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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SASHI L. SINGH,)	Case No. 2:10-CV-0836-JAM-GGH
)	
Plaintiff,)	<u>ORDER GRANTING DEFENDANTS'</u>
)	<u>MOTION TO DISMISS</u>
v.)	
)	
AMERICA'S SERVICING COMPANY; NEW)	
CENTURY MORTGAGE CORPORATION;)	
FIRST AMERICAN LOANSTAR TRUSTEE)	
SERVICES; DEUTSCHE BANK NATIONAL)	
TRUST COMPANY; MFN MORTGAGE;)	
GREGORY LYNN NICHOLS; and DOES)	
1-20, inclusive,)	
)	
Defendants.)	

This matter comes before the Court on Defendants Deutsche Bank National Trust Company and Wells Fargo Bank, N.A. d/b/a America's Servicing Company's ("Defendants'") Motion to Dismiss (Doc. 20) Plaintiff Sashi Singh's First Amended Complaint ("FAC") (Doc. 15). Defendants move to dismiss the three claims against them in the FAC, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes

1 dismissal of one of the claims.¹ For the reasons set forth
2 below, Defendants' motion is granted.

3
4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 In March 2006, Plaintiff obtained a \$344,149.00 first and
6 \$64,528.00 second mortgage ("the Loans") secured by deeds of
7 trust on the property located at 5454 Knotty Pine Way,
8 Sacramento, California ("the property"). The deeds of trust
9 identified New Century Mortgage Corporation as lender and North
10 American Title Company as trustee. Subsequently, Defendant
11 America's Servicing Company ("ASC") began servicing the Loans.
12 Plaintiff defaulted on the loans, and a Notice of Default was
13 recorded on June 3, 2009. First American Loanstar Trustee
14 Services was substituted in as trustee on July 9, 2009. On July
15 24, 2009, an assignment of the deeds of trust to Deutsche Bank
16 National Trust Company as Trustee for Morgan Stanley ABS Capital
17 1, Inc. ("Deutsche") was recorded. A Notice of Trustee's Sale
18 was recorded on September 24, 2009. The property was purchased
19 by Deutsche at a foreclosure sale on January 20, 2010.

20 Plaintiff alleges that prior to the closing of the loan,
21 the mortgage broker Gregory Nichols made numerous
22 misrepresentations to Plaintiff regarding the terms of the loan.
23 Plaintiff brought claims of fraud, negligent misrepresentation
24 and wrongful foreclosure against Defendants. Plaintiff also
25 brought additional claims against other defendants who are not
26 parties to this motion. Plaintiff has voluntarily dismissed

27 _____
28 ¹ This motion was determined to suitable for decision without
oral argument. E.D. Cal. L.R. 230(g).

1 defendant First American Loanstar Trustee Services (not a party
2 to this motion), and has voluntarily dismissed all but one of
3 the claims against Defendants. Accordingly, the only remaining
4 claim against Defendants is a claim for wrongful foreclosure.

6 II. OPINION

7 A. Legal Standard

8 A party may move to dismiss an action for failure to
9 state a claim upon which relief can be granted. Fed. R. Civ. P.
10 12(b)(6). In considering a motion to dismiss, the court must
11 accept the allegations in the complaint as true and draw all
12 reasonable inferences in favor of the plaintiff. Scheur v.
13 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
14 Davis v. Schere, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.
15 319, 322 (1972). "Notwithstanding this deference, it is
16 improper for a court to assume the plaintiff can prove facts
17 which he or she has not alleged." Ozuna v. Home Capital
18 Funding, 2009 WL 2496804, at *1 (S.D. Cal. Aug. 13, 2009).
19 Assertions that are mere "legal conclusions," are not entitled
20 to the assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937,
21 1949-50 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544,
22 555 (2007)). To survive a motion to dismiss, a plaintiff needs
23 to plead "enough facts to state a claim to relief that is
24 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
25 544, 555, 570 (2007). Dismissal is appropriate where the
26 plaintiff fails to state a claim supportable by a cognizable
27 legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d
28 696, 699 (9th Cir. 1990).

1 Upon granting a motion to dismiss, a court has discretion
2 to allow leave to amend the complaint. See Fed. R. Civ. Pro.
3 15(a). "Absent prejudice, or a strong showing of any [other
4 relevant] factor[], there exists a presumption under Rule 15(a)
5 in favor of granting leave to amend." Eminence Capital, L.L.C.
6 v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis
7 in original). "Dismissal with prejudice and without leave to
8 amend is not appropriate unless . . . it is clear that the
9 complaint could not be saved by amendment." Id.

10 Generally, the court may not consider material beyond the
11 pleadings in ruling on a motion to dismiss for failure to state
12 a claim. Sherman v. Stryker Corp., 2009 WL 2241664, at *2 (C.D.
13 Cal. Mar. 30, 2009) (internal citations omitted). There are two
14 exceptions: when material is attached to the complaint or relied
15 on by the complaint, or when the court takes judicial notice of
16 matters of public record, provided the facts are not subject to
17 reasonable dispute. Id. Defendants have requested that the
18 Court take judicial notice of several of the loan documents
19 which are matters of public record and relied on in the FAC.
20 (Doc. 18, ex. 2). Accordingly, the Court takes judicial notice
21 as requested.

22 B. Wrongful Foreclosure

23 The FAC alleges that Defendants wrongfully foreclosed
24 on the property because Defendants are not persons entitled to
25 enforce a security interest in the property pursuant to
26 California Commercial Code §3301. Plaintiff alleges Defendants
27 cannot produce the Note as required by Section 3301. However,
28 as Defendants correctly note, nonjudicial foreclosures are not

1 governed by California Commercial Code §3301. See e.g. Pok v.
2 American Home Mortg. Servicing, Inc., 2010 WL 476674, *7 (E.D.
3 Cal. Feb. 3, 2010).

4 Furthermore, Plaintiff has not alleged tender, which is
5 required under California law to challenge a foreclosure sale.
6 Montoya v. Countrywide Bank, FSB, 2009 WL 1813973, *11 (N.D.
7 Cal. June 25, 2009). ("Under California law, the tender rule
8 requires that as a precondition to challenging a foreclosure
9 sale, or any cause of action implicitly integrated to the sale,
10 the borrower must make a valid and viable tender of payment of
11 the secured debt.")

12 Lastly, Plaintiff's opposition brief raises new allegations
13 that the cause of action for wrongful foreclosure arises from
14 California Civil Code §2923.5. The Court will not consider new
15 allegations raised for the first time in the opposition.
16 Moreover, Section 2923.5 does not create a private right of
17 action. Zendejas v. GMAC Wholesale Mortg. Corp., 2010 WL
18 2629899, *4 (E.D. Cal. June 29, 2010).

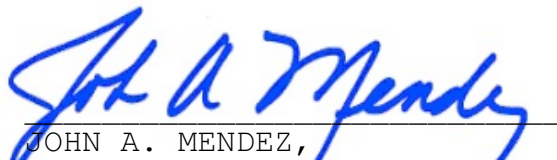
19 Accordingly, Plaintiff's FAC has failed to state a claim
20 against Defendants for wrongful foreclosure, and further
21 amendment would be futile. The Court grants Defendant's Motion
22 to Dismiss, with prejudice.

23 III. ORDER

24 For the reasons set forth above, Defendants' Motion to
25 Dismiss is GRANTED, WITH PREJUDICE.

26 IT IS SO ORDERED.

27 Dated: September 29, 2010

28 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE