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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNLy R. BECKER, THE
BECKER TRUST DATED
MARCH 25, 1991,

NO. CIV. S-10-2799 LKK/KJN

Plaintiffs,

v.

O R D E R

WELLS FARGO BANK, N.A.,
WACHOVIA MORTGAGE
CORPORATION; DOES 1-20,

Defendants.

_____/

Plaintiff, who is proceeding pro se, has filed this suit concerning several mortgages on different properties. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and L.R. 302(c)(21).

On March 21, 2011, the Magistrate Judge filed an order and findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty-one days. Plaintiff filed timely objections to the findings and

1 recommendations. He also disputed aspects of the Magistrate Judge's
2 order. In the interests of justice, this court construed his
3 "objections" to the order as a motion for reconsideration of the
4 order.

5 Having carefully reviewed the entire file, the court adopts
6 the findings and recommendations in full. The court also grants in
7 part and denies in part plaintiff's motion for reconsideration.

8 **A. Motion for Reconsideration**

9 Plaintiff's motion for reconsideration of the Magistrate
10 Judge's order is denied for the reasons stated in the order, except
11 as discussed herein. The Magistrate Judge granted plaintiff leave
12 to file a claim under the Real Estate Settlement Procedures Act
13 ("RESPA"), 12 U.S.C. §§ 2600 et seq. However, he limited this leave
14 to be premised only upon facts that Becker has already pled.
15 Plaintiff seeks reconsideration of this limitation. The court finds
16 that plaintiff shall be permitted to allege new facts in support
17 of this claim. Thus, plaintiff's motion for reconsideration is
18 granted only insofar as the Magistrate Judge's order limited the
19 facts Becker could allege in his RESPA claim.

20 **B. Findings and Recommendations**

21 The court finds that the findings and recommendations are
22 supported by the record and by the Magistrate Judge's analysis.
23 Nonetheless, the determines that it is appropriate to address an
24 issue raised in plaintiff's objections and to clarify a standard.

25 **1. Preemption Under HOLA**

26 Plaintiff seeks leave to amend several of his claims to

1 include allegations that defendants are not the holders of his
2 notes. Ostensibly, plaintiff intends to argue, under various legal
3 theories, that defendants have no right to foreclose upon him
4 because they do not own his loans, but that rather other,
5 unidentified entities own the loans. The court finds that the
6 Magistrate Judge's denial of this request was appropriate because
7 any claims premised upon such allegations are preempted by the Home
8 Owner's Loan Act ("HOLA").

9 HOLA expressly preempts claims based on the "processing,
10 origination, servicing, *sale or purchase of*, or investment or
11 participation in, mortgages." 12 C.F.R. § 560.2 (b)(10) (emphasis
12 added). A state law that applies generally must be preempted by
13 HOLA if, as applied, it falls under § 560.2(b). Silvas v. E*Trade
14 Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir. 2008); see also DeLeon
15 v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1124-26 (N.D. Cal.
16 2010) (detailed discussion and analysis of preemption under HOLA).
17 Here, plaintiff seeks to add allegations that his mortgages were
18 somehow transferred to or acquired by unknown entities. HOLA,
19 however, expressly preempts claims based upon the sale or purchase
20 of mortgages. 12 C.F.R. § 560.2(b)(10); see also Jarbo v. BAC Home
21 Loan Servicing, No. 10-12632, 2010 WL 5173825, at *5 (E.D. Mich.
22 Dec. 15, 2010) (concluding that claims resting upon alleged flaws
23 in the "sale, transfer, acquisition, and/or investment in
24 Plaintiff's mortgages" are specifically preempted by Section
25 560.2(b)(10)). Consequently, claims premised on allegations that
26 an entity foreclosed upon a loan that was assigned to another party

1 or for which that entity possessed no ownership interest at the
2 time of foreclosure are preempted.¹ Thus, the court adopts the
3 findings and recommendations insofar as they deny plaintiff leave
4 to amend to include these allegations because such amendment would
5 be futile.

6 **2. Lender's Duty of Care**

7 In his order, the Magistrate Judge dismissed plaintiff's
8 negligence claims, but granted him leave to file amended claims
9 premised upon "a duty that may have been triggered based upon
10 defendants' . . . actions or representations during the loan
11 modification application process." Findings and Recommendations at
12 38. While the Magistrate Judge made no error in his description of
13 the standard by which a lender may owe a borrower a duty of care,
14 the court nonetheless finds it appropriate to provide additional
15 discussion concerning this test.

16 California courts have stated that "as a general rule, a
17 financial institution owes no duty of care to a borrower when the
18 institution's involvement in the loan transaction does not exceed
19 the scope of its conventional role as a mere lender of money."
20 Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089,
21 1096 (1991). Applying this rule, the court in Nymark granted
22 summary judgment to defendant on a claim that the defendant lender

23
24 ¹ The court notes that in a related, yet distinct contention
25 as to whether a party need demonstrate actual possession of the
26 underlying note to foreclose, courts in this district have
"unanimously concluded that in a non-judicial foreclosure," actual
possession is not required. See, e.g., Champlaie v. BAC Home Loans
Servicing, 706 F. Supp. 2d 1029, 1045, 1048-49 (E.D. Cal. 2009).

1 had acted negligently in appraising the borrower's collateral to
2 determine if it is adequate security for a loan refinancing the
3 borrower's mortgage, as the court concluded as a matter of law that
4 no duty of care existed with respect to the appraisal. Id. at 1096.
5 See also Wagner v. Benson, 101 Cal. App. 3d 27, 35 (1980) (a lender
6 has no duty to ensure that borrower will use borrowed money
7 wisely).

8 The court understands Nymark to be limited in two ways. First,
9 a lender may owe a duty of care sounding in negligence to a
10 borrower when the lender's activities exceed those of a
11 conventional lender. The Nymark court noted that the "complaint
12 does not allege, nor does anything in the summary judgment papers
13 indicate, that the appraisal was intended to induce plaintiff to
14 enter into the loan transaction or to assure him that his
15 collateral was sound."² Id. at 1096-97. Nymark thereby implied that
16 had such an intent been present, the lender may have had a duty to
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18 ² The court notes that in Nymark, the loan was being taken to
19 refinance a mortgage. In this scenario, a borrower may have less
20 need to know the value of the property. The home has already been
21 bought, and if the lender attempts to enforce the security through
22 a non-judicial foreclosure, the lender may not seek a deficiency
23 judgment against the borrower. Alliance Mortgage Co. v. Rothwell,
10 Cal. 4th 1226, 1236 (1995) (citing Roseleaf Corp. v.
Chierighino, 59 Cal. 2d 35, 43-44 (1963)). Even in this situation,
22 however, the borrower has an interest in the value of the home, at
23 least because the lender may seek a deficiency judgment after a
judicial foreclosure. Id.

24 In the context of a purchase money loan, the borrower has a
25 much clearer interest in the appraisal, and the instant court
doubts that Nymark could be extended to such a case. In this case,
25 however, there is no dispute regarding the accuracy of the
26 appraisal. The court instead discusses Nymark for its general
holdings.

1 exercise due care in preparing the appraisal. See also Wagner v.
2 Benson, 101 Cal. App. 3d 27, 35 (1980) ("Liability to a borrower
3 for negligence arises only when the lender actively participates
4 in the financed enterprise beyond the domain of the usual money
5 lender.").

6 Second, even when a lender's acts are confined to their
7 traditional scope, Nymark announced only a "general" rule. Rather
8 than conclude that no duty existed per se, the Nymark court
9 determined whether a duty existed on the facts of that case by
10 applying the six-factor test established by the California Supreme
11 Court in Biakanja v. Irving 49 Cal. 2d 647 (1958). Nymark, 231 Cal.
12 App. 3d at 1098; see also Glenn K. Jackson Inc. v. Roe, 273 F.3d
13 1192, 1197 (9th Cir. 2001). This test balances six non-exhaustive
14 factors:

15 [1] the extent to which the transaction was
16 intended to affect the plaintiff, [2] the
17 foreseeability of harm to him, [3] the degree
18 of certainty that the plaintiff suffered
19 injury, [4] the closeness of the connection
between the defendant's conduct and the injury
suffered, [5] the moral blame attached to the
defendant's conduct, and [6] the policy of
preventing future harm.

20 Roe, 273 F.3d at 1197 (quoting Biakanja, 49 Cal. 2d at 650)
21 (modification in Roe). Although Biakanja stated that this test
22 determines "whether in a specific case the defendant will be held
23 liable to a third person not in privity" with the defendant, 49
24 Cal. 2d. at 650, Nymark held that this test also determines
25 "whether a financial institution owes a duty of care to a
26 borrower-client," 231 Cal. App. 3d at 1098. Applying these factors

1 to the specific facts in that case, the Nymark court assumed that
2 plaintiff suffered injury, but held that the remaining factors all
3 indicated against finding a duty of care. Id. at 1098-1100.

4 In Roe, the Ninth Circuit noted that the California Supreme
5 Court "arguably limited" Biakanja in Bily v. Arthur Young & Co.,
6 3 Cal. 4th 370, (1992), which held a court must consider three
7 additional factors before imposing a duty of care. Roe, 273 F.3d
8 at 1198. Roe summarized these factors as "(1) liability may in
9 particular cases be out of proportion to fault; (2) parties should
10 be encouraged to rely on their own ability to protect themselves
11 through their own prudence, diligence and contracting power; and
12 (3) the potential adverse impact on the class of defendants upon
13 whom the duty is imposed." Id. (citing Bily, 3 Cal. 4th at 399-
14 405). Bily was decided before Nymark, but not discussed therein.

15 **C. Conclusion**

16 For the reasons discussed in the findings and recommendations
17 and the reasons discussed herein, the court ORDERS as follows:

- 18 (1) The Magistrate Judge's March 22, 2011 Findings and
19 Recommendations (Doc. No. 49) are ADOPTED IN FULL.
- 20 (2) Plaintiff's request for reconsideration is GRANTED IN
21 PART and DENIED IN PART. Specifically, plaintiff is
22 granted leave to add new facts in support of his RESPA
23 claim. The request for reconsideration is OTHERWISE
24 DENIED.
- 25 (3) Plaintiff shall file an amended pleading entitled
26 "Second Amended Complaint" within thirty (30) days of

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being served with this order.

IT IS SO ORDERED.

DATED: August 1, 2011.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT