IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MILES Y. MATSUMURA and VALERIE A. MATSUMURA, Plaintiffs, vs. BANK OF AMERICA, N.A.; and DOES 1-50. Defendants.	)	CIV. NO. 11-00608 JMS-BMK ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendant Bank of America, N.A. ("Defendant" or BANA") moves for summary judgment on Plaintiffs Miles and Valerie Matsumura's ("Plaintiffs" or "the Matsumuras") remaining claim for promissory estoppel. Doc. No. 35. The court heard the Motion on May 20, 2013. Because genuine issues of material fact exist, the Motion is DENIED.

II. BACKGROUND

On February 10, 2012, the court granted in part and denied in part Defendant's Motion to Dismiss, concluding in relevant part that Plaintiffs had

stated a claim for promissory estoppel ("February 2012 Order").[1] *See Matsumura v. Bank of Am.*, 2012 WL 463933 (D. Haw. Feb. 10, 2012). The parties are thus familiar with the factual and procedural background, and the court need not repeat the allegations of the Complaint here. Reiterating the court's relevant conclusion, the February 2012 Order decided as follows:

> Under Hawaii law, Plaintiff must establish the following four elements to state a claim for promissory estoppel:
>
> (1) There must be a promise;
> (2) The promisor must, at the time he or she made the promise, foresee that the promisee would rely upon the promise (foreseeability);
> (3) The promisee does in fact rely upon the promisor's promise; and
> (4) Enforcement of the promise is necessary to avoid injustice.
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> *White v. Pac. Media Grp., Inc.*, 322 F. Supp. 2d 1101, 1109 (D. Haw. 2004) (quoting *In re Herrick*, 82 Haw. 329, 337-38, 922 P.2d 942, 950-51 (1996)). In this context, "[a] 'promise' is defined as 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *In re Herrick*, 82 Haw. at 338, 922 P.2d at 951 (quoting Restatement (Second) of Contracts § 2(1) (1979)).
>
> Count Three alleges, in pertinent part:
> The Matsumuras relied in good faith upon

[1] The court dismissed claims for wrongful foreclosure and for violations of the Truth in Lending Act, 15 U.S.C. §§ 1635(a) & 1653(f), with leave to amend. *Matsumura v. Bank of Am.*, 2012 WL 463933, at *7 (D. Haw. Feb. 10, 2012). Plaintiffs chose not to amend their Complaint, and thus the only claim remaining is Count Three, seeking relief under a promissory estoppel theory.

> the loan modification promises of [BANA] . . . to their detriment, with the full knowledge of [BANA] that they would do so . . . such that, in the event that any elements essential to the making of a contract may be found to be absent herein, [BANA] is estopped from asserting or denying same[.]

> Compl. ¶ 19. Elsewhere, the Complaint alleges Plaintiffs "were told [by BANA] that they were eligible for a loan modification, but that they must stop paying their mortgage to secure a loan modification [and] as a result thereof and in reliance thereon they stopped paying their mortgage." *Id.* ¶ 8. It further references Exhibit 4, which in turn summarizes "the mistreatment the Matsumuras received from [BANA] as they responded to promises of a sizeable loan modification." *Id.* ¶ 11.
>
> Although not clear, the Complaint sufficiently alleges facts that -- if proven -- would support a plausible claim of promissory estoppel. The Complaint alleges a "promise" (that Plaintiffs would qualify for "a sizable loan modification" and that, in order to apply for the modification, "the loan must be between 4-6 months delinquent"). Compl. Ex. 4, at 1. Plaintiffs allege that they were "[a]ssured that when [a] loan is in [the] modification process [the] account is put on hold and will not be sent for foreclosure." *Id.* The Complaint also alleges circumstances indicating it was foreseeable that they would rely on alleged promises, and that they did rely to their detriment. *See In re Herrick*, 82 Haw. at 337-38, 922 P.2d at 950-51.

Matsumura, 2012 WL 463933, at *5-6 (internal footnotes omitted). As to Exhibit Four attached to the Complaint, the February 2012 Order stated:

> Exhibit 4 is a compilation of allegations in time-line format. Because the Complaint attaches and references

> Exhibit 4 as a "summary' of allegations, the court will construe the Complaint as if Exhibit 4's allegations are in the Complaint itself. *See Cooper v. Pickett*, 137 F.3d 616, 622-23 (9th Cir. 1997) (stating that although "a district court generally may not consider any material beyond the pleadings" in ruling on a motion to dismiss, "material which is properly submitted as part of the complaint [in an exhibit] may be considered").

