

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**

MARCOS A PROA and
CHRISTINA J. PROA, as
individuals,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., et
al.,

Defendants.

Case No. 13cv0759 BTM(WVG)
**ORDER GRANTING MOTIONS
TO DISMISS COMPLAINT**

Motions to dismiss have been filed by (1) Fidelity National Title Company; and (2) Wells Fargo Bank, N.A., and U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2004-BB. For the reasons discussed below, Defendants' motions to dismiss are **GRANTED**.

I. FACTUAL BACKGROUND

On October 12, 2004, Plaintiffs Marcos A. Proa and Christina J. Proa borrowed \$480,000 from Wells Fargo Bank, N.A. ("Wells Fargo"), to refinance the property located at 10108 Fabled Waters Court, Spring Valley, California

1 91977 (the "Property"). The loan was secured by a Deed of Trust on the
2 Property. (Compl., Ex. A.) The Deed of Trust identified the Trustee as Fidelity
3 National Title Ins. Co.

4 On May 14, 2012, Wells Fargo assigned its beneficial interest in the Deed
5 of Trust to U.S. Bank National Association, as Trustee, Successor in Interest
6 to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset
7 Securities Corporation, Mortgage Pass-Through Certificates, Series 2004-BB
8 ("U.S. Bank").

9 On April 1, 2011, a Notice of Default and Election to Sell under Deed of
10 Trust was recorded by LSI Title Company, as agent for Fidelity National Title
11 Company. (Compl., Ex. B.) According to the Notice of Default, Plaintiffs were
12 in arrears in the amount of \$11,591.14 as of March 24, 2011. (Id.)

13 In a Substitution of Trustee executed on April 12, 2011 and recorded on
14 July 7, 2011, Wells Fargo substituted Fidelity National Title Company
15 ("Fidelity") as Trustee in lieu of Fidelity National Title Ins. Co. (Compl., Ex. C.)
16 Notices of Trustee's Sale were recorded on July 7, 2011 and January 24, 2013.
17 (Compl., Exs D & I.)

18 On March 15, 2013, the Property was sold at a trustee's sale. On March
19 25, 2013, a Trustee's Deed Upon Sale was recorded, reflecting the sale of the
20 Property to Granite Ranch Opportunities, LLC. (Fidelity's RJN Ex. B.)

21 Plaintiffs commenced this action on March 29, 2013. In their Complaint,
22 Plaintiffs assert the following claims: (1) violation of Cal. Bus. & Prof. Code §
23 17200, et. seq.; (2) intentional misrepresentation; (3) negligent
24 misrepresentation; (4) fraudulent concealment; (5) declaratory relief;
25 (6) violation of 15 U.S.C. § 1611, et seq.; (7) violation of 26 U.S.C. § 2605 et
26 seq.; (8) violation of 15 U.S.C. § 1602, et seq.; (9) violation of 15 U.S.C. § 1692

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

II. STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual allegations are not required, factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, 565 U.S. 662, 679 (2009) (internal quotation marks omitted). Only a complaint that states a plausible claim for relief will survive a motion to dismiss. Id.

21
22
23
24

III. DISCUSSION

Fidelity and Wells Fargo move to dismiss the Complaint in its entirety for failure to state a claim. As discussed below, the Court agrees that dismissal is warranted.

25
26

A. Claims for Intentional Misrepresentation, Negligent Misrepresentation, and Fraudulent Concealment

27
28

Plaintiffs' claims for intentional misrepresentation (second cause of action), negligent misrepresentation (third cause of action), and fraudulent

1 concealment (fourth cause of action) are based on allegations that due to
2 invalid assignments of interest and defects in recorded documents pertaining
3 to the Deed of Trust and nonjudicial foreclosure, Fidelity and Wells Fargo had
4 no standing to foreclose upon the Property. These allegations are not
5 supported by the facts.

6 Plaintiffs allege that Defendants attempted but failed to assign or transfer
7 Plaintiffs' note to Wells Fargo. (Comp. ¶ 19.) This allegation makes no sense
8 because Wells Fargo was the original lender.

9 Plaintiffs allege that the Substitution of Trustee was void because it did
10 not comply with Paragraph 24 of the Deed of Trust, which provides that “[t]he
11 instrument shall contain the name of the original Lender, Trustee and Borrower,
12 the book and page where this Security Instrument is recorded and the name
13 and address of the successor trustee.” However, the Substitution of Trustee
14 in fact included the name of the beneficiary who is also the original lender
15 (Wells Fargo), the names of the borrowers (Plaintiffs), the name of the original
16 trustee (Fidelity National Title Ins. Co) and the identifying information for the
17 security instrument (“Deed of trust dated 10/12/2004 and Recorded on
18 10/20/2004 as Instrument No. 2004-0995729 of official records in the Office of
19 the Recorder of San Diego County, California.”). (Compl., Ex. C.)

