UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THORNE HUCK et al.,

Plaintiffs,

vs.

COUNTRYWIDE HOME LOANS, INC. et al.,

Defendants.

3:09-cv-00643-RCJ-VPC

ORDER

This case arises out the foreclosure of Plaintiff Thorne Huck's mortgage. Pending before the Court are four motions: two motions to dismiss, a motion to remand, and a motion to stay. Plaintiffs have not responded to the motions to dismiss but have filed notices that they intend not to respond until their motion to remand is resolved.[1] For the reasons given herein, the Court grants the motions to dismiss in part and denies them in part, denies the motion to remand, and denies the motion to stay as moot.

I. FACTS AND PROCEDURAL HISTORY

On April 3, 2006, Plaintiff Thorne Huck gave lender Countrywide Home Loans, Inc.

[1]This constitutes consent to granting the motions. L.R. Civ. Prac. 7-2(d). Plaintiffs allege they should not be "burdened" with answering Defendants' motions in federal court while their motion to remand is pending, but there is no burden beyond what would exist in state court, where Defendants surely would have filed the same motions to dismiss had the case not been removed. In fact, Plaintiffs would only have had ten (10) days to respond to those motions in state court before failure to respond constituted consent to granting the motions, *see* Nev. Dist. Ct. R. 13(3), whereas they had fifteen (15) days to respond in this Court, *see* L. R. Civ. Prac. 7-2(b), (d). Far from further burdening Plaintiffs in this regard, removal had the effect of giving Plaintiffs an additional five days to respond to the motions.

("Countrywide") a promissory note in the amount of $168,000 to purchase real property located at 213 Endeavor Ln., Fernley, NV 89408 ("the Property"), secured by a deed of trust ("DOT") against the Property. (*See* Adjustable Rate Note 1, 4, Apr. 3, 2006, ECF No. 8, Ex. B; DOT 1–4, Apr. 3, 2006, ECF No. 8, Ex. A).[2] The trustee on the DOT is Recontrust Co., N.A. (*See id.* 2). The interest rate was fixed at 6.625% until May 1, 2011, with monthly payments of $927.50. (*See* Adjustable Rate Note 1).

On October 26, 2009, an employee of Security Union Title Insurance Co., as agent for BAC Home Loans Servicing, LP (formerly known as Countrywide Home Loans Servicing, LP), as agent for Trustee Corps, recorded a notice of default and election to sell ("NOD") in Lyon County. (*See* NOD, Oct. 26, 2009, ECF No. 8, Ex. F). There is no indication in the record that any of these agencies had been previously substituted as trustee for Recontrust, or that Countrywide or Recontrust as beneficiary and trustee, respectively, caused any of the entities listed on the NOD to record it. This indicates a statutory defect in foreclosure that will support an injunction against sale unless and until cured. *See* Nev. Rev. Stat. § 107.080(2)(c).

Plaintiffs sued Defendants Countrywide; Countrywide Financial Corp.; Merscorp, Inc.; Mortgage Electronic Registration Systems, Inc. ("MERS"), Bank of America Corp., N.A.; Recontrust Co., N.A.; and Kumud Patel in state court, asserting fourteen causes of action. Defendants removed. The case was transferred to Case No. 2:09-md-02119-JAT in the District of Arizona, and this Court stayed the case pending remand. In accordance with the Judicial Panel on Multidistrict Litigation's partial remand order, Judge Teilborg has determined that the first cause of action and part of the third, fourth, and tenth through twelfth causes of action (insofar as they do not concern MERS) have been remanded to this Court. (*See* Am. Order 8:16–17, June 4,

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[2]Yvonne Huck joins as a Plaintiff, although she does not appear to be liable on the note as a signatory, but only to the extent her share of community property is vulnerable to satisfy it as a matter of law.

2010, ECF No. 24). The Court may therefore rule on the following causes of action without a risk of inconsistent rulings by the MDL court: (1) Unfair Lending Practices Under Nevada Revised Statutes ("NRS") Section 589D.100; (3) Injunctive Relief; (4) Declaratory Relief; (10) Civil Conspiracy; (11) Racketeering Under NRS Section 207.470; and (12) Unjust Enrichment.

II. LEGAL STANDARDS

A. Remand for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction, possessing only those powers granted by the Constitution and statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The party asserting federal jurisdiction bears the burden of overcoming the presumption against it. *Kokkonen*, 511 U.S. at 377. Federal Rule of Civil Procedure 12(b)(1) provides an affirmative defense for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Additionally, a court may raise the question of subject matter jurisdiction sua sponte at any time during an action. *United States v. Moreno-Morillo*, 334 F.3d 819, 830 (9th Cir. 2003). Regardless of who raises the issue, "when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing 16 J. Moore et al., Moore's Federal Practice § 106.66[1], pp. 106-88 to 106-89 (3d ed. 2005)).

A district court's jurisdiction extends to cases removed from state court under particular circumstances. 28 U.S.C. § 1441(b) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."). In cases removed from state court, a federal court later finding a lack of subject matter jurisdiction does not dismiss, but must remand to state court. 28 U.S.C. § 1447(c). A decision to remand a case

removed on any other basis than civil rights removal jurisdiction under 28 U.S.C. § 1443 "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d).

A defect in removal exists where jurisdiction is predicated purely on diversity and one or more defendants is a citizen of the forum state. *See* § 1441(b). This is the "forum defendant" rule. However, the citizenship of a defendant who has been fraudulently joined is discounted. *Ritchie v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Where fraudulent joinder is alleged, a court does not take the allegations of citizenship in the complaint as true but permits the defendant seeking removal to present facts showing fraudulent joinder. *See id.* "Joinder is fraudulent [i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state." *Hunter v. Philip Morris* USA, 582 F.3d 1039, 1043 (9th Cir. 2009) (citations and internal quotation marks omitted) (alteration in original).

B. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th

Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly v. Bell Atl. Corp.*, 550 U.S. 554, 555 (2007)).

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

III. ANALYSIS

A. Motions to Remand and to Stay

The Court denies the motion to remand. Plaintiffs have sued one non-diverse, forum-resident Defendant: Patel. Patel is fraudulently joined, however, and his joinder therefore does not defeat diversity.

An agent is personally liable to third parties for his own torts, regardless of whether he is

acting on behalf of a corporate principal within the scope of his employment, but unless the agent and the third party agree, the agent is not liable on contracts entered into by the agent on behalf of the principal where the principal is disclosed. *See* Restatement (Third) of Agency § 7.01 & cmt. b (2006). Agents in Nevada can be personally liable in tort for misrepresentations they make to third parties. *See Nev–Tex Oil & Gas v. Precision Rolled Prods.*, 782 P.2d 1311, 1311 (Nev. 1989) (citing *Carrell v. Lux*, 420 P.2d 564, 576 (Ariz. 1966); *Pentecost v. Harward*, 699 P.2d 696, 699 (Utah 1985)). Although the Nevada Supreme Court has not directly ruled on the question, the states appear to be in agreement that an agent cannot be liable on a contract entered into on behalf of a principal where the agent has disclosed the principal. *See, e.g.*, *Eppler, Guerin & Turner, Inc. v. Kasmir*, 685 S.W.2d 737, 738 (Tex. 1985); *Rathbon v. Budlong*, 15 Johns. 1, 2–3 (N.Y. 1818) (holding that an employee of a company could not be not liable in contract for actions taken on behalf of corporation).

Patel cannot be liable in contract here, because he is alleged only to have acted in his capacity as an agent for the institutional Defendants. Furthermore, he is alleged only to have "participated in the procurement, drafting, or presentment of the documents and transactions creating the causes of action alleged herein." This is not enough to state a tort claim against him under *Iqbal* and *Twombly* because it is not a tort to "participate[] in the procurement, drafting, or presentment of [loan and mortgage] documents." There are no factual allegations indicating how Patel is liable for any tort due to this activity. It is consistent with the Complaint that Patel merely handed papers to Huck to sign, without even knowing much about what was in them or having any intent to defraud. It is also consistent with the Complaint that he merely printed copies of the documents or performed some other innocuous task touching upon the documents that would not possibly give rise to tort liability.

Additionally, it appears that Patel has never been served. He therefore has not been "properly joined and served," 28 U.S.C. § 1441(b), and although an unserved forum defendant

cannot be discounted in determining jurisdiction simply because he is unserved, the failure to serve him even long after removal is a powerful indicator of fraudulent joinder because it indicates a lack of intent to proceed against him in good faith.

The Court finds that Patel is fraudulently joined and denies the motion to remand. Even if remand were otherwise appropriate, part of the case is still pending before the MDL in the District of Arizona, and a remand order applying only to certain causes of action in the case would be a procedural catastrophe. Finally, the motion to stay is denied as moot because it simply requests a stay until a ruling on the present motion to remand.

B. Motions to Dismiss

1. Unfair Lending Practices Under NRS Section 598D.100

Huck alleges that he was preyed upon because the lender didn't scrutinize his income closely enough.[3] Plaintiff obtained the loan in the present case on April 3, 2006. The statute of limitations under section 598D.100 is three years, *see* Nev. Rev. Stat. § 11.190(3)(a), and the present case was brought on September 23, 2009. The statute of limitations therefore bars this cause of action.

