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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MIYAYAMA YUICHI, an individual,

Plaintiff,

v.

MTC FINANCIAL INC., dba TRUSTEE
CORPS, a California corporation;
FEDERAL HOME LOAN MORTGAGE
CORPORATION, a federally chartered
corporation; and DOES 1-5, inclusive,

Defendants.

Case No. 2:16-cv-00206-MMD-CWH

ORDER

I. SUMMARY

Plaintiff purchased property encumbered by a first deed of trust and seeks to halt non-judicial foreclosure proceedings. Before the Court Federal Home Loan Mortgage Corporation's ("Freddie Mac") Motion to Dismiss ("Motion"). (ECF No. 19.) Plaintiff has opposed (ECF No. 20) and Freddie Mac has replied (ECF No. 21). For the reasons discussed below, the Motion is granted.

II. BACKGROUND

The following facts are taken primarily from the Complaint and the briefs relating to Plaintiff's motion for a temporary restraining order. On October 9, 2014, Plaintiff acquired his interest in a residential real property located at 9404 Amber Valley Lane in Las Vegas ("the Property") from Indian Home Program, LLC, Series III. (ECF No. 1-1 at 4, 11.) Since then, he has spent a significant amount of money on improvements to the Property. (*Id.* at 7-8.) The Property is encumbered by a deed of trust to National City

1 Mortgage to secure a mortgage loan to the previous owner, Dennis Del Re. (ECF No.
2 12-1.) A subsequent deed of trust (“DOT”) was recorded in August 2004 to secure a
3 loan by National City Mortgage.¹ (ECF No. 12-2.)

4 On September 30, 2013, Defendant MTC Financial Inc. dba Trustee Corps
5 (“MTC” or “Trustee Corps”), as substitute trustee under the DOT, recorded a Notice of
6 Breach and Default and Election to Sale (“NOD”). (ECF No. 12-3.)

7 On March 10, 2014, Indian Homes recorded a Bankruptcy Trustee’s quitclaim
8 deed (“BT Quitclaim Deed”). (ECF No. 12-4.) Indian Homes conveyed the Property to
9 Plaintiff on October 9, 2014. (ECF No. 1-1 at 11.)

10 Shortly before Plaintiff acquired the Property, Trustee Corps recorded a Notice of
11 Trustee’s Sale (“NOTS”) on September 23, 2014. (ECF No. 12-5.) After Plaintiff
12 acquired the Property, on November 19, 2015, Trustee Corps recorded a new Notice of
13 Trustee’s Sale for December 30, 2015. (ECF No. 12-7.) An assignment of the DOT to
14 Freddie Mac was also recorded on November 19, 2015. (ECF No. 12-8.) Plaintiff
15 alleges that Freddie Mac “holds the mortgage loan encumbering the subject real
16 property.” (ECF No. 1-1 at 5.)

17 On December 28, 2015, Plaintiff initiated this action in state court. (ECF No. 1-1.)
18 Freddie Mac removed the action and has moved for dismissal. (ECF Nos. 1, 19.)

19 **III. LEGAL STANDARD**

20 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
21 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
22 provide “a short and plain statement of the claim showing that the pleader is entitled to
23 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
24 While Rule 8 does not require detailed factual allegations, it demands more than “labels
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26 ¹The Court takes judicial notice of the publicly recorded documents in connection
27 with the Property and referenced in this section of the Order. *See Disabled Rights*
28 *Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the
court may take judicial notice of the records of state agencies and other undisputed
matters of public record under Fed. R. Evid. 201).

1 and conclusions” or a “formulaic recitation of the elements of a cause of action.”
2 *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555) (internal
3 quotation marks omitted). “Factual allegations must be enough to raise a right to relief
4 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to
5 dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that
6 is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570)
7 (internal quotation marks omitted).

8 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
9 apply when considering motions to dismiss. First, a district court must accept as true all
10 well-pleaded factual allegations in the complaint; however, legal conclusions are not
11 entitled to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of
12 action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a
13 district court must consider whether the factual allegations in the complaint allege a
14 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s
15 complaint alleges facts that allow a court to draw a reasonable inference that the
16 defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not
17 permit the court to infer more than the mere possibility of misconduct, the complaint has
18 “alleged — but it has not shown — that the pleader is entitled to relief.” *Id.* at 679
19 (quoting Fed. R. Civ. P. 8(a)(2)) (internal quotation marks and alteration omitted). When
20 the claims in a complaint have not crossed the line from conceivable to plausible, the
21 complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain
22 either direct or inferential allegations concerning “all the material elements necessary to
23 sustain recovery under *some* viable legal theory.” *Twombly*, 550 U.S. at 562 (quoting
24 *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

25 Generally, a court may not consider any material beyond the pleadings in ruling
26 on a Rule 12(b)(6) motion to dismiss. *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir.2003).
27 One exception to this rule is where, as here, a court take judicial notice of “matters of
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1 public record.” See *Lee v. Los Angeles*, 250 F.3d 668, 688–89 (9th Cir.2001) (internal
2 citations omitted).

3 **IV. DISCUSSION**

4 The Complaint asserts three claims for violations of NRS § 107.080, declaratory
5 relief, and unjust enrichment. (Dkt. no. 1-1 at 5-8.) Freddie Mac seeks to dismiss all
6 three claims. The Court will address each claim in turn.

7 **A. Violations of NRS § 107.080**

8 The Complaint alleges that NRS 107.080(3) and (4)(a) require “Defendants to
9 provide notice of default and election to sell and/or notice of trustee sale to all persons
10 with an interest in the property, including Plaintiff” and Defendants failed to provide
11 Plaintiff with notice of trustee sale.² (ECF NO. 1-1 at 5 (emphasis omitted).) Freddie
12 Mac points to the express language of statute to argue that it complied with Nevada’s
13 statutory requirements.

14 The procedures for conducting a trustee’s foreclosure sale are set forth in NRS
15 § 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the
16 beneficiary, or the trustee must execute and record a notice of default and election to
17 sell. NRS § 107.080(2)(c). A copy of the notice of default and election to sell must be
18 mailed by registered mail or certified mail with return receipt requested to “the grantor
19 or, to the person who holds the title of record on the date the notice of default and
20 election to sell is recorded, and, if the property is operated as a facility licensed under
21 chapter 449 of NRS, to the State Board of Health, at their respective addresses, if
22 known, otherwise to the address of the trust property. NRS § 107.080(3). The trustee or
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24 ²In response to the Motion, Plaintiff contends that the Complaint should be
25 construed to allege that Freddie Mac violated NRS § 17.080(3)(a) by failing to include in
26 the NOD a description of “the deficiency in performance or payment,” which deprived
27 him of the opportunity to cure the default. (ECF No. 20 at 6.) However, the NOD did
28 identify the deficiency as “including but not limited to, the obligations set forth in that
certain Promissory Note with a face amount of \$207,000.00.” (ECF No. 12-3 at 1.) The
unpaid balance is identified in the NOTS. (ECF No. 12-7.) Moreover, it is not clear to
the Court that Plaintiff has standing to challenge the content of the NOD when he was
not among the parties entitled to notice under NRS § 17.080(3)(a).

1 other person authorized to make the sale must wait at least three months after
2 recording the notice of default and election to sell before the sale may proceed.
3 NRS § 107.080(2)(e). After the three month period, the trustee must give notice of the
4 time and place of the sale to the following: “each trustor, any other person entitled to
5 notice pursuant to this section and, if the property is operated as a facility licensed
6 under chapter 449 of NRS, the State Board of Health, by personal service or by mailing
7 the notice by registered or certified mail to the last known address of the trustor and any
8 other person entitled to such notice pursuant to this section.” NRS § 107.080(4)(a).

9 Plaintiff contends that NRS § 107.080(3) requires that the NOD be sent to him as
10 the titleholder of record and the grantor’s successor. (ECF No. 20 at 6-8.) However, his
11 argument does not find support in the statute. NRS § 107.080(3) requires that the NOD
12 be sent “to the grantor, or to the person who holds the title of record on the date the
13 notice of default and election to sell is recorded.” But Plaintiff did not hold the title to the
14 Property at the time the NOD was recorded on September 30, 2013, or when the first
15 NOTS was recorded on September 23, 2014.³ Nor is Plaintiff covered within the group
16 who must be given notice under NRS § 107.080(4)(a), which includes “any other person
17 entitled to notice pursuant to this section.” Plaintiff does not show how he would fall
18 among this catch-all group.

19 Plaintiff asserts policy arguments for why NRS § 107.080(3) should be construed
20 to require that the NOD and NOT must be provided to the “current record title holder.”⁴
21 (ECF No. 20 at 8-10.) However, NRS § 107.080(3) is unambiguous in identifying the
22 parties who are entitled to notice: the grantor *or* the title holder on the date the NOD is
23 recorded.

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25 ³Indeed, Plaintiff acquired the Property in October 2014, more than a year after
26 the NOD was recorded. Plaintiff thus should have had at least constructive notice of the
recorded NOD and the first NOTS at the time that he acquired the Property.

27 ⁴Plaintiff also alleges that Freddie Mac violated his constitutional due process
28 rights. This claim is not asserted in the Complaint and it is not clear whether such a
claim may be asserted against Defendants.

1 The Court agrees with Freddie Mac that Plaintiff's claim for violations of NRS §
2 107.080(3) should be dismissed.

3 **B. Declaratory Relief**

4 Plaintiff seeks a declaration that the Property "cannot be sold without providing
5 him with a reasonable opportunity to cure the default on the loan encumbering the
6 property." (ECF No. 1-1 at 6.) Plaintiff relies on *Title Insurance and Trust Co. v. Chicago*
7 *Title Insurance Co.*, 634 P.2d 1216 (Nev. 1981) to argue that as the title holder, he has
8 a right to cure the default.⁵ (ECF No. 20 at 14.) In that case, the Nevada Supreme Court
9 found that a vendee of the grantor of the deed of trust, who had purchased real property
10 from the borrower and grantor of the deed of trust, was a "successor in interest"
11 pursuant to NRS § 107.080(3).⁶ The court found that by including a "successor in
12 interest" in NRS § 107.080(3) shows that "the legislature intended that a purchaser of
13 real estate who is a grantor of a deed of trust should have a reasonable opportunity to
14 cure a default or deficiency before the property may be sold by the trustee, and that
15 such opportunity should be extended to one who holds under such a grantor." *Id.* at
16 1218.

17 Here, Plaintiff has no contractual relationship with the borrower, Mr. Del Re, such
18 that he may be deemed Mr. Del Re's successor in interest. Plaintiff acquired the
19 Property via a quitclaim deed from Indian Homes, whose interest in the Property was
20 subject to the DOT. (ECF No. 12-4.) Absent a legal relationship with Mr. Del Re or
21 Freddie Mac, Plaintiff cannot show that Freddie Mac must be compelled to give him the
22 opportunity to cure the default.

23 _____
24 ⁵Plaintiff also relies on NRS § 107.080(3)(a) which requires the NOD to describe
25 the deficiency. (ECF No. 20 at 14.) Again, Plaintiff's contention that the NOD failed to
describe the deficiency or payment is factually inaccurate. *See* discussion *supra* at n. 2.

26 ⁶The "successor in interest" language was removed from NRS § 107.080(3) in a
27 1989 amendment to the statute. 1989 Nev. Stat. 1770-71. Rather than requiring that a
28 notice of default and election to sell be mailed to a grantor's successor in interest, the
1989 amendment provides that the mailing may be directed to "the person who holds
the title of record on the date the notice of default and election to sell is recorded." 1989
Nev. Stat. 1771. This language appears in the current version of the statute.

1 Plaintiff asserts that he seeks declaratory relief “on information and belief, that
2 any encumbrance on the subject property was satisfied by the mortgage insurance.”
3 (ECF No. 20 at 14.) This allegation is not raised in the Complaint. Even if it was properly
4 raised, Plaintiff cannot seek declaratory relief without asserting a viable claim.

5 **C. Unjust Enrichment**

6 “The phrase ‘unjust enrichment’ is used in law to characterize the result or effect
7 of a failure to make restitution of, or for, property or benefits received under such
8 circumstances as to give rise to a legal or equitable obligation to account therefor.”
9 *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187
10 (Nev. 1997). “Unjust enrichment occurs when ever [sic] a person has and retains a
11 benefit which in equity and good conscience belongs to another.” *Id.* (quotations and
12 citation omitted).

13 Plaintiff asserts a claim for unjust enrichment, but it is not entirely clear what
14 benefits Defendants purportedly retained that belongs to him. Plaintiff alleges that he
15 has invested in making improvements to the Property and paying expenses on the
16 Property. (ECF No. 1-1 at 8.) He alleges that because “Defendants’ deed of trust has
17 been paid in full through the original trustor’s mortgage insurance,” they are not entitled
18 to seek foreclosure and should not be allowed to retain the proceeds of the sale. (*Id.*)
19 (ECF No. 1-1 at 8.) He further asserts that Defendants would be unjustly enriched if
20 they are allowed to retain the proceeds of the sale on the Property. (*Id.*)

21 To the extent the recovery that Plaintiff seeks is to prevent foreclosure or to
22 prohibit Defendants from keeping the proceeds of the sale, such recovery is not
23 available under a claim for unjust enrichment. “The doctrine of unjust enrichment or
24 recovery in quasi contract applies to situations where there is no legal contract but
25 where the person sought to be charged is in possession of money or property which in
26 good conscience and justice he should not retain but should deliver to another [or
27 should pay for].” *Leasepartners Corp.*, 942 P.2d at 187 (citing *Lipshie v. Tracy Inv. Co.*,
28 566 P.2d 819, 824 (1977) (“To permit recovery by quasi-contract where a written

1 agreement exists would constitute a subversion of contractual principles.”)). Defendants
2 are not unjustly enriched at Plaintiff’s expense and did not retain a benefit that belongs
3 to Plaintiff.

4 Freddie Mac argues that Plaintiff’s claim is barred by the voluntary payment
5 doctrine, citing to *Nevada Ass’n Services, Inc. v. Dist. Ct.*, 338 P.3d 1250 (Nev. 2014).
6 In that case, the Nevada Supreme Court explained the doctrine as follows:

7 The voluntary payment doctrine is an affirmative defense that
8 “provides that one who makes a payment voluntarily cannot recover it on
9 the ground that he was under no legal obligation to make the payment.”
10 *Best Buy Stores v. Benderson-Wainberg Assocs.*, 668 F.3d 1019, 1030
11 (8th Cir.2012) (internal quotations omitted). “The ‘voluntary’ in the
12 voluntary payment doctrine does not entail the mere payment of the bill or
13 fee.” *Putnam v. Time Warner Cable of Se. Wis.*, 255 Wis.2d 447, 649
14 N.W.2d 626, 632 (2002). Instead, it considers “the willingness of a person
15 to pay a bill *without protest as to its correctness or legality.*” *Id.* at 633.
16 This doctrine serves to promote the “policy goals of certainty and stability”
17 in transactions. *Berrum v. Otto*, 127 Nev. —, — n. 5, 255 P.3d 1269,
18 1273 n. 5 (2011).

19 *Id.* at 1253-54. This doctrine does not apply to the situation here where Plaintiff is not
20 claiming that he made payments to Defendants and now seeks recovery of that
21 payment.

22 To the extent Plaintiff’s unjust enrichment claim is for recovery of money spent on
23 improvements to the Property, Plaintiff may be able to state a colorable claim depending
24 on the circumstances under which those improvements were made. Because of the
25 scant allegations relating to the improvements to the Property and expenses paid
26 relating to the Property, the Court cannot find that “[t]here is no unjust enrichment.” See
27 *Bonneville Power Admin. V. Washington Public Power Supply Sys.*, 956 F.2d 1497,
28 1505 (9th Cir. 1992). The Court will therefore dismiss Plaintiff’s unjust enrichment claim
with leave to amend.

25 V. CONCLUSION

26 The Court notes that the parties made several arguments and cited to several
27 cases not discussed above. The Court has reviewed these arguments and cases and

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1 determines that they do not warrant discussion as they do not affect the outcome of
2 Freddie Mac's Motion.

3 It is therefore ordered that Freddie Mac's Motion to Dismiss (ECF No. 19) is
4 granted. Plaintiff's first two claims for violation of NRS § 107.080 and for declaratory
5 relief are dismissed with prejudice. Plaintiff's third claim for unjust enrichment is
6 dismissed without prejudice and with leave to amend. Should Plaintiff wish to amend his
7 Complaint, he has fifteen (15) days to file an amended complaint to assert a claim for
8 unjust enrichment to cure the deficiencies identified in this Order. Failure to file an
9 amended complaint will result in dismissal of the third claim for unjust enrichment with
10 prejudice.

11 DATED THIS 21st day of September 2016.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE