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

LENN M. HAFFEMAN, and BEVERLY A. HAFFEMAN,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. 12cv00046 BTM (WVG)

**ORDER RE DEFENDANTS’
MOTION TO DISMISS AND
PLAINTIFFS’ MOTION FOR LEAVE
TO FILE A FIRST AMENDED
COMPLAINT**

Pending before the Court are Defendant Wells Fargo’s motion to dismiss the original complaint (Doc. 3) and Plaintiffs’ motion for leave to file a First Amended Complaint (“FAC”) (Doc. 7). For the reasons set forth herein, the Court GRANTS Defendants’ motion to dismiss the original complaint and GRANTS IN PART and DENIES IN PART Plaintiffs’ motion for leave to file an FAC.

I. PROCEDURAL BACKGROUND¹

Plaintiffs’ original complaint in this action contained two causes of action: Violation of California Civil Code § 2923.5 and Declaratory Relief/Injunctive Relief. On January 23,

¹The Court assumes the parties’ familiarity with the underlying facts of this case. For a review, see the Court’s March 9, 2012 Order Denying Request for Injunction against Foreclosure Sale (Doc. 10).

1 2012, Defendant Wells Fargo (“Defendant” or “Wells Fargo”) moved to dismiss the case.
2 The motion to dismiss was set for hearing on April 6, 2012.

3 On February 28, 2012, Plaintiffs made two motions: an ex parte motion for a
4 temporary restraining order preventing Defendants from executing a foreclosure sale, and
5 the currently-pending motion for leave to file a FAC, which was also set for hearing on April
6 6, 2012. The proposed FAC, attached as an exhibit to Plaintiffs’ motion, re-alleges word-for-
7 word Plaintiffs’ claims for violation of § 2923.5 and declaratory/injunctive relief, and adds
8 claims for trespass and breach of the implied covenant of good faith and fair dealing.

9 On March 9, 2012, the Court denied Plaintiffs’ ex parte motion for a TRO, reasoning
10 that Plaintiffs were not likely to prevail on any of their claims and that the balance of equities
11 did not tip in their favor. See Doc. 10. Specifically, the Court reasoned that Plaintiffs could
12 not rely on § 2923.5 because, under the plain terms of the deed of trust, the property at issue
13 (the “Property”) was not Plaintiffs’ primary residence. The Court further reasoned that any
14 defects in the foreclosure process were not likely to entitle Plaintiffs to any declaratory or
15 injunctive relief, since Plaintiffs had failed to establish prejudice. Lastly, the Court noted that
16 Plaintiffs have been in arrears on the loan since August 2010, and that they did not occupy
17 the Property (i.e. they would not experience great hardship resulting from foreclosure), so
18 the balance of equities did not tip in their favor.

19 On March 14, 2012, Wells Fargo filed a response (Doc. 11) to the motion for leave to
20 file an FAC. On March 17, 2012, Plaintiffs filed a paper (Doc. 12) that both opposed the
21 motion to dismiss and replied in support of the motion for leave to file an FAC. On March 19,
22 2012, Wells Fargo filed a reply in support of the motion to dismiss (Doc. 13). The Court
23 considers all these papers together.

24
25 **II. DISCUSSION**
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27 As a threshold issue, Plaintiffs argue that their motion for leave to file an FAC moots
28 the motion to dismiss. The Court disagrees. First, Plaintiffs moved for leave to file an FAC

1 37 days after Wells Fargo filed and served its motion to dismiss--well beyond the 21-day
2 period allotted by Federal Rule of Civil Procedure 15(a)(1)(B) for amending as a matter of
3 course in response to a motion to dismiss. Thus, Plaintiffs are not entitled to amend as a
4 matter of course. Second, two of the four claims presented in the proposed FAC (Doc. 7-1,
5 Ex. A (Proposed FAC)) mirror the two claims in the original complaint, and Wells Fargo has
6 opposed the motion for leave to amend on the ground that amendment would be futile. The
7 Court therefore finds that judicial economy would be served by resolving the motion to
8 dismiss the two claims in Plaintiffs' original complaint in conjunction with Defendants' futility
9 challenge to the motion for leave to file an amended FAC.

10
11 a. Motion to dismiss

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13 Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a "short and plain
14 statement" of the claim showing that plaintiff is entitled to relief and giving the defendant fair
15 notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S.
16 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
17 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient
18 facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696,
19 699 (9th Cir. 1988).

20 Plaintiffs' original complaint contains two causes of action. Plaintiffs have voluntarily
21 dismissed their first cause of action, violation of § 2923.5. (Doc. 12 at 6.) Since the plain
22 language of the Deed of Trust states that the Property is *not* Plaintiffs' primary residence, §
23 2923.5 is not applicable in this case, and the Court dismisses Plaintiffs' § 2923.5 cause of
24 action with prejudice.

25 In Plaintiffs' second cause of action (for declaratory and injunctive relief), Plaintiffs
26 "seek a declaration that the Notice of Default and Notice of Sale are void and of no effect .
27 . . . [and] an order enjoining Defendants from proceeding with the foreclosure sale[.]" (Doc.
28 1-1 at 8 of 39.) Plaintiffs support their claim that the Notice of Default was void on the

1 grounds that First American, the party that recorded the Notice of Default, was not authorized
2 to do so, and that the Notice of Default was filed in violation of the thirty-day notice
3 requirement in the Deed of Trust.

4 As stated in the Court's March 9, 2012 Order, Plaintiffs have failed to allege that First
5 American was not authorized to record the Notice of Default. See Doc. 10 at 5. That Order
6 also explained that Plaintiff failed to allege prejudice resulting from the failure to comply with
7 the thirty-day notice provision, and thus, the failure to comply did not render the notice of
8 default legally deficient. See Knapp v. Doherty, 123 Cal. App. 4th 76, 94 (6th Dist. 2004)
9 (premature notice of sale in violation of statute did not invalidate sale because borrower
10 suffered no prejudice). Lastly, the March 9, 2012 Order noted that Plaintiffs have been
11 unable to make any loan payments since August 2010, and have not alleged any tender of
12 the amount owed in arrears. See Doc. 10 at 7-8 (citing FPCI RE-HAB 01 v. E&G
13 Investments, Ltd., 207 Cal. App. 3d 1018, 1022 (2d Dist. 1989) (“[I]f plaintiffs could not have
14 redeemed the property had the sale procedures been proper, any irregularities in the sale
15 did not result in damages to the plaintiffs.”)). Accordingly, Plaintiff's original complaint fails
16 to state a claim for declaratory relief in the manner requested by Plaintiff.

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18 b. Motion for leave to file an FAC

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20 Federal Rule of Civil Procedure 15(a)(2) permits a party to amend its pleading “only
21 with the opposing party's written consent or the court's leave. The court should freely give
22 leave when justice so requires.”

23 Plaintiffs' proposed FAC re-alleges the § 2923.5 and declaratory/injunctive relief
24 claims verbatim. Plaintiffs assert that they are withdrawing the § 2923.5 claim. For the same
25 reasons as set forth above, the Court DENIES with prejudice Plaintiffs' motion for leave to
26 file an FAC to the extent Plaintiffs seek to include a § 2923.5 claim in the FAC. The Court
27 DENIES the motion without prejudice to the extent Plaintiffs seek to re-allege their previous
28 claim for declaratory/injunctive relief. Any claim for declaratory/injunctive relief added to

