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

GONZALO ESPINOZA, an individual; and
ROSALBA ESPINOZA, an individual,

Plaintiffs,

vs.

BANK OF AMERICA, N.A., a North
Carolina corporation; and SRA
ASSOCIATES, INC., a New Jersey
corporation; and DOES 1-20, inclusive,

Defendants.

CASE NO. 11cv0894 - IEG(CAB)

**ORDER GRANTING
DEFENDANTS’
MOTION TO DISMISS**

[Doc. No. 6]

Defendant Bank of America approved Plaintiffs’ “short sale” of real property to a third party. When Bank of America’s agent, Defendant SRA Associates, attempted to collect the unpaid balance, Plaintiffs filed suit in state court, seeking a declaratory judgment that California’s “anti-deficiency” statutes bar Defendants from collecting the unpaid balance. Defendants removed the action to this Court and filed a motion to dismiss. For the reasons stated below, the Court **GRANTS** Defendants’ motion and **DISMISSES** Plaintiffs’ complaint **WITHOUT PREJUDICE**.

BACKGROUND

The following background is taken from Plaintiffs’ complaint unless otherwise noted.

In late 2004, Plaintiffs purchased property located in San Diego County at 397 Camino Elevado, Bonita, CA 91902. The purchase was financed with two mortgages, and the mortgages were secured by deeds of trust (DOT 1 and DOT 2) that were executed and recorded.

1 Over the next two years, Plaintiffs engaged in a series of additional finance transactions.¹
2 By the end of 2007, Plaintiffs' property was secured by two deeds of trust, DOT 3 (with
3 Washington Mutual Bank) and DOT 5 (with Bank of America); all other deeds of trusts had been
4 terminated.

5 In October 2009, Plaintiffs entered into an agreement with a third party for a "short sale."
6 Because the agreement was designed to alienate the property for less than the full amount owed on
7 the property, it was contingent on the approval of the two lien holders, Chase Home Finance (as
8 successor-in-interest to Washington Mutual Bank) and Bank of America. Plaintiffs obtained
9 approval for the "short sale" from Chase Home Finance and Bank of America and then closed
10 escrow on the "short sale." On April 1, 2010, Bank of America executed a reconveyance deed that
11 reconveyed DOT 5 back to Plaintiffs, and Plaintiffs transferred ownership of the property to the
12 new buyer.

13 In November 2010, Defendant SRA Associates, acting on behalf of Bank of America, sent
14 a collection letter to Plaintiffs demanding payment of a \$79,652.98 balance. Plaintiffs' obligation
15 to pay the \$79,652.98 balance is the subject of this action.

16 Plaintiffs filed suit in San Diego Superior Court, and Defendants removed the action to this
17 Court on April 27, 2011. [Doc. No. 1.] Plaintiffs seek a declaratory judgment that California's
18 "anti-deficiency" statutes bar Defendants from collecting on the \$79,652.98 balance. Defendants
19 filed the present motion to dismiss on May 4, 2011. [Doc. No. 6.] The motion is fully briefed and
20 suitable for disposition without oral argument pursuant to Local Civil Rule 7.1(d).

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25 ¹ In 2006, Plaintiffs refinanced DOT 1 and DOT 2 with Washington Mutual Bank, and a third
26 deed of trust (DOT 3) was executed. DOT 3 was recorded on June 5, 2006. As part of the refinance
27 with Washington Mutual Bank, full reconveyance deeds were executed and recorded, terminating
28 DOT 1 and DOT 2. Soon after recording DOT 3, Plaintiffs took out a mortgage with Bank of
America, which was secured by a fourth deed of trust (DOT 4) and recorded. Plaintiffs later
refinanced DOT 4 with Bank of America, and a fifth deed of trust (DOT 5) was recorded on
November 14, 2007. As part of the refinance with Bank of America, a reconveyance deed was
executed and recorded, terminating DOT 4.

1 **DISCUSSION**

2 **I. Legal Standard for a Rule 12(b)(6) Motion to Dismiss**

3 A complaint must contain “a short and plain statement of the claim showing that the
4 pleader is entitled to relief.” Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule
5 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in
6 the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The
7 court must accept all factual allegations pled in the complaint as true, and must construe them and
8 draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty*
9 *Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule 12(b)(6) dismissal, a
10 complaint need not contain detailed factual allegations, rather, it must plead “enough facts to state
11 a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
12 (2007). A claim has “facial plausibility when the plaintiff pleads factual content that allows the
13 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
14 *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).

15 However, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”
16 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of
17 action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted). A court need not accept “legal
18 conclusions” as true. *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). In spite of the
19 deference the court is bound to pay to the plaintiff’s allegations, it is not proper for the court to
20 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have
21 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors of Cal.,*
22 *Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

23 **II. Analysis**

24 In California, if a borrower defaults on a loan and the deed of trust contains a power of sale
25 clause, the lender may pursue a non-judicial foreclosure. *Benitez v. Recon Trust, CA*, 2011 WL
26 998327, at *2 (S.D. Cal. Mar. 21, 2011) (citing *McDonald v. Smoke Creek Live Stock Co.*, 209
27 Cal. 231, 236-237 (1930) (“The law affecting the validity of trust deeds, having been thus early
28 established, has continued to be the law of this state with relation to that form of security . . . it has

1 been long customary in the form and content of such trust deeds to provide for the foreclosure
2 thereof either by an action of foreclosure in the courts or by a trustee’s sale, at the option of the
3 trustee or beneficiary thereunder.”). A non-judicial foreclosure is subject to the “anti-deficiency”
4 statutes, which prevent the foreclosing lender from obtaining a judgment for any difference
5 between the debt and the proceeds from the sale:

6 No judgment shall be rendered for any deficiency upon a note secured by a deed of
7 trust or mortgage upon real property or an estate for years therein hereafter
8 executed in any case in which the real property or estate for years therein has been
9 sold *by the mortgagee or trustee under power of sale contained in the mortgage or
10 deed of trust.*

11 Cal. Civ. Proc. Code § 580d (emphasis added). By its terms, section 580d applies “only when a
12 personal judgment against a debtor is sought *after a foreclosure.*” *Dreyfuss v. Union Bank of
13 California*, 24 Cal. 4th 400, 407 (2000) (emphasis added).

14 Here, Plaintiffs do not allege Defendants pursued a foreclosure or exercised the “power of
15 sale” contained in the deed of trust. Instead, Plaintiffs allege *they* pursued a “short sale” of the
16 property. *See* Compl. ¶ 16. That the “short sale” was contingent on Bank of America’s approval
17 does not mean the the property was sold by Bank of America as mortgagee under its “power of
18 sale.” Because Plaintiffs’ allegations do not entitle them to relief under section 580d, and because
19 Plaintiffs do not seek relief under any other provision, the Court **DISMISSES WITHOUT
20 PREJUDICE** Plaintiffs’ complaint.²

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26 ² Although Plaintiffs assert two causes of action in their complaint, the Court agrees with
27 Defendants that Plaintiffs seek relief under Cal. Civ. Proc. Code § 580d only. *See* Def.’s Reply at 2.
28 In their first cause of action, Plaintiffs rely on Cal. Civ. Proc. Code § 580d. In their second cause of
action, titled “Non-Recourse Loan Under California Law,” Plaintiffs do not cite any statutory
provisions but refer generally to the anti-deficiency statutes. Addressing Plaintiffs’ second cause of
action, Defendants argue their right to recover the unpaid balance is not barred by the “one action
rule” under Cal. Civ. Proc. Code § 726. *See* Def.’s Mot. at 6. Plaintiffs respond that they “have not
raised the one-action rule against Defendants.” Pls.’ Opp’n at 9. But Plaintiffs do not attempt to
differentiate their second cause of action from their first cause of action. *See generally id.*

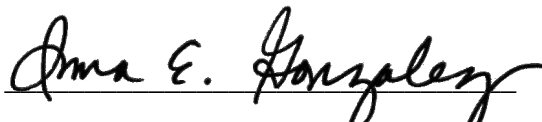
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CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants motion to dismiss and **DISMISSES** Plaintiffs' complaint **WITHOUT PREJUDICE**. If Plaintiffs wish to file an amended complaint, they should do so **within 21 days** of the filing of this order. The amended complaint should be a complete document without reference to any prior pleading.

IT IS SO ORDERED.

DATED: 7/6/2011



**IRMA E. GONZALEZ, Chief Judge
United States District Court**