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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL L. HOBBS, et al.,
Plaintiffs,
v.
WELLS FARGO BANK, N.A., et al.,
Defendants.

No. 2:17-cv-01920 KJM CKD PS

FINDINGS AND RECOMMENDATIONS

On December 13, 2017, the court held a hearing on defendants’ motions to dismiss this action pursuant to Rule 12(b)(6). (ECF Nos. 6 & 7.) David Newman appeared telephonically for defendant Wells Fargo Bank; Kristina Pelletier appeared for defendants BSI Financial Services and Wilmington Savings Fund Society; and the pro se plaintiffs, who filed briefs opposing the motions, did not appear. At the close of the hearing, the court took the matter under submission. As not all parties have consented to magistrate judge jurisdiction, the undersigned issues the following findings and recommendations.

I. Removal & Jurisdiction

Plaintiffs commenced this action in the Sacramento Superior Court on July 12, 2017. They named four defendants: Wells Fargo Bank; Clear Recon Corp.; BSI Financial Services; and Wilmington Savings Fund Society (DBA Christiana Trust, as Trustee of the Brougham Fund I Trust). Plaintiffs allege violations of the California Homeowner’s Bill of Rights, fraud, slander of

1 title, and other claims relating to the foreclosure sale of real property located at 2206 Stockman
2 Circle in Folsom, California. (ECF No. 1 (“Compl.”).) Along with damages, they seek an
3 injunction barring defendants from foreclosing on the property during the pendency of this action.
4 (Id., ¶¶ 48-59.)

5 On September 15, 2017, defendants removed this action to federal court on the basis of
6 diversity, citing (1) plaintiffs’ California citizenship; (2) BSI’s citizenship in Delaware and Texas;
7 (3) Wilmington’s citizenship in Delaware; (4) Wells Fargo’s citizenship in South Dakota; and (5)
8 the fact that, on August 24, 2017, California corporation Clear Recon served and filed a
9 Declaration of Non-Monetary Status (“DNMS”) pursuant to California Civil Code § 29241 in the
10 state court action.¹ (ECF No. 1 at 3-4 & Ex. 6.) In it, Clear Recon stated its belief that it has been
11 named in this action “solely in its capacity as Trustee under [a] Deed of Trust, and not arising out
12 of any wrongful acts or omissions on its part in the performance of its duties as trustee” and
13 agreed to be bound by any court order regarding the Deed of Trust. (Id., Ex. 6.) No objection to
14 the DNMS was filed within the statutory 15-day period, and the case was subsequently removed.

15 28 U.S.C. § 1332 authorizes district courts to exercise original jurisdiction in cases in
16 which the amount in controversy exceeds the sum or value of \$75,000.00 and the parties are
17 citizens of different states. Diversity jurisdiction requires complete diversity, meaning every
18 plaintiff must be diverse from every defendant. Id. “[A] federal court must disregard nominal or
19 formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.”
20 Navarro Sav. Ass’n v. Lee, 446 U.S. 458, 461 (1980). A nominal defendant is one “who holds
21 the subject matter of the litigation in a subordinate or possessory capacity as to which there is no
22 dispute.” SEC v. Colello, 139 F.3d 674, 676 (9th Cir. 1998) (internal quotation marks omitted).

23 California Civil Code § 29241 permits a trustee to file a DNMS if it is named in a state-
24 court action “solely in its capacity as trustee, and not arising out of any wrongful acts or
25 omissions on its part in the performance of its duties as trustee.” Cal. Civ. Code § 29241(a). If a
26 plaintiff does not object to the trustee’s DNS within fifteen days of service, the trustee becomes a

27 ¹ As to the amount in controversy, defendants cite the home loan for the real property at issue,
28 which was originally for \$375,000 and more recently had a higher balance. (ECF No. 1 at 4.)

1 nominal party in the action. Id. § 29241(d). If the case is then removed to federal court, the
2 district court may treat the trustee as a nominal party and disregard its citizenship for diversity
3 purposes. Moore v. Wells Fargo Bank, 2016 WL 3091087 (E.D. Cal. June 2, 2016).

4 Here, trustee Clear Recon properly filed a DNMS in state court and, after waiting for any
5 objections, defendants removed the action to federal court. Thus the court should treat DMNS as
6 a nominal party whose California residency does not destroy diversity jurisdiction.

7 II. Procedural History

8 In January 2005, plaintiffs refinanced the real property located at 2206 Stockman Circle in
9 Folsom, California by borrowing \$375,000 from defendant Wells Fargo’s predecessor-in-interest,
10 World Savings Bank, FSB. (Compl., ¶ 17, Ex. A.)² The loan was modified in 2007 and a second
11 time in 2009. (WF RJN, Exs. B & C.) The 2009 modification lowered the balance on the loan by
12 more than \$40,000 (10% of the loan balance) and lowered the monthly payment amount. (Id., Ex.
13 C.)

14 Despite these modifications, plaintiffs had difficulty making their loan payments. In
15 February 2016, Clear Recon Corp. (the substitute trustee under the deed of trust³) recorded a
16 Notice of Default (“NOD”). (Compl., ¶ 21; WF RJN Ex. D.) The NOD indicates that payment
17 was more than \$12,000 behind as of February 2016. (Id.) It also contains a “Declaration of
18 Compliance” indicating that Wells Fargo attempted to contact plaintiffs before Clear Recon
19 recorded the NOD in order to discuss possible alternatives to foreclosure. (Id.) Plaintiffs allege
20 in the complaint that Wells Fargo did not actually contact them to discuss alternatives before the
21 NOD was recorded. (Compl., ¶¶ 24, 40-41, 45, 70-71.) Since plaintiffs did not cure their default,
22 Clear Recon recorded a Notice of Trustee’s Sale (“NOTS”) in July 2016. (Id., ¶ 23, Ex. D.) The
23 date of the sale was set for August 11, 2016. (Id.)

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26 ² World Savings Bank, FSB eventually merged into Wells Fargo Bank, N.A. (WF Request for
27 Judicial Notice (“RJN”), Ex. A.)

28 ³ Clear Recon Corp. recorded a “Substitution of Trustee” on February 10, 2016. (Compl., ¶ 19,
Ex. B.)

1 On August 10, 2016, the day before the scheduled foreclosure sale, plaintiffs filed for
2 Chapter 13 bankruptcy in the Eastern District, Case No. 16-25253. (WF RJN, Ex. E.) As a
3 result, the sale was postponed and, to date, no foreclosure sale has taken place. Plaintiffs did not
4 file their claims against defendants in their bankruptcy schedules. (BSI RJN, Ex. 8.) On March
5 30, 2017, Wells Fargo filed a “Transfer of Claim” notice indicating that (1) ownership of the loan
6 had been transferred to defendant Wilmington Savings Fund, and (2) the servicing of the loan had
7 been transferred to defendant BSI. (WF RJN, Ex. H.) The bankruptcy proceeding ended on June
8 6, 2017.

9 On June 29, 2017, three weeks after the first bankruptcy proceeding ended, plaintiffs filed
10 a second petition for Chapter 13 Bankruptcy in the Eastern District, Case No. 17-24273. (WF
11 RJN, Ex. I.) Again, plaintiffs sought to stay the foreclosure sale of the property at issue.
12 However, plaintiffs again failed to disclose their claims against defendants in their bankruptcy
13 schedules. Plaintiffs commenced this action in the Sacramento Superior Court on July 12, 2017.
14 On August 3, 2017, their second bankruptcy petition was dismissed.

15 III. Legal Standards

16 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a
17 complaint must contain more than a “formulaic recitation of the elements of a cause of action”; it
18 must contain factual allegations sufficient to “raise a right to relief above the speculative level.”
19 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). “The pleading must contain something
20 more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable
21 right of action.” Id., quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp.
22 235-236 (3d ed. 2004). “[A] complaint must contain sufficient factual matter, accepted as true, to
23 ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
24 (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads
25 factual content that allows the court to draw the reasonable inference that the defendant is liable
26 for the misconduct alleged.” Id.

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1 IV. Discussion

2 Defendants argue that, because plaintiffs failed to give notice of potential claims against
3 them in their bankruptcy schedules, plaintiffs are judicially estopped from pursuing the instant
4 claims against them.

5 The filing of a bankruptcy petition creates an estate, which includes ““all legal and
6 equitable interests of the debtor in property at the commencement of the case,”” including any
7 causes of action. Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001) (quoting 11 U.S.C. §
8 541(a)). The estate includes any causes of action that arise in the period between the filing of the
9 petition and the final discharge. See In re Kottmeier, 240 B.R. 440, 442 (M.D. Fla. 1999); see
10 also Vertkin v. Wells Fargo Home Mortgage, 2010 WL 3619798 at *2 (N.D. Cal. 2010) (if asset
11 comes into being after petition filed, effect of failure to file amended schedule listing asset
12 precludes debtor from later claiming it has been abandoned by trustee in favor of debtor).
13 Because the bankruptcy trustee has the exclusive right to sue on behalf of the estate, the debtor
14 loses the capacity to sue in his own name unless the trustee abandons the claim. See Estate of
15 Spirtos v. One San Bernardino County Superior Court Case, 443 F.3d 1172, 1175 (9th Cir. 2006).
16 Although a trustee may abandon “worthless or low-value assets, including legal claims,” there is
17 no abandonment without an affirmative act. See Biesek v. Soo Line Railroad Company, 440 F.3d
18 410, 413 (7th Cir. 2006). Assets that are neither abandoned nor administered remain the property
19 of the estate even after the case is closed. See In re Lopez, 283 B.R. 22, 28 (9th Cir. BAP 2002);
20 see also In re Pace, 146 B.R. 562, 564–66 (9th Cir. BAP 1992), (unscheduled property remains in
21 estate after case is closed).

22 Here, because plaintiffs never scheduled the claims raised in the civil action in their
23 bankruptcy proceedings, the claims remained the property of the estate unless abandoned by the
24 trustee. Moreover, even if the claims had been abandoned, plaintiffs would be judicially estopped
25 from bringing them in this civil action. In a similar case, Curry v. Wells Fargo, No. 2:14-cv-
26 01311 TLN CKD PS (E.D. Cal. Sept. 3, 2014), the court found plaintiff’s claims barred by the
27 doctrine of judicial estoppel where plaintiff “did not list his claims against defendant as assets in
28 his bankruptcy schedules” even though “the facts and circumstances giving rise to all of his

1 claims occurred before plaintiff filed his petition for bankruptcy.” In that action, the court
2 granted defendant’s motion to dismiss.


3 Plaintiffs’ opposition does not meaningfully address the argument that their claims are
4 judicially estopped, but largely argues that the complaint met the Rule 8 pleading requirements.
5 Thus, though defendants alternatively argue that plaintiff’s claims are preempted by federal law
6 and that their state law claims are defectively pled, there appears to be no need to reach these
7 issues. Nor does cure by amendment appear viable.

8 Accordingly, IT IS HEREBY RECOMMENDED THAT:

- 9 1. Defendant Wells Fargo’s motion to dismiss (ECF No. 6) be granted;
10 2. Defendants BSI’s and Wilmington Savings’ motion to dismiss (ECF No. 7) be granted;
11 and
12 3. This action be closed.

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

20 Dated: December 19, 2017

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23 CAROLYN K. DELANEY
24 UNITED STATES MAGISTRATE JUDGE