

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 ANTHONY COLEMAN,) Case No.: 2:11-cv-00178-GMN-LRL
4)
5 Plaintiff,) **ORDER**
6 vs.)
7)
8 AMERICAN HOME MORTGAGE)
9 SERVICING, INC.; POWER DEFAULT)
10 SERVICES, INC.; T.D. SERVICE COMPANY;)
11 MORTGAGE ELECTRONIC REGISTRATION)
12 SYSTEMS, INC.; AMERICAN HOME)
13 MORTGAGE ACCEPTANCE INC.,)
14 Defendants.)

15 **INTRODUCTION**

16 Before the Court is Defendants American Home Mortgage Servicing, Inc., (“American
17 Home Servicing”), Power Default Services, Inc. f/k/a AHMSI Default Services, Inc. (“Power
18 Default”), and Mortgage Electronic Registration Systems’ (“MERS”) Motion to Dismiss (ECF
19 No. 8). Plaintiff Anthony Coleman filed an untimely Response on July 18, 2011 (ECF No. 28)
20 and Defendants filed a Reply on July 28, 2011 (ECF No. 31).

21 Defendants American Home, Power Default and MERS also filed a Motion to Expunge
22 Lis Pendens on June 29, 2011 (ECF No. 22).

23 Also before the Court is Defendant T.D. Service Company’s (T.D. Service) Motion to
24 Dismiss filed on June 10, 2011 (ECF No. 12). Plaintiff filed a Response on June 24, 2011 (ECF
25 No. 16) and Defendant filed a Reply on June 27, 2011 (ECF No. 17).

Following these motions, Plaintiff filed two Motions to Amend/Correct Complaint (ECF
Nos. 29 & 36).

1 **FACTS AND BACKGROUND**

2 On or around October 15, 2004, Plaintiff Anthony Colman entered into a mortgage
3 agreement with American Home Mortgage Acceptance, Inc. for \$311,250.00 to purchase a
4 home at 6136 Benchmark Way, North Las Vegas, Nevada, 89031(the “Property”). (See Deed of
5 Trust (hereinafter “DOT”, October 15, 2004, Ex. A, ECF No. 8.) On the Deed of Trust, the
6 trustee is Fidelity National Title and MERS is listed as “nominee” and “beneficiary.” (See id.)
7 AHMSI Default Services, Inc. filed a Notice of Default (hereinafter “NOD”) on September 2,
8 2008. (See NOD, September 2, 2008, Ex. C, ECF No. 8.) AHMSI Default Services, Inc. is
9 listed as an agent for the trustee by Fidelity National Title as agent; however Fidelity National
10 Title is crossed out and replaced with “Lender Processing Service, as Agent.” (See id.)

11 On the same date as the NOD, AHMSI Default Services was substituted as trustee for
12 “Fidelity National Title by Bank of New York as Trustee for American Home Mortgage
13 Investment Trust 2004-4 Mortgage-backed notes, Series 2004-4 by American Home Mortgage
14 Servicing, Inc.” (hereinafter “Bank of New York”). (Substitution of Trustee, hereinafter “SOT”,
15 September 2, 2008, Ex. L, ECF No. 1–6.) On September 25, 2008, MERS, as nominee for
16 American Home Mortgage Acceptance, Inc. assigned the DOT to American Home Servicing.
17 (See Assignment of DOT, Sept. 25, 2008, Ex. M, ECF No. 1–6.) Then on November 25, 2009
18 American Home Servicing assigned the DOT to Bank of New York. (See Assignment of DOT,
19 Nov. 25, 2009, Ex. B, ECF No. 8.)

20 The trustee’s sale took place on April 20, 2011. (See Trustee’s Deed Upon Sale, April 20,
21 2011, Ex. E, ECF No. 8.) Power Default was the trustee listed on the sale. (Id.) Bank of New
22 York purchased the Property on that date. (Id.) It appears that T.D. Service Company conducted
23 the trustee sale as “an agent for Power Default.” (Id.)

24 Plaintiff filed the instant suit seeking to void the sale of the Property, alleging eight (8)
25 causes of action: (1) RESPA violation; (2) fraud and intentional deceit; (3) breach of contract

1 and breach of implied covenant of good faith and fair dealing; (4) quiet title; (5) declaratory
2 judgment; (6) fraudulent assignment; (7) set aside illegal trustee sale; and (8) fraudulent
3 foreclosure.

