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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TERRY L. SNOOK and ANGELA SNOOK,
Plaintiffs,
v.
SIERRA PACIFIC MORTGAGE
COMPANY, INC.; et al.,
Defendants.

3:11-CV-0471-LRH-VPC

ORDER

Before the court is defendants Sierra Pacific Mortgage Company, Inc. ("Sierra Pacific") and Greenhead Investments, Inc.'s ("Greenhead") motion to dismiss (Doc. #5¹) to which defendants Tigor Title of Nevada ("Tigor"); Stanley S. Silva ("Silva"); Cal-Western Reconveyance Corporation ("CRC"); and Nationstar Mortgage, LLC ("Nationstar") joined (Doc. ##10, 14). Plaintiffs Terry Snook and Angela Snook (collectively "plaintiffs") file an opposition (Doc. #8) to which Sierra Pacific and Greenhead replied (Doc. #13).

I. Facts and Procedural History

On October 11, 2005, plaintiffs purchased real property through a mortgage note and deed of trust executed by defendant Sierra Pacific. Plaintiffs defaulted on the loan and defendants initiated non-judicial foreclosure proceedings.

¹ Refers to the court's docketing number.

1 Subsequently, on May 12, 2011, plaintiffs filed a complaint against defendants alleging nine
2 causes of action: (1) debt collection violations; (2) Nevada Unfair and Deceptive Trade Practices
3 Act, NRS 598.0923; (3) Nevada Unfair Lending Practices Act, NRS 598D.100; (4) breach of the
4 covenant of good faith and fair dealing; (5) NRS 107.080; (6) quiet title; (7) fraud; (8) slander of
5 title; and (9) abuse of process. Doc. #1, Exhibit C. Thereafter, moving defendants filed the present
6 motion to dismiss. Doc. #5.

7 **II. Legal Standard**

8 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
9 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
10 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
11 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
12 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
13 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
14 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
15 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.
16 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

17 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
18 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
19 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
20 the court to draw the reasonable inference, based on the court’s judicial experience and common
21 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
22 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
23 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
24 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
25 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

1 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
2 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
3 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
4 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
5 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
6 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
7 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
9 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

10 **III. Discussion**

11 **A. Debt Collection Violations**

12 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal
13 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,
14 plaintiffs allege that defendants violated the FDCPA by initiating a non-judicial foreclosure without
15 following the proper procedures for attempting to collect a debt.

16 It is well established that non-judicial foreclosures are not an attempt to collect a debt under
17 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*
18 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.
19 2010) (holding that recording a notice of default is not an attempt to collect a debt because the
20 borrower already consented to allow the foreclosure trustee to record the notice upon default).
21 Therefore, the court finds that plaintiffs fail to state a claim against moving defendants for violation
22 of the FDCPA, and thereby NRS § 649.

23 **B. Nevada Unfair and Deceptive Trade Practices Act**

24 Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of
25 Nevada without all required state, county or city licenses. NRS 598.0923(1). Plaintiffs alleges that
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1 defendants violated the statute by recording the underlying notice of default without having a state
2 business license. However, pursuant to Nevada Law, the action of attempting to collect on a debt
3 secured by real property or attempting to enforce a mortgage security interest does not constitute
4 doing business in the state. *See* NRS 80.015(h). Because defendants were attempting to enforce a
5 security interest in real property by initiating non-judicial foreclosure proceedings, they were not
6 required to have a state business license, and thus they did not violate the Nevada Unfair and
7 Deceptive Trade Practices Act as a matter of law.

8 **C. Nevada Unfair Lending Practices Act**

9 NRS 598D.100 prohibits lenders from making loans “without determining, using
10 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home
11 loan.” NRS 598D.100(1)(b). However, this suitability language was added in mid-2007 when the
12 statute was amended. Although plaintiffs allege that defendants violated the present version of the
13 statute, their loan originated in 2005, prior to the current amendment. Therefore, plaintiffs’ loan
14 cannot have violated the current statutory language requiring a determination that a borrower has
15 the ability to repay the loan.

16 Additionally, plaintiffs’ unfair lending practices claim is barred by the applicable statute of
17 limitations. The statute of limitations on an unfair lending practices claim under NRS 598D is two
18 (2) years. *See* NRS § 11.190(3)(a). Plaintiffs purchased the property in 2005, and did not file the
19 present action until 2011, over four years after the statute of limitations had expired. Accordingly,
20 the court shall grant moving defendants’ motion as to this issue.

21 **D. Breach of Good Faith and Fair Dealing**

22 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith
23 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784
24 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
25 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
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1 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
2 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
3 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.
4 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*
5 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

6 Initially, the court notes that there is no contract between plaintiffs and defendants Ticor,
7 Silva, CRC, Nationstar or Greenhead. The only contract at issue is the mortgage note originated by
8 defendant Sierra Pacific. Therefore, the court finds that plaintiffs have failed to allege a sustainable
9 claim for breach of the covenants of good faith and fair dealing as to these defendants.