Id. at *1 n.2.

Now, in response to Defendant's Motion for Summary Judgment, Plaintiff Valerie Matsumura ("Valerie") submits a declaration that mirrors Exhibit Four to the Complaint, although it adds certain details -- some of which Defendant contends the court must ignore as being contradictory to Valerie's answers to interrogatories given during discovery. *See* Doc. No. 46-1, V. Matsumura Decl.; Doc. No. 36-12, Def.'s Ex. J (Answers to Interrogs.). In turn, the answers to interrogatories also mirror Exhibit Four. *See* Doc. No. 1-2 at 34-38, Compl. Ex. 4. That is, in all essential respects, Plaintiffs have supported the allegations of the Complaint with evidence that, if believed, substantiates at least a prima facie claim that promissory estoppel applies (although the proper remedy if liability under such a theory is ultimately established at a trial remains open).

III. STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(a). Rule 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999).

"A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citing *Celotex*, 477 U.S. at 323); *see also Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004). "When the moving party has carried its burden under Rule 56[(a)] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts [and] come forward with specific facts showing that there is a *genuine issue for trial*." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986) (citation and internal quotation signals omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (stating that a party cannot "rest upon the mere allegations or denials of his pleading" in opposing summary judgment).

"An issue is 'genuine' only if there is a sufficient evidentiary basis on

which a reasonable fact finder could find for the nonmoving party, and a dispute is 'material' only if it could affect the outcome of the suit under the governing law." *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson*, 477 U.S. at 248). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *see also Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor" (citations omitted)).

IV. DISCUSSION

A. The Court Considers Valerie's Declaration

Defendant objects to much of Valerie's declaration, and requests that the court strike nineteen statements or paragraphs from the declaration. Doc. No. 49, Def.'s Objections to Evidence. Defendant bases almost all of the objections on Federal Rules of Evidence 402 and 403, contending that the statements are irrelevant. For example, Defendant contends that this statement is irrelevant:

> I first spoke with a [BANA] representative sometime in or around April 2009 and was told that they would only consider modifying my loan once I was 4-6 months behind on my payments. However, once I was at least four months delinquent, I was told they would easily be able to negotiate a loan modification. Relying on this

promise, I stopped making monthly payments.

Id. at 2 (quoting Doc. No. 46-1, V. Matsumura Decl. ¶ 4).

Defendant's objections are unfounded. The court refuses to strike the identified portions of Valerie's declaration for several reasons. First, relevancy objections serve little, if any, purpose where the court is considering whether a non-movant has created a genuine issue of material fact under Federal Rule of Civil Procedure 56. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) ("[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself . . . . A court can award summary judgment only when there is no genuine dispute of material fact. It cannot rely on irrelevant facts, and thus relevance objections are redundant."). *See also, e.g.*, *Perez-Denison v. Kaiser Found. Health Plan of the Nw.*, 868 F. Supp. 2d 1065, 1088 (D. Or. 2012) (same) (following *Burch*); *Harris Technical Sales, Inc. v. Eagle Test Sys., Inc.*, 2008 WL 343260, at *3 (D. Ariz. Feb. 5, 2008) (same). More importantly, Valerie's statements in her declaration -- such as those quoted above -- are certainly relevant. Indeed, her statements explain or expand upon the factual basis for Plaintiffs' Complaint -- they largely repeat Exhibit Four, which the court has construed as being part of the Complaint.

February 2012 Order, 2012 WL 463933 at *1 n.2. Whether or not the statements are true (an assessment the court cannot make at this summary judgment stage), they are obviously relevant to the issues in this case.

Defendant also objects that an oral promise to modify a loan is barred by Hawaii Revised Statutes ("HRS") § 656-1, Hawaii's Statute of Frauds. Doc. No. 49, Objections to Evidence at 7 (objecting to a statement, in part, that "Christina then took my financial information once more and immediately offered a loan modification, lowering our monthly payments to 31% of our gross monthly income to approximately $2,500 a month"). But this substantive argument duplicates the promissory estoppel analysis -- it is not appropriate as an objection to considering the statement, especially where the challenged statement is part and parcel of Plaintiffs' promissory estoppel claim itself. *See, e.g.*, *Au v. Republic State Mortg. Co.*, 2013 WL 1339738, at *4-6 (D. Haw. Mar. 29, 2013) (recognizing that Hawaii has adopted possible exceptions to the Statute of Frauds under Restatement (Second) of Contracts § 139, which is similar to Restatement (Second) of Contracts § 90 (promissory estoppel)). In any event, the court overrules the objection on its merits, as the question (properly raised) would be whether application of HRS § 656-1 would work an "injustice" when considering the factors in Restatement § 139 -- an inquiry the parties have not addressed and

that cannot be made on the present record. *See, e.g.*, *id.* at *4-5 (citing *McIntosh v. Murphy*, 52 Haw. 29, 36, 469 P.2d 177, 181 (1970)).

