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**United States District Court
Central District of California**

YOLANDA P. BERNARDO,
Plaintiff,

v.

THE BANK OF NEW YORK MELLON
AS TRUSTEE FOR CIT MORTGAGE
LOAN TRUST 2007-1; CALIBER HOME
LOANS, INC.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; SUMMIT
MANAGEMENT COMPANY, LLC;
VERICREST FINANCIAL, INC.;
WILMINGTON FINANCE, INC.; and
DOES 1–50, inclusive,
Defendants.

Case № 5:14-cv-01755-ODW(DTBx)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH PREJUDICE [5]**

I. INTRODUCTION

Plaintiff Yolanda P. Bernardo filed this action seeking relief from foreclosure on her home located in Riverside County, California. Before the Court is an unopposed Motion to Dismiss filed by Defendants The Bank of New York Mellon as

1 Trustee for CIT Mortgage Loan Trust 2007-1 (“BONY”); Caliber Home Loans, Inc.
2 (“Caliber”)¹; Mortgage Electronic Registration Systems, Inc. (“MERS”); and Summit
3 Management Company, LLC (“Summit”). (ECF No. 5.) Defendant Wilmington
4 Finance, Inc. (“Wilmington”) separately joined in the Motion. (ECF No. 7.) For the
5 reasons discussed below, the Court **GRANTS** Defendants’ Motion to Dismiss
6 **WITHOUT LEAVE TO AMEND**. (ECF No. 5.)

7 **II. FACTUAL BACKGROUND**

8 Bernardo initiated this action in pro per in Riverside County Superior Court on
9 July 21, 2014. (Not. of Removal Ex. 1.) She brings six claims against Defendants for
10 (1) declaratory relief; (2) fraud; (3) “tortious violation” of the Real Estate Settlement
11 Procedures Act (“RESPA”), 12 U.S.C. § 2607(b); (4) quiet title; (5) violation of the
12 Rosenthal Fair Debt Collections Practices Act (“RFDCPA”), Cal. Civ. Proc. Code §
13 1788.17; and (6) injunctive relief. (*Id.*) Defendants removed the action to federal
14 court on August 25, 2014 based on federal-question jurisdiction. (*Id.* ¶¶ 6–8.)
15 Defendants also allege diversity jurisdiction. (*Id.* ¶¶ 9–11.)

16 Bernardo’s claims arise out of a \$310,000 loan obtained from Wilmington on
17 March 26, 2007. (Compl. ¶) The loan was secured by a Deed of Trust encumbering
18 Bernardo’s home in Murrieta, California. (RJN Ex. A.)² The Deed of Trust identified
19 Financial Title as trustee and MERS as the beneficiary. (*Id.*) Bernardo and her now-
20 deceased husband, as co-owners of the home, signed the Deed of Trust. (*Id.*)

21 On November 11, 2008, a Notice of Default was recorded, noticing that the
22 loan was more than \$22,000 in arrears. (*Id.* Ex. B.) On March 1, 2010, an
23 Assignment of Deed of Trust was recorded, which served to notice the public of the
24 transfer of the beneficial interest under the Deed of Trust from MERS to BONY. (*Id.*

25
26 ¹ According to Caliber, Defendant Vericrest Financial, Inc. was erroneously sued as a separate
27 entity. Caliber was formerly known as Vericrest Financial, Inc. (Mot. 1:2–11.)

28 ² Defendants request judicial notice of 15 documents. (ECF No. 5-2.) The Court **GRANTS** the
Request. Exhibits A–N are publicly recorded documents. Exhibit O is a document of public record
from the California Secretary of State. *See* Fed. R. Evid. 201(b)(2).

1 Ex. C.) A Substitution of Trustee was also recorded on the same date, replacing
2 Financial Title with Mortgage Lender Services, Inc. as trustee. (*Id.* Ex. D.) In
3 addition, a Notice of Trustee's Sale was recorded to notify the public of the time and
4 place of the scheduled sale. (*Id.* Ex. E.)

5 In April 2010, the foreclosure sale was cancelled and the Notice of Default
6 rescinded. (*Id.* Ex. F.) But the loan went into default again and a new Notice of
7 Default was recorded on August 4, 2011. (*Id.* Ex. G.) One month later, a Substitution
8 of Trustee was recording, substituting Summit as trustee under the Deed of Trust. (*Id.*
9 Ex. H.) Two Notices of Trustee's Sale were then recorded in October and November
10 2011. (*Id.* Exs. I, J.) However, the sale was once again cancelled and the Notice of
11 Default was rescinded on December 7, 2011. (*Id.* Ex. K.)

