UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANN GAVIN, PAUL GAVIN, FAMM STEEL INC., and AUSTIN REALTY, LTD,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 06-12314-DPW
SOVEREIGN BANK,	)	
Defendant.	)	

MEMORANDUM AND ORDER
June 30, 2008

This is a lender liability action based on the one time borrower-lender relationship between FAMM Steel, Inc. ("FAMM") and Austin Realty, Ltd. ("Austin") (referred to jointly as "Plaintiffs")[1] and their lender, Sovereign Bank ("Sovereign"). The relationship ultimately deteriorated and resulted in the liquidation of the Plaintiffs' assets. The Plaintiffs allege multiple violations by Sovereign of a duty to act in good faith and a fiduciary duty. They also raise claims based on an instrumentality theory of liability, fraud, deceit, duress, interference with advantageous contractual and business relations, and Chapter 93A. Sovereign has filed a motion for summary judgment as to all counts of the Complaint, and for

[1] On November 9, 2007, Ann and Paul Gavin agreed to voluntarily dismiss with prejudice their individual claims against Sovereign. Thus, the remaining Plaintiffs in this case are FAMM and Austin.

reasons I discuss below, I will grant the Defendant's motion.

I. BACKGROUND

A. The Borrower-Lender Relationship

FAMM, a family-owned steel fabricating business, operated out of a facility based in New Hampshire. At all relevant times, Austin was the record title owner of this facility. Ann Gavin served as FAMM's President and Secretary, while her father, Paul Gavin, served as the company's Vice President and Treasurer. In order to expand operations, FAMM entered into a banking relationship with Sovereign[2] in the fall of 1998. Sovereign's Vice President, Edward M. Powers, served as FAMM's main point of contact within the bank.

Between 1998 and 2002, Sovereign extended approximately $6.1 million of credit to the Plaintiffs by providing FAMM with a revolving line of credit, a term loan, and guaranties of letters of credit and Austin with a real estate loan. The Plaintiffs' obligations were documented by a series of demand and term promissory notes, formula-based lines of credit, and loan agreements as well as limited personal guarantees from Ann and Paul Gavin.

During 2001, FAMM expanded its business by building

[2] The Plaintiffs initially started their banking relationship with Fleet National Bank. Sovereign is the successor-in-interest to Fleet National Bank. For purposes of this memorandum, I use Sovereign to refer to both Sovereign and Fleet National Bank.

additions to its New Hampshire facility and installing heavy duty conveyor systems. Although it was anticipated that FAMM would only break even in 2001 due to the expenses incurred during its expansion phase, the company ultimately incurred a loss due to the economic impact of the events of 9/11. These losses, which extended into 2002, caused FAMM to be in default of certain loan covenants. Sovereign waived the 2001 covenant defaults.

B. FAMM's Financial Management

In the fall of 2001, FAMM experienced several changes in its financial management. FAMM's outside financial consultant, Michael Ciampa, resigned, and its in-house comptroller, Charles Stearns, gave notice that he intended to resign at the end of 2001. FAMM contacted its accountant, Paul Seelye, and arranged to have someone from Seelye's firm temporarily assist FAMM with its finances while it searched for a replacement for Stearns. But in January 2002 - when the company informed Powers of its decision - Powers indicated that he was uncomfortable having the accounting firm that handled FAMM's accounting review also be involved in the company's daily operations. Instead, he indicated he wanted an individual in whom he had confidence to oversee FAMM's finances and insisted on the hiring of David Lee to oversee the accounting department on an interim basis until FAMM found a permanent comptroller.

Although Ann Gavin told Powers she did not want to hire Lee because he was providing consulting services to a company owned by one of her former partners, Powers indicated that he had already contacted Lee and that Ann Gavin should contact him to “get him on board.” After FAMM hired Lee, it continued its search for a permanent comptroller. Ann Gavin interviewed five candidates and the company invited two of these candidates back for follow-up interviews with Paul Gavin, other FAMM managers, and Lee. According to Ann Gavin, Powers wanted Lee to interview all the comptroller candidates and have an opinion on whom to hire; in essence, FAMM is said to have needed Lee's approval as to who to hire. Since the interviewers concluded that they could work with either candidate and Lee had a preference for Keith Woolford, FAMM ultimately hired Woolford, who started working at the company in March 2002.

