UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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LARRY D. JENT; MARY S. JENT, Plaintiffs, v. NORTHERN TRUST CORPORATION; and THE NORTHERN TRUST COMPANY, Defendants.	CIV. NO. 2:13-1684 WBS CKD MEMORANDUM AND ORDER RE: MOTION TO DISMISS

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Plaintiffs Larry D. Jent and Mary S. Jent brought this action against defendants Northern Trust Corporation and the Northern Trust Company in connection with defendants' allegedly wrongful conduct related to a residential loan. Defendants now move to dismiss plaintiffs' First Amended Complaint ("FAC") for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Factual and Procedural Background

In 2011, plaintiffs entered into a loan agreement

secured by a Deed of Trust on property located at 12001 Somerset Drive in Truckee, California (the "Property"). (FAC ¶¶ 1, 16 (Docket No. 16); Defs.' Req. for Judicial Notice ("RJN") Ex. 1 (Docket No. 19-1).) The Note and Deed of Trust named Northern Trust, N.A., a predecessor by merger to defendant Northern Trust Company, as beneficiary. (FAC ¶ 16.) Beginning in November 2012, plaintiffs were unable to make monthly payments. (Id. ¶ 17.) At this time, the Property was listed for sale, and plaintiffs attempted to secure additional credit with other financial institutions. (Id. ¶¶ 18-19.)

On March 21, 2013, defendants recorded a Notice of Default ("NOD") on the Property, allegedly without contacting plaintiffs as required by California law. (Id. ¶ 23; RJN Ex. 3 (Docket No. 19-3).) According to plaintiffs, the NOD was accompanied by a declaration pursuant to California Civil Code section 2923.55 making the contradictory assertions that defendants had both contacted plaintiffs to assess plaintiffs' financial situation and that defendants, despite exercising due diligence, were unable to contact plaintiffs. (FAC ¶ 24.)

Plaintiffs claim that, as a result of the recording of the NOD, other financial institutions withdrew their offers of credit. (FAC ¶¶ 29-33.) Plaintiffs also allege that the inconsistent statements in the declaration itself caused harm in the form of reduced value of the Property. (Id. ¶¶ 34-35.) Further, plaintiffs claim defendants made the alleged contradictory assertions with intent to do harm. (Id. ¶¶ 37-38.) In April 2013, plaintiffs informed defendants that the NOD had been improperly recorded, and in May defendants recorded a

rescission of the NOD. (Id. ¶¶ 39-45; RJN Ex. 4 (Docket No. 19-4).)

On August 18, 2013, plaintiffs filed a Complaint bringing claims for slander of title, negligent misrepresentation, negligence, and violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Profs. Code § 17200 et seq. (Docket No. 1.) The court granted defendants' motion to dismiss the Complaint in its entirety on October 28, 2013. (Docket No. 15.) On November 7, 2013, plaintiffs filed the FAC, realleging claims for slander of title, negligence, and violations of the UCL. (Docket No. 16.) Defendants now move to dismiss the FAC for failure to state a claim pursuant to Rule 12(b)(6). (Docket No. 18.)

II. Request for Judicial Notice

In general, a court may not consider items outside the pleadings when deciding a motion to dismiss, but it may consider items of which it can take judicial notice. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial notice of facts "not subject to reasonable dispute" because they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. A court may properly take judicial notice of matters of public record outside the pleadings. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). A court may also consider a document outside the complaint if "that document's authenticity is not questioned and the plaintiff's complaint necessarily relies on

that document." Ayala v. World Sav. Bank, FSB, 616 F. Supp. 2d 1007, 1014 n.3 (C.D. Cal. 2009) (citation omitted).

Defendants request that the court judicially notice four recorded documents pertaining to the Property: the underlying promissory Note, printouts of tax assessments against the Property, the NOD, and the Notice of Rescission. (See RJN Exs. 1-4.) Plaintiffs do not oppose this request. The court will take judicial notice of the Note, the NOD, and the Notice of Rescission, since they are matters of public record whose accuracy cannot be questioned. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). Moreover, neither party disputes the authenticity of these documents and, having referred to the documents throughout the FAC, plaintiffs' claim relies on them. See Ayala, 616 F. Supp. 2d at 1014 n.3. The tax assessments do not affect the outcome of this Order, and the court therefore declines to take judicial notice of them.

III. Analysis

On a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely

consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556–57).

A. Slander of Title

"Slander of title occurs when a person, 'without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof some pecuniary loss or damage.'" Ghuman v. Wells Fargo Bank, N.A., --- F. Supp. 2d ----, Civ. No. 1:12-00902 AWI BAM, 2013 WL 552097, at *3 (E.D. Cal. Feb. 13, 2013) (quoting Sumner Hill Homeowners' Ass'n v. Rio Mesa Holdings, LLC, 205 Cal. App. 4th 999, 1030 (5th Dist. 2012)). To state a claim for slander of title, a plaintiff must allege: "1) a publication; 2) which is without privilege or justification; 3) which is false; and 4) which causes direct and immediate pecuniary loss." Jackson v. Ocwen Loan Servicing, LLC, Civ. No. 2:10-00711 MCE GGH, 2010 WL 3294397, at *4 (E.D. Cal. Aug. 20, 2010) (citing Manhattan Loft, LLC v. Mercury Liquors, Inc., 173 Cal. App. 4th 1040, 1050–51 (2d Dist. 2009)). Plaintiffs again claim that defendants maliciously recorded the NOD with an accompanying declaration that contained false and contradictory statements, which caused plaintiffs to lose out on obtaining outside credit and lowered the value and vendibility of the Property. (FAC ¶¶ 23-36.)

Plaintiffs again fail to allege a plausible connection between any allegedly false statements and the losses plaintiffs claim to have suffered. "[A]n essential element of a cause of action for slander of title is that the plaintiff suffered pecuniary damage as a result of the disparagement of title . . .

." Sumner Hill, 205 Cal. App. 4th at 1032 (emphasis added) (citing Manhattan Loft, 173 Cal. App. 4th at 1057). "If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title." Id. at 1030 (citing Hill v. Alan, 259 Cal. App. 2d 470, 489 (1st Dist. 1968)).

Plaintiffs make contradictory allegations regarding whether it was the NOD itself or the accompanying declaration that caused their harm. Although plaintiffs amended their complaint to allege that, "[a]ccording to multiple licensed California real estate agents, the inconsistent assertions in the declaration . . . caused the value and salability of the Subject Property to be lowered even after the Notice was rescinded," (FAC ¶ 34), plaintiffs also appear to allege that a financial institution withdrew on offer of credit "as a result of the negative affect the assertions made in the Notice of Default" itself, (id. ¶ 33). Moreover, the allegedly false statement in the declaration accompanying the NOD does not itself "cast doubt upon the existence or extent of" plaintiffs' interest in the Property." Sumner Hill, 205 Cal. App. 4th at 1030. Nothing in the declaration, by itself, makes any claim on the Property, and the declaration is therefore meaningless without the NOD. See Phillips v. Glazer, 94 Cal. App. 2d 673, 677 (2d Dist. 1949) (citation omitted) (defining a disparaging statement as "a complete denial of title in others" or "any unfounded claim of an interest in the property which throws doubt upon its ownership").

Plaintiffs appear to advance the theory that the NOD itself was rendered "false" by virtue of the alleged defect in

the declaration. The alleged defect upon which plaintiffs rely amounts to the fact that in addition to simply checking the box indicating that defendants contacted plaintiffs to assess plaintiffs' financial situation defendants also checked the box indicating that despite exercising due diligence defendants were unable to contact plaintiffs. Nobody disputes that the first box in the declaration was properly checked. The fact that defendants also checked the second box, in the court's view, amounts to no more than surplusage. Further, the court observes that checking both boxes is not technically inconsistent: defendants could have been unable to contact plaintiffs after several attempts and have ultimately contacted plaintiff. More importantly, to rely upon such a hypertechnical argument to invalidate the NOD would allow plaintiffs to play "gotcha" with defendants. The court is unwilling to effect such a result.

There is no claim that the NOD itself contained false statements that disparaged plaintiffs' title. As plaintiffs admit, they were unable to make the loan payments between November 2012 and January 2013. (FAC ¶ 17.) Therefore, the NOD is not actionable because it is not false, and even assuming the declaration accompanying the NOD was false, it is not actionable because it does not disparage plaintiffs' title. Plaintiffs, therefore, fail to allege they "suffered pecuniary damage as a result of the disparagement of title." Sumner Hill, 205 Cal. App. 4th at 1032. Accordingly, the court must grant defendants' motion to dismiss plaintiffs' slander of title claim.

B. Negligence

To assert a cause of action for negligence, plaintiffs

must allege: "(1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." Mendoza v. City of Los Angeles, 66 Cal. App. 4th 1333, 1339 (2d Dist. 1998). "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." Vasquez v. Residential Invs., Inc., 118 Cal. App. 4th 269, 278 (4th Dist. 2004).

Plaintiffs again fail to allege a plausible theory under which defendants owed them a duty of care. An arm's length transaction between lender and borrower does not create an actionable duty of care. Saldate v. Wilshire Credit Corp., 711 F. Supp. 2d 1126, 1132 (E.D. Cal. 2010) (O'Neill, J.); see also Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096 (3d Dist. 1991) ("[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money."). "This general rule also applies to loan servicers." Argueta v. J.P. Morgan Chase, Civ. No. 2:11-441 WBS GGH, 2011 WL 2619060, at *4 (E.D. Cal. June 30, 2011).

Plaintiffs now allege that defendants "exceeded the scope of the conventional role of a mere lender of money." (FAC ¶ 56.) Plaintiffs do not allege any further facts to substantiate this allegation, and, without more, the court is not required to accept these conclusory allegations as true. See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010) ("We are not . . . required to accept as true allegations

that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”). These allegations are not sufficient to plead the existence of a duty of care owed to plaintiffs.

Nor do the statutory requirements for non-judicial sales under California Civil Code section 2923.55 create a duty of care here. Plaintiffs again fail to provide any authority for the proposition that they may seek damages for a violation of section 2923.55 under a theory of negligence. In contrast, California courts have repeatedly held that “California’s non-judicial foreclosure statute . . . is a ‘comprehensive statutory framework established to govern non-judicial foreclosure sales [and] is intended to be exhaustive.’” Lane v. Vitek Real Estate Indus. Grp., 713 F. Supp. 1092, 1098 (E.D. Cal. 2010) (Shubb, J.) (alteration in original) (quoting Moeller v. Lien, 25 Cal. App. 4th 822, 834 (2d Dist. 1994)). The California legislature has spoken: a borrower may seek an injunction to enjoin an improper foreclosure if a trustee’s deed upon sale has not been recorded, Cal. Civ. Code § 2924.12(a)(1); or, if a trustee’s deed upon sale has been recorded, the borrower may seek damages for violations of the statutory provisions, id. § 2924.12(b). However, the statute provides a “safe harbor,” precluding liability “for any violation . . . corrected and remedied prior to the recordation of a trustee’s deed upon sale.” Id. § 2924.12(c).

Here, defendants rescinded the NOD, (RJN Ex. 4), and no trustee’s deed upon sale has been recorded. Therefore, section 2924.12(c) precludes liability under California’s non-judicial

foreclosure statutory scheme. See Vasquez v. Bank of Am., N.A., Civ. No. 13-02902 JST, 2013 WL 6001924, at *7 (N.D. Cal. Nov. 12, 2013) (confirming that a plaintiff "may not seek remedies under Section 2924.12 that do not apply to the present status of the property," and noting that, "if no trustee's deed upon sale has been recorded," any damages claims "are unavailable until such time as the deed upon sale has been recorded"). To import a duty of care from this statute would allow plaintiffs to sue for damages where the legislature expressly foreclosed liability. Although plaintiffs contend that their alleged damages are otherwise left without remedy, it is not the place of this court to second-guess the legislature and expand the private right of action for violations of section 2923.55 beyond what the legislature has already provided. Cf. Ottolini v. Bank of Am., Civ. No. 11-0477 EMC, 2011 WL 3652501, at *5 (N.D. Cal. Aug. 19, 2011) (holding that allowing non-judicial foreclosure statute "to serve as a statutory basis for a negligence claim would circumvent the limited scope of relief provided by the statute").

