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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTINE BARNES,
Plaintiff,
v.
RICK MORTELL, et al.,
Defendants.

Case No. [4:14-cv-02373-KAW](#)

**ORDER GRANTING WELLS FARGO'S
MOTION TO INTERVENE AND FILE
MOTION TO EXPUNGE LIS PENDENS**

Re: Dkt. No. 113

On May 22, 2014, Plaintiff Kristine Barnes recorded a notice of lis pendens on Defendants' real property located at 110 South Veilwood Circle, The Woodlands, Texas ("Subject Property"), in connection with this lawsuit. (Req. for Judicial Not., "RJN," Dkt. No. 114, Ex. A.)

Upon review of the moving papers, the Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below, GRANTS Proposed Intervenor Wells Fargo's motion to intervene.

I. BACKGROUND

On May 22, 2014, Plaintiff Kristine Barnes filed this action for fraud and to void her contract in connection with her attempted purchase of two condominiums in Honduras that she claims were never built and was instead a scheme to defraud buyers. (Compl., Dkt. No. 1.) Plaintiff named Defendants Rick Mortell (a.k.a. Eric Mortell), Darlene Mortell, Erika Mortell, Bay Islands Enterprises Inc., and Bay Islands Enterprises Investments S.A. DE C.V. (a.k.a. Viva Roatan Resort and Viva Wyndham Resort). *Id.* Plaintiff claims that she learned of the alleged fraud and breach of contract in the summer of 2012, when she discovered that the title company she used to facilitate the purchase was not a legitimate title company. (Compl. ¶ 16.)

On May 22, 2014, Plaintiff recorded a notice of lis pendens on Defendants' real property

1 located at 110 South Veilwood Circle, The Woodlands, Texas (“Subject Property”). (Req. for
2 Judicial Not., “RJN,” Dkt. No. 114, Ex. A.)

3 On September 28, 2015, Plaintiff filed a notice of settlement. On January 19, 2016, the
4 parties filed a joint status report stating that they expected to file a dismissal within 120 days.
5 (Dkt. No. 103.) No dismissal was filed. On September 27, 2016, Plaintiff filed a status report to
6 notify the Court that the parties’ attempts to perform the conditions of settlement, which required
7 the sale of the subject property, had not occurred due to the collapse of the housing market in
8 Houston, Texas. (Pl.’s Status Report, Dkt. 110 at 1.) Plaintiff also informed the undersigned that
9 Wells Fargo was initiating foreclosure proceedings in Texas because Defendants had defaulted on
10 their first lien mortgage. *Id.*

11 On November 21, 2016, Proposed Intervenor Wells Fargo Bank, N.A. filed a motion to
12 intervene and to file a motion to expunge the lis pendens, which it contends was improperly
13 recorded. (Mot., Dkt. No. 113-1.) On December 5, 2016, Plaintiff filed an opposition. (Pl.’s
14 Opp’n, Dkt. No. 116.) On December 12, 2016, Wells Fargo filed a reply. (Reply, Dkt. No. 118.)

15 **II. LEGAL STANDARD**

16 **A. Motion to Intervene**

17 Federal Rule of Civil Procedure 24(a)(2) provides for intervention as a matter of right
18 where the potential intervenor “claims an interest relating to the property or transaction that is the
19 subject of the action, and is so situated that disposing of the action may as a practical matter
20 impair or impede the movant’s ability to protect its interest, unless existing parties adequately
21 represent that interest.” The Ninth Circuit has summarized the requirements for intervention as of
22 right under Rule 24(a)(2) as follows:

- 23 (1) [T]he [applicant’s] motion must be timely; (2) the applicant must
24 have a “significantly protectable” interest relating to the property or
25 transaction which is the subject of the action; (3) the applicant must
26 be so situated that the disposition of the action may as a practical
matter impair or impede its ability to protect that interest; and (4) the
applicant’s interest must be inadequately represented by the parties
to the action.

27 *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (quoting
28 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006)). Proposed

1 intervenors must satisfy all four criteria, and the “[f]ailure to satisfy any one of the requirements is
2 fatal to the application.” *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir.
3 2009). In evaluating motions to intervene, “courts are guided primarily by practical and equitable
4 considerations, and the requirements for intervention are broadly interpreted in favor of
5 intervention.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). “Courts are
6 to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed
7 complaint or answer in intervention, and declarations supporting the motion as true absent sham,
8 frivolity or other objections.” *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir.
9 2001).

10 Alternatively, the court has discretion to grant an applicant’s request for permissive
11 intervention. Under Federal Rule of Civil Procedure 24(b), “on a timely motion, the court may
12 permit anyone to intervene who . . . has a claim or defense that shares with the main action a
13 common question of law or fact.” Permissive intervention under Rule 24(b) requires an applicant
14 to “prove that it meets three threshold requirements: (1) it shares a common question of law or fact
15 with the main action; (2) its motion is timely; and (3) the court has an independent basis for
16 jurisdiction.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). If these threshold
17 requirements are all met, the court has discretion to permit or deny intervention under Rule 24(b).
18 “[I]n exercising its discretion, the court is to consider ‘whether the intervention will unduly delay
19 or prejudice the adjudication of the rights of the original parties.’” *Kootenai Tribe of Idaho v.*
20 *Veneman*, 313 F.3d 1094, 1128 n. 10 (9th Cir. 2002) (quoting Fed. R. Civ. P. 24(b)(2)).

21 **B. Request for Judicial Notice**

22 As a general rule, a district court may not consider any material beyond the pleadings in
23 ruling on a motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). A district court
24 may take notice of facts not subject to reasonable dispute that are “capable of accurate and ready
25 determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R.
26 Evid. 201(b); *United States v. Bernal–Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). “[A] court may
27 take judicial notice of ‘matters of public record,’” *Lee*, 250 F.3d at 689 (citing *Mack v. S. Bay Beer*
28 *Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)), and may also consider “documents whose contents

1 are alleged in a complaint and whose authenticity no party questions, but which are not physically
2 attached to the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other
3 grounds by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). The court need not
4 accept as true allegations that contradict facts which may be judicially noticed. *See Mullis v.*
5 *United States Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

6 **III. DISCUSSION**

7 **A. Request for Judicial Notice**

8 As a preliminary matter, Wells Fargo asks that the Court take judicial notice of five
9 documents in support of its motion to intervene: A) Notice of Lis Pendens, dated May 22, 2014,
10 and recorded in the County of Montgomery, Texas, as document number 2014048714; B) General
11 Warranty deed with third party vendor’s lien, recorded on March 28, 2007, in the County of
12 Montgomery, Texas, as document number 200741251; C) Deed of Trust in favor of World
13 Savings Bank, recorded on April 23, 2007 in the County of Montgomery, Texas, as document
14 number 2007041252; D) 2006 Federal Reserve order approving Wachovia’s acquisition of Golden
15 West Financial; and E) 2008 Federal Reserve order approving Wells Fargo’s acquisition of
16 Wachovia. (Req. for Judicial Notice, “RJN,” Dkt. No. 114.)

17 Plaintiff does not oppose the request for judicial notice.

18 Exhibits A through E are true and correct copies of official public records, whose
19 authenticity is capable of accurate and ready determination by resort to sources whose accuracy
20 cannot reasonably be questioned. *See Fed. R. Evid. 201(b)*.

21 Accordingly, the Court GRANTS Wells Fargo’s request for judicial notice.

22 **B. Motion to Intervene**

23 Wells Fargo seeks to intervene as a matter of right pursuant to Rule 24(a), so the Court
24 need not address permissive intervention.

25 **i. Timeliness**

26 Plaintiff argues that Proposed Intervenor’s motion is untimely. (Pl.’s Opp’n at 3).
27 Specifically, Plaintiff argues that the case is settled, and the parties would be prejudiced because
28 “the plaintiff[,] in any further negotiation[,] would demand greater security from the defendants if

1 there was a perception that Wells Fargo Bank could be successful in attacking the plaintiff’s claim
2 of ownership and interest in the property.” (Pl.’s Opp’n at 4.) Plaintiff argues that Wells Fargo’s
3 intervention, and presumably the expunging of the lis pendens, would force the case to be tried. *Id.*
4 These arguments are unavailing.

5 The determination as to whether a motion to intervene is timely is left to the court’s
6 discretion. *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981); *Alisal*, 370 F.3d at 921.
7 Courts weigh three factors in determining whether a motion to intervene is timely: “(1) the stage
8 of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and
9 (3) the reason for and length of the delay.” *Cal. Dep’t of Toxic Substances Control v. Commercial*
10 *Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002).

11 First, while there is a pending settlement, more than a year has passed since the notice of
12 settlement was filed. This discounts Plaintiff’s argument that the proceedings are advanced, and,
13 therefore, the Court assigns little weight to the existence of a settlement agreement. (*See* Pl.’s
14 Opp’n at 4.) Indeed, Defendants have spent over a year attempting to sell the subject property to
15 obtain the proceeds to pay the settlement, but have been unsuccessful. Plaintiff’s previously
16 reported that “[i]t [did] not appear possible to file a settlement without resulting in the discharge of
17 the Lis Pendens,” which would enable Wells Fargo to sell the home. (Pl.’s Status Report, Dkt. 110
18 at 1-2.)

19 Second, any claim of prejudice to the parties based on Plaintiff’s demand for “greater
20 security” from Defendants is not persuasive. While the settlement may not be finalized and the
21 case disposed of due to the unavailability of sale proceeds or other guarantees is a function of
22 Defendant’s actions. The proposed intervention itself did not cause this situation nor did the
23 timing thereof. Rather, the Mortells’ decision to default on their mortgage is the source of any
24 potential prejudice. Thus, the Court assigns little weight to this factor.

25 Third, Wells Fargo argues that the length of delay was reasonable under the circumstances.
26 (Mot. at 8.) Wells Fargo discovered this lawsuit in May 2015 when it ran a title search in
27 preparation for its foreclosure proceedings on the Subject Property. (Mot. at 8.) Wells Fargo
28 retained counsel to intervene and discovered that the parties had entered into a settlement

1 agreement wherein the property would be marketed and sold. *Id.* Wells Fargo expected the lien to
2 be paid off in full from the sale, but the property did not sell and the mortgage continued to be in
3 arrears. *Id.* In its reply, Wells Fargo contends that it is now clear that the parties will be unable to
4 sell the property and that it can no longer rely on the purported terms of a settlement that it was
5 never a party to. (Reply at 3.) The Court agrees that the delay was reasonable under the
6 circumstances. Wells Fargo relied on the pending settlement, because the parties recognized it as
7 priority lienholder, and it expected the lien to be satisfied upon the sale of the property. Since the
8 property remains unsold and in the possession of the Mortells, who have defaulted on their
9 mortgage loan, the Court finds that Wells Fargo’s reliance on the settlement terms as a reason for
10 delay was reasonable.

11 In light of the foregoing, the Court concludes that Proposed Intervenor’s motion is timely
12 under the circumstances.

13 **ii. Protectable Interest**

14 “Rule 24(a)(2) does not require a specific legal or equitable interest,” and it is “generally
15 enough that the interest is protectable under some law, and that there is a relationship between the
16 legally protected interest and the claims at issue.” *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d
17 1173, 1179 (9th Cir. 2011) (citations omitted). The relationship requirement is met “if the
18 resolution of the plaintiff’s claims actually will affect the applicant.” *Donnelly*, 159 F.3d at 410.
19 The “interest” test is not a clear-cut or bright-line rule, because “[n]o specific legal or equitable
20 interest need be established.” *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Instead,
21 the “interest” test directs courts to make a “practical, threshold inquiry,” and “is primarily a
22 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is
23 compatible with efficiency and due process.” *Id.*; *County of Fresno v. Andrus*, 622 F.2d 436, 438
24 (9th Cir. 1980) (internal quotation marks and citation omitted).

25 Proposed Intervenor contends that it has a “legally protectable interests” as the successor in
26 interest to a deed of trust on the Subject Property. (Mot. at 9.) Wells Fargo cites *Sullivan v.*
27 *Quality Loan Serv. Corp.*, which held that the bank, which had directed that the property be sold at
28 a non-judicial foreclosure sale, had a significant protectable interest in the property that was

1 protected by law and related to the plaintiff’s claim. *See Sullivan v. Quality Loan Serv. Corp.*,
2 2011 WL 124280, at *4 (D. Idaho Jan. 11, 2011)(citing *United States v. City of Los Angeles*, 288
3 F.3d 391, 398 (9th Cir. 2002)). Here, while *Sullivan* involved a borrower plaintiff seeking to
4 dissolve of a lien by quitclaim, the resolution of Plaintiff’s claims by settlement would affect
5 Wells Fargo’s interest in the property, as it would impeded the non-judicial foreclosure action
6 pending in Texas.

7 Thus, Wells Fargo has a sufficient legally protectable interest to support intervention.

8 **iii. Impairment of Interests**

9 Rule 24(a)(2) requires that the party seeking intervention is “so situated that disposing of
10 the action may as a practical matter impair or impede the movant’s ability to protect its interest.”
11 The Ninth Circuit has followed the guidance of Rule 24 advisory committee notes in holding that
12 “[i]f an absentee would be substantially affected in a practical sense by the determination made in
13 an action, he should, as a general rule, be entitled to intervene.” *Berg*, 268 F.3d at 822.

14 Proposed Intervenor contends that the allegedly improper lis pendens clouds title to the
15 subject property, which impedes its right and ability to sell the property at a rate that will satisfy
16 the amount of Defendant’s default. (Mot. at 9; Reply at 4.) In opposition, Plaintiff argues that
17 Wells Fargo is not prejudiced, because there is sufficient equity in the property to pay off the
18 mortgage. (Pl.’s Opp’n at 4.) Plaintiff’s claim, however, that there is sufficient equity to satisfy
19 the mortgage and the arrearage is merely speculative given that the property has been listed for
20 sale for more than one year, and has had several price reductions.

21 Accordingly, the Court is persuaded that the disposition of this action may impair or
22 impede Wells Fargo’s ability to protect its rights, and finds that this requirement for intervention is
23 satisfied.

24 **iv. Interests Inadequately Represented by the Parties**

25 “The burden of showing inadequacy of representation is ‘minimal’ and satisfied if the
26 applicant can demonstrate that representation of its interests ‘may be’ inadequate.” *Citizens for*
27 *Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v.*
28 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Three factors are examined to evaluate adequacy

1 of representation: (1) whether the interest of a present party is such that it will “undoubtedly”
2 make all of a proposed intervenor’s arguments; (2) whether the present party is “capable and
3 willing” to make such arguments; and (3) whether a proposed intervenor would offer any
4 “necessary elements” to the proceeding that other parties would neglect. *Id.*

5 Wells Fargo contends that none of the existing parties will protect its lien rights. (Mot. at
6 11.) Specifically, Plaintiff has no interest in upholding Wells Fargo’s liens on the Property, and
7 Defendants are “purported fraudsters,” who have no stake in protecting Wells Fargo’s rights and
8 have defaulted on their mortgage, and continue to live rent free on the Subject Property. *Id.*

9 Indeed, Wells Fargo’s lien is ever increasing due to the Mortells’ default, and the parties’
10 actions, which included Plaintiff asking the Court to assist in finding “a way to file a settlement
11 but retain the lis pendens” to prevent Wells Fargo from exercising their lien right to sell the home
12 at foreclosure (Dkt. No. 110), make it clear that Wells Fargo’s interests are not adequately
13 represented by the parties.

14 Accordingly, the Court finds that the fourth element for intervention as of right is satisfied.

15 **IV. CONCLUSION**

16 In light of the foregoing, the Court finds that Wells Fargo has met the requirements for
17 intervention as a matter of right, and GRANTS the motion to intervene, such that Wells Fargo
18 may participate as an interested party. Wells Fargo is granted leave to file its motion to expunge
19 lis pendens, and shall do so within 14 days of this order.

20 In light of the above, the Court recommends that the parties meet and confer regarding a
21 possible informal resolution to this matter. The Court will set a case management conference after
22 the forthcoming motion to expunge is resolved.

23 IT IS SO ORDERED.

24 Dated: January 10, 2017

25 
26 KANDIS A. WESTMORE
27 United States Magistrate Judge
28