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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BENITO A FLORES,
Plaintiff,

v.

GREENPOINT MORTGAGE
FUNDING, INC., et al.,
Defendants.

Case No. 17-cv-00055 NC

**ORDER GRANTING IN PART, AND
DENYING IN PART WITH LEAVE
TO AMEND, MOTIONS TO
DISMISS**

Re: Dkt. Nos. 11, 27

Pro se plaintiff Benito Flores sued various entities¹ connected with his 2005 home mortgage. Flores alleges defendants lack standing to foreclose, intentional infliction of emotional distress (IIED), quiet title, fraud in the concealment, fraud in the inducement, slander of title, declaratory relief, violations of the Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA), and rescission. Dkt. No. 1-1. Defendants filed motions to dismiss. Dkt. Nos. 11, 27. Flores did not rebut defendants' arguments for dismissal in his opposition brief. Because the Court finds Flores lacks standing to bring his claims, failed to state a claim, and that his claims are time-barred, the Court

¹ Greenpoint Mortgage Funding, Inc.; HSBC Bank USA, N.A. As Trustee for Securitized Trust Deutsche Alt-A Securities, Inc. Mortgage Loan Trust, Series 2006-AFI; Wells Fargo Bank, N.A.; Mortgage Electronic Registration System, a.k.a. "MERS"; and Ocwen Loan Servicing, LLC.

1 DISMISSES Flores’ complaint in its entirety. However, with respect to the claims for
2 wrongful foreclosure and declaratory relief only, the Court DISMISSES those claims
3 WITH LEAVE TO AMEND. All of Flores’ other claims are DISMISSED WITH
4 PREJUDICE.

5 **I. BACKGROUND**

6 On November 17, 2005, Benito Flores and his wife Maria Flores, as borrowers signed
7 a deed of trust for a property on Langley Canyon Road in Salinas, California. Dkt. No. 3-
8 1.² The promissory note on this transaction was for \$583,200. *Id.* at 2. The lender on this
9 transaction was defendant GreenPoint Mortgage Funding, Inc., and the beneficiary was
10 defendant Mortgage Electronic Registration System, Inc. (MERS). *Id.* The deed of trust
11 was assigned twice. First, on March 27, 2009 from MERS to Greenpoint Mortgage
12 Funding, Inc. Dkt. No. 12-2. Second, on November 21, 2013, Greenpoint assigned the
13 deed of trust to HSBC Bank USA, National Association. Dkt. No. 12-3.

14 After the second assignment, Flores’ loan was “securitized,” and Flores contends it
15 was not properly transferred to the Series 2006-AF1 Trust. Dkt. No. 1-1 at 11. Flores
16 alleges numerous vaguely stated violations to the trust’s Pooling and Servicing Agreement
17 and in the securitization process. *Id.* at 11-15.

18 On October 30, 2015, Western Progressive, LCC, apparently as agent for HSBC
19 under the deed of trust, filed with the Monterey County Recorder a Notice of Default and
20 Election to Sell Under Deed of Trust. Dkt. No. 3-2. The amount owed on the mortgage at
21 that time was \$282,659.21. *Id.* at 2.

22 Flores filed his complaint in Monterey County Superior Court on October 31, 2016,
23 and defendant HSBC removed the case to federal court on January 5, 2017. Dkt. Nos. 1,
24 1-1. Defendants HSBC and Greenpoint filed motions to dismiss Flores’ complaint. Dkt.

25 _____
26 ² Ocwen, HSBC, and Wells Fargo requested the Court take judicial notice of the deed of
27 trust and notice of default for the property in question in this case. Dkt. No. 3. The same
28 defendants also seek judicial notice of recorded assignments of the deed of trust in 2009
and 2013. Dkt. No. 12. The Court GRANTS both requests, as deeds of trust and the
notice of default are in the public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689
(9th Cir. 2001) (citing Fed. R. Evid. 201).

1 Nos. 11, 27. All parties consented to the jurisdiction of a magistrate judge under 28 U.S.C.
2 § 636(c). Dkt. Nos. 8, 9, 10, 13, 19, 26.

3 **II. LEGAL STANDARD**

4 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
5 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
6 motion to dismiss, all allegations of material fact are taken as true and construed in the
7 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
8 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
9 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
10 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
11 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
12 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
13 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
14 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
15 *v. Iqbal*, 556 U.S. 662, 678 (2009).

16 **III. DISCUSSION**

17 **A. Claims Arising From Origination.**

18 Flores alleges³ claims arising from the origination of his loan for violations of (1)
19 RESPA, (2) TILA, (3) rescission, (4) fraud in the inducement, and (5) fraud in the
20 concealment. The first three claims are time-barred, and the fraud claims are insufficiently
21 pled.