Finally, plaintiffs contend that the alleged violation of section 2923.55 constitutes negligence per se. "Negligence per se delineates a specific manner, based upon statute or regulation, in which a breach of duty may be identified. However, a breach is irrelevant if no duty has first been established." Heflebower v. JPMorgan Chase Bank, NA, Civ. No. 1:12-01671 AWI SMS, 2013 WL 5476806, at *11 (E.D. Cal. Sept. 30, 2013). Thus, negligence per se only allows for a presumption that a defendant failed to exercise due care after the court has already determined that the defendant owes the plaintiff an

independent duty of care. Cal. Serv. Station & Auto. Repair Ass'n v. Am. Home Assur. Co., 62 Cal. App. 4th 1166, 1180 (1st Dist. 1998). Here, having found above that defendants did not owe plaintiffs a duty of care, plaintiffs' negligence per se theory cannot support their claim.

Accordingly, because defendants did not owe plaintiffs a legal duty of care, the court will grant defendants' motion to dismiss plaintiffs' negligence claim.

C. UCL

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice . . . ." Cal. Bus. & Prof. Code § 17200. "This cause of action is generally derivative of some other illegal conduct or fraud committed by a defendant, and '[a] plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation.'" Castaneda v. Saxon Mortg. Servs., Inc., 687 F. Supp. 2d 1191, 1202 (E.D. Cal. 2009) (Shubb, J.) (quoting Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (2d Dist. 1993)).

As alleged, plaintiffs' UCL claims are wholly derivative of the slander of title claim and alleged section 2923.55 violations described above. (See FAC ¶¶ 61-62 (alleging defendants "engaged in 'unlawful' business practices under the UCL based on the Slander of Title Claim and intentional violation of Civil Code 2923.55" and that defendants "engaged in 'unfair' business practices under the UCL because they intentionally violated Civil Code section 2923.55").)

Plaintiffs' slander of title claim cannot be the basis of their UCL claim because, as described above, the slander of

title claim fails for lack of falsity and a plausible connection between any allegedly false statements and plaintiffs' harm. Plaintiffs contend, however, that the aforementioned statutory safe harbor under section 2924.12, precluding liability "for any violation . . . corrected and remedied prior to the recordation of a trustee's deed upon sale," Cal. Civ. Code section 2924.12(c), does not apply to derivative claims under the UCL because defendants' alleged wrongdoing was intentional.

The California Supreme Court has held that "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 182 (1999). Despite plaintiffs' contentions, Lopez v. Nissan North America, Inc., 201 Cal. App. 4th 572 (2d Dist. 2011), does not establish that intentional conduct is precluded from statutory "safe harbor" provisions under the UCL. Lopez merely referenced a case limiting the applicability of a safe harbor provision relating to the regulation of rental cars, Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1163 (1st Dist. 2000), before holding that Schnall did not apply because Schnall "involve[d] a very different type of safe harbor provision." Lopez, 201 Cal. App. 4th at 594.

Section 2924.12 is also "a very different type of safe harbor provision." Id. Plaintiffs have not offered any authority--and the court is not aware of any--stating that the safe harbor established by section 2924.12 does not apply to intentional conduct. Instead, by its own terms, the statute precludes from liability "any violation . . . corrected and

remedied prior to a trustee's sale." Cal. Civ. Code § 2924.12(c) (emphasis added). The only distinction the statute makes regarding intent is allowing for statutory or treble damages if the violation "was intentional, reckless or resulted in willful misconduct." Id. § 2924.12(b). Thus, section 2924.12 provides a safe harbor for defendants' alleged wrongdoing, and "plaintiffs may not use the general unfair competition law to assault that harbor," allegations of intentional wrongdoing notwithstanding. Cel-Tech, 20 Cal. 4th at 812. Defendants' alleged violation of section 2923.55, intentional or not, is not independently actionable under the UCL.

Because plaintiffs' underlying claim for slander of title fails, and section 2924.12 immunizes defendants' alleged wrongdoing, plaintiffs' UCL claim has no leg to stand on. Accordingly, the court must grant defendants' motion to dismiss the claim.

D. Leave to Amend

Although leave to amend must be freely given, the court is not required to allow futile amendments. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992). Because the court has already permitted plaintiffs to amend their pleadings and it appears that plaintiffs are unable to state a viable claim against defendants, all claims will be dismissed with prejudice and without leave to amend.

IT IS THEREFORE ORDERED that defendants' motion to dismiss be, and the same hereby is, GRANTED.

The Clerk of the Court is directed to enter a judgment of dismissal in accordance with this Order and close the file.

Dated: January 14, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE