

Electronically signed on 7/16/2026 6:50 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "Daniel Richardson", is written over a light blue rectangular background.

Daniel Richardson
Superior Court Judge