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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN STORM, an individual; SUZANNE STORM, an individual,

Plaintiff,

vs.

AMERICA'S SERVICING COMPANY and DOES 1-10,

Defendant.

CASE NO. 09cv1206-IEG (JMA)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Doc. No. 13

Presently before the Court is Defendant America's Servicing Company's ("Defendant") motion to dismiss Plaintiffs' first amended complaint (Doc. No. 13) and Defendant's request for judicial notice of several documents in support of its motion (Doc. No. 5-4). Plaintiffs filed an opposition, and Defendant filed a reply. The Court finds Defendant's motion suitable for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1). For the reasons stated herein, the Court **GRANTS IN PART and DENIES IN PART** the motion to dismiss.

FACTUAL BACKGROUND

The following facts are drawn from Plaintiffs' first amended complaint ("FAC") unless otherwise noted. This matter concerns a loan obtained by Plaintiffs Suzanne Storm and John

1 Storm (“Plaintiffs”), which was secured by a deed of trust against their property. Defendant is the
2 servicer for the loan. On September 30, 2003, Plaintiff Suzanne Storm inherited a parcel of land in
3 Boulevard, California (the “Property”) of approximately 113 acres. She later transferred her
4 interest in the Property to both herself and John Storm. One five-acre portion of the Property,
5 commonly known as 39323 Lillie Lane, was improved with a home (the “Home Parcel”), and the
6 rest remained undeveloped (the “Unimproved Parcels”). According to Plaintiffs, until recently,
7 both parties believed the Property was divided into several separate legal parcels because the land
8 had multiple different assessor’s parcel numbers.

9 On July 14, 2006, Plaintiffs obtained a loan from Accredited Home Lenders, Inc. in the
10 amount of \$520,000, secured by a first deed of trust (“Deed of Trust”) against the Property.¹ The
11 loan was subsequently transferred to U.S. Bank National Association, and Defendant became the
12 servicer for the loan. According to Plaintiffs, when they acquired the loan, they were informed
13 that the loan was only being secured against the Home Parcel and not the Unimproved Parcels.
14 However, in 2007, when Plaintiffs decided to sell a portion of the Unimproved Parcels, they
15 discovered the Deed of Trust had a legal description which appeared to encumber both the Home
16 Parcel and Unimproved Parcels.

17 Upon discovering the mistake, Defendant agreed that only the Home Parcel should have
18 been encumbered. Subsequently, on March 6, 2007, Defendant recorded a Substitution of Trustee
19 and Partial Reconveyance to release the lien on the Unimproved Parcels. (FAC, Exhibit A.) On
20 October 18, 2007, Defendant recorded an updated Substitution of Trustee and Partial
21 Reconveyance (the “Partial Reconveyance”) with a more specific legal description of the
22 property.² (FAC, Exhibit B.)

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24 ¹Plaintiffs have obtained two additional loans in the amount of \$130,000 each, secured by second and third deeds
of trust on their property.

25 ²A letter from Defendant to Plaintiffs’ attorney, which was attached to the document, states: “Please find enclosed
26 the updated Substitution of Trustee and Partial Reconveyance for the above-referenced loan for recording to release the
27 lots which were encumbered in error.” The reconveyance states:
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1 In November 2007, Plaintiffs defaulted on their loan payments, and Defendant
2 subsequently began non-judicial foreclosure proceedings. On May 9, 2008, Plaintiffs filed for
3 Chapter 13 Bankruptcy protection. During the bankruptcy proceedings, the parties stipulated to
4 Plaintiffs making an agreed-upon monthly payment on the loan. (Def. Request for Judicial Notice
5 to Pl.'s Original Compl., Exhibit B.) However, Plaintiffs defaulted on the payments, and on
6 March 16, 2009, the Bankruptcy Court lifted the automatic stay in this case. (Id., Exhibit C.) On
7 March 23, 2009, Plaintiffs voluntarily dismissed their bankruptcy case. (Id., Exhibit D.)

8 On January 14, 2009, Plaintiffs and Defendant learned that the Home Parcel and
9 Unimproved Parcels were in fact, one legal parcel. (FAC, Exhibit C.)

10 This lawsuit followed. On April 2, 2009, Plaintiffs filed their original complaint in
11 California Superior Court for the County of San Diego seeking declaratory and injunctive relief,
12 alleging that the Deed of Trust was invalid and Defendant was attempting to foreclose on the
13 Home Parcel separately despite knowing that it was not a separate legal parcel. Nevertheless, on
14 April 8, 2009, the property was sold at a trustee's sale for \$299,000. (FAC, Exhibit C.) According
15 to Plaintiffs, they only became aware after filing the original complaint that Defendant had not
16 foreclosed on the Home Parcel alone, but on the entire property, including the Unimproved
17 Parcels. Id.

18 PROCEDURAL HISTORY

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20 _____
21 Mortgage Electronic Registration Systems, Inc., owner and holder of the note secured by deed of trust
22 dated July 6, 2006, made by Suzanne Howard-Storm and John Storm, as trustor, to LandAmerica
23 Southland Title, as trustee for the benefit of Mortgage Electronic Register Systems, as beneficiary,
24 which deed of trust was recorded on July 14, 2006, in the office of the Country Recorder of San Diego,
25 California, as Instrument No. 2006-0495723, hereby substitutes itself as trustee in lieu of the above-
26 named trustee under said deed of trust and as successor trustee, and in accordance with the provisions
27 of said deed of trust, does hereby reconvey to the person or persons legally entitled thereto, without
28 warranty, all the estate, title, and interest acquired by Trustee under said deed of trust in and to that
portion of the property described as follows: See attached Exhibit "A" ("The Southwest Quarter of the
Northwest Quarter of Section 29, in Township 17 South, Range 7 East, San Bernadino Meridian, in the
County of San Diego, State of California, according to Official Plat thereof. Assessor's Parcel No.:
612-081-01.

1 On June 3, 2009, Defendant removed the case to this court on the basis of diversity
2 jurisdiction. (Doc. No. 1.) On June 10, 2009, Defendant filed a motion to dismiss the original
3 complaint (Doc. No. 5), which the Court denied as moot in light of its order granting Plaintiffs'
4 motion to amend the complaint. (Doc. No. 11.) On July 27, 2009, Plaintiffs filed the FAC (Doc.
5 No. 12) which sets forth three causes of action: (1) declaratory relief and injunctive relief, (2) quiet
6 title, and (3) slander of title.

7 On August 21, 2009, Defendant filed this motion to dismiss the FAC for failure to state a
8 claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). (Doc.
9 No. 13.) Defendant seeks dismissal of all three causes of action and requests judicial notice of
10 several documents in support of its motion.

11 **DISCUSSION**

12 **I. Legal Standard**

13 A complaint must contain “a short and plain statement of the claim showing that the
14 pleader is entitled to relief.” Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule
15 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in
16 the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The
17 court must accept all factual allegations pled in the complaint as true, and must construe them and
18 draw all reasonable inferences from them in favor of the nonmoving party. Cahill v. Liberty
19 Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996). To avoid a Rule 12(b)(6) dismissal, a
20 complaint need not contain detailed factual allegations, rather, it must plead “enough facts to state
21 a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
22 (2007). However, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
23 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of
24 action will not do.” Id. at 555 (citation omitted). “Factual allegations must be enough to raise a
25 right to relief above the speculative level, on the assumption that all the allegations in the
26 complaint are true (even if doubtful in fact).” Id. (citation omitted). In spite of the deference the
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1 court is bound to pay to the plaintiff's allegations, it is not proper for the court to assume that "the
2 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the . . .
3 laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal. State
4 Council of Carpenters, 459 U.S. 519, 526, (1983). Also, the court need not accept "legal
5 conclusions" as true. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). Id. at 1950.

6 However, "[w]hen there are well-pleaded factual allegations, a court should assume their
7 veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. A
8 claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw
9 the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949
10 (citing Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability
11 requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."
12 Id. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it
13 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (citing
14 Twombly, 550 U.S. at 557).

15 16 II. Request for Judicial Notice

17 On June 10, 2009, Defendant filed a request for judicial notice asking the Court to
18 judicially notice the following documents, which are either filed in the U.S. Bankruptcy Court for
19 the Southern District of California or recorded in the San Diego County Recorder's Office: (1)
20 Plaintiffs' Chapter 13 Voluntary Petition, filed on May 9, 2008 in the U.S. Bankruptcy Court; (2)
21 the parties' Stipulation Granting Adequate Protection, filed on November 24, 2008 in the U.S.
22 Bankruptcy Court; (3) the U.S. Bankruptcy Court's Order Granting Motion for Relief from Stay,
23 filed on March 16, 2009; (4) the U.S. Bankruptcy Court's Order Granting Request by Debtor for
24 Dismissal of Chapter 13 Bankruptcy Case, filed on March 23, 2009; (5) the Notice of Trustee's
25 Deed Upon Sale, filed with the San Diego County Recorder's Office on April 23, 2009; and (6) the
26 Deed of Trust, filed with the San Diego County Recorder's Office on July 14, 2006.

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1 In ruling on a motion to dismiss for failure to state a claim, “a court may generally consider
2 only allegations contained in the pleadings, exhibits attached to the complaint, and matters
3 properly subject to judicial notice.” Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007).
4 Accordingly, a court may consider matters of public record on a motion to dismiss, and in doing so
5 “does not convert a Rule 12(b)(6) motion to one for summary judgment.” Mack v. South Bay
6 Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other grounds by* Astoria Federal
7 Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 111 (1991).

8 Here, the documents Defendant has submitted are public records subject to judicial notice
9 under Federal Rule of Evidence 201. The Court therefore GRANTS Defendant’s request for
10 judicial notice of the above documents.

11 12 III. Analysis

13 A. First Cause of Action: Declaratory Relief

14 1. Legal Standard

15 Under 28 U.S.C. § 2201, “any court of the United States, upon the filing of an appropriate
16 pleading, may declare the rights and other legal relations of any interested party seeking such
17 declaration, whether or not further relief is or could be sought.” A party seeking declaratory relief
18 must establish that there is a present and actual controversy between the parties. City of Cotati v.
19 Cashman, 29 Cal. 4th 69, 80 (2002). Declaratory relief is only appropriate “(1) when the judgment
20 will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it
21 will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the
22 proceeding.” Guerra v. Sutton, 783 F.2d 1371, 1376 (9th Cir. 1986).

23 Declaratory relief is ultimately a request for relief, rather than a cause of action, and in
24 order to weigh it the Court must look to the underlying claims. *See, e.g.,* Weiner v. Klais & Co.,
25 108 F.3d 86, 92 (6th Cir. 1997).

26 2. Analysis

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1 The Court finds this is an appropriate case for declaratory judgment.³ Plaintiffs allege that
2 an actual controversy has arisen and now exists between Plaintiffs and Defendant. Plaintiffs
3 request a judicial determination of their rights and duties with respect to the Deed of Trust and
4 request a declaration that the Deed of Trust is void, or alternatively, that Defendant has no interest
5 in the Unimproved Parcels because of the Partial Reconveyance.

6 Plaintiffs raise two arguments. First, Plaintiffs argue that the Deed of Trust is void due to a
7 mutual mistake in the drafting of the legal description of the property, which led to the
8 encumbering of the entire property although the parties intended only to encumber the Home
9 Parcel. Therefore, Plaintiffs claim that they have an interest in the entire property which was
10 foreclosed upon. Second, Plaintiffs argue that even if the Deed of Trust was valid, it only
11 encumbered the Home Parcel, because the Partial Reconveyance rendered the First Deed of Trust
12 inoperable. In that case, Plaintiffs contend they still have an interest in the Unimproved Parcels
13 which were foreclosed upon.

14 a. Deed of Trust

15 Plaintiffs request a declaration that the Deed of Trust upon which the foreclosure was
16 based is void as being “illegal, uncertain or formed as a result of mistake.”⁴ Defendant argues that
17 Plaintiffs’ contentions as to mutual mistake are contradicted by the express terms of the Deed of
18 Trust; but even assuming there was a mutual mistake, the appropriate remedy is rescission.
19 Defendant contends that in order to obtain rescission Plaintiffs must return the parties to the
20 “status quo ante” by tendering the unpaid debt and costs in the amount of \$607,314.90.

21 A mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the
22 person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a
23 fact past or present, material to the contract or (2) a belief in the present existence of a thing
24 material to the contract, which does not exist, or in the past existence of such a thing, which has

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26 ³Defendant does not dispute the jurisdictional aspects of Plaintiffs’ claim for declaratory relief.

27 ⁴Plaintiffs do not challenge any procedural aspect of the foreclosure sale.
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1 not existed. Cal. Civ. Code § 1577. “Consent is deemed to have been obtained through mistake
2 ‘only when it would not have been given had such cause not existed.’” Id. § 1568; see also
3 Hannah v. Steinman, 159 Cal. 142 (1911).

4 Here, Plaintiffs have alleged sufficient facts to support their claim that the parties made a
5 mistake as to a fact material to the contract - the legal description of the property to be encumbered
6 - and that Plaintiffs would not have consented to the agreement had the mistake not existed; i.e.,
7 Plaintiffs would not have agreed to encumber the entire property. Plaintiffs allege that when they
8 acquired the loan, they were informed that the loan was only being secured against the Home
9 Parcel and not the Unimproved Parcels (FAC ¶ 9), and that after discovery of the mistake,
10 Defendant agreed that its lien was only intended to do encumber the Home Parcel (id. ¶ 15).
11 Plaintiffs attach to the FAC the Partial Reconveyance, which was intended to release the lien on
12 the Unimproved Parcels. (FAC, Exhibits A and B.)

13 However, the usual remedy for mutual mistake is rescission and restitution. See
14 Restatement (Second) of Contracts Ch. 6, § 158, cmt. b (“Avoidance of a contract ideally involves
15 a reversal of any steps that the parties may have taken by way of performance, so that each party
16 returns such benefit as he may have received.”). In some situations, a purported contract may be
17 held to be void and may be disregarded without taking the procedural steps of rescission. See
18 Meyer v. Haas, 58 P. 1042 (Cal. 1899) (fraud in the inception); Orton v. Privett, 262 P. 713 (Cal.
19 1927) (total failure of consideration); Backus v. Sessions, 110 P.2d 51 (Cal. 1941) (lack of mental
20 capacity); Smith v. Bach, 191 P. 14 (Cal. 1920) (illegality); Charles Brown & Sons v. White
21 Lunch Co., 268 P. 490 (Cal. 1928) (uncertainty or lack of mutuality of obligation). This is not
22 such a case. Plaintiffs request the court find the Deed of Trust is void as being illegal or uncertain,
23 but provide no factual allegations to support either ground.

24 Neither is this a case where mutual mistake prevented formation of the contract in the first
25 instance; for example, where both parties had a different understanding as to the identity of the
26 subject matter (see Balistreri v. Nev. Livestock Prod. Credit Ass’n, 262 Cal. Rptr. 862 (Ct. App.
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1 1989) (holding no contract was formed where plaintiffs sought cancellation of a deed of trust
2 securing a loan to their son, and the trust deed, by error of a trustee’s loan agent, encumbered their
3 own residence instead of the property co-owned with their son)), or the subject matter, or
4 something essential to performance ceased to exist before the agreement was reached. According
5 to the FAC, a contract was formed when the parties agreed to encumber the Home Parcel, and the
6 mistake was merely in the drafting of the agreement.

7 Thus, at the most the First Deed of Trust may be voidable and subject to rescission due to
8 mutual mistake. To the extent that Plaintiffs seek a declaration declaring the Deed of Trust void,
9 the Court finds Plaintiffs have failed to state a claim.⁵

10 b. Partial Reconveyance

11 Having found that the Deed of Trust is not void, the issue before the Court is whether
12 Plaintiffs have alleged sufficient facts to support a finding that they retain an interest in the
13 Unimproved Parcels based on the Partial Reconveyance. Defendant raises several arguments.
14 First, Defendant argues that the Partial Reconveyance itself is void or subject to rescission due to
15 mutual mistake of fact or law, and therefore, the Deed of Trust controls. Second, Defendant
16 claims that no consideration was given for the Partial Reconveyance. Finally, Defendant contends
17 that the claim fails for failure to allege tender of the underlying debt. The Court addresses these
18 arguments in turn.

19 The Court finds that the Partial Reconveyance may violate the Subdivision Map Act (the
20 “Act”). Cal. Gov’t Code §§ 66410 *et seq.* The Act provides that property cannot legally be

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24 ⁵ Because Plaintiffs’ FAC does not request rescission as a remedy, the Court need not address Defendant’s
25 argument that Plaintiff cannot rescind because of failure to tender the unpaid debt. The Court notes however that it has
26 the discretion to condition rescission upon tender of the unpaid debt. See Cal. Civ. Code § 1692 (“If in an action or
27 proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to
28 make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities
between the parties.”); § 1693 (“[T]he court may make a tender of restoration a condition of its judgment.”).

1 divided for sale, lease or financing without local approval and recording of a map.⁶ Id. § 66424.
2 Subject to certain exceptions not relevant here, the Act requires tentative and final maps for all
3 subdivisions creating five or more parcels, and parcel maps for subdivisions consisting of four or
4 fewer parcels.⁷ Id. §§ 66426, 66428(a); see also Gomes v. County of Mendocino, 44 Cal. Rptr. 2d
5 93, 98 (Ct. App. 1995). Plaintiffs’ own allegations suggest that the Partial Reconveyance was a
6 division of property for financing which required either a parcel map or final map. Plaintiffs
7 attach to the FAC a letter from the County of San Diego, Department of Planning and Land Use,
8 which contains a determination by the county that the Property is one legal lot. (FAC, Exhibit C.)
9 The FAC does not state that a parcel map or final map was recorded, or that any exemption was
10 applicable. In fact, Plaintiffs themselves argue that had Defendant foreclosed only on the Home
11 Parcel, Defendant would have subdivided the property illegally in violation of the Act. (FAC ¶
12 29.) Plaintiffs contend that after the parties discovered the Property was one legal lot, both parties
13 were unclear about the legality of the subdivision (id. ¶ 20), and to get around this, Defendant
14 foreclosed on the entire property (id. ¶ 29).

15 Defendant claims violation of the Act renders the Partial Reconveyance void or
16 unenforceable; therefore the Deed of Trust controls. This is incorrect. Under California law, a
17 transfer without a required parcel map is “*voidable* at the sole option of the grantee” (in this case,
18 Plaintiffs).⁸ Cal. Gov’t Code § 66499.32 (emphasis added); see also Falk v. Mt. Whitney Sav. &

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20 ⁶The Act defines “subdivision” as “the division, by any subdivider, of any unit or units of improved or
21 unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous
22 units, for the purpose of sale, lease or financing, whether immediate or future” Cal. Gov. Code § 66424 (emphasis
23 added).

24 ⁷The Act states: “[a] tentative and final map shall be required for all subdivisions creating five or more parcels
25” Cal. Gov. Code § 66426. The Act further states: “A parcel map shall be required for subdivisions as to which a final
26 or parcel map is not otherwise required by this chapter, unless the preparation of the parcel map is waived by local
27 ordinance as provided in this section.” Id. § 66428(a).

28 ⁸ Section 66499.32 of the Act states in full:

(a) Any deed of conveyance, sale or contract to sell real property which has been divided, or which has resulted from a
division, in violation of the provisions of this division, or of the provisions of local ordinances enacted pursuant to this
division, is voidable at the sole option of the grantee, buyer or person contracting to purchase, his heirs, personal

1 Loan Ass'n, 5 F.3d 347 (9th Cir. 1993). There are no facts to suggest that Plaintiffs attempted to
2 void the transaction.

3 The case of Falk v. Mt. Whitney Savings & Loan Association is factually similar to this
4 case. In Falk, plaintiff Ms. Falk sold her property to the Ashjians, but because of an alleged error
5 by the title company, the deed of trust described all 10 acres, including a 1.65-acre parcel she
6 intended to keep for herself. Id. at 349. The Ashjians and Mt. Whitney, the holder of the deed of
7 trust, agreed a mistake had been made and drafted a partial reconveyance document to reconvey
8 back the 1.65-acre parcel which it sent to the title company, but never recorded. Id. The 10 acres
9 were later foreclosed on and plaintiff sued to reform the deed or defeat the foreclosure sale buyer's
10 claim to the 1.65-acre parcel. The district court held the partial reconveyance "never became
11 effective" because the transfer of the 1.65-acre parcel without a parcel map would violate the
12 Subdivision Map Act. Id. at 351. In reversing the summary judgment, the Ninth Circuit held that,
13 under California law, a transfer without a parcel map is *voidable* at the sole option of the grantee
14 (Ms. Falk); it was not void. Id. Thus, plaintiff was entitled to be heard on her claim that the
15 original 10 acre conveyance was a mistake, that Mt. Whitney knew it, and that the foreclosure sale

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17 representative, or trustee in insolvency or bankruptcy within one year after the date of discovery of the violation of the
18 provisions of this division or of local ordinances enacted pursuant to the provisions of this division, but the deed of
19 conveyance, sale or contract to sell is binding upon any successor in interest of the grantee, buyer or person contracting
20 to purchase, other than those above enumerated, and upon the grantor, vendor, or person contracting to sell, or his assignee,
21 heir or devisee.

22 (b) Any grantee, or his successor in interest, of real property which has been divided, or which has resulted from a division,
23 in violation of the provisions of this division or of local ordinances enacted pursuant thereto, may, within one year of the
24 date of discovery of such violation, bring an action in the superior court to recover any damages he has suffered by reason
25 of such division of property. The action may be brought against the person who divided the property in violation of the
26 provisions of this division or of local ordinances enacted pursuant thereto and against any successors in interest who have
27 actual or constructive knowledge of such division of property.

28 The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of
compliance filed pursuant to Section 66499.35 or identified in a recorded final map or parcel map, from and after the date
of recording.

The provisions of this section shall not limit or affect in any way the rights of a grantee or his successor in interest under
any other provision of law.

Cal. Gov. Code § 66426 (emphasis added).

1 buyer never acquired an interest in the 1.65-acre parcel. Id. Likewise, in this case, the Partial
2 Reconveyance is voidable by Plaintiffs. Thus, Plaintiffs have stated a claim that they have an
3 interest in the Unimproved Parcels that were foreclosed upon.

4 The Court further finds there was sufficient consideration for the Partial Reconveyance.
5 Construing the complaint in the light most favorable to Plaintiffs, Plaintiffs have alleged facts to
6 support an inference that in consideration for the Partial Reconveyance, Plaintiffs did not pursue
7 rescission of the Deed of Trust at an earlier time, believing that Defendant had remedied the
8 mistake.

9 Finally, Defendant argues that, in any event, Plaintiffs fail to state a claim for relief
10 because without tender of the underlying debt, the foreclosure sale cannot be set aside. This is the
11 contention underlying Defendant’s entire motion to dismiss. The Court finds that it need not make
12 a determination on this issue, except to note that failure to allege tender is not decisive at this
13 stage. Whether Plaintiffs are required to tender is a matter of discretion left up to the Court.⁹ At
14 this procedural juncture, the Court only decides whether Plaintiffs have pleaded “enough facts to
15 state a claim to relief that is plausible on its face.” See Bell Atl. Corp. v. Twombly, 550 U.S. 544,
16 570 (2007). When there are well-pleaded factual allegations, the Court must “assume their
17 veracity and then determine whether they plausibly give rise to an entitlement to relief.” See
18 Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009).

21 ⁹ The cases that Defendant cites in its motion to dismiss generally stand for the proposition that tender of the
22 indebtedness is required in an action to set aside a trustee’s sale for *irregularities in sale notice or procedure*. See e.g.,
23 Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (Ct. App. 1984) (defect in notice of sale); Karlsen v. Am. Sav.
24 & Loan Ass’n, 92 Cal. Rptr. 851 (Ct. App. 1971) (trustee sold to a corporation in which trustee was financially interested);
25 Manown v. Cal-Western Reconveyance Corp., 2009 WL 2406335 (S.D. Cal. Aug. 4, 2009) (defect in notice of sale);
26 Alvara v. Aurora Loan Servs., Inc., 2009 WL 1689640 (N.D. Cal. June 16, 2009) (defect in notice of sale). The Court is
27 unaware of any case holding there is a bright-line rule requiring tender of the unpaid debt to set aside a sale in other
28 circumstances, such as where a trustee allegedly sells property that is not encumbered. See Humboldt Sav. Bank v.
McCleverty 119 P. 82 (Cal. 1911) (“[T]here are not a few cases holding that where a party has the right to avoid a sale,
he is not bound to tender any payment in redemption . . . Whatever may be the correct rule, viewing the question generally,
it is certainly not the law that an offer to pay the debt must be made, where it would be inequitable to exact such offer of
the party complaining of the sale.”) (internal citations omitted).

1 To the extent that Plaintiffs seek a declaration that they retain an interest in the
2 Unimproved Parcels based on the Partial Reconveyance, the Court finds that Plaintiffs have stated
3 a claim. Accordingly, the Court DENIES Defendant’s motion to dismiss the claim for declaratory
4 relief.

5 B. First Cause of Action: Injunctive Relief

6 Plaintiffs seek a permanent injunction enjoining Defendant from: (1) continuing with any
7 foreclosure proceedings and (2) interfering with Plaintiff’s lawful ownership, use and possession
8 of the property. Because the request for injunctive relief is a remedy rather than a cause of action,
9 the Court declines to make a determination at this point in the proceedings. It is more appropriate
10 to determine the need for an injunction after Plaintiffs have shown they are entitled to relief.
11 Accordingly, the Court DENIES Defendant’s motion to dismiss as to the request for injunctive
12 relief.¹⁰

13 C. Second Cause of Action: Quiet Title

14 1. Legal Standard

15 The purpose of a quiet title action is to determine “all conflicting claims to the property in
16 controversy and to decree to each such interest or estate therein as he may be entitled to.”
17 Newman v. Cornelius, 83 Cal. Rptr. 435, 437 (Ct. App. 1970). California Code of Civil Procedure
18 § 761.020 provides that a complaint for quiet title “shall be verified” and shall include the
19 following:

20 (a) A description of the property that is the subject of the action. . . . In the case
21 of real property, the description shall include both its legal description and its
street address or common designation, if any.

22 (b) The title of the plaintiff as to which a determination under this chapter is
23 sought and the basis of the title. . . .

24 (c) The adverse claims to the title of the plaintiff against which a determination is
25 sought.

26 _____
27 ¹⁰As to Plaintiffs’ request for a temporary restraining order or preliminary injunction, the Court may appropriately
28 consider an application for these forms of relief upon a motion for such relief.

1 (d) The date as of which the determination is sought. If the determination is
2 sought as of a date other than the date the complaint is filed, the complaint shall
include a statement of the reasons why a determination as of that date is sought.

3 (e) A prayer for the determination of the title of the plaintiff against the adverse
4 claims.