Furthermore, the pre-2007 statute did not apply to mortgages that qualified as residential mortgage transactions under HOEPA, as here, where a security interest is retained against the property to finance its acquisition or construction. *See* Nev. Rev. Stat, § 598D.040 (2005); 15 U.S.C. § 1602(aa)(1), (w). Also, Patel is not a "lender" under Chapter 598D because he is not a mortgagee, beneficiary under a deed of trust, or other creditor with respect to the loan, so this cause of action cannot apply against him for this additional reason. *See* Nev. Rev. Stat. § 598D.050.

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[3]Under the first cause of action, the Property is incorrectly identified as "1240 Eider Circle, Fallon, Nevada." (*See* Compl. ¶ 47, ECF No. 1-1).

Finally, section 598D.100 was amended in 2007, with an effective date of June 13, 2007. *See* 2007 Nev. Stat. 2844–46. Therefore, the pre-2007 version of the statute applies to the present case. The prior statute, which applies here, made it actionable if a lender made "a home loan to a borrower based solely upon the equity of the borrower in the home property and without determining that the borrower has the ability to repay the home loan from other assets . . . ." Nev. Rev. Stat. § 598D.100 (2006). Plaintiffs have not alleged facts indicating a violation of the statute but have simply alleged in conclusory fashion that Defendants violated it. (*See* Compl. ¶ 47). This is insufficient; Plaintiffs must "alleg[e] specific facts showing how Defendants failed to adhere to this statutory requirement . . . ." *Urbina v. Homeview Lending, Inc.*, 681 F. Supp. 1254, 1259–60 (D. Nev. 2009) (Hunt, C.J.) (dismissing a claim under the post-2007 version of the statute). Plaintiffs claim that the loan was based on "stated income" with no verification of that income. Plaintiffs fail to allege whether they in fact incorrectly stated their income on the loan documents. Moreover, the statute does not require any particular verification method, but only a determination of the ability of the borrower to repay from assets other than an estimated future increase in equity. Plaintiffs appear to admit that the lender gave them the loan based on the income they reported to the lender. This is sufficient under the statute. "The lender should have known I was lying about my income" is not a particularly convincing argument, at least not under the pre–2007 version of the statute. A lender has the right to presume the borrower is not lying on his application. As Defendants note, Patel verified Plaintiffs' income by obtaining Thorne Huck's signature on his application, under acknowledgment of civil and criminal penalties for falsehoods therein, wherein Huck claimed a monthly income of $13,750. (Residential Loan Application , ECF No. 17, Ex. H). Under the post-2007 version of the statute, which requires a "commercially reasonable means" of determining the ability to repay, an argument could be made that a lender who does not verify stated income beyond the signature of the borrower has not fulfilled its duties under the statute, but the pre-2007 version of the statute

applies in this case. The Court dismisses this cause of action.

2. Injunctive and Declaratory Relief

The Court denies the motion to dismiss as to these causes of action, because there remains a question of fact as to statutory defect in foreclosure. *See* Nev. Rev. Stat. § 107.080(2)(c). The entity who filed the NOD is not the original trustee or beneficiary, nor is there any evidence indicating the entity who filed the NOD was the agent or successor of one of these entities. This supports an injunction, so long as Plaintiffs are willing to do equity by making full monthly payments during the injunction period.

3. Civil Conspiracy

"An actionable civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d 610, 622 (Nev. 1994) (citing *Wise v. S. Pac. Co.*, 35 Cal. Rptr. 652 (Ct. App. 1963); *Bliss v. S. Pac. Co.*, 321 P.2d 324 (Or. 1958)). A corporation cannot conspire with its employees in their official capacities. *Id.*

Plaintiffs allege a conspiracy between the institutional Defendants, but they allege no specific agreement. Plaintiffs allege only that one or more Defendants failed to inform "Nevada mortgagors" of their rights. (*See* Compl. ¶ 107). This alleges no agreement, much less an agreement to engage in unlawful activity, and it does not even identify Plaintiffs as the particular victims of the alleged conspiracy. Next, Plaintiffs allege that several Defendants "continue to eject Nevadans from their home [sic] notwithstanding knowledge of their own illegal conduct and unclean hands . . . ." (*Id.*). This does not cure the deficiencies. No agreement is pled. The Court dismisses this cause of action (as to the non-MERS Defendants).

