

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

JACK A. NISSIM,

No. C 12-1201 CW

Plaintiff,

ORDER GRANTING
MOTIONS TO DISMISS
(Docket Nos. 17,
37 and 39),
GRANTING LEAVE TO
AMEND AND SETTING
CASE MANAGEMENT
CONFERENCE

v.

WELLS FARGO BANK, N.A.; FIRST
AMERICAN TITLE COMPANY; ATLANTIC
BANCORP; and NICHOLAS DUDUM,

Defendants.

_____ /

Plaintiff Jack A. Nissim asserts various mortgage-related claims against Defendants Wells Fargo Bank, N.A. and First American Title Company.¹ Wells Fargo and First American move to dismiss Plaintiff's first amended complaint (1AC). Plaintiff opposes their motions. The Court took the motions under submission on the papers. Having considered the arguments presented by the parties, the Court GRANTS the motions to dismiss and GRANTS Plaintiff leave to amend.

¹ Plaintiff has voluntarily dismissed his claims against Defendants Atlantic Bancorp and Nicholas Dudum.

United States District Court
For the Northern District of California

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1 BACKGROUND

2 I. Facts

3 The following summary is taken from the 1AC and certain
4 documents of which the Court takes judicial notice.²

5 In December 2004, Plaintiff entered into a loan transaction
6 with Wells Fargo for the purchase of property located at 1438 28th
7 Avenue in San Francisco, California. 1AC ¶ 15. Plaintiff
8 originally sought a loan with a fixed interest rate but was
9 induced into entering into a loan with an adjustable interest rate
10 based on promises that Plaintiff could later refinance the
11 property with a fixed interest rate. Id. The loan included a
12 penalty for early refinancing if he refinanced the property within
13 three years. Id.

14 In approximately December 2005, Plaintiff was assisted by
15 Atlantic Bancorp, a real estate broker, and its representative,
16 Dudum, in investigating loan options to purchase property in New
17 Mexico. Id. at ¶¶ 16, 45.

18 "Plaintiff was making regular mortgage payments under his
19 original loan when he began receiving statements with higher
20 payment amounts." 1AC ¶ 53. Specifically, in approximately March
21 2006, when Plaintiff received his monthly mortgage bill, he "was
22 completely shocked" to notice that the payment amount had

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24 ² Wells Fargo and First American ask, and Plaintiff does not
25 oppose, that the Court take judicial notice of (1) the 2005 loan
26 agreement with Plaintiff's purported signature, to which the 1AC
27 refers; (2) recorded documents associated with the foreclosure
28 sale, including the deed of trust, notice of default, substitution
of trustee and notice of trustee's sale; and (3) documents that
show that World Savings Bank became Wachovia Mortgage, FSB and
then subsequently merged into Wells Fargo Bank, N.A. The Court
GRANTS Defendants' request.

1 increased and that the "total amount due on the loan was much
2 higher since it was inflated with penalties." Id. at ¶ 17. "At
3 this moment, Plaintiff discovered that instead of merely exploring
4 financing options for property in New Mexico, Atlantic Bancorp and
5 Dudum had actually refinanced Plaintiff's Property without his
6 knowledge." Id. "The refinance loan was with World Savings Bank,
7 F.S.B.," predecessor-in-interest to Wells Fargo. Id. at ¶ 21.
8 See also RJN, Ex. A (copy of an Adjustable Rate Mortgage Note
9 dated December 16, 2005). Plaintiff alleges that Wells Fargo "is
10 believed to be the current owner of the loan at issue." Id. at
11 ¶ 7.

12 The "loan documents were signed and notarized using
13 Plaintiff's name, but Plaintiff never signed said documents" and
14 Atlantic Bancorp and Dudum "executed forged documents on
15 Plaintiff's behalf" for the refinancing. 1AC ¶¶ 34, 73.³
16 Although he alleges that he never signed the loan documents,
17 Plaintiff also alleges that he was "wrongfully induced" into
18 "entering into a refinancing agreement." Id. at ¶ 64. Plaintiff
19 further alleges that, although he had not signed the documents,
20 they "were apparently notarized" by First American's subsidiary,
21 Alliance Title Company. Id. at ¶ 18. He alleges that First
22 American, "as the parent corporation of Alliance Title Company,
23 insured the genuineness of the documents that were closed in
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26 ³ Although in the 1AC Plaintiff specifically identifies
27 Atlantic Bancorp and Dudum as the ones who executed the forged
28 document on his behalf, in his opposition to Wells Fargo's motion
to dismiss, Plaintiff states that "the exact source of the forgery
is unknown." Opp. to Wells Fargo's Mot. 9.

1 escrow in the loan transaction between Plaintiff and Wells Fargo."
2 Id. at ¶ 8.

3 The "terms of the new loan were worse than the original
4 loan." Id. at ¶ 19. Specifically, the "principal and interest
5 rate on the forged note was worse than the original note." Id.
6 "The interest of the second loan [was] also excessive." Id. The
7 monthly payments that he "was asked to make under the new loan
8 were . . . less than the monthly interest accumulations." Id.
9 "Paying this amount caused Plaintiff to amass arrears on every
10 payment he made." Id. Further, he "was penalized for violating
11 the early refinancing clause of his original loan." Id. at ¶ 18.

12 The "actual terms of the 'forged note'" were "concealed from
13 and never released to Plaintiff." Id. at ¶ 19. Nevertheless,
14 Plaintiff tried to "arrange . . . terms that would have been
15 acceptable and was unable to do so." Id.

16 When Plaintiff realized "that loan refinancing documents had
17 been forged" in 2006, he "brought suit immediately," asserting the
18 same causes of action as in the instant case. Id. at ¶ 25. "This
19 original lawsuit was filed in 2006." Id.⁴ That suit "was removed
20 to Bankruptcy court where it resided for some time until it was
21 dismissed without prejudice when the Bankruptcy was dismissed."
22 Id. Plaintiff does not allege when the case was dismissed, but
23 asserts that he "re-filed in a timely fashion." Id.

24 On November 1, 2011, NDEX West, as agent for the beneficiary,
25 Wells Fargo, recorded a notice of default and election to sell,
26 _____

27 ⁴ However, in his opposition to Wells Fargo's first motion to
28 dismiss, Plaintiff states that he brought the suit in state court
in 2007. Opp. to Wells Fargo Mot. at 8.

1 stating that Plaintiff was in default of the December 2005 note.
2 RJN, Ex. H.

3 On December 5, 2011, a substitution of trustee was recorded,
4 substituting NDEX West in place of the original trustee. RJN, Ex.
5 I.

6 On January 31, 2012, NDEX West recorded a notice of trustee's
7 sale, stating that the property would be sold at a trustee's sale
8 on February 22, 2012 at 2:00 p.m. RJN, Ex. J.

9 Plaintiff further alleges that, on February 22, 2012, his
10 house was foreclosed on and his "property was sold at a trustee's
11 sale." 1AC ¶ 29. However, elsewhere in the 1AC, Plaintiff
12 suggests that the trustee's sale has not yet taken place:
13 Plaintiff alleges that "Defendants are now seeking to wrongfully
14 foreclose on Plaintiff's Property" and that they "should be
15 precluded from . . . selling Plaintiff's Property at a trustee's
16 sale." Id. at ¶ 58. See also Opp. to First American Mot. 7 ("at
17 this point there has been no completed foreclosure sale").

18 II. Procedural history

19 Plaintiff initiated this case on February 7, 2012 in San
20 Francisco Superior Court, naming Wells Fargo as the only
21 Defendant. On March 9, 2012, Wells Fargo removed the action to
22 federal court. Docket No. 1.

23 On March 16, 2012, Wells Fargo filed a motion to dismiss
24 Plaintiff's complaint. Docket No. 6.

25 On April 6, 2012, Plaintiff filed his 1AC, adding as
26 Defendants First American, Atlantic Bancorp and Dudum. Docket No.
27 11. The 1AC asserts five claims against all Defendants: (1) quiet
28 title; (2) reformation of contract; (3) wrongful foreclosure in

1 violation of California Civil Code § 2924, et seq.; (4) slander of
2 title; and (5) equitable indemnity.

3 On April 20, 2012, Wells Fargo filed its first motion to
4 dismiss the 1AC. Docket No. 17.

5 On May 2, 2012, the Court found the motion to dismiss the
6 original complaint to be moot. Docket No. 23.

7 After the parties stipulated twice to continue the hearing on
8 Wells Fargo's motion to dismiss and the case management
9 conference, Docket Nos. 26, 30, the Court vacated the hearing and
10 conference to be reset if appropriate and directed the parties to
11 participate in alternative dispute resolution (ADR) with the
12 assistance of the Court's ADR Unit, Docket No. 31.

13 On November 7, 2012, the court-appointed mediator filed a
14 certificate stating that the mediation process was complete and
15 that the parties had not reached a settlement. Docket No. 36.

16 On November 28, 2012, First American filed a motion to
17 dismiss the 1AC, and Wells Fargo filed a second motion to dismiss
18 the 1AC. Docket Nos. 37 and 39.

19 On November 30, 2012, the Court issued an order addressing
20 the newly filed motions to dismiss and service upon Atlantic
21 Bancorp and Dudum. Docket No. 42. In that order, the Court noted
22 that Wells Fargo's first motion to dismiss was fully briefed and
23 that further briefing on Wells Fargo's second motion was not
24 required, and vacated the briefing schedule on that motion. The
25 Court maintained the briefing schedule on First American's motion
26 and stated that Plaintiff need not repeat the same arguments
27 already made in opposition to Wells Fargo's first motion. The
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1 Court also directed Plaintiff to file proof of timely service upon
2 Atlantic Bancorp or a motion for extension of time for service.

3 On December 12, 2012, Plaintiff filed a notice of voluntary
4 dismissal of Atlantic Bancorp and Dudum, which this Court granted
5 on December 13, 2012. See Docket Nos. 43 and 45.

6 LEGAL STANDARD

7 A complaint must contain a "short and plain statement of the
8 claim showing that the pleader is entitled to relief." Fed. R.
9 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
10 state a claim, dismissal is appropriate only when the complaint
11 does not give the defendant fair notice of a legally cognizable
12 claim and the grounds on which it rests. Bell Atl. Corp. v.
13 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
14 complaint is sufficient to state a claim, the court will take all
15 material allegations as true and construe them in the light most
16 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
17 896, 898 (9th Cir. 1986). However, this principle is inapplicable
18 to legal conclusions; "threadbare recitals of the elements of a
19 cause of action, supported by mere conclusory statements," are not
20 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
21 (citing Twombly, 550 U.S. at 555).

22 A statute of limitations defense may be raised by a motion to
23 dismiss if the running of the relevant statute of limitations is
24 apparent on the face of the complaint. Ledesma v. Jack Stewart
25 Produce, Inc., 816 F.2d 482, 484 n.1 (9th Cir. 1987). When a
26 motion to dismiss is based on the running of a statute of
27 limitations, the motion can be granted "only if the assertions of
28 the complaint, read with the required liberality, would not permit

1 the plaintiff to prove that the statute was tolled." Jablon v.
2 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (citation
3 omitted).

4 When granting a motion to dismiss, the court is generally
5 required to grant the plaintiff leave to amend, even if no request
6 to amend the pleading was made, unless amendment would be futile.
7 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
8 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
9 amendment would be futile, the court examines whether the
10 complaint could be amended to cure the defect requiring dismissal
11 "without contradicting any of the allegations of [the] original
12 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
13 Cir. 1990).

14 DISCUSSION

15 I. Liability of First American

16 First American contends that Plaintiff has not properly plead
17 any basis for imposing liability upon it. Plaintiff responds that
18 he alleged that First American "insured the genuineness of the
19 documents that were closed in escrow in the alleged loan refinance
20 transaction between Plaintiff and Wells Fargo," and that he
21 specifically alleged "the wrongdoing of the notary since that
22 individual declared under penalty of perjury that the forged
23 promissory note and deed of trust were signed by Plaintiff in
24 their presence when in fact they were not." Opp. to First
25 American Mot. 6.

26 As First American points out, in the lAC, Plaintiff alleges
27 that it can be held liable because it is "the parent corporation
28 of Alliance Title Company" and Alliance Title Company is its

1 subsidiary. Id. at ¶¶ 8, 18. Plaintiff does not make any
2 additional allegations about First American.

3 "It is a general principle of corporate law deeply 'ingrained
4 in our economic and legal systems' that a parent corporation (so-
5 called because of control through ownership of another
6 corporation's stock) is not liable for the acts of its
7 subsidiaries." United States v. Bestfoods, 524 U.S. 51, 61 (1998)
8 (quoting Douglas & Shanks, Insulation from Liability Through
9 Subsidiary Corporations, 39 Yale L.J. 193 (1929)). However,
10 California courts may nonetheless pierce the corporate veil and
11 impose alter ego liability where a subsidiary and the parent are
12 "not really separate entities" and where they find "(1) that there
13 is such unity of interest and ownership that the separate
14 personalities [of the two entities] no longer exist and (2) that
15 failure to disregard [their separate identities] would result in
16 fraud or injustice." Doe v. Unocal Corp., 248 F.3d 915, 926 (9th
17 Cir. 2001) (internal quotation marks and citations omitted,
18 brackets in original). "The first prong of this test has
19 alternately been stated as requiring a showing that the parent
20 controls the subsidiary 'to such a degree as to render the latter
21 the mere instrumentality of the former.'" Id. (citation omitted);
22 see also Holak v. Kmart Corp., 2012 U.S. Dist. LEXIS 176331, at
23 *10-11 (E.D. Cal.) (granting leave to amend to allege "sufficient
24 facts to give rise to a plausible basis for piercing the corporate
25 veil").

26 Thus, simply alleging that First American is the parent
27 company of Alliance Title Company, its subsidiary, is insufficient
28 to plead a basis for liability against First American.

1 Further, as First American argues, Plaintiff has not alleged
2 sufficiently any breach of duty by the notary. Although Plaintiff
3 alleges that his signature on the documents was forged, Plaintiff
4 has not plead that the notary knew or had any reason to know this
5 or that the notary failed to verify the identity of the signer.

6 Accordingly, the Court GRANTS First American's motion to
7 dismiss Plaintiff's claims against it. Plaintiff is granted leave
8 to amend to remedy these deficiencies identified above.

9 II. Quiet Title

10 "The purpose of a quiet title action is to finally settle and
11 determine, as between the parties, all conflicting claims to the
12 property in controversy, and to decree to each such interest or
13 estate therein as he may be entitled to." Rosenfeld v. JPMorgan
14 Chase Bank, N.A., 732 F. Supp. 2d 952, 974 (N.D. Cal. 2010)
15 (internal quotation marks and citations omitted). A quiet title
16 action must include in a verified complaint: "(1) a description of
17 the property in question; (2) the basis for plaintiff's title; and
18 (3) the adverse claims to plaintiff's title." Ananiev v. Aurora
19 Loan Servs., LLC, 2012 U.S. Dist. LEXIS 132489, at *9-10 (N.D.
20 Cal.); Cal. Civ. Proc. Code § 760.020.

21 "In order to satisfy the second requirement, plaintiff must
22 allege that he has discharged his debt, regardless to whom it is
23 owed." Id. (citing Kelley v. Mort. Elec. Registration Sys., Inc.,
24 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009)); see also Miller v.
25 Provost, 26 Cal. App. 4th 1703, 1707 (1994) ("This rule was based
26 on the equitable principle that a mortgagor of real property
27 cannot, without paying his debt, quiet his title against the
28 mortgagee."). "That is, to state a claim, Plaintiff must allege a

1 valid and viable offer of tender." Sowinski v. Wells Fargo Bank,
2 N.A., 2012 U.S. Dist. LEXIS 168198, at *4-5 (N.D. Cal.) (citing
3 Chancellor v. OneWest Bank, 2012 U.S. Dist. LEXIS 125249, at *10
4 (N.D. Cal.)).

5 Defendants argue that Plaintiff has failed to state a claim
6 to quiet title because he has failed to allege tender
7 sufficiently. In the 1AC, Plaintiff has plead that he "hereby
8 offers to tender any amount proper and necessary to effectuate
9 rescission of the void contract." 1AC ¶ 28. Plaintiff argues
10 that this is a sufficient allegation of tender because his
11 complaint attacks the validity of the underlying debt, he is not
12 in default under the forged note and it would be inequitable to
13 require him to tender the full amount of his indebtedness.
14 Plaintiff also argues that he received nothing under the 2005
15 forged note and thus "has nothing to tender in exchange for
16 reformation or rescission of the forged note."

17 Plaintiff appears to base his arguments that he should not be
18 required to make a full tender on the understanding that he seeks
19 to restore the 2004 mortgage agreement and challenges only the
20 validity of the forged refinancing agreement. However, in his
21 quiet title claim, Plaintiff seeks to remove all clouds from his
22 title and requests a determination that he holds title to the
23 property, free from all claims of Defendants, apparently including
24 the original promissory note and deed of trust. See 1AC ¶¶ 36, 37
25 ("Plaintiff seeks to quiet title against the claims of Defendants,
26 and each of them. . . . Defendants and each of them, has no valid,
27 lawful, or equitable title, estate, lien or interest in the
28 Property. Defendants do not . . . own or have a legal interest in

1 the pertinent notes secured by the corresponding deeds of
2 trust."). Without an allegation that he has paid the full amount
3 of the original loan, Plaintiff has not stated a claim to quiet
4 title.

5 In addition, Plaintiff has not alleged any adverse claim to
6 his title that is held or asserted by First American that creates
7 a present controversy between him and First American to be
8 resolved by a judgment quieting title. See Friends of the Trails
9 v. Blasius, 78 Cal. App. 4th 810, 831 (2000) ("there is no
10 entitlement to a judgment quieting title insofar as there is no
11 antagonistic property interest").

12 Defendants also argue that this claim is time-barred because
13 Plaintiff failed to bring it within three years of December 2005
14 when the loan refinancing papers were filed. "Since there is no
15 statute of limitations governing quiet title actions as such, it
16 is ordinarily necessary to refer to the underlying theory of
17 relief to determine which statute applies." Muktarian v. Barmby,
18 63 Cal. 2d 558, 560 (1965). In the case of fraud or mistake, the
19 statute of limitations is three years after the fraud or mistake
20 has been discovered. Cal. Civ. Proc. Code § 338(d). In actions
21 based on rescission of a contract in writing where the ground is
22 fraud or mistake, the statute of limitations is four years after
23 the fraud or mistake has been discovered. Cal. Civ. Proc. Code
24 § 337(3). "However, 'no statute of limitations runs against a
25 plaintiff seeking to quiet title while he is in possession of the
26 property.'" Espinoza v. Recontrust Co., N.A., 2010 U.S. Dist.
27 LEXIS 71337, at *16. (S.D. Cal.) (quoting Muktarian, 63 Cal. 2d at
28 560). Thus, because Plaintiff is still in possession of the

1 property, his quiet title claim is not barred by the statute of
2 limitations.

3 Accordingly, the Court GRANTS Defendants' motions to dismiss
4 Plaintiff's claim seeking to quiet title. Plaintiff is granted
5 leave to amend to address the deficiencies identified above.

6 III. Reformation of Contract

7 In this claim, Plaintiff contends that, because the
8 "refinancing loan was fabricated through the forgery of
9 Plaintiff's signature" and the only real agreement that he entered
10 into was the original mortgage signed in 2004, his loan "should be
11 reformed to reflect the terms of the original obligation and not
12 the terms of the refinancing agreement." 1AC ¶ 41.

13 Wells Fargo argues that Plaintiff has failed to plead any
14 element of a cause of action for reformation of contract. "To
15 state a claim for reformation under California law, a plaintiff
16 must plead that 'by reason of fraud practiced by one of the
17 parties, or of the mutual mistake of the parties or of a mistake
18 of one of them, which the other at the time knew or suspected,
19 there were omitted from the instrument certain material terms and
20 conditions. In other words, that the language of the writing
21 failed, for some reason, to express the intention of the
22 parties.'" Leisher v. Wachovia Mortg., Inc., 2011 U.S. Dist.
23 LEXIS 3037 (S.D. Cal.) (quoting Pascoe v. Morrison, 219 Cal. 54,
24 56 (1933)); see also Cal. Civ. Code § 3399 (setting forth when a
25 contract may be revised). "A complaint for the reformation of a
26 contract should allege what the real agreement was, what the
27 agreement as reduced to writing was, and where the writing fails
28 to embody the real agreement. It is also necessary to aver facts

1 showing how the mistake was made, whose mistake it was and what
2 brought it about, so that mutuality may appear." Lane v. Davis,
3 172 Cal. App. 2d 302, 309 (1959) (quoting Johnson v. Sun Realty
4 Co., 138 Cal. App. 296, 300 (1934)). "Basic to a cause of action
5 for reformation is a showing of a definite intention or agreement
6 on which the minds of the parties had met which pre-existed and
7 conflicted with the instrument in question." Appalachian Ins. Co.
8 v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 21 (1989)
9 (internal quotation marks, formatting and citation omitted).

10 Wells Fargo argues that Plaintiff has not plead sufficiently
11 that the parties actually entered into a contract that the 2005
12 agreement failed to accurately reflect, or what the terms of such
13 contract was. Wells Fargo claims that Plaintiff instead asks "the
14 Court to make an entirely new contract reflecting the terms of the
15 2004, preferred loan agreement." Wells Fargo Mot. 8. Wells Fargo
16 is correct that Plaintiff has not alleged that the parties
17 actually had a meeting of the minds in 2005 that the purportedly
18 fraudulent agreement fails to reflect.

19 First American also contends that it is not properly named as
20 a Defendant for this claim. In the 1AC, Plaintiff has not alleged
21 that First American is a party to any contract or agreement with
22 him. Thus, Plaintiff has not identified any agreement that the
23 Court could reform between him and First American.

24 Defendants also argue that reformation requires fraud or
25 mistake, which Plaintiff has not plead sufficiently. In his
26 opposition to Wells Fargo's motion to dismiss, Plaintiff states
27 that he seeks reformation on the grounds of "a forgery, or
28 presumably fraud," not mistake. Wells Fargo is correct that

1 Plaintiff has not plead that it has directly engaged in any fraud
2 or forgery.

3 Further, Plaintiff has not properly plead an agency
4 relationship between Wells Fargo and Atlantic Bancorp, Dudum or
5 any others, such that their purported forgery or other malfeasance
6 could be imputed to Wells Fargo. Plaintiff has only conclusorily
7 alleged that "each Defendants [sic] was acting as the agent,
8 servant, employee, partner, co-conspirator, and/or joint venture
9 of each remaining Defendants [sic]." 1AC ¶ 13. Plaintiff is
10 required to make more than conclusory allegations, especially
11 "when normally, as a matter of law, a broker is the agent of the
12 borrower not the lender." Abels v. Bank of Am., N.A., 2012 U.S.
13 Dist. LEXIS 28125, at *19 (N.D. Cal.) (citing Montoya v. McLeod,
14 176 Cal. App. 3d 57, 64 (1985)).

15 Plaintiff has also not plead sufficiently that Atlantic
16 Bancorp, Dudum, Alliance or First American acted with the
17 ostensible authority of Wells Fargo. Under California law,
18 ostensible agency exists "when the principal intentionally, or by
19 want of ordinary care, causes a third person to believe another to
20 be his agent who is not really employed by him." Cal. Civ. Code
21 § 2300. Thus, Plaintiff must plead that Wells Fargo itself has
22 done something that caused Plaintiff to believe that these others
23 were its agents. The only action taken by Wells Fargo that
24 Plaintiff points to in support of his argument regarding
25 ostensible authority is that Wells Fargo has recently instituted
26 foreclosure proceedings to enforce the 2005 deed of trust and
27 promissory note. This does not suggest that the actions of
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1 Atlantic, Dudum or Alliance Title in 2005 were taken on behalf of
2 Wells Fargo.

3 In addition, Defendants argue that, on the face of the 1AC,
4 this claim is barred by the four year statute of limitations for
5 the rescission of a written contract. Cal. Code Civ. Proc.
6 § 337(3). To the extent that Defendants state that the statute
7 began running in December 2005, the date of the execution of the
8 forged contract, this is incorrect. Instead, the four year time
9 period began to run in March 2006, when Plaintiff alleges that he
10 discovered the fraud. Id. Nevertheless, because the action was
11 not filed until February 2012, this claim is time-barred, unless
12 the statute of limitations was tolled for at least twenty-three
13 months. Plaintiff contends that this claim was timely asserted
14 because he brought it promptly after discovering Wells Fargo's
15 claim of title and "again immediately after his original suit was
16 dismissed without prejudice." Opp. at 8.

17 "California equitably tolls the statute of limitations during
18 the pendency of an earlier action if there is 'timely notice, and
19 lack of prejudice to the defendant, and reasonable and good faith
20 conduct on the part of the plaintiff.'" Retail Clerks Union Local
21 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983).

22 California courts have found that three requirements must be
23 present for this rule of equitable tolling may apply: "(1) the
24 plaintiff must have diligently pursued his or her claim; (2) the
25 fact that the plaintiff is left without a judicial forum for
26 resolution of the claim must be attributable to forces outside the
27 control of the plaintiff; and (3) the defendant must not be
28 prejudiced by application of the doctrine (which is normally not a

1 factor since the defendant will have had notice of the first
2 action)." Hull v. Central Pathology Serv. Med. Clinic, 28 Cal.
3 App. 4th 1328, 1336 (1994). See also Prettyman v. City of San
4 Diego Police Dep't, 2012 U.S. Dist. LEXIS 38461, at *12 (S.D.
5 Cal.) (equitable tolling may apply "to prevent unjust technical
6 forfeiture of certain claims") (internal quotations omitted).
7 While this rule ordinarily does not allow a party to "deduct the
8 time consumed by the pendency of an action if it was later
9 dismissed without prejudice," Prettyman, 2012 U.S. Dist. LEXIS
10 38461, at *12-13, that bar normally applies to prevent the
11 voluntary dismissal of actions by the plaintiff, because of
12 courts' concern that "an indefinite extension of the statutory
13 period -- through successive filings and dismissals -- might well
14 result," Wood v. Elling Corp., 20 Cal. 353, 359-60 (1977).

15 Here, Plaintiff has alleged that his earlier action was
16 dismissed without prejudice by the bankruptcy court when it
17 dismissed his bankruptcy case, not that he voluntarily dismissed
18 the action. However, Plaintiff has not plead the dates on which
19 he filed the earlier action or on which the bankruptcy court
20 dismissed it, and has not alleged facts that could support a
21 finding that Defendants would not be prejudiced by application of
22 this doctrine. Accordingly, Plaintiff has not sufficiently plead
23 facts to establish that the statute was tolled for a duration
24 sufficient to have made his claims timely.

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1 Accordingly, the Court grants Defendants' motion to dismiss
2 this claim.⁵ Plaintiff is granted leave to amend to remedy the
3 deficiencies identified above. He must plead the dates on which
4 he filed the state court action and on which the bankruptcy court
5 dismissed it, and identify the case numbers and courts for those
6 proceedings.

7 IV. Wrongful Foreclosure

8 Plaintiff alleges that Defendants' foreclosure of his
9 property violated California Civil Code section 2924, because the
10 notice of default did not specify the accurate amount of arrears
11 due to its inclusion of penalties and fees related to the forged
12 refinancing agreement.

13 Defendants argue that Plaintiff's claim for wrongful
14 foreclosure is insufficiently plead for several reasons. First,
15 Defendants argue that Plaintiff has not "plead with certainty the
16 first essential element of a wrongful foreclosure sale, i.e., a
17 completed trustee's sale." First American Mot. 14; see also Wells
18 Fargo Mot. 8. Plaintiff responds that a completed trustee's sale
19 is not required for this claim because the "primary remedy" sought
20 for this claim is injunctive relief to "prevent the wrongful
21 foreclosure" of the property. Plaintiff fails to provide any
22 authority in support of his argument. However, in addition to
23 seeking to stop the foreclosure process, Plaintiff requests that
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26 ⁵ The Court notes that, in his opposition to Wells Fargo's
27 motion to dismiss, Plaintiff refers several times to rescission of
28 the 2005 document, as opposed to reformation. See, e.g., Opp. to
Wells Fargo Mot. 6. In amending his complaint, Plaintiff may
plead a claim for rescission or cancellation of the 2005 contract
instead of attempting to re-plead his claim for reformation.

1 he be awarded "actual damages" that he suffered from the
2 purportedly wrongful foreclosure. 1AC ¶ 59.

3 In the 1AC, Plaintiff has made contradictory allegations both
4 that a trustee's sale has been completed and that the property is
5 "in danger of being sold" but has not yet been sold. 1AC ¶¶ 22,
6 29; see also id. at ¶ 58 ("Defendants are now seeking to
7 wrongfully foreclose on Plaintiff's Property . . . Defendants
8 should be precluded from foreclosing on Plaintiff's Property and
9 from selling Plaintiff's Property at a trustee's sale."). In his
10 responses to the motions to dismiss, Plaintiff consistently
11 asserts that "Plaintiff's Property has not yet been sold at a
12 scheduled trustee's sale." Opp. to First American Mot. 7.

13 Under California law, a "lender or foreclosure trustee may
14 only be liable to the mortgagor or trustor for wrongful
15 foreclosure if the property was wrongfully or illegally sold under
16 a power of sale contained in a mortgage or deed of trust."

17 Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 961
18 (N.D. Cal. 2010) (citing Munger v. Moore, 11 Cal. App. 3d 1, 7
19 (1970)). See also Permito v. Wells Fargo Bank, N.A., 2012 U.S.
20 Dist. LEXIS 55977, at *9 (N.D. Cal.) ("The first element for a
21 wrongful foreclosure claim is that the property was illegally or
22 fraudulently sold under a power of sale in a deed of trust.");
23 Chancellor v. OneWest Bank, 2012 U.S. Dist. LEXIS 71992, at *24-26
24 (N.D. Cal.) (dismissing without prejudice a wrongful foreclosure
25 claim as "premature" where the plaintiff alleged that a
26 foreclosure sale was scheduled but not that it had already
27 occurred). Accordingly, if a trustee's sale has not yet taken
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1 place, Plaintiff's claim for damages as a result of the wrongful
2 foreclosure is premature.

3 Defendants also argue that Plaintiff has not specified the
4 specific part of section 2924 that he asserts Defendants have
5 violated. Plaintiff responds that he "specifically identifies
6 that Defendant violated Civil Code § 2924 for not recording a
7 Notice of Default with accurate amounts of arrears and as such,
8 the nature of the breach was not known to the Plaintiff." Opp. to
9 Wells Fargo Mot. to Dismiss 12. He acknowledges that the 1AC
10 "fails to specifically identify the actual section" that was
11 purportedly violated but avers that "this deficiency can easily be
12 cured by allowing leave to amend in order to state that Defendant
13 specifically violated Civil Code § 2924(a)(1)(C)." Id.⁶

14 In addition, Defendants argue that Plaintiff's wrongful
15 foreclosure claim fails because he has inadequately alleged tender
16 of the indebtedness. Although tender may be required to set aside
17 a completed trustee's sale, if Plaintiff seeks equitable relief to
18 postpone or prevent the sale, many "courts have refused to extend
19 the tender rule to cases where the foreclosure sale has not yet
20 occurred." Tang v. Bank of Am., N.A., 2012 U.S. Dist. LEXIS
21 38642, at *14 (C.D. Cal.); see also Howl v. Bank of Am., N.A.,
22 2011 U.S. Dist. LEXIS 91698, at *5 (N.D. Cal.); Silva-Pearson v.
23 BAC Home Loans Servicing, LP, 2011 U.S. Dist. LEXIS 71639, at *5-6

24 _____
25 ⁶ California Civil Code section 2924(a)(1)(C) requires that
26 the notice of default include a "statement setting forth the
27 nature of each breach actually known to the beneficiary and of his
28 or her election to sell or cause to be sold the property to
satisfy that obligation and any other obligation secured by the
deed of trust or mortgage that is in default."

1 (N.D. Cal.); Dubin v. BAC Home Loans Servicing, 2011 U.S. Dist.
2 LEXIS 19921, at *7 (N.D. Cal.).

3 Where a foreclosure sale has taken place, without pleading
4 tender or the ability to offer tender, a plaintiff cannot state a
5 cause of action challenging a foreclosure. Karlsen v. Am. Savings
6 & Loan Ass'n, 15 Cal. App. 3d 112, 117 (1971) (citing Copsey v.
7 Sacramento Bank, 133 Cal. 659, 662 (1901)); Smith v. Wachovia,
8 2009 U.S. Dist. LEXIS 57553, at *8 (N.D. Cal.) (citing Karlsen, 15
9 Cal. App. 3d at 117). "An exception to the tender rule may apply,
10 however, where it would be inequitable to require tender." Bowe
11 v. Am. Mortg. Network, Inc., 2012 U.S. Dist. LEXIS 80044 (C.D.
12 Cal.) (citing Onofrio v. Rice, 55 Cal. App. 4th 413, 424 (1997)).
13 Further, "if the action attacks the validity of the underlying
14 debt, a tender is not required since it would constitute an
15 affirmative of the debt." Onofrio, 55 Cal. App. 4th at 424
16 (citation omitted). On this basis, at least one court in this
17 district has declined to impose a tender requirement when the
18 plaintiffs challenged the validity of the underlying debt, "by
19 alleging forgery and fraud in the consummation of the underlying
20 security." See Kurek v. America's Wholesale Lender, 2010 U.S.
21 Dist. LEXIS 75401, at *1-2 (N.D. Cal.). Similarly, here, if a
22 foreclosure sale has taken place, it would be inequitable to
23 require Plaintiff to tender the full amount secured by the 2005
24 note because he alleges that he never agreed to that debt and his
25 name was forged on the refinancing papers.

26 Although full tender is not required, under the circumstances
27 present here, Plaintiff's current allegation of tender is
28 insufficient. Plaintiff does not challenge the validity of the

1 debt incurred through the 2004 mortgage agreement and instead
2 seeks rescission of the 2005 agreement in order to have the 2004
3 agreement reinstated. The tender rule "is premised upon the
4 equitable maxim that a court of equity will not order that a
5 useless act be performed." Arnolds Management Corp. v. Eischen,
6 158 Cal. App. 3d 575, 579 (1984). The rationale is that, "without
7 tender, a plaintiff cannot redeem the property and so unwinding a
8 completed foreclosure sale would be 'useless.'" Tang v. Bank of
9 Am., N.A., 2012 U.S. Dist. LEXIS 38642 (C.D. Cal.). Plaintiff has
10 alleged an offer "to tender any amount proper and necessary to
11 effectuate rescission of the void contract." 1AC ¶ 28. Plaintiff
12 must at least also allege an offer to pay the amounts due for the
13 monthly payments under the original loan, including any fees and
14 interest incurred due to the late payment. If Plaintiff is able
15 to make such an allegation truthfully, it appears that it would
16 not be useless to set aside a foreclosure sale and reinstate the
17 original loan.

18 Accordingly, the Court grants Defendants' motions to dismiss
19 the claim for wrongful foreclosure. Plaintiff is granted leave to
20 amend to plead whether or not a trustee's sale has been completed,
21 to identify the particular subsection of section 2924 that he
22 alleges Defendants have violated and, if a trustee's sale has
23 taken place, to plead tender adequately.

24 V. Slander of Title

25 Plaintiff alleges that "the Defendants have recorded a notice
26 of default on a void note which was manufactured by the
27 Defendants' own wrongdoing" and that, as a result, he has suffered
28

1 damage to his credit, an inflated premium, accrual of arrearages,
2 attorneys' fees and foreclosure. 1AC ¶¶ 64-69.

3 The elements of a claim for slander of title under California
4 law are (1) publication, (2) falsity, (3) absence of privilege and
5 (4) "'disparagement of another's land which is relied upon by a
6 third party and which results in a pecuniary loss.'" Smith v.
7 Commonwealth Land Title Ins. Co., 177 Cal. App. 3d 625, 630 (1986)
8 (quoting Appel v. Burman, 159 Cal. App. 3d 1209, 1214 (1984)).
9 Because, under California law, the "mailing, publication, and
10 delivery of notices" required as part of the nonjudicial
11 foreclosure process are considered privileged communications, see
12 Cal. Civ. Code § 2924(d)(1), Plaintiffs must also allege that the
13 recording was done with malice, that is, it "was motivated by
14 hatred or ill will" or "the defendant lacked reasonable grounds
15 for belief in the truth of the publication and therefore acted in
16 reckless disregard of the plaintiff's rights." Kachlon v.
17 Markowitz, 168 Cal. App. 4th 316, 336 (2008) (internal quotations
18 omitted).

19 Defendants argue that Plaintiff has not sufficiently alleged
20 that he was damaged by any false publication because "the
21 proximate cause of loss is due solely to Plaintiff's default on
22 the loan." Wells Fargo Mot. 10; First American Mot. 16. However,
23 Plaintiff has alleged that the second forged agreement had
24 significantly less favorable terms than the original loan, which
25 caused his monthly payments to increase, and that "his inability
26 to make monthly mortgage payments, as well as the total amount of
27 arrearages, was a direct result of the forged second note and the
28 false [notice of default]." 1AC ¶¶ 17, 19, 69. Thus, Plaintiff

1 has alleged adequately that he suffered a loss because of the
2 purported fraud and void note.

3 However, Plaintiff has made only conclusory allegations that
4 Wells Fargo and First American acted with malice. Plaintiff has
5 specifically alleged that Atlantic Bancorp and Dudum--against whom
6 Plaintiff is no longer pursuing claims--forged his signature. He
7 has not alleged that either Wells Fargo or First American knew of
8 the forgery or that they acted out of hatred or ill will toward
9 him. Although Plaintiff asserts in his response to First
10 American's motion that "the notary authenticating Plaintiff's
11 forged signatures knew that the signatures were not genuine," Opp.
12 to First American Mot. 7-8, Plaintiff did not allege in the 1AC
13 that the notary had such knowledge. Further, as explained above,
14 Plaintiff has not alleged sufficiently any basis to assign
15 liability to First American for the notary's actions.
16 Accordingly, Plaintiff has failed to allege this claim adequately
17 against either remaining Defendant.

18 Thus, the Court GRANTS Defendants' motions to dismiss this
19 claim. Plaintiff is granted leave to remedy the deficiencies
20 identified above.

21 VI. Equitable Indemnity

22 Both Defendants argue that Plaintiff's claim for equitable
23 indemnification is misplaced because that doctrine applies only to
24 apportion liability among various defendants who are jointly and
25 severally liable to a plaintiff.

26 Plaintiff did not respond to Wells Fargo's argument.
27 Accordingly, the Court GRANTS Wells Fargo's motion to dismiss this
28 claim.

1 In his opposition to First American's motion, Plaintiff
2 states that he "seeks equitable indemnity from Defendant First
3 American for their alleged misconduct in creating the initial
4 controversy." Opp. to First American Mot. 8. He points to his
5 allegations that, "as a result of the forged documents, Plaintiff
6 suffers from 'overcharges of fees, incurred attorneys' fees,
7 etc. . .'" and states that, to the extent "Wells Fargo seeks such
8 sums from Plaintiff, First American is liable for equitable
9 indemnity." Id.

10 "At the heart of the doctrine of equitable indemnity is
11 apportionment based on fault. At a minimum equitable indemnity
12 requires a determination of fault on the part of the alleged
13 indemnitor." Heritage Oaks Partners v. First American Title Ins.
14 Co., 155 Cal. App. 4th 339, 348 (2007) (internal quotation marks,
15 citations and formatting omitted). "One point stands clear:
16 there can be no indemnity without liability. In other words,
17 unless the prospective indemnitor and indemnitee are jointly and
18 severally liable to the plaintiff there is no basis for
19 indemnity." Id. (internal quotation marks, citations and
20 formatting omitted).

21 Thus, to state a cause of action for equitable indemnity,
22 Plaintiff must allege that he was jointly and severally liable
23 with First American to Wells Fargo. Plaintiff has not done so.
24 Accordingly, the Court GRANTS, with leave to amend, First
25 American's motion to dismiss this claim.

26 CONCLUSION

27 For the reasons set forth above, the Court GRANTS Defendants'
28 motions to dismiss (Docket Nos. 17, 37 and 39). Within fourteen

1 days of the date of this Order, Plaintiff may file a second
2 amended complaint to remedy the deficiencies identified above. He
3 may not add further claims or allegations not authorized by this
4 Order.

5 If Plaintiff files a second amended complaint, Defendants
6 shall respond to it within fourteen days after it is filed. If
7 Defendants move to dismiss the second amended complaint, to the
8 extent possible, Defendants, who share counsel, shall file a joint
9 motion. Plaintiff shall respond to the motion within fourteen
10 days after it is filed. Defendants' reply, if necessary, shall be
11 due seven days thereafter. Any motion to dismiss will be decided
12 on the papers.

13 The Court sets a case management conference for April 17,
14 2013 at 2:00 p.m.

15 IT IS SO ORDERED.

16
17 Dated: 1/17/2013


18 CLAUDIA WILKEN
19 United States District Judge
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