22 First, Flores’ claims under RESPA, TILA, and for rescission are time-barred. “If a
23 lender fails to disclose material information required by TILA, a borrower has a right to
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25 ³ In his opposition, Flores also appears to allege a claim for breach of fiduciary duty, denial
26 of due process, breach of the covenant of quiet enjoyment, breach of the implied warranty
27 of habitability, and negligent infliction of severe emotional distress. Dkt. No. 46 at 7.
28 This is the first time Flores has raised these claims in this case. The Court will not
consider these insufficiently pled claims for the first time in an opposition for a motion to
dismiss. *Cf. Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008)
(refusing to hear a new claim on a summary judgment motion where the complaint lacked
the necessary factual allegations).

1 rescind within three years of consummation of the loan. . . . In addition, a borrower has a
2 right to monetary damages within one year of consummation of the loan.” *Das v. WMC*
3 *Mortg. Corp.*, 831 F. Supp. 2d 1147, 1156 (N.D. Cal. 2011) (citing *King v. California*, 784
4 F.2d 910, 913 (9th Cir. 1986)). Flores’ deed of trust was signed in 2005. Under either
5 timeframe, Flores’ claims are irreparably time-barred. Also, Flores failed to allege any
6 facts creating the “appropriate circumstances” under which the Court would equitably toll
7 the statute of limitations until Flores discovered the alleged TILA violation. *King*, 784
8 F.2d at 915. As to the RESPA claim, Flores appears to claims violations of 12 U.S.C. §
9 2607, which prohibits kickbacks and unearned fees. Flores’ sole statement in support of
10 the RESPA claim is that “[d]efendants violated RESPA because the payments between the
11 Defendants were misleading and designed to create a windfall.” Dkt. No. 1-1 at 28. This
12 vague allegation falls short of stating a claim. In any event, this claim is also time-barred,
13 as the relevant statute of limitations for RESPA violations is 1 year. 12 U.S.C. § 2614;
14 *Altman v. PNC Mortg.*, 850 F. Supp. 2d 1057, 1074 (E.D. Cal. 2012). The claim for
15 rescission derives from the other alleged legal violations in the complaint and also is
16 subject to a three-year statute of limitations. Dkt. No. 1-1 at 28-29; *Miguel v. Country*
17 *Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002). Thus, the TILA, RESPA, and
18 rescission claims are DISMISSED WITH PREJUDICE.

19 Second, as to Flores’ fraud in the concealment and fraud in the inducement claims,
20 they fail to state a claim, and after two opposition briefs and a hearing, Flores has not
21 cured the deficiencies in his complaint. The elements of fraud are: “(a) a
22 misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or
23 knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e)
24 resulting damage.” *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294 (2005)
25 (quoting *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). Fraud in the inducement
26 is a type of fraud, occurring “when the promisor knows what he is signing but his consent
27 is induced by fraud, mutual assent is present and a contract is formed, which, by reason of
28 the fraud, is voidable.” *Hinesley*, 135 Cal. App. 4th at 294-95 (internal citations and

1 quotation marks omitted). On the other hand, in addition to the above elements, fraud in
2 the concealment requires defendant have been under a duty to disclose the concealed fact
3 to the plaintiff. *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th
4 858, 868 (2008) (internal citations omitted). When pleading fraud in federal courts, “a
5 party must state with particularity the circumstances constituting fraud or mistake.” Fed.
6 R. Civ. P. 9(b). “Averments of fraud must be accompanied by ‘the who, what, when,
7 where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
8 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

9 Flores’ fraud allegations fall short for several reasons. First, Flores does not
10 differentiate between defendants’ differing roles in his mortgage over the years, and
11 instead lumps defendants as collective fraudsters in the complaint. Second, Flores’
12 allegations do not demonstrate that any defendants acted with knowledge of the conduct he
13 alleges was fraudulent. As to the concealment claim, Flores’ claim fails because he has
14 not shown that any defendant owed him a duty. *Blickman*, 162 Cal. App. 4th at 868.
15 Because Flores has had multiple opportunities to elaborate on his claims, the Court finds
16 that giving leave to amend would be futile. Thus, both fraud claims are DISMISSED
17 WITH PREJUDICE.

18 **B. Claims Arising From Securitization, Default, and Foreclosure.**

19 Flores alleges a number of claims arising from the defaulting of his loan and the
20 alleged imminent foreclosure. He alleges (1) wrongful foreclosure, (2) quiet title, (3)
21 slander of title, (4) intentional infliction of emotional distress, and (5) declaratory relief.

22 As to Flores’ wrongful foreclosure claim, Flores has not alleged sufficient facts to
23 demonstrate he has standing to sue. As a general matter, a borrower lacks standing to
24 challenge the assignment of his loan. *Zeppeiro v. GMAC Mortg., LLC*, 662 F. App’x 500,
25 501 (9th Cir. 2016) (citing *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 927
26 (2016)). A deed of trust may be assigned multiple times during the life of the loan it
27 secures, but “if the borrower defaults on the loan, only the current beneficiary may direct
28 the trustee to undertake the nonjudicial foreclosure process.” *Yvanova*, 62 Cal. 4th at 927-

1 28. A borrower has standing to challenge “void” assignments, but not assignments that are
2 merely “voidable.” *Id.* at 939.

3 Flores states a number of ostensible statements of law, but does not apply them to
4 his case specifically.⁴ As the Court understands Flores’ confusingly stated claim, Flores
5 alleges defendants violated the Pooling and Servicing Agreement when assigning and/or
6 transferring his mortgage loan to the real estate mortgage investment conduit trust. Dkt.
7 No. 1-1 at 11-12. However, California state courts and at least one court in this district
8 found that the mere violation of such an agreement does not make an assignment void,
9 rather than voidable. *Rivac v. NDeX W., LLC*, No. 13-cv-1417 PJH, 2017 WL 1075040, at
10 *11 (N.D. Cal. Mar. 22, 2017) (citing *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal.
11 App. 4th 808, 815 (2016), *reh’g denied* (Apr. 11, 2016), *review denied* (July 13, 2016)).
12 “[A]ny failure to comply with the terms of the PSA renders Defendants’ acquisition of
13 plaintiffs’ loan merely voidable by the trust beneficiary, rather than void.” *Id.* (citing
14 *Saterbak*, 245 Cal. App. 4th at 815). Thus, Flores’ allegations do not render such an
15 assignment void. Flores does, however, state a number of additional allegations that
16 defendants unlawfully “sold, assigned, and/or transferred their ownership and security
17 interest” in the promissory note and deed of trust. Dkt. No. 1-1 at 7.

18 While the California Supreme Court has not yet decided whether a pre-foreclosure
19 borrower may void an assignment of a note and deed of trust by showing the assignment
20 was defective, courts in this district have predicted that to the extent the high court
21 approves barring pre-foreclosure challenges, “it will limit that holding only to pre-
22 foreclosure plaintiffs who lack any ‘specific factual basis’ for bringing their claims.”
23 *Lundy v. Selene Fin., LP*, No. 15-cv-05676 JST, 2016 WL 1059423, at *13 (N.D. Cal.
24 Mar. 17, 2016), *accord Powell v. Wells Fargo Home Mortg.*, No. 14-cv-04248 MEJ, 2016

26 ⁴ Flores makes a number of hypothetical statements, such as that “Defendants . . . cannot
27 produce any evidence that the Promissory Note has been transferred.” Dkt. No. 1-1 at 18.
28 However, it is Flores who brings this lawsuit challenging the foreclosure of his home, and
it is his burden to show the infirmities in defendants’ actions or inactions that entitle him to
relief. Fed. R. Civ. P. 8(a).

1 WL 1718189, at *8 (N.D. Cal. Apr. 29, 2016) and *Reed v. Wilmington Trust, N.A.*, No. 16-
2 cv-01933 JSW, 2016 WL 3124611, at *4 (N.D. Cal. June 3, 2016). Here, Flores has failed
3 to specify the transfers by particular defendants that would create a “specific factual basis”
4 for his wrongful foreclosure claim. *Lundy*, 2016 WL 1059423, at *13. The Court does
5 not, however, find that Flores’ wrongful foreclosure claim cannot be cured. The Court
6 therefore DISMISSES the claim for wrongful foreclosure WITH LEAVE TO AMEND. If
7 the wrongful foreclosure claim is to survive a further motion to dismiss, Flores is required
8 to provide facts as to which assignments and/or transfers by which defendants were legally
9 infirm, how the assignments and/or transfers were legally infirm, and when the
10 assignments and/or transfers occurred. If Flores fails to provide such facts, the Court will
11 dismiss Flores’ wrongful foreclosure claim with prejudice.

12 Second, Flores lacks standing to quiet title to the property in question in his own
13 name. The purpose of a quiet title action is to establish title against adverse claims to real
14 property or any interest therein. Cal. Code Civ. Proc. § 760.020. “[A] mortgagor of real
15 property cannot, without paying his debt, quiet his title against the mortgagee.” *Miller v.*
16 *Provost*, 26 Cal. App. 4th 1703, 1707 (1994). Here, Flores lacks standing to bring a claim
17 to quiet title to his home because he has not satisfied his mortgage debt. *See* Dkt. No. 3-2
18 at 2 (notice of default stating Flores owes \$282,659.21 as of November 4, 2015). Thus,
19 this claim is DISMISSED WITH PREJUDICE.

20 Third, Flores alleges slander of title, which “occurs when a person, without
21 privilege to do so, publishes a false statement that disparages title to property and causes
22 pecuniary loss.” *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 85 (1997). Flores
23 cannot state a claim for slander of title because nonjudicial foreclosure proceedings are
24 privileged. Cal. Civ. Code § 47(c)(1) (“[a] privileged publication or broadcast is one
25 made: (c) [i]n a communication, without malice, to a person interested therein, (1) by one
26 who is also interested.”). “Nonjudicial foreclosure documents are subject to this privilege.”
27 *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1158 (N.D. Cal. 2013) (citing
28 Cal. Civ. Code § 2924(d)). Further, Flores provided no facts showing defendants acted

1 with malice. To show malice, a plaintiff must show “that the publication was motivated by
2 hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable
3 grounds for belief in the truth of the publication and therefore acted in reckless disregard
4 of the plaintiff’s rights.” *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 336 (2008)
5 (internal quotation marks omitted). Flores’ slander of title claim is based on a conclusory
6 allegation that defendants’ publication of the default documents was “fraudulent,
7 oppressive, and malicious.” The Court therefore **DISMISSES** the slander of title claim
8 **WITH PREJUDICE**.

9 Fourth, Flores alleges IIED. The elements of IIED are: “(1) outrageous conduct by
10 the defendant, (2) intention to cause or reckless disregard of the probability of causing
11 emotional distress, (3) severe emotional suffering and (4) actual and proximate causation
12 of the emotional distress.” *Kiseskey v. Carpenters’ Trust for So. California*, 144 Cal. App.
13 3d 222, 229 (1983). Debt collection, by its nature, causes the debtor emotional distress;
14 however, “[s]uch conduct is only outrageous if it goes beyond all reasonable bounds of
15 decency.” *Ross v. Creel Printing & Publ’g Co.*, 100 Cal. App. 4th 736, 745 (2002)
16 (internal citations and quotations marks omitted). Here, Flores’ allegations fall short as he
17 has not shown any wrongdoing, or intention of wrongdoing, by defendants in initiating
18 foreclosure proceedings. Where this is the case, Flores’ emotional distress merely arises
19 from defendants’ debt collection. Per *Ross*, debt collection by itself cannot form the basis
20 for an IIED claim. 100 Cal. App. 4th at 745. Flores has not alleged additional facts
21 suggesting wrongdoing by defendants. Thus, the Court concludes that he lacks the
22 necessary facts to state a claim and **DISMISSES WITH PREJUDICE** Flores’ IIED claim.

23 Next, the Court dismisses without prejudice Flores’ declaratory relief claim, which
24 is dependent on the survival of at least one independent claim. *Mayen v. Bank of Am. N.A.*,
25 No. 14-cv-03757 JST, 2015 WL 179541, at *5 (N.D. Cal. Jan. 14, 2015) (dismissing claim
26 for declaratory relief where the Court dismissed the complaint in its entirety).

27 Lastly, Flores has not added his wife, an indispensable party, as a party to this case.
28 Mrs. Flores is an indispensable party because not including her may endanger her ability to

1 protect her interests, and may open up defendants to incurring multiple or inconsistent
2 obligations because of her interests. Fed. R. Civ. P. 19(a)(1)(B). Flores has provided no
3 explanation for Mrs. Flores' absence as a party. If Flores wants his complaint to survive a
4 motion to dismiss, he must add Mrs. Flores as a party.

5 **IV. CONCLUSION**

6 For the reasons stated above, the Court DISMISSES Flores' complaint, with leave
7 to amend as to the wrongful foreclosure and declaratory relief claims only. The rest of
8 Flores' claims are DISMISSED WITH PREJUDICE. If Flores wishes to amend his
9 complaint, he must file a motion for leave of Court to file his amended complaint by April
10 28, 2017. The proposed amended complaint must be attached to the filed motion. Flores
11 may not repeat the dismissed claims, and may not add new claims or defendants. If Flores
12 fails to amend his complaint, the Court will enter judgment against him and terminate the
13 case.

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15 **IT IS SO ORDERED.**

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17 Dated: April 7, 2017


NATHANAEL M. COUSINS
United States Magistrate Judge

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