

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

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

**JACOB WINDING dba Top to Bottom  
Cleaning Service,**

**Plaintiff,**

**v.**

**NDEX WEST, LLC as TRUSTEE;  
WELLS FARGO BANK, N.A., and  
DOES 1 through 100, inclusive,**

**Defendants**

**CV F 10 - 2026 AWI  
DLB**

**MEMORANDUM OPINION  
AND ORDER ON  
DEFENDANT’S MOTION TO  
DISMISS AND MOTION TO  
STRIKE AND RELATED  
ORDERS**

**Doc. #'s 39, 40 and 45**

This is an action for declaratory and injunctive relief, economic damages, and exemplary damages by Jacob Winding dba Top to Bottom Cleaning Service (“Plaintiff”) against defendants, NDEX, LLC, and Wells Fargo Bank, N.A. (Collectively, “Defendants”). The action arises out of the foreclosure and sale of a parcel of land located in Salida in Stanislaus County. In the complaint, Plaintiff alleges claims for declaratory relief, cancellation of instruments, and fraud. In this memorandum opinion and order, the court addresses Defendants’ motion to dismiss Plaintiff’s First Amended Complaint [“FAC”] and Defendants’ motion to strike portions of the FAC. The parties do not dispute that diversity jurisdiction exists pursuant to 28 U.S.C. § 1332. Venue is proper in this court.



1           On December 4, 2009, the owner Warner Bowers transferred his interest in the  
2 Property via quitclaim deed to TTB Services, Inc. The quitclaim deed was recorded on  
3 December 7, 2009.

4           Plaintiff's FAC alleges the 2007 Loan went into default<sup>1</sup> at sometime prior to March  
5 24, 2010. Plaintiff also does not dispute that Wells Fargo recorded a Notice of default on  
6 March 24, 2010, and a Notice of Sale on June 25, 2010. The parties both allege that a  
7 trustee's sale was conducted on September 22, 2010. The parties agree that Wells Fargo took  
8 title to the Property at the trustee's sale pursuant to its credit bid.

9           Plaintiff's FAC alleges that "Defendants failed to provide adequate notices of sale of  
10 the [Property] by posting said notices in a manner that was neither conspicuous nor likely to  
11 put Plaintiff on notice that the [Property] was to be sold." Doc. # 35 at ¶ 23. In addition,  
12 Plaintiff alleges "Plaintiff is unaware of any notices of sale of the [Property] having been sent  
13 to him pursuant to the California Civil Code. Doc. # 35 at ¶ 24.

14           The now-operative FAC was filed on March 16, 2011, following the dismissal of  
15 Plaintiff's original complaint pursuant to Defendants' motion to dismiss. The FAC alleges  
16 three claims for relief. The first requests the court declare Plaintiff's rights with regard to the  
17 priority of the Plaintiff's and Defendants' claims on the Property. The second claim for relief  
18 requests injunctive relief to hold void the promissory note secured by 2007 Deed of Trust and  
19 the Deed of Trust Upon Sale. Plaintiff's third claim for relief alleges fraud based on  
20 Defendants' representation of the status of their Deed of Trust as superior to Plaintiff's. The  
21 instant motions to dismiss and to strike were filed on March 31, 2011. On May 5, 2011, the  
22 court vacated the scheduled hearing date and took the matter under submission as of May 9,  
23

---

24  
25 <sup>1</sup> Plaintiff actually alleges that Owners defaulted on the 2007 mortgage at sometime prior to March 24,  
26 2010. It is not disputed that the Property was conveyed to Plaintiff dba TTB Services, Inc. by way of quitclaim deed  
27 on or about December 4, 2009. Thus, whenever the default actually occurred, Plaintiff was the owner of the  
28 Property at the time notice of default was recorded on March 24, 2010. Given that there is no dispute that the 2007  
mortgage was in default as of the time the notice of default was issued, it is not important to this opinion when  
default occurred or who owned the Property at the time.

1 2011.

2 **LEGAL STANDARD**

3 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure  
4 can be based on the failure to allege a cognizable legal theory or the failure to allege  
5 sufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc.,  
6 749 F.2d 530, 533-34 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule  
7 12(b)(6), a complaint must set forth factual allegations sufficient “to raise a right to relief  
8 above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)  
9 (“Twombly”). While a court considering a motion to dismiss must accept as true the  
10 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425  
11 U.S. 738, 740 (1976), and must construe the pleading in the light most favorable to the party  
12 opposing the motion, and resolve factual disputes in the pleader's favor, Jenkins v.  
13 McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969), the allegations must be  
14 factual in nature. See Twombly, 550 U.S. at 555 (“a plaintiff’s obligation to provide the  
15 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a  
16 formulaic recitation of the elements of a cause of action will not do”). The pleading standard  
17 set by Rule 8 of the Federal Rules of Civil Procedure “does not require ‘detailed factual  
18 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me  
19 accusation.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (“Iqbal”).

20 The Ninth Circuit follows the methodological approach set forth in Iqbal for the  
21 assessment of a plaintiff’s complaint:

22 “[A] court considering a motion to dismiss can choose to begin by identifying  
23 pleadings that, because they are no more than conclusions, are not entitled to  
24 the assumption of truth. While legal conclusions can provide the framework  
25 of a complaint, they must be supported by factual allegations. When there are  
well-pleaded factual allegations, a court should assume their veracity and then  
determine whether they plausibly give rise to an entitlement to relief.”

26 Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th Cir. 2009) (quoting Iqbal, 129 S.Ct. at  
27 1950).



1 by date of recording and that Plaintiff's lien was recorded later than Defendants. Doc. # 38 at  
2 7:9-19 (citing Cal. Civ. Code §§ 1214 and 1107). Second, and in the court's opinion more  
3 determinative of Plaintiff's claims, the Magistrate Judge concluded that "when Plaintiff  
4 (TTB) took title [to the Property] by quitclaim deed, Plaintiff's [2009] Deed of Trust was  
5 extinguished and his loan was no longer secured by the Property." Doc. # 38 at 7:21-23  
6 (citing Sheldon v. La Brea Materials Co., 216 Cal. 686, 691 (1932)).

7 "[A] trust creates an immediate interest making the beneficiary an *equitable* owner of  
8 the trust res." Burkett v. Capovilla, 112 Cal.App.4th 1444, 1450 (2nd Dist. 2003) (italics  
9 added). When the *legal* ownership of the trust res is transferred to the beneficiary, the legal  
10 and equitable interests merge and the trust (and mortgage creating the trust) is extinguished.  
11 O'Meara v. DeLamater, 52 Cal.App.2d 665, 668 (4th Dist. 1942). Exhibits B and C of  
12 Plaintiff's FAC establish that TTB Services, Inc. was the Beneficiary of the 2009 Trust Deed  
13 created by the 2006 mortgage. Exhibit D to Plaintiff's FAC establishes that Owners  
14 conveyed legal title to the res of the Trust Deed - the Property - via quitclaim deed to TTB  
15 Services, Inc. on December 4, 2009. As of that date, TTB Services, Inc. became the owner of  
16 both legal and equitable interests in the Property and the legal and equitable interests merged  
17 extinguishing the mortgage and its Trust Deed. At that point both the \$80,000.00 mortgage  
18 and the Trust Deed created by that mortgage in 2006 ceased to exist and Plaintiff dba TTB  
19 services, Inc. became simply the owner of the Property.

20 Plaintiff's FAC and the documents attached to it show that the Property was  
21 transferred to TTB Services, Inc. via quitclaim deed. "A quitclaim deed, however, "transfers  
22 only whatever interest the grantors possess at the time of the conveyance." In re Marriage of  
23 Gioia, 119 Cal.App.4th 272, 281 (2 Dist. 2004). A quitclaim deed does not contain any  
24 implied covenant or warranty of title or freedom from encumbrances. Id. Consequently,  
25 Plaintiff took the property subject to any liens on the property existing at the time of the  
26 conveyance on December 4, 2009, including the lien created by Defendants' 2007 Deed of  
27

1 Trust.

2 Plaintiff's first claim for declaratory relief will be dismissed. Plaintiff's central  
3 contention that his lien on the Property is senior to Defendants' is without any factual or legal  
4 basis because Plaintiff has no lien on the Property because the 2006 mortgage and its  
5 corresponding lien was extinguished when the Property was conveyed to Plaintiff. On  
6 December 4, 2009, Plaintiff became owner of the Property subject to the lien established by  
7 Defendants 2007 mortgage and Trust Deed.

8 **II. Plaintiff's Second Claim for Cancellation of Instruments and Third Claim for**  
9 **Fraud**

10 Plaintiff's second claim for relief seeks cancellation of the Promissory Note secured  
11 by the 2007 Deed of Trust and the subsequent Trustee's Deed Upon Sale. Cancellation of  
12 both instruments is sought on the ground both were obtained by the fraud complained of in  
13 Plaintiff's third claim for relief. Plaintiff's second claim for relief therefore hinges on the  
14 success of his third claim for relief to which the court turns first.

15 Plaintiff's third claim for relief for fraud alleges the following:

- 16 1. "[Defendants issued] a Notice of Default, Notice of Sale and subsequent non-judicial  
17 foreclosure of the Subject Property pursuant to a Deed of Trust [that was] junior to  
that of Plaintiff. Doc. # 35 at ¶ 35.
- 18 2. "Defendants [. . .] had actual and constructive knowledge that their deed was junior to  
19 that of Plaintiff, by virtue of Plaintiff's recordation of his Deed of Trust prior to the  
date that Defendants' recorded their Notice of Default and Notice of Sale." Doc. # 35  
20 at ¶ 36.
- 21 3. "Despite this actual and constructive knowledge, Defendants, [. . .], proceeded to  
22 foreclose on the Subject Property by fraudulently concealing their junior status to  
Plaintiff's on the aforementioned deeds, and did so intentionally without providing  
notice of the foreclosure to Plaintiff as required by Statute . . . ." Doc. # 35 at ¶ 37.

23 The elements of common law fraud normally requires the plaintiff to prove "(a) [a]  
24 misrepresentation ...; (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to  
25 induce reliance; (d) justifiable reliance; and (e) resulting damage." Lazar v. Superior Court,  
26 12 Cal.4th 631, 638 (1996). The allegations quoted above set forth the factual basis for the  
27

1 elements of falsity and scienter. Since the court has found that Plaintiff did not hold a senior  
2 Deed of Trust – that he in fact held no deed of trust as of the date of Defendants filing of  
3 Notice of Default and subsequent notices – the elements of falsity and scienter must fail.  
4 Plaintiff alleges, and Defendants vigorously dispute, that Defendants failed to supply notice  
5 of Default and Notice of Sale according to the requirements of California law. The court  
6 need not rule on the adequacy of Defendants’ notice since the lack of notice is not, by itself, a  
7 sufficient basis for a claim of fraud where there are no facts to establish falsity or scienter.

8 Because Plaintiff’s claim for fraud fails, his claim for cancellation of instruments  
9 must also fail. Plaintiff’s second and third claims for relief will therefore be dismissed.  
10 Because the court finds that Plaintiff has failed to state a claim upon which relief can be  
11 granted as to each of Plaintiff’s claims for relief, the court will dismiss the FAC in its entirety  
12 and need not decide Defendants’ motion to strike. Defendants’ motion to strike will be  
13 denied as moot.

14 “If a complaint is dismissed for failure to state a claim, leave to amend should be  
15 granted unless the court determines that the allegation of other facts consistent with the  
16 challenged pleading could not possibly cure the deficiency.” Schreiber Distributing Co. v.  
17 Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986). In the order granting  
18 Defendant’s motion to expunge the notice of pending litigation, the Magistrate Judge  
19 expressed doubt as to the viability of Plaintiff’s claims. Plaintiff’s FAC proves out the  
20 Magistrate Judge’s concern. The linchpin of Plaintiff’s action is his contention that  
21 Defendants could not proceed to foreclose on their lien because Plaintiff held a superior lien.  
22 As discussed, this contention is both factually and legally without merit. The court must  
23 conclude that Plaintiff’s failure to state a claim upon which relief can be granted cannot be  
24 cured by further pleading. Leave to amend will therefore be denied and judgment will be  
25 entered in favor of Defendants.

26 The court also notes that Plaintiff has moved to stay the order granting expungement  
27  
28



1 of the notice of *lis pendens* and appears to have moved (or is perhaps contemplating moving)  
2 for an order for interlocutory appeal. Given that this memorandum opinion and order brings  
3 this case to final judgment, there is no reason for grant of a stay of the prior order for  
4 expungement of the notice of *lis pendens* nor is there any reason for interlocutory appeal. As  
5 of the filing of this order and entry of judgment by the Clerk of the Court, Plaintiff is entitled  
6 to seek appeal pursuant to 28 U.S.C. § 1291 and Rule 3 of the Federal Rules of Appellate  
7 Procedure. Therefore, any motions relating to stay or interlocutory appeal will be denied as  
8 moot.

9  
10 THEREFORE, for the reasons discussed above, it is hereby ORDERED that:

- 11 1. Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
12 Procedure is hereby GRANTED as to all claims set forth in the FAC. Plaintiff's FAC  
13 is hereby DISMISSED in its entirety with prejudice.
- 14 2. The Clerk of the Court shall enter judgment in favor of Defendants and shall CLOSE  
15 the CASE.
- 16 3. Defendant's motion to strike is DENIED as MOOT.
- 17 4. Plaintiff's motion to stay the Magistrate Judge's order removing notice of *lis pendens*  
18 is DENIED.
- 19 5. Plaintiff's motion for stay of sale of the Property is DENIED.
- 20 5. To the extent there are any pending motions regarding interlocutory appeal, such  
21 motions are DENIED as Moot.

22  
23 IT IS SO ORDERED.

24 Dated: May 18, 2011

25   
26 \_\_\_\_\_  
27 CHIEF UNITED STATES DISTRICT JUDGE  
28