

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DELIA S. PALCE,

Plaintiff,

v.

JP MORGAN CHASE BANK, et al.,

Defendants.

No. C 11-2932 PJH

**ORDER GRANTING MOTION
TO DISMISS; GRANTING MOTION
TO EXPUNGE; DENYING MOTION
TO STRIKE**

Defendants’ motion to dismiss, motion to strike, and motion to expunge lis pendens came on for hearing on January 11, 2012 before this court. Plaintiff Delia S. Palce (“plaintiff”) failed to appear at the hearing. Defendants JP Morgan Chase Bank, N.A. (“Chase”) and California Reconveyance Company (“California Reconveyance”)(collectively “defendants”), appeared through their counsel, Berrie Goldman. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants’ motion to dismiss and motion to expunge lis pendens, and DENIES the motion to strike as moot, for the reasons stated at the hearing, and summarized as follows:

1. Plaintiff’s claims asserted against defendant Chase are DISMISSED. Plaintiff alleges that she entered into the underlying loan with defendant on October 3, 2007 and that defendant was formerly known as Washington Mutual Bank. See FAC, ¶ 8. In fact, it was not until September 25, 2008, the same day that the Office of Thrift Supervision closed Washington Mutual Bank and appointed the FDIC as receiver for the bank, that Chase entered into a Purchase and Assumption agreement with the FDIC, pursuant to which Chase acquired many of Washington Mutual’s assets. The Purchase and Assumption agreement, however, expressly provides that the FDIC retains liability for borrower claims

1 relating to any Washington Mutual lending or loan purchase activities that predate
2 September 25, 2008. See Request for Judicial Notice (“RJN”), Ex. E at § 2.5. Since all of
3 plaintiff’s claims are fundamentally premised upon allegations stemming from the October
4 3, 2007 loan originally executed between plaintiff and Washington Mutual, the FDIC is the
5 real party in interest with respect to plaintiff’s claims, and Chase cannot be deemed to have
6 assumed any liability related to any of them. See, e.g., Rosenfeld v. JPMorgan Chase
7 Bank, N.A., 732 F. Supp. 2d 952, 960 (N.D. Cal. 2010)(acknowledging that, under
8 Purchase and Assumption agreement, Chase “did not assume the potential liabilities of
9 [WaMu] associated with claims of borrowers”); see also Yeomalakis v. F.D.I.C., 562 F.3d
10 56 (1st Cir. 2009)(finding denial of motion to substitute Chase Bank as party appropriate,
11 since FDIC was appropriate party pursuant to Purchase and Assumption
12 agreement)(“When Washington Mutual failed, Chase Bank acquired many assets but its
13 agreement with the FDIC retains for the FDIC “any liability associated with borrower claims
14 for payment of or any liability to any borrower for monetary relief, or that provide for any
15 other form of relief to any borrower.”).

16 Since plaintiff cannot cure the foregoing deficiency by amendment, plaintiff’s claims
17 against Chase are dismissed with prejudice.

18 2. With respect to the remaining defendant California Reconveyance,
19 defendants correctly note that plaintiff’s complaint alleges no specific unlawful conduct
20 purportedly undertaken by California Reconveyance. At most, the FAC alleges that
21 California Reconveyance “does not have authority to act as trustee” and furthermore, that it
22 is not in possession of the original Note and had no ability to transfer the Note or foreclose
23 upon plaintiff’s property. See FAC, ¶ 10; see also id., ¶¶ 27-29. However, to the extent
24 that California Reconveyance is alleged to be the designated trustee with respect to the
25 underlying loan, California Reconveyance could have played no role with respect to any act
26 occurring at the time of loan origination, or occurring in connection with the issuance or
27 servicing of plaintiff’s loan. Nor does plaintiff allege as much. As such, since plaintiff’s
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1 substantive legal claims relate only to acts occurring at the time of loan origination or in
2 connection with loan servicing, they fail to state viable claims against California
3 Reconveyance.

4 To the extent, moreover, that plaintiff otherwise seeks to hold California
5 Reconveyance accountable for wrongfully foreclosing upon plaintiff's property due to failure
6 to possess the "original note," not only is there no claim for wrongful foreclosure stated, but
7 as defendants correctly note, a trustee need not possess the original note in order to
8 initiate foreclosure pursuant to a Deed of Trust. See, e.g., Gamboa v. Trustee Corps.,
9 2009 WL 656285 at *4 (N.D. Cal., March 12, 2009); see also Putkkuri v. ReconTrust Co.,
10 2009 WL 32567 at *2 (S.D. Cal., Jan. 5, 2009)(under Civil Code § 2924(a), trustee has right
11 to initiate foreclosure process, and production of original note is not required).

12 Finally, while the court need to go into detail with respect to the specifics of each
13 claim asserted against California Reconveyance in light of the foregoing universal
14 deficiencies, the court nonetheless notes that even if it did, it would find the individual
15 claims inadequately pleaded.

16 Having failed to properly allege any actionable conduct by California Reconveyance
17 in connection with loan origination or servicing, or in connection with the foreclosure of
18 plaintiff's property, plaintiff's claims as to California Reconveyance are hereby DISMISSED.
19 Since this is plaintiff's second opportunity to amend her complaint (having previously had
20 her complaint dismissed and been given leave to amend) and she has still failed to cure the
21 deficiencies noted therein, and moreover since any amendment is likely to be futile, the
22 instant dismissal is with prejudice.

23 3. To the extent plaintiff seeks to add additional claims against defendants under
24 the Truth in Lending Act and the Real Estate Settlement Procedures Act by way of her
25 opposition brief, the court notes that such claims are not properly before it, since plaintiff
26 has failed to allege them in her amended complaint, nor has she sought leave to amend the
27 complaint in order to do so. Moreover, even if these claims were properly before the court,
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1 they would suffer the same deficiencies already noted above in connection with plaintiff's
2 already existing claims.

3 4. In view of the foregoing, defendants' motion to strike plaintiff's references to
4 the lending industry, and plaintiff's requests for punitive and injunctive relief and for
5 attorney's fees, is DENIED as moot.

6 5. Defendants' corresponding motion to expunge the recorded lis pendens filed
7 by plaintiff in state court is GRANTED. Defendants may seek whatever relief they are
8 entitled to, by virtue of the court's order, in the appropriate state court forum.

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10 **IT IS SO ORDERED.**

11 Dated: January 11, 2012



PHYLLIS J. HAMILTON
United States District Judge

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