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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEBORAH L. BURKE and SEAN K.
BURKE,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,
WELLS FARGO BANK, N.A., as for
JPMORGAN MORTGAGE TRUST
2008-R2 MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2008-R2,

Defendants.

No. C 13-04249 WHA

**ORDER GRANTING SUMMARY
JUDGMENT**

INTRODUCTION

In this foreclosure dispute, defendants move for summary judgment. For the reasons stated herein, the motion for summary judgment is **GRANTED**.

STATEMENT

The undisputed facts are as follows. On August 7, 2007, plaintiffs Deborah L. Burke and Sean K. Burke obtained a home loan in the amount of \$1,256,250.00 from Washington Mutual Bank (WaMu) (Childress Decl. ¶ 5). The deed of trust that secured the loan identified WaMu as the beneficiary, California Reconveyance (CRC) as the trustee, and plaintiffs as the borrowers (Request for Judicial Notice (RJN), Exh. 1). Plaintiffs then received a modification from WaMu that became effective on September 1, 2008 (Childress Decl., ¶ 7, Exh. D).

1 On September 25, 2008, WaMu was closed by the Office of Thrift Supervision and the
2 Federal Deposit Insurance Corporation was named receiver (*id.* ¶ 4, Exh. A). That same day,
3 defendant JPMorgan Chase Bank, N.A. executed a Purchase & Assumption Agreement with the
4 FDIC, pursuant to which Chase agreed to purchase certain WaMu assets (*ibid.*).

5 Thereafter, plaintiffs began making payments to Chase and submitted multiple
6 modification applications, which were denied by Chase (Childress Decl. ¶¶ 11–15). Plaintiffs
7 thereafter fell behind on their payments and, on October 28, 2010, a notice of default (NOD)
8 was recorded in Alameda County (RJN, Exh. 3). According to the NOD, the past due payments
9 totaled \$28,024.95. Plaintiffs again applied for a modification with Chase but the application
10 was denied (Childress Decl. ¶ 17).

11 On April 18, 2011, a notice of trustee’s sale was recorded in Alameda County (RJN,
12 Exh. 4). The sale was scheduled for May 11, 2011 (*ibid.*), but was later postponed (Childress
13 Decl. ¶ 18). Plaintiffs again reapplied for a modification but were denied (*id.* at 19). On April
14 18, 2012, a second notice of trustee’s sale was recorded in Alameda County (RJN, Exh. 5). The
15 sale was scheduled for May 15, 2015 (*ibid.*), but was later postponed (Childress Decl. ¶ 20).
16 Plaintiffs again applied for a modification but were denied (*id.* at 21).

17 In 2015, an assignment of the deed of trust was recorded, which “memorialize[d] the
18 transfer that occurred by operation of law on September 25, 2008” of the mortgage from the
19 FDIC as receiver of WaMu to Chase (RJN, Exh. 6).

20 To date, no trustee’s sale has occurred (Childress Decl. ¶ 23). Plaintiffs continue to
21 reside at the property but are not making any monthly payments (Gerlt-Ferraro Decl. ¶ 5, Exh.
22 P; *id.* ¶ 8, Exh. S). Plaintiffs continue to be in default and the mortgage has an unpaid balance
23 of \$1,303,620.08 with a total payoff amount of \$1,823,963.50 (Childress Decl. ¶ 24).

24 Defendants submit a declaration from a Chase employee stating that Chase possesses the
25 original note, as well as the deed of trust, and that no sale or securitization of the mortgage
26 occurred prior to Chase’s purchase of WaMu’s assets in September of 2008 (Childress Decl. ¶
27 9–10).

28

1 On September 13, 2013, plaintiffs filed a complaint seeking damages and an “order
2 forever enjoining” defendants from foreclosing on the property (among other remedies). The
3 crux of the complaint is that defendants lack a beneficial interest in plaintiffs’ mortgage and
4 therefore lack standing to foreclose on the loan.

5 The original complaint asserted multiple theories for why defendants lacked a beneficial
6 interest in plaintiffs’ mortgage. Judge Samuel Conti rejected all theories except for one:
7 plaintiffs were allowed to proceed with the theory that defendants lacked a beneficial interest in
8 the loan because the mortgage was securitized prior to Chase’s purchase of WaMu’s assets.¹
9 Judge Conti allowed five claims to proceed under this theory: (1) wrongful foreclosure; (2)
10 quiet title; (3) cancellation of instruments; (4) violation of California Civil Code section 2923.5;
11 and (5) unjust enrichment.²

12 Defendants now move for summary judgment as to all remaining claims. This order
13 follows full briefing and oral argument.