After Woolford started work, Powers continued to require that FAMM retain Lee. Powers had meetings with Lee regarding FAMM's financial condition and often failed to include Ann Gavin. Powers wanted Lee to train and oversee Woolford, initially until the end of June but Powers then extended the period until the end of 2002.

During 2002, Woolford and Lee neglected to reconcile FAMM's ledgers and monthly bank statements and incorrectly accelerated the recognition of project revenues. Over the course of the year, the overstatements became progressively worse. According to Ann Gavin, she did not learn of these irregularities until Lee resigned in November 2002. At that time, Lee informed her that certain accounts had not been reconciled. In order to reconcile these accounts, in late 2002, FAMM rehired Ciampa as a financial consultant. After making the necessary account adjustments, the company learned that its expected $300,000 profit for 2002 was actually a $1.1 million[3] loss. Ann Gavin testified that she would have done things differently if she had known the company was operating at a loss. The company, Plaintiffs contend, would have bid on additional projects and would not have paid employee bonuses, given extra vacation time, or made arrangements to purchase a car. FAMM ultimately fired Woolford in January 2003.

Upon learning about FAMM's actual 2002 performance, Sovereign required the company to hire a company turnaround consultant. According to Ann Gavin, Powers promised that if FAMM hired the turnaround consultant, he would retain FAMM's account rather than sending it to another department within the bank. After FAMM hired Joe Picano, a bank approved turnaround consultant, Sovereign ultimately transitioned the account to John Bowen in its Managed Assets Division.

In February 2003, without notifying FAMM, Sovereign stopped

[3] Although Sovereign states that the actual loss in 2002 was “some $700,000”, deposition testimony, which I credit to the degree favorable to the Plaintiffs, indicates that FAMM lost approximately $1.1 million in 2002.

automatically sweeping cash from FAMM's bank accounts to pay down the line of credit. This resulted in FAMM's account becoming overdrawn. After the bank stopped the automatic cash sweep, FAMM was required to manage its accounts manually but was unable to view them online; consequently the company could not determine which of its checks cleared on a daily basis.

FAMM's account was assigned to Bowen in March 2003. Throughout that year, FAMM remained in covenant default. Sovereign refused to waive the 2003 default, which negatively affected FAMM's bonding capacity and its ability to bid on projects successfully. Sovereign terminated FAMM's line of credit on May 31, 2003. According to Ann Gavin, Bowen had promised to extend the company's line of credit if FAMM paid down a portion of its line that it had drawn down. But after FAMM made the requested payment, Sovereign, nevertheless, terminated the line of credit.

Sovereign denied many of FAMM's requests for assistance. The bank refused to speak with FAMM's suppliers and potential lenders. It refused to release copies of appraisals and environmental reports in its files. According to Ann Gavin, it took approximately ten months to send FAMM copies of certain cancelled checks from 2002. It mishandled some of FAMM's checks, causing them to be bounced and re-bounced when, in fact, the funds in FAMM's account were actually adequate to pay the checks.

In addition, according to Ann Gavin and Picano, Sovereign was unresponsive to any of the company's workout proposals. Throughout 2003 and early 2004, FAMM provided various proposals, including the refinancing of its loans with the Bank of New Hampshire for up to $2.5 million plus an additional "hope note" of $1 million, the purchasing of various obligations for $800,000, and having outside investors pay Sovereign $2 million to refinance the loans. Sovereign ultimately sold FAMM's loans in 2004 for $1.725 million to a third party, Republic Financial. After the sale, Republic Financial liquidated FAMM's assets for approximately $2.5 million and the Gavins were released from their personal guarantees.

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and affidavits show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" when the "contested fact has the potential to change the outcome of the suit under the governing law" and a "genuine" issue is one where "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). In conducting this analysis, a court, as I have done in the factual recitation above, views the record in the light most favorable to the non-moving party, granting all reasonable inferences in that party's favor. *Id.* at 94.

