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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JESUS CHAVEZ-GALLEGOS and MARTA
VALENCIA de CHAVEZ,

Plaintiffs,

v.

FIRST MAGNUS FINANCIAL
CORPORATION; et al.,

Defendants.

3:11-cv-0709-LRH-VPC

ORDER

Before the court is defendants JP Morgan Chase Bank, N.A. (“JP Morgan”); California Reconveyance Company (“CRC”); U.S. Bank National Association (“U.S. Bank”); and Mortgage Electronic Registration Systems, Inc.’s (“MERS”) (collectively “defendants”) motion to dismiss. Doc. #12.¹ Plaintiffs Jesus Chavez-Gallegos (“Chavev-Gallegos”) and Marta Valencia de Chavez (“Valencia”) (collectively “plaintiffs”) filed an opposition (Doc. #18) to which defendants replied (Doc. #20).

Also before the court are defendants motion to strike plaintiffs’ second opposition (Doc. #26) and motion to strike plaintiffs’ second amended complaint (Doc. #37).

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¹ Refers to the court’s docket entry number.

1 **I. Facts and Procedural History**

2 In March, 2006, plaintiffs purchased real property through a mortgage note and deed of trust
3 originated by defendant First Magnus Financial Corporation (“First Magnus”). Eventually,
4 plaintiffs defaulted on the mortgage note and defendants initiated non-judicial foreclosure
5 proceedings.

6 Subsequently, plaintiffs filed a complaint alleging seven causes of action against
7 defendants: (1) wrongful foreclosure; (2) negligence; (3) negligent and/or fraudulent
8 misrepresentation; (4) slander of title; (5) breach of implied covenant of good faith and fair
9 dealing; (6) declaratory relief; and (7) injunctive relief. Doc. #1, Exhibit A. Thereafter, defendants
10 filed the present motion to dismiss. Doc. #12.

11 **II. Legal Standard**

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

21 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
22 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
23 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
24 the court to draw the reasonable inference, based on the court’s judicial experience and common
25 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
26

1 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
2 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
3 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
4 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

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

14 **III. Motion to Dismiss**

15 **A. Wrongful Foreclosure**

16 An action for wrongful foreclosure requires that, at the time of the foreclosure sale, the
17 plaintiff was not in breach of the mortgage contract. *Collins v. Union Federal Sav. & Loan Ass’n*,
18 662 P.2d 610, 623 (Nev. 1983). Here, it is undisputed that plaintiffs were in default on their
19 mortgage obligations so there can be no sustainable action for wrongful foreclosure.

20 **B. Negligence**

21 In order to allege a claim for negligence, a plaintiff must show: (1) a duty owed by
22 defendants to plaintiff; (2) a breach of that duty by defendants; (3) causation; and (4) damages. *See*
23 *Hammerstein v. Jean Dev. W.*, 907 P.2d 975, 977 (Nev. 1995). There is no special duty of care
24 owed by a financial institution when the institution’s involvement in a loan transaction does not
25 exceed the scope of a mere lender. *See Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal.App.

1 3d 1089, 1096 (Cal. App. 1991); *see also*, *Wagner v. Benson*, 101 Cal.App. 3d 27, 34 (Cal. App.
2 1980) (“Liability to a borrower for negligence arises only when a lender actively participates in the
3 finance enterprise beyond the demand of the usual money lender.”).

4 Here, plaintiffs make no allegations that the lending transaction was anything more than an
5 arms-length transaction by the defendants. Thus, under the allegations in the complaint, defendants
6 had no duty towards plaintiffs beyond a normal loan transaction. Absent a duty, there can be no
7 breach. *See A.C. Shaw Constr.*, 784 P.2d at 10.

8 **C. Negligent/Fraudulent Misrepresentation**

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

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

22 **D. Slander of Title**

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

1 Here, the recorded notice of default and notice of trustee's sale are not false and malicious
2 communications disparaging plaintiffs' title. First, they concede that they were in default on their
3 loan. Thus the notice of default does not make a false statement about the title. Second, it is not
4 false that the property was to be sold at a trustee's sale. Therefore, the court finds that plaintiffs
5 have failed to state a claim for slander of title.

6 **E. Breach of Implied Covenant of Good Faith and Fair Dealing**

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

16 Here, there is no contract between plaintiffs and moving defendants. The only contract is
17 the mortgage contract between plaintiffs and First Magnus. Therefore, plaintiffs fail to state a claim
18 against moving defendants for breach of the implied covenants of good faith and fair dealing.

19 **F. Declaratory and Injunctive Relief**

20 Claims for injunctive or declaratory relief are remedies that may be afforded to a party after
21 he has sufficiently established and proven his claims; they are not separate causes of action. *See*
22 *e.g., In re Wal-Mart & Hour Employment Practices Litig.*, 490 F. Supp. 1091, 1130 (D. Nev. 2007)
23 (holding that a claim for injunctive relief was not a separate cause of action or independent ground
24 for relief). Here, plaintiffs' claims fail to establish any claim for relief. Accordingly, plaintiffs are
25 not entitled to injunctive or declaratory relief.

1 **IV. Motions to Strike**

2 The court may strike a filing for “any redundant, immaterial, impertinent, or scandalous
3 matter.” FED. R. CIV. P. 12(f). In their motions, defendants seek to strike plaintiffs’ second
4 opposition to the motion to dismiss (Doc. #25) and plaintiffs’ second amended complaint
5 (Doc. #33) as impertinent filings. *See* Doc. ##26, 37. The court agrees. Neither the second
6 opposition, nor the second amended complaint were filed with leave of court. Further, plaintiffs
7 have provided no justification for filing the aforementioned documents. Accordingly, the court
8 shall grant defendants’ motions and strike these filings.

9
10 IT IS THEREFORE ORDERED that defendants’ motion to dismiss (Doc. #12) is
11 GRANTED. Defendants JP Morgan Chase Bank, N.A.; California Reconveyance Company; U.S.
12 Bank National Association; and Mortgage Electronic Registration Systems, Inc. are DISMISSED
13 as defendants in this action.

14 IT IS FURTHER ORDERED that defendants’ motion to strike second opposition
15 (Doc. #26) and motion to strike second amended complaint (Doc. #37) are GRANTED. The clerk
16 of court is directed to STRIKE plaintiffs’ second opposition (Doc. #25) and second amended
17 complaint (Doc. #33).

18 IT IS FURTHER ORDERED that defendant’s motion to strike (Doc. #35) is DENIED as
19 moot.

20 IT IS SO ORDERED.

21 DATED this 11th day of April, 2012.



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24 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE