

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLIFFORD VANDERHOOF & VIENA
LENORE VANDERHOOF,

Plaintiffs,

v.

NATIONSTAR MORTGAGE,

Defendant.

No. 2:17-cv-2563-TLN-KJN PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Presently pending before the court is defendant Nationstar Mortgage’s (“Nationstar”) motion to dismiss the first amended complaint filed by plaintiffs Clifford Vanderhoof and Viena Lenore Vanderhoof. (ECF No. 15.) Plaintiffs opposed the motion, and Nationstar filed a reply brief. (ECF Nos. 17, 18.)¹ After carefully considering the court’s record and the applicable law, the court recommends that Nationstar’s motion be GRANTED and the case be DISMISSED without further leave to amend.

///

¹ The motion was submitted for decision without oral argument on the record and written briefing pursuant to Local Rule 230(g).

1 BACKGROUND

2 Around October 25, 2007, plaintiff Clifford Vanderhoof obtained a \$146,500.00 mortgage
3 loan by virtue of a note secured by a Deed of Trust pertaining to real property located at 800
4 Drake Drive, Newcastle, California, 95658 (the “Property”). See Request for Judicial Notice,
5 ECF No. 15-1 [“RJN”], Ex. A at pp. 1-2.)² The Deed of Trust was recorded on October 31, 2007.
6 (Id. at p. 1.) The Deed of Trust identified Countrywide Bank, FSB as the lender; ReconTrust
7 Company, N.A. as the trustee; and Mortgage Electronic Registration Systems, Inc. (“MERS”) as
8 the nominee for the lender and the lender’s successors and assigns, as well as the beneficiary
9 under the Deed of Trust. (Id. at p. 2) The Deed of Trust provided that the note or a partial
10 interest in the note, together with the Deed of Trust, could be sold one or more times without
11 prior notice to the borrower. (Id. ¶ 20.) Additionally, the Deed of Trust contained a power of
12 sale provision, providing that MERS, as nominee for the lender and lender’s successors and
13 assigns, had the right to exercise the lender’s interests, including the right to foreclose and sell the
14 Property upon default. (Id. at p. 3.)

15 On March 8, 2016, the beneficial interest in the Deed of Trust was assigned to Nationstar,
16 and a Corporate Assignment of Deed of Trust was recorded on March 25, 2016. (RJN, Ex. B.)

17 Thereafter, on March 31, 2016, Nationwide substituted Clear Recon Corp. as the trustee
18 under the Deed of Trust, and the Substitution of Trustee was recorded on April 12, 2016. (RJN,
19 Ex. C.)

20 On October 20, 2016, a Modification of Deed of Trust, signed by plaintiff Clifford
21 Vanderhoof and Nationstar, was recorded, providing for a fixed interest rate and a new unpaid
22 principal balance amount of \$153,407.68. (RJN, Ex. D.)

23 On February 22, 2017, Clear Recon Corp., as trustee under the Deed of Trust and pursuant
24 to Nationstar’s request, recorded a Notice of Default indicating that plaintiff Clifford Vanderhoof
25 had breached his payment obligations under the loan and Deed of Trust. (RJN, Ex. E.)

26 _____
27 ² The court grants Nationstar’s request for judicial notice (ECF No. 15-1), which requests the
28 court to take judicial notice of public records recorded with the Placer County Recorder’s office.
See Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (courts
may take judicial notice of matters of public record).

1 Subsequently, on August 1, 2017, Clear Recon Corp. recorded a Notice of Trustee’s Sale, setting
2 a public auction sale of the Property for August 30, 2017. (RJN, Ex. F.) The Notice of Trustee’s
3 Sale cautioned that the sale date could be postponed one or more times, and provided contact
4 information to ascertain any postponement(s) and any rescheduled date(s). (Id.) The Property
5 was ultimately sold to a third party at a public auction on October 11, 2017, and a Trustee’s Deed
6 Upon Sale was recorded on October 24, 2017. (RJN, Ex. G.)

7 Thereafter, on November 7, 2017, plaintiffs filed the instant action in the Placer County
8 Superior Court. (ECF No. 1.) Defendants removed the action to federal court on December 7,
9 2017, invoking the court’s diversity of citizenship jurisdiction under 28 U.S.C. § 1332. (Id.) On
10 January 10, 2018, the court, after considering briefing related to Nationstar’s motion for a more
11 definite statement, dismissed plaintiffs’ original complaint with leave to amend. (ECF No. 12.)
12 In that order, the court, in light of plaintiffs’ *pro se* status, outlined the applicable law, and
13 provided some basic instructions, with respect to pleading standards under the Federal Rules of
14 Civil Procedure. (Id.)

15 Subsequently, on January 22, 2018, plaintiffs filed the operative first amended complaint.
16 (ECF No. 14.) Liberally construed, the first amended complaint seeks \$2,000,000.00 in damages
17 based on the following claims: (1) foreclosure sale without notification of a sale date;
18 (2) foreclosure sale that shocks the conscience; (3) foreclosure sale without a jury trial;
19 (4) improper assignment of mortgage; and (5) unjust enrichment. (Id.)

20 The instant motion to dismiss followed on February 5, 2018. (ECF No. 15.)

21 LEGAL STANDARD

22 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
23 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
24 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
25 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
26 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
27 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to dismiss,
28 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that

1 is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.
2 Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
3 factual content that allows the court to draw the reasonable inference that the defendant is liable
4 for the misconduct alleged.” Id.

5 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
6 facts alleged in the complaint as true and construes them in the light most favorable to the
7 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is “not,
8 however, required to accept as true conclusory allegations that are contradicted by documents
9 referred to in the complaint, and [the court does] not necessarily assume the truth of legal
10 conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559 F.3d at
11 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and,
12 prior to dismissal, tell a plaintiff of deficiencies in her complaint and give plaintiff an opportunity
13 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.
14 Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police
15 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally construed,
16 particularly where civil rights claims are involved”); see also Hebbe v. Pliler, 627 F.3d 338, 342
17 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings liberally even when
18 evaluating them under the standard announced in Iqbal).

19 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally
20 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
21 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506
22 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not
23 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the
24 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,
25 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding
26 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.
27 2003).

28 ///

1 DISCUSSION

2 As an initial matter, Nationstar argues that all of plaintiffs' claims should be dismissed,
3 because plaintiffs cannot challenge a completed foreclosure sale without tendering the amount
4 due under their loan. However, the court notes that plaintiffs' first amended complaint requests
5 only monetary damages and does not actually seek to set aside the foreclosure sale. Nationstar's
6 briefing does not discuss, or cite legal authority in support of, the proposition that the tender rule
7 also bars claims related to the foreclosure that do not actually seek to set aside the foreclosure
8 sale. See, e.g. Vissuet v. Indymac Mortgage Services, 2010 WL 1031013, at *2 (N.D. Cal. Mar.
9 19, 2010) (unpublished) (California tender rule applies only where the plaintiff is trying to set
10 aside a foreclosure sale due to some irregularity). In this case, the court need not, and does not,
11 express any opinion regarding such application of the tender rule, because plaintiffs' individual
12 claims in any event fail to state a claim upon which relief can be granted.

13 Plaintiffs' first claim alleges that the Notice of Trustee's Sale failed to provide plaintiffs
14 with a date and time for the sale, and that the sale was thus conducted without proper notice to
15 plaintiffs. In support of that contention, plaintiffs attached to their first amended complaint the
16 second page of the Notice of Trustee's Sale, which does not specify the date and time for the sale.
17 (ECF No. 14.) However, upon considering the complete recorded Notice of Trustee's Sale, of
18 which the court may take judicial notice, the date and time for the sale clearly appears on the first
19 page of the Notice of Trustee's Sale, along with contact information to ascertain any
20 postponement(s) and any rescheduled date(s). (RJN, Ex. F.) As such, plaintiffs' first claim fails
21 to state a claim upon which relief can be granted.

