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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
6 RENO, NEVADA

7 DYSON FOURNESS AND VIRGINIA,) 3:10-CV-40-ECR-RAM
8 FOURTESS,)
9 Plaintiffs,)
10 vs.) Order
11 MORTGAGE ELECTRONIC REGISTRATION)
12 SYSTEM, INC.; ROBERT V. BUDHWA;)
13 FIELDSTONE MORTGAGE COMPANY;)
14 NATIONAL DEFAULT SERVICING CO.;)
15 HOME EQ SERVICING; AND DOES I-X)
16 Defendants.)

17 Plaintiffs in this case are homeowners who claim to be victims
18 of an unlawful and wrongful foreclosure initiated by Defendants.
19 Plaintiffs assert five claims for relief: (1) wrongful foreclosure;
20 (2) fraud in the inducement; (3) conspiracy to commit wrongful
21 foreclosure; (4) unjust enrichment and; (5) slander of title. Now
22 pending is Defendants HomeEq Servicing, Mortgage Electronic
23 Registration Systems, Inc. ("MERS") and National Default Servicing
24 Co.'s ("NDSC") motion to dismiss (# 10).

25 The motion is ripe, and we now rule on it.
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1 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
2 F.3d at 1403 (citation omitted).

3 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
4 normally limited to the complaint itself. See Lee v. City of L.A.,
5 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
6 materials outside the pleadings in making its ruling, it must treat
7 the motion to dismiss as one for summary judgment and give the non-
8 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
9 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
10 court may, however, consider certain materials – documents attached
11 to the complaint, documents incorporated by reference in the
12 complaint, or matters of judicial notice – without converting the
13 motion to dismiss into a motion for summary judgment." Ritchie, 342
14 F.3d at 908.

15 If documents are physically attached to the complaint, then a
16 court may consider them if their "authenticity is not contested" and
17 "the plaintiff's complaint necessarily relies on them." Lee, 250
18 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
19 A court may also treat certain documents as incorporated by
20 reference into the plaintiff's complaint if the complaint "refers
21 extensively to the document or the document forms the basis of the
22 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
23 adjudicative facts or matters of public record meet the requirements
24 of Fed. R. Evid. 201, a court may judicially notice them in deciding
25 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A
26 judicially noticed fact must be one not subject to reasonable
27 dispute in that it is either (1) generally known within the
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1 territorial jurisdiction of the trial court or (2) capable of
2 accurate and ready determination by resort to sources whose accuracy
3 cannot reasonably be questioned.").

4 5 III. Analysis

6 A. Wrongful Foreclosure

7 The first claim alleged in Plaintiffs' complaint is wrongful
8 foreclosure. It appears that Plaintiffs' wrongful foreclosure claim
9 is based on two independent theories of relief. Plaintiffs' first
10 theory of relief is as follows:

11 The obligation of the Plaintiffs . . . was discharged
12 when the investors of the mortgage backed securities claims
13 were paid as a result of over-collateralization of the
14 obligations and/or credit default swaps and/or federal
15 bailout funds and other monies paid to investors who owned
16 the note of the Plaintiffs co-mingled with the other notes
and obligations and/or to the Defendants or bank holding
companies who disbursed the monies in such a fashion as to
extinguish the obligation of Plaintiffs to repay the monies
that they borrowed

17 (Compl. ¶ 36 (#1).)

18 An action for the tort of wrongful foreclosure will lie only
19 "if the trustor or mortgagor can establish that at the time the
20 power of sale was exercised or the foreclosure occurred, no breach
21 of condition or failure of performance existed on the mortgagor's or
22 trustor's part which would have authorized the foreclosure or
23 exercise of the power of sale." Collins v. Union Fed. Sav. & Loan
24 Ass'n, 662 P.2d 610, 623 (Nev. 1983). The "material issue of fact
25 in a wrongful foreclosure claim is whether the trustor was in
26 default when the power of sale was exercised." Id. Plaintiffs do
27 not allege that they were not in default on their loan. Moreover,

1 Plaintiffs' theory, that the federal bailout funds somehow
2 extinguished their mortgage obligation, is simply untenable.

