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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARTIN ENG,
Plaintiff,
v.
JAMES DIMON, et al.,
Defendants.

No. 11-3173 MMC

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

Before the Court is the motion, filed July 12, 2012, by defendant Quality Loan Service Corporation ("Quality Loan") to dismiss plaintiff Martin Eng's ("Eng") Second Amended Complaint ("SAC"). Also before the Court is the motion, filed July 16, 2012, by defendants JPMorgan Chase Bank, N.A. ("JPMorgan") and California Reconveyance Company ("CRC") to dismiss the SAC. No opposition has been filed to either motion.¹ Having read and considered the papers filed in support of the motions, the Court rules as follows.²

A. First Cause of Action

The First Cause of Action, titled "Violations of Calif. Civil Code §2932.5," is subject to

¹ Pursuant to the Civil Local Rules of this District, Eng's opposition to Quality Loan's motion was due no later than July 29, 2012, and Eng's opposition to JPMorgan's motion was due no later than August 2, 2012. See Civil L.R. 7-3 (providing "[t]he opposition must be filed and served not more than 14 days after the motion was filed"); Fed. R. Civ. P. 6(d) (providing 3 additional days to file where service of motion is made by mail).

² By order filed August 21, 2012, the Court deemed the matter appropriate for decision on the moving papers and vacated the hearing scheduled for August 24, 2012.

1 dismissal because Section 2932.5 “applies only to mortgages that give a power of sale to
2 the creditor, not to deeds of trust which grant a power of sale to the trustee.” See Roque v.
3 Suntrust Mortgage, Inc., No. C09-00040 RMW, 2010 WL 546896 at *3 (N.D. Cal. Feb. 10,
4 2010). Where, as here, the power of sale is contained in the Deed of Trust, the nonjudicial
5 foreclosure statutes, contained in California Civil Code §§ 2924, et seq., apply. See id.

6 **B. Second Cause of Action**

7 The Second Cause of Action, titled “No Evidence of a Loan (Standing),” is subject to
8 dismissal because, as set forth below, JPMorgan and Quality Loan had the right to initiate
9 foreclosure and did not need to produce the note executed by Eng in order to do so.

10 In the Second Cause of Action, Eng alleges defendants “cannot prove they ever
11 ‘loaned’ anything of value” (see id. ¶ 70) because defendants have provided “neither the
12 original Note for examination, nor a certified copy” (see id. ¶ 71) and thus “[did] not have
13 standing” to foreclose (see id. ¶ 69).

14 JPMorgan has shown, however, that it purchased all of Washington Mutual’s assets,
15 including the loan at issue here, pursuant to a Purchase and Assumption Agreement (“the
16 P&A Agreement”). (See JPMorgan’s Request for Judicial Notice (hereinafter “RJN”) Ex.
17 9.)³ JPMorgan, as Washington Mutual’s successor in interest, and Quality Loan as trustee,
18 consequently had the right to initiate foreclosure after Eng defaulted on the loan (see id. Ex
19 7 (Deed of Trust), Ex. 11 (Notice of Default))⁴ and, contrary to Eng’s allegation, JPMorgan

21 ³ JPMorgan’s request that the Court take judicial notice of the P&A Agreement,
22 which document is available on the website of the Federal Deposit Insurance Corporation,
23 is hereby GRANTED. See Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052
24 (9th Cir. 2007) (“[A] court may take judicial notice of matters of public interest without
25 converting a motion to dismiss into a motion for summary judgment, as long as the facts
noticed are not subject to reasonable dispute.”) (internal quotations and citations omitted);
Allen v. United Fin. Mortg. Corp., 660 F. Supp. 2d 1089, 1093-94 (N.D. Cal. 2009) (taking
judicial notice of P&A Agreement).

