

E-FILED on 2/18/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALLEN GAMBLE and VERONICA
GAMBLE

Plaintiffs,

v.

GMAC MORTGAGE CORPORATION and
OCWEN LOAN SERVICING, LLC, And All
Persons Unknown Claiming Any Legal Or
Equitable Right, Title, Estate, Lien Or Interest
In The Property Described In The Complaint
Adverse To Plaintiff's Title, Or Any Cloud
Upon Plaintiff's Title Thereto, Does 1-100,

Defendants.

No. C-08-05532 RMW

ORDER GRANTING DEFENDANT
OCWEN'S MOTION TO DISMISS AND
GRANTING DEFENDANT GMAC'S
MOTION TO DISMISS

Re Docket Nos. 5, 6, 8, 9, & 13

Defendants Ocwen Loan Servicing, LLC ("Ocwen") and GMAC Mortgage, LLC ("GMAC") separately move to dismiss Allen and Veronica Gamble's ("Gambles") complaint under Rule 12(b)(6) for failure to state a claim. For the reasons stated below, the court grants both motions.

I. BACKGROUND

Plaintiffs were the beneficial owners and title holders of residential real property in Salinas, California. (Compl. ¶ 1.) Ocwen serviced the loan for this property during 2007 and had authority to act on behalf of the holder of the underlying promissory note. (*Id.* at ¶ 3.) On or about June 15, 2007 plaintiffs and defendant Ocwen entered into a forbearance agreement ("Ocwen agreement") in

1 lieu of foreclosure of the Salinas property. (*Id.* at ¶ 7.) Plaintiffs contend that they fully complied
2 with that agreement's terms. (*Id.*)

3 After the execution of the Ocwen agreement, GMAC began to service the loan. (*Id.* at ¶ 8.)
4 No later than January 2008, GMAC repudiated the Ocwen agreement and represented to plaintiffs
5 that they were obligated to enter into a new agreement with different terms to avoid a trustee's sale.
6 (*Id.*) Plaintiffs tendered a payment to satisfy a condition of the GMAC forbearance agreement on
7 February 29, 2008. However, the foreclosure sale of the Salinas property occurred on March 6,
8 2008. (*Id.*) Plaintiffs assert that they did not know that GMAC's offer was withdrawn or that a
9 forbearance was not in effect, as plaintiffs received letters relating to the forbearance as late as
10 March 4, 2008. (*Id.*)

11 Plaintiffs allege that the foreclosure sale was unlawful because 1) a forbearance agreement
12 was in effect; 2) plaintiff's tendered and GMAC refused payment under the new agreement; 3) the
13 credit bid was overstated as it did not include payments made to Ocwen; and 4) plaintiffs were not
14 notified of the date of the sale. (Compl. ¶¶ 10 and 11.)

15 Plaintiffs seek a declaratory judgment that both defendants breached the forbearance
16 agreements and that GMAC defrauded plaintiffs and violated California Civil Code § 2924,
17 therefore excusing plaintiffs of their obligations under the forbearance agreements. (Compl. 5:15.)
18 Plaintiffs also seek a declaration that plaintiffs are the true owners of the Salinas property, and that
19 plaintiffs are entitled to monetary damages if defendants cannot reconvey title of the Salinas
20 property to plaintiffs. (Compl. 5:16 - 6:14.)

21 22 II. ANALYSIS

23 A. General Standards for Rule 12(b)(6) Motion to Dismiss

24 A 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. To
25 survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is
26 plausible on its face." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (quoting
27 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). At the motion-to-dismiss stage, the court
28 must accept the plaintiff's factual allegations as true and construe them in the light most favorable to

1 the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). But the court need not
2 accept "labels and conclusions," and "formulaic recitation[s] of the elements of a cause of action."
3 *Bell Atlantic*, 550 U.S. 544.

4 **B. Claim for Declaratory Relief**

5 Plaintiffs seek declaratory judgment under California Civil Code § 1060. Defendant GMAC
6 moves to dismiss, arguing that declaratory relief under § 1060 is improperly sought in this action
7 because "declaratory relief operates prospectively to declare future rights, rather than to redress past
8 wrong." (Def.'s Mot. to Dismiss 5:8.) But once a case is removed to federal court, whether to grant
9 declaratory relief becomes a procedural matter implicating the Declaratory Judgement Act ("DJA").
10 *Lopez v. GMAC Mortgage Corp.*, 2007 WL 3232448 (N.D. Cal.) (citing *Golden Eagle Ins. Co. v.*
11 *Travelers Cos.*, 103 F.3d 750, 753 (9th Cir. 1996) (*overruled on other grounds by Gov't Employees*
12 *Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998))). The DJA permits federal courts to "declare the
13 rights and other legal relations" or parties to "a case of actual controversy." 28 U.S.C. § 2201.
14 Further, declaratory judgment actions are governed by the same pleading standards as other federal
15 civil actions. *Marchese v. Shearson Hayden Stone, Inc.*, 644 F. Supp. 1381, 1386 (C.D.Cal.1986)
16 (citing 5 WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1238, 202 (1969)).

17
18 **1. Breach of Contract**

19 Here, plaintiffs want the court to issue a declaratory judgment declaring that defendants
20 breached the forbearance agreements. They do not, however, sufficiently plead the elements of the
21 underlying breach of contract action to defeat defendants' motions to dismiss. To establish a breach
22 of contract claim, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for
23 nonperformance, the defendant's breach, and damage to the plaintiff. *Amelco Elec. v. City of*
24 *Thousand Oaks* 27 Cal.4th 228, 243 (2002) (citing 4 WITKIN, CAL. PROCEDURE (4th ed. 1997)
25 Pleading, § 476, p. 570.).

