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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BILL DOSCHER,

Plaintiff,

vs.

WELLS FARGO MORTGAGE,
INC.,

Defendants.

Case No.: 15cv01082 BTM(NLS)

**ORDER GRANTING MOTION TO
DISMISS**

For the following reasons, the unopposed motion to dismiss Plaintiff Bill Doscher’s (“Plaintiff”) Complaint, filed by Defendant, Wells Fargo Bank, N.A., erroneously sued as “Wells Fargo Home Mortgage, Inc.,” now a division of Wells Fargo Bank, N.A., (“Wells Fargo”) is **GRANTED**.

I. BACKGROUND

Plaintiff initiated this case in the Superior Court of California for the County of San Diego on April 13, 2015, by filing a Complaint against Wells Fargo Mortgage, Inc. The caption of the Complaint listed other defendants but they were crossed out. The striking of the other defendants appears to be initialed by the Plaintiff. Thus, Wells Fargo is the only defendant. The matter arises out a scheduled foreclosure on Plaintiff’s real property. Wells Fargo removed the action to this Court on May 13, 2015 under 28 U.S.C. § 1332, and filed the pending motion to dismiss on May 20, 2015. Plaintiff did not file an opposition and the motion was taken under submission on July 10, 2015.

1 The following facts are uncontested. On August 23, 2007, Plaintiff obtained
2 a loan of \$520,000 from World Savings Bank (“WSB”), which was secured by a
3 deed of trust recorded against the parcel located at 4788 Beachwood Ct.,
4 Carlsbad, California 92008 (“the property”). (Doc. 6-1, Ex. A.) On December 31,
5 2007, WSB changed its name to Wachovia Mortgage, FSB (“Wachovia”). (Doc.
6 6-1, Ex. C.) In November 2009, the lender changed its name twice more when it
7 was converted to Wells Fargo Bank Southwest, N.A. and merged with Wells
8 Fargo Bank, N.A. (Doc. 6-1, Ex. E.) Plaintiff defaulted on the loan in February
9 2013. (Doc. 6-1, Ex. G., at 33). On September 10, 2014, Defendant began the
10 foreclosure process by recording a notice of default with the San Diego County
11 Recorder’s Office. (Doc 6-1, Ex. G.) A notice of trustee’s sale was subsequently
12 recorded on December 10, 2014. (Doc. 6-1, Ex. H.) The foreclosure sale date
13 has been postponed to September 10, 2015. (Doc. 6-1, at Exh. H.)

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14 **II. DISCUSSION**

15 Plaintiff’s Complaint alleges claims against Wells Fargo for: (1) injunction;
16 (2) permanent injunction; (3) unjust enrichment; and (4) setting aside or vacating
17 the sale. Plaintiff’s main argument is that Wells Fargo lacks standing to foreclose
18 on the property because it is “not the real party in interest, it is not the lender and
19 it is not the assignee of the lender.” (Doc. 1-2, at 3, ¶4.)

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1 **A. Request for Judicial Notice**

2 Wells Fargo argues that Doscher’s claims fail as a matter of law based on
3 judicially noticeable documents which show, inter alia, that Wells Fargo is the
4 party in interest. Wells Fargo requests that the Court take judicial notice of eight
5 such documents. (Doc. 6-1.)

6 Generally, district courts may not consider any material or documents
7 beyond the pleadings on a Rule 12(b)(6) motion. Lee v. City of Los Angeles, 250
8 F.3d 668, 688 (9th Cir. 2001) (overruled on other grounds by Galbraith v. Cnty. of
9 Santa Clara, 307 F.3d 1119, 1125–26 (9th Cir. 2002)). However, under Federal
10 Rule of Evidence 201, courts may take judicial notice of evidence that is not
11 subject to reasonable dispute and “can be accurately and readily determined
12 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
13 201(b)(2).

14 The Court takes notice of the following documents: (1) Certificate of
15 Corporate Existence for WSB, dated April 21, 2006, issued by the Office of Thrift
16 Supervision, Department of the Treasury; (2) a letter dated November 19, 2007,
17 from the Office of Thrift Supervision, Department of the Treasury, confirming the
18 amendment of WSB’s charter and bylaws and its name change to Wachovia; (3)
19 Wachovia’s charter, dated December 31, 2007; (4) a letter dated November 1,
20 2009 from the Comptroller of the Currency confirming Wachovia’s conversion to
a national bank with the name Wells Fargo Bank Southwest, N.A. and its merger
with Wells Fargo Bank N.A.; and (5) a Federal Deposit Insurance Corporation
profile and history of WSB and its transition to Wells Fargo Bank N.A., dated
March 14, 2012. (Doc. 6-1, Exh. B–F.) The Court finds that these documents are
properly subject to judicial notice under Fed. R. Evid. 201. See Rosell v. Wells

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1 Fargo Bank N.A., 2014 WL 4063050, at *3–4 (N.D. Cal. Aug. 15, 2014) (granting
2 judicial notice of the same documents); Hite v. Wachovia Mortgage, No. 2:09–
3 cv–02884–GEB, 2010 U.S. Dist. LEXIS 57732, at *7 (E.D. Cal. June 10,
4 2010)(same). The Court will also take judicial notice of the deed of trust, notice of
5 default, and notice of trustee’s sale, (Doc. 6-1, Exh. A, G–H), pertaining to the
6 conveyance and threatened foreclosure on the property because they are
7 publicly recorded documents the authenticity of which is not at issue. See Rosell,
8 2014 WL 4063050 at *4.

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12 **B. Motion to Dismiss**

13 A complaint must contain a “short and plain statement of the claim showing
14 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Dismissal under Rule
15 12(b)(6) for failure to state a claim is appropriate only when the complaint does
16 not give the defendant fair notice of a legally cognizable claim and the grounds
17 on which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
18 considering whether the complaint is sufficient to state a claim, the court will take
19 all material allegations as true and construe them in the light most favorable to
20 the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The
Ninth Circuit has “repeatedly held that a district court should grant leave to
amend even if no request to amend the pleading was made, unless it determines
that the pleading could not possibly be cured by the allegation of other facts.”
Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
quotation marks omitted).

1 For the reasons stated above, Wells Fargo’s motion to dismiss the claims
2 for injunction and permanent injunction is **GRANTED**.

3 **2. Unjust Enrichment**

4 Plaintiff claims that Wells Fargo will be unjustly enriched by a sum of
5 \$944,624.62 if the property is foreclosed upon. California courts are divided as to
6 whether unjust enrichment is a proper cause of action. Some courts have held
7 that there is no cause of action for unjust enrichment and that it is only a general
8 principle underlying particular legal theories. See Chan Tang, 2012 WL 960373,
9 at *12 (citing Melchior v. New Line Productions, Inc., 106 Cal. App. 4th 779, 793
10 (2003)). Other courts allow unjust enrichment claims to proceed where there is
11 “receipt of a benefit and the unjust retention of the benefit at the expense of
12 another.” Id. (citing Peterson v. Cellco P’ship, 164 Cal. App. 4th 1583, 1593
13 (2008)). In essence, these courts construe unjust enrichment as a quasi-contract
14 claim for restitution. See F.D.I.C. v. Dintino, 167 Cal. App. 4th 333 (2008).
However, an action based on a quasi-contract cannot lie where there exists a
valid express contract covering the same subject matter. See Rutherford
Holdings, LLC v. Plaza Del Rey, 223 Cal. App. 4th 221, 231 (2014).

15 As a party to an express contract, here the mortgage note, Plaintiff can only
16 assert a claim for restitution based on unjust enrichment by “alleg[ing in that
17 cause of action] that the express contract is void or was rescinded.” Id. However,
18 the Complaint makes neither assertion. Nor does Plaintiff plead that Wells
19 Fargo’s receipt of the alleged benefit was unjust because it was “conferred by
20 mistake, fraud, coercion or request” or some other injustice. See Dinosaur
Development, Inc. v. White, 216 Cal. App. 3d 1310, 1316 (1989)). Any benefit
that Wells Fargo may receive by way of foreclosure on the property is not

1 unjustly conferred because it simply compensates the mortgagee for Plaintiff's
2 nonpayment of moneys due on the mortgage note.

3 Therefore, Wells Fargo's motion to dismiss the claim for unjust enrichment
4 is **GRANTED**.

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8 **3. Setting Aside or Vacating Sale**

9 In California, one of the elements of an equitable cause of action to set
10 aside a foreclosure sale is that "the trustee or mortgagee caused an illegal,
11 fraudulent, or willfully oppressive sale of real property pursuant to a power of sale
12 in a mortgage or deed of trust." In re Mortg. Electronic Registration Systems, Inc.,
13 754 F.3d 772, 784 (9th Cir. 2014). Plaintiff fails to state facts purporting that the
14 anticipated foreclosure sale is illegal, fraudulent, or willfully oppressive.
15 Additionally, the sale has not yet occurred and there is nothing to set aside or
16 vacate.

17 For these reasons, Wells Fargo's motion to dismiss the claim to set aside
18 or vacate the sale is **GRANTED**.

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4. Tender Rule in Foreclosure Matters

Lastly, Wells Fargo argues that all of Plaintiff's equitable claims are deficient
because Plaintiff has not alleged an ability to tender the full indebtedness amount.

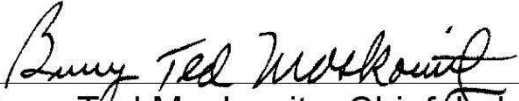
1 See In re Mortg. Electronic Registration Systems, Inc., 754 F.3d 772, 784 (9th Cir.
2 2014). This argument fails because California law excuses mortgagors from the
3 tender requirement where the foreclosure sale has not yet occurred. Id. at 785;
4 Hague v. Wells Fargo N.A., 2011 WL 6055759, at *5 (N.D. Cal. Dec. 6, 2011). In
5 the present case, the record shows that the foreclosure sale has not yet taken
6 place. Although this does not save the Complaint, Plaintiff is not required to tender
7 the full amount of his debt to state a claim for equitable relief.

8 III. CONCLUSION

9 For the reasons discussed above, Wells Fargo's motion to dismiss is
10 **GRANTED**. Plaintiff's claims for injunction, permanent injunction, unjust
11 enrichment, and to vacate or set aside the sale of the property are **DISMISSED**
12 without prejudice. Plaintiff has leave to file an amended complaint within 15 days
13 of the entry of this Order. Failure to do so will result in the entry of a final
14 judgment dismissing this case.

15 **IT IS SO ORDERED.**

16 Dated: August 24, 2015

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18 Barry Ted Moskowitz, Chief Judge
19 United States District Court
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