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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RACHEL BURD,

Plaintiff(s),

v.

JP MORGAN CHASE and BANK OF
NEW YORK MELLON ,

Defendant(s).

2:13-CV-337 JCM (PAL)

ORDER

Presently before the court is defendants JP Morgan Chase and Bank of New York Mellon’s motion to dismiss. (Doc. # 4). Pro se plaintiff Rachel Burd responded (doc. # 8), and defendants filed a reply (doc. # 9).

I. Background Facts

On or about June 30, 2006, plaintiff purchased property located at 3017 Prairie Princess Avenue in North Las Vegas (“the property”). (Doc. 4-1, Ex. A). Plaintiff executed a promissory note in the amount of \$232,950 in favor of Countrywide Bank, N.A., which was secured by a deed of trust against the property naming Mortgage Electronic Registration System, Inc. (“MERS”) as the beneficiary. (*Id.*). CTC Real Estate Services was named as the trustee for the deed of trust. (*Id.*).

On October 6, 2009, MERS executed a corporation assignment of deed of trust, assigning the deed to the Bank of New York Mellon (“BNY”) as the successor in interest of JP Morgan Chase. (*Id.* at Ex. B). Subsequently BNY executed a substitution of trustee, naming ReconTrust Company

1 as trustee. (*Id.* at Ex. C).

2 Also, on October 6, 2009, ReconTrust Company recorded a notice of default. (*Id.* at Ex. D).
3 ReconTrust Company recorded a rescission of the notice of default on April 8, 2010. (*Id.* at Ex. E).
4 A notice of trustee’s sale was recorded by ReconTrust Company on August 3, 2010. (*Id.* at Ex. F).
5 A foreclosure mediation certificate was recorded by ReconTrust Company on October 25, 2010, and
6 notices of trustee’s sale were recorded on October 25, 2010, and March 15, 2011. (*Id.* at Exs. G-I).
7 The property was sold at a trustee’s sale on June 2, 2011, and a trustee’s deed upon sale was recorded
8 on June 21, 2011. (*Id.* at Ex. J)

9 Plaintiff filed her complaint on February 4, 2013, in state court. (Doc. # 1, Ex. A). Although
10 not abundantly clear, the court, in fairness, construes plaintiff’s pro se complaint to allege the
11 following claims: (1) securitization, (2) validity of assignment, (3) misrepresentation and fraud, and
12 (4) quiet title. (*Id.*). Defendants removed the case on February 27, 2013 (doc. # 1), and subsequently
13 filed the instant motion to dismiss (doc. # 4).

14 **II. Legal Standard**

15 *A. Rule 8*

16 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can
17 be granted.” FED. R. CIV. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
18 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2); *Bell*
19 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
20 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements
21 of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted). “Factual
22 allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus,
23 to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim
24 to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

25 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when
26 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations
27 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.

1 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
2 suffice. *Id.* at 1949. Second, the court must consider whether the factual allegations in the complaint
3 allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's
4 complaint alleges facts that allows the court to draw a reasonable inference that the defendant is
5 liable for the alleged misconduct. *Id.* at 1949.

6 Where the complaint does not “permit the court to infer more than the mere possibility of
7 misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.”
8 *Id.* (internal quotations and alterations omitted). When the allegations in a complaint have not
9 crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550
10 U.S. at 570.

11 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
12 1216 (9th Cir. July 25, 2011). The *Starr* court stated, “First, to be entitled to the presumption of
13 truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of
14 action, but must contain sufficient allegations of underlying facts to give fair notice and to enable
15 the opposing party to defend itself effectively. Second, the factual allegations that are taken as true
16 must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party
17 to be subjected to the expense of discovery and continued litigation.” *Id.*

18 “Generally, a district court may not consider any material beyond the pleadings in ruling on
19 a Rule 12(b)(6) motion However, material which is properly submitted as part of the complaint
20 may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
21 F.2d 1542, 1555 n.19 (9th Cir.1990) (citations omitted). Similarly, “documents whose contents are
22 alleged in a complaint and whose authenticity no party questions, but which are not physically
23 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
24 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d
25 449, 454 (9th Cir. 1994). Under Fed. R. Evid. 201, a court may take judicial notice of “matters of
26 public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if
27 the district court considers materials outside of the pleadings, the motion to dismiss is converted into
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1 a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
2 925 (9th Cir. 2001).