3 Plaintiffs' alternative theory is that because MERS was
4 improperly named as the beneficiary on Plaintiffs' deed of trust,
5 "the security interest in their properties was rendered invalid,"
6 (P.'s Opp. at 9 (#12)), as was any action by MERS purporting to
7 substitute trustees, (Compl. ¶ 26 (#1)). Plaintiffs' alternative
8 theory is likewise untenable. We agree with Plaintiffs that calling
9 MERS a "beneficiary" is incorrect. Weingartner v. Chase Home
10 Finance, LLC, --- F. Supp. 2d ----, No. 2:09-cv-02255, 2010 WL
11 1006708, at * 2 (D. Nev. March 15, 2010) ("MERS is not a beneficiary.
12 MERS is the nominee of the beneficiary. Often, the true beneficiary
13 (the lender/nominator) will obfuscate this distinction on the deed
14 of trust by referring to MERS as the 'beneficiary of record.'"). We
15 have not discovered, however, nor has Plaintiff provided, any
16 authority in support of the contention that the incorrect
17 designation of MERS as a beneficiary on Plaintiffs' deed of trust
18 renders the security interest on Plaintiffs' property invalid.

19 We also disagree with Plaintiffs' assertion that because of the
20 incorrect designation, any substitution of trustees effected by MERS
21 was a nullity. MERS is named in Plaintiffs' deed of trust not only
22 as the beneficiary but as the nominee for the lender. (Request for
23 Judicial Notice ("RJN"), Ex. 2 (#11).) In that capacity, MERS has
24 the authority for substitution of trustees. Weingartner, 2010 WL
25 1006708, at * 2 (noting that the nominee on a deed of trust has
26 authority to administer the deed of trust, which includes authority
27 for substitution of trustees). We have not discovered, nor has
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1 Plaintiff provided, any authority in support of a contrary
2 proposition. Plaintiffs' claim for wrongful foreclosure will
3 therefore be dismissed.¹

4 B. Fraud in the Inducement

5 Plaintiffs' second claim for relief is for fraud in the
6 inducement. Plaintiffs' claim fails to satisfy the particularity
7 requirements of Rule 9(b). Federal Rule of Civil Procedure 9(b)
8 requires that a complaint "must state with particularity the
9 circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b).
10 Rule 9(b) "requires . . . an account of the time, place, and
11 specific content of the false representations as well as the
12 identities of the parties to the misrepresentations." Swartz v.
13 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation
14 marks and citation omitted). In a case with multiple defendants,
15 "Rule 9(b) does not allow a complaint to merely lump multiple
16 defendants together but requires plaintiffs to differentiate their
17 allegations when suing more than one defendant and inform each
18 defendant separately of the allegations surrounding his alleged
19 participation in the fraud." Id. at 764-65 (internal quotation
20 marks and citation omitted).

21 Plaintiffs' claim for fraud in the inducement fails to allege
22 who made what misrepresentations or when any of the alleged

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24 ¹The parties spill considerable amounts of ink discussing the
25 implications of the circumstance that NDSC was only formally
26 substituted as Trustee after NDSC filed a notice of default. It
27 appears this issue came to the parties' attention when Defendants
28 filed their request for judicial notice (#11). Regardless, there are
no facts alleged, nor claims asserted, in the complaint relating to
this issue. As such, this issue is not a part of this case unless and
until Plaintiffs choose to amend their complaint.

1 misrepresentations took place. The claim is replete with vague and
2 conclusory allegations such as "Defendants failed to advise the
3 Plaintiffs that the obligation on his [sic] note had been discharged
4 in whole or in part, and failed to advise Plaintiffs of the fact
5 that Defendants had no lawful rights to foreclose upon the homes of
6 Plaintiffs." (Compl. ¶ 47 (#1).) Plaintiffs' claim for fraud in
7 the inducement will therefore be dismissed.

8 C. Conspiracy to Commit Wrongful Foreclosure

9 Plaintiffs' third claim for relief alleges that all Defendants
10 engaged in a conspiracy to "promote, encourage, facilitate and
11 actively engage in wrongful foreclosures perpetrated on
12 Plaintiffs" (Compl. ¶ 57 (#1).) A civil conspiracy is "a
13 combination of two or more persons who, by some concerted action,
14 intend to accomplish some unlawful objective for the purpose of
15 harming another which results in damage ." Collins v. Union Fed.
16 Sav. & Loan Ass'n., 663 P.2d 610, 622 (Nev. 1983). An "act in
17 furtherance of the conspiracy [must] constitute an actionable tort."
18 Eikelberger v. Tolotti, 611 P.2d 1086, 1088 & n.1 (Nev. 1980).
19 Plaintiffs have failed to adequately allege a plausible claim for
20 conspiracy. The basis alleged for the conspiracy claim in
21 Plaintiffs' complaint is the wrongful foreclosure claim, which is
22 itself fatally deficient. Plaintiffs' third claim will therefore be
23 dismissed.

