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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**HERMINA CORNEJO, LEONEL
CORNEJO AND NOE CORNEJO,**

Plaintiffs,

v.

FCI LENDER SERVICES, INC.;
DOWNEY SAVINGS AND LOANS
ASSOCIATION, F.A.; and DOES 1-50
inclusive,

Defendants.

CIV-F-09-0259 AWI SMS

ORDER RE: MOTION TO DISMISS

(Docs. 6 and 10)

I. History¹

Plaintiffs purchased the property at 1535 Montclair Drive, Modesto, CA 95350 on May 6, 2005. Defendant Downey Savings and Loans Association provided the mortgage for the purchase. Third party DSL Service Company was the original trustee under the deed of trust; the trustee was later changed to Defendant FCI Lender Services, Inc. Plaintiffs fell behind their mortgage payments. Defendant FCI recorded a Notice of Default and Election to Sell Under Deed of Trust on June 10, 2008 and a Notice of Trustee’s Sale sometime in September 2008. On

¹The factual history is provided for background only and does not form the basis of the court’s decision; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 December 18, 2008, Defendants sold the property in a non-judicial foreclosure sale.

2 Plaintiffs filed suit in the Superior Court of California, County of Stanislaus on January
3 12, 2009. Plaintiffs claim entitlement to relief under fraudulent misrepresentation, fraudulent
4 inducement (with respect to Doe defendants only), the Rosenthal Fair Debt Collections Act (with
5 respect to Doe defendants only), Federal Fair Debt Collections Act, Real Estate Settlement
6 Procedures Act, Home Ownership and Equity Protection Act, Truth in Lending Act, Regulation
7 Z, Federal Trade Commission Act, Cal. Bus. & Prof. Code §17200; Plaintiffs also seek to quiet
8 title to the property. Defendants² removed the case to the Eastern District of California and now
9 move to have the case dismissed for failure to state a claim. Plaintiff has neither filed an
10 opposition nor a notice of non-opposition. The matter was taken under submission without oral
11 argument.

12 Plaintiffs have been represented in this matter by the law firm of M.W. Roth. That law
13 firm is no longer operational; the Superior Court of California, County of Los Angeles has
14 assumed jurisdiction of the law firm as of March 27, 2009. The State Bar of California has taken
15 custody of the client files of that law firm and has been attempting to contact the law firm's
16 clients to advise them to seek new counsel. There has been no contact from Plaintiffs in this case
17 since it was removed.

18 **II. Legal Standards**

19 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
20 plaintiff's "failure to state a claim upon which relief can be granted." A dismissal under Rule
21 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient
22 facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
23 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
24 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
25 _____

26
27 ²Defendant Downey Savings and Loans Association and Defendant FCI Lender Services,
28 Inc. were taken over by the Federal Deposit Insurance Corporation. U.S. Bank National
Association has taken over the two institutions as successor in interest to the FDIC receivership.

1 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
2 of action will not do. Factual allegations must be enough to raise a right to relief above the
3 speculative level, on the assumption that all the allegations in the complaint are true (even if
4 doubtful in fact)...a well-pleaded complaint may proceed even if it strikes a savvy judge that
5 actual proof of those facts is improbable” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56
6 (2007), citations omitted. “[O]nly a complaint that states a plausible claim for relief survives a
7 motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the
8 Court of Appeals observed, be a context-specific task that requires the reviewing court to draw
9 on its judicial experience and common sense. But where the well-pleaded facts do not permit the
10 court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it
11 has not shown that the pleader is entitled to relief.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
12 (2009), citations omitted. The court is not required “to accept as true allegations that are merely
13 conclusory, unwarranted deductions of fact, or unreasonable inferences.” Sprewell v. Golden
14 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). The court must also assume that “general
15 allegations embrace those specific facts that are necessary to support the claim.” Lujan v. Nat’l
16 Wildlife Fed’n, 497 U.S. 871, 889 (1990), citing Conley v. Gibson, 355 U.S. 41, 47 (1957),
17 overruled on other grounds at 127 S. Ct. 1955, 1969. Thus, the determinative question is
18 whether there is any set of “facts that could be proved consistent with the allegations of the
19 complaint” that would entitle plaintiff to some relief. Swierkiewicz v. Sorema N.A., 534 U.S.
20 506, 514 (2002). At the other bound, courts will not assume that plaintiffs “can prove facts
21 which [they have] not alleged, or that the defendants have violated...laws in ways that have not
22 been alleged.” Associated General Contractors of California, Inc. v. California State Council of
23 Carpenters, 459 U.S. 519, 526 (1983).

24 In deciding whether to dismiss a claim under Rule 12(b)(6), the Court is generally limited
25 to reviewing only the complaint. “There are, however, two exceptions....First, a court may
26 consider material which is properly submitted as part of the complaint on a motion to dismiss...If
27 the documents are not physically attached to the complaint, they may be considered if the
28 documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them.

1 Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.”
2 Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), citations omitted. The Ninth
3 Circuit later gave a separate definition of “the ‘incorporation by reference’ doctrine, which
4 permits us to take into account documents whose contents are alleged in a complaint and whose
5 authenticity no party questions, but which are not physically attached to the plaintiff’s pleading.”
6 Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005), citations omitted. “[A] court may not
7 look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition
8 to a defendant’s motion to dismiss. Facts raised for the first time in opposition papers should be
9 considered by the court in determining whether to grant leave to amend or to dismiss the
10 complaint with or without prejudice.” Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003),
11 citations omitted.

12 If a Rule 12(b)(6) motion to dismiss is granted, claims may be dismissed with or without
13 prejudice, and with or without leave to amend. “[A] district court should grant leave to amend
14 even if no request to amend the pleading was made, unless it determines that the pleading could
15 not possibly be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th
16 Cir. 2000) (en banc), quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other
17 words, leave to amend need not be granted when amendment would be futile. Gompper v. VISX,
18 Inc., 298 F.3d 893, 898 (9th Cir. 2002).

20 III. Discussion

21 Plaintiffs make many assertions, but the foundational claim appears to be that Defendants
22 do not have the legal authority to foreclose on his property. Plaintiffs state,

23 12. Plaintiffs are informed and believe, and based thereon allege that Defendants were not
24 entitled to foreclose on Trust Deed No. 1 recorded against the Subject Property because
25 they are not and were not either: (a) the ‘holders’ of a note that substantiates their alleged
26 claim to an interest in the Subject Property that would afford them the right to foreclose;
27 (b) a nonholder in possession of a note executed by Plaintiffs who had the rights of a
28 holder to foreclose on Trust Deed No. 1 against the Subject Property; or (c) a person not
in possession of a note that substantiates their claim to an interest in the Subject Property
who was otherwise entitled to enforce Trust Deed No. 1 under California law.

13. Plaintiffs further allege that Defendants did not have the right to direct TRUSTEE to
foreclose on Trust Deed No. 1 and sell the Subject Property owned by Plaintiffs.

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2 Doc. 2, Complaint, at 4:9-18. All of Plaintiffs' claims against non-Doe defendants derive from
3 this foundational allegation. See Doc. 2, Complaint, at 6:8-10; 9:24-10:5; 12:1-8; 13:9-15; and
4 14:7-11.

5 The court does not quite comprehend how this allegation gives rise to Plaintiffs' claims.
6 As Defendants point out, "Defendants, however, do have the right to payment under the note and
7 to foreclose because, as alleged in the Complaint, Defendant Downey Savings is the original
8 lender." Doc. 10, Brief, at 4:6-8. Plaintiff admits the Defendant Downey was the original lender
9 and that Defendant FCI recorded a Notice of Default and Election to Sell Under Deed of Trust
10 and a Notice of Trustee's Sale under Defendant Downey's direction. Doc. 2, Complaint, at 3:1-
11 15.

12 "Financing or refinancing of real property is generally accomplished in California through
13 a deed of trust. The borrower (trustor) executes a promissory note and deed of trust, thereby
14 transferring an interest in the property to the lender (beneficiary) as security for repayment of the
15 loan. The deed of trust is recorded to give notice to future lenders and purchasers that the
16 property is encumbered by an outstanding loan. Legal title to the property is held by a trustee
17 until the loan is repaid in full." Bartold v. Glendale Federal Bank, 81 Cal. App. 4th 816, 821
18 (Cal. App. 4th Dist. 2000).

19 The statutory scheme can be briefly summarized as follows. Upon default by the trustor,
20 the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale (Cal.
21 Civ. Code §2924). The foreclosure process is commenced by the recording of a notice of
22 default and election to sell by the trustee (Cal. Civ. Code §2924). After the notice of
23 default is recorded, the trustee must wait three calendar months before proceeding with
24 the sale (Cal. Civ. Code §2924(b)). After the 3-month period has elapsed, a notice of sale
25 must be published, posted and mailed 20 days before the sale and recorded 14 days before
the sale (Cal. Civ. Code §2924f). The trustee may postpone the sale at any time before the
sale is completed (Cal. Civ. Code §2924g(c)(1)). If the sale is postponed, the requisite
notices must be given (Cal. Civ. Code §2924g(d)). The conduct of the sale, including any
postponements, is governed by Civil Code section 2924g. The property must be sold at
public auction to the highest bidder (Cal. Civ. Code §2924g(a)).

26 Moeller v. Lien, 25 Cal. App. 4th 822, 830 (Cal. App. 2d Dist. 1994), citations omitted. To
27 initiate the foreclosure process, "The trustee, mortgagee, or beneficiary, or any of their authorized
28 agents shall first file for record, in the office of the recorder of each county wherein the

1 mortgaged or trust property or some part or parcel thereof is situated, a notice of default.” Cal.
2 Civ. Code §2924(a)(1), emphasis added.

3 Plaintiffs’ allegations suggest that Defendants went through the proper procedures to
4 foreclose on the property. Plaintiffs have failed to state a claim. As it appears that amendment
5 would be futile given the representations contained in the complaint, leave to amend is not
6 granted.

7

8 **IV. Order**

9 Defendants’ motion to dismiss is GRANTED. Plaintiffs’ complaint and all causes of
10 action are DISMISSED. The clerk of the court is directed to close the case.

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12 IT IS SO ORDERED.

13 **Dated:** August 24, 2009

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE

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