4 2. Analysis

5 Plaintiffs have alleged sufficient facts to state a claim for quiet title. First, the FAC
6 includes the legal description of the property and its street address or common designation. (FAC
7 ¶ 3; Exhibit D.) Second, as the Court concluded earlier, Plaintiffs have alleged sufficient facts to
8 support a claim that they have an interest in the property based on the Partial Reconveyance. (Id. ¶
9 37.) Third, Plaintiffs have alleged Defendant’s adverse claims, specifically that Defendant has
10 foreclosed on the property and assert the foreclosure was lawful. (Id. ¶ 37-38.) Fourth, Plaintiffs
11 identify a date as of which the determination is sought. Plaintiffs allege that they executed the
12 Deed of Trust on July 14, 2006 (id. ¶ 11) and the Partial Reconveyance on October 18, 2007 (id.).
13 Finally, the FAC states a prayer for the determination of the title. (Id. at 8:10-11.)

14 Defendant raises two arguments. First, Defendant argues that plaintiff’s claim must be
15 verified as required by California Code of Civil Procedure § 761.020. However, Plaintiffs filed
16 the FAC after Defendant removed the case to federal court, and in federal court “[u]nless a rule of
17 statute specifically states otherwise, a pleading need not be verified or accompanied by an
18 affidavit.” Fed. R. Civ. P. 11(a); see also Farzana K. v. Indiana Dep’t of Educ., 473 F.3d 703 (7th
19 Cir. 2007).

20 Second, Defendant contends Plaintiffs’ quiet title claim fails because they have not alleged
21 the ability to tender the amount of the indebtedness. As discussed above, lack of tender is not fatal
22 to Plaintiffs’ claim at this stage. Accordingly, the Court DENIES the motion to dismiss as to the
23 quiet title claim.

24 D. Third Cause of Action: Slander of Title

25 1. Legal Standard

26 The cause of action for slander of title has been described as follows: “One who, without a
27 privilege to do so, publishes matter which is untrue and disparaging to another’s property in land .
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1 . . . under such circumstances as would lead a reasonable man to foresee that the conduct of a third
2 person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss
3 resulting to the other from the impairment of vendibility thus caused.” Glass v. Gulf Oil Corp., 96
4 Cal. Rptr. 902, 906 (Ct. App. 1970) (quoting Restatement (Second) of Torts § 642). It follows that
5 the elements of slander of title are: (1) publication, (2) falsity, (3) absence of privilege, and (4)
6 disparagement of another’s land which is relied upon by a third party and which results in a
7 pecuniary loss. Appel v. Burman 206 Cal. Rptr. 259, 262 (Ct. App. 1984).

8 2. Analysis

9 The Court finds Plaintiffs have failed to state a claim for slander of title because Plaintiffs
10 do not allege publication was false. Plaintiffs allege that Defendant “published the Trustee’s Deed
11 upon Sale . . . which states that the *entire* property was sold to a third party.” (FAC ¶ 42
12 (emphasis in original).) Plaintiffs do not allege the publication was not true. In fact, Plaintiffs
13 allege that the Deed of Trust appeared to encumber the entire property (id. ¶ 15) and that
14 Defendant *did* sell the entire property (id. ¶ 23). Furthermore, the Trustee’s Deed Upon Sale (id.,
15 Exhibit D) contains the same legal description of the property as the Deed of Trust (id., Exhibit E).

16
17 It is not proper for the Court to assume that Plaintiffs can prove facts that they have not
18 alleged or that Defendant has violated the laws in ways that have not been alleged. See Associated
19 Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).
20 Accordingly, the Court GRANTS defendant’s motion to dismiss with prejudice the slander of title
21 claim.

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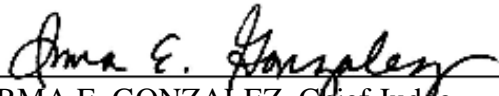
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CONCLUSION

For the reasons stated above, the Court: (1) **GRANTS** Defendant's June 10, 2009 request for judicial notice; (2) **DENIES** the motion to dismiss as to Plaintiffs' first cause of action for declaratory relief and injunctive relief; (3) **DENIES** the motion to dismiss as to Plaintiffs' second cause of action for quiet title; and (4) **GRANTS** the motion to dismiss with prejudice as to Plaintiffs' third cause of action for slander of title.

IT IS SO ORDERED.

DATED: November 6, 2009


IRMA E. GONZALEZ, Chief Judge
United States District Court