20 Plaintiffs also contend that the Assignment of Deed of Trust is invalid
21 because it was notarized by an employee of Wells Fargo, the assignor.
22 (Compl. ¶¶ 32-41.) Plaintiffs point to an excerpt from the Pocketbook for Iowa
23 Notaries Public (Compl., Ex. H.), which explains that because a notary is
24 supposed to act as an impartial witness, “[i]f the notary stands to make a
25 financial gain by notarizing such a document or is a party or a representative
26 of a party to the document, they should refer it to another notary and avoid the
27 risk of a lawsuit based upon the financial interest in the agreement.” Even
28 assuming the Wells Fargo employee stood “to make a financial gain” from

1 notarizing the document, Plaintiffs do not provide any authority that this
2 circumstance would make the notarized document *void as a matter of law*.

3 Plaintiffs allege that the Notice of Default was defective because it did not
4 attach a Declaration of Due Diligence as required by Cal. Civ. Code § 2923.5.
5 (Compl. ¶ 27.) At the time the Notice of Default was recorded, section
6 2923.5(a)(2) provided, “A mortgagee, beneficiary, or authorized agent shall
7 contact the borrower in person or by telephone in order to assess the
8 borrower’s financial situation and explore options for the borrower to avoid
9 foreclosure.” Section 2923.5(b) further provided, “A notice of default filed
10 pursuant to Section 2924 shall include a declaration that the mortgagee,
11 beneficiary, or authorized agent has contacted the borrower, has tried with due
12 diligence to contact the borrower as required by this section, or that no contact
13 was required pursuant to subdivision (h).” The Notice of Default recorded in
14 this case complied with the requirements of § 2923.5 by including the following
15 language in its last paragraph:

16
17 The mortgagee, beneficiary or authorized agent for the mortgagee
18 or beneficiary pursuant to California Civil Code § 2923.5(c)
19 declares that the mortgagee, beneficiary or the mortgagee’s or
beneficiary’s authorized agent has either contacted the borrower or
tried with due diligence to contact the borrower as required by
California Civil Code § 2923.5.

20 (Compl., Ex. B.)¹

21 Plaintiffs also challenge the validity of the Notices of Trustee’s Sale.
22 According to Plaintiffs, the notices did not list a sale date. (Compl. ¶¶ 31, 43.)
23 However, the first Notice of Sale included a sale date of July 27, 2011 (Compl.,
24

25 ¹ Section 2923.5 was revised by 2012 legislation (Stats.2012, c. 87 (S.B. 900)). Now,
26 section 2923.5 specifies that the *mortgage servicer* shall contact the borrower. In their
27 Opposition, Plaintiffs argue that the declaration in the Notice of Default is invalid because
28 the Notice of Default was signed by an agent of the Trustee, not the “mortgage servicer.”
However, under the version of the statute in effect in 2011, contact could be made by the
mortgagee, beneficiary, or authorized agent. Furthermore, section 2923.5 does not require
that the mortgage servicer execute the declaration, just that the notice of default include a
declaration that the mortgage servicer contacted or attempted to contact the borrower.

1 Ex. D), and the second Notice of Sale included a sale date of February 13,
2 2013. (Compl., Ex. I.)

3 Plaintiffs have not made out a plausible claim that Defendants recorded
4 false documents and/or lacked standing to foreclose upon the Property.
5 Therefore, Plaintiffs' claims for intentional misrepresentation, negligent
6 misrepresentation, and fraudulent concealment fail.

7
8 B. Federal Statutory Claims

9 Plaintiffs allege that Defendants violated federal laws, including 15 U.S.C.
10 § 1611 (Truth in Lending Act - "TILA"), 15 U.S.C. § 1602 (Home Ownership and
11 Equity Protection Act - "HOEPA"), 26 U.S.C. § 2605 (Real Estate Settlement
12 Procedures Act - "RESPA"), and 15 U.S.C. § 1692 (Fair Debt Collection
13 Practices Act - "FDCPA"). Plaintiffs have failed to state a claim under these
14 federal statutes.