12 On July 8, 2013, a Notice of Default was recorded for a third time. (*Id.* Ex. L.)
13 A Notice of Trustee's Sale was recorded three months later and the property was sold
14 on February 28, 2014. (*Id.* Ex. M.) A Trustee's Deed Upon Sale was recorded on
15 March 5, 2014. (*Id.* Ex. N.)

16 In her Complaint, Bernardo seeks to set aside the foreclosure and obtain a loan
17 modification to pay off the remaining amount due on the loan. Defendants contend
18 that the foreclosure sale was lawful and moved to dismiss after removing this action
19 from state court.³ (ECF No. 5.) Before filing this Motion to Dismiss, counsel for
20 Defendants made several unsuccessful attempts to contact Bernardo to discuss the
21 merits of the Motion in compliance with Local Rule 7-3. Bernardo was required to
22 file an opposition to this Motion no later than September 15, 2014. L.R. 7-9. To date,
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24
25 ³ Wilmington separately joined in the Motion. But the Court notes that Wilmington incorrectly filed
26 the Notice of Joinder on CM/ECF. To the extent the incorrect filing requires a ruling from this
27 Court, the Court **GRANTS** the Notice of Joinder. (ECF No. 7.) Wilmington also incorrectly filed a
28 Notice of Non-Opposition on CM/ECF, also seeking a ruling from the Court separate and apart from
the Court's ruling on this Motion. The Court **STRIKES** this document for being improperly filed.
(ECF No. 11.) Counsel for Wilmington is advised to review CM/ECF filing procedures before
electronically filing any additional documents in the Central District of California.

1 no opposition has been filed. Bernardo did not appear at the October 6, 2014 hearing
2 on this Motion.

3 **III. LEGAL STANDARD**

4 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
5 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
6 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To
7 survive a dismissal motion, a complaint need only satisfy the minimal notice pleading
8 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v.*
9 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to
10 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
11 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,
12 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
13 *Iqbal*, 556 U.S. 662, 678 (2009).

14 The determination whether a complaint satisfies the plausibility standard is a
15 “context-specific task that requires the reviewing court to draw on its judicial
16 experience and common sense.” *Id.* at 679. A court is generally limited to the
17 pleadings and must construe all “factual allegations set forth in the complaint . . . as
18 true and . . . in the light most favorable” to the plaintiff. *Lee v. City of L.A.*, 250 F.3d
19 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations,
20 unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden*
21 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

22 **IV. DISCUSSION**

23 Defendants move to dismiss all six of Bernardo’s claims under Rule 12(b)(6)
24 for failure to state a claim as a matter of law or insufficient pleading. The Court
25 addresses the sufficiency of each of Bernardo’s claims below.

26 **A. Fraud**

27 Defendants argue that Bernardo’s allegations fail to support her claim for fraud
28 and that her claim is also barred by the statute of limitations. The Court finds that

1 Bernardo’s fraud claim is premised on two alleged acts. First, Bernardo alleges that
2 the foreclosure was fraudulent because it was done by Summit, which was
3 “unlicensed” at the time and has not been allowed to conduct business in California
4 since 1986. (Compl. ¶ 41.) Second, Bernardo alleges that her signature was “deleted”
5 from the Promissory Note for the loan even though both she and her husband signed
6 the note. (*See id.* ¶¶ 44–53.) Neither of Bernardo’s alleged acts can sustain a claim
7 for fraud.

8 With respect to Summit’s allegedly unlicensed status at the time of foreclosure,
9 Bernardo’s allegations are based on the status of an unrelated entity. Attached to the
10 Complaint is a printout from the California Secretary of State’s website. (*See* Compl.
11 Ex. A.) The printout indicates that the entity “Summit Management Company, Inc.”
12 was dissolved in 1986. (*Id.*) But Defendant Summit Management Company, LLC is
13 not the same entity, but rather a limited liability company. (*See* RJN Ex. O.) Thus,
14 Bernardo’s fraud claim fails to the extent it relies on Summit’s “unlicensed” status.
15 *See Lee*, 250 F.3d at 688 (holding that judicially noticeable facts are the exception to
16 the rule that consideration of extrinsic evidence converts a 12(b)(6) motion to a
17 summary-judgment motion).

18 The fraud claim also fails as it relates to Bernardo’s allegations that her
19 signature was deleted from the Promissory Note. California has a three-year statute of
20 limitations on fraud claims. Cal. Civ. Proc. Code § 338. The date of the loan
21 origination and the date the parties executed the loan agreements was in March 2007.
22 This action was not filed until July 21, 2014. The Court finds nothing in the
23 Complaint to support tolling of the statute of limitations for any period of time.
24 Accordingly, the three-year statute of limitations has long since expired.

25 For these reasons, Bernardo’s fraud claim is **DISMISSED**.

26 **B. RESPA**

27 Bernardo’s RESPA claim is somewhat confusing. Bernardo titles her claim
28 “tortious violation” of RESPA and specifically cites 12 U.S.C. § 2607(b), which is the

1 portion of RESPA that prohibits fee splitting. (*See* Compl. ¶¶ 65–73.) But, as
2 Defendants point out, the Complaint is completely devoid of allegations relating to fee
3 splitting. (*See* Mot. 6:21–26.)

4 Moreover, the thrust of Bernardo’s allegations relate to “inquiries” she made
5 regarding the loan. (*See, e.g.*, Compl. ¶¶ 71–72.) There is another portion of RESPA
6 that imposes a duty on loan servicers to respond to borrower inquiries. *See* 12 U.S.C.
7 § 2605(e)(1). But even construing Bernardo’s claim under this section of RESPA, her
8 claim fails. Bernardo’s allegations are woefully deficient because she does not allege
9 that her “inquiries” meet the requirements of a “qualified written request” as set forth
10 in the statute. *See id.* § 2605(e)(1)(B). The allegations regarding her “inquiries” do
11 not even meet the basic notice requirements of Rule 8. In addition, § 2605(e) applies
12 only to loan servicers, but Bernardo alleges her RESPA claim against all Defendants.
13 As set forth in the factual background above, not all Defendants are loan servicers.

14 The Court **DISMISSES** Bernardo’s RESPA claim as well.

15 **C. Quiet Title**

16 Defendants put forth several reasons for dismissal of Bernardo’s quiet-title
17 claim, many of them specific to each Defendant. But the Court finds an alternative
18 basis for dismissal of the quiet-title claim as it applies to all Defendants.

19 Bernardo must allege that she has satisfied her debt before bringing a quiet-title
20 claim. *See, e.g., Stebley v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 526
21 (2011); *Aguilar v. Bocci*, 29 Cal. App. 3d 475, 477–78 (1974). However, Bernardo
22 admits in the Complaint that she has not paid off the loan that was secured by the
23 property at issue. (*See* Compl. ¶¶ 8–11.) Nor does Bernardo allege that she offered to
24 pay the full amount of the debt. Therefore, Bernardo’s claim for quiet title is also
25 **DISMISSED**.

26 **D. RFDCPA**

27 Bernardo’s also seeks relief for an alleged violation of the RFDCPA. The
28 RFDCPA is California’s version of the federal Fair Debt Collections Practices Act

1 (“FDCPA”), 15 U.S.C. §§ 1692–92p. California Civil Code section 1788.17—cited
2 by Bernardo in her Complaint—states that a violation of the FDCPA is also a
3 violation of the RFDCPA. But the FDCPA does not apply to foreclosure activities.
4 *See, e.g., Junger v. Bank of Am., N.A.*, No. 11-cv-10419-CAS(VBKx), 2012 WL
5 603262, at *4 (C.D. Cal. Feb. 24, 2012) (“[T]he activity of foreclosing on property
6 pursuant to a deed of trust is not the collection of a debt within the meaning of the
7 FDCPA.”(citations omitted)). Thus, Bernardo’s RFDCPA claim fails and is also
8 **DISMISSED.**

9 **E. Declaratory and Injunctive Relief**

10 The Court turns finally to Bernardo’s separately pleaded claims for declaratory
11 and injunctive relief. Declaratory and injunctive relief are remedies. Since the Court
12 has dismissed all of Bernardo’s other claims, there is no basis for obtaining these
13 remedies. 28 U.S.C. § 2201 (requiring “a case of actual controversy” to obtain a
14 declaratory judgment); *Shell Oil Co. v. Richter*, 52 Cal. App. 2d 164, 168 (“Injunctive
15 relief is a remedy and not, in itself, a cause of action, and a cause of action must exist
16 before injunctive relief may be granted.”). Accordingly, the Court **DISMISSES**
17 Bernardo’s first and sixth claims for declaratory and injunctive relief.

18 **V. CONCLUSION**

19 For the reasons discussed above, the Court **GRANTS** Defendants’ Motion to
20 Dismiss **WITH PREJUDICE**. (ECF No. 5.) Dismissal is with prejudice due to
21 Bernardo’s non-opposition and the unlikelihood that amendment would cure the
22 deficiencies in the Complaint. The Clerk of Court shall close this case.

23 **IT IS SO ORDERED.**

24
25 October 6, 2014

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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE