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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GAYLEN HERFURTH and DOUGLAS
HERFURTH,

Plaintiffs,

v.

CITIMORTGAGE, INC.; U.S. BANK
NATIONAL ASSOCIATION, AS
INDENTURE TRUSTEE ON BEHALF
OF THE HOLDERS OF THE
CITIGROUP MORTGAGE LOAN TRUST
2006-AR1, MORTGAGE-BACKED
NOTES, SERIES 2006-AR1;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
CR TITLE SERVICES, INC.; and
DOES 1 through 50, inclusive,

Defendants.

No. 2:14-cv-01037 JAM CKD

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

This matter is before the Court on Defendants CitiMortgage, Inc., et al.'s ("Defendants") Motion to Dismiss (Doc. #27) Plaintiffs Gaylen Herfurth and Douglas Herfurth's ("Plaintiffs") First Amended Complaint ("FAC") (Doc. #26). Plaintiffs oppose the motion (Doc. #30) and Defendants filed a reply (Doc. #31).

1 For the following reasons, Defendants' motion is GRANTED.¹

2
3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 On November 9, 2005, Plaintiffs obtained a \$525,000 loan
5 ("Subject Loan") from American Home Mortgage Acceptance, Inc.
6 ("AHMA"). FAC ¶ 16. This loan was secured by a Deed of Trust
7 recorded against real property located at 12449 Larkspur Lane in
8 Grass Valley, California ("Subject Property"). FAC ¶¶ 11, 16.
9 In July 2008, Plaintiffs contacted Defendant CitiMortgage and
10 sought a loan modification. FAC ¶ 17. Defendant CitiMortgage
11 allegedly informed Plaintiffs that they would only be considered
12 for a loan modification if they ceased making payments on the
13 loan. FAC
14 ¶ 17.

15 On December 1, 2008, Plaintiffs received a letter from
16 Defendant CitiMortgage informing them that they were delinquent
17 on the loan in the amount of \$11,640. FAC ¶ 19. On January 14,
18 2009, a Notice of Default against Plaintiffs was recorded with
19 the Nevada County Recorder's Office claiming a delinquency in the
20 amount of \$17,087.50. FAC ¶ 20. On that same date, an
21 Assignment of Deed of Trust was recorded with the Nevada County
22 Recorder's Office, transferring the beneficial interest under the
23 Deed of Trust from Defendant MERS to Defendant CitiMortgage. FAC
24 ¶ 21. Plaintiffs allege that this transfer was improper because
25 an employee from Defendant CitiMortgage purported to make the
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for October 1, 2014.

1 assignment on behalf of Defendant MERS. FAC ¶ 21. Plaintiffs'
2 efforts to work with Defendant CitiMortgage on a loan
3 modification were unsuccessful and the Subject Property was sold
4 at a non-judicial foreclosure sale in February 2010. FAC ¶ 26.

5 Plaintiffs further allege that, at some point between
6 November 16, 2005 and January 14, 2009, the original lender -
7 AHMA - "took steps to sell the Subject Loan (including the Note
8 and/or Deed of Trust) to an entity that purportedly intended to
9 pool the Subject Loan with other residential mortgage loans,
10 securitize the pool, and sell the securities on the open market."
11 FAC ¶¶ 27-28. Plaintiffs allege that AHMA's securitization of
12 the Deed of Trust was improper, as it failed to conform to the
13 statutorily and contractually required procedure. FAC ¶¶ 29-35.

14 Plaintiffs allege that "the first time [they] had any
15 indication that an attempt to securitize their loan had been
16 made" was in December 2013. FAC ¶ 51. After Plaintiffs' counsel
17 determined that any potential fraud, negligence, or promissory
18 estoppel claims were time-barred, Plaintiffs' counsel
19 "requisitioned the services of a securitization auditor to
20 perform an investigation into the history of the Subject Loan."
21 FAC ¶¶ 49-50. The auditor determined that the "loan was
22 purportedly securitized" into a beneficiary trust. FAC ¶ 50.
23 Plaintiffs allege that they did not learn of this securitization
24 until December 2013 because, throughout the course of its
25 relationship with Plaintiffs, Defendant CitiMortgage had "held
26 itself out to Plaintiffs as the sole owner and beneficiary of the
27 Subject Loan." FAC ¶ 48.

28 On February 11, 2014, Plaintiffs filed a complaint in Nevada

1 County Superior Court, which was removed by Defendants to this
2 Court. On July 29, 2014, the Court dismissed Plaintiffs'
3 original complaint, finding that Plaintiffs' conclusory
4 allegations with regard to its delayed discovery of the alleged
5 securitization of the loan were insufficient to overcome
6 Defendants' statute of limitations, judicial estoppel, and
7 standing arguments. However, the Court granted Plaintiffs leave
8 to amend their complaint, in order to supplement these
9 allegations. Three days later, Plaintiffs filed the FAC, which
10 includes additional allegations concerning the delayed discovery
11 and the following causes of action: (1) Wrongful Foreclosure; (2)
12 Conversion; and (3) Violation of Business and Professions Code §
13 17200.

14 15 II. OPINION

16 A. Judicial Notice

17 Defendants request that the Court take judicial notice of
18 seven documents: (1) a Deed of Trust recorded on November 16,
19 2005 in the Nevada County Recorder's Office; (2) a Substitution
20 of Trustee recorded on September 14, 2009 in the Nevada County
21 Recorder's Office; (3) a Voluntary Petition for Chapter 7
22 Bankruptcy, filed in the U.S. Bankruptcy Court for the Eastern
23 District of California on May 1, 2009; (4) a Discharge Order
24 dated August 19, 2009, entered in the U.S. Bankruptcy Court for
25 the Eastern District of California; (5) the docket sheet for
26 Plaintiffs' bankruptcy case; (6) a Trustee's Deed Upon Sale
27 recorded on March 31, 2010 in the Nevada County Recorder's
28 Office; and (7) the servicing agreement to the Citigroup Mortgage

1 Loan Trust 2006-AR1 Mortgage-Backed Notes, Series 2006-AR1.
2 Defs.' Request for Judicial Notice ("DRJN") (Doc. #28).

3 Generally, the Court may not consider material beyond the
4 pleadings in ruling on a motion to dismiss. However, the Court
5 may take judicial notice of matters of public record, provided
6 that they are not subject to reasonable dispute. See, e.g.,
7 Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D. Cal. 2009)
8 (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.
9 2001) and Fed. R. Evid. 201).

10 The first six documents listed above are public records.
11 Three of the documents were recorded in the Nevada County
12 Recorder's Office, and three of the documents are public court
13 filings. Furthermore, Plaintiffs have not opposed Defendants'
14 request, and the documents are not subject to reasonable dispute.
15 Therefore, they are the proper subject of judicial notice. See
16 Fed. R. Evid. 201. With regard to the first six documents,
17 Defendants' request is granted. The Court need not reach
18 Defendant's request with regard to the seventh document listed,
19 as it is not relevant to the Court's decision.

20 B. Discussion

21 1. Statute of Limitations

22 Defendants argue that that each of Plaintiffs' causes of
23 action is barred by the applicable statute of limitations. MTD
24 at 5. Specifically, Defendants argue that the amendments made by
25 Plaintiffs to the complaint are insufficient to trigger the
26 doctrine of equitable tolling. MTD at 6. Plaintiffs respond
27 that their causes of action did not accrue until December 2013,
28 when the securitization audit was conducted and they learned of

1 the alleged improper securitization. Opp. at 9.

2 Plaintiffs' causes of action are based on the alleged
3 securitization of Plaintiffs' loan - which occurred no later than
4 January 14, 2009 - and fraudulent statements made on the
5 Assignment of Deed of Trust, recorded on January 14, 2009. FAC
6 ¶¶ 21, 28. A Notice of Default against Plaintiffs was recorded
7 on that same date: January 14, 2009. FAC ¶ 20. Absent unusual
8 circumstances, Plaintiffs' causes of action accrued on January
9 14, 2009. See Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522
10 F.3d 1049, 1054 (9th Cir. 2008) (noting that a cause of action
11 ordinarily accrues "on the date of the plaintiff's injury").
12 Because Plaintiffs did not file the complaint until February 10,
13 2014, each of their claims will be barred by the applicable
14 statute of limitations, unless they can show that equitable
15 tolling should apply. See Cal. Bus. & Prof. Code § 17208 (four-
16 year limitations period for actions brought under § 17200); Cal.
17 Civ. Proc. Code § 338 (three-year limitations period for actions
18 based on fraud); Cal. Civ. Proc. Code § 343 (four-year
19 limitations period for any actions not expressly given a specific
20 limitations period in the Code).

21 The Ninth Circuit has held that accrual of a cause of action
22 may be "postponed until the plaintiff either discovers or has
23 reason to discover the existence of a claim." Platt, 522 F.3d at
24 1054. This exception to the ordinary rule of "accrual upon
25 injury" is known as the "discovery rule." Id. However, the mere
26 late discovery of a potential claim by a plaintiff is
27 insufficient to trigger application of the "discovery rule."
28 Rather, a plaintiff is "required to conduct a reasonable

1 investigation after becoming aware of an injury, and [is] charged
2 with knowledge of the information that would have been revealed
3 by such an investigation." Id. As long as a plaintiff has a
4 "reasonable ground for suspicion, the plaintiff must go out and
5 find the facts; she cannot wait for the facts to find her." Id.

6 Here, Plaintiffs did not learn of the alleged injury until
7 they conducted a securitization audit of the subject loan in
8 December 2013. FAC ¶ 51. Still, nothing prevented Plaintiffs
9 from "requisition[ing] the services of a securitization auditor"
10 at an earlier date. FAC ¶ 50. Plaintiffs acknowledge that they
11 "may have been in possession of sufficient facts to allege . . .
12 fraud, negligence, [and] breach of contract . . . relating to
13 modification efforts," but argue that "those facts have nothing
14 to do with the facts relating to securitization." Opp. at 5.
15 However, the Ninth Circuit has noted that, "[r]ather than
16 examining whether the plaintiffs suspect facts supporting each
17 specific legal element of a particular cause of action, we look
18 to whether the plaintiffs have reason to at least suspect that a
19 *type of wrongdoing* has injured them." Platt, 522 F.3d at 1055
20 (emphasis added). Accordingly, the Ninth Circuit has rejected a
21 "hypertechnical approach to the application of the discovery
22 rule:" a plaintiff is "required to conduct a reasonable
23 investigation after becoming aware of *an injury*," even if it is
24 not ultimately that specific injury which gives rise to her cause
25 of action. Id. (emphasis added). After Plaintiffs became aware
26 of "an injury" - i.e. the claims relating to the failed
27 modification - Plaintiffs were "required to conduct a reasonable
28 investigation . . . and are charged with knowledge of the

1 information that would have been revealed by such an
2 investigation." Id.

3 The performance of a securitization audit falls within the
4 scope of such a "reasonable investigation." By Plaintiffs' own
5 allegations, "an investigation into the history of the Subject
6 Loan" yielded the information that is the basis of Plaintiffs'
7 current claims. FAC ¶ 50. Plaintiffs also do not allege the
8 performance of the securitization audit was prompted by the late
9 discovery of additional information. Rather, after Plaintiffs
10 first met with counsel on an unspecified date, Plaintiffs'
11 counsel "requisitioned the services of a securitization
12 auditor[.]" FAC ¶ 50. Plaintiffs acknowledge that, at the time
13 that this investigation was performed, they "had no further
14 information to indicate that an attempt to securitize the Subject
15 Loan had ever occurred." FAC ¶ 50. Given these allegations, the
16 "investigation into the history of the Subject Loan" - including
17 the securitization audit - was part of the initial inquiry
18 performed by Plaintiffs' counsel. As Defendant argues, nothing
19 prevented Plaintiffs from seeking the assistance of counsel at an
20 earlier date. MTD at 7; see Cervantes v. Countrywide Home Loans,
21 Inc., 656 F.3d 1034, 1045 (9th Cir. 2011) (declining to toll the
22 statute of limitations when the plaintiffs failed to allege that
23 the late discovery was caused by "circumstances beyond their
24 control"). Had Plaintiffs done so, the "reasonable
25 investigation" would have commenced prior to the expiration of
26 the applicable limitations periods, and Plaintiffs would have had
27 sufficient information to state the securitization-based causes
28 of action. Plaintiffs therefore cannot avail themselves of the

1 "discovery rule" and each cause of action is barred by the
2 applicable statute of limitations. See Cal. Bus. & Prof. Code §
3 17208 (four-year limitations period for actions brought under §
4 17200); Cal. Civ. Proc. Code § 338 (three-year limitations period
5 for actions based on fraud); Cal. Civ. Proc. Code § 343 (four-
6 year limitations period for any actions not expressly given a
7 specific limitations period in the Code).

8 2. Leave to Amend

9 In the July 29, 2014 Order, the Court noted that the
10 conclusory allegations in the original complaint "fail[ed] to
11 explain why [the information giving rise to Plaintiffs'
12 securitization-based claims] was unavailable until December
13 2013[.]" Order at 6. Although the Court granted Plaintiffs
14 leave to amend their complaint in order to remedy its
15 deficiencies, Plaintiffs were unable to do so. As discussed
16 above, the additional allegations in the FAC do not explain why
17 the information revealed by the securitization audit was
18 unavailable until December 2013. Indeed, the allegations in the
19 FAC suggest that the securitization audit could have been
20 performed within the limitations period, had Plaintiffs met with
21 counsel sooner. Accordingly, the Court concludes that amendment
22 of the FAC would be futile, and declines to grant Plaintiffs
23 leave to file a third complaint. Deutsch v. Turner Corp., 324
24 F.3d 692, 718 (9th Cir. 2003).

25 As the Court finds that Plaintiffs are procedurally barred
26 from bringing each of their claims by the applicable statute of
27 limitations, the Court need not reach Defendants' remaining
28 arguments. Plaintiffs' first, second, and third causes of action

1 are DISMISSED WITHOUT LEAVE TO AMEND.

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III. ORDER

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For the reasons set forth above, the Court GRANTS WITHOUT
LEAVE TO AMEND Defendant's Motion to Dismiss:

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IT IS SO ORDERED.

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Dated: November 6, 2014

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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