10 As to defendant Sierra Pacific, plaintiffs allege that Sierra Pacific breached the implied
11 covenant by failing to offer them a loan modification. However, it is undisputed that Sierra Pacific
12 sold the mortgage note over five years ago prior to plaintiffs' default and desire for a loan
13 modification. Further, it is undisputed that there is no loan modification contract between plaintiffs
14 and any of the defendants. Therefore, the court finds that plaintiffs fail to allege a claim for breach
15 of the covenants of good faith and fair dealing.

16 **E. NRS 107.080**

17 In their complaint, plaintiffs allege that defendants improperly foreclosed on their property
18 because the promissory note was severed from the deed of trust and none of the defendants hold the
19 original mortgage note. *See Doc. #1, Exhibit A.*

20 Nevada law does not require the production of the original note before one of the statutorily
21 enumerated parties initiates a non-judicial foreclosure. *Weingarter v. Chase Home Finance, LLC*,
22 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010). Therefore, plaintiffs fail to allege a claim upon which
23 relief can be granted.

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1 **F. Quiet Title**

2 Under Nevada law, a quiet title action may be brought by someone who claims an adverse
3 interest in property. NRS § 40.010. Here, moving defendants do not claim any interest in the
4 property adverse to plaintiffs' interest in the property. Therefore, plaintiffs have no grounds to quiet
5 title against moving defendants.

6 **G. Fraud**

7 “In alleging fraud or mistake, a party must state with particularity the circumstances
8 constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading
9 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well
10 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th
11 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a
12 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation).

13 Here, plaintiffs fail to allege anything more than defendants defrauded them during the loan
14 process. There are no allegations of who failed to provide information or what information was not
15 provided. Further, plaintiffs fail to specifically allege the requisite “time, place, and specific content
16 of the false representation as well as the identities of the parties to the misrepresentations.”
17 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). Therefore, the court finds that
18 plaintiffs' allegations are insufficient to support their claim for fraud.

19 **H. Slander of Title**

20 A claim for slander of title “involves false and malicious communications, disparaging to
21 one's title in land, and causing special damages.” *Executive Mgmt., Ltd. v. Ticor Title Co.*, 963 P.2d
22 465, 478 (Nev. 1998).

23 Here, the recorded notice of default and notice of trustee's sale are not false and malicious
24 communications disparaging plaintiffs' title. First, plaintiffs concedes that they was in default on
25 their loan. Thus the notice of default, although allegedly recorded before CRC was authorized to do
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1 so, does not make a false statement about the title to the property. Second, it is not false that the
2 property was to be sold at a trustee's sale. Therefore, the court finds that plaintiffs have failed to
3 state a claim for slander of title.

4 **I. Abuse of Process**

5 To establish a claim for abuse of process a party must show that an opposing party (1) had
6 an ulterior purpose for bringing a legal action other than resolving a legal dispute, and (2) used the
7 legal process in a way that is not proper in the regular conduct of the proceeding. *Las Vegas Fetish*
8 *and Fantasy Halloween Ball, Inc. v. Ahern Rentals*, 182 P.3d 764, 767 (Nev. 2008); *Georgiou*
9 *Studio, Inc. v. Boulevard Invest, LLC*, 663 F. Supp. 2d 973, 982 (D. Nev. 2009).

10 Here, the court finds that plaintiffs have failed to allege any facts demonstrating that
11 defendants had an ulterior motive in initiating non-judicial foreclosure proceedings other than the
12 resolution of their default on the mortgage note. Further, the process at issue in this action is a non-
13 judicial foreclosure which is not the characteristic legal action contemplated by an abuse of process
14 claim. *See e.g., Smith v. Wachovia Mortgage Corp.*, 2009 WL 1948829, *5 (N.D. Cal. 2009).

15 Therefore, the court finds that plaintiffs have failed to state a claim for abuse of process.

16 Accordingly, the court shall grant moving defendants' motion to dismiss.²

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24 ² The court, in granting defendants' motions to dismiss, notes that plaintiffs did not request leave to
25 amend their complaint. However, even if they did request leave to amend, the court would deny the request
26 because they have failed to make any showing that amendment in this particular case would not be futile or that
they could overcome the identified pleading defects.

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IT IS THEREFORE ORDERED that defendants' motions to dismiss (Doc. #5) is GRANTED. Defendants Ticor Title of Nevada; Stanley S. Silva; Cal-Western Reconveyance Corporation; Nationstar Mortgage, LLC; Sierra Pacific Mortgage Company, Inc; and Greenhead Investments, Inc. are DISMISSED as defendants in this action.

IT IS SO ORDERED.

DATED this 15th day of September, 2011.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE