

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

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4	THOMAS WURTZBERGER,)
5)
6	Plaintiff,) 2:09-cv-01718-GEB-DAD
7)
8	v.) <u>ORDER GRANTING DEFENDANTS'</u>
9) <u>MOTIONS TO DISMISS</u>
10	RESMAE MORTGAGE CORPORATION;)
11	AMERICA'S SERVICING COMPANY;)
12	MORTGAGE ELECTRONIC REGISTRATION)
13	SYSTEMS, INC.; HSBC BANK USA, as)
14	trustee for ACE SECURITIES CORP.)
15	HOME EQUITY LOAN TRUST, SERIES)
16	2007-HE3; NDEx WEST, LLC,)
17)
18	Defendants.)
19)

On November 2, 2009, Defendants Wells Fargo Bank, N.A. dba America's Servicing Company ("Wells Fargo"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and HSBC Bank, USA, as trustee for Ace Securities Corp. Home Equity Loan Trust, Series 2007-HE3, ("HSBC") filed a motion under Federal Rule of Civil Procedure ("Rule") 12(b)(6) in which they seek dismissal of Plaintiff's First Amended Complaint ("FAC") without leave to amend. Plaintiff did not oppose the motion.

On November 5, 2009, Defendant NDEx West, LLC ("NDEx") filed a motion under Rule 12(b)(6), in which it seeks dismissal of Plaintiff's claims with prejudice. NDEx moves in the alternative for summary judgment under Rule 56, based on a conclusory argument which is not reached because of the below ruling on the dismissal motion. Plaintiff opposed NDEx's motion and requested leave to amend his claims against NDEx. (Opp'n 13:15-17.)

Further, on November 24, 2009, Defendant Resmae filed a verified "Suggestion of Bankruptcy," informing the Court that on

1 February 12, 2007, Defendant Resmae Mortgage Corporation ("Resmae")
2 filed for bankruptcy, and that on June 5, 2007, the United States
3 Bankruptcy Court for the District of Delaware confirmed a "Second
4 Amended Plan of Reorganization of [Resmae]," ("Plan") which
5 "discharged . . . [Resmae] from any Claim that arose before [that
6 date], to the fullest extent provided by . . . the Bankruptcy Code."
7 (Sugg. of Bankruptcy 2:22-25.) The Plan contains a "permanent
8 injunction against any person commencing or continuing any action
9 . . . to collect, offset, or recover any claim" against
10 Resmae. (Id. 2:22-3:6.) Resmae argues: "Given the permanent
11 injunction . . . Resmae respectfully requests that it be dismissed
12 from this action." (Id. 3:5-6.) Plaintiff did not respond to this
13 filing.

14 This permanent injunction enjoins Plaintiff's claims against
15 Resmae. Therefore, Resmae's unopposed request to be dismissed from
16 this action is granted.

17 I. BACKGROUND

18 Plaintiff alleges four claims in his FAC against all
19 Defendants: (1) wrongful foreclosure for failing to properly assign
20 the [ARN] and Deed of Trust; (2) wrongful foreclosure for failing to
21 validly substitute a trustee; (3) rescission of foreclosure for
22 failing to properly assign the Deed of Trust; and (4) rescission of
23 foreclosure for failing to validly substitute a trustee. (FAC ¶¶ 29-
24 43.) Each claim concerns an ARN Plaintiff signed on October 2, 2006,
25 in which Plaintiff agreed to pay Resmae \$224,000.00, and which was
26 secured by Plaintiff's residence ("Property") through a Deed of Trust.
27 (Id. ¶¶ 9-10.) Plaintiff attached to the FAC the ARN, the Deed of
28 Trust, and the Notice of Default and Election to Sell the Property,

1 the Assignment of the Deed of Trust, the Notice of Trustee's Sale for
2 the Property, and the Trustee's Deed Upon Sale of the Property.

3 Plaintiff seeks damages, interest and reconveyance of the Property.

4 Plaintiff alleges in his FAC he "became behind on his
5 mortgage payments in September[] 2007 . . . [and] . . . attempted
6 payment of all arrearage[] in November[] 2007 [, but] [t]he check was
7 returned and it was explained that Plaintiff had to go through the
8 foreclosure process." (Id. ¶ 16.) "On December 4, 2007, a Notice of
9 Default was filed against the Property" naming NDEx as the foreclosure
10 trustee and "[o]n January 28, 2008, for value received, MERS assigned
11 the Deed of Trust, and purported to assign the [ARN], to HSBC (the
12 foreclosing beneficiary)" (Id. ¶¶ 20-21.)

13 "On March 11, 2008, a Notice of Trustee's Sale was recorded
14 against the Property" listing NDex as the trustee and "indicat[ing]
15 that the sale would occur on March 26, 2008." (Id. ¶ 22.) Plaintiff
16 alleges there was never a properly recorded substitution of NDex as
17 the new trustee. (Id. ¶ 23.)

18 Plaintiff further alleges: "On November 4, 2008, NDEx
19 conducted a trustee's sale of Plaintiff's [P]roperty on behalf of
20 HSBC" and the "Trustee's Deed Upon Sale" indicates HSBC was the
21 beneficiary and purchaser at the sale, but Plaintiff never received
22 notice for the November 4, 2008, trustee's sale. (Id. ¶¶ 24-26.) The
23 only notice of trustee's sale Plaintiff alleges he received was for
24 the trustee's sale scheduled for March 25, 2008. (Id. ¶ 25.) Although
25 Plaintiff alleges the trustee's sale was scheduled for March 25, 2008,
26 the Notice of Trustee's Sale attached as Exhibit 5 to the FAC shows
27 that the trustee's sale was actually scheduled for March 26, 2008.

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II. LEGAL STANDARDS

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2 When deciding a Rule 12(b)(6) dismissal motion, the Court
3 “must . . . accept[] as true all facts alleged in the complaint, and
4 draw[] all reasonable inferences in favor of the plaintiff.” al-Kidd
5 v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). “Conclusory
6 allegations of law and unwarranted inferences[, however,] are
7 insufficient to defeat a motion to dismiss for failure to state a
8 claim.” National Ass'n for Advancement of Psychoanalysis v.
9 California Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000)
10 (internal citations and quotations omitted).

11 Wells Fargo, MERS, HSBC, and NDEx (collectively
12 “Defendants”) request that judicial notice be taken of
13 Plaintiff’s FAC and/or certain documents attached to the FAC. These
14 documents are the ARN, the Deed of Trust, the Notice of Default and
15 Election to Sell, the Assignment of Deed of Trust, the Notice of
16 Trustee’s Sale, and the Trustee’s Deed Upon Sale. Since “a plaintiff
17 may attach a copy of a document to the complaint and incorporate it by
18 reference; such a document become[s] a part of the pleading for all
19 purposes.” Reyes v. Department of Treasury, No. 1:09-cv-00319-LJO-SMS,
20 2009 WL 981604, at *2, n.1 (E.D. Cal. April 10, 2009) (referencing
21 Fed.R.Civ.P. 10(c). Therefore, the referenced documents constitute
22 part of the pleadings under the incorporation by reference doctrine.

23 Defendants also request that the Court take judicial notice
24 of the publically recorded Substitution of Trustee. (Wells Fargo’s
25 Request for Judicial Notice (“RFJN”) Ex. 2); (NDEx’s RFJN Ex. 6).
26 Defendant NDEx also requests that the Court take judicial notice of
27 the publically recorded Grant Deed granting the Property to Plaintiff
28 and his spouse as joint tenants (“Grant Deed”), as well as the

1 publically recorded Interspousal Transfer Deed in which Plaintiff's
2 wife granted Plaintiff her joint-tenant share of the Property
3 ("Interspousal Transfer Deed"). (NDEx's RFJN Ex. 1-2.)

