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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SALVADOR HERNANDEZ, JR. and
WENDY CUEVAS,

Plaintiffs,

v.

FIRST AMERICAN LOANSTAR
TRUSTEE SERVICES, et al.,

Defendants.

Case No. 10cv00119 BTM(WVG)

**ORDER GRANTING MOTIONS TO
DISMISS**

Defendant First American Loanstar Trustee Services (“Loanstar”) and Defendants Wells Fargo Bank, N.A. (“Wells Fargo”) and HSBC Bank USA, N.A. (“HSBC”), have filed motions to dismiss Plaintiffs’ Complaint for failure to stat a claim. For the reasons discussed below, Defendants’ motions are **GRANTED**.

I. BACKGROUND

Plaintiffs commenced this action in the Superior Court of California, County of San Diego. On January 15, 2010, Defendants removed the action to federal court.

On or about February 15, 2007, Plaintiffs obtained a loan from Wells Fargo in the principal amount of \$448,000, secured by real property located at 1551 Masterson Lane, San Diego, CA 92154 (the “Property”). (Ex. G to Compl.) On June 10, 2009, Loanstar recorded a Notice of Default. (Ex. D to Compl.) On July 16, 2009, Wells Fargo recorded a

1 Substitution of Trustee that substituted Loanstar as the Trustee in lieu of Fidelity National
2 Title Insurance Company. (Loanstar RJN, Ex. A.) On July 23, 2009, the Deed of Trust was
3 assigned by Wells Fargo to HSBC Bank USA National Association as Trustee for Wells
4 Fargo Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-6.
5 (Loanstar RJN, Ex. B.)

6 On September 11, 2009, Loanstar recorded a Notice of Trustee's Sale. (Ex. A to
7 Compl.) On October 1, 2009, Loanstar conducted a trustee sale of the Property. HSBC was
8 the successful purchaser, and Loanstar recorded a Trustee's Deed Upon Sale in favor of
9 HSBC. (Ex. C to Compl.)

11 **II. STANDARD ON MOTION TO DISMISS**

12 Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a "short and plain
13 statement" of the claim showing that plaintiff is entitled to relief and giving the defendant fair
14 notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S.
15 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
16 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient
17 facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696,
18 699 (9th Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in
19 plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff.
20 See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although
21 detailed factual allegations are not required, factual allegations "must be enough to raise a
22 right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct.
23 1955, 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to
24 relief' requires more than labels and conclusions, and a formulaic recitation of the elements
25 of a cause of action will not do." Id.

27 **III. DISCUSSION**

28 In their Complaint, Plaintiffs assert the following causes of action: (1) claim to set

1 aside trustee's sale; (2) claim to cancel trustee's deed; (3) lack of standing; (4) negligence
2 per se - violation of Cal. Bus. & Prof. Code § 17500 (against Wells Fargo only); (5)
3 negligence per se - violations of the Home Ownership Equity Protection Act ("HOEPA"), 15
4 U.S.C. § 1602, et seq. (against Wells Fargo only); (6) negligence per se - violation of Cal.
5 Civil Code § 2924b (against Loanstar and Wells Fargo only); (7) negligence per se - violation
6 of Cal. Fin. Code § 4973(f)(1) (against Wells Fargo only); (8) negligence per se-violation of
7 the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601, et seq. and Regulation Z (against Wells
8 Fargo only); (9) negligent lending (against Wells Fargo only); (10) quiet title; and (11)
9 injunctive relief. Defendants contend that Plaintiffs' Complaint should be dismissed for failure
10 to state a claim. The Court agrees with Defendants.

11
12 A. Claims to Set Aside Sale, Cancel Trustee's Deed, and Quiet Title

13 Plaintiffs seek to set aside the sale of the Property, cancel the Trustee's Deed Upon
14 Sale in favor of HSBC, and quiet title. These claims fail because Plaintiffs have not alleged
15 that they tendered the amounts owing under the loan.

16 Under California law, "an action to set aside a trustee's sale for irregularities in sale
17 notice or procedure should be accompanied by an offer to pay the full amount of the debt for
18 which the property was security." Arnolds Management Corp. v. Eischen, 158 Cal. App. 3d
19 575, 577 (1984). "A valid and viable tender of payment of the indebtedness owing is
20 essential to an action to cancel a voidable sale under a deed of trust." Karlsen v. American
21 Sav. & Loan Assn., 15 Cal. App. 3d 112, 117 (1971). The reason for this requirement is that
22 a court of equity will not use its remedial power to accomplish a futile act that has no
23 beneficial purpose. Id. at 117-18.

24 Plaintiffs do not allege that they have tendered the amounts due under the loan.
25 Therefore, Plaintiffs cannot bring a claim to set aside the trustee's sale or to quiet title. See
26 Manown v. Cal-Western Reconveyance Corp., 2009 WL 2406335, * 6 (S.D. Cal. Aug. 4,
27 2009).

28

1 B. Standing

2 Plaintiffs claim that Defendants lacked standing to take any action on the note or to
3 initiate the foreclosure proceedings because they have not produced the “Original
4 Promissory Note.”

