

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

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

DAVID FOWLER, et al.,  
Plaintiffs,  
v.  
WELLS FARGO BANK, N.A.,  
Defendant.

Case No. [18-cv-01254-MMC](#)

**ORDER DENYING IN PART AND  
DEFERRING RULING IN PART ON  
MOTION FOR RELIEF FROM  
JUDGMENT AND ORDER GRANTING  
MOTION TO DISMISS**

Before the Court is plaintiff David Fowler and Colisa McFadden's Motion, filed December 14, 2018, "for Relief from Judgment and Order Granting Defendant's Motion to Dismiss Plaintiffs' Complaint." Defendant Wells Fargo Bank, N.A. ("Wells Fargo") has filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support of and in opposition to the motion,<sup>1</sup> the Court rules as follows.<sup>2</sup>

By order filed November 14, 2018, the Court granted Wells Fargo's motion to dismiss plaintiffs' complaint and dismissed plaintiffs' claims without leave to amend, after which, on December 7, 2018, the Clerk of Court entered judgment. In the instant motion, plaintiffs assert that, as a result of excusable neglect on the part of plaintiffs' counsel, plaintiffs failed to make certain arguments in their opposition to the motion to dismiss, which arguments they now ask the Court to consider.

In their complaint, plaintiffs alleged the following three causes of action: (1) the

---

<sup>1</sup>Plaintiffs failed to provide the Court with a chambers copy of their reply. Nonetheless, the Court has considered it. For future reference, plaintiffs are reminded that, pursuant to Civil Local Rule 5-1(e)(7) and the Court's Standing Orders, parties are required to provide for use in chambers one paper copy of each document that is filed electronically.

<sup>2</sup>By order filed January 15, 2019, the Court took the matter under submission.

1 First Cause of Action, titled "Violation of Cal. Civil Code § 2924, et seq.," by which  
2 plaintiffs alleged Wells Fargo "caused a Notice of Trustee's Sale to be recorded" (see  
3 Compl. ¶ 9), but failed to "post a copy of the Notice of Trustee's Sale to [p]laintiffs' door"  
4 (see Compl. ¶ 14) and "mail the Notice of Trustee's Sale to [p]laintiffs via certified or  
5 registered mail" at least "20 days before the date of the sale" (see Compl. ¶ 15); (2) the  
6 Second Cause of Action, titled "Violation of Cal. Civil Code § 2923.7," by which plaintiffs  
7 alleged Wells Fargo failed to "adequately advise [p]laintiffs of the status of their  
8 application [for a loan modification]" (see Compl. ¶ 29), failed to "ensure that [p]laintiffs  
9 were considered for all foreclosure prevention alternatives" (see id.), and failed to  
10 "provide [p]laintiffs with an adequate single point of contact" (see Compl. ¶ 30); and  
11 (3) the Third Cause of Action, titled "Unfair Competition – Violation of Business and  
12 Professions Code §§ 17200 et seq.," by which plaintiffs alleged the conduct on which  
13 they based the First and Second Causes of Action constituted "unlawful business  
14 practices" (see Compl. ¶ 32) and "unfair business practices" (see Compl. ¶¶ 37-38).

15 In its motion to dismiss, Wells Fargo argued that plaintiffs' claims were, inter alia,  
16 preempted by the Home Owners' Loan Act ("HOLA"), and the Court, in its order of  
17 dismissal, agreed. Plaintiffs, relying on Rule 60(b)(1), argue that, as a result of a mistake  
18 they assert is excusable, they failed to argue in their opposition that HOLA does not  
19 preempt their First Cause of Action.<sup>3</sup> See Fed. R. Civ. P. 60(b)(1) (providing court may  
20 relieve party from judgment due to "mistake, inadvertence, surprise, or excusable  
21 neglect").

22 Plaintiffs fail to cite any authority providing that a party's failure to make a legal  
23 argument, where such argument is not based on a change of law or newly discovered  
24 evidence, can constitute the type of omission sufficient to set aside a judgment, and, as  
25 Wells Fargo points out, not only policy considerations, but existing authority as well,  
26

---

27 <sup>3</sup>Instead, plaintiffs, in their opposition, argued that national banks, such as Wells  
28 Fargo, could not rely on HOLA.

1 counsel against allowing a party to do so. See, e.g., Castillo-Antonio v. Iqbal, 2017 WL  
2 3335682, at \*3-4 (N.D. Cal. August 4, 2017) (holding motion to set aside order granting  
3 summary judgment cannot be based on argument that movant's counsel, in opposing  
4 motion for summary judgment, failed to make argument counsel could have made).

5 In any event, in this instance, it would be futile to set aside the judgment and order  
6 of dismissal as to the First Cause of Action. Specifically, as Wells Fargo points out,  
7 courts that have considered the issue have found, and this Court agrees, that statutory  
8 claims challenging the manner in which a mortgagor provides notice of a trustee's sale  
9 are preempted by HOLA. See DeLeon v. Wells Fargo Bank, 729 F. Supp. 2d 1119,  
10 1121, 1126 (N.D. Cal. 2010) (finding claim under § 2924b, alleging mortgagees "never  
11 received notice of a trustee's sale and that the notice of such a sale never was posted on  
12 the [p]roperty," preempted by HOLA); Stefan v. Wachovia, 2009 WL 4730904, at \*3  
13 (December 7, 2009) (finding claims challenging defendant's "initiation of the state  
14 foreclosure process under California Civil Code § 2924" preempted by HOLA); see also  
15 Frausto v. ING Bank, FSB, 2013 WL 12097535, at \*6 (S.D. Cal. September 16, 2013)  
16 (holding claim for fraudulent concealment, where plaintiff alleged duty to disclose arose  
17 from defendant's failure to comply with duties set forth in § 2924b, preempted by HOLA).

18 Moreover, even if not preempted, the First Cause of Action is subject to dismissal.  
19 In particular, plaintiffs, in their complaint, acknowledged they had received a copy of the  
20 Notice of Trustee's Sale twenty days before the scheduled sale (see Compl. ¶¶ 9-10),  
21 and, as explained in an earlier order issued by the Court, "any failure by defendant to  
22 comply with § 2924b(b)(2) and/or 2924f(b)(3) was 'harmless,' and, consequently, 'is not  
23 actionable.'" (See Order, filed February 27, 2018, at 2:23-25 (quoting Falcocchia v.  
24 Saxon Mortgage, Inc., 709 F. Supp. 2d 860, 870 (E.D. Cal. 2010))); see also Lehner v.  
25 United States, 685 F.2d 1187, 1190-91 (9th Cir. 1982) (holding plaintiff failed to state  
26 cognizable claim alleging defendant United States mailed notice of foreclosure sale to  
27 "wrong address," where plaintiff had received actual notice of pending sale during  
28 "repeated conversations" with "government officials").