4 A court "may take judicial notice of matters of public
5 record and may consider them without converting a Rule 12 motion into
6 one for summary judgment." United States v. 14.02 Acres of Land, 547
7 F.3d 943, 955 (9th Cir.2008) (internal quotations and citations
8 omitted). The court takes judicial notice of the Substitution of
9 Trustee, the Grant Deed, and the Interspousal Transfer Deed, since
10 these documents are publically recorded and concern the Property.

11 Plaintiff also requests in his opposition to NDEx's motion,
12 that judicial notice be taken of injunction briefs and an restraining
13 order which are not relevant to the pending motions. Since these
14 documents are not relevant to the pending motions they will not be
15 considered.

16 **III. ANALYSIS**

17 Defendants seek dismissal of Plaintiff's two wrongful
18 foreclosure claims. Plaintiff alleges in his first wrongful
19 foreclosure claim: "[o]n or about January 28, 2008[,] MERS did not
20 effectively assign the Deed of Trust since MERS "is not a party to the
21 [ARN] or the Deed of Trust," "has no beneficial interest in the [ARN]
22 or Deed of Trust," and "'as a nominee'" for the Lender, MERS "is not
23 the legal beneficiary of the Deed of Trust or [ARN]." (FAC ¶¶ 30-31.)
24 Further, Plaintiff alleges that "[s]ince HSBC was never properly
25 assigned the Deed of Trust, HSBC had no power to foreclose on the
26 Property and the trustee's sale was unlawful," even though the
27 "Trustee's Deed Upon Sale indicates that HSBC was the foreclosing
28 beneficiary." (Id. ¶ 32.)

1 Wells Fargo, MERS, and HSBC argue this claim fails because
2 Plaintiff's allegations are contrary to the Deed of Trust in which it
3 is states: "MERS is the beneficiary under this Security Instrument;"
4 and therefore, MERS was "authorized to undertake actions permitted
5 under the Deed," such as selling the ARN without prior notice to
6 Plaintiff. (Wells Fargo's Mot. 7:5-20.) Wells Fargo, MERS, and HSBC
7 cite Benham v. Aurora Loan Services, No. C-09-2059 SC, 2009 WL 2880232
8 (N.D. Cal. September 1, 2009) in support of their position that since
9 MERS was the beneficiary, MERS had authority to assign the Deed of
10 Trust. NDEX makes the same argument. (NDEX's Mot. 9:1-7.)

11 Plaintiff counters in his opposition to NDEX's motion that
12 MERS is "not an economic 'beneficiary' under the Deed of Trust; it
13 [did not] collect . . . money, no[r] . . . realize any value of the
14 prop[erty] at foreclosure sale," and under California Civil Code
15 section 2932.5, "the power of sale can only vest [in] one who is
16 entitled to receive money payments," therefore MERS could not assign
17 the ARN and Deed of Trust to HSBC. (Opp'n 8:14-22.)

18 NDEX rejoins that California Civil Code section 2932.5
19 ("Section 2932.5") concerns "mortgagee[s,]" not beneficiaries like
20 MERS in this case. (NDEX's Reply 3:9-4:11.) Section 2932.5 states:

21 Where a power to sell real property is given to a
22 mortgagee, or other encumbrancer, in an instrument
23 intended to secure the payment of money, the power
24 is part of the security and vests in any person who
25 by assignment becomes entitled to payment of the
26 money secured by the instrument. The power of sale
27 may be exercised by the assignee if the assignment
28 is duly acknowledged and recorded.

CAL. CIV. CODE § 2932.5 (emphasis added).

Plaintiff's argument is unpersuasive in light of the

1 language in Section 2932.5. Further, the Deed of Trust, which was
2 recorded on October 6, 2006, names MERS as the beneficiary, acting
3 solely as a nominee for Resmae and Lenders First Choice, as the
4 Trustee. (Pl's Ex. 2.) Moreover, as stated in Benham, "as the
5 beneficiary under the Deed of Trust, it is clear that MERS had . . .
6 had the authority to assign its beneficial interest under the Deed of
7 Trust to [Defendant];" and since "MERS held legal title to the
8 interests granted by Plaintiff in the Deed of Trust, [it] had the
9 right to foreclose and sell the property if Plaintiff defaulted on
10 [his] loan." 2009 WL 2880232 at *3-4.

11 Plaintiff also argues that MERS could not assign the ARN or
12 foreclose on the property because "MERS never [held] the ARN." (Opp'n
13 9:19.) However, "[u]nder California law, there is no requirement for
14 the production of the original note to initiate a non-judicial
15 foreclosure." Casteneda v. Saxon Mortg. Services, Inc., No. CIV.
16 2:09-01124 WBS DAD, --- F.Supp.2d ----, 2009 WL 4640673 at *7 (E.D.
17 Cal. Dec. 3, 2009) (citing Oliver v. Countrywide Home Loans, Inc., No.
18 CIV S0-1381 FCD GGH, 2009 WL 3122573, at *3 (E.D. Cal. Sept. 29, 2009)
19 (citing Alvara v. Aurora Loan Servs., No. C-0-1512 SC, 2009 WL
20 1689640, at *6 (N.D. Cal. Jun.16, 2009)); Putkkuri v. Recontrust Co.,
21 No. 08cv1919 WQH (AJB), 2009 WL 32567, at *2 (S.D. Cal. Jan. 5, 2009);
22 Kamp v. Aurora Loan Servs., No. SACV 09-00844-CJC(RNBx), 2009 WL
23 3177636, at *4, (C.D. Cal. Oct. 1, 2009); Champlaie v. BAC Home Loans
24 Servicing, LP, No S-09-1316 LKK/DAD, 2009 WL 3429622, at *13-14
25 (E.D.Cal. Oct. 22, 2009) (stating possession of the note is not
26 required for non-judicial foreclose on a property).

27 Plaintiff also contends that "the Notice of Default lists
28

1 'America's Servicing Company, C/O Ndex West, LLC' as the beneficiary
2 [but] [t]here is certainly no assignment on record transferring the
3 [ARN] or Deed of Trust to America's Servicing Company." (Opp'n 10:7-
4 9.) This contention belied by the Notice of Default, which identifies
5 "Mortgage Electronic Registration Systems, Inc. (MERS), as Beneficiary
6 Recorded on 10/06/2006." (Pl's Ex. 3.)

7 Therefore, Plaintiff's first claim for wrongful foreclosure
8 based on the allegation that MERS was not the named beneficiary and
9 had no right to assign the Deed of Trust is dismissed.

10 Defendants also seek dismissal of Plaintiff's second
11 wrongful foreclosure claim, in which Plaintiff alleges Defendants
12 failed to validly substitute a trustee. Specifically, Plaintiff
13 alleges that "[o]n or about March 11, 2008, a trustee's sale was
14 noticed for the Property," indicating NDEx was the trustee, but for
15 the actual sale on November 4, 2008, there was no "properly filed
16 assignment of [t]rustee giving NDEx the right to conduct a trustee's
17 sale on the Property." (Id. ¶ 37.) Plaintiff also alleges there was
18 no proper notice of the trustee's sale on November 11 2008. (Id. ¶
19 39.) Although Plaintiff alleges in paragraph 37 of the FAC that the
20 trustee's sale occurred on November 11, 2008, the Trustee's Deed Upon
21 Sale which Plaintiff attaches to his complaint as Exhibit 6 shows the
22 trustee's sale occurred on November 4, 2008. (Pl's Ex. 6.) Further,
23 Plaintiff alleges that since "Resmae had already been paid in full on
24 the indebtedness that the Deed of Trust secures," "the foreclosure
25 [was] wrongful." (Id. ¶ 40.) This allegation against Resmae has been
26 dismissed since Plaintiff has not opposed the dismissal of Resmae as a
27 defendant.