3 *B. Rule 9*

4 Rule 9 provides that for a party to allege fraud, he “must state with particularity the
5 circumstances constituting fraud . . . Malice, intent, knowledge, and other conditions of a person’s
6 mind may be alleged generally.” FED. R. CIV. P. 9(b). Assertions of fraud must include “the who,
7 what, when, where, and how” of the misconduct alleged. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
8 1097, 1106 (9th Cir. 2003). Rule 9 serves several purposes, including: (1) providing defendants with
9 adequate notice so they are able to defend the charge and deter plaintiffs from filing complaints “as
10 a pretext for the discovery of unknown wrongs”; (2) to protect those whose reputation would be
11 harmed as a result of being subject to fraud charges; and (3) to ‘prohibit [] plaintiff[s] from
12 unilaterally imposing upon the court, the parties and society enormous social and economic costs
13 absent some factual basis.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
14 (quoting *In re Stac Elecs. Sec Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (citation omitted)).

15 **III. Discussion**

16 As an initial matter, the court acknowledges that the complaint and opposition to the instant
17 motion are *pro se*, which is held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94
18 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however
19 inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by
20 lawyers.”) (internal quotations and citations omitted). However, “pro se litigants in the ordinary civil
21 case should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*,
22 790 F.2d 1362, 1364 (9th Cir.1986).

23 Defendants argue that plaintiff has not met the proper pleading requirements under Fed. R.
24 Civ. P. 9 and that plaintiff’s complaint presents no potentially viable claims for relief against
25 defendants. Plaintiff asserts that her complaint meets and exceeds the standard governed by Fed. R.
26 Civ. P. 8(a).

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1 A. *Securitization*

2 Securitization does not inherently change the “existing legal relationship between the parties
3 to the extent that the original parties cease to occupy the roles they did at the closing.” *Reyes v.*
4 *GMAC Mortgage, LLC.*, 2:11-cv-100-JCM-RJJ, 2011 WL 1322775, *2 (D. Nev. 2011).
5 “Securitization of a loan does not in fact alter or affect the legal beneficiary’s standing to enforce the
6 deed of trust.” *Id.* (collecting cases). Since “securitization merely creates a separate contract,
7 distinct from plaintiffs’ debt obligations[] under the note and does not change the relationship of
8 the parties in any way, plaintiffs’ claims arising out of the securitization fail.” *Id.* at *3 (citing
9 *Commonwealth Prop. Advocates, LLC v. First Horizon Home Loan Corp.*, No. 2:10-cv-375, 2010
10 WL 4788209, at *4 (D. Utah Nov. 16, 2010) (quotation marks and citation omitted)).

11 The court construes plaintiff’s pro se complaint to allege claims premised upon the
12 securitization of the note. (Doc. # 1-1, 2: ¶ 4). To the extent that plaintiff’s claims rely upon
13 securitization of the note changing the legal relationship of the parties, these claims are dismissed
14 because there are no grounds in which relief may be granted.

15 B. *Validity of Assignment*

16 It is well-established that “a third party lacks standing to raise a violation of a [Pooling and
17 Servicing Agreement (‘PSA’)].” *Benoist v. U.S. Bank N.A.*, 2012 WL 3202180, at *5 (D.Haw. Aug.
18 3, 2012) (collecting cases); *see also, e.g., Vilorio v. Premium Capital Funding LLC*, 2012 WL
19 4361252, at *3 (D.Nev. Sept. 20, 2012) (“Plaintiffs lack standing . . . to enforce or assert claims
20 arising under the trust purchase agreement or [PSA] surrounding the ‘securitization’ of the Note.”)
21 (collecting cases).

22 The court construes plaintiff’s pro se complaint to allege that the assignment of the note and
23 deed of trust was invalid for violating various provisions of the PSA. (Doc. # 1-1, 2: ¶ 3). However,
24 even if these allegations are true, plaintiff was neither a party, nor an intended third-party beneficiary,
25 to the assignment of the PSA. Plaintiff has also failed to assert that she is a party to, or a third-party
26 of, the PSA’s terms or the assignment of deed of trust. Therefore, plaintiff does not have standing
27 to allege any violations of the PSA or attack the validity of the assignment.
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1 Plaintiff's implied claims based on alleged PSA violations or the validity of the assignment
2 are dismissed.

