

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DITECH FINANCIAL LLC, et al.,

Plaintiff(s),

v.

PARADISE SPRINGS ONE HOMEOWNERS  
ASSOCIATION, et al.,

Defendant(s).

Case No. 2:16-CV-2900 JCM (GWF)

ORDER

Presently before the court is defendant/crossdefendant Paradise Springs One Homeowners Association's (the "HOA") motion to dismiss. (ECF No. 25). Defendant/crossclaimant Annabel E. Barber ("Barber") filed a response (ECF No. 29), to which the HOA replied (ECF No. 30).

**I. Facts**

This case involves a dispute over real property located at 5462 Birchbrook Court, Las Vegas, Nevada 89120 (the "property").

On August 28, 2003, Emily Razzano obtained a loan from Countrywide Home Loans, Inc. in the amount of \$175,200.00 to purchase the property, which was secured by a deed of trust recorded September 5, 2003. (ECF No. 1). Plaintiff Federal National Mortgage Association ("Fannie Mae") acquired ownership of the loan in September 2003. (ECF No. 1).

The deed of trust was assigned to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP ("BAC") via an assignment of deed of trust recorded on May 18, 2011. (ECF No. 1). Effective July 1, 2011, BAC merged into Bank of America, N.A. ("BANA"). (ECF No. 1). BANA assigned the deed of trust to plaintiff Ditech Financial LLC f/k/a Green Tree Servicing, LLC ("Green Tree") via an assignment deed recorded on July 9, 2013. (ECF No. 1).

1 On September 22, 2011, defendant Nevada Association Services, Inc. (“NAS”), acting on  
2 behalf of the HOA, recorded a notice of delinquent assessment lien, stating an amount due of \$  
3 2,868.40. (ECF No. 1). On November 17, 2011, NAS recorded a notice of default and election to  
4 sell to satisfy the delinquent assessment lien, stating an amount due of \$ 4,641.50. (ECF No. 1).

5 On December 19, 2011, BANA requested a ledger from NAS and offered to pay the  
6 superpriority amount of the lien, of which NAS allegedly refused to provide. (ECF No. 1). BANA  
7 did not tender the amounts due under the HOA’s claimed lien. (ECF No. 1 at 9).

8 On April 2, 2012, NAS recorded a notice of sale, stating an amount due of \$7,820.67. (ECF  
9 No. 1). On May 4, 2012, the HOA purchased the property at the foreclosure sale for \$9,280.67.  
10 (ECF No. 1). The foreclosure deed was recorded on May 31, 2012. (ECF No. 1). The HOA  
11 transferred the property to defendants Annabel Barber and Robert Wang for “\$1.00 and a  
12 peppercorn” via a quitclaim deed recorded August 25, 2015. (ECF No. 1).

13 On December 15, 2016, plaintiffs filed the underlying complaint, alleging claims for quiet  
14 title/declaratory relief, breach of NRS 116.1113, and wrongful foreclosure. (ECF No. 1). On  
15 March 13, 2017, the court dismissed plaintiffs’ claims for breach of NRS 116.1113 and wrongful  
16 foreclosure. (ECF No. 19).

17 On March 16, 2017, Wang and Barber filed a crossclaim against the HOA and NAS for  
18 negligent misrepresentation, indemnification, and contribution. (ECF No. 22).

19 In the instant motion, the HOA moves to dismiss the crossclaims against it pursuant to  
20 Federal Rule of Civil Procedure 12(b)(6). (ECF No. 25).

## 21 **II. Legal Standard**

22 A court may dismiss a pleading for “failure to state a claim upon which relief can be  
23 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled crossclaim must provide “[a] short and plain  
24 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*  
25 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
26 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the  
27 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

28

1 “Factual allegations must be enough to rise above the speculative level.” Twombly, 550  
2 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual  
3 matter to “state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678 (citation  
4 omitted).

5 In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply  
6 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
7 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
8 Id. at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory  
9 statements, do not suffice. Id. at 678.

10 Second, the court must consider whether the factual allegations in the complaint allege a  
11 plausible claim for relief. Id. at 679. A claim is facially plausible when the plaintiff’s complaint  
12 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the  
13 alleged misconduct. Id. at 678.

