

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV17-03153 JAK (KSx)

Date July 24, 2017

Title Jose A Miranda v. SCME Mortgage Bankers, Inc., et al.

Present: The Honorable **JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE**

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (DKT. 11);

PLAINTIFF'S MOTION TO REMAND CASE TO STATE COURT (DKT. 22)

JS-6 as to Quality Loan Service Corp., Aztec Foreclosure Corp. and SCME Mortgage Bankers Inc.

I. Introduction

Jose Miranda ("Plaintiff") brought this action in the Los Angeles Superior Court against SCME Mortgage Bankers, Inc. ("SCME"), Quality Loan Service Corporation ("Quality"), Aurora Loan Services LLC ("Aurora"), Nationstar Mortgage LLC ("Nationstar"), Wells Fargo Bank, N.A. ("Wells Fargo") and Aztec Foreclosure Corporation ("Aztec") (collectively, "Defendants"). Dkt. 1 at 12. The Complaint advances the following causes of action: (i) unfair competition; (ii) wrongful foreclosure; (iii) fraud; and (iv) cancellation of an instrument. *Id.* On April 26, 2017, Defendants removed the action. Dkt. 1. On May 3, 2017, Defendants filed a Motion to Dismiss ("Motion to Dismiss"). Dkt. 11. Plaintiff opposed the Motion to Dismiss (Dkt. 36), and Defendants replied. Dkt. 41. On May 30, 2017, Plaintiff filed a Motion to Remand ("Motion to Remand"). Dkt. 22. Defendants opposed the Motion to Remand (Dkt. 31), and Plaintiff replied. Dkt. 35.

On July 6, 2017, a hearing on the Motions was held, and they were taken under submission. Dkt. 45. For the reasons stated in this Order, the Motion to Remand is **DENIED** and the Motion to Dismiss is **GRANTED**.

II. Factual Background

A. The Parties

Plaintiff is a citizen of California. Notice of Removal, Dkt. 1 at 3 ¶ 4. Nationstar is a citizen of Delaware and Texas. *Id.* at 3 ¶¶ 5-6. Wells Fargo is a citizen of South Dakota. *Id.* at 4 ¶ 7. Aurora is a citizen of Delaware and Colorado. *Id.* at 4 ¶ 8. Quality and Aztec each is a citizen of California. Compl., Dkt. 1 at 14 ¶¶ 7-8. SCME was a California Corporation that has been defunct since 2008. *Id.* at 13 ¶ 2. SCME has not been served. Dkt. 37.

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B. The Loan

On October 21, 2004, Plaintiff acquired the subject property (“Property”), which is located at 15239 East Bernard Court, Hacienda Heights, California. Compl., Dkt. 1 ¶¶ 1,15. Plaintiff borrowed \$615,000 from SCME (“Loan”) that was memorialized in a promissory note (“Note”), and secured by a deed of trust (“Deed of Trust”) with respect to the Property. *Id.*; Ex. 1 to Request for Judicial Notice (“RJN”), Dkt. 12.¹

On March 10, 2009, a substitution of trustee was recorded that identified Quality as the successor trustee. Compl., Dkt. 1 at 19 ¶ 27. On May 1, 2009, Quality filed a notice of trustee sale with respect to the Property. *Id.* ¶ 28. On September 1, 2010, an Assignment of Deed of Trust was recorded. It assigned the Deed of Trust to Aurora. Ex. 2 to RJN. On January 31, 2011, another notice of trustee’s sale was recorded as to the Property. *Id.* at 20 ¶ 30; Ex. 7 to Compl., Dkt. 1. On February 28, 2011, a notice of rescission of trustee’s deed upon sale was recorded. Compl., Dkt. 1 at 20 ¶ 31; Ex. 8 to Compl., Dkt. 1.

On January 31, 2013, an Assignment of Deed of Trust was recorded. It assigned the Deed of Trust to Nationstar. Ex. 3 to RJN. On February 21, 2014, an Assignment of Deed of Trust was recorded assigning the Deed of Trust to Wells Fargo, as trustee. Ex. 4 to RJN.

On September 10, 2015, a notice of default was recorded based on the claim that Plaintiff had not met the payment obligations under the Note. Ex. 5 to RJN. The notice of default stated that Aztec was substituted as the trustee under the Deed of Trust. *Id.* On February 10, 2016, a notice of trustee’s sale was recorded. It stated that a foreclosure sale of the Property would proceed on March 9, 2016. Ex. 6 to RJN. The Property was sold on March 8, 2017. Ex. 7 to RJN. On March 14, 2017, the trustee’s deed upon sale was recorded. *Id.*

C. The Allegations of the Complaint

The Complaint alleges that SCME violated California law in issuing the Loan to Plaintiff. Compl., Dkt. 1 at 16-18 ¶¶ 11-22. It alleges that SCME’s actions are all unlawful because SCME has been a defunct corporation without a valid license since 2008. *Id.* ¶ 22. The Complaint alleges that the Notice of Default issued by Quality on January 15, 2009 is improper because Quality failed to file a due diligence declaration. *Id.* ¶ 26. The Complaint alleges that the September 2015 notice of default is deficient because it did not accurately state the amounts allegedly owed under the Note, confirms that Plaintiff was not contacted as

¹ Pursuant to Fed. R. Evid. 201, Defendants seek judicial notice of the Deed of Trust, the recorded assignments of the Deed of Trust, the Notice of Default, the Notice of Trustee’s Sale, and the Trustee’s Deed upon sale, all of which concern the Property. RJN, Dkt. 12. Defendants also seek judicial notice of the dockets in various bankruptcy proceedings commenced by Plaintiff and concerning the Property. Courts may take judicial notice of facts that are “not subject to reasonable dispute” where they are “generally known within the trial court’s territorial jurisdiction” or “can [] accurately and readily [be] determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Some of these documents are referred to in the Complaint. “[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Under Fed. R. Evid. 201, a court may also take judicial notice of “matters of public record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). In light of the foregoing standards, the request for judicial notice is **GRANTED**. Fed. R. Evid. 201(c)(2).

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part of the declaration of due diligence and was never served on Plaintiff. *Id.* ¶ 33. The Complaint alleges that Defendants wrongfully foreclosed on the Property because Plaintiff was not provided with proper notice of the sale and thereby an opportunity to cure the default. *Id.* ¶ 45.

III. Analysis

A. Legal Standards

1. Motion to Remand

A motion to remand is the procedure used to challenge the removal of an action. *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). In general, a civil action may be removed only if it could have been filed initially in a federal court. 28 U.S.C. § 1441(a). The removing party has the burden of establishing that removal was proper. *Id.* “If a case is improperly removed, the federal court must remand the action because it has no subject-matter jurisdiction to decide the case.” *ARCO Env’tl. Remediation, L.L.C. v. Dep’t of Health & Env’tl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000). The removal statute is to be strictly construed; any doubt about removal jurisdiction is to be resolved in favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

Federal courts have subject matter jurisdiction where the adverse parties are citizens of different states, and the amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1332, 1441. “[O]ne exception to the requirement of complete diversity is where a non-diverse defendant has been ‘fraudulently joined.’” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). “[F]raudulently joined defendants will not defeat removal on diversity grounds.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).

Fraudulent joinder “is a term of art.” *Morris*, 236 F.3d at 1067. “Joinder of a non-diverse defendant is deemed fraudulent, and the defendant’s presence in the lawsuit is ignored for purposes of determining diversity, [i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.” *Id.* (internal quotations omitted and alteration in original). The defendant “is entitled to present the facts showing the joinder to be fraudulent.” *Id.*; see also *id.* at 1068 (citing *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 263 (5th Cir. 1995), for the proposition that “[f]raudulent joinder claims may be resolved by ‘piercing the pleadings’ and considering summary judgment-type evidence such as affidavits and deposition testimony”). In a claim of fraudulent joinder, the defendant “must take and carry the burden of proof.” *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (“If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader’s deductions.”).

A district court must determine whether there is subject matter jurisdiction before reaching the merits of an action. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 94 (1998).

2. Motion to Dismiss

Fed. R. Civ. P. 8(a) provides that a “pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief” The complaint must state

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facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a “formulaic recitation of the elements of a cause of action.” *Id.* at 555. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Application

1. Motion to Remand

Plaintiff argues that this action should be remanded because there is no federal subject matter jurisdiction. He contends that there is not complete diversity among the parties because SCME, Quality and Aztec each is a citizen of California, as is Plaintiff. Defendants contend that there is diversity jurisdiction because Quality and Aztec have been fraudulently joined as defendants. Therefore, their California citizenship does not affect the diversity analysis. Plaintiff also argues that this action should be remanded because it was improperly removed, because neither Quality nor Aztec consented. Defendants reply that the consent of Quality and Aztec was not required because both were fraudulently joined as parties.

Defendant argues that Quality and Aztec were fraudulently joined because Plaintiff cannot state a claim against either of them. Quality was the trustee on the Deed of Trust from January 15, 2009 to August 31, 2015. Ex. 5 to RJN, Dkt. 3 at 2. Aztec was substituted as the trustee under the Deed of Trust on August 31, 2015. *Id.* Quality recorded the foreclosure notices in 2009, and Aztec recorded the present foreclosure notices in 2016. Defendants contend that the actions of Quality and Aztec related to the foreclosure filings and trustee’s sale are privileged and protected from Plaintiff’s tort claims under Cal. Civ. Code § 2924(d).

Cal. Civ. Code § 2924(d) provides:

All of the following shall constitute privileged communications pursuant to Section 47:

- (1) The mailing, publication, and delivery of notices as required by this section.
- (2) Performance of the procedures set forth in this article.
- (3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.

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“These statutes protect trustees from tort claims arising from conduct regarding notices in non-judicial foreclosure.” *Moreno v. Wells Fargo*, 2011 WL 6372637, at *8 (N.D. Cal. Dec. 20, 2011) (citing *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 339 (2008)). Absent a showing that the trustee acted with malice, this privilege protects trustees from any tort claim arising out of the statutorily required mailing, publication, and delivery of notices in non-judicial foreclosure, and the performance of statutory non-judicial procedures. *Kachlon*, 168 Cal. App. 4th at 339.

Plaintiff contends that this privilege does not apply because Quality and Aztec did not act in good faith. In support of this position, Plaintiff cites Cal. Civ. Code § 2924(b), which provides: “In performing acts required by this article, the trustee shall incur no liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed of trust, or mortgage.”

The allegations in the Complaint do not address errors based on a trustee’s reliance on information provided by the beneficiary. Thus, Defendants do not contend that the privilege under Cal. Civ. Code § 2924(b) applies. Instead, as noted, they rely on Cal. Civ. Code § 2924(d). There are no allegations in the Complaint that would support a finding that Quality and Aztec did not act in good faith. The only specific factual allegations as to the conduct of Quality and Aztec are that the notice of default Quality filed in 2009 is “illegal” because Quality “failed to file its ‘due diligence’ declaration as required by the foreclosure statute.” Compl., Dkt. 1 ¶ 26. Thus, it is alleged that the actions Quality took to carry out a trustee’s sale were illegal because Quality failed to comply with the statutory procedures. This is the precise conduct that is privileged under Cal. Civ. Code § 2924(d).

Plaintiff contends that, because he has alleged that Quality and Aztec and all other Defendants engaged in fraud, the Complaint provides a basis for the claim that the privilege does not apply. Bare allegations of fraud are not sufficient to overcome the privilege of Cal. Civ. Code § 2924(d). Bare allegations are also insufficient under Fed. R. Civ. P. 9(b). There are no allegations in the Complaint from which a plausible inference could be drawn that either Quality or Aztec acted with malice in carrying out its duties as trustees. Thus, Cal. Civ. Code § 2924(d) bars all of the claims against these two defendants.

For the foregoing reasons, Quality and Aztec were fraudulently joined Defendants. *Moreno*, 2011 WL 6372637, at *8.² Because there is complete diversity of citizenship, the Motion to Remand is **DENIED**.

2. Motion to Dismiss

a) Wrongful Foreclosure

(1) Legal Standards

A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure. A

² Plaintiff also argues that the citizenship of SCME defeats complete diversity. Because Plaintiff has not served SCME, its citizenship is not at issue. Dkt. 37. Further, the Complaint alleges that SCME no longer exists, but is defunct. For this additional reason, its citizenship is not relevant to the determination of diversity jurisdiction.

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foreclosure initiated by one with no authority to do so is wrongful for purposes of such an action [O]nly the original beneficiary, its assignee or an agent of one of these has the authority to instruct the trustee to initiate and complete a nonjudicial foreclosure sale.

Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919, 929 (2016) (citations omitted).

To maintain a wrongful foreclosure claim,

a plaintiff must allege that (1) defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) plaintiff suffered prejudice or harm; and (3) plaintiff tendered the amount of the secured indebtedness or were excused from tendering.

Chavez v. Indymac Mortgage Servs., 219 Cal. App. 4th 1052, 1062 (2013).

(2) Application

Defendants argue that to allege a wrongful foreclosure, the borrower must tender or offer to tender a sum sufficient to cure the default. Because the Complaint makes no allegations as to tender, Defendants argue the claim is deficient. In California, the tender rule requires that a plaintiff seeking to bar or set aside a foreclosure must allege that he or she offered to tender the amount outstanding and was able to do so at the time the offer was made. *Karlsen v. Am. S&L Ass'n*, 15 Cal. App. 3d 112, 118 (1971). “When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure.” *Alicea v. GE Money Bank*, 2009 WL 2136969, at *3 (N.D. Cal. July 16, 2009). The tender rule applies at all stages of the foreclosure proceeding. *Fammilop v. Wells Fargo Bank, N.A.*, 2011 WL 61614, at *3 (C.D. Cal. Jan. 4, 2011) (“[A] plaintiff is required to offer tender for the full amount owed to sustain a cause of action in regards to any aspect of the sales procedure.”). Under California law, the tender rule applies to “any cause of action implicitly integrated to the sale” of the plaintiff’s property. *Montoya v. Countrywide Bank, F.S.B.*, 2009 WL 1813973, at *11 (N.D. Cal. June 25, 2009).

There are four exceptions to the tender rule:

First, if the borrower’s action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. Second, a tender will not be required when the person who seeks to set aside the trustee’s sale has a counterclaim or setoff against the beneficiary. In such cases, it is deemed that the tender and the counter claim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. Third, a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale. . . . Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee’s deed is void on its face.

Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 112-13 (2011) (citations omitted).

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Defendants argue that Plaintiff has neither alleged nor offered to pay the amount due on the Loan. The tender requirement applies, and has not been satisfied. Plaintiff has not alleged that he has the ability to tender. Nor has Plaintiff presented support for the application of any of the exceptions to the tender rule. Plaintiff argues that he is not required to allege tender. Thus, he contends that the sale is void because Defendants did not comply with the procedures required by California law. This includes a failure to provide Plaintiff with notice of default or of the sale. He argues that “[a] sale is rendered void . . . when the defects are substantial, such as when there has been a failure to give notice of sale to the trustor or to specify the correct default in the notice of default.” *Ram v. OneWest Bank, FSB*, 234 Cal. App. 4th 1, 11 (2015). Plaintiff argues that he need not allege tender because “trustors attacking a void deed are ‘not required to meet any of the burdens imposed when, as a matter of equity, a party wishes to set aside a voidable deed.’” *Id.* (quoting *Dimock v. Emerald Properties*, 81 Cal. App. 4th 868, 878 (2000)).

“A sale is not rendered void merely because of minor or technical defects.” *Id.* “An allegation of tender of the indebtedness is necessary when the person seeking to set aside the foreclosure sale asserts the sale is voidable due to irregularities in the sale notice or procedure.” *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 801 (2013). “A nonjudicial foreclosure sale is accompanied by a common law presumption that it ‘was conducted regularly and fairly.’” *Melendrez v. D & I Inv., Inc.*, 127 Cal. App. 4th 1238, 1258 (2005) (quoting *Brown v. Busch*, 152 Cal. App. 2d 200, 204 (1957)). “This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity.” *Id.* “It is the burden of the party challenging the trustee’s sale to prove such irregularity and thereby overcome the presumption of the sale’s regularity.” *Id.* Thus, Plaintiff has the burden to “affirmatively to plead facts demonstrating the impropriety [of the sale].” *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 270 (2011) *disapproved of on other grounds by Yvanova*, 62 Cal. 4th 919.

“A deed of trust, which binds the trustor, may direct the trustee to include in the deed to the property recitals that notice was given as required under the deed of trust and state that such recitals shall be conclusive proof of the truthfulness and regularity thereof.” *Little v. Cfs Serv. Corp.*, 188 Cal. App. 3d 1354, 1359 (1987). Under such circumstances, “notice defects are deemed voidable, not void.” *Ram*, 234 Cal. App. 4th at 19; *see also Little*, 188 Cal. App. 3d at 1359 (“Where there has been a notice defect and conclusive presumption language in the deed, courts have characterized the sales as ‘voidable.’”). California courts have held that where “the trustee’s deed upon sale recites that the trustee complied with the deed of trust and all applicable statutory requirements of the State of California” and “[n]o inconsistent recitals appear on the face of the trustee’s deed,” then “any notice defects are deemed voidable, not void.” *Ram*, 234 Cal. App. 4th at 19; *accord West*, 214 Cal. App. 4th at 802 (“The third amended complaint alleged only procedural irregularities in the sale notice and procedure. The trustee’s deed upon sale recites that the trustee complied with the deed of trust and all applicable statutory requirements of the State of California. No inconsistent recitals appear on the face of the trustee’s deed. Thus, any notice defects are deemed voidable, not void.”).

This case presents the same circumstances as those in *Ram* and *West*. The trustee’s deed upon sale recites that the trustee, Aztec, has complied with all applicable statutory requirements and performed all duties required by the Deed of Trust. Ex. 7 to RJN, Dkt. 12 at 54. It also recites that all notice requirements were satisfied. *Id.* at 55. No inconsistencies or irregularities appear on the face of the trustee’s deed. Thus, any notice defects would make the sale voidable, not void.

Plaintiff must allege tender, or an exception from the tender requirement, to set aside the trustee’s sale. *Ram*, 234 Cal. App. 4th at 19; *West*, 214 Cal. App. 4th at 802. The Complaint does not do so. Nor does it

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adequately allege fraud for the reasons state in the discussion that follows. For the foregoing reasons, the Complaint does not sufficiently plead wrongful foreclosure and the Motion to Dismiss is **GRANTED** as to this cause of action, and it is dismissed, without prejudice to the filing of an amended complaint that presents allegations made in good faith and in compliance with Fed. R. Civ. P. 11.³

b) Fraud

(1) Legal Standards

Fed. R. Civ. P. 9(b) requires that a complaint “state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Rule 9(b) requires a plaintiff to allege specific details about the fraud “including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted). Allegations must be “specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Id.* (internal quotation marks omitted); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (a plaintiff must “articulate the who, what, when, where and how of the alleged misconduct”).

Under California law, the “indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).

(2) Application

The Complaint does not plead fraud with any particularity. It alleges that Defendants committed fraud by recording illegal instruments. Compl., Dkt. 1 at 22 ¶ 49. It also alleges that the various assignments of the Deed of Trust were illegal, and that to have recorded them constituted fraud. *Id.* ¶¶ 50-51. The Complaint does not sufficiently explain the basis on which Plaintiff contends that the assignments were illegal. To the extent that Plaintiff contends that assignments were illegal in substituting Quality and Aztec as the trustee, such a claim is barred as a matter of law. Those assignments have been recorded. “Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section.” Cal. Civ. Code § 2934a(d).

The Complaint also fails to plead with particularity what representations were false or the basis on which Plaintiff contends that they were false. It also does not allege what person(s) made the misrepresentations, or when or how these misrepresentations were made. Nor does it allege knowledge of falsity or any factual allegations establishing intent to defraud, other than the conclusory statement that Defendants “intended that the whole world, including Plaintiff to rely on those recorded documents as a genuine and valid recording of assignments and declarations of due diligence when in fact such assignments and

³ Defendants argue that the dismissal should be with prejudice because Plaintiff cannot allege in good faith that he can make a tender. They refer to his several bankruptcies to support this position, including the one filed on February 1, 2017. That bankruptcy was dismissed without discharge 20 days later. Ex. 15 to RJN. Because this raised factual issues, it is not a sufficient, independent basis to dismiss with prejudice.

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declaration were fraught with illegality and fraud.” Compl., Dkt. 1 at 23 ¶ 51. The Complaint also contains no factual allegations as to the necessary elements of reasonable reliance or injury.

For the foregoing reasons, the fraud claim fails as pleaded, and the Motion to Dismiss is **GRANTED** as to this claim, with leave to amend under the same conditions stated earlier as to the wrongful foreclosure claim.

c) Cancellation of Instrument

“A request to cancel a trustee’s deed is a request for a remedy as opposed to an independent cause of action.” *Qureshi v. Countrywide Home Loans, Inc.*, 2010 WL 841669, at *7 (N.D. Cal. Mar. 10, 2010) (citing *Porter v. Superior Court*, 73 Cal. App. 3d 793, 799 (1977)).

The cancellation of instrument cause of action relies on the same allegations as those made in support of the wrongful foreclosure and fraud causes of action. Because those causes of action have not been adequately alleged, the cancellation of instrument claim necessarily fails. Consequently, the Motion to Dismiss is **GRANTED** as to this claim, with leave to amend under the same conditions stated earlier as to the wrongful foreclosure claim.

d) Cal. Bus. & Prof. Code § 17200

The cause of action for violations of Cal. Bus. & Prof. Code § 17200 (“UCL”) is asserted only against SCME. SCME has not been served. Dkt. 37. Further, to the extent that the UCL claim is intended to be asserted against the other Defendants, it is derivative of the other causes of action. Accordingly, the UCL claim fails for the same reasons that the corresponding claims are deficient. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). For the foregoing reasons, the Motion to Dismiss is **GRANTED** as to this claim, with leave to amend under the same conditions stated earlier as to the wrongful foreclosure claim.

e) Eduardo Garcia Ramos Is a Necessary Party

Defendants also contend that this action should be dismissed because Plaintiff has failed to join Eduardo Garcia Ramos, who is a transferee of interest in the Property by a grant deed. Ex. 13 to RJN, Dkt. 12 at 146. As a co-owner of the Property, Ramos is a necessary and indispensable party. Fed. R. Civ. P. 19; *see also Virginia Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1248 (9th Cir. 1998) (“no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.”).

Plaintiff contends that he will join Ramos in any amended complaint. Opposition, Dkt. 36 at 4. Ramos is also a citizen of California, so he would not defeat diversity jurisdiction if joined because he would not be a defendant. In any amended complaint, Plaintiff shall join Ramos subject to the good faith a Rule 11 obligations stated above.

* * *

For the foregoing reasons, the Motion to Dismiss is **GRANTED** with leave to amend.

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IV. Conclusion

For the reasons stated in this Order, the Motion to Remand is **DENIED** and the Motion to Dismiss is **GRANTED**. Any amended complaint shall be filed no later than August 7, 2017, and shall be based on allegations made in good faith and in full compliance with Fed. R. Civ. P. 11.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
ak _____