5 Plaintiffs’ theory that the original note must be produced lacks merit.

6 California Civil Code §§ 2924-2924k provide a “comprehensive framework for the
7 regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed
8 of trust.” Moeller v. Lien, 25 Cal. App. 4th 822, 830 (1994). Within this framework,
9 nonjudicial foreclosure proceedings can be instituted by “the trustee, mortgagee, or
10 beneficiary, or any of their authorized agents” by filing a notice of default with the office of the
11 recorder. Cal. Civ. Code § 2924(a)(1). No less than three months after the filing of the
12 notice of default, a notice of sale may be given by “the mortgagee, trustee, or other person
13 authorized to take the sale.” Cal. Civ. Code § 2924(a)(3). There is absolutely no
14 requirement that the original note be in possession of or produced by the party filing the
15 notice of default or giving the notice of sale.

16 Therefore, this claim is dismissed for failure to state a claim.

17
18 C. Negligence Per Se - Statutory Claims

19 Plaintiffs have not stated a valid claim under any of the California or federal statutes
20 referenced in the Complaint.

21
22 1. Cal. Bus. & Prof. Code § 17500

23 Plaintiffs claim that Wells Fargo violated Cal. Bus. & Prof. Code § 17500 by (1) telling
24 Plaintiffs they were getting a typical 30 year fixed-rate loan for the purchase of the Property
25 when they actually received a loan with interest-only payments for the first 15 years; and (2)
26 giving Plaintiffs a “Stated Income Loan” so that Plaintiff’s income could be inflated without
27 documentation to support the borrowed amount, without regard to future ability to pay.

28 Cal. Bus & Prof. Code § 17500 makes it illegal for anyone to engage in false or

1 deceptive advertising. To state a cause of action under this statute, the plaintiff must
2 demonstrate that members of the public are likely to be deceived. Wayne v. Staples, Inc.,
3 135 Cal. App. 4th 466, 484 (2006). Allegations of fraudulent conduct alleged in support of
4 a plaintiff's § 17500 claim must satisfy the heightened pleading requirements of Rule 9(b).
5 Labra v. Cal-Western Reconveyance Corp., 2010 WL 889537 (N.D. Cal. March 11, 2010).

6 Plaintiffs have not alleged facts showing that Wells Fargo engaged in deceptive
7 advertising or otherwise made statements likely to deceive the public. Furthermore Plaintiffs
8 have not pled fraud with specificity. Plaintiffs do not detail what statements were made to
9 Plaintiffs, who made the statements, when the statements were made, and whether the
10 statements were in writing. In the Complaint, Plaintiffs reference a "Commitment Letter"
11 which states that the loan is a "30 year fixed rate first mortgage loan." (Ex. H to Compl.)
12 However, the letter also indicates that the "amortization type" is an "interest only payment,"
13 and the second page specifies that Plaintiffs will make 180 "interest-only" payments of
14 \$2,380.00. It is unclear whether Plaintiffs are relying on other representations made by Wells
15 Fargo.

16 Accordingly, Plaintiffs have failed to state a claim for violation of Cal. Bus. & Prof.
17 Code § 17500.

18 19 2. HOEPA and TILA Violations

20 Plaintiffs allege that Wells Fargo violated the HOEPA and TILA by failing to disclose
21 until the time of signing that they were getting an "interest only" loan that was based on
22 "stated income." Plaintiffs also allege that the final Truth-in-Lending Disclosure was not
23 provided to them at any time. (Compl. ¶ 58.)

24 Setting aside the fact that it appears that Plaintiffs were informed about the interest-
25 only nature of the loan, these claims are barred by the applicable one-year statute of
26 limitations. TILA and HOEPA claims must be brought "within one year from the date of the
27 occurrence of the violation." 15 U.S.C. § 1640(e). Based on the allegations of the Complaint
28 there is no basis for equitable tolling of the statute of limitations. Plaintiffs admit that they

1 *knew at the time of signing* about the true nature of their loan, but it was “too late” to change
2 course “because the Plaintiffs had no time to find another lender and compare, or they would
3 lose out the property they really wanted after an exhaustive search that would meet their
4 lifestyles.” (Compl. ¶ 59.) Furthermore, Plaintiffs allege that they did not get the final truth-in-
5 lending disclosure at all, not that certain terms were incorrect and they had no reason to
6 know until a future time.

7 The alleged violations occurred at the time of closing, in or about February 2007.
8 Plaintiffs did not bring this action until November 16, 2009. Therefore, Plaintiffs’ HOEPA and
9 TILA claims are time-barred.

10

11 3. Cal. Civ. Code § 2924b

12 Plaintiffs allege that Loanstar and Wells Fargo violated Cal. Civil Code § 2924b
13 because the Notice of Default did not specify whether the amount owing on the loan was for
14 “principal, interest, or something else.”

15 However, no part of Cal. Civil Code § 2924b requires that the notice of default
16 separate the amount owed into principal and interest. Cal. Civ. Code § 2924c actually
17 provides the form for notices of default. This form, which was utilized in this case, provides
18 in relevant part, “[Y]ou may have the legal right to bring your account in good standing by
19 paying all of your past due payments plus permitted costs and expenses within the time
20 permitted by law for reinstatement of your account This amount is _____ as of
21 _____.” Section 2924c does not require that the amount owed be divided into principal
22 and interest. Therefore, Plaintiffs have not pled a violation of California law governing
23 notices of default.

24

25 4. Cal. Financial Code § 4973(f)(1)

26 Plaintiffs allege that Wells Fargo violated Cal. Fin. Code § 4973(f)(1) by failing to
27 ensure that Plaintiffs would be able to make the scheduled payments based upon their
28 current and expected income, obligations, employment status, and other financial resources.

1 However, Plaintiffs have failed to allege facts establishing that Cal. Fin. Code § 4973
2 is applicable. Section 4973 prohibits certain acts in connection with “covered loans,” which
3 are defined as follows:

4 (b) “Covered loan” means a consumer loan in which the original principal
5 balance of the loan does not exceed the most current conforming loan limit for
6 a single-family first mortgage loan established by the Federal National
Mortgage Association in the case of a mortgage or deed of trust, and where
one of the following conditions are met:

7 (1) For a mortgage or deed of trust, the annual percentage rate
8 at consummation of the transaction will exceed by more than
9 eight percentage points the yield on Treasury securities having
10 comparable periods of maturity on the 15th day of the month
11 immediately preceding the month in which the application for the
12 extension of credit is received by the creditor.

13 (2) The total points and fees payable by the consumer at or
14 before closing for a mortgage or deed of trust will exceed 6
15 percent of the total loan amount.

16 Cal. Fin. Code § 4970.

17 Plaintiffs do not allege that the annual percentage rate at consummation of the loans
18 exceeded the Treasury securities rate by more than eight percentage points or that the total
19 points and fees paid by Plaintiffs at or before closing exceeded six percent of the total loan
20 amount. Therefore, Plaintiffs have failed to state a claim under Cal. Fin. Code § 4973(f).

21 D. Negligent Lending

22 Plaintiffs allege that Wells Fargo negligently created the loan on a stated loan basis,
23 putting Plaintiffs at risk of not being able to make payments in the future and losing their
24 property. However, Wells Fargo did not owe a general duty of care to Plaintiffs independent
25 of its obligation to comply with all applicable laws and regulations and to perform under the
26 loan agreement. See, e.g., Castaneda v. Saxon Mortg. Services, Inc., ___F. Supp. 2d ___,
27 2009 WL 4640673 (E.D. Cal. Dec. 3, 2009) (holding that no duties arose from loan
28 transaction outside of those in the agreement and that lender did not owe a duty of care to
plaintiffs); Labra, 2010 WL 889537 at * 12 (“Lenders and loan servicers owe no duty to a
borrower other than as expressly agreed to in the promissory note, deed of trust, and
foreclosure statutes.”).

1 E. Accounting

2 Plaintiffs seek an accounting because “the amount of money still owed to defendant
3 WELLS FARGO is unknown to Plaintiffs and cannot be determined without an accounting.”
4 (Compl. ¶ 98.) However, Plaintiffs, as the party owing money, not the party owed money,
5 has no right to seek an accounting. A suit for an accounting lies where an action is *for an*
6 *amount which is unliquidated and unascertained.* St. James Church of Christ Holiness v.
7 Superior Court In and For Los Angeles County, 135 Cal. App. 2d 352, 359 (1955). Since
8 Plaintiffs are seeking an accounting for amounts they allegedly owe, the Court dismisses
9 Plaintiffs’ claim. See Nguyen v. LaSalle Bank Nat. Ass’n, 2009 WL 3297269, * 11 (C.D. Cal.
10 Oct. 13, 2009) (dismissing plaintiffs claim for accounting of amounts due on their loan).

11
12 F. Injunctive Relief

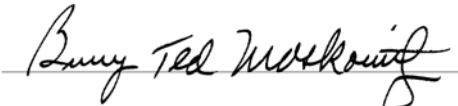
13 Plaintiffs seek an injunction that prohibits Defendants from seeking payment from
14 Plaintiffs on the loans and prohibits HSBC from evicting Plaintiffs. However, injunctive relief
15 is a remedy, not a separate cause of action. Cox Communications PCS, L.P. v. City of San
16 Marcos, 204 F. Supp. 2d 1272, 1283 (S.D. Cal. 2002). Because Plaintiffs’ underlying causes
17 of action have failed to state a claim, Plaintiffs’ claim for injunctive relief is dismissed as well.

18
19 **IV. CONCLUSION**

20 For the reasons discussed above, Defendants’ motions to dismiss are **GRANTED**.
21 Plaintiffs’ Complaint is **DISMISSED** for failure to state a claim. Although the Court has
22 doubts that Plaintiffs can state a valid claim, the Court will grant Plaintiffs leave to file an
23 amended complaint. If Plaintiffs choose to file an amended complaint, they must do so within
24 14 days of the filing of this Order. Failure to do so will result in the entry of judgment
25 dismissing the case.

26 **IT IS SO ORDERED.**

27 DATED: April 12, 2010

28

Honorable Barry Ted Moskowitz
United States District Judge