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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 BANK OF NEW YORK MELLON,

8 Plaintiff,

3:16-cv-00436-RCJ-WGC

9 vs.

ORDER

10 HIGHLAND RANCH HOMEOWNERS
11 ASSOCIATION et al.,

12 Defendants.

13 This case arises from a residential foreclosure by the Highland Ranch Homeowners
14 Association (“Highland Ranch” or “HOA”) for failure to pay HOA fees. Pending before the
15 Court are two motions to dismiss (ECF Nos. 8, 18), a countermotion for summary judgment
16 (ECF No. 21), and a motion for sanctions against Plaintiff (ECF No. 39).

17 **I. FACTS AND PROCEDURAL BACKGROUND**

18 In 2004, non-party homeowners obtained a \$250,000 mortgage loan to purchase property
19 located at 6411 Samish Court, Sun Valley, Nevada 89433 (the “Property”). Plaintiff Bank of
20 New York Mellon (“Plaintiff”) acquired the note and Deed of Trust (“DOT”) by Corporate
21 Assignment of Deed of Trust recorded October 7, 2009. (Compl. ¶¶ 15–16, ECF No. 1.)

22 On November 1, 2011, as a result of the homeowners’ failure to pay HOA fees, the HOA
23 recorded a notice of delinquent assessment. (*Id.* at ¶ 17.) An HOA foreclosure sale took place on
24 June 20, 2014, at which time Defendant TBR I, LLC (“TBR”) purchased the Property for

1 \$31,100. (Compl. ¶¶ 27–28, ECF No. 1; Mot. Dismiss 4, ECF No. 8.) The deed of sale was
2 recorded on July 8, 2014. (Compl. ¶ 27, ECF No. 1.) Subsequently, TBR transferred its interest
3 in the Property to Defendant Airmotive Investments, LLC (“Airmotive”) by way of quitclaim
4 deed recorded February 29, 2016. (*Id.* at ¶ 29.)

5 On July 22, 2016, Plaintiff brought this action for quiet title and declaratory relief,
6 violation of NRS 116.1113, wrongful foreclosure, injunctive relief, and deceptive trade practices.
7 On August 15, 2016, Defendant Kern & Associates Ltd. (“Kern”) moved to dismiss Plaintiff’s
8 claims against it. (ECF No. 8.) On August 29, 2016, the HOA also moved to dismiss Plaintiff’s
9 fifth cause of action for deceptive trade practices. (ECF No. 18.) On September 1, 2016, Plaintiff
10 filed an opposition to the motions to dismiss and a countermotion for summary judgment. (ECF
11 No. 21.) On October 5, 2016, Kern moved for sanctions against Plaintiff under Federal Rule of
12 Civil Procedure 11 arising from the filing of the Complaint. (ECF No. 39.)

13 **II. LEGAL STANDARDS**

14 **a. Dismissal for Failure to State a Claim**

15 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
16 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
17 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
18 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
19 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
20 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
21 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
22 failure to state a claim, dismissal is appropriate only when the complaint does not give the
23 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
24 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is

1 sufficient to state a claim, the court will take all material allegations as true and construe them in
2 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
3 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
4 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
5 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

6 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
7 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
8 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
9 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
10 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
11 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
12 cognizable cause of action (*Conley* review), but also must allege the facts of his case so that the
13 court can determine whether the plaintiff has any basis for relief under the cause of action he has
14