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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NEAL FOSTER, No. 2:11-cv-00735-MCE-DAD  
Plaintiff,

v. MEMORANDUM and ORDER

WELLS FARGO BANK, N.A., a  
California Corporation;  
CAL-WESTERN RECONVEYANCE  
CORPORATION, a California  
Corporation, NDEX WEST, LLC,  
Delaware Corporation and  
DOES 1-1000,  
Defendants.

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Through this action, Plaintiff Neal Foster ("Plaintiff") seeks redress for the alleged fraud and deceit of Defendants Wells Fargo Bank ("Wells Fargo"), Cal-Western Reconveyance Corporation ("Cal-Western"), and NDEX West ("NDEX") in connection with the trustee sale of a second mortgage to Plaintiff. Plaintiff originally filed his complaint in Yolo County Superior Court. Wells Fargo removed the action to this Court based on diversity jurisdiction. However, complete diversity between the parties opposed in interest does not exist.

1 It is fundamental that federal courts are courts of limited  
2 jurisdiction. Vacek v. United States Postal Serv., 447 F.3d  
3 1141, 1145 (9th Cir. 2006). Regardless of whether the issue is  
4 raised by the parties, a district court has a duty to consider  
5 the basis of subject matter jurisdiction sua sponte. United  
6 Investors Life Ins. v. Waddell & Reed Inc., 360 F.3d 960, 966-67  
7 (9th Cir. 2004). See also Fed. R. Civ. P. 12(h)(3). There is a  
8 "strong presumption" against removal jurisdiction, and the  
9 defendant bears the burden of establishing that removal is  
10 proper. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).  
11 As a result, defendants must affirmatively allege the basis of  
12 diversity jurisdiction in the notice of removal. Kanter v.  
13 Warner-Lambert Co., 265 F.3d 853, 857-58 (9th Cir. 2001).  
14 Diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) requires  
15 complete diversity of citizenship between the parties opposed in  
16 interest. Kuntz v. Lamar Corp., 385 F.3d 1177, 1181 (9th Cir.  
17 2004).

18 Wells Fargo concedes that both Plaintiff and Cal-Western are  
19 citizens of California. Consequently, if Cal-Western is a  
20 properly joined defendant, the Court lacks diversity  
21 jurisdiction. However, Wells Fargo contends that Cal-Western is  
22 fraudulently joined. A fraudulently joined party is ignored for  
23 purposes of diversity jurisdiction. Morris v. Princess Cruises,  
24 Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). Joinder of a  
25 non-diverse defendant is deemed fraudulent if "the plaintiff  
26 fails to state a cause of action against a resident defendant,  
27 and the failure is obvious according to the settled rules of the  
28 state." Id.

1 There is a general presumption against fraudulent joinder, and  
2 the removing defendant has the burden to prove fraudulent joinder  
3 by clear and convincing evidence. Hamilton Materials, Inc. v.  
4 Dow Chemical Corp., 494 F.3d 1203, 1206 (9th Cir. 2007).  
5 Further, if there is a colorable claims against a party, joinder  
6 is not fraudulent. Charlin v. Allstate Ins. Co., 19 F. Supp. 2d  
7 1137, 1140 (C.D. Cal. 1998) (quotations omitted). Doubtful  
8 questions of state law should be determined in state court. Id.

9 Plaintiff claims that Cal-Western, as a trustee of a deed of  
10 trust, fraudulently induced him to purchase a second mortgage at  
11 a trustee sale for \$47,000. Specifically, Plaintiff alleges that  
12 Cal-Western represented that it was selling the real "property"  
13 in question, without disclosing that said property was subject to  
14 a first mortgage in the amount of \$210,000. Wells Fargo asserts  
15 that the joinder of Cal-Western is fraudulent because a trustee,  
16 as a mere agent of the trustor and beneficiary, may not be held  
17 individually liable under California law. In support of its  
18 assertion, Wells Fargo cites Mercado v. Allstate Insurance  
19 Company for the proposition that an agent or employee is not  
20 individually liable as a defendant.<sup>1</sup> 340 F.3d 824, 826 (9th Cir.  
21 2003). Wells Fargo contends that, because Cal-Western was acting  
22 as a mere agent, and because an agent cannot be held individually  
23 liable, Plaintiff's claim against Cal-Western fails as a matter  
24 of law.

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26 <sup>1</sup> Wells Fargo also cites McCabe v. General Foods Corp.,  
27 811 F.2d 1336 (9th Cir. 1987) and Charlin v. Allstate Ins. Co.,  
28 19 F. Supp. 2d 1137 (C.D. Cal. 1998) for the same proposition.  
However, both cases are distinguishable for the same reasons as  
Mercado.

1 Wells Fargo's argument is ultimately unpersuasive because  
2 Mercado is distinguishable from the instant case. The holding of  
3 Mercado applies to typical employer-employee or agency  
4 relationships. It does not extend to shield a trustee of a deed  
5 of trust from individual liability. Similar to Mercado, a  
6 trustee of a deed of trust acts as a "kind of common agent for  
7 the trustor and the beneficiary." Hatch v. Collins, 225 Cal.  
8 App. 3d 1104, 1111 (Cal. Ct. App. 1990). However, such agency is  
9 passive, and for the limited purpose of conducting a sale in the  
10 event of default, or reconveying the property upon satisfaction  
11 of the debt. Id.

12 Further, in addition to the obligations of a common agent, a  
13 trustee has a duty to conduct a trustee sale "fairly, openly,  
14 reasonably, and with due diligence, exercising sound discretion  
15 to protect the rights of the mortgagor and others." Id. at 1112  
16 (internal quotations omitted). Breach of said duty may give rise  
17 to a cause of action for professional negligence, breach of an  
18 obligation created by statute, or fraud. Id. at 1112-13. The  
19 duty extends to all participants of the sale, including  
20 prospective bidders. Baron v. Colonial Mortgage Service Co., 111  
21 Cal. App. 3d 316, 324 (Cal. Ct. App. 1980). As a result of the  
22 unique obligations and duties of a trustee of a deed of trust,  
23 Mercado is inapplicable to the instant case.

24 Plaintiff alleges that Cal-Western committed fraud and  
25 deceit in connection with a trustee sale inducing him to buy an  
26 allegedly valueless second mortgage. Such a cause of action is  
27 not obviously defective according to the well settled rules of  
28 California.

1 Because Plaintiff has stated a colorable claim against Cal-  
2 Western, Wells Fargo cannot meet its burden to establish  
3 fraudulent joinder, and this Court lacks diversity jurisdiction.

4 Based on the foregoing, the case is hereby REMANDED to The  
5 Superior Court of the State of California, County of Yolo  
6 pursuant to 28 U.S.C. § 1447(c). The Clerk is ordered to close  
7 the case.

8 IT IS SO ORDERED.

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10 Dated: April 6, 2011

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MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE