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

RAYMUNDO GONZALEZ; RAY A.
GONZALEZ; and RAMONA GONZALEZ,

Plaintiffs,

vs.

CNA FORECLOSURE SERVICE, INC.,

Defendant.

CASE NO. 09 CV 2034 MMA (MDD)
ORDER:
**DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

[Doc. No. 21]

**GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

[Doc. No. 22]

Currently before the Court are Plaintiffs Raymundo Gonzalez, Ray A. Gonzalez, and Ramona Gonzalez's motion for summary judgment [Doc. No. 21], and Defendant CNA Foreclosure Service, Inc.'s motion for summary judgment [Doc. No. 22]. On April 4, 2011, the Court in its discretion found the motions suitable for determination on the papers and without oral argument, pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **GRANTS** Defendant's motion for summary judgment, and **DENIES** Plaintiffs' motion for summary judgment.

///

1 **BACKGROUND**

2 The following facts are not reasonably in dispute.¹ Plaintiffs owned residential real
3 property located at 40 Walnut Avenue, Chula Vista, California 91911 (“Property”). [Doc. No. 21,
4 Exh. E, Decl. of Michele Canty, 12:3-6.] Plaintiffs obtained the Property subject to a \$330,000
5 loan, secured by a Deed of Trust in favor of Dakota Loans, Inc. [See Doc. No. 24, Exh. A.]
6 Plaintiffs failed to make their June 1, 2009 loan payment, and Dakota Loans retained Defendant
7 CNA Foreclosure Service (“CNA”) on or about August 17, 2009 to act as trustee and file a Notice
8 of Default “and proceed with the foreclosure proceedings as necessary.” [Id.; Canty Decl. 12:10-
9 14; 12:21-13:8.] Prior to CNA’s involvement, Land America Commonwealth Title was the
10 Trustee of record for the Property. [Canty Decl. 24:9-17; Doc. No. 24, Exh. E.] Although CNA
11 “accepted the position as trustee at the time the notice of default was filed . . . CNA was not
12 recorded as the trustee until later.” [Canty Decl. 24:9-25:10.] Specifically, CNA recorded the
13 Substitution of Trustee on November 25, 2009. [Doc. No. 24, Exh. D.]

14 On August 18, 2009, at Dakota Loan’s instruction, CNA caused a “notice of default and
15 election to sell under deed of trust” to be recorded against the Property. [Doc. No. 24, Exh. A;
16 Canty Decl. 26:20-21; 27:7-20.] CNA also mailed the notice to Plaintiffs, which stated that as of
17 August 17, 2009, Plaintiffs were past due in their loan payments and owed \$11,536.53. [Doc. No.
18 24, Exh. A.] The Notice of Default further stated CNA had been appointed as Trustee. [Id.]

19 On August 28, 2009, CNA mailed Plaintiffs a “30 Day Notice” entitled “Notice Under Fair
20 Debt Collection Practices Act” advising Plaintiffs their mortgage loan had been referred to CNA
21 “for foreclosure based upon default under the terms of the Note and Deed of Trust.” [Doc. No. 24,
22 Exh. B.] The August 28 letter included a copy of the previously recorded Notice of Default, and
23 stated, in bolded and underlined text: “**Please be advised that we are attempting to collect a**
24 **debt. Any information obtained from the Trustor will be used for that purpose.**” [Id.]

25 Plaintiffs filed the present action against CNA on September 17, 2009, alleging two causes
26 of action for violations of the Fair Debt Collection Practices Act (“FDCPA”) and California’s

27
28 ¹ Neither Plaintiffs nor Defendant submitted a separate statement of undisputed material facts
in support of their respective motions for summary judgment, as required by the undersigned’s
chambers Rule I.

1 Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”). [Doc. No. 1.] The parties filed
2 their cross-motions for summary judgment on February 8, 2011.

3 **LEGAL STANDARD**

4 Pursuant to Federal Rule of Civil Procedure 56, a party is entitled to summary judgment “if
5 the pleadings, depositions, answers to interrogatories, and admissions on file, together with the
6 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
7 party is entitled to a judgment as a matter of law.” *Hubbard v. 7-Eleven*, 433 F. Supp. 2d 1134,
8 1139 (S.D. Cal. 2006) (citing former Fed. R. Civ. P. 56(c)(2)). It is beyond dispute that “[t]he
9 moving party bears the initial burden to demonstrate the absence of any genuine issue of material
10 fact.” *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (citation omitted).
11 “Once the moving party meets its initial burden, . . . the burden shifts to the nonmoving party to
12 set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a
13 genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal
14 quotation marks and citations omitted).

15 A mere scintilla of evidence is not sufficient “to defeat a properly supported motion for
16 summary judgment; instead, the nonmoving party must introduce some ‘significant probative
17 evidence tending to support the complaint.’” *Fazio v. City & County of San Francisco*, 125 F.3d
18 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477 U.S. at 249, 252). Thus, in opposing a
19 summary judgment motion it is not enough to simply show that there is some metaphysical doubt
20 as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
21 (1986) (citations omitted). However, when assessing the record to determine whether there is a
22 “genuine issue for trial,” the court must “view the evidence in the light most favorable to the
23 nonmoving party, drawing all reasonable inferences in his favor.” *Horphag*, 475 F.3d at 1035
24 (citation omitted). On summary judgment, the Court may not make credibility determinations; nor
25 may it weigh conflicting evidence. *See Anderson*, 477 U.S. at 255. Thus, as framed by the
26 Supreme Court, the ultimate question on a summary judgment motion is whether the evidence
27 “presents a sufficient disagreement to require submission to a jury or whether it is so one-sided
28 that one party must prevail as a matter of law.” *Id.* at 251-52.

1 **DISCUSSION**

2 **I. FAIR DEBT COLLECTION PRACTICES ACT**

3 “The FDCPA was enacted to eliminate abusive debt collection practices by debt collectors,
4 to insure that those debt collectors who refrain from using abusive debt collection practices are not
5 competitively disadvantaged, and to promote consistent State action to protect consumers against
6 debt collection abuses.” *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1198 (C.D. Cal.
7 2008) (internal marks omitted) (citing 15 U.S.C. § 1692(e)). As a threshold matter, liability cannot
8 attach under the FDCPA unless the defendant is a debt collector, trying to collect a debt. *Id.* at
9 1199.

10 Plaintiffs assert they are entitled to summary judgment because CNA is a debt collector
11 within the meaning of the FDCPA, and CNA failed to provide Plaintiffs with the notices required
12 by the statute. [Doc. No. 21, p. 1.] In addition, Plaintiffs accuse CNA of making false, deceptive,
13 and misleading statements in the notices, and wrongfully threatening to take legal action against
14 Plaintiffs it could not legally take. [*Id.*] Defendant opposes Plaintiffs’ motion and also moves for
15 summary judgment on the grounds that CNA is not a debt collector, nor did CNA engage in any
16 activity regulated by the FDCPA. [Doc. Nos. 22, 23.]

17 **(A) Debt Collector**

18 The FDCPA defines “debt collector” as “any person who uses any instrumentality of
19 interstate commerce or the mails in any business the principal purpose of which is the collection of
20 any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due
21 or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). CNA argues it is not a debt
22 collector within the meaning of the FDCPA because it acts solely as a trustee or agent on behalf of
23 a lender. [Doc. No. 22, p.3; Canty Decl. 8:13-14 (CNA “is solely a trustee performing nonjudicial
24 foreclosure processes”.] At a lender’s instruction, CNA will prepare a notice of default, and the
25 mailings required by California Civil Code sections 2494 *et seq.* [Canty Decl. 8:13-9:17.] CNA
26 does not, however, assist or otherwise facilitate collection of the money allegedly owed. [*Id.* at
27 39:13-41:16.] Although the lender provides CNA with the delinquent payment amount to be
28 included in the notice of default, if a borrower were to contact CNA to make a payment or

1 otherwise dispute the amount owed, CNA would refer the borrower directly to the lender. [*Id.*]
2 CNA has never collected money from a borrower on any of the accounts it has serviced. [*Id.* at
3 1:8-9.] Plaintiffs erroneously construe Ms. Canty’s testimony as “acknowledg[ing] [that CNA]
4 regularly facilitates in the collection of debts.” [Doc. No. 21, p.3 n.2 (citing Canty Decl. 8:15-
5 9:17.)] However, Ms. Canty’s testimony is clear, CNA has no involvement in collecting money
6 from borrowers on behalf of the lenders; CNA’s role is strictly limited to enforcing the lender’s
7 security interest in the property. [Canty Decl. 8:13-14; 39:13-41:16.]

