

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

AUGUSTA INVESTMENT)
MANAGEMENT, LLC,)
))
Plaintiff,)
))
vs.)
))
DOMONIC GRUNSTAD, et al.,)
))
Defendants.)
_____)

Case No.: 2:15-cv-00125-GMN-NJK

ORDER

Pending before the Court is the Motion to Dismiss (ECF No. 15) filed by Defendant Carrington Mortgage Service, LLC (“Carrington”). Plaintiff Augusta Investment Management, LLC (“Plaintiff”) filed a Response (ECF No. 16), and Carrington filed a Reply (ECF No. 17). For the reasons discussed below, the Court **GRANTS** Defendant’s Motion to Dismiss.

I. BACKGROUND

This action involves a dispute over property that was subject to a homeowners’ association “super-priority” lien for delinquent assessment fees. (See Compl., ECF No. 1-2). On April 4, 2008, Defendants Domonic Grunstad and Kyle Kuriatnyk¹ executed a Deed of Trust on their property located at 9164 Conquest Court, Las Vegas, Nevada (the “Property”). (Id. ¶¶ 1, 12). The Deed of Trust listed Taylor, Bean & Whitaker Mortgage Corp. (“TB&W”) as trustee and Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary. (Id. ¶ 12; Deed of Trust, ECF No. 1-5). The Loan was also federally insured by the Department of Housing and Urban Development (“HUD”) through the Federal Housing Administration (“FHA”) insurance program. (See Deed of Trust).

¹ On March 25, 2015, the Clerk of Court entered default (ECF No. 14) against Defendant Kuriatnyk for failure to make an appearance in this case. As of the date of this Order, Defendant Grunstad has not been served nor has he made an appearance.

1 On March 1, 2013, Assessment Management Services (“AMS”) filed a Notice of
2 Delinquent Assessment Lien on the Property on behalf of the Tapestry at Town Center
3 Homeowners’ Association (“HOA”). (Compl. ¶ 22). On April 15, 2014, AMS filed a Notice of
4 Default and Election to Sell under the HOA lien. (Id. ¶ 23). AMS then filed a Notice of Intent
5 to Foreclose on the Property. (Id. ¶ 24). On November 6, 2014, AMS foreclosed on the HOA
6 lien, selling the Property to Plaintiff. (Id. ¶¶ 24, 27).

7 On October 17, 2011, TB&W assigned the Deed of Trust to Bank of America, N.A.,
8 successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans
9 Servicing, LP (“BOA”). (Compl. ¶ 16). On January 21, 2015, BOA assigned the Deed of Trust
10 to Carrington. (Mot. for Substitution 2:15, ECF No. 8).

11 Plaintiff initiated the present action by filing its Complaint in state court on December
12 15, 2014, seeking to quiet title against both BOA and the former owners of the Property,
13 Defendants Grunstad and Kuriatnyk. (Compl. ¶¶ 53–57). Plaintiff later agreed to substitute
14 Carrington, assignee to the Deed of Trust, as a named defendant in place of BOA. (Non-Opp’n
15 to Mot. to Substitute, ECF No. 11; see also Order, ECF No. 12). Plaintiff alleges that
16 Carrington and its predecessors’ interests in the property were extinguished by the HOA
17 foreclosure sale pursuant to Nevada Revised Statutes § 116.3116. (Id. at ¶¶ 1, 18–34); see also
18 SFR Invs. Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, at *1 (2014) (holding that an HOA’s
19 foreclosure of its super-priority lien under § 116.3116 extinguishes a first deed of trust).

20 On January 22, 2015, former Defendant BOA removed the case to this Court. (ECF No.
21 1). Carrington subsequently filed the presently pending Motion to Dismiss, asserting that
22 Plaintiff cannot prove good title in itself because the HOA sale was invalid. (MTD 4:2–5, ECF
23 No. 15).

1 **II. LEGAL STANDARD**

2 Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a
3 cause of action that fails to state a claim upon which relief can be granted. See *North Star Int'l*
4 *v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to
5 dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
6 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
7 on which it rests. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
8 whether the complaint is sufficient to state a claim, the Court will take all material allegations
9 as true and construe them in the light most favorable to the plaintiff. See *NL Indus., Inc. v.*
10 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

11 The Court, however, is not required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
13 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
14 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
15 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
16 *Twombly*, 550 U.S. at 555) (emphasis added). In order to survive a motion to dismiss, a
17 complaint must allege “sufficient factual matter, accepted as true, to state a claim to relief that
18 is plausible on its face.” *Id.* “A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Id.*

21 “Generally, a district court may not consider any material beyond the pleadings in ruling
22 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
23 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
24 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
25 “documents whose contents are alleged in a complaint and whose authenticity no party

1 questions, but which are not physically attached to the pleading, may be considered in ruling on
2 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
3 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
4 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
5 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
6 materials outside of the pleadings, the motion to dismiss is converted into a motion for
7 summary judgment. See Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261
8 F.3d 912, 925 (9th Cir. 2001).

9 If the court grants a motion to dismiss, it must then decide whether to grant leave to
10 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
11 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
12 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
13 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
14 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is
15 only denied when it is clear that the deficiencies of the complaint cannot be cured by
16 amendment. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

17 **III. DISCUSSION**

18 The underlying issue here is whether pursuant to Nevada Revised Statutes § 116.3116,
19 HOA’s November 6, 2014 foreclosure on the Property extinguished TB&W and its successors’
20 first security interest. Carrington argues that “[b]ecause the loan [on the Property] is
21 guaranteed by the United States Government [through the FHA insurance program], the HOA’s
22 non-judicial foreclosure under NRS 116.3116 violate[d] the Supremacy Clause.” (MTD 5:4–6,
23 ECF No. 15). As a result, “the HOA sale [was] invalid . . . and Plaintiff cannot quiet its title to
24 the property.” (Id.).

1 The Court has previously addressed Carrington’s argument in a case with almost
2 identical facts. See *Washington & Sandhill Homeowners Ass’n v. Bank of Am., N.A.*, No. 2:13-
3 cv-01845-GMN-GWF, 2014 WL 4798565 (D. Nev. Sept. 25, 2014). In *Washington &*
4 *Sandhill*, the Court described “the FHA insurance program[in which] mortgagees must take
5 action within a limited time after a default and, if they purchase the property at the foreclosure,
6 mortgagees must then convey title to HUD.” *Id.* at *6; see also *Sec. of Hous. & Urban Dev. v.*
7 *Sky Meadow Ass’n*, 117 F. Supp. 2d 970, 973–74 (C.D. Cal. 2000). The Court went on to find
8 that

9 in situations where a mortgage is insured by a federal agency under
10 the FHA insurance program, state laws cannot operate to undermine
11 the federal agency’s ability to obtain title after foreclosure and resell
12 the property. Accordingly, even though HOA would generally be able
13 to conduct a foreclosure pursuant to Nevada Revised Statutes
14 § 116.3116 that would extinguish a first secured interest, such a
15 foreclosure in this case “would operate[] to impede or condition the
16 implementation of federal policies and programs” and therefore “must
17 yield under the supremacy clause of the Constitution to the interests
18 of the federal government.”

19 *Id.* (quoting *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979)).²

20 In this case, Plaintiff alleges that HOA’s November 6, 2014 foreclosure extinguished the
21 first Deed of Trust on the federally-insured Property. (Compl. ¶ 53). However, “[b]ecause a
22 homeowners association’s foreclosure under Nevada Revised Statutes § 116.3116 on a Property
23 with a mortgage insured under the FHA insurance program would have the effect of limiting
24 the effectiveness of the remedies available to the United States, the Supremacy Clause bars
25

² Although HUD held a present interest in the property at issue in *Washington & Sandhill*, HUD did not acquire its interest until after the HOA foreclosure sale. *Washington & Sandhill*, 2014 WL 4798565, at *1–2 (“[Mortgagee] conveyed title to the Property by grant deed to HUD on May 17, 2013[, and] . . . HOA . . . purchased the Property at a foreclosure sale . . . on May 23, 2012.”). Accordingly, the result in *Washington & Sandhill* would have remained the same regardless of whether HUD’s interest in the disputed property was a present interest or a future interest.

1 such foreclosure sales.” Washington & Sandhill, 2014 WL 4798565, at *7. Therefore, HOA’s
2 foreclosure was invalid under the United States Constitution. Accordingly, HOA’s claims for
3 quiet title—which are premised on this foreclosure’s extinguishment of the FHA insured
4 mortgage interest—must be dismissed.

5 Plaintiff suggests that this case does not implicate any federal interests because “FHA
6 insurance is likely not even triggered by the homeowners [sic] association sale.” (Resp. 6:20,
7 ECF No. 16). Further, Plaintiff instructs the Court to “determine whether HUD would pay on
8 this claim of a private mortgage corporation failing to make a[n HOA] lien payment.” (Id. 9:8–
9 9). Indeed, if HUD’s future interest in the Property was barred at the time of HOA’s
10 foreclosure sale because the FHA insurance policy had already terminated, then the Supremacy
11 Clause analysis would not apply. However, Plaintiff does not cite to any case law, statute, or
12 regulation in support of its theory that an exception to HUD’s future interest in the Property
13 might exist, and the Court is not required to do this legal analysis for Plaintiff. *Couturier v. Am.*
14 *Invsco Corp.*, No. 2:12-cv-01104-APG-NJK, 2013 WL 4499008, at *3 (D. Nev. Aug. 20, 2013)
15 (“A judge is the impartial umpire of legal battles, not a party’s attorney. He is neither required
16 to hunt down arguments the parties keep camouflaged, nor required to address perfunctory and
17 undeveloped arguments.”). Because Plaintiff has failed to allege that any exception to HUD’s
18 future interest in the Property exists, Defendant’s Motion to Dismiss is granted.

19 However, Rule 15(a)(2) of the Federal Rules of Civil Procedure allows courts to “freely
20 give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Court should
21 “freely give” leave to amend when there is no “undue delay, bad faith or dilatory motive on the
22 part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the
23 amendment, [or] futility of amendment.” Id.; *Forman v. Davis*, 371 U.S. 178, 182 (1962).
24 Generally, the Court denies leave to amend only when it is clear that the deficiencies of the
25 complaint cannot be cured by amendment. See *DeSoto v. Yello Freight Sys., Inc.*, 957 F.2d 655,

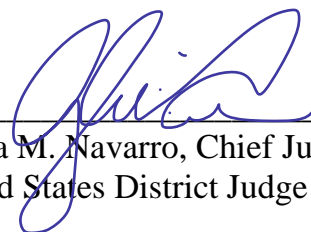
1 658 (9th Cir. 1992). Further, “a district court should grant leave to amend even if no request to
2 amend the pleading was made, unless it determines that the pleading could not possibly be
3 cured.” See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

4 Because amending Plaintiff’s Complaint to allege an exception to HUD’s future interest
5 in the Property would resolve the deficiencies in Plaintiff’s Complaint, the Court finds that
6 amendment would not be futile. Therefore, Plaintiff’s Complaint is dismissed without
7 prejudice, and Plaintiff is granted leave to file an amended complaint curing this defect.
8 Plaintiff shall file an amended complaint within twenty-one days of the date of this Order
9 explaining the basis of any alleged exceptions to HUD’s future interest. Failure to file an
10 amended complaint by this date shall result in the Court dismissing Plaintiff’s claims against
11 Defendants with prejudice.

12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss (ECF No. 15) is
14 **GRANTED**. Plaintiff’s Complaint (ECF No. 1-2) is **DISMISSED without prejudice**.
15 Plaintiff shall have twenty-one days from the date of this Order to file an amended complaint.
16 Failure to file a second amended complaint by this date shall result in the dismissal of
17 Plaintiff’s claim with prejudice.

18 **DATED** this 10 day of March, 2016.

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21 _____
22 Gloria M. Navarro, Chief Judge
23 United States District Judge
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25