22 In their second claim, plaintiffs contend that the foreclosure sale shocked the conscience
23 and violated the "California Unfair Deception Practice Act," because the Property was valued at
24 over \$300,000.00 and the trustee sold it for approximately \$200,000.00. That claim fails as a
25 matter of law, because California law does not require the foreclosure sale price to approximate
26 the fair market value of the property, and the disparity here does not even plausibly shock the
27 conscience. See Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1236-37 (1995).

28 ///

1 Plaintiffs' remaining claims border on the frivolous and may be disposed of without
2 significant discussion. Plaintiffs' third claim that they were improperly denied a jury trial prior to
3 the foreclosure sale is simply incorrect as a matter of law, because California's non-judicial
4 foreclosure framework does not require any judicial proceedings, let alone a jury trial. The fourth
5 claim appears to allege that foreclosure was improper, because the mortgage was not properly
6 assigned, the chain of title was broken, the note became unenforceable because it was separated
7 from the Deed of Trust, and plaintiffs have no contract with Nationstar. Such conclusory
8 allegations and arguments are plainly meritless, and the public records clearly show that
9 assignments were proper and that foreclosure proceedings were appropriately initiated. Finally,
10 the fifth claim alleges that Nationstar was unjustly enriched, because it had somehow received
11 money for the Property from some unspecified insurance policy and/or from "cashing out" the
12 promissory note. Plaintiffs' allegations in that regard are entirely conclusory, largely
13 unintelligible, and without merit. The Deed of Trust clearly authorized Nationstar to foreclose
14 and sell the Property upon default, whether or not any third party insurance existed.

15 Consequently, the court finds that plaintiffs' first amended complaint is subject to
16 dismissal. The only question remaining is whether dismissal should be with or without leave to
17 amend.

18 Ordinarily, the court, consistent with applicable law, liberally grants leave to amend if it
19 appears possible that a plaintiff, and especially a *pro se* plaintiff, could amend to state a
20 potentially cognizable claim. However, in this case, plaintiffs have already previously been
21 provided with notice regarding federal pleading requirements and an opportunity to amend.
22 Additionally, the nature of plaintiffs' claims here, as discussed above, does not suggest that they
23 could be cured in a second amended complaint. Moreover, in their opposition brief, plaintiffs
24 provide an irrelevant dissertation on the Uniform Commercial Code and only posit additional
25 frivolous claims, such as that the foreclosure documents were invalid due to an alleged minor
26 misspelling of plaintiff Clifford Vanderhoof's name, and that plaintiffs were never actually given
27 a loan because banks purportedly cannot lend any credit or deposits. Therefore, the court
28 concludes that granting further leave to amend would be futile. See Cahill v. Liberty Mut. Ins.

1 Co., 80 F.3d 336, 339 (9th Cir. 1996).

2 CONCLUSION

3 Accordingly, IT IS HEREBY RECOMMENDED that:

- 4 1. Nationstar's motion to dismiss (ECF No. 15) be GRANTED.
- 5 2. The action be DISMISSED without further leave to amend.
- 6 3. Any lis pendens on the Property filed by plaintiffs be expunged.
- 7 4. The Clerk of Court be directed to close this case.

8 In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
9 discovery, and motion practice in this action are STAYED pending resolution of the findings and
10 recommendations by the district judge. With the exception of objections to the findings and
11 recommendations and non-frivolous motions for emergency relief, the court will not entertain or
12 respond to motions and other filings until the findings and recommendations are resolved.

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 (14)
15 days 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." Any reply to the objections
18 shall be served on all parties and filed with the court within fourteen (14) days after service of the
19 objections. The parties are advised that failure to file objections within the specified time may
20 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
21 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

22 IT IS SO ORDERED AND RECOMMENDED.

23 Dated: March 30, 2018

24 
25 _____
26 KENDALL J. NEWMAN
27 UNITED STATES MAGISTRATE JUDGE
28