8 Based on Ms. Canty’s undisputed testimony, the Court concludes CNA is not a “debt
9 collector” within the meaning of the FDCPA. At no time did CNA seek to collect money from
10 Plaintiffs. Rather, CNA’s notices informed Plaintiffs that if they did not take action with respect
11 to the amounts allegedly owed to the beneficiary, Dakota Loans, Plaintiffs may lose legal rights
12 and the Property may be subject to foreclosure. [*See* Doc. No. 24, Exhs. A-B.] As the Ninth
13 Circuit noted in *Santoro v. CTC Foreclosure Serv. Corp.*, 12 Fed. Appx. 476 *11-12 (9th Cir.
14 2001), a foreclosure sale notice issued in compliance with California Civil Code section 2924 *et*
15 *seq.* does not seek to collect a debt.² Thus, such notices do not fall within the conduct prohibited
16 by the FDCPA. [*Id.*] Plaintiffs’ reliance on case law outside the Ninth Circuit purportedly to the
17 contrary is not persuasive, as Plaintiffs acknowledge “the courts are not uniform in their treatment
18 of th[e] distinction . . . between collecting debts and merely enforcing a security interest in
19 property.” [Doc. No. 24, p.1; Doc. No. 21, n.2 (citing cases from the Fourth Circuit, Fifth Circuit,
20 and district courts in Louisiana and Oregon).]

21 Nor does the Court find that CNA’s August 28 letter to Plaintiffs stating, “**Please be**
22 **advised that we are attempting to collect a debt. Any information obtained from the Trustor**
23 **will be used for that purpose**” requires a different result. [*See* Doc. No. 24, Exh. C.] Ms. Canty
24 provided un rebutted testimony that as the trustee, CNA was not required to provide the August 28
25 letter to Plaintiffs, and did so merely as a courtesy to encourage Plaintiffs to take action to preserve
26 their rights with respect to the Property. Ms. Canty explained, “this notice is not required on this

27
28 ² Pursuant to Federal Rule of Appellate Procedure 32.1 and local rule for the United States
Court of Appeals for the Ninth Circuit 36-3, this Court does not rely on *Santoro* as precedent, but does
find the opinion illustrative.

1 particular loan. However, it's included to make sure that the Gonzalezes realize that they have the
2 right to talk with the beneficiary about the foreclosure process and the debt amount." [Canty Decl.
3 51:11-22.] This single statement does not transform CNA into a debt collector. Nor is it sufficient
4 to create a genuine issue of material fact regarding whether CNA is a debt collector within the
5 meaning of the FDCPA. *See Nwoke v. Countrywide Home Loans, Inc.*, 251 Fed. App. 363, 365
6 (7th Cir. 2007).

7 The plain language of the statute provides, a debt collector is "any person who uses any
8 instrumentality of interstate commerce or the mails in any business the principal purpose of which
9 is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly,
10 debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). CNA's
11 undisputed testimony establishes that it is not a debt collector as defined by the FDCPA. The sole
12 purpose of CNA's business is to act as a trustee for lenders to facilitate the foreclosure process.
13 [Canty Decl. 8:13-24.] All the information CNA includes in the notices regarding any amounts
14 owed are provided by the lenders, CNA does not interact with the borrowers regarding the
15 amounts owed, nor has CNA ever collected money on behalf of the lenders. Accordingly, CNA's
16 isolated statement that it is "attempting to collect a debt" does not transform CNA into a debt
17 collector. CNA is therefore not subject to liability under the FDCPA.

18 **(B) Debt**

19 Even if the Court assumes CNA is a debt collector, Plaintiffs' FDCPA claim fails because
20 "foreclosing on a property pursuant to a deed of trust is not the collection of a debt within the
21 meaning of the FDCPA." *Izenberg*, 589 F. Supp. 2d at 1199 (internal marks and citations
22 omitted). The FDCPA defines a "debt" as "any obligation or alleged obligation of a consumer to
23 pay money arising out of a transaction in which the money, property, insurance, or services which
24 are the subject of the transaction are primarily for personal, family, or household purposes,
25 whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). Although
26 the Ninth Circuit has not addressed this particular question, the district courts in this circuit are in
27 accord, that the nonjudicial foreclosure process facilitated by CNA does not fall within the
28 meaning of "debt" as defined by the FDCPA. *Quintero Family Trust v. Onewest Bank*, 2010 U.S.

1 Dist. LEXIS 63659 *10-12 (S.D. Cal. June 25, 2010) (citing *Diessner v. Mortgage Elec. Reg. Sys.*,
2 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009); *Izenberg*, 589 F. Supp. 2d at 1199; *Hulse v. Ocwen*
3 *Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Ricon v. Recontrust Co.*, No.
4 09cv9370 (IEG)(JMA), 2009 U.S. Dist. LEXIS 67807 (S.D. Cal. Aug. 4, 2009)).

5
6 As one court explained:

7 Foreclosing on a trust deed is distinct from the collection of the
8 obligation to pay money. The FDCPA is intended to curtail
9 objectionable acts occurring in the process of collecting funds from a
10 debtor. But, foreclosing on a trust deed is an entirely different path.
Payment of funds is not the object of the foreclosure action. Rather, the
lender is foreclosing its interest in the property. Foreclosure by the
trustee is not the enforcement of the obligation because it is not an
attempt to collect funds from the debtor.

11 *Quintero Family Trust*, 2010 U.S. Dist. LEXIS at *12 (citing *Hulse*, 195 F. Supp. 2d at 1204)).

12 Although Plaintiffs cite opinions from other circuits that have reached a different
13 conclusion, this Court prefers to join the clear precedent set by its fellow courts in this Circuit.
14 Moreover, viewing the foreclosure process as the enforcement of an interest in property, not the
15 collection of a debt, is consistent with the Ninth Circuit’s persuasive position in *Santoro*, 12 Fed.
16 Appx. at *11-12, that a foreclosure sale notice issued in compliance with California Civil Code
17 section 2924 *et seq.* does not seek to collect a debt. This conclusion is particularly apt in the
18 present case where the only alleged wrongdoing centers on the pre-foreclosure notices sent by
19 CNA. Accordingly, the Court concludes CNA was not attempting to collect a debt and Plaintiffs’
20 FDCPA claim fails as a matter of law.

21 The Court is not persuaded by Plaintiffs’ argument that CNA’s conduct is nevertheless
22 actionable because it is “*independent* from any non-judicial foreclosure, and [occurred] well
23 before any non-judicial foreclosure was to take place.” [Doc. No. 24, p.4 (emphasis in original).]
24 A non-judicial foreclosure does not occur in a vacuum. The foreclosure process is exactly that, a
25 process, which requires certain notices and recordings such as those provided by CNA here. *See*,
26 *e.g.*, Cal. Civ. Code § 2924c (notice of default requirements); *Pro Value Properties, Inc. v. Quality*
27 *Loan Service Corp.*, 170 Cal. App. 4th 579, 581 (2009) (noting defendant “instituted nonjudicial
28 foreclosure proceedings, commencing with the recordation of a notice of default”); Cauty Decl.

1 8:19-9:14.]. Further, even if the notices were deemed independent acts, CNA did not violate the
2 FDCPA because it is not a debt collector subject to the requirements imposed by the statute.

3 Finally, Plaintiffs' reliance on *Gumbs v. Litton Loan Servicing*, 2010 U.S. Dist. LEXIS
4 47890 (E.D. Cal. May 13, 2010) to establish that CNA's conduct went beyond merely foreclosing
5 on the property under a Deed of Trust, and constituted debt collection activity, is misplaced. In
6 *Gumbs*, the district court denied Litton Loans's motion to dismiss the plaintiffs' Rosenthal Act
7 claim because the defendant allegedly "made deceptive phone calls, sent letters, and engaged in
8 unlawful acts in an attempt to collect a debt it was not lawfully owed." *Id.* at *13. Moreover,
9 Litton Loans allegedly demanded and received mortgage payments from the plaintiffs. The facts
10 of *Gumbs* are dissimilar from those in the present action. Here, the undisputed testimony
11 demonstrates CNA never demanded nor received money from Plaintiffs. Rather, on behalf of
12 Dakota Loans, CNA sent three notices to Plaintiffs, including the notice of default, the
13 unnecessary FDCPA notice, and the notice of substitution of trustee. CNA's limited involvement
14 to facilitate the foreclosure process does not rise to the level of conduct alleged in *Gumbs*.

15 **(C) CNA's Status as Trustee**

16 Plaintiffs also argue CNA's failure to record the substitution of trustee until November
17 2009 made CNA's notices false and misleading because CNA was not the trustee when it sent the
18 August notices. [Doc. No. 24, p.2-3; Doc. No. 21, p.7-8.] The Court disagrees. As Defendant
19 points out, California Civil Code section 2934a(c) specifically allows a trustee appointed by the
20 beneficiary to record the substitution of trustee after the notice of default is recorded, so long as
21 the substitution is recorded prior to the notice of sale. The record is devoid of any evidence that
22 CNA did not timely file the substitution of trustee in accordance with California Civil Code
23 section 2934a. Regardless, because the Court finds that CNA is not a debt collector and CNA did
24 not attempt to collect a debt, CNA's conduct cannot give rise to liability under the FDCPA.

25 **II. ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT**

26 Much like the FDCPA, California's Rosenthal Act prohibits "debt collectors from
27 engaging in unfair or deceptive acts or practices in the collection of consumer debts. . . ." *Gardner*
28 *v. Am. Home Mortg. Servicing, Inc.*, 691 F. Supp. 2d 1192, 1198 (E.D. Cal. 2010) (citation omitted).

1 The Act likewise only governs the conduct of debt collectors in their efforts to collect consumer
2 debts. *Id.*

3 Moreover, “[t]he law is clear that foreclosing on a deed of trust does not invoke the
4 statutory protections of the [Rosenthal Act].” *Sipe v. Countrywide Bank*, 690 F. Supp. 2d 1141,
5 1151 (E.D. Cal. 2010) (citations omitted); *Gardner*, 691 F. Supp. 2d at 1189-99 (“foreclosure
6 pursuant to a deed of trust does not constitute debt collection under the Rosenthal Act. . . .
7 California courts have declined to regard a residential mortgage loan as a debt under the Rosenthal
8 Act”); *Castenada v. Saxon Mortg. Services*, 687 F. Supp. 2d 1191, 1197 (E.D. Cal.) (“foreclosure
9 pursuant to a deed of trust does not constitute debt collection under [the Rosenthal Act]”)
10 (collecting cases); *Keen v. Am. Home Mortg. Servicing, Inc.*, 664 F. Supp. 2d 1086, 1095 (E.D.
11 Cal. 2009) (same); *Rosal v. First Federal Bank of California*, 671 F. Supp. 2d 1111, 1134-35
12 (N.D. Cal. 2009) (same). Because the Court concludes CNA is not a debt collector and did not
13 engage in debt collection activities, *see* Section I *supra*, CNA is not subject to liability under the
14 Rosenthal Act and Plaintiffs’ second cause of action fails as a matter of law.

15 **CONCLUSION**

16 For the reasons stated above, the Court **GRANTS** Defendant CNA’s motion for summary
17 judgment, and **DENIES** Plaintiffs’ motion for summary judgment. This order disposes of all
18 claims in this action. Accordingly, the Clerk of Court is instructed to terminate the case file and
19 enter judgment in favor of Defendant CNA Foreclosure Service, Inc., and against Plaintiffs
20 Raymundo Gonzalez, Ray A. Gonzalez, and Ramona Gonzalez.

21 **IT IS SO ORDERED.**

22
23 DATED: June 29, 2011



24 Hon. Michael M. Anello
25 United States District Court
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