4 DISCUSSION

5 **A. Rule 12(b)(6) Standard**

6 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
7 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
8 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
9 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
10 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
11 12(b)(6) tests the complaint’s sufficiency. *See North Star Int’l. v. Arizona Corp. Comm’n.*, 720
12 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
13 failure to state a claim, dismissal is appropriate only when the complaint does not give the
14 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
15 *Atl. Corp. v. Twombly*, 550 U.S. 544, 554, 127 S.Ct. 1955, 1964 (2007). However, facts must be
16 sufficient to edge a complaint from the conceivable to the plausible in order to state a claim. *Id.*
17 In considering whether the complaint is sufficient to state a claim, the court will take all material
18 allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus.,*
19 *Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept
20 as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
21 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

22 The Supreme Court recently clarified that, in order to avoid a motion to dismiss, the
23 complaint must contain “factual content that allows the court to draw the reasonable inference
24 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949
25 (2009). The Court in *Ashcroft* further stated “[w]here a complaint pleads facts that are “merely

1 consistent with” a defendant’s liability, it “stops short of the line between possibility and
2 plausibility of entitlement to relief.” Id. Therefore, merely making an allegation is not enough
3 to survive a motion to dismiss; facts that a particular defendant may plausibly be liable for the
4 alleged conduct must be pled.

5 If the court grants a motion to dismiss, it must then decide whether to grant leave to
6 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
7 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
8 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); Foman
9 v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
10 that the deficiencies of the complaint cannot be cured by amendment. See DeSoto v. Yellow
11 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

12 Mindful of the fact that the Supreme Court has “instructed the federal courts to liberally
13 construe the ‘inartful pleading’ of pro se litigants,” Eldridge v. Block, 832 F.2d 1132, 1137 (9th
14 Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of leniency.

15 **B. Analysis**

16 **1. Statutory Defect – N.R.S. 170.080**

17 While Plaintiff has not specifically stated a claim for a statutorily defective foreclosure
18 under N.R.S. 170.080, Plaintiff’s sixth, seventh and eighth claims for fraudulent assignment, set
19 aside illegal trustee sale and fraudulent foreclosure will be construed as alleging a claim for a
20 statutorily defective foreclosure under N.R.S. § 170.080.

21 Nevada law provides that a deed of trust is an instrument that may be used to “secure the
22 performance of an obligation or the payment of any debt.” NRS § 107.020(1). Upon default, the
23 beneficiary, the successor in interest of the beneficiary, or the trustee may foreclose on the
24 property through a trustee’s sale to satisfy the obligation. NRS § 107.080(2)(c).

25 The procedures for conducting a trustee’s foreclosure sale are set forth in NRS § 107.080.

1 To commence a foreclosure, the beneficiary, the successor in interest of the beneficiary, or the
2 trustee must execute and record a notice of the breach and election to sell. NRS § 107.080(2)(c).
3 Under NRS § 107.080(5), a “sale made pursuant to this section may be declared void by any
4 court of competent jurisdiction in the county where the sale took place” if:

5 (a) The trustee or other person authorized to make the sale does not
6 substantially comply with the provisions of this section or any
7 applicable provision of NRS 107.086 and 107.087;

8 (b) Except as otherwise provided in subsection 6, an action is
9 commenced in the county where the sale took place within 90 days
10 after the date of the sale; and

11 (c) A notice of lis pendens providing notice of the pendency of the
12 action is recorded in the office of the county recorder of the county
13 where the sale took place within 30 days after commencement of the
14 action.

15 NRS § 107.080(5)(a)-(c).

16 A nominee on a deed of trust has the authority, as an agent, to act on behalf of the holder
17 of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide Bank, FSB*,
18 2009 WL 3617650, * 1 (D.Nev.2009). As long as the note is in default and the foreclosing
19 trustee is either the original trustee or has been substituted by the holder of the note or the
20 holder’s nominee, there is no defect in the Nevada foreclosure. *Id.* at *2.

21 The documents submitted by the parties demonstrate that the foreclosure may have been
22 statutorily invalid.¹ AHMSI Default Services, Inc. was listed as the trustee on the NOD on
23 September 2, 2008. However, the substitution of AHMSI Default Services, Inc. on the same
24 date appears to be invalid.

25 ///

¹ The Court takes judicial notice of the public records adduced by Defendants (ECF No. 8 Exs. A-C, E) and Plaintiff (ECF No. 1–6, Exs. L, M). See *Mack v. S. Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

1 The Substitution of Trustee, dated September 2, 2008 states that AHMSI Default Services
2 was substituted as trustee for Fidelity National Title by Bank of New York. However, Bank of
3 New York had yet to be assigned the DOT on September 2, 2008. It was not until September
4 25, 2008, that MERS, as nominee for American Home Mortgage Acceptance, Inc. assigned the
5 DOT to American Home Servicing. Then, on November 25, 2009, American Home Servicing
6 assigned the DOT to Bank of New York. Therefore, it appears that AHMSI Default Services,
7 Inc. was never properly substituted as trustee on September 2, 2008 and Power Default did not
8 have the proper authority to foreclose under N.R.S. § 107.080(2)(c).

9 Unfortunately, even though there may be a claim for a statutorily defective foreclosure,
10 Plaintiff has failed to state a claim for the tort of wrongful foreclosure pursuant to Nevada law
11 because he does not dispute his delinquency on the mortgage payments. See *Collins v. Union*
12 *Fed. Sav. & Loan Ass'n*, 662 P.2d 610 (Nev.1983) (Nevada recognizes the tort of wrongful
13 foreclosure where a homeowner alleges a lender wrongfully exercised the power of sale and
14 foreclosed upon their property when the homeowner was not in default on the mortgage loan.)

15 Further, to the extent Plaintiff's allegations are construed to state claims regarding
16 improper securitization of a mortgage, these also fail. See *Chavez*, 2010 WL 2545006, at*2
17 (holding N.R.S. § 107.080 does not forbid the securitization of a loan); *Guerra v. Just Mortg.*,
18 *Inc.*, No. 2:10-cv-00029-KJD-RJJ, 2010 WL 4822948, at *4-*5 (D.Nev. Nov. 22, 2010)
19 (holding that plaintiff's fraud claim fails because lender had no legal duty to inform plaintiff of
20 potential securitization of mortgage note). See also *Byrd v. Meridian Foreclosure Serv.*, No.
21 2:11-cv-00096-KJD-PAL, 2011 WL 1362135 (D.Nev. Apr. 8, 2011) (court dismissed
22 securitization claim because Nevada does not impose a legal duty on lender to inform the
23 borrower of securitization).

24 Plaintiff is granted leave to amend his sixth, seventh and eighth causes of action to allege
25 a statutory defect under N.R.S. § 107.080.

1 **2. Real Estate Settlement Procedures Act (RESPA)**

2 Plaintiff alleges that he sent Qualified Written Request (“QWR”) to American Home
3 Mortgage, Power Default, T.D. Service Company and MERS on May 1, 2010 pursuant to 12
4 U.S.C. §2605(e) and attached a copy of the letter to the Complaint (QWR, Ex. B, ECF No.1.)
5 Plaintiff alleges that Defendants failed to comply with the requirements of RESPA to
6 acknowledge receipt of the QWR within 20 business days and to provide a full written report of
7 their findings requested within 60 business days. Plaintiff admits that on June 28, 2010
8 American Home Servicing provided publicly recorded documents and said it does not have to do
9 anything else under 2605(e)(1)(a). (See Letter, June 28, 2010, Ex. G, ECF No. 1.) The letter
10 from American Home Servicing indicated that it was the current servicer of the loan. (Id.)

11 Loan servicers are obligated to respond to legitimate QWRs under 12 U.S.C. §
12 2605(e)(1).² A QWR is defined as:

13 a written correspondence, other than notice on a payment coupon or
14 other payment medium supplied by the servicer, that –

15
16 ² Specifically, loan servicers must follow these statutory guidelines:

17 (2) Action with respect to inquiry. Not later than 60 days (excluding legal public holidays, Saturdays, and
Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if
applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –

18 (A) make appropriate corrections in the account of the borrower, including the crediting of any late
charges or penalties, and transmit to the borrower a written notification of such correction (which shall
19 include the name and telephone number of a representative of the servicer who can provide assistance
to the borrower);

20 (B) after conducting an investigation, provide the borrower with a written explanation or clarification
that includes –

21 (i) to the extent applicable, a statement of the reasons for which the servicer believes the account
of the borrower is correct as determined by the servicer; and

22 (ii) the name and telephone number of an individual employed by, or the office or department of,
the servicer who can provide assistance to the borrower; or

23 (C) after conducting an investigation, provide the borrower with a written explanation or clarification
that includes –

24 (i) information requested by the borrower or an explanation of why the information requested is
unavailable or cannot be obtained by the servicer; and

25 (ii) the name and telephone number of an individual employed by, or the office or department of,
the servicer who can provide assistance to the borrower.

12 U.S.C. § 2605(e)(2).

- 1 (i) includes, or otherwise enables the servicer to identify, the name
and account of the borrower; and
- 2 (ii) includes a statement of the reasons for the belief of the borrower,
3 to the extent applicable, that the account is in error or provides
sufficient detail to the servicer regarding other information sought by
4 the borrower.

5 12 U.S.C. § 2605(e)(1)(B).

6 Here, Plaintiff's letter does not appear to meet this definition, since his request does not
7 include any statement of the reasons for his belief that the account is in error, nor does it request
8 corrections to the account. Instead, Plaintiff's stated reason for the letter is "to complain about
9 the accounting and servicing of this mortgage and my need for understanding and clarification
10 of various sale, transfer, funding source, legal and beneficial ownership, charges, credits, debits,
11 transactions, reversals, actions, payment, analyses and records related to the servicing of this
12 account from its origination to the present date." (See QWR, Ex. B, ECF No. 1.) Plaintiff's
13 QWR continues that he is "concerned with all the news lately regarding the stories of predatory
14 lending and you have left me feeling that there is something you are trying to hide." Plaintiff
15 demands certain documentation and audits to be done with respect the loan servicer's practices
16 and procedures. Plaintiff then asks dozens of questions that amount to a discovery request.
17 These requests do not adhere to the letter nor the spirit of the RESPA statute. Accordingly, the
18 Court dismisses this claim without leave to amend.

19 **3. Fraud and Intentional Deceit**

20 Fed. R. Civ. P. 9(b) provides that "[i]n alleging fraud or mistake, a party must state with
21 particularity the circumstances constituting fraud or mistake." The elements of intentional
22 misrepresentation or common law fraud in Nevada are: (1) a false representation made by the
23 defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient
24 basis for making the representation); (3) defendant's intention to induce the plaintiff to act or to
25 refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance

1 upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance.
2 *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992).

3 Plaintiff fails to state with any particularity facts that would establish a claim for
4 intentional misrepresentation or common law fraud. Therefore, this claim is dismissed without
5 prejudice. Plaintiff is granted leave to amend this claim.

6 **4. Breach of Contract and Implied Covenant of Good Faith and Fair Dealing**

7 To state a claim for breach of contract in Nevada, a Plaintiff must demonstrate (1) the
8 existence of a valid contract, (2) that plaintiff performed or was excused from performance,
9 (3) that the defendant breached, and (4) that the plaintiff sustained damages. See *Calloway v.*
10 *City of Reno*, 993 P.2d 1259, 1263 (2000). Under Nevada law, “[e]very contract imposes upon
11 each party a duty of good faith and fair dealing in its performance and execution.” *A.C. Shaw*
12 *Constr. v. Washoe County*, 105 Nev. 913, 784 P.2d 9, 9 (Nev.1989) (quoting Restatement
13 (Second) of Contracts § 205).

14 Plaintiff has only alluded to the contract formed between himself and the “Lender.”
15 Furthermore, Plaintiff alleges that the wrongful conduct of the defendants has to do with
16 predatory lending. Therefore, Plaintiff has only potentially stated a claim against the Defendant
17 American Home Mortgage Acceptance, Inc. as the lender on the DOT. Therefore, the Court
18 finds that Plaintiff has failed to allege a sustainable claim for breach of contract and the
19 covenants of good faith and fair dealing as to Defendants American Home Servicing, Power
20 Default, T.D. Service Company, and MERS. Accordingly, the Court dismisses Plaintiff’s
21 second cause of action against all defendants, except American Home Mortgage Acceptance,
22 Inc., without leave to amend.

23 **5. Quiet Title and Declaratory Judgment**

24 The Court will not dismiss Plaintiff’s claims for quiet title and declaratory judgment at
25 this time because Plaintiff has stated a claim for a statutorily defective foreclosure.

1 **CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendants American Home Mortgage Servicing, Inc.,
3 (“American Home Servicing”), Power Default Services, Inc. f/k/a AHMSI Default Services, Inc.
4 (“Power Default”), and Mortgage Electronic Registration Systems’ (“MERS”) Motion to
5 Dismiss (ECF No. 8) and Defendant T.D. Service Company’s (T.D. Service) Motion to Dismiss
6 (ECF No. 12) are **GRANTED in part as to claims, one and two and DENIED in part as to**
7 **claims three, four, five, six, seven and eight.** Plaintiff Anthony Coleman is granted leave to
8 Amend as provided by this Order. **Plaintiff Anthony Coleman shall file his amended**
9 **complaint by January 3, 2012.**

10 **IT IS ORDERED** that Defendants’ Motion to Expunge Lis Pendens (ECF No. 22) is
11 **DENIED.**

12 **IT IS FURTHER ORDERED** that Plaintiff’s two Motions to Amend/Correct Complaint
13 (ECF Nos. 29 & 36) are **DENIED as MOOT.**

14 DATED this 8th day of December, 2011.

15
16 
17 _____
18 Gloria M. Navarro
19 United States District Judge
20
21
22
23
24
25