24 D. Unjust Enrichment

25 Plaintiffs' fourth claim for relief alleges unjust enrichment
26 against all Defendants. Under Nevada law, unjust enrichment occurs
27 when "a person has and retains a benefit which in equity and good
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1 conscience belongs to another." Leasepartners Corp. v. Robert L.
2 Brooks Trust Dated November 12, 1975, 942 P.2d 182, 187 (Nev. 1997).
3 An action "based on a theory of unjust enrichment is not available
4 when there is an express, written contract, because no agreement can
5 be implied when there is an express agreement." Id. The doctrine
6 of unjust enrichment thus only "applies to situations where there is
7 no legal contract but where the person sought to be charged is in
8 possession of money or property which in good conscience and justice
9 he should not retain but should deliver to another [or should pay
10 for]." Id. (quoting 66 Am. Jur. 2d Restitution § 11 (1973)).

11 The basic premise of Plaintiffs' claim for unjust enrichment is
12 that they were "targeted for and lured" into their mortgages. (Am.
13 Compl. ¶ 177 (#35).) These mortgages are express and written
14 contracts; Plaintiffs' fourth claim thus fails and will be
15 dismissed.

16 E. Slander of Title

17 Plaintiffs' fifth claim alleges slander of title. A claim for
18 slander of title "involves false and malicious communications,
19 disparaging to one's title in land, and causing special damages."
20 Executive Mgmt., Ltd. v. Ticor Title Co., 963 P.2d 465, 478 (Nev.
21 1998). Plaintiffs' slander of title claim is based on the same
22 untenable legal theory of Plaintiffs' other claims: "National
23 Default Servicing and HomeEq (Barclays) knew that they did not have
24 any grounds to believe that the Fournesses owed them any money on
25 the note nor does National Default Servicing and HomeEq (Barclays)
26 know who the actual investors on the note and deed of trust for the
27 Fournesses are or how much is owed or how much has been discharged
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1 on that note or whether pursuant to another action, the mote has
2 been paid in part of discharged in whole." (Compl. ¶ 80 (#1).)
3 Plaintiffs' fifth claim will therefore be dismissed.

4 5 **IV. Leave to Amend**

6 Under Rule 15(a) leave to amend is to be "freely given when
7 justice so requires." FED. R. CIV. P. 15(a). In general, amendment
8 should be allowed with "extreme liberality." Owens v. Kaiser Found.
9 Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting
10 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
11 Cir. 1990)). If factors such as undue delay, bad faith, dilatory
12 motive, undue prejudice or futility of amendment are present, leave
13 to amend may properly be denied in the district court's discretion.
14 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th
15 Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

16 In light of the liberal spirit of Rule 15(a), Plaintiffs should
17 have an opportunity to amend their complaint. If the amended
18 complaint is similarly deficient, however, we may be forced to
19 conclude that leave to further amend would be futile.

20 21 **VI. Conclusion**

22 Plaintiffs' first claim for wrongful foreclosure fails because
23 Plaintiffs do not allege that they were not in default on their loan
24 and Plaintiffs' theories of relief are untenable and unsupported by
25 authority. Plaintiffs' second claim for fraud in the inducement
26 fails because it does not satisfy the particularity requirements of
27 Rule 9(b). Plaintiffs' third claim for conspiracy to commit

1 wrongful foreclosure fails because Plaintiffs' underlying wrongful
2 foreclosure claim is fatally deficient. Plaintiffs' fourth claim
3 for unjust enrichment fails because mortgages are express and
4 written contracts. Plaintiffs' fifth claim for slander of title is
5 based on the same untenable legal theory of Plaintiffs' other
6 claims. Plaintiffs will be given leave to amend.

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8 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' Motion to
9 Dismiss (#10) is **GRANTED**.

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11 **IT IS FURTHER ORDERED THAT** Plaintiffs shall have twenty-one
12 (21) days within which time to file an amended complaint.

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15 DATED: December 3, 2010.



UNITED STATES DISTRICT JUDGE