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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JASON DAVIS, et al.,
Plaintiffs,
v.
NATIONSTAR MORTGAGE, LLC, et al.,
Defendants.

No. 2:16-cv-2599 KJM CKD PS

FINDINGS AND RECOMMENDATIONS

Defendant Ocwen Loan Servicing, LLC’s (“Ocwen”) motion to dismiss and defendants Nationstar Mortgage, LCC’s (“Nationstar”), Mortgage Electronic Registration Systems, Inc.’s (“MERS”), and Barrett Daffin Frappier Tredder & Weiss, LLP’s (“BDFTW”)¹ motion to dismiss came on regularly for hearing on August 16, 2017. (ECF Nos. 34, 36.) Present at the hearing, representing themselves, were pro se plaintiffs Jason and Joann Davis. Present telephonically were Mike Aleali, representing Ocwen; Diane P. Cragg, representing Nationstar and MERS; and James T. Lee, representing BDFTW.

Upon review of the documents in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

¹ Although not initially a party to Nationstar’s and MERS’s motion to dismiss, BDFTW filed a notice of joinder to the motion on November 17, 2016, based on the assertion that the grounds for dismissal asserted in the motion as to those two defendants was equally applicable to BDFTW. (ECF No. 39.)

1 I. BACKGROUND

2 A. Procedural History

3 Plaintiffs, who are proceeding without counsel in this action, filed their complaint on
4 September 13, 2016 in the Yolo County Superior Court, naming Nationstar, MERS, BDFTW,
5 Ocwen, and Indymac Bank, F.S.B. (“Indymac”) as defendants. (ECF No. 1-1.) While the case
6 was pending in the state court, BDFTW timely filed a declaration of non-monetary status
7 pursuant to California Civil Code § 2924I, and, therefore, is only a nominal party to this action
8 not subject to monetary damages. (ECF No. 1-3.)

9 The action was subsequently removed to this court by defendants pursuant to this court’s
10 diversity jurisdiction. (ECF No. 1.) On November 7, 2016, defendants Nationstar and MERS
11 filed a motion to dismiss, which defendant BDFTW subsequently joined. (ECF Nos. 7, 12.) On
12 November 9, 2016, defendants Ocwen, and Indymac filed a motion for judgment on the
13 pleadings. (ECF No. 10.) After a hearing on the motions, the undersigned recommended that the
14 motions be granted, Indymac be dismissed without leave to amend, and plaintiffs be granted an
15 opportunity to file an amended complaint against the remaining defendants. (ECF No. 27.) On
16 May 12, 2017, District Judge Kimberly J. Mueller adopted the findings and recommendations
17 (ECF No. 27) in full, dismissed Indymac without leave to amend, and granted plaintiffs an
18 opportunity to file an amended complaint against the remaining defendants. (ECF No. 29.)
19 Importantly, plaintiffs were granted leave based upon oral representations they made at the
20 December 9, 2016 hearing. Specifically, the court found that:

21 the allegations of plaintiffs’ complaint fail to state even a single
22 cognizable cause of action. However . . . Plaintiffs alleged at the
23 hearing that their automatic monthly payments under the mortgage
24 loan were not being credited to their account beginning as of the
25 time of the initial transfer of interest, and the complaint shows that
26 Nationstar, by care of BDFTW, deemed plaintiffs in default as of
27 April 8, 2016. ([ECF No.1-1] at 55.) Based on these additional
28 allegations plaintiffs provided at the hearing, it appears that
plaintiffs may be able to state a cognizable cause of action against
one or more of defendants Northstar, MERS, Ocwen, and BDFTW.
Accordingly, the court recommends that the complaint be
dismissed, but with leave to amend with regard to those defendants.

(ECF No 27 at 25–26.)

1 On June 12, 2017, plaintiffs filed their first amended complaint. (ECF No. 32.)

2 Defendants Ocwen, MERS, Nationstar, and BDFTW subsequently filed motions to
3 dismiss, which came on regularly for hearing on August 16, 2017. (ECF Nos. 34, 36.) At the
4 hearing, the undersigned informed plaintiffs that the first amended complaint (ECF No. 32) was
5 nearly identical to the original complaint (ECF No. 1-1), which had been dismissed. Plaintiffs
6 once again maintained that they have evidence that defendants failed to credit their account for
7 mortgage payments plaintiffs had made. The undersigned took the motions to dismiss under
8 submission, but ordered the parties to confer regarding the alleged mortgage payments, and to
9 report back to the court. (ECF No. 49.) Later that day, defendants reported that after the parties
10 conferred on August 16, 2017, “[p]laintiffs agreed that the accounting on their loan is in fact
11 accurate. Plaintiffs do not contend to have records to controvert this fact.” (ECF No. 50 at 2.)
12 Plaintiffs have not disputed defendants’ representation of their discussion.

13 B. First Amended Complaint

14 Plaintiffs’ first amended complaint is nearly identical to their original complaint. The
15 only differences between the two are: the elimination of any references to Indymac (compare
16 ECF No 1-1, with ECF No. 32); the removal of paragraph 68, a conclusory statement regarding
17 injury in fact (compare ECF No. 1-1 at 18, with ECF No. 32 at 14); and the omission of the
18 recession cause of action (compare ECF No. 1-1 at 4, 30, with ECF No. 32 at 1). Importantly, the
19 common “factual and general allegations” set forth by plaintiffs in the first amended complaint
20 are identical to those set forth in the original complaint.² (Compare ECF No 1-1 at 7–11, with
21 ECF No. 32 at 4–8.)

22 In brief, plaintiffs bring eleven causes of action related to the issuing and servicing of their
23 December 24, 2007 mortgage loan: (1) violations of California’s Homeowners Bill of Rights; (2)
24 negligence; (3) violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof.
25 Code § 17200, et seq.; (4) injunctive relief; (5) fraud in the concealment; (6) fraud in the
26 inducement; (7) predatory lending practices; (8) constructive fraud; (9) slander of title; (10) quiet

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28 ² For a detailed summary of plaintiffs’ factual allegations, refer to this court’s December 9, 2016
findings and recommendations (ECF No. 27 at 3–5).

1 title; and (11) declaratory relief. (ECF No. 32 at 9–29.)

2 II. LEGAL STANDARDS

3 In considering a motion to dismiss for failure to state a claim upon which relief can be
4 granted pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the
5 allegations of the complaint in question, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and
6 construe the pleading in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416 U.S.
7 232, 236 (1974). The court is “not, however, required to accept as true conclusory allegations
8 that are contradicted by documents referred to in the complaint, and [the court does] not
9 necessarily assume the truth of legal conclusions merely because they are cast in the form of
10 factual allegations.” Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). The court “may
11 generally consider only allegations contained in the pleadings, exhibits attached to the complaint,
12 and matters properly subject to judicial notice.” Outdoor Media Grp., Inc. v. City of Beaumont,
13 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted).

14 In order to avoid dismissal for failure to state a claim a complaint must contain more than
15 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause
16 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
17 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
18 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a claim
19 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A claim
20 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
21 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
22 1949.

23 A motion to dismiss pursuant to Rule 12(b)(6) may also challenge a complaint’s
24 compliance with Federal Rule of Civil Procedure 9(b) where fraud is an essential element of a
25 claim. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). Rule 9(b),
26 which provides a heightened pleading standard, states: “In alleging fraud or mistake, a party must
27 state with particularity the circumstances constituting fraud or mistake. Malice, intent,
28 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P.

1 9(b). These circumstances include the “time, place, and specific content of the false
2 representations as well as the identities of the parties to the misrepresentations.” Swartz v.
3 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (quoting Edwards v. Marin Park,
4 Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)); see also Kearns v. Ford Motor Co., 567 F.3d 1120,
5 1124 (9th Cir. 2009) (“Averments of fraud must be accompanied by ‘the who, what, when,
6 where, and how’ of the misconduct charged”). “Rule 9(b) demands that the circumstances
7 constituting the alleged fraud be specific enough to give defendants notice of the particular
8 misconduct . . . so that they can defend against the charge and not just deny that they have done
9 anything wrong.” Kearns, 567 F.3d at 1124.

10 III. DISCUSSION

11 In their motions to dismiss, defendants point to plaintiffs’ failure to amend their complaint
12 in any meaningful way. Ocwen stresses that, “[i]ndeed, the only amendments to the FAC are the
13 omission of Indymac Bank, F.S.B. (“IndyMac”) as a defendant to this action and the removal of
14 the rescission cause of action.” (ECF No. 34 at 9.) MERS and Nationstar similarly point out that
15 “[t]he FAC, however, does not cure any of the deficiencies in the Complaint. Instead, the
16 allegations in the FAC are **identical** to the allegations in the Complaint. The only difference is
17 that the references to IndyMac Bank, F.S.B. have been deleted from the allegations, and
18 Plaintiffs’ rescission claim against IndyMac Bank, F.S.B. is not re-pled in the FAC.” (ECF No.
19 36 at 8 (emphasis in the original).)

20 This court extensively analyzed the failings of plaintiffs’ original complaint (see ECF No.
21 27 at 11–25) and, therefore, finds it unnecessary to restate the deficiencies that remain in the
22 functionally-identical first amended complaint. As outlined above, the only differences in the
23 first amended complaint came through the deletion of one defendant, one cause of action, and one
24 conclusory paragraph. Plaintiffs failed to add any new facts in the first amended complaint.
25 Therefore, just as plaintiffs failed to “state even a single cognizable cause of action” in their
26 original complaint (ECF No. 27 at 25), so too have they failed to state even a single cognizable
27 cause of action in their first amended complaint. As such, the court recommends that plaintiffs’
28 first amended complaint be dismissed.

1 Further, leave to amend was previously granted because plaintiffs asserted that they had
2 additional information that would confirm that defendants had not been properly crediting
3 plaintiffs' mortgage payments. (See Id.) However, plaintiffs have apparently admitted that the
4 accounting on their loan is in fact accurate, as they have failed to dispute defendants' joint
5 statement. (See ECF No. 50.)

6 Therefore, this court recommends that plaintiffs' first amended complaint be dismissed
7 without leave to amend. See Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir.
8 1989) (citing Foman v. Davis, 371 U.S. 178, 182 (1962) ("In deciding whether justice requires
9 granting leave to amend, factors to be considered include the presence or absence of undue delay,
10 bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue
11 prejudice to the opposing party and futility of the proposed amendment.")).

12 Accordingly, IT IS HEREBY RECOMMENDED that:

- 13 1. Defendants' motions to dismiss (ECF Nos. 34, 36) be GRANTED and plaintiff's
14 complaint be DISMISSED WITHOUT LEAVE TO AMEND;
- 15 2. The Clerk of Court be directed to close this case.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
21 within the specified time may waive the right to appeal the District Court's order. Martinez v.
22 Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: September 15, 2017

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25 _____
26 CAROLYN K. DELANEY
27 UNITED STATES MAGISTRATE JUDGE