26 **a. Ocwen**

27 Plaintiffs assert that they entered a forbearance agreement with Ocwen and that they
28 complied with the terms of that agreement by making agreed upon payments. (Compl. ¶ 7.) They

1 then go on to state that Ocwen breached the agreement. (Compl. ¶ 13.) They do not, however,
2 allege what the essential terms of the agreement were or how Ocwen breached it. The statement that
3 Ocwen breached the forbearance agreement is conclusory and thus the claim cannot survive Ocwen's
4 motion to dismiss.

5 **b. GMAC**

6 Plaintiffs allege that GMAC offered to enter a forbearance agreement with them on "January
7 24, [2008]" to avoid a foreclosure sale, that they tendered \$4,532.83 on or about February 29, 2008,
8 that GMAC refused plaintiffs' tender, and that GMAC caused the Salinas property to be foreclosed
9 upon. (Compl. ¶¶ 8-9.) In support of this allegation, plaintiffs attach GMAC's offer as Exhibit 2 to
10 their complaint. The offer attached is dated January 14, 2008, not January 24, 2008. Further, the
11 offer states that in order to participate, plaintiffs must "sign [the] letter; and return it along with the
12 payment indicated . . . by **1/21/2008**." (Ex. 2 to Compl. (emphasis added))

13 Where an exhibit to a pleading is inconsistent with the pleading, the exhibit controls. *Gant v.*
14 *Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995) ("document that discloses what the
15 complaint alleges it concealed will defeat the allegation of concealment"); *Hoff Supply Co. v. Allen-*
16 *Bradley Co.*, 768 F. Supp 132, 134 n.3 (M.D. Pa. 1991) ("in the event of an inconsistency between
17 averments in the complaint and the actual provisions of the agreements, the agreements will
18 prevail"); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)
19 ("in the event of conflict between the bare allegations of the complaint and any exhibit attached ...,
20 the exhibit prevails"); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir.
21 1974) ("If the appended document . . . reveals facts which foreclose recovery as a matter of law,
22 dismissal is appropriate."); *Consolidated Jewelers, Inc. v. Standard Fin. Corp.*, 325 F.2d 31, 36 (6th
23 Cir. 1963) ("in case of a variance between the allegations of a pleading and the recitals of an exhibit
24 thereto attached, the latter will govern when the exhibit is the foundation of the pleading"); *Northern*
25 *Ind. Gun & Outdoor v. City of Southbend*, 163 F.3d 449, 454 (7th Cir. 1998) ("when a written
26 instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the
27 allegations"). Here, the facts alleged by plaintiffs are inconsistent with the exhibit. The exhibit
28 gives a deadline of January 21, 2008 to tender a payment of \$4,532.83. In their complaint plaintiffs

1 state that "on or about February 29, 2008 plaintiffs tendered the first payment to GMAC," and
2 "GMAC wrongfully refused payment under the putative new agreement." The offer explicitly states
3 the deadline and plaintiffs allege that they tendered the first payment over thirty days after that
4 deadline. It appears that under the facts alleged and the exhibit provided that there was no
5 forbearance contract with GMAC in effect and thus no breach of that contract. This claim is
6 therefore dismissed.

7 **2. Fraud**

8 Plaintiffs assert that GMAC defrauded plaintiffs by "feigning cooperation . . . while at the
9 same time taking actions [to cause the foreclosure sale]," but do not plead facts sufficient to meet
10 Rule 9(b)'s heightened pleading standard. Fed. R. Civ. P. 9(b). Rule 9 requires pleading of
11 evidentiary facts, such as time, place, persons, statements, and explanation of why statements are
12 misleading. *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 n.7 (9th Cir. 1994). Here, plaintiffs
13 do not allege specific facts beyond a bare allegation of fraud. The complaint therefore fails to state a
14 claim.

15 **C. Other Matters**

16 As for the complaint's allegations that defendants violate California Civil Code § 2924, the
17 complaint does not allege the particular provision violated, nor what specific conduct constituted its
18 violation. Those claims are also dismissed. Because all of plaintiffs' claims are dismissed, the court
19 does not reach Ocwen's request for judicial notice.

20 **D. Plaintiffs' Objection to Defendant GMAC's Notice of Stipulation to Extend Time**
21 **to Respond to Plaintiff's Complaint**

22 Plaintiffs object to the stipulation filed by GMAC to extend time to respond to the complaint.
23 While plaintiffs agreed to extend the time in which GMAC had to respond, they argue that they did
24 not agree to GMAC "late filing a Rule 12 motion." (Pl.'s Notice of Objection to Notice of
25 Stipulation.)


26 A 12(b) motion "must be made before *pleading* if a responsive pleading is allowed." Fed. R.
27 Civ. P. 12(b) (emphasis added). The Ninth Circuit has held that 12(b) motions may be filed any time
28 before an answer is filed, and that where defendants obtain an extension of time to respond, this

1 includes the right to assert 12(b) defenses by preanswer motion. *Aetna Life Ins. Co. v. Alla Medical*
2 *Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988). Thus, because plaintiffs agreed to extend
3 GMAC's time to respond, they extended GMAC's time to move to dismiss under Rule 12(b).

4
5 **III. ORDER**

6 For the reasons stated above, defendants' motions to dismiss are granted. Plaintiff shall have
7 20 days leave to amend. Plaintiffs' motion for sanctions is denied.

8
9 DATED: 2/18/09



RONALD M. WHYTE
United States District Judge

