

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

U.S. BANK NATIONAL ASSOCIATION, a national banking association, as successor-in-interest to the FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for Park National Bank,

Plaintiff,

vs.

SANDY K. FRIEDRICHS, an individual; and DOES 1 through 50, inclusive,

Defendant;

AND RELATED COUNTERCLAIMS.

CASE NO. 12cv2373-GPC(KSC)

ORDER GRANTING COUNTERDEFENDANTS' MOTION TO DISMISS ALBERT ZAPPIA'S SECOND AMENDED COUNTERCLAIM WITH PREJUDICE; GRANTING COUNTERCLAIMANT SANDY ZAPPIA'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COUNTERCLAIM; DENYING ALBERT ZAPPIA'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COUNTERCLAIM; AND DENYING COUNTERDEFENDANTS' MOTIONS TO DISMISS SANDY ZAPPIA'S SECOND AMENDED COUNTERCLAIM AS MOOT

[Dkt. Nos. 134, 136, 153, 157.]

On September 6, 2013, Counterclaimants Sandy Zappia¹ and Albert Zappia filed a second amended counterclaim against Counterdefendants U.S. Bank, as successor to the Federal Deposit Insurance Corporation, as Receiver for Park National; Nicholas

¹Sandy Zappia is also known as Sandy Friedrichs, the named Defendant.

1 Ocepek; Jocelyn Bigall; Robin Tharpe; Jacqueline Barlow; Patrick Nygard; and Joshua
2 Wayser. (Dkt. No. 130.) On September 23, 2013, Counterdefendants U.S. Bank
3 National Association, Bank, (“U.S. Bank”) and Joshua Wayser filed a motion to
4 dismiss the second amended counterclaim. (Dkt. No. 134.) On September 23, 2013,
5 Counderdefendant Nicholas Ocepek filed a joinder to the motion to dismiss. (Dkt. No.
6 135.) Counterdefendants Jocelyn Bigall and Patrick Nygard also filed a motion to
7 dismiss the second amended counterclaim. (Dkt. No. 136.)

8 On September 30, 2013, Counterclaimant Sandy Zappia, filed a notice of
9 substitution of attorney. (Dkt. No. 146.) The substitution of attorney applies only to
10 Sandy Zappia, not Albert Zappia.

11 Counterclaimant Sandy Zappia, with counsel, filed an opposition on October 22,
12 2013.² (Dkt. No. 148.) Counterclaimant Albert Zappia, still proceeding *pro se*, filed
13 an opposition on October 22, 2013. (Dkt. No. 150.) On November 14, 2013,
14 Counterdefendants filed their replies. (Dkt. Nos. 159, 160, 162.)

15 On November 4, 2013, Counterclaimant Sandy Zappia filed a motion for leave
16 to file a third amended counterclaim. (Dkt. No. 153.) On November 12, 2013, Albert
17 Zappia also filed a motion for leave to file a third amended counterclaim. (Dkt. No.
18 157.) Counterdefendants U.S. Bank, Ocepek, Bigall and Nygard filed their oppositions
19 on November 22 and 24, 2013. (Dkt. Nos. 163, 165, 167.) On December 3, 2013,
20 Counterclaimants filed their replies. (Dkt. Nos. 169, 170.)

21 The motions are submitted on the papers without oral argument, pursuant to
22 Civil Local Rule 7.1(d)(1). After a review of the briefs, supporting documentation,
23 and the applicable law, the Court GRANTS Counterdefendants’ motion to dismiss
24 Albert Zappia’s second amended counterclaim with prejudice; and DENIES Albert
25 Zappia’s motion for leave to file a third amended counterclaim. The Court also
26 GRANTS Counterclaimant Sandy Zappia’s motion for leave to file a third amended
27

28 ²On October 22, 2013, Sandy Zappia filed a notice of dismissal as to Defendants Ocepek,
Bigall, Thorpe, Barlow, Nygard and Wayser. (Dkt. No. 151.)

1 counterclaim; and DENIES Counterdefendants' motions to dismiss Sandy Zappia's
2 second amended counterclaims as MOOT.

3 **Procedural Background**

4 On July 13, 2012, Plaintiff U.S. Bank filed a complaint in the Superior Court of
5 San Diego against Defendant Sandy Friedrichs, also known as Sandy Zappia, for
6 appointment of receiver and judicial foreclosure. On September 28, 2012, Defendant
7 Sandy Zappia and non-party Albert Zappia, Defendant's husband, proceeding *pro se*,
8 removed the case to this Court. (Dkt. No. 1.) On October 12, 2012, the case was
9 transferred to the undersigned judge. (Dkt. No. 2.) On October 15, 2012, Defendant
10 filed an *ex parte* motion for temporary restraining order and preliminary injunction
11 seeking to restrain Plaintiff from foreclosing Defendant's business property located at
12 1340 La Mirada Drive, San Marcos, California 92078. (Dkt. No. 3.) On October 18,
13 2012, the Court denied Defendant's *ex parte* motion for a temporary restraining order
14 because the Court concluded that Defendant had not shown irreparable harm since
15 Plaintiff had moved the sale of the property to November 15, 2012. (Dkt. No. 6.) After
16 further briefing and hearing oral argument on the motion for preliminary injunction, on
17 November 9, 2012, the Court granted Defendant's motion for preliminary injunction
18 pending further briefing. (Dkt. Nos. 30, 33.)

19 On November 1, 2012, Counterclaimants Sandy Zappia and Albert Zappia filed
20 a counterclaim against Counterdefendants U.S. Bank, Nicholas Ocepek, Erica
21 Itskovich, Jocelyn Bigall and Patrick Nygard. (Dkt. No. 19-1.) On February 13, 2013,
22 the Court granted Albert Zappia's motion to intervene; denied Defendants' motion to
23 disqualify Plaintiff's attorney Wayser and Tanada; denied Defendants' motion to
24 dismiss; granted Counterdefendants U.S. Bank, Nygard and Bigall's motions to dismiss
25 the counterclaim; granted Counterdefendant Ocepek's motion to dismiss and dismissed
26 Counterdefendant Itskovich with prejudice. (Dkt. No. 102.) The Court granted
27 Counterclaimant Sandy Zappia leave to file an amended counterclaim. (*Id.*) On
28 February 13, 2013, the Court issued an order dissolving the preliminary injunction for

1 failure to satisfy the factors to support a preliminary injunction and failure to comply
2 with bond requirements under the Civil Local Rules. (Dkt. No. 104.)

3 An amended counterclaim was filed on March 14, 2013. (Dkt. No. 106.) On
4 August 30, 2013, the Court granted Counterclaimants' motion for leave to file a second
5 amended counterclaim and denied Counterdefendants' motions to dismiss as moot.
6 (Dkt. No. 129.)

7 On September 6, 2013, Counterclaimants filed an second amended counterclaim.
8 (Dkt. No. 130.) On September 23, 2013, Counterdefendants U.S. Bank, Ocepek,
9 Wayser and Bigall filed motions to dismiss the second amended counterclaim. (Dkt.
10 Nos. 134, 135, 136.)

11 On November 4, 2013, Counterclaimant Sandy Zappia filed a motion for leave
12 to file a third amended counterclaim against Counterdefendant U.S. Bank only. (Dkt.
13 No. 153.) The proposed second amended counterclaim alleges causes of action for
14 cancellation of instruments; violation of the Fair Debt Collection Practices Act, 15
15 U.S.C. § 1692; unfair business practices under California Business & Professions Code
16 section 17200 *et seq.*; declaratory relief; accounting; unjust enrichment; and quiet title.
17 (Id.) On November 12, 2013, Counterclaimant Albert Zappia filed a motion for leave
18 to file a third amended counterclaim against Counterdefendants U.S. Bank, Robin
19 Tharpe; Jacqueline Barlow; Jocelyn Bigall; and Patrick Nygard. (Dkt. No. 157.) He
20 alleges causes of action that U.S. Bank is not the real party in interest; cancellation of
21 instruments; violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692;
22 violation of California Business & Professions Code section 1700 *et seq.*; declaratory
23 relief, accounting; quiet title; and RICO violations. (Id.)

24 **Factual Background**

25 Around April 9, 2007, GreenPoint Mortgage Funding lent Defendant Sandy
26 Friedrichs, on a recourse basis, the principal sum of \$340,000, secured by the property
27 located at 1340 La Mirada Drive, San Marcos, CA 92078. (Dkt. No. 1-1, Compl. ¶ 5.)
28 The loan was memorialized in a written Promissory Note. (Id. ¶ 6; Ex. 2.) On April

1 18, 2007, GreenPoint recorded a “Deed of Trust, Assignment of Rents, Security
2 Agreement and Fixture Filing” (“Deed of Trust”) with the San Diego County
3 Recorder’s Office. (Id. ¶ 7; Ex. 3.) Defendant executed the Deed of Trust as trustor,
4 to GreenPoint, as beneficiary, and to Marin Conveyancing Corp., as trustee. (Id.) On
5 August 1, 2008, Park National recorded an “Assignment of Deed of Trust” whereby
6 GreenPoint assigned all of its right, title, and interest in, to and under the Note, Deed
7 of Trust and Assignment to Park National. (Id. ¶ 10; Ex. 4.) On October 30, 2009, the
8 FDIC placed Park National into receivership and assigned the assets of Park National,
9 including the Loan, to U.S. Bank. (Id. ¶ 10; Ex. 5.)

10 Section 3 of the Deed of Trust contains a provision entitled, Assignment of
11 Rents; Appointment of Receiver; Lender in Possession which assigns to Lender rents,
12 issues, and profits from the property. (Id. ¶ 8.) It also allows Lender to collect, sue for
13 and compromise rents and to direct tenants of the Property to pay all rent to, or as
14 directed by Lender upon the occurrence of an event of default; and also allows the
15 Lender to seek an appointment of receiver through the courts. (Id.)

16 Defendant failed to make her monthly payments starting in March 2012. (Id. ¶
17 11.) Defendant’s failure to pay the loan is a default on the obligations for which the
18 deed of trust is security. (Id. ¶ 12.) As of June 18, 2012, the principal amount due and
19 owing was \$282,834.66, plus accrued default interest, late charges, and other fees.
20 (Id.) Plaintiff seeks specific performance for appointment of receiver and judicial
21 foreclosure against Defendant Sandy Zappia.

22 In the second amended counterclaim, Counterclaimants allege that U.S. Bank is
23 not the lawful owner of the Note and the assignment of the Note and Deed of Trust was
24 void.

25 Discussion

26 A. Standing as to Albert Zappia

27 In the Court’s prior order filed on February 13, 2013, the Court concluded that
28 Albert Zappia has not shown he has standing to assert claims against U.S. Bank and

1 granted Counterdefendant U.S. Bank’s motion to dismiss Albert Zappia’s counterclaim
2 against it. (Dkt. No. 102 at 10.)

3 In the instant motions to dismiss, Counterdefendants argue that Albert Zappia
4 has no standing to assert any claims against it because the allegations in the
5 counterclaim all arise from the loan, and not the property. Counterclaimant Albert
6 Zappia does not address the standing issue in his briefs.

7 Article III, section 2 of the United States Constitution requires that a plaintiff has
8 standing to bring a claim. In order “to satisfy Article III’s standing requirements, a
9 plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and
10 particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury
11 is fairly traceable to the challenged action of the defendant; and (3) it is likely, as
12 opposed to merely speculative, that the injury will be redressed by a favorable
13 decision.” Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S.
14 167, 180–81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61
15 (1992)); cf. Bateman v. Countrywide Home Loans, 12-0033 SOM/BMK, 2012 WL
16 5593228, at 4 (D. Haw. Nov. 14, 2012) (borrowers who are not parties to or
17 beneficiaries of a pooling and service agreement lack standing to challenge alleged
18 violations of such agreements). Here, Albert Zappia is not a party to the loan
19 documents and he does not demonstrate that he has standing to allege claims against
20 U.S. Bank. Accordingly, the Court GRANTS Counterdefendant’s motion to dismiss
21 Albert Zappia’s second amended counterclaim with prejudice and DENIES Albert
22 Zappia’s motion for leave to file a third amended counterclaim.