26 ⁴ JPMorgan’s request that the Court take judicial notice of the Deed of Trust (RJN
27 Ex. 7), and the Notice of Default (RJN Ex. 11), both as recorded by the Assessor-Recorder
28 for the City and County of San Francisco, is hereby GRANTED. See Intri-Plex Techs., Inc.,
499 F.3d at 1052; Perez v. Am. Home Mortg. Servicing, Inc., No 12-00932 WHA, 2012 WL
1413300, at *2 (N.D. Cal. April 23, 2012) (taking judicial notice of recorded deed of trust
and recorded notice of default as a matter of public record not generally subject to dispute).

1 and Quality Loan did not need to produce the note in order to do so. See Cal. Civ. Code §§
2 2924, et. seq. (authorizing beneficiary of deed of trust, and trustee as beneficiary’s agent,
3 to initiate foreclosure); Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F. Supp. 2d 1039,
4 1043 (N.D. Cal. 2009) (holding “California law does not require possession of the note as a
5 precondition to non-judicial foreclosure under a deed of trust”).

6 Lastly, Eng’s reliance on the California Commercial Code (see SAC ¶¶ 33, 69) is
7 misplaced. The Commercial Code does not apply to nonjudicial foreclosures under deeds
8 of trust. See Segura v. Green Tree Servicing, LLC, No. 11-CV-634 AI SMS, 2011 WL
9 2462856 at *4 (E.D. Cal. June 17, 2011) (holding “reliance on the California Commercial
10 Code § 3301 et seq. is improper because, pursuant to California law, those sections do not
11 govern non-judicial foreclosures under deeds of trust”).

12 **C. Third Cause of Action**

13 The Third Cause of Action, titled “Wrongful Foreclosure,” is subject to dismissal
14 because JPMorgan and Quality Loan had authority to initiate foreclosure and because Eng
15 has failed to allege tender.

16 As discussed above, JPMorgan obtained all rights under the deed of trust pursuant
17 to the P&A Agreement (see RJN Ex. 9), Eng defaulted on the loan (see id. Ex. 11), and
18 Quality Loan, as agent for JPMorgan, initiated foreclosure by recording a Notice of Default
19 (see id.).

20 Moreover, as in the First Amended Complaint (“FAC”), Eng has failed to allege
21 tender, a prerequisite to a claim for wrongful foreclosure. “Under California law, the ‘tender
22 rule’ requires that as a precondition to challenging a foreclosure sale, or any cause of
23 action implicitly integrated to the sale, the borrower must make a valid and viable tender of
24 payment of the debt,” see Montoya v. Countrywide Bank, No. 09-00641 JW, 2009 WL
25 1813973, at *11 (N.D. Cal. June 25, 2009) (collecting cases), or at least allege his ability to
26 do so, see Bonner v. Select Portfolio Servicing, Inc., No. 10-00609 CW, 2010 WL 2925172
27 (N.D. Cal. July 26, 2010); see also Dubin v. BAC Home Loans Servicing, No. C 10-05065
28 EDL, 2011 WL 794995, at *2 (N.D. Cal. Mar. 1, 2011) (noting “California district courts

1 apply the tender rule in examining wrongful foreclosure claims”).

2 Here, Eng does not allege he has attempted to tender the loan amount or that he
3 has the ability to do so.

4 **D. Fourth Cause of Action**

5 The Fourth Cause of Action, titled “Quiet Title,” is subject to dismissal because
6 securitization of the loan did not divest JPMorgan of the right to foreclose and also because
7 Eng has failed to allege tender.

8 As discussed above, JPMorgan, under the P&A Agreement, acquired the right to
9 foreclose. (See RJN Ex. 9.) Further, even if, as Eng alleges, the loan was securitized,
10 such securitization would not have divested Washington Mutual, or JPMorgan as its
11 successor, of the right to foreclose. See, e.g., Lane v. Vitek Real Estate Indus. Group, 713
12 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) (noting “[t]he argument that parties lose their
13 interest in a loan when it is assigned to a trust pool has . . . been rejected by many district
14 courts”).⁵

15 Moreover, Eng’s “Quiet Title” claim, like his “Wrongful Foreclosure” claim, fails
16 because he has not alleged tender. “To maintain a quiet title claim, a plaintiff is required to
17 allege tender of the proceeds of the loan at the pleading stage . . . [or] plead an ability to
18 tender.” See Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1032 (N.D. Cal. 2010)
19 (internal quotation, citation and emphasis omitted).

20 Finally, a Cause of Action for Quiet Title is an improper means of challenging a
21 foreclosure where, as here, the foreclosure has already occurred. See Lopez v. Chase
22 Home Fin., LLC, No. CV F 09-0449, 2009 WL 981676, at *7 (E.D. Cal. Apr. 9, 2009)
23 (holding “[i]f the foreclosure is successful, title will change, and the quiet title claim is an

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25 ⁵ In the SAC, Eng cites Javaheri v. JPMorgan Chase, No. CV10-8185 ODW, 2011
26 WL 2173786 (C.D. Cal. June 2, 2011), wherein the court denied a motion to dismiss in a
27 case involving a securitized loan. Eng’s citation to Javaheri is unavailing. In that case, the
28 plaintiff alleged Washington Mutual had transferred the loan to a separate entity prior to
securitization, and thereafter executed the P&A Agreement, thus raising the issue of
whether Washington Mutual held the loan on the date its assets were transferred to
JPMorgan. See id. at *5. No such allegation is contained in Eng’s SAC.

1 improper means to challenge foreclosure”).

2 **E. Injunctive and Declaratory Relief**

3 Eng seeks injunctive and declaratory relief. Injunctive relief is not available to Eng
4 because each of his individual causes of action, as discussed above, fails. For the same
5 reason, Eng is not entitled to declaratory relief.

6 **F. Quality Loan’s Status as Trustee and Agent**

7 Eng’s claims against Quality Loan are also subject to dismissal because Quality
8 Loan, as a trustee, comes within the protection provided by California Civil Code § 2924(b),
9 which provides as follows: “In performing acts required by this article, the trustee shall incur
10 no liability for any good faith error resulting from reliance on information received in good
11 faith from the beneficiary regarding the nature and the amount of the default under the
12 secured obligation, deed of trust, or mortgage.” The SAC, like the FAC, contains no factual
13 allegations suggesting Quality Loan acted other than in such good faith reliance.

14 Moreover, Quality Loan, as an agent of the beneficiary, is not liable to Eng for
15 injuries caused by any failure to perform a duty owed solely to JPMorgan. See Ruiz v.
16 Herman Weissker, Inc., 130 Cal. App. 4th 52, 65 (2005) (holding California agency statute
17 “does not render an agent liable to third parties for the failure to perform duties owed to his
18 principal” (emphasis omitted)). As in the FAC, nothing in the SAC Eng suggests Quality
19 Loan is liable for any action it took in its capacity as an agent.

20 **G. Allegations as to CRC**

21 As discussed, Quality Loan was the trustee that initiated and conducted the
22 foreclosure. (See RJN Ex. 11.) Eng alleges CRC was the original trustee under the Deed
23 of Trust. (See SAC ¶ 84.) The SAC contains no factual allegations identifying any action
24 taken by CRC. Absent any factual allegations explaining what CRC is alleged to have
25 done, all claims as to CRC are subject to dismissal. Further, even if CRC had been alleged
26 to have been the trustee that initiated the foreclosure, any claims against CRC would suffer
27 from the same deficiencies identified above, and, consequently, likewise are subject to
28 dismissal.

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H. Leave to Amend

Eng has neither opposed defendants' motions to dismiss nor sought leave to amend. Although the absence of a request for such leave is not dispositive, the Court notes that Eng, at this point, has had three opportunities to state a claim, including an opportunity to cure the deficiencies described in detail in the Court's order dismissing the FAC, and there is no indication any further leave will result in a viable pleading.


Accordingly, the SAC will be dismissed without further leave to amend.

CONCLUSION

For the reasons stated, the above-referenced motions to dismiss are, in each instance, hereby GRANTED.

IT IS SO ORDERED.

Dated: August 24, 2012


MAXINE M. CHESNEY
United States District Judge