Finally, Defendant contends that the court cannot consider certain of Valerie's statements -- such as her statement that "[t]he [BANA] representative took my financial information over the phone, and then told me right then that I qualified for a loan modification under the program," Doc. No. 46-1, V. Matsumura Decl. ¶ 5 -- because they contradict her interrogatory answers. But the "sham affidavit" rule is simply inapplicable to Valerie's declaration. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-99 (9th Cir. 2009) ("[O]ur cases have emphasized that the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit."). "[T]he sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence [and thus] 'should be applied with caution.'" *Id.* at 998 (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993)). "[T]he rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony, rather, the district court must make a factual determination that the contradiction was actually a 'sham.'" *Id.* (citing *Kennedy v. Allied Mut. Ins. Co.*,

952 F.2d 262, 267 (9th Cir. 1991) (internal quotation marks omitted)).

Valerie's statements in her declaration are largely consistent with Exhibit Four (and thus with Plaintiffs' answers to interrogatories). The effect of any "embellishment" or additional details that may arguably be inconsistent with other evidence would go to the weight of her testimony at trial. They create an issue of credibility, but are not a basis to ignore the statements. *See Kalama v. JP Morgan Chase Bank*, 2011 WL 5879432, at *3 n.4 (D. Haw. Nov. 22, 2011) ("[V]ariations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all.") (quoting *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986)). *See also id.* ("[I]nnocent lapses of memory, such as a failure to remember one item to a question calling for many items to be recollected, or lack of memory as to precise dates, would be permissible; however, changes from 'yes' to 'no,' or gross departures from original testimony, would not be legitimate.") (quoting *BNSF Ry. Co. v. San Joaquin Valley R. Co.*, 2009 WL 3872043, at *7 (E.D. Cal. Nov. 17, 2009)).

In short, the court will consider Valerie's entire declaration as evidence submitted in opposition to Defendant's Motion for Summary Judgment.

B. Genuine Issues of Material Fact Exist

Given Valerie's declaration, Defendant's argument -- that no genuine issues of material fact exist such that summary judgment is appropriate in its favor -- lacks merit. At this summary judgment phase, the court must draw all reasonable inferences in the evidence in favor of Plaintiffs. *See, e.g.*, *Posey*, 546 F.3d at 1126) (stating that "the evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in his favor" (citations omitted)). Crediting Valerie's declaration and construing other evidence in the record in Plaintiffs' favor, Defendant made a promise to at least consider Plaintiffs for a loan modification -- if not that they actually qualified for a modification -- and apparently made a promise not to foreclose while the loan modification was being considered. Defendant told Plaintiffs they must actually be four to six months in arrears before they could qualify for a loan modification, and led Plaintiffs to believe that further payments would disqualify them from eligibility for a modification. Plaintiffs relied on those promises and stopped making payments (even if they have missed a payment or payments earlier). Apparently after Plaintiffs submitted an application, Defendant then began foreclosure proceedings in April 2010 (without -- according to Plaintiffs -- Defendant informing them until May 2010 that the application had been denied in January 2010). After many other

conversations, Plaintiffs eventually incurred late fees, costs, and other damages in bringing the loan current in June 2010.[2]

The court previously concluded that promissory estoppel could apply in these circumstances. *Matsumura*, 2012 WL 463933, at *5-6. And many other courts have likewise found the doctrine applicable in similar circumstances. *See, e.g.*, *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 348 (D. Mass. 2011) (establishing a claim for promissory estoppel where "Wells Fargo promised to engage in negotiating a loan modification if the Dixons defaulted on their payments and provided certain financial information, and they did so in reasonable reliance on that promise, only to learn that the bank had taken advantage of their default status by initiating foreclosure proceedings"); *Sohal v. Fed. Home Loan Mortg. Corp.*, 2011 WL 3842195, at *6 (N.D. Cal. Aug. 30, 2011) (upholding a promissory estoppel claim where the bank "allegedly promised Plaintiffs that it was negotiating a loan modification in good faith, that it would not foreclose upon the Property, and that it would inform Plaintiffs of any schedule trustee's sale") (internal quotation marks omitted); *Bosque v. Wells Fargo Bank, N.A.*, 762 F.