B. Legal Claims

Rather than follow the order of counts in the Complaint, I set forth the disputed claims in an order that provides a path of contentions easier to follow.

1. Instrumentality

In Count VIII of the Complaint, the Plaintiffs assert a claim based on an “instrumentality” theory of liability. “Under the 'instrumentality' doctrine, a corporation or a bank may be held liable for the debts of another corporation when it misuses that corporation by treating it as a mere business conduit for the purposes of the dominant corporation or bank.” *F. C. Imports, Inc. v. First Nat'l Bank of Boston*, 816 F. Supp. 78, 91 (D.P.R. 1993). A lender is liable under this theory if there is a strong showing that the lender “assumed actual, participatory, total control of the debtor.” *Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973), *reh'g denied*, 490 F.2d 916 (5th Cir. 1974). But “[m]erely taking an active part in the management of the debtor corporation does not automatically constitute control, as used in the 'instrumentality' doctrine”. *Id.*

The Plaintiffs argue that Sovereign exercised undue control over FAMM's financial affairs. Specifically, they focus on Sovereign's requirement that FAMM hire and retain Lee to manage the company's finances. They also argue that Sovereign had control over the hiring of FAMM's comptroller since FAMM needed Lee's approval before it could hire anyone. Based on Lee's preference, FAMM ultimately hired Keith Woolford to be its comptroller. Lee was in charge of training Woolford and providing financial updates. Throughout this process, Ann Gavin was often excluded from Lee's conversations with Powers and would only find out about Sovereign's decisions through updates provided by Lee.

The issue is whether these acts, taken as a whole, rise to the necessary level of actual control. "Through its loan agreement, every lender effectively exercises 'control' over its borrower to some degree." *In re Clark Pipe & Supply Co., Inc.*, 893 F.2d 693, 701 (5th Cir. 1990), *reh'g denied*, 899 F.2d 11 (5th Cir. 1990) (TABLE); *see also Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1465 (D.S.D. 1996), *aff'd*, 111 F.3d 135 (8th Cir. 1997) (noting that "a certain amount of control and influence over a debtor is simply consistent with a creditor's responsibility to protect the investment"). The level of control necessary for lender liability under an instrumentality theory "does not arise unless the plaintiff can show that the creditor [] obtained the power to direct the day-to-day management of the debtor." 1 LENDER LIABILITY: LAW, PRAC. & PREVENTION § 5:8.

Courts have evaluated situations similar to the instant case where banks controlled or otherwise influenced the hiring and firing of a company's financial officer. In *Chicago Mill & Lumber Co. v. Boatmen's Bank*, 234 F. 41 (8th Cir. 1916), the lending bank arranged for its assistant cashier to become president of a debtor company in order to protect the bank's interest in the company. The company manager testified that he received his orders from the bank's assistant cashier who often conferred with the bank president. *Chicago Mill*, 234 F. at 44. The Eighth Circuit concluded that the bank's control was "easily and naturally referable to a legitimate and customary practice of keeping an oversight by a creditor over the business, management, and operations of a debtor of doubtful solvency." *Id.* at 46. Thus, its control did not rise to the level necessary to impose liability based on the instrumentality doctrine. *See id.* Similarly, in *Schwan's Sales Enters., Inc. v. Commerce Bank & Trust Co.*, 397 F. Supp. 2d 189 (D. Mass. 2005), Judge Saylor concluded that a bank's control over the hiring and firing of a company's chief financial officer and the subsequent hiring of his replacement did not constitute absolute control since there was no evidence that the bank controlled or acted through its designated chief financial officer. 397 F. Supp. 2d at 197.

The two cases relied upon by the Plaintiffs, *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc.*, 678 S.W.2d 661 (Tex. App. 8 Dist. 1984) (*writ dism. by agr.*), and *Melamed v. Lake County Nat'l Bank*, 727 F.2d 1399 (6th Cir. 1984), are factually distinguishable. In *Farah*, the corporate debtor alleged that its lenders forced the election of a new chief executive officer, installed directors loyal to the banks, and interfered with the company's corporate governance. *Farah*, 678 S.W.2d at 668. In *Melamed*, there was evidence that the bank, in addition to arranging replacement of the debtor's accountant, supervised every payment made by the debtor company. *Melamed*, 727 F.2d at 1403. The facts in both cases indicate a much higher level of involvement on the part of the lenders than is alleged here. More importantly, neither case imposed lender liability based on an instrumentality theory. Thus, these cases are not helpful for purposes of analyzing the instant action.

While Sovereign's requirements that FAMM hire Lee and Woolford to manage the company's finances were perhaps ill-advised, they do not constitute “absolute, participatory, total control” of FAMM's operations. As a concerned lender, Sovereign was entitled to engage in heightened scrutiny of FAMM's financial management. Despite the interaction between Lee and Powers, there is no evidence that Powers directed Lee's actions. In fact, if the Plaintiffs' contentions are true that Lee's failure to reconcile FAMM's accounts properly and his failure to supervise Woolford properly led to FAMM's demise, these actions also negatively affected Sovereign. Since the facts as alleged by the Plaintiffs do not support the conclusion that Sovereign had sufficient control over FAMM to involve the instrumentality theory of liability, I will grant the Defendant's motion for summary judgment as to Count VIII.[4]

2. Covenant of Good Faith and Fair Dealing

Several of the Plaintiffs' claims are premised on a covenant of good faith.[5] Every contract is subject to an implied covenant of good faith and fair dealing. *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004). The purpose of this covenant "is to ensure that neither party interferes with the ability of the other to enjoy the fruits of the contract."

---

[4] To the extent the Plaintiffs' claims are based on a tort theory of liability, I note that the Massachusetts statute of limitations for tort actions is three years. Mass. Gen. Laws ch. 260 § 2A. This case was filed on December 29, 2006. According to exhibits submitted by Sovereign, the Plaintiffs were aware of their accounting irregularities by December 28, 2002, over four years before they filed their Complaint. Both Lee and Woolford had departed the company by January 2003. Thus, any tort claims based on the improper conduct of Lee and Woolford are time-barred.

[5] Specifically, in Counts I through IV of the Complaint, the Plaintiffs assert the following claims: breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the Uniform Commercial Code's good faith obligation, and breach of the duty of good faith and fair dealing.

Chokel v. Genzyme Corp., 449 Mass. 272, 276 (2007); *Uno Restaurants*, 441 Mass. at 385. But this covenant is limited to the intended scope of the contract and does not “create rights and duties not otherwise provided for in the existing contractual relationship.” *Id.*

The Plaintiffs argue that the following facts show Sovereign's failure to act in good faith: 1) terminating the automatic cash sweep without notice; 2) failing to provide FAMM with online account management creating a situation in which FAMM was unable to verify when its checks cleared on a daily basis; 3) mishandling of FAMM's accounts causing checks to bounce when there was adequate funding in its accounts; 4) refusing to answer third party phone calls or inquiries from FAMM's subcontractors, suppliers, and tax collection agencies; 5) refusing to respond to restructuring proposals and offers to purchase; 6) delaying ten months before sending FAMM copies of checks and bank statements that FAMM was missing; 7) failing to waive the Plaintiffs' covenant defaults; 8) failing to issue a forbearance agreement; and 9) terminating FAMM's line of credit after FAMM paid down the line. (*See* Ps' Opp. at 10-12.) What the Plaintiffs fail to mention in this litany, however, is the fact that FAMM was in default of its loan covenants at the time each of these events occurred.