14 ANALYSIS

15 1. MOTION FOR SUMMARY JUDGMENT

16 Under Rule 56, summary judgment is proper where the pleadings, discovery, and
17 affidavits show that there is “no genuine issue as to any material fact and [that] the moving
18 party is entitled to judgment as a matter of law.” A fact is material if it might affect the
19 outcome of the suit under governing law, and a dispute about a material fact is genuine “if the
20 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”

21 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

22
23 ¹ Judge Conti rejected two other theories asserted by plaintiffs for why Chase lacks a beneficial interest
24 in the loan: (1) because WaMu had changed its name in April of 2005 (Dkt. No. 52 at 9, n.1); and (2) because
25 the loan had been securitized prior to Chase’s purchase of WaMu’s assets in September 2008 (Dkt. No. 52 at 5).
26 In an attempt to resurrect the latter theory, plaintiffs now cite to a recent California Supreme Court decision,
27 *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016). However, the California Supreme Court
explicitly stated that the holding in *Yvanova* did not apply to pre-foreclosure proceedings such as the instant
matter. “We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure
by a suit questioning the foreclosing party’s right to proceed.” *Id.* at 924. Moreover, for the reasons discussed
herein, Chase has demonstrated that it purchased the mortgage from WaMu in September 2008; therefore, it
could not have been securitized prior to that date.

28 ² Judge Conti allowed plaintiffs to amend certain other claims but plaintiffs never amended these
claims (*see* Dkt. No. 57).

1 A party moving for summary judgment who does not have the ultimate burden of
2 persuasion at trial has the initial burden of producing evidence negating an essential element of
3 the nonmoving party’s claims *or* showing that the nonmoving party does not have enough
4 evidence of an essential element to carry its burden of persuasion at trial. *Nissan Fire &*
5 *Marine Ins. Co. V. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to
6 the nonmoving party to “go beyond the pleadings, and by his own affidavits, or by the
7 ‘depositions, answers to interrogatories, or admissions on file,’ designate ‘specific facts
8 showing that there is a genuine issue for trial.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324
9 (1986).

10 All of plaintiffs’ claims rest on the theory that Chase lacks a beneficial interest in the
11 mortgage such that it lacks standing to foreclose on it. This order concludes that summary
12 judgment in favor of defendants is appropriate here because no material dispute exists as to
13 whether Chase holds a beneficial interest in the mortgage. Chase owns the mortgage; plaintiff
14 submits nothing to suggest otherwise.

15 Defendants submit evidence that demonstrates Chase owns the loan. Chase possesses
16 the original note as well as the deed of trust (Childress Decl. ¶ 9–10). A Chase employee who
17 has reviewed the entire record of the mortgage states in a declaration that no sale or
18 securitization of the mortgage occurred prior to Chase’s purchase of WaMu’s assets in
19 September of 2008 (Childress Decl. ¶ 10). Moreover, an assignment of deed was recorded in
20 2015, which “memorialize[d] the transfer that occurred by operation of law on September 25,
21 2008” of the mortgage from the FDIC as WaMu’s receiver to Chase (RJN, Exh. 6).

22 The only evidence that plaintiffs cite in their opposition brief are blurry screenshots
23 appended to the amended complaint. The screenshots refer to a mortgage-backed security but
24 make *no* identifiable reference to plaintiffs’ loan. Plaintiffs make no effort to explain how the
25 screenshots show plaintiffs’ loan was securitized. This order holds that no reasonable trier of
26 fact could conclude based on these screenshots that the loan was securitized prior to Chase’s
27 purchase of WaMu’s assets in September 2008.
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1 All of plaintiffs' claims rise and fall on the theory that defendants do not own the loan.
2 Because Chase demonstrates that it owns the mortgage, all of plaintiffs' claims fail.
3 Defendants' motion for summary judgment as to all claims is therefore **GRANTED**.

4 **2. JUDICIAL NOTICE.**

5 Under Federal Rule of Evidence 201, a court may judicially notice a fact that is not
6 subject to reasonable dispute because it (1) is generally known within the trial court's territorial
7 jurisdiction; or (2) can be accurately and readily determined from the sources whose accuracy
8 cannot reasonably be questioned. Here, defendants request judicial notice of various public
9 records, including plaintiffs' deed of trust. The request for judicial notice of Exhibits 1, 3, 4, 5,
10 and 6 is **GRANTED**. Because the other documents are not necessary to this decision, the request
11 for judicial notice of the other documents is **DENIED**.

12 **CONCLUSION**

13 For the reasons stated herein, the motion for summary judgment is **GRANTED**.
14 Judgment will follow.

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16 **IT IS SO ORDERED.**

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18 Dated: September 15, 2016.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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