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[2] Plaintiffs identify five different promises by Defendant (1) to either consider them for a loan modification, or that they were in fact eligible for a modification, but that they were only so eligible if the loan was four to six months in arrears; and (2) that no foreclosure would take place while the loan was under consideration for a modification. As Defendant points out, however, these five promises are essentially all versions of the same two promises: Plaintiffs were eligible for a modification and no foreclosure would take place while an application was pending.

Supp. 2d 342, 353-54 (D. Mass. 2011) (similar); *Fletcher v. OneWest Bank*, 798 F. Supp. 2d 925, 932-33 (N.D. Ill. 2011) ("Fletcher is claiming reliance on OneWest's promise to consider her [modification] application and give her a response. She claims that she racked up additional fees and costs as a result of OneWest's delay."); *McGann v. PNC Bank, N.A.*, 2013 WL 1337204, at *7 (N.D. Ill. Mar. 29, 2013) ("McGann also alleges that she relied on PNC's assurance that she was being considered for a HAMP loan modification to her detriment because she continued to make payments under the TPP Agreement. . . . As a result of making those payments, McGann defaulted on her mortgage obligations, which resulted in PNC's ultimately instituting foreclosure proceedings.").

Because Plaintiffs had previously missed a payment in August and December 2008, Defendant argues that Plaintiffs cannot have relied (by stopping their loan payments in April 2009) on any promise that Plaintiffs were eligible for a loan modification. But the point is that Plaintiffs stopped making payments altogether because they were led to believe, if not promised by Defendant, that they needed to be four to six months in arrears, and that making payments would prevent them from qualifying for eligibility for a loan modification. Even if, however, Plaintiffs were "in default" for missing payments in August and December 2008, it is entirely consistent with their desire to seek a loan

modification in April 2009 and their failure to make further payments (at least until June 2010, when they brought the loan current).

Defendant also points out that Valerie admitted in her deposition that Plaintiffs stopped making payments on advice of counsel, and imply that Plaintiffs cannot now claim that they stopped making payments in reliance on promises from Defendant. Doc. No. 48, Def.'s Mot. at 17. But this argument is only relevant to Plaintiffs' failure to make payments after June 2010 (when Plaintiffs brought the loan current), or perhaps after this suit was filed in August 2011 -- it does not address whether it was reasonable for Plaintiffs to stop making payments a year earlier in April 2009.

Defendant also argues that it ultimately "honored any alleged promise not to pursue foreclosure," Doc. No. 48, Def.'s Reply at 19, because the foreclosure has now been postponed and the subject property has not been sold. *Id.* at 20-21. But, construing the evidence in favor of Plaintiffs, the postponement or halting of foreclosure proceedings was the result of Plaintiffs' bringing the loan current. That is, the postponement was not based on Plaintiffs' application or qualification for a loan modification.

In short, genuine issues of material fact exist as to whether promissory estoppel can apply. At the very minimum, the doctrine could create liability or

responsibility by Defendant for additional fees and costs that Plaintiffs incurred in reasonable reliance in June 2010, when they brought the loan current. *See, e.g.*, *Dixon*, 798 F. Supp. 2d at 348 ("[D]amages appropriately will be confined to the value of their expenditures in reliance on Wells Fargo's promise [not to initiate foreclosure proceedings]."). Whether or not the relevant promise was merely to *consider* Plaintiffs for a loan modification, or whether promises were made that they actually *qualified* for, and would *receive*, a modification, cannot be determined at this summary judgment phase. Similarly, it is premature -- because a determination depends on the credibility and extent of any promises made by Defendant -- to decide whether it was reasonable for Plaintiffs to fail to make payments *after* June 2010. And even assuming that terms of any promised loan modification are too vague and uncertain to enforce, the extent of any equitable remedy that might be available would depend on the nature of the promises that were made and the reasonableness of Plaintiffs' reliance -- factual determinations that cannot be made at this summary judgment stage. *See id.* at 348 n.2 ("[A]ll of this remains speculative; assuming liability, the evidence presented at trial will no doubt illuminate the proper measure of reliance damages that the Court ought [to] fashion.").

V. CONCLUSION

For the foregoing reasons, Defendant Bank of America, N.A.'s Motion for Summary Judgment, Doc. No. 35, is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 20, 2013.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

Matsumura v. Bank of Am., N.A., Civ. No. 11-00608 JMS-BMK, Order Denying Defendant's Motion for Summary Judgment