

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELENA ASTURIAS, et al.,
Plaintiffs,
v.
NATIONSTAR MORTGAGE LLC, et al.,
Defendants.

Case No. [15-cv-03861-RS](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

I. INTRODUCTION

Plaintiffs Elena Asturias and Carlota Del Portillo financed and purchased a property at 176 Randall Street in San Francisco, California. They fell behind on their mortgage payments and submitted an application for a loan modification. Eventually, Nationstar Mortgage LLC became the loan servicer for the mortgage, and defendants U.S. Bank, N.A., and Veriprise Processing Solutions LLC were substituted as the trustees. Asturias and Del Portillo contend that all defendants did not comply with various provisions of the Homeowner Bill of Rights (“HBOR”). They advance the following eight claims for relief: (1) violation of California Civil Code § 2923.5; (2) violation of California Civil Code § 2923.6; (3) violation of California Civil Code § 2923.7; (4) declaratory relief pursuant to California Civil Code § 2924.11; (5) violation of the Unfair Competition Law (“UCL”), California Business and Professions Code § 17200 et seq.; (6) to

1 set aside the trustee’s sale; and (7) cancellation of the trustee’s deed upon sale.¹ Defendants move
2 to dismiss the FAC. This matter is suitable for disposition without oral argument pursuant to
3 Local Rule 7-1(b).

4 Having failed to plead adequately these claims initially, the court granted Asturias and Del
5 Portillo leave to amend their complaint. Dkt. 24. The First Amended Complaint (“FAC”) suffers
6 from many of the same deficiencies as did its predecessor. Specifically, the FAC does not include
7 a critical factual averment without which their HBOR claims cannot proceed: that 176 Randall
8 Street was plaintiffs’ principal residence. Asturias and Del Portillo have also failed to satisfy the
9 requirements of Federal Rule of Civil Procedure 9(b) to establish that any defendants engaged in
10 fraudulent conduct. Finally, they have not adequately pleaded valid and unconditional tender to
11 set aside the trustee’s sale and cancel the trustee’s deed. Given these deficiencies, the FAC must
12 be dismissed. Asturias and Del Portillo have one final opportunity to amend their complaint,
13 provided they can do so in good faith.

14 **II. FACTUAL AND PROCEDURAL HISTORY²**

15 In October 2005, Asturias and Del Portillo entered into a mortgage agreement with All
16 California, Inc., in the amount of \$1,000,000, and secured by the property at 176 Randall Street.
17 The Deed of Trust named Fidelity National Title the trustee. In April 2010, US Bank National
18 Association was substituted as the trustee, and, at some point, Bank of America, N.A., replaced
19 All California, Inc., as the loan servicer. During BOA’s tenure as plaintiffs’ loan servicer, they
20 submitted an application for a loan modification. Plaintiffs³ aver that they “never received a
21 written determination on the status of the application” before BOA sold its interest in the loan to
22

23 ¹ Although the FAC lists a claim to quiet title in the caption, plaintiffs have not made such a claim
24 in the body of their FAC. This order addresses only the seven claims specifically advanced.

25 ² Because Defendants have filed a motion to dismiss, all facts alleged in the FAC are taken as true
26 for the purpose of this motion.

27 ³ The complaint refers to “plaintiff” and “plaintiffs” throughout the complaint. Asturias and Del
28 Portillo must be more specific about who did what should they choose to file a second amended
complaint.

1 Nationstar. Subsequently, they submitted a new application for loan modification to Nationstar,
2 but never received a written determination on the status of the application prior to the foreclosure
3 sale of the property.

4 In January 2015, Veriprise became the trustee under the Deed of Trust and recorded a
5 Notice of Default and Election to Sell Under Deed of Trust. A declaration from a Veriprise
6 employee was attached to the Notice of Default, stating that Veriprise had contacted plaintiffs to
7 assess their financial situation and explore options to avoid foreclosure, but had not heard from
8 plaintiffs in the past thirty days. In April 2015, a Notice of Trustee’s Sale was recorded,
9 announcing that the sale of the 176 Randall Street property would take place on July 10, 2015.
10 The property sold at the July foreclosure sale. RJN Ex. 6.⁴

11 Shortly after the sale, in August 2015, Asturias and Del Portillo filed this suit in San
12 Francisco County Superior Court. Defendants removed the case to federal court and filed a
13 motion to dismiss the complaint. Plaintiffs sought a remand to San Francisco Superior Court. The
14 court denied the motion to remand and granted with leave to amend defendants’ motion to
15 dismiss. Plaintiffs have now filed their FAC, and defendants have renewed their efforts to dismiss
16 the complaint with prejudice.

17 **III. LEGAL STANDARD**

18 “A pleading that states a claim for relief must contain . . . a short and plain statement of the
19 claim showing that the pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). “[D]etailed
20 factual allegations are not required,” but a complaint must provide sufficient factual allegations to
21 “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
22 (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). In addition, “in allegations of fraud or
23 mistake, a party must state with particularity the circumstances constituting fraud and mistake.”
24 Fed. R. Civ. P. 9(b). To satisfy this requirement, a plaintiff must plead “the who, what, when,

25 _____
26 ⁴ Defendants seek judicial notice of documents recorded with the San Francisco Assessor-Record
27 regarding the 176 Randall Street property, most of which are attached to the complaint. Because
the records are appropriate for judicial notice, the defendants’ request is granted.

1 where, and how that would suggest fraud.” *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)
2 (internal quotation marks omitted). “A plaintiff must set forth more than the neutral facts
3 necessary to identify the transaction. The plaintiff must set forth what is false or misleading about
4 a statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
5 2003) (internal quotation marks and alteration omitted).

6 Federal Rule of Civil Procedure 12(b)(6) provides a mechanism to test the legal sufficiency
7 of the averments in the complaint. Dismissal is appropriate when the complaint “fail[s] to state a
8 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint in whole or in
9 part is subject to dismissal if it lacks a cognizable legal theory or the complaint does not include
10 sufficient facts to support a plausible claim under a cognizable legal theory. *Navarro v. Block*,
11 250 F.3d 729, 732 (9th Cir. 2001). When evaluating a complaint, the court must accept all its
12 material allegations as true and construe them in the light most favorable to the non-moving party.
13 *Iqbal*, 556 U.S. at 678. “A claim has facial plausibility when the plaintiff pleads factual content
14 that allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” *Id.* This standard requires “more than a sheer possibility that the defendant
16 has acted unlawfully.” *Id.* “Where a complaint pleads facts that are merely consistent with a
17 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
18 relief.” *Id.* (internal quotation marks omitted). When plaintiffs have failed to state a claim upon
19 which relief can be granted, leave to amend should be granted unless “the complaint could not be
20 saved by any amendment.” *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

21 IV. DISCUSSION

22 A. Claims 1-4: The HBOR Claims

23 Plaintiffs’ Claims 1 through 4 all arise under California’s HBOR—a set of provisions
24 enacted to forestall some of the worst effects of the homeowner foreclosure crisis. The provisions
25 of the HBOR obligate lenders to provide certain information to borrowers, to issue written
26 determinations regarding the borrower’s eligibility for a loan application, and to provide a single
27 point of contact for borrowers seeking loan modification. See Cal. Civ. Code §§ 2923.5-.7. The

1 HBOR also provides borrowers a cause of action for injunctive relief if a trustee’s deed upon sale
2 has not been recorded. Id. § 2924.12. To invoke the protections of these provisions, however, the
3 property at issue must be “owner-occupied,” which “means that the property is the principal
4 residence of the borrower and is security for the loan made for personal, family, or household
5 purposes.” Id. § 2924.15.

6 Asturias and Del Portillo have not adequately pleaded facts that would entitle them to
7 pursue the HBOR remedies they seek. The FAC avers that plaintiffs “reside in real property” at
8 176 Randall Street. FAC ¶ 1. A person can reside in multiple homes, but the HBOR’s apply only
9 to the borrower’s principal, i.e., chief or primary residence. Because the FAC remains ambiguous
10 as to whether 176 Randall Street is the primary residence of both Asturias and Del Portillo,
11 defendants’ motion to dismiss claims 1-4 is granted. Plaintiffs insist that they can adequately
12 plead this critical fact if given the opportunity. Even though Asturias and Del Portillo have
13 already received a second chance and failed to meet their burden, they are granted one final
14 chance to plead their HBOR claims if they can do so adequately and in good faith.

15 **B. Claim 5: The UCL Claim**

16 Section 17200 of California’s Unfair Competition Law (“UCL”) prohibits all unlawful,
17 unfair, or fraudulent business acts or practices. Cal. Bus. & Prof. Code § 17200 et seq. Each of
18 these three types of business acts or practices are independently actionable; “a plaintiff may show
19 that the acts or practices at issue are either unlawful or unfair or deceptive.” Walker v.
20 Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1169 (2002). “A business practice is
21 ‘unlawful’ if it is forbidden by law.” Id. (internal quotation marks omitted). “Unfair” business
22 practices are those which “offend[] an established public policy”; are “immoral, unethical,
23 oppressive, unscrupulous or substantially injurious to consumers”; or those which do not outweigh
24 “the gravity of the harm to the alleged victim.” Id. at 1169-70 (internal quotation marks omitted).
25 Finally, a business practice is “deceptive” if “members of the public are likely to be deceived.” Id.
26 at 1170.

27 To raise a claim under the UCL, however, a plaintiff must aver facts showing that she has

1 “suffered an injury in fact and . . . lost money or property as a result of the unfair competition.”
2 Cal. Bus. & Prof. Code § 17204. Asturias and Del Portillo must therefore include facts in their
3 complaint that establish a “‘causal connection’ between [defendants’] alleged UCL violation and
4 [their] injury in fact.” Rubio v. Capital One Bank, 613 F.3d 1195, 1203-04 (9th Cir. 2010)
5 (quoting Hall v. Time Inc., 158 Cal.App.4th 847, 855 (2008)).

6 The only averment that addresses causation is extremely conclusory. Asturias and Del
7 Portillo claim, “Plaintiff did not get the benefit of making her loan current, and paid penalties and
8 interest on back dues Plaintiff should not have owed, suffered the irreparable harm of permanently
9 losing her home, as well as” the lost opportunity to pursue other foreclosure prevention options,
10 the costs and attorney’s fees, and consequential damages. FAC ¶ 26. This type of conclusory,
11 threadbare averment is insufficient to state a claim for relief. Iqbal, 556 U.S. at 678. First, the
12 complaint speaks of one plaintiff, but Asturias and Del Portillo are both plaintiffs. Which of them
13 suffered these damages is anyone’s guess. Second, plaintiffs have not explained with sufficient
14 specificity exactly how defendants caused their damages. To the extent they rely on violations of
15 the HBOR to form the basis of their claim under the “unlawful” prong, that claim must fail
16 because they have not pleaded violations of the HBOR.

17 Nor have plaintiffs adequately pleaded a claim under the “unfair” prong of the UCL.
18 Asturias and Del Portillo accuse defendants of “dual-tracking” their applications for loan
19 modification. Dual tracking is a pejorative term referring to the practice of working with a
20 borrower who is exploring alternatives to foreclosure while pursuing foreclosure at the same time.
21 Plaintiffs claim that defendants never intended to grant the application for loan modification and
22 failed to follow various notification procedures designed to encourage non-foreclosure resolution
23 of a default. At least they have attempted to tether their claim to activity that “violat[es] the policy
24 or spirit” of the HBOR, but they have not pleaded facts to conclude that had defendants behaved
25 differently, then the 176 Randall property would not have been sold.

26 Finally, to state a claim under the “fraud” prong of the UCL, Asturias and Del Portillo
27 must satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). Garcia v. Sony

1 *Computer Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1061 (N.D. Cal. 2012). They have fallen well
2 short of that mark. There is nothing in the FAC to determine the “who, what, when, where, and
3 how” to suggest that defendants were involved in any fraudulent conduct. *Cooper*, 137 F.3d at
4 627 (internal quotation marks omitted). Accordingly, plaintiffs’ fifth claim for relief must be
5 dismissed with one final chance to amend if they can.

6 **C. Claims 6 and 7: To Set Aside the Trustee Sale and Cancel the Trustee’s Deed**

7 “After a nonjudicial foreclosure sale has been completed, the traditional method by which
8 the sale is challenged is a suit in equity to set aside the trustee’s sale.” *Lona v. Citibank, N.A.*, 202
9 Cal. App. 4th 89, 103 (2011). That remedy is generally available only in three circumstances:
10 procurement of the foreclosure decree by fraud; “where the sale has been improperly, unfairly or
11 unlawfully conducted, or is tainted by fraud”; or “where there has been a mistake” and equity
12 requires setting aside the sale. *Id.* at 103 (internal quotation marks omitted). To prevail on a claim
13 to set aside the trustee sale, a mortgagor-plaintiff must prove “(1) the trustee or mortgagee caused
14 an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a
15 mortgage or deed of trust”; (2) the sale prejudiced the plaintiff; and (3) that she “tendered the
16 amount of the secured indebtedness or was excused from tendering.” *Id.* at 104. Because this
17 claim for relief sounds in fraud, Rule 9(b) applies.

18 Asturias and Del Portillo have failed to meet their pleading burden. “[F]ailure to comply
19 with the statutory procedural requirements for the notice or conduct of sale” ordinarily satisfies the
20 first element. *Id.* Most of the “procedural irregularities” referenced in the complaint are
21 connected with defendants’ failure to follow the requirements of the HBOR. For the reasons
22 previously discussed, plaintiffs have not pleaded adequately that those procedural requirements
23 apply to them. Moreover, Asturias and Del Portillo have not outlined any information that would
24 establish fraudulent conduct. For example, the FAC does not include any information about when
25 defendants allegedly told them that they would not proceed with foreclosure or who made that
26 promise. Nor have plaintiffs offered any explanation as to how they changed their position based
27 on these supposed falsehoods. Absent those critical details, Asturias and Del Portillo cannot
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1 obtain the relief they seek.

2 Finally, Asturias and Del Portillo have not averred that they made a valid offer “to pay
3 back what the plaintiff has received less interest and finance charges.” *Pantoja v. Countrywide*
4 *Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1184 (N.D. Cal. 2009). Instead, they aver willingness
5 and ability to “tender funds to satisfy the alleged deficiency,” but they expressly admit that they
6 “did not tender those funds” because defendants informed them that the sale would not proceed as
7 a result of the review of the loan modification application. FAC ¶ 59. The FAC is ambiguous
8 about whether Asturias and Del Portillo are ready and willing to pay the full amount of their debt
9 unconditionally. To start, the complaint does not contain any information about the total debt at
10 issue. Plaintiffs are equally equivocal about the total funds at their disposal to pay the outstanding
11 debt. Finally, they have averred only that they will tender “funds,” not that they will tender the
12 full amount. Without an unconditional offer to tender full performance, plaintiffs cannot state a
13 claim to set aside the trustee sale. *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 580
14 (1984) (citing Cal. Civ. Code § 1486).

15 In sum, plaintiffs have not satisfied the heightened pleading requirement of Rule 9(b). Nor
16 have they pleaded adequate tender. Accordingly, Claim 6 must be dismissed with one last
17 opportunity to amend the complaint.

18 **V. CONCLUSION**

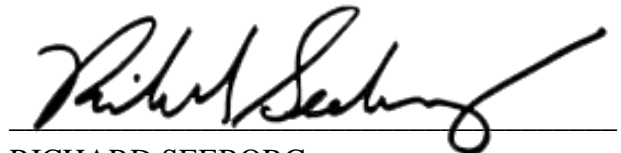
19 Plaintiffs have not stated viable claims for relief. Accordingly, the FAC is dismissed with
20 leave to amend.

21 **IT IS SO ORDERED.**

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23 Dated: January 29, 2016

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RICHARD SEEBORG
United States District Judge

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