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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANA MIRIAM C. DICKENS,
Plaintiff,
v.
NBS DEFAULT SERVICES, LLC,
et al.,
Defendants.

Case No.: 17cv1610-LAB (RBB)

**ORDER GRANTING IN PART
MOTION TO DISMISS**

Plaintiff Ana Miriam C. Dickens, proceeding *pro se*, filed an action in state court challenging the nonjudicial foreclosure on her home. After removing the case, Defendant Wells Fargo Bank, N.A. moved to dismiss, and supported its motion with a request for judicial notice.

Judicial Notice

Under Fed. R. Evid. 201, the Court can take judicial notice of facts not subject to reasonable dispute. Dickens does not oppose judicial notice and does not dispute the authenticity of any of the documents. In fact, her opposition cites and relies on several of the documents. She disputes facts stated in some of the documents, however. For example, she says the Notice of Default overstates the amount of default in that it fails to credit her for payments she made. She also

1 reads the declaration in support of the Notice of Default as saying she was
2 contacted, and says neither Defendant contacted her. Similarly, she says the
3 Notice of Trustee's Sale fails to properly credit her for payments she made.

4 The only exhibit that is not properly the subject of judicial notice is Exhibit C,
5 a letter from the Office of Thrift Supervision authorizing World Savings Bank, FSB
6 to amend its charter and bylaws to change its name to Wachovia Mortgage. While
7 the letter itself cannot be noticed, the fact of World Savings Bank's name change
8 is well-documented in public records and can be noticed. *See, e.g., Campidoglio*
9 *LLC v. Wells Fargo & Co.*, 870 F.3d 963, 967 (9th Cir. 2017) (reciting the history
10 of Wachovia and World Savings Bank); *Rucker v. Wells Fargo Bank, N.A.*, 605
11 Fed. Appx. 670 (9th Cir. 2015) (in the case caption, identifying Wells Fargo as
12 "Successor by Merger with Wachovia Mortgage FSB formerly World Savings Bank
13 FSB"). The request is **GRANTED IN PART** as to Exhibit C, as noted. And the
14 request is **GRANTED** as to all other exhibits.

15 **Legal Standards**

16 A motion to dismiss challenges the legal sufficiency of a complaint. *Navarro*
17 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept all factual
18 allegations as true and construe them in the light most favorable to Plaintiffs.
19 *Cedars Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975
20 (9th Cir. 2007).

21 A motion to dismiss under Rule 12(b)(6) is evaluated by looking at the
22 complaint itself, documents incorporated into the complaint by reference, and any
23 relevant matters of which judicial notice may be properly taken. *See Tellabs, Inc.*
24 *v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

25 Documents incorporated by reference include those whose authenticity is
26 not contested, and upon which the complaint necessarily relies, regardless of the
27 extent to which it is mentioned in the complaint. *Parrino v. FHP, Inc.*, 146 F.3d
28 699, 706 (9th Cir. 1998).

1 Matters properly subject to judicial notice can also be considered when ruling
2 on a 12(b)(6) motion to dismiss. *Swartz v. KMPG LLP*, 476 F.3d 756, 763 (9th Cir.
3 2007). The court may treat such documents as “part of the complaint, and thus
4 may assume that its contents are true for purposes of a motion to dismiss under
5 Rule 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

6 The well-pleaded facts must do more than permit the Court to infer “the mere
7 possibility of misconduct”; they must show that the pleader is entitled to relief.
8 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To defeat the motions to dismiss, the
9 factual allegations need not be detailed, but they must be sufficient to “raise a right
10 to relief above the speculative level” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
11 555 (2007). Importantly, a plaintiff must plead facts, not mere “labels and
12 conclusions.” *Id.*

13 Legal conclusions, unlike facts, are not presumed to be true and the Court
14 need not accept them as such or rely on them even if they are cast in the form of
15 factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139
16 (9th Cir. 2003). Likewise, the Court need not accept allegations that contradict
17 matters subject to judicial notice. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d
18 544, 551 (9th Cir. 2014).