28 Defendants argue Plaintiff's first allegation that there was

1 no properly filed assignment of NDEx as trustee fails because NDEx was
2 properly substituted as trustee under California Civil Code § 2934a(d)
3 by the Substitution of Trustee, which was recorded on February 21,
4 2008. (Wells Fargo's Mot. 8:3-11, Wells Fargo's RFJN Ex. 2); (NDex's
5 Mot. 8:3-6; NDEx's RFJN Ex. 6.) NDEx also argues "[r]egardless, no
6 substitution was necessary to conduct the foreclosure because NDEx[,]
7 act[ing] as the 'agent' for the beneficiary" under California Civil
8 Code 2924(a)(1) could "commence the nonjudicial foreclosure by
9 recording and servicing a notice of default." (NDex's Mot. 8:6-11.)

10 Plaintiff counters in his opposition to NDEx's motion that
11 because MERS is not the "true beneficiary," it follows that HSBC was
12 not properly assigned the Deed of Trust and NDEx was not properly
13 substituted as trustee. (Opp'n 10:13-16.) Plaintiff also argues
14 since NDEx lacked authority to foreclose on his property, the
15 trustee's sale was void. Plaintiff cites Dimock v. Emerald
16 Properties, 81 Cal.App.4th 868, 871(2000), as support for this
17 argument, in which the Court held that a "[trustee's] sale by the
18 prior trustee was void" when a new trustee had been substituted.
19 (Opp'n 10:11-11:15, 12:20-23.).

20 "California Civil Code Section 2934a authorizes the
21 beneficiary to substitute the trustee. [Therefore,] [w]hen MERS
22 substituted [NDEx] as trustee . . . MERS had the authority, as
23 beneficiary, to make the substitution. Thus, [NDEX] was authorized to
24 initiate foreclosure sale in the capacity of the trustee, as well as
25 in the capacity as an agent for MERS" Martinez v. America's
26 Wholesale Lender, No. C 09-05630 WHA, 2010 WL 934617, at *4 (N.D.Cal.
27 March 15, 2010). Further, California Civil Code section 2934a(d)
28 states:

1 [a] trustee named in a recorded substitution of
2 trustee shall be deemed to be authorized to act as
3 the trustee under the mortgage or deed of trust for
4 all purposes from the date the substitution is
5 executed by the mortgagee, beneficiaries, or by
6 their authorized agents. . . . Once recorded, the
7 substitution shall constitute conclusive evidence
8 of the authority of the substituted trustee or his
9 or her agents to act pursuant to this section.

6 CAL. CIV. CODE 2934a(d) (emphasis added).

7 Under California Civil Code section 2934a MERS, as the
8 beneficiary, properly substituted NDEx and this substitution became
9 effective when the Substitution of Trustee was recorded on February
10 21, 2008. As of this date, NDEx was a trustee under California Civil
11 Code 2934a(d), "for all purposes" during the foreclosure on
12 Plaintiff's property. Therefore, Plaintiff's allegation that there
13 was no properly filed "assignment" of NDEx as the trustee is
14 dismissed.

15 Defendants also argue that Plaintiff's allegation in
16 his second wrongful foreclosure claim that he did not receive notice
17 of the trustee's sale on November 4, 2008, fails since Plaintiff
18 received a notice of trustee's sale for the March 11, 2008, sale,
19 which was scheduled less than a year before the November 4, 2008,
20 sale.

21 Under California law, "a new notice of sale must be provided
22 only if the sale is postponed for a period or periods totally more
23 than 365 days." (Wells Fargo's Mot. 8:14-19); (NDEx's Mot. 8:12-19.)

24 California Civil Code 2924g(c)(1)-(2)(c)(1) states:

25 There may be a postponement or postponements of the
26 sale proceedings . . . at any time prior to the
27 completion of the sale for any period of time not
28 to exceed a total of 365 days from the date set
forth in the notice of sale. . . . In the event that
the sale proceedings are postponed for a period or
periods totaling more than 365 days, the scheduling

1 of any further sale proceedings shall be preceded
2 by giving a new notice of sale in the manner
prescribed in Section 2924f.

3 CAL. CIV. CODE 2924g(c)(1)-(2)(c)(1) (emphasis added). Since Plaintiff
4 alleges he received a notice of the trustee's sale scheduled March 11,
5 2008, which was less than 365 days before the actual November 4, 2008,
6 trustee's sale, Plaintiff's second wrongful foreclosure claim fails
7 and is dismissed.

8 Defendants also seek dismissal of Plaintiff's two remaining
9 rescission claims. Plaintiff alleges in his first rescission claim
10 that Defendants failed to properly assign the Deed of Trust to HSBC
11 and therefore HSBC "had no authority to sell the property" and the
12 sale "must be rescinded;" and Plaintiff alleges in his second
13 rescission claim that Defendants failed to validly substitute NDEX as
14 Trustee and because of this failure the foreclosure is invalid and
15 must be rescinded. (Id. ¶¶ 35, 41-43.)

16 Defendants argue these claims fail because Plaintiff has not
17 alleged he has tendered the amount due under the ARN. (Wells Fargo's
18 Mot. 6: 2-3); (NDEX's Mot. 6:17-21.) Plaintiff counters that he does
19 not have to tender the amount due under the ARN because he is
20 asserting the "foreclosure did not comply with the strict statutory
21 requirements of a non-judicial foreclosure," and thus he is not
22 "relying on equity to attack the trustee's deed" and "does not need to
23 tender the amount of the debt." (Opp'n 13:6-11.) Plaintiff's
24 argument explains his rescission claims are based purely on the
25 alleged statutory defects in the foreclosure.

26 Contrary to Plaintiff's allegations that the foreclosure did
27 not comply with strict statutory requirements, MERS, as the
28 beneficiary, properly assigned the Deed of Trust to HSBC, which is

1 reflected in the Assignment of the Deed that was publically recorded
2 on January 28, 2008. (Pl's Ex. 4.) Further, as discussed above, NDEx
3 was properly substituted as trustee, as shown in the Substitution of
4 Trustee recorded on February 21, 2008. (Wells Fargo's RFJN Ex. 2);
5 (NDEx's RFJN Ex. 6.) Therefore, Plaintiff's allegations that the
6 foreclosure was defective fail, and Plaintiff's rescission claims are
7 dismissed.

8 **IV. LEAVE TO AMEND**

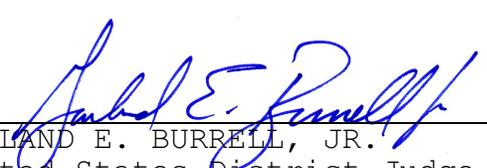
9 Plaintiff requests leave to amend his claims only against
10 NDEx. (Opp'n 13:15-17.) NDEx counters that Plaintiff has "fail[ed] to
11 state how his fatally defective [FAC] can be amended." (NDEx's Reply
12 8:13-18.)

13 Plaintiff has been given leave to amend before, and yet the
14 amended claims in the FAC are not supported by the record and are
15 dismissed again in this order. Further, Plaintiff has not shown how
16 he could cure his claims through amendment. "When a proposed
17 amendment would be futile, there is no need to prolong the litigation
18 by permitting further amendment." Chaset v. Fleer/Skybox Int'l, LP,
19 300 F.3d 1083, 1088 (9th Cir.2002). Therefore, Plaintiff's request
20 for leave to amend is denied.

21 **V. CONCLUSION**

22 For the foregoing reasons, each Defendant's dismissal motion
23 is granted with prejudice, and this action shall be closed.

24 Dated: April 29, 2010

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27 _____
28 GARLAND E. BURRELL, JR.
United States District Judge