15
16 1. TILA & HOEPA

17 In their sixth and eighth causes of action, Plaintiffs allege that Defendants
18 violated TILA and HOEPA by failing to make a full accounting, by failing to
19 make required disclosures, and by extending credit to Plaintiffs without regard
20 to repayment ability. Plaintiffs' TILA and HOEPA claims are barred by the
21 statute of limitations. Damages claims under TILA and HOEPA must be
22 brought "within one year from the date of the occurrence of the violation." 15
23 U.S.C. § 1640(e). Generally, the limitations period starts at the consummation
24 of the transaction. King v. California, 784 F.2d 910, 915 (9th Cir. 1986). This
25 lawsuit was filed more than eight years after the loan at issue closed.

26 Although equitable tolling of TILA cases is available in some cases, see
27 King, 784 F.2d at 915, Plaintiffs have not alleged any facts suggesting that the
28 doctrine of equitable tolling is applicable here. "In order for the doctrine of

1 equitable tolling to be applied in a TILA action, the Plaintiff must show that his
2 creditor fraudulently concealed the violation.” Kelley v. Galveston Autoplex,
3 196 F.R.D. 471, 478 (S.D. Tex. 2000). See also Hubbard v. Fidelity Federal
4 Bank, 91 F.3d 75, 79 (9th Cir. 1996) (holding that one-year statute of limitations
5 was not tolled as to initial TILA disclosures because “nothing prevented
6 [plaintiff] from comparing the loan contract, Fidelity’s initial disclosures, and
7 TILA’s statutory and regulatory requirements.”). Plaintiffs have not alleged any
8 facts showing that Defendants engaged in conduct to prevent them from
9 discovering their claim. It seems that nothing prevented Plaintiffs from looking
10 into whether Wells Fargo made all of the required disclosures. Similarly, there
11 is no apparent reason why Plaintiffs could not have timely discovered their
12 claim that credit was extended without proper regard to their ability to pay.

13 Plaintiffs also seek rescission under TILA . (Compl. ¶ 99.) Under TILA,
14 the borrower may rescind the loan agreement if the lender fails to deliver
15 certain forms or make proper disclosures. 15 U.S.C. § 1635. Initially, the
16 borrower has three days following the consummation of the transaction or the
17 delivery of the disclosure forms to notify the creditor of his intent to rescind. 15
18 U.S.C. § 1635(a). If, however, the creditor fails to provide notice of the
19 borrower’s right of rescission or fails to make a material disclosure, the “right
20 of rescission shall expire three years after the date of consummation of the
21 transaction or upon the sale of the property, whichever occurs first” 15
22 U.S.C. § 1635(f).

23 Even if Plaintiffs’ right to rescind was extended to three years, that time
24 expired long before Plaintiffs gave notice of rescission by filing this suit.
25 Section 1635(f) “completely extinguishes the right of rescission at the end of
26 the 3 year period.” Beach v. Ocwen Federal Bank, 523 U.S. 410, 412 (1988).
27 The Ninth Circuit explains, “§ 1635(f) is a statute of repose, depriving the courts
28 of subject matter jurisdiction when a § 1635 claim is brought outside the three-

1 year limitation period.” Miguel v. Country Funding Corp., 309 F.3d 1161, 1164
2 (9th Cir. 2002). Thus, the three-year period for rescission is not subject to
3 equitable tolling. See Kimball v. Flagstar Bank F.S.B., 2012 WL 3030102, at
4 *8 (S.D. Cal. July 25, 2012); Khan v. ReconTrust Co., 2012 WL 2571312, at *4
5 (N.D. Cal. July 2, 2012).

6 7 2. RESPA

8 In their seventh cause of action, Plaintiffs allege that Defendants violated
9 RESPA, by placing Plaintiffs in a loan “for the purpose of unlawfully increasing
10 or otherwise obtaining yield spread fees and sums in excess of what would
11 have been lawfully earned.” (Compl. ¶ 105.)

12 Plaintiffs’ claim is barred by RESPA’s one-year statute of limitations. 12
13 U.S.C. § 2614. As discussed above, although Plaintiffs’ loan closed in October
14 2004, this action was not filed until March 2013.

15 16 3. FDCPA

17 In their ninth cause of action, Plaintiffs allege that Defendants violated the
18 FDCPA, 15 U.S.C. § 1692g, by failing to validate Plaintiffs’ debt. (Compl. ¶
19 119.) Plaintiffs also suggest that Defendants violated the FDCPA by enforcing
20 the Deed of Trust through nonjudicial foreclosure even though they had no
21 legal right to do so. (Compl. ¶ 19.)

22 Plaintiffs’ claim for violation of 15 U.S.C. § 1692g fails because Wells
23 Fargo, the party to whom any request for debt validation would have been
24 directed, is a mortgage servicer, and mortgage servicers are not “debt
25 collectors.” The FDCPA defines a “debt collector” as “any person who uses
26 any instrumentality of interstate commerce or the mails in any business the
27 principal purpose of which is the collection of any debts, or who regularly
28 collects or attempts to collect, directly or indirectly, debts owed or due or

1 asserted to be owed or due another.” 15 U.S.C. § 162a(6). The Court agrees
2 with the courts that hold that a mortgagor or mortgage servicing company
3 ordinarily is not a “debt collector” within the meaning of the FDCPA. See e.g.,
4 Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985) (holding that
5 FDCPA’s definition of debt collector “does not include the consumer’s creditors,
6 a mortgage servicing company, or any assignee of the debt, so long as the
7 debt was not in default at the time it was assigned.”); Walker v. Equity 1
8 Lenders Group, 2009 WL 1364430, * 7 (S.D. Cal. May 14, 2009); Nool v.
9 Homeq Servicing, 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009).

10 To the extent Plaintiffs mean to assert a claim under § 1692f(6)(A), which
11 provides that it is an unfair debt collection practice to take or threaten to take
12 any nonjudicial action to effect dispossession or disablement of property “if
13 there is no present right to possession of the property claimed as collateral
14 through an enforceable security interest,” Plaintiffs have not alleged facts
15 showing that Defendants lacked the right to enforce the Deed of Trust through
16 nonjudicial foreclosure. To the extent Plaintiffs intend to assert a claim under
17 § 1692e, which prohibits false, deceptive, or misleading representations in
18 connection with the collection of any debt, Defendants’ actions in initiating
19 nonjudicial foreclosure proceedings do not constitute debt collection activity
20 within the scope of § 1692e . See Hulce v. Ocwen Federal Bank, FSB, 195 F.
21 Supp. 2d 1188, 1204 (D. Or. 2002); Izenberg v. ETS Servs., LLC, 589 F. Supp.
22 2d 1193, 1198-99 (C.D. Cal. 2008).²

23 Accordingly, Defendants’ motions to dismiss are granted as to Plaintiffs’
24

25 ² Section 1692a(6) specifies that *for the purposes of § 1692f(6)*, the term debt
26 collector “also includes any person who uses any instrumentality of interstate commerce or
27 the mails in any business the principal purpose of which is the enforcement of security
28 interests,” meaning that such a person does not fall within the scope of the *general* definition
of a debt collector. Therefore, the acts Defendants took to enforce a security interest do not
qualify as debt collection within the scope of § 1692e. See Natividad v. Wells Fargo Bank,
N.A., 2013 WL 2299601, at * 9 (N.D. Cal. May 24, 2013).

1 FDCPA claim.

2

3 C. Declaratory Relief Claim and Claim for Violation of Cal. Bus. & Prof. Code
4 § 17200

5 In their first cause of action, Plaintiffs allege that Defendants violated Cal.
6 Bus. & Prof. Code § 17200 by wrongfully foreclosing on the Property. In their
7 fifth cause of action, Plaintiffs seek a declaration that Defendants lack standing
8 to authorize and conduct foreclosure and that any sale of the Property is
9 therefore void. These claims are premised on Plaintiffs' other claims, which the
10 Court has determined are subject to dismissal. As discussed above, Plaintiff
11 has not made out a plausible claim that Defendants lacked standing to
12 foreclose on the Property and/or violated federal statutes in connection with
13 extending the loan or pursuing nonjudicial foreclosure. Therefore, Defendants'
14 motions to dismiss are granted as to these claims as well.

15

16

IV. CONCLUSION

17

18

19

20

21

22

23

24

25

26

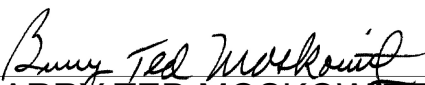
27

28

For the reasons discussed above, Defendants' motions to dismiss are
GRANTED. Plaintiffs' Complaint is **DISMISSED** for failure to state a claim.
The Court will grant Plaintiffs one opportunity to amend their complaint. If
Plaintiffs choose to do so, the amended complaint must be filed within 15 days
of the entry of this Order.

IT IS SO ORDERED.

DATED: August 22, 2013


BARRY TED MOSKOWITZ, Chief Judge
United States District Court