3 *C. Misrepresentation and Fraud*

4 Intentional misrepresentation requires that the plaintiff state "(1) the defendant made a false
5 representation; (2) with the knowledge or belief that the representation was false (knowledge that
6 it had an insufficient basis for making the representation); (3) and was made with the intention of
7 inducing the party to act or refrain from acting upon the misrepresentation; (4) plaintiff justifiably
8 relied upon the misrepresentation; and (5) plaintiff suffered damage as a result of the reliance."
9 *Scaffidi v. United Nissan*, 425 F. Supp. 2d 1159, 1168-69 (D. Nev. 2005). Intentional
10 misrepresentation and negligent misrepresentation are related, the difference being "that a negligent
11 misrepresentation is made without a reasonable basis for believing its truthfulness." *Id.* at 1170.

12 "[A] plaintiff asserting fraud against a corporate [entity] must state the names of the persons
13 who made the allegedly fraudulent representations, their authority to speak, to whom they spoke,
14 what they said or wrote, and when it was said or written." *Roberts v. McCarthy*, no. 2:11-cv-00080,
15 2010 WL 1363811, at *3 (D. Nev. April 11, 2011) (quoting *Spencer v. DHI Mortg., Inc.*, 642
16 F.Supp.2d 1153, 1164 (E.D. Cal. 2009)).

17 Plaintiff's reliance upon Rule 8(a)'s requirement of a "short and plain statement of the claim
18 showing that the pleader is entitled to relief" is not applicable in cases of fraud. Fraud claims must
19 meet the heightened pleading standard of Rule 9 and allege the who, what, when where, and how.
20 Plaintiff's complaint only states that she had a "justified reliance on truthfulness of ownership and
21 proper assignments which was misrepresented by defendant's account of ownership beneficiary
22 through endorsements, assignments, notice of default and notice of trustee sale." (Doc. # 1-1, 2: ¶
23 5).

24 Plaintiff fails to provide the time, place, substance of the alleged misrepresentation, or the
25 identity of the person who made the alleged misrepresentation. Thus, even with plaintiff's complaint
26 construed liberally, she has failed to make sufficient allegations under the heighten pleading
27 standard. Further, plaintiff has failed to provide any factual assertions that she justifiably relied on
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1 the alleged misrepresentation or allege how her reliance on the misrepresentation caused her to suffer
2 her damages.

3 Since plaintiff has failed to adequately plead or allege fraud or misrepresentation, these
4 claims are dismissed.

5 *D. Quiet Title*

6 “A quiet title claim requires a plaintiff to allege that the defendant is unlawfully asserting an
7 adverse claim to title to real property.” *Kemberling v. Ocwen Loan Servicing, LLC*, 2:09-CV-00567-
8 RCJ (LRL), 2009 WL 5039495, at *2 (D. Nev. 2009). Where such adverse claims exist, the party
9 seeking to have another party’s right to property extinguished bears the burden of overcoming the
10 “presumption in favor of the record titleholder.” *See Breliant v. Preferred Corp.*, 918 P.2d 314, 318
11 (Nev. 1996); *see also Clay v. Scheeline Banking & Trust Co.*, 159 P. 1080, 1082 (Nev. 1916).

12 The court construes plaintiff’s pro se complaint to assert a claim for quiet title. (Doc. # 1-1,
13 2: ¶ 5). In plaintiff’s complaint she asserts no other party claiming any interest in the property that
14 is adverse to plaintiff’s title or the deed of trust. She also has not identified any party with an adverse
15 interest. There is not presently a dispute between two or more parties over the right to foreclosure
16 under the mortgage. Plaintiff has not overcome the burden of a “presumption in favor of the record
17 titleholder.” Therefore, plaintiff’s quiet title is dismissed.

18 **IV. Conclusion**

19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants JP Morgan
21 Chase and Bank of New York Mellon’s motion to dismiss (doc. # 4) be, and the same hereby is,
22 GRANTED without prejudice.

23 DATED April 25, 2013.

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25 
26 **UNITED STATES DISTRICT JUDGE**