

United States District Court
For the Northern District of California

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

DALE HARMS, et al.,
Plaintiffs,
v.
RECONTRUST COMPANY, N.A., et al.,
Defendants.

No. 10-01598 CW
ORDER GRANTING
PLAINTIFFS'
APPLICATION TO
PROCEED IN FORMA
PAUPERIS AND
DISMISSING
COMPLAINT
(Docket Nos. 14,
17 and 20)

Plaintiffs Dale and Laurie Harms have filed several applications for leave to proceed in forma pauperis (IFP). The matter was decided on the papers. Having considered all of the papers filed by Plaintiffs, the Court GRANTS the applications to proceed IFP and DISMISSES the complaint.

DISCUSSION

A court may authorize a plaintiff to prosecute an action in federal court without prepayment of fees or security if the plaintiff submits an affidavit showing that he or she is unable to pay such fees or provide such security. See 28 U.S.C. § 1915(a). Plaintiffs have submitted the required documentation, and it appears from their applications that their assets and income are insufficient to enable them to prosecute the action. Accordingly, their applications to proceed without the payment of the filing fee are GRANTED.

1 The Court's grant of Plaintiffs' applications to proceed IFP,
2 however, does not mean that they may continue to prosecute their
3 complaint. A court is under a continuing duty to dismiss a case
4 filed without the payment of the filing fee whenever it determines
5 that the action "(i) is frivolous or malicious; (ii) fails to state
6 a claim on which relief may be granted; or (iii) seeks monetary
7 relief against a defendant who is immune from such relief." 28
8 U.S.C. § 1915(e)(2)(B)(i)-(iii). Because a dismissal pursuant to
9 § 1915(e)(2)(B) is not a dismissal on the merits, but rather an
10 exercise of the court's discretion under the IFP statute, the
11 dismissal does not prejudice the filing of a paid complaint making
12 the same allegations. Denton v. Hernandez, 504 U.S. 25, 32 (1992).

13 Plaintiffs allege that, on March 20, 2010, they received
14 notifications regarding foreclosure proceedings to occur on their
15 home, which is located at 930 W. Cypress Road, Oakley, California.
16 They claim that any such foreclosure proceedings on their home are
17 invalid because Mortgage Electronic Registration Systems, Inc.,
18 (MERS), which is listed as the beneficiary on the deed of trust,
19 "does not possess both the 'Security Instrument' (DEED OF TRUST)
20 and the original debt instrument 'Note,' upon which 'MERS' claims
21 the right to foreclose." Comp. at 2.

22 Plaintiffs want proof that Recontrust Company (RC) has a
23 perfected interest in the title, has authority to foreclose, has
24 possession of both the note and the security instrument, and is the
25 holder in due course of the note.

26 Plaintiffs have acquired "the CUSIP/SEC security number that
27 is associated with the Mortgage Note which is proof that it has
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1 been converted into a mortgaged backed security, and sold on the
2 stock market." Comp. at 7.

3 Plaintiffs also assert that "production of a 'certified copy'
4 of the security is a federal crime prosecutable by 20 years in
5 federal prison." Id. They also assert that the lender and
6 servicer of the loan, Bank of New York and BAC Home Loans "have
7 committed securities fraud by selling unregistered securities under
8 15 U.S.C. §§ 77fff, 77e and 77x and 18 U.S.C. § 894 and 1348."
9 Comp. at 8.

10 Plaintiffs demand that the Court enjoin and dismiss
11 foreclosure proceedings against the property, rescind loan number
12 09229913-1, grant a reconveyance of the deed of trust and return
13 all payments Plaintiffs have made on the aforementioned loan.

14 Plaintiffs' complaint must be dismissed because they fail to
15 allege a cognizable claim upon which relief may be granted. The
16 sections of Title 18, United States Code, which Plaintiffs cite are
17 federal criminal statutes. Plaintiffs, as private citizens, may
18 not bring a criminal action against Defendants. If Plaintiffs
19 believe that Defendants have violated criminal laws, they may
20 complain to the appropriate law enforcement agency. Therefore, any
21 claims Plaintiffs allege under Title 18 of the United States Code
22 are dismissed.

23 Plaintiffs also attempt to allege a claim for the sale of
24 unregistered securities. Title 15 U.S.C. § 771 creates liability
25 for the sale of unregistered securities in certain circumstances.
26 Raymond v. Merrill Lynch, 1991 WL 520500, *6 (C.D. Cal.). However,
27 standing to bring a private lawsuit is limited to purchasers or
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1 offerees of stock sold. Smolen v. Deloitte, Haskins & Sells, 921
2 F.2d 959, 965 (9th Cir. 1990). From Plaintiffs' allegations, it is
3 apparent that they were neither purchasers nor offerees of the
4 securities at issue.

5 Lastly, in California, there is no requirement that a trustee
6 or beneficiary produce the original promissory note prior to a non-
7 judicial foreclosure sale. See, e.g., Pantoja v. Countrywide Home
8 Loans, Inc., 640 F. Supp. 2d 1177, 1186 (N.D. Cal. 2009); Smith v.
9 Wachovia, 2009 WL 1948829, at *3 (N.D. Cal.); Neal v. Juarez, 2007
10 WL 2140640, *8 (S.D. Cal.) (citing R.G. Hamilton Corp. v. Corum,
11 218 Cal. 92, 94, 97 (1933); Cal. Trust Co. v. Smead Inv. Co., 6
12 Cal. App. 2d 432, 435 (1935)). California Civil Code Sections 2924
13 through 2924k "provide a comprehensive framework for the regulation
14 of a non-judicial foreclosure sale pursuant to a power of sale
15 contained in a deed of trust." Knapp v. Doherty, 123 Cal. App. 4th
16 76, 86 (2004) (quoting Moeller v. Lien, 25 Cal. App. 4th 822, 830
17 (1994)). Knapp explains the non-judicial foreclosure process as
18 follows:

19 Upon default by the trustor [under a deed of trust
20 containing a power of sale], the beneficiary may declare
21 a default and proceed with a nonjudicial foreclosure
22 sale. The foreclosure process is commenced by the
23 recording of a notice of default and election to sell by
24 the trustee. After the notice of default is recorded,
the trustee must wait three calendar months before
proceeding with the sale. After the 3-month period has
elapsed, a notice of sale must be published, posted and
mailed 20 days before the sale and recorded 14 days
before the sale.

25 Knapp, 123 Cal. App. 4th at 86 (citation omitted). "A properly
26 conducted nonjudicial foreclosure sale constitutes a final
27 adjudication of the rights of the borrower and lender." Id. at 87.

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1 In sum, Plaintiffs have not alleged actionable irregularities in
2 the non-judicial foreclosure sale.

3 Thus, the Court dismisses Plaintiffs' complaint as legally
4 frivolous. This dismissal is without prejudice to Plaintiffs
5 refiling the complaint after paying the full filing fee. The Case
6 Management Conference set for July 27, 2010 at 2:00 p.m. is
7 vacated.

8 IT IS SO ORDERED.

9 Dated: 10-1598



CLAUDIA WILKEN
United States District Judge

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