

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Michelle Clark, an individual,)
)
Plaintiff,)
v.)
Equity One, Inc; et al.,)
)
Defendants.)
_____)

CIV 13-1199 TUC LAB

ORDER

Pending before the court is a motion to dismiss filed by the defendants Aurora Commercial Corp., Lehman ABS Corporation, and Mortgage Electronic Registration Systems, Inc. (Doc. 11)

The plaintiff in this action, Michelle Clark, borrowed money from the defendant Equity One, Inc. to purchase residential property. She subsequently defaulted, and the property was sold at a non-judicial foreclosure trustee’s sale. In the pending action, Clark claims that none of the defendants had “standing” to foreclose and she was fraudulently induced to borrow the money in the first place. In the pending motion, the defendants move that the complaint be dismissed with prejudice pursuant to Fed.R.Civ.P. 8, 9(b), and 12(b)(6).

The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having received the written consent of all appearing parties. *See* FED.R.CIV.P. 73; (Docs. 10, 21). The court finds the motion suitable for decision without oral argument. *See* Fed.R.Civ.P. 78(b).

1 On August 6, 2013, shortly after the sale, Clark filed the pending action in Pima County
2 Superior Court. (Doc. 1-2, p. 5) Her complaint is divided into four claims: Lack of Standing
3 to Foreclose, Fraud in Concealment, Fraud in Inducement, and Declaratory Relief. (Doc. 1-2,
4 pp. 20-28)

5 Also included within the complaint is a request for injunctive relief. (Doc. 1-2, p. 28)
6 Clark argues she is entitled to relief because she can establish “(A) a strong likelihood of
7 success on the merits; (B) the possibility of irreparable injury not remediable by damages; (C)
8 a balance of hardships in [her] favor; and (D) public policy favoring the requested relief.” *Id.*

9 On September 20, 2013, the action was removed to this court by the defendant Aurora
10 Commercial Corp. based on diversity jurisdiction. (Doc. 1, p. 1) Clark was evicted on
11 November 4, 2013. (Doc. 11, p. 4)

12 The defendants Aurora Commercial Corp., Lehman ABS Corporation, and Mortgage
13 Electronic Registration Systems, Inc. filed the pending motion on December 19, 2013. (Doc.
14 11) They move that this court dismiss the complaint with prejudice pursuant to Fed.R.Civ.P. 8,
15 9(b), and 12(b)(6). *Id.*

16 17 Standard of Review

18 “A Rule 12(b)(6) motion tests the legal sufficiency of the claim.” *Cook v. Brewer*, 637
19 F.3d 1002, 1004 (9th Cir. 2011). The claim must allege a legally cognizable theory of relief and
20 include factual allegations sufficient to support that theory. *Hinds Investments, L.P. v. Angioli*,
21 654 F.3d 846, 850 (9th Cir. 2011).

22 To survive the motion to dismiss, “[f]actual allegations must be enough to raise a right
23 to relief above the speculative level . . . on the assumption that all the allegations in the
24 complaint are true even if doubtful in fact.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555,
25 127 S.Ct. 1955, 1965 (2007) (internal punctuation omitted). “[A] well-pleaded complaint may
26 proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that
27 a recovery is very remote and unlikely.” *Id.* at 556, 1965 (internal punctuation omitted).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Discussion

In Count 1, Clark claims the defendants lack standing to foreclose because they cannot prove they have a beneficial interest in the note. Moreover, she argues MERS does not have the authority to act as the lender’s agent and is merely a sham beneficiary. In Count 4, she reiterates her objections to the trustee sale and moves that this court award the property to her. Clark’s objection to the propriety of the sale, however, comes too late.

Pursuant to A.R.S. § 33-811(C), “[t]he trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain standard time on the last business day *before* the scheduled date of the sale.” (emphasis added) Clark’s action was filed *after* the sale had already occurred. She has waived any objection to the propriety of the sale. *See BT Capital, LLC v. TD Service Co. of Arizona*, 229 Ariz. 299, 301, 275 P.3d 598, 600 (2012) (“Where, as here, a trustee’s sale is completed, a person subject to § 33–811(C) cannot later challenge the sale based on pre-sale defenses or objections.”). Counts 1 and 4 are precluded by the waiver provision of A.R.S. § 33-811(C).

The waiver provision, however, does not affect Counts 2 and 3 because they do not depend on the validity of the sale. *See Custom Homes By Via LLC v. Bank of Oklahoma*, 2013 WL 5783400, 5 (D.Ariz.2013).

In Count 2, Clark claims the “[d]efendants concealed the fact that the Loans were securitized as well as the terms of the Securitization Agreements” (Doc. 1-2, p. 24) In Count 3, she claims the defendants intentionally misrepresented to her that they are the “holder and owner” of the note and that they have the authority to foreclose on the property. Had she not been so misled, she would not have borrowed the money in the first place.

These are both claims for fraud. Accordingly, they must be constructed in accordance with Fed.R.Civ.P. 9, which states that “circumstances constituting fraud” must be stated with “particularity.” In other words, “the pleader must state the time, place, and specific content of

1 the false representations as well as the identities of the parties to the misrepresentation.”
2 *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir.
3 1986). Clark did not do that. Accordingly, the claims should be dismissed.

4 The court finds in the alternative that these claims are barred by the three-year statute of
5 limitations for fraud. A.R.S. § 12-543(3). The alleged misrepresentations were made in 2003
6 when the money was borrowed. Clark filed her complaint in 2013, almost ten years later. Clark
7 offers no argument to the contrary in her response. (Doc. 13) Accordingly, the court concludes
8 these claims must be dismissed.

9 The court further notes that the nature of these two claims makes them particularly
10 problematic. In Count 3, Clark alleges the defendants intentionally misrepresented to her that
11 they are the “holder and owner” of the note and that they have the authority to foreclose on the
12 property. This was not a misrepresentation. The defendants *did* have the authority to foreclose.
13 As the deed of trust specifically states, “MERS holds . . . legal title to the interests granted by
14 the Borrower” and has “the right to foreclose and sell the property.” (Doc. 11-1, p. 8) This is
15 a true statement of how MERS operates. *See Cervantes v. Countrywide Home Loans Inc.*, 656
16 F.3d 1034, 1038-39 (9th Cir. 2011); *see also Hogan v. Washington Mut. Bank, N.A.*, 230 Ariz.
17 584, 585, 277 P.3d 781, 782 (2012) (“Arizona’s non-judicial foreclosure statutes do not require
18 the beneficiary to prove its authority or ‘show the note’ before the trustee may commence a
19 non-judicial foreclosure.”). A true statement cannot support an action for fraud. *See Meritage*
20 *Homes Corp. v. Hancock*, 522 F.Supp.2d 1203, 1219 (D.Ariz. 2007) (“A true statement cannot
21 form the basis for a fraudulent inducement claim. . . .”).

22 In Count 2, Clark claims the “[d]efendants concealed the fact that the Loans were
23 securitized as well as the terms of the Securitization Agreements” (Doc. 1-2, p. 24) She
24 further argues she reasonably relied on the defendants’ misrepresentations to her detriment. *Id.*

25 Presumably this securitizing occurred after the loan was made, sold, and bundled, so it
26 is difficult to see how the defendants could have concealed what had not yet occurred. In the
27 alternative, Clark might be claiming that the defendants concealed their intentions to sell the
28

1 note some time in the future. This theory of the case, however, fails to account for the statement
2 in the deed of trust warning Clark of this very possibility. The deed of trust explicitly states that
3 the “Note or a partial interest in the Note (together with [the deed of trust]) [could] be sold one
4 or more times without prior notice to Borrower.” (Doc. 11-1, p. 16, ¶ 20) It is difficult to see
5 how Clark could have reasonably relied on the defendants’ alleged misrepresentation in light
6 of this explicit notice to the contrary.

7 Embedded within the complaint is a request for injunctive relief. (Doc. 1-2, p. 28) Clark
8 argues she is entitled to relief because she can establish “(A) a strong likelihood of success on
9 the merits; (B) the possibility of irreparable injury not remediable by damages; (C) a balance
10 of hardships in [her] favor; and (D) public policy favoring the requested relief.” *Id.* Clark,
11 however, has not established “a strong likelihood of success on the merits” on any of her claims.
12 In fact, she has not alleged any claims that will survive the pending motion to dismiss.
13 Injunctive relief will not be granted. *See Henkels v. J.P. Morgan Chase*, 2011 WL 2357874,
14 7 (D.Ariz. 2011) (“Plaintiff must base his requests for injunctive and declaratory relief on a
15 cognizable legal theory.”).

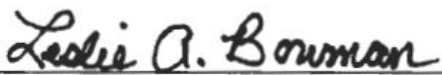
16 In her response to the pending motion, Clark requests permission to amend the complaint
17 to add a claim for wrongful foreclosure. Her request, however, is procedurally improper
18 because she fails to comply with the Local Rules, which require a movant seeking to amend to
19 submit a copy of the proposed amended pleading for the court’s inspection. LRCiv. 15.1. The
20 defendants noticed this oversight in their reply brief, but Clark has made no attempt to correct
21 her error.

22 Moreover, wrongful foreclosure is not a cause of action currently recognized by the
23 Arizona state courts. *Cervantes v. Countrywide Home Loans Inc.*, 656 F.3d 1034, 1042-43 (9th
24 Cir. 2011). There have been a few instances where a federal district court has permitted a
25 wrongful foreclosure action to proceed on the assumption that Arizona might recognize that
26 cause of action, but in those cases cited by Clark, the action was premised on the theory that the
27 foreclosure was wrongful because the plaintiff was not in default. *Id.* Clark makes no such
28

1 allegation here. Accordingly, even if this court were to permit a wrongful foreclosure claim,
2 Clark fails to allege a factual basis to support such a claim. *See In re Mortgage Eletronic*
3 *Registration Systems, Inc.*, ___ F.3d.___, 2014 WL 2611314, *9 (9th Cir. 2014) (“But even if we
4 were to assume that the tort of wrongful foreclosure exists in Arizona, one of its elements would
5 very likely be lack of default or tender to cure the default”). Accordingly,
6

7 IT IS ORDERED that the motion to dismiss filed by the defendants Aurora Commercial
8 Corp., Lehman ABS Corporation, and Mortgage Electronic Registration Systems, Inc. is
9 GRANTED. (Doc. 11) Clark’s request to file an amended complaint adding a claim for
10 wrongful foreclosure is “procedurally improper and substantively unsupported.” *Cervantes v.*
11 *Countrywide Home Loans Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011). The Clerk of the Court is
12 instructed to enter judgment accordingly and close this case.
13

14 DATED this 2nd day of July, 2014.

15
16 
17 _____
18 Leslie A. Bowman
19 United States Magistrate Judge
20
21
22
23
24
25
26
27
28