23 **B. Legal Standard Under Federal Rule of Civil Procedure 15(a)**

24 Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint after
25 a responsive pleading may be allowed by leave of the court and such leave “shall be
26 freely given when justice so requires.” Fed. R. Civ. P. 15(a). Granting leave to amend
27 rests in the sound discretion of the trial court. Internat’l Ass’n of Machinists &
28 Aerospace Workers v. Republic Airlines, 761 F.2d 1386, 1390 (9th Cir. 1985). This

1 discretion must be guided by the strong federal policy favoring the disposition of cases
2 on the merits and permitting amendments with “extreme liberality.” DCD Programs
3 Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). This liberality is “applied even
4 more liberally to pro se litigants.” Eldridge v. Block, 832 F.2d 1132, 1135 (9th Cir.
5 1987).

6 “Five factors are taken into account to assess the propriety of a motion for leave
7 to amend: bad faith, undue delay, prejudice to the opposing party, futility of
8 amendment, and whether the plaintiff has previously amended the complaint.” Johnson
9 v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004) (citing Nunes v. Ashcroft, 348 F.3d
10 815, 818 (9th Cir. 2003)). In practice, however, courts more freely grant plaintiffs
11 leave to amend pleadings in order to add claims than new parties. Union Pacific R.R.
12 Co. v. Nevada Power Co., 950 F.2d 1429, 1432 (9th Cir. 1991).

13 Here, Counterclaimant Sandy Zappia, with new counsel, seeks leave to file a
14 third amended counterclaim. She contends that the proposed amendment is not made
15 in bad faith and not futile as the law in California has changed under Glaski v. Bank
16 of America, Nat’l Assoc., 218 Cal. App. 4th 1079 (2013). Counterdefendants argue
17 that counterclaimant has had numerous opportunities to amend the deficiencies in the
18 counterclaim and has failed to do so. They also argue the proposed amendments are
19 futile.

20 “[A] proposed amendment is futile only if no set of facts can be proved under the
21 amendment to the pleadings that would constitute a valid and sufficient claim or
22 defense.” Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Courts
23 ordinarily do not consider the validity of a proposed amended pleading in deciding
24 whether to grant leave to amend and defer consideration of challenges to the merits of
25 a proposed amendment until after leave to amend is granted and the amended pleadings
26 are filed. Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Cal. 2003)
27 (citation omitted); accord Green Valley Corp. v. Caldo Oil Co., No. 09cv4028-LHK,
28 2011 WL 1465883, at *6 (N.D. Cal. April 18, 2011) (noting “the general preference

1 against denying a motion for leave to amend based on futility.”). Arguments
2 concerning the sufficiency of the proposed pleadings, even if meritorious, is better left
3 for briefing on a motion to dismiss. Lillis v. Apria Healthcare, No. 12cv52-IEG(KSC),
4 2012 WL 4760908, at * 1 (S.D. Cal. Oct. 5, 2012).

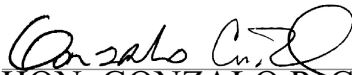
5 Here, both parties argue, in detail, the merits of the Glaski case. However, at this
6 stage of the proceedings, the Court need not consider the validity of the proposed
7 amended pleading, and in light of the Ninth Circuit’s extremely liberal policy favoring
8 leave to amend, the Court GRANTS Counterclaimant Sandy Zappia’s motion for leave
9 to file a third amended counterclaim. See Lillis, 2012 WL 4760908 at *1. The Court
10 also notes that now that Sandy Zappia is no longer proceeding *pro se* and has retained
11 counsel, the case will now be able to proceed efficiently on the merits.

12 **Conclusion**

13 Based on the above, the Court GRANTS Counterdefendants’ motion to dismiss
14 Albert Zappia’s second amended counterclaim for lack of standing with prejudice and
15 DENIES Albert Zappia’s motion for leave to file a third amended counterclaim. The
16 Court also GRANTS Counterclaimant Sandy Zappia’s motion for leave to file a third
17 amended counterclaim, and DENIES Counterdefendants’ motions to dismiss Sandy
18 Zappia’s second amended counterclaim as MOOT. Counterclaimant Sandy Zappia
19 shall file the proposed third amended counterclaim within seven (7) days of the filing
20 of this order.

21 IT IS SO ORDERED.

22
23 DATED: December 17, 2013

24 
25 HON. GONZALO P. CURIEL
26 United States District Judge
27
28