14 Where the complaint does not permit the court to infer more than the mere possibility of  
15 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” Id.  
16 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line  
17 from conceivable to plausible, plaintiff’s claim must be dismissed. Twombly, 550 U.S. at 570.

18 The Ninth Circuit addressed post-Iqbal pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
19 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

20 First, to be entitled to the presumption of truth, allegations in a complaint or  
21 counterclaim may not simply recite the elements of a cause of action, but must  
22 contain sufficient allegations of underlying facts to give fair notice and to enable  
23 the opposing party to defend itself effectively. Second, the factual allegations that  
are taken as true must plausibly suggest an entitlement to relief, such that it is not  
unfair to require the opposing party to be subjected to the expense of discovery and  
continued litigation.

24 Id.

### 25 **III. Discussion**

#### 26 **A. Negligent Misrepresentation**

27 In the instant motion, the HOA argues that dismissal of the negligent misrepresentation  
28 claim is proper because crossclaimants fail to allege or reference any language set forth in the

1 quitclaim deed, which governs the parties' rights and refutes the claim asserted. (ECF No. 25 at  
2 3). The court agrees.

3 The Nevada Supreme Court defines the tort of negligent misrepresentation as follows:

4  
5 (1) One who, in the course of his business, profession or employment, or in any  
6 other action in which he has a pecuniary interest, supplies false information for the  
7 guidance of others in their business transactions, is subject to liability for pecuniary  
8 loss caused to them by their justifiable reliance upon the information, if he fails to  
9 exercise reasonable care or competence in obtaining or communicating the  
10 information.

11 *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998).

12 Fraud is an "essential element" of a negligent misrepresentation claim. *Scaffidi v. United*  
13 *Nissan*, 425 F. Supp. 2d 1159, 1169–70 (D. Nev. 2005). Allegations of fraud are subject to a  
14 heightened pleading standard. See Fed. R. Civ. P. 9(b) ("[A] party must state with particularity  
15 the circumstances constituting fraud . . ."). Rule 9(b) operates "to give defendants notice of the  
16 particular misconduct which is alleged," requiring plaintiffs to identify "the circumstances  
17 constituting fraud so that the defendant can prepare an adequate answer from the allegations."  
18 *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (citations omitted). "The complaint must  
19 specify such facts as the times, dates, places, benefits received, and other details of the alleged  
20 fraudulent activity." *Id.* (citations omitted).

21 Crossclaimants merely allege that the HOA negligently made material representations to  
22 crossclaimants, including that the HOA's lien against the property was superior to any other claim  
23 against the property and that crossclaimants would take title to the property free and clear of any  
24 other claims. (ECF No. 22 at 22). Crossclaimants' general and conclusory allegations fall short  
25 of satisfying Rule 9's specificity requirements.

26 Accordingly, the HOA's motion to dismiss will be granted without prejudice as to this  
27 claim.

### 28 **B. Contribution & Indemnity**

"The remedies of contribution and implied, i.e., noncontractual indemnity allow parties  
extinguishing tort liabilities by way of settlement or payment of judgments to seek recovery from

1 other potential tortfeasors under equitable principles.” The Doctors Co. v. Vincent, 98 P.3d 681,  
2 686 (Nev. 2004).

3 The crossclaim fails to allege the existence of any settlement or payment of judgment  
4 extinguishing tort liabilities. In fact, the crossclaim fails to allege the existence of a pending tort  
5 claim.

6 Accordingly, the court will grant, without prejudice, the HOA’s motion to dismiss as to  
7 these claims.

8 **IV. Conclusion**

9 Accordingly,

10 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the HOA’s motion to  
11 dismiss (ECF No. 25) be, and the same hereby is, GRANTED WITHOUT PREJUDICE.

12 IT IS FURTHER ORDERED that the crossclaim (ECF No. 22) be, and the same hereby is,  
13 DISMISSED WITHOUT PREJUDICE.

14 DATED July 20, 2017.

15   
16 \_\_\_\_\_  
17 UNITED STATES DISTRICT JUDGE