19 In assessing the adequacy of a complaint, the Court need not look to
20 explanations provided in the opposition. New or expanded allegations in opposition
21 to a motion to dismiss are considered when deciding whether to grant leave to
22 amend, but are not considered when ruling on a 12(b)(6) motion. See *Schneider*
23 *v. Cal. Dep't of Corr. & Rehab.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). See also
24 *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

25 When a complaint is dismissed for failure to state a claim, ordinarily leave to
26 amend is granted. See *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
27 1052 (9th Cir. 2003) (per curiam). But leave to amend will be denied where it is
28 clear the complaint cannot be saved by amendment. *Id.*

1 Although California pleading standards applied to the complaint before
2 removal, federal pleading standards apply now. *See Petersen v. Allstate Indem.*
3 *Co.*, 281 F.R.D. 413, 416 n.1 (holding that federal pleading standards apply to
4 state-law causes of action in federal court).

5 **Discussion**

6 **Allegation that Wells Fargo is Not the Beneficiary**

7 Dickens' allegations about who the current beneficiary is under the deed of
8 trust are legal conclusions, not factual allegations. The judicially noticed
9 documents show Wells Fargo succeeded as beneficiary to the deed of trust, and
10 Wells Fargo's motion to dismiss correctly traces the succession. (See Docket no.
11 4 at 13:7–14:5.) Her allegation that World Savings Bank is a “defunct banking
12 corporation” is also incorrect.

13 The judicially noticed materials and facts show that the deed of trust was
14 executed in favor of World Savings Bank, F.S.B. and its successors and/or
15 assignees. (Ex. A.) Through a series of name changes and mergers, Wells Fargo
16 Bank, N.A. became the successor World Savings Bank, and is therefore the
17 beneficiary of the deed of trust just as it claims to be. This is not subject to any
18 reasonable dispute, Dickens' conclusory allegations to the contrary
19 notwithstanding. *See Carbajal v. Wells Fargo Bank, N.A.*, 697 Fed. Appx. 555,
20 556 (9th Cir. 2017) (“The district court properly relied on judicially noticed
21 documents to find Wells Fargo obtained beneficial interest of the loan [secured by
22 a promissory note or deed of trust] as a successor of World Savings Bank.”)

23 **Allegation that Defendants Did Not Comply with Legal Obligations**

24 Dickens' allegations about which provision of law applies to her claim, and
25 what the requirements are, are not entitled to a presumption of truth.

26 Dickens brings claims under California's Homeowner's Bill of Rights
27 (“HBOR”), and cites California Civil Code § 2923.5. That section was replaced
28 with Civil Code § 2923.55, effective January 1, 2013. *Shaw v. Ocwen Loan*

1 *Servicing, LLC*, 2016 WL 7048979 at *4 (N.D. Cal., Dec. 5, 2016). This new
2 section requires that a mortgage servicer contact the borrower “in person or by
3 telephone in order to assess the borrower's financial situation and explore options
4 for the borrower to avoid foreclosure,” thirty days prior to recording a notice of
5 default. *Id.* The complaint alleges that Defendants did not contact Dickens, and
6 Wells Fargo does not claim otherwise.

7 But this section includes an exception if the lender undertakes due diligence
8 to attempt to contact the homeowner. That is what Wells Fargo maintains it did,
9 and Dickens has not alleged either that Wells Fargo did not undertake the required
10 due diligence, or that its efforts were insufficient. Furthermore, the complaint does
11 not allege facts suggesting that any violation of the HBOR was material. It only
12 mentions that she was not contacted by phone or in person¹ — not that she was
13 not contacted at all, or that she did not find the information she needed some other
14 way. Nor has she alleged facts showing she was harmed by the claimed HBOR
15 violation. See *Shumake v. Caliber Home Loans, Inc.*, 2017 WL 1362681 at *5
16 (C.D. Cal., Jan. 6, 2017) (citing Civil Code §§ 2924.10, 2924.17, and 2923.55)
17 (holding that HBOR violations are only actionable if they are material); *Colbert v.*
18 *Sage Point Lender Servs., LLC*, 2014 WL 7409291 at *7 (E.D. Cal., Dec. 30, 2014)
19 (dismissing claim for failure to allege actual economic harm from HBOR violations).

20 Although Wells Fargo argues that the Court should assume its declaration
21 regarding due diligence is true, the Court cannot make that assumption when ruling
22 on a 12(b)(6) motion.

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26 ¹ Each time the complaint alleges the lender’s and loan servicer’s failure to
27 contact Dickens, it specifies “in person or by telephone.” (Compl., ¶¶ 1, 21, 22,
28 28, 40, The allegations are entirely consistent with some other kind of contact,
such as a letter or email advising Dickens of her rights or asking her to contact
Wells Fargo.

1 **Allegations of Negligence, Constructive Fraud, and Concealment**

2 Dickens' allegations that Defendants' alleged negligence is actionable are
3 legal conclusions, and are not presumed true. A duty of care is a prerequisite for
4 a negligence claim. *Davis v. Nationstar Mortgage, LLC*, 2016 WL 7178466 at *8
5 (E.D. Cal., Dec. 9, 2016) (citing cases). And a lender generally owes no duty of
6 care to borrower with regard to lending and servicing the mortgage loan, and
7 attempting to foreclose on property. *Id.*; see also *Nymark v. Heart Fed. Sav. &*
8 *Loan Ass'n*, 23 Cal. App. 3d 1089, 1095–96 (Cal. App. 3 Dist. 1991) (holding that,
9 ordinarily, a financial institution acting within the scope of its conventional activities
10 as a lender owes no duty of care to a borrower).

11 Constructive fraud, unlike ordinary fraud, applies only in the context of a
12 fiduciary or confidential relationship. *Apostol v. CitiMortgage*, 2013 WL 6328256
13 at *9 (N.D. Cal., Nov. 21, 2013) (“[I]n order to allege a claim for constructive fraud,
14 there must be a fiduciary or confidential relationship between the parties.”) As
15 noted, Dickens has not alleged facts to suggest any fiduciary or other confidential
16 relationship.

17 Similarly, a claim of fraud through nondisclosure or concealment requires a
18 legal duty of disclosure, such as through a fiduciary or confidential relationship.
19 See *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 41 Cal. App. 4th 863, 866 (Cal.
20 App. 2 Dist. 1996). Dickens has not alleged facts sufficient to show that such a
21 duty or relationship existed.

22 Furthermore, the complaint alleges that the non-disclosed facts pertained to
23 the securitization of loans and plans for transferring the note at the time Dickens
24 entered into her loan. (Compl., ¶¶ 114–121.) It concludes that she was materially
25 harmed by the non-disclosure. But there is no explanation of how any of those
26 facts led to the foreclosure, or otherwise harmed Dickens.

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1 **Intentional Infliction of Emotional Distress**

2 The elements of a claim of intentional infliction of emotional distress include,
3 among other things, the extreme and outrageous conduct by the defendant with
4 the intention of causing emotional distress. *Cornell v. Berkeley Tennis Club*, 18
5 Cal. App. 5th 908, 945 (Cal. App. 1 Dist. 2017). This element may also be satisfied
6 by the reckless disregard of the probability of causing such distress. The conduct
7 is “outrageous” when it is so extreme as to exceed all bounds of what is usually
8 tolerated in a civilized community. *Id.*

9 Dickens has not alleged any “extreme and outrageous conduct” by
10 Defendants, as courts define such conduct. Nor has she pled facts leading to a
11 plausible inference that Defendants satisfied either the intent or reckless
12 indifference element.

13 **Slander of Title**

14 Dickens alleges that recordation of the notices of default and notice of sale
15 amounted to slander of title because they were “malicious or without authority”.
16 (Compl., ¶ 74.) She alleges this is so because “none of the Defendants have
17 perfected any claim of title or security interest in the Property” and that the
18 “mortgages” were not legally or properly acquired. (*Id.*, ¶ 75–76.)

19 Her allegations in support of this claim are almost wholly conclusory, and
20 conflict with the judicially-noticed documents showing that Wells Fargo is in fact
21 the beneficiary.

22 **Other Claims**

23 Dickens claims for declaratory relief; her claim under Cal. Bus. & Prof. Code
24 § 17200, *et seq.*; and her claim to quiet title fail for the same reasons set forth
25 above.

26 Dickens vaguely refers to failure to properly credit her mortgage payments,
27 but she never says what this means. For example, she does not identify any
28 payments she made that she was not correctly credited with, or suggest the

1 amount of those payments. Nor does she even suggest what was improper about
2 how they were credited. The first time reference to such payments occurs is in the
3 middle of paragraph 21. (See also ¶¶ 22, 47, 49, 55, 56, 107.) Given that the
4 complaint alleges she “provided proof of the payments” to Defendants, she should
5 be able to allege these facts.

6 **Rescission**

7 Rescission is a remedy, not a cause of action. *Wright v. Ocwen Loan*
8 *Servicing, LLC*, 2011 WL 13223956 at *5 (C.D. Cal., July 12, 2011). Dickens asks
9 that she be permitted to rescind the original loan. But for reasons set forth above,
10 she has not pled any facts that would support the award of this equitable remedy.

11 Furthermore, although Wells Fargo did not raise the issue, the Court may
12 require plaintiffs seeking to rescind a home mortgage loan to tender ability to pay
13 the loan. See *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1269 n.48
14 (C.D. Cal. 2010). The reason for this rule is to avoid deciding moot issues or grant
15 meaningless relief. See *Kmety v. Bank of America, Inc.*, 2011 WL 4566441 at *2
16 (S.D. Cal., Sept. 30, 2011). See also *Mt. Healthy City Sch. Dist. Bd. of Educ. v.*
17 *Doyle*, 429 U.S. 274, 278 (1977) (federal courts must raise jurisdictional issues,
18 *sua sponte* if necessary). Before entertaining any claim for rescission, the Court
19 requires that Dickens tender ability to repay the amount of the loan.

20 **Dickens’ Other Arguments**

21 Dickens’ opposition raised numerous arguments, none of which show that
22 the complaint is adequately pled. Dickens concedes that the motion has some
23 merit, however, and argues that the problems it has identified can be cured by
24 amendment. (Opp’n, Docket no. 8, at 3:16–20.)

25 **Conclusion and Order**

26 The Court finds that the complaint fails to state a claim. Because it is not
27 absolutely clear the complaint cannot be saved by amendment, the complaint is
28 **DISMISSED WITHOUT PREJUDICE**. If Dickens believes she can successfully

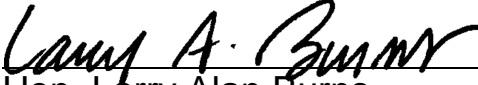
1 amend, she may file an *ex parte* motion for leave to amend (without obtaining a
2 hearing date) that complies with Civil Local Rule 15.1(b). She must do so no later
3 than **Thursday, April 5, 2018**. If she needs more time, she should file an *ex parte*
4 application requesting an extension, and explaining why she needs more time. **If**
5 **she does not seek leave to amend within the time permitted, and this action**
6 **may be dismissed.**

7 Dickens' motion for leave to amend must not seek reconsideration of any of
8 the Court's rulings in this order. If she wishes to ask the Court to reconsider any
9 of its rulings, she must comply with Civil Local Rule 7.1(i) and the chambers
10 Standing Order in Civil Cases. ¶ 4(j), both of which are available on the Court's
11 public website.

12 If Dickens files a motion for leave to amend, Defendants may file an
13 opposition no later than **14 calendar days from the date Dickens files her**
14 **motion**. No reply is to be filed without leave. After any motion and opposition are
15 filed, the Court may schedule a hearing if appropriate. Otherwise, the matter will
16 be deemed submitted on the briefs.

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19 **IT IS SO ORDERED.**

20 Dated: March 5, 2018

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23 Hon. Larry Alan Burns
24 United States District Judge
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