The first seven events, even if true, do not constitute violations of good faith. In the context of a lender-borrower relationship, courts have required that the bank “be honest in its dealings with a borrower and not purposefully injure a borrower's right to obtain the benefits of the contractual relationship with the bank.” *In re Greenberg*, 212 B.R. 422, 429 (Bankr. D. Mass. 1997). This requirement conforms with the Uniform Commercial Code, as adopted by Massachusetts, which defines “good faith” as “honesty in fact in the conduct or transaction concerned.” Mass. Gen. Laws ch. 106 § 1-201(19). After reviewing these seven events, I find, as a matter of law, that none involve dishonest behavior by Sovereign. Although the bank may have mishandled FAMM's accounts on several occasions, the Plaintiffs have failed to show that such behavior was purposefully done to injure FAMM.

Nor did these events deprive the Plaintiffs of benefits from their contractual relationship with Sovereign. In *F.D.I.C. v. LeBlanc*, 85 F.3d 815 (1st Cir. 1996), the First Circuit concluded that a bank's “arguably 'hard-nosed'” actions did not breach the covenant of good faith since the borrower received the loan proceeds and the bank did not take adverse actions until after the borrower defaulted on his loan. 85 F.3d at 822. Thus the bank's actions did not deprive the borrower of the benefits of the loan agreement. *Id.* Here, the Plaintiffs received the proceeds from their loan agreements and Sovereign did not impose any additional requirements until after the Plaintiffs were in covenant default.

Good faith is limited to the scope of the agreement, and the Plaintiffs have failed to point to any provisions in their loan agreements requiring Sovereign to engage in loan workout negotiations, waive covenant defaults, or answer third party questions regarding the loan. Sovereign could, of course, have engaged in such actions as an accommodation to the Plaintiffs, and the bank did in fact waive the 2001 covenant defaults. But Sovereign was not under an obligation to take any of these actions.[6]

The last two events discussed by the Plaintiffs, Sovereign's

---

[6] The Plaintiffs have also argued that Sovereign was unresponsive to third party requests to see the appraisals and environmental reports in the bank's files. But Massachusetts courts have traditionally viewed "a bank's relationship to its customers simply as one of creditor and debtor; a relationship which imposes no duty to counsel or make disclosures to the customer." *In re Greenberg*, 212 B.R. 422, 428 (Bankr. D. Mass. 1997). Sovereign had a legitimate concern with providing information to third parties as Bowen testified in deposition:

> From the bank's perspective, . . . you talk to a lender and you say the wrong thing and the borrower sues you for chilling the deal because you said the wrong thing and the deal doesn't close. Conversely, you talk to a lender and he does the deal, and a year later the deal blows up, he sues you for giving false information.

Sovereign had no obligation to talk with third parties or turn over its internal reports. Thus, its refusal to do so does not constitute a breach of its covenant of good faith and fair dealing. *See Hughes v. Holt*, 435 A.2d 687, 689 (Vt. 1981) ("The appraisal report was for the exclusive use of the bank, and right or wrong in content, it was confidential.").

promise to issue a forbearance agreement which it never issued and its termination of FAMM's line of credit after FAMM paid down the line, taken together could arguably raise an issue of dishonesty. The allegation must be that, although Sovereign never intended to extend FAMM's line of credit or provide a forbearance agreement, it misled FAMM into believing that the extension and forbearance agreement would be forthcoming if FAMM agreed to pay down a portion of its line. In order to oppose summary judgment, however, this allegation must be supported by "evidence which would be admissible at trial to make out the requisite issue of material fact." *Fragoso v. Lopez*, 991 F.2d 878, 887 (1st Cir. 1993) (quoting *Kelly v. U.S.*, 924 F.2d 355, 357 (1st Cir. 1991)). The Plaintiffs refer to portions of Ann Gavin's and Joseph Picano's depositions, but none of the excerpts provide support that Sovereign purposefully misled FAMM.[7] *See*

---

[7] In reference to the letter from Sovereign terminating FAMM's line of credit, Ann Gavin testified:

> I remember receiving this letter, and I remember calling John Bowen, and it does say that the outstanding amounts are due and payable in full, but I had spoken to him about it, and they had - initially, we had been told that the line was going to be extended, and he asked us to make some paydowns based on that, which we did, and he - he sent this out after the line had been terminated.

During Picano's deposition, he discussed a letter sent by Ann Gavin to Bowen after FAMM's line of credit was terminated.

> Q: On Page 2 of the letter, Ann Gavin writes to John Bowen, quote, "My line was shut off in May 2003 - after you advised Joe Picano and I that it would be extended.

E.A. Miller, Inc. v. South Shore Bank, 405 Mass. 95, 101 (1989) ("If there had been bad actions - if the bank had misled the plaintiffs . . . - the plaintiffs would have at least some evidence themselves, and with it they could defeat the bank's motion for . . . summary judgment."). Rather, the deposition testimony shows two parties engaged in arms-length negotiations with one party voluntarily making a payment prior to the formalization of any agreement. I find this allegation, without more support, does not sufficiently raise a genuine issue of material fact. Accordingly, I will grant the Defendant's motion for summary judgment as to Counts I through IV.

3. Fiduciary Duty

The Plaintiffs argue that Sovereign created a special relationship with FAMM when the bank required FAMM to hire Lee as a consultant. A relationship between a lender and borrower generally does not give rise to a fiduciary duty. *See, e.g.*, *Pimental v. Wachovia Mortgage Corp.*, 411 F. Supp. 2d 32, 39 (D. Mass. 2006)); *Flaherty v. Baybank Merrimack Valley, N.A.*, 808 F. Supp. 55, 64 (D. Mass. 1992); *In re Greenberg*, 212 B.R. at 428.

Although "a fiduciary relationship can develop where one party reposes its trust and confidence in another, . . . one

---

(I made a paydown based on your commitment)." Did Mr. Bowen advise you that the line would be extended?

A: I don't remember him advising us that the line was going to be extended.

party cannot unilaterally transform a business relationship into a fiduciary relationship." *In re Greenberg*, 212 B.R. at 428-29; *see also Flaherty*, 808 F. Supp. at 64. In the business context, the existence of mutual respect and confidence does not alter the parties' obligations. *Nat'l Shawmut Bank of Boston v. Hallett*, 322 Mass. 596, 602 (1948); *Snow v. Merchants Nat'l Bank of New Bedford*, 309 Mass. 354, 360 (1941). "Rather, to create such a relationship, the fiduciary, in this case the Bank, would have to know of and accept the plaintiff's trust." *In re Greenberg*, 212 B.R. at 429; *see also Pimental*, 411 F. Supp. 2d at 40 (suggesting that a fiduciary relationship can arise "if a lender both knows that a borrower is placing her trust in it and accepts that trust").

The Plaintiffs have failed to produce any evidence showing that Sovereign knew of and accepted FAMM's trust. Lee's role was always that of a consultant and he was originally intended to be a temporary supervisor who could provide additional oversight for the bank's investment. He did not serve as the company's chief financial officer; this role was filled by Woolford. Although he played a role in selecting Woolford, Ann Gavin and other FAMM managers interviewed and approved of Woolford as well.

Even assuming FAMM placed trust in Sovereign's ability to choose a responsible financial consultant, this trust was not accepted by Sovereign. Instead, its requirement that FAMM hire Lee was exercised purely as a lender seeking to protect its own loan investment. That this requirement should also benefit FAMM, the underlying company, does not represent acceptance by Sovereign of additional obligations. A finding to the contrary would transform all lenders who exercise oversight of their financially distressed borrowers into fiduciaries. I find that no fiduciary relationship existed between Sovereign and the Plaintiffs and will grant the Defendant's motion for summary judgment as to the breach of fiduciary duty claims raised in Counts V through VII.

4. Interference with Advantageous Business Relations

The Plaintiffs allege in Count XI that Sovereign interfered with their advantageous business relations by: 1) failing to respond to workout proposals and 2) failing to provide a forbearance agreement and terminating FAMM's line of credit after the company paid down part of its line. The Plaintiffs argue that these actions prevented FAMM from pursuing third party contracts and interfered with the company's ability to manage its internal affairs.

A plaintiff must prove four factors in a successful claim for intentional interference with advantageous relations:

> 1) he had an advantageous relationship with a third party (e.g., a present or prospective contract . . .); 2) the defendant knowingly induced a breaking of the relationship; 3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and 4) the plaintiff was harmed by the defendant's actions.

Blackstone v. Cashman, 448 Mass. 255, 260 (2007); *see also United*

Truck Leasing Corp. v. Geltman, 406 Mass. 811 (1990). Even if Sovereign knew its actions would prevent FAMM from pursuing advantageous prospective contracts, it was still entitled, to the extent permitted by the loan agreements, to protect its investment as it saw fit. There was nothing to show that Sovereign's actions were improper in motive or means. As I discussed above, Sovereign did not have a fiduciary relationship with the Plaintiffs nor did it fail to act in good faith when it required FAMM to hire Lee. The Plaintiffs were in default of their loan covenants, and the bank was entitled to implement additional protective measures. Sovereign was in no way required to engage in workout negotiations, provide a forbearance agreement, or extend FAMM's line of credit. Thus, I find that the Plaintiffs are unable to show that Sovereign's actions were improper in motive or means, and I will grant the Defendant's motion for summary judgment as to Count XI.

5. Fraud and Duress

In Counts IX and X, the Plaintiffs raise claims of fraud and duress. The Plaintiffs' fraud argument is premised on the false representations made by Lee. “To prevail on a claim for fraud or deceit, a plaintiff must prove as an essential element of the claim that the defendant has knowingly made a false statement of material fact, intending that the plaintiff rely thereon, and upon which the plaintiff did rely.” *Chan v. Chen*, 70 Mass. App. Ct. 79, 82 (2007); *Sahin v. Sahin*, 435 Mass. 396, 402 n.9 (2001).

The Plaintiffs outline Lee's false statements that they contend they relied upon. But they have brought this action against Sovereign and not Lee. Although the evidence in the light most favorable to the Plaintiffs may obligate me in evaluating the summary judgment motion to conclude that Sovereign required that FAMM hire Lee, the Plaintiffs fail to provide any evidence that the bank knew of Lee's incompetence. Without such evidence, they cannot show that Sovereign knowingly misrepresented Lee's qualifications or that it was the constructive author of the allegedly false statements. I will dismiss the fraud claim, which is Count IX of the Complaint.

Nor can the Plaintiffs make out a claim for economic duress. Economic duress arises when "1) . . . one side involuntarily accepted the terms of another; 2) . . . circumstances permitted no other alternatives; and 3) . . . said circumstances were the result of coercive acts of the opposite party." *Int'l Underwater Contractors, Inc. v. New England Tel. & Tel. Co.*, 8 Mass App. Ct. 340, 342 (1979)(quoting *Urban Plumbing & Heating Co. v. U.S.*, 408 F.2d 382, 389 (Ct. Cl. 1969)). To the extent the Plaintiffs rely on the imposition of Lee as the basis for their duress claim, their claim must fail. Sovereign's imposition only occurred after the Plaintiffs were in default of their loan covenants. The Plaintiffs have not alleged that the original loan agreements were made under duress. After they were in default, they could have refused Sovereign's requirement and dealt with the consequences of their refusal. This is a decision that any distressed borrower must consider, but it does not rise to the level of legally cognizable economic duress. I will dismiss Count X of the Complaint.

6. Chapter 93A

The Plaintiffs' Chapter 93A claim must likewise be dismissed. Chapter 93A provides protection against "unfair or deceptive acts or practices." Mass. Gen. Law ch. 93A § 2. "Conduct is unfair or deceptive if it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness or immoral, unethical, oppressive, or unscrupulous." *Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 25 (1st Cir. 2001) (internal quotations and citations omitted). Because I find that Sovereign did not breach its covenant of good faith nor did it violate any duties to the Plaintiffs, I will grant the Defendant's motion for summary judgment as to Count XII. *See Interstate Brands Corp. v. Lily Transp. Corp.*, 256 F. Supp. 2d 58, 61 (D. Mass. 2003).

III. CONCLUSION

For the reasons stated more fully above, I GRANT Defendant's Motion for Summary Judgment as to all counts of the Complaint.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE