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

THOMAS WURTZBERGER,)	
)	
Plaintiff,)	2:09-cv-01718-GEB-DAD
)	
v.)	<u>ORDER</u>
)	
RESMAE MORTGAGE CORPORATION;)	
AMERICA'S SERVICING COMPANY;)	
MORTGAGE ELECTRONIC REGISTRATION)	
SYSTEMS, INC.; HSBC BANK USA, as)	
trustee for ACE SECURITIES CORP.)	
HOME EQUITY LOAN TRUST, SERIES)	
2007-HE3; NDEX WEST, LLC; AND DOES)	
1-10,)	
)	
Defendants.)	
)	

On June 29, 2009 Defendants Wells Fargo Bank dba America's Servicing Company, ("ASC"), Mortgage Electronic Registration Systems, Inc., ("MERS"), and HSBC Bank, USA ("HSBC"), as trustee for Ace Securities Corp. Home Equity Loan Trust ("ACE") (collectively "Defendants") filed a motion for dismissal of Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(6), arguing Plaintiff's Complaint fails to state a claim upon which relief can be granted. Defendants request that judicial notice be taken of documents incorporated by reference into Plaintiff's Complaint and that those documents be considered when the Court decides their motion. Plaintiff opposes the motion, but does not oppose Defendants' judicial notice. Therefore, that request is granted. U.S. v. Ritchie, 342

1 F.3d 903, 908 (9th Cir. 2003) ("A court may . . . consider . . .
2 documents incorporated by reference in the complaint, or matters of
3 judicial notice-without converting the motion to dismiss into a motion
4 for summary judgment.").

5 BACKGROUND

6 Plaintiff alleges three claims in his Complaint: breach of
7 contract, conversion, and wrongful foreclosure. Each claim concerns
8 an adjustable rate note ("ARN") Plaintiff signed on October 2, 2006.
9 Plaintiff alleges in his Complaint: "[t]he Note states that Borrower
10 owed Lender . . . \$224,000.00, plus interest. Borrower has promised
11 to pay this debt in regular Periodic Payments and to pay the debt in
12 full not later November 1, 2036." (Compl. ¶ 15.) Plaintiff also
13 signed a Deed of Trust ("Deed") secured by Plaintiff's residence at
14 460 Alemar Way, Yuba City, California, 96991. (Compl. ¶ 15; Ex. 2,
15 3.) The Deed allows the lender to transfer the ARN to a successor
16 trustee. Plaintiff alleges on or about January 2007 Resmae sold the
17 ARN and the Deed to ACE for "over 200% of [the \$224,000 loan amount.]"
18 (Compl. ¶ 25.)

19 Plaintiff "became behind on his mortgage payments in
20 September, 2007, [but alleges he] . . . attempted payment of all
21 arrearage[] in November, 2007 [and] [t]he check was returned and it
22 was explained that Plaintiff had to go through the foreclosure
23 process." (Compl. ¶ 27). Plaintiff "makes a demand of Defendants [in
24 his Complaint] for a full reconveyance under . . . Paragraph 23 of the
25 Deed" (Compl. ¶ 26.) Paragraph 23 of the Deed provides
26 "[u]pon payment of all sums secured by this Security Instrument,
27 Lender shall request Trustee to reconvey the Property and shall
28 surrender this Security Instrument and all notes evidencing debt

1 secured by this Security Instrument to Trustee. Trustee shall
2 reconvey the Property without warranty to the person or persons
3 legally entitled to it." (Compl. ¶ 23; Ex. 2, ¶ 23.)

4 "On December 4, 2007, a Notice of Default was filed against
5 the Property," and "[o]n January 28, 2008, for value received, MERS
6 assigned the Deed . . . [and the ARN] to HSBC (the foreclosure
7 beneficiary at the foreclosure proceeding)" (Compl. ¶¶ 31-
8 32.) Plaintiff alleges in February 2008 he attempted to modify the
9 loan and made three payments between March and June 2008. (Compl. ¶
10 28). A Notice of Trustee's Sale, however, was recorded against the
11 Property on March 11, 2008 and Ndex West was listed as the trustee.
12 (Compl. ¶¶ 33, 36.) Plaintiff alleges there was never a properly
13 recorded substitution of Ndex West as the new trustee. (Compl. ¶ 34.)
14 A trustee's sale occurred on November 4, 2008 on behalf of HSBC, but
15 Plaintiff alleges he never received notice of the trustee's sale
16" (Compl. ¶ 36.)

17 Plaintiff's breach of contract claim against Resmae is based
18 on Resmae's failure to reconvey the property to Plaintiff when Resmae
19 allegedly received 200% of the loan obligation, in violation of
20 paragraph 23 of the Deed. (Compl. ¶ 41.) Plaintiff's conversion claim
21 is based on Defendants' conversion of the "excess monies" from the
22 200% of the loan obligation received, and Defendants' refusal to
23 return the converted property. (Compl. ¶¶ 50-55.) Plaintiff alleges
24 in his wrongful foreclosure claim that because "Resmae had already
25 been paid in full on the indebtedness that the Deed . . . secure[d],"
26 MERS's assignment of the Deed to HSBC was "not effective;" therefore,
27 Ndex West did not have "the right to conduct a trustee's sale . . .
28 [or] foreclose on the Property." (Compl. ¶¶ 59, 64.) Plaintiff also

1 alleges the foreclosure was wrongful because he "did not receive
2 proper notice of the trustee's sale on November 11, 2008." (Compl. ¶
3 63.)

4 STANDARD

5 "Federal Rule of Civil Procedure 8(a)(2) 'requires only a
6 short and plain statement of the claim showing that the pleader is
7 entitled to relief,' in order to 'give the defendant fair notice of
8 what the . . . claim is and the grounds upon which it rests.'" Bell
9 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citation
10 omitted). "[W]e must in a review of all Rule 12(b)(6) motions,
11 accept[] as true all facts alleged in the complaint, and draw[] all
12 reasonable inferences in favor of the plaintiff." al-Kidd v.
13 Ashcroft, --- F.3d ----, 2009 WL 2836448, at *5 (9th Cir. 2009).
14 "Conclusory allegations of law and unwarranted inferences[, however,]
15 are insufficient to defeat a motion to dismiss for failure to state a
16 claim. In determining whether plaintiff[] can prove facts in support
17 of [his] claim that would entitle [him] to relief, [the Court] may
18 consider facts contained in documents [incorporated by reference into]
19 the complaint." National Ass'n for Advancement of Psychoanalysis v.
20 California Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000)
21 (internal citations and quotations omitted).

22 DISCUSSION

23 Defendants argue Plaintiff's breach of contract claim fails
24 because Plaintiff has not alleged facts establishing that Defendants
25 have breached the terms of any contract with Plaintiff. Defendants
26 are correct since the Deed and the ARN do not show Defendants had an
27 obligation to reconvey the property to Plaintiff as Plaintiff alleges.
28 Therefore, this portion of the motion is granted.

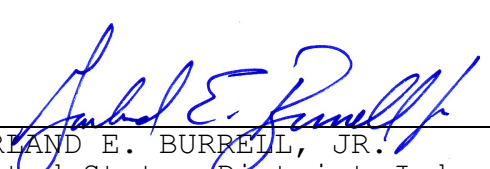
1 Defendants also seek dismissal of Plaintiff's conversion
2 claim, arguing Plaintiff has failed to allege all of the required
3 elements of this claim. (Defs' Mot. 9:5-20.) An element of a
4 conversion claim is that plaintiff was the owner of specified property
5 or had the right to possession of the property at the time of the
6 conversion. Oakdale Village Group v. Fong, 43 Cal.App.4th 539, 543-44
7 (1996). Since Plaintiff has not set forth sufficient facts alleging
8 this element, this portion of the motion is granted.

9 Lastly, Defendants argue Plaintiff's wrongful foreclosure
10 claim must fail because Plaintiff has not alleged he tendered the full
11 loan amount of \$224,000, plus interest. (Defs' Mot. 10:4-8.) "It is
12 settled that an action to set aside a trustee's sale for
13 irregularities in sale notice or procedure should be accompanied by an
14 offer to pay the full amount of the debt for which the property was
15 security." Arnolds Management Corp. v. Eischen, 158 Cal.App.3d 575,
16 578 (1984). Therefore, this portion of Defendants' motion is granted.

17 CONCLUSION

18 For the foregoing reasons, Plaintiff's complaint is
19 dismissed. However, Plaintiff requests leave to amend his complaint
20 should any claim be dismissed. Plaintiff is granted ten (10) days
21 from the date on which this Order is filed within which to file a
22 amended complaint curing any deficiency in a claim addressed above.

23 Dated: October 6, 2009

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GARLAND E. BURRELL, JR.
United States District Judge