1 Plaintiffs' pleading must overcome the deficiencies highlighted in the preceding section.

2 Plaintiffs also add two new causes of action: Trespass and breach of the implied
3 covenant of good faith and fair dealing. In support of their claim for trespass, Plaintiffs
4 proposed FAC alleges that in March 2011, while Plaintiffs maintained a possessory interest
5 in the Property, Defendants or their agents entered the Property without Plaintiffs' consent,
6 changed the locks on the main house, and posted notices of vacancy on the Property.
7 (Proposed FAC ¶ 38.) Wells Fargo argues that the claim for trespass is futile because the
8 Deed of Trust permitted these alleged actions. However, the portion of the Deed of Trust
9 quoted by Wells Fargo permits "Securing the Property" (which can include changing locks)
10 *only if* Plaintiff has "abandoned the Property[.]" See Doc. 11 at 4 (citing RJN (Doc. 3-1) Ex.
11 1 (Deed of Trust) ¶ 9.) Plaintiffs' proposed FAC specifically alleges that Plaintiffs did *not*
12 abandon the property and that Plaintiffs' caretakers occupied the Property at the time of the
13 alleged trespass. (Proposed FAC ¶¶ 17, 39.) Thus, amendment to include a claim for
14 trespass would not be futile, and the Court GRANTS the motion for leave to file an FAC to
15 the extent Plaintiffs seek to include a claim for trespass.

16 Plaintiffs' cause of action for breach of the implied duty of good faith and fair dealing
17 is based on the existence of an alleged oral agreement between Plaintiffs and Wells Fargo
18 pursuant to which Wells Fargo agreed to resolve Plaintiffs' applications for a short sale
19 transaction and/or deed-in-lieu of foreclosure prior to any foreclosure sale. (Proposed FAC
20 ¶ 43.) Wells Fargo argues that any purported oral agreement between the parties modifying
21 Wells Fargo's rights and obligations under the Deed of Trust, including the right to foreclose,
22 is subject to California's statute of frauds. The Court agrees. See Cal. Civ. Code § 2922
23 (extending statute of frauds to mortgages); Secret v. Security Nat. Mortg. Loan Trust 2002-
24 2, 167 Cal. App. 4th 544, 552-53 (4th Dist. 2008) (noting that "[a]n agreement to modify a
25 contract that is subject to the statute of frauds is also subject to the statute of frauds," and
26 holding that an agreement "altering the lender's ability to exercise a right to foreclose under
27 the note and deed of trust due to the borrower's default" was unenforceable because it did
28 not comport with the requirements of the statute of frauds). Accordingly, the Court DENIES

1 with prejudice the motion for leave to file an FAC to the extent Plaintiffs seek to add a claim
2 for breach of the implied duty of good faith and fair dealing based on an alleged oral
3 agreement to modify Defendants' rights and obligations under the loan documents.

4 The Court notes that Plaintiffs moved for leave to file an FAC at an early stage in this
5 case, and Wells Fargo has not alleged any prejudice that would or could result from an
6 amendment to Plaintiffs' pleading at this time.

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III. CONCLUSION

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10 For the reasons set forth above, the Court GRANTS Wells Fargo's motion to dismiss
11 the Complaint. The Court GRANTS IN PART and DENIES IN PART Plaintiff's motion for
12 leave to file an FAC. The Court GRANTS the motion to the extent Plaintiffs seek to include
13 in their FAC a claim for trespass. The Court DENIES the motion with prejudice to the extent
14 Plaintiffs seek to include any § 2923.5 claim or any claim for breach of the implied covenant
15 of good faith and fair dealing arising out of an alleged oral agreement modifying the terms
16 of the loan documents. The Court DENIES the motion without prejudice to the extent
17 Plaintiffs seek to re-allege their previous claim for declaratory/injunctive relief and grants
18 Plaintiffs leave to bring a cause of action for declaratory/injunctive relief that overcomes the
19 deficiencies illustrated in this Order. Plaintiff may not file the proposed First Amended
20 Complaint attached to their motion as Exhibit A. Rather, Plaintiff may file within 20 days of
21 the entry of this order a First Amended Complaint not inconsistent with the terms of this
22 Order.

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28 Because continuous litigation of the pleadings will only delay a decision on the merits,

1 and Plaintiffs are on notice of the required elements of their claims, Defendant Wells Fargo
2 shall answer any amended complaint within 30 days of service and may make any
3 arguments for dismissal as a matter of law in a motion for summary judgment.
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5 **IT IS SO ORDERED.**

6 Dated: September 10, 2012
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HONORABLE BARRY TED MOSKOWITZ
United States District Judge

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