4. Racketeering Under NRS 207.470

Under Nevada's RICO statute, a private party can bring a civil action for treble damages,

attorney's fees, and costs for injures sustained by a violation of section 207.400. *See* Nev. Rev. Stat. § 207.470. Plaintiffs allege Defendants engaged in racketeering. Plaintiffs, however, nowhere identify which unlawful act under section 207.400 they believe Defendants to have committed. Plaintiffs simply quote the definition of "racketeering" under section 207.390 and allege that Defendants engaged in racketeering through predatory lending practices. Plaintiffs have not identified two predicate offenses required to constitute "racketeering." *See* § 207.390. Such crimes include murder, manslaughter, mayhem, certain batteries, kidnapping, sexual assault, arson, robbery, extortion, seduction, forgery, burglary, grand larceny, bribery, assault with a deadly weapon, certain frauds, etc. *See* § 207.360. If the predicate offenses are intended to be frauds, they are not pled sufficiently under Rule 12(b)(6), much less under Rule 9(b). The Court dismisses this cause of action (as against the non-MERS Defendants).

5. Unjust Enrichment

In Nevada, the elements of an unjust enrichment claim or "quasi contract" are: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances where it would be inequitable to retain the benefit without payment. *See Leasepartners Corp., Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (quoting *Unionamerica v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo. 1967))). Unjust enrichment is an equitable substitute for a contract, and an action for unjust enrichment therefore cannot lie where there is an express written agreement. *See Marsh*, 839 P.2d at 613 (citing *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824 (Nev. 1977); 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)).

Here, Plaintiffs specifically allege contracts. Those contracts, the note and deed of trust, specify their terms. Contracts exist governing the relationship between Thorne Huck and

Defendants. Plaintiffs do not allege any benefit bestowed upon any Defendant that is not subject to a contract. The Court dismisses this cause of action (as against the non-MERS Defendants).

Finally, the Court notes that even if Judge Teilborg has granted a motion to amend in this case or others that are part of MDL Case No. 2:09-md-02119-JAT, such an order can only apply to those causes of action remaining with Judge Teilborg and does not necessarily affect this Court's analysis of whether to permit amendment with respect to the claims pending before this Court. The District of Arizona has no jurisdiction over the causes of action remanded to this Court by the JPML, just as this Court has no jurisdiction over those causes of action not remanded. Both this Court and the Arizona court lack the ability to grant a motion to amend a complaint in its entirety in any case where pretrial jurisdiction is split between them. In such cases, the respective courts have the power only to grant a motion to amend in part, i.e., with respect to the claims before it. This Court has deferred to Judge Teilborg's determinations of which causes of action have been remanded to this Court and which causes of action remain with him. But the Court has deferred to him for the practical purpose of avoiding competing rulings over the same causes of action, not because his determination is binding. It is possible this Court could disagree with Judge Teilborg over which causes of action the JPML has remanded in a particular case, because the JPML has given broad, nonspecific guidance in this regard and has not even indicated whether the transferor or transferee court is to make such determinations. Nevertheless, it is the JPML that has separated and remanded certain causes of action back to this Court, not Judge Teilborg. Unless and until the JPML gives more specific guidance, this Court will continue to defer to Judge Teilborg's determinations of which claims have been remanded in order to avoid the procedural disaster that would befall these cases in the face of competing rulings.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 4) is DENIED.

IT IS FURTHER ORDERED that the Motion to Stay (ECF No. 5) is DENIED as moot.

IT IS FURTHER ORDERED that the Motions to Dismiss (ECF Nos. 9, 27) are GRANTED as to the first cause of action, GRANTED as to the tenth through twelfth causes of action with respect to the non-MERS Defendants, DENIED as to the third and fourth causes of action, and DENIED as to the remaining causes of action for lack of jurisdiction, as these currently remain with Judge Teilborg in Case No. 2:09-md-02119-JAT in the District of Arizona.

IT IS FURTHER ORDERED that Defendants will cease foreclosure proceedings for one-hundred (100) days. During this period, Plaintiffs will make full, regular monthly payments under the note every thirty (30) days, with the first payment due fifteen (15) days after the date of this order. Plaintiffs need not pay late fees or cure the entire amount of past default at this time. Failure to make monthly payments during the injunction period, however, will result in a lifting of the injunction.

IT IS FURTHER ORDERED that during the injunction period Defendants will conduct a private mediation with Plaintiffs in good faith. This means the beneficiary must send a representative to the mediation who has actual authority to modify the note, although actual modification is not required.

IT IS FURTHER ORDERED that Plaintiffs will provide requested information to Defendants in advance of the mediation in good faith.

IT IS SO ORDERED.

Dated: December 28, 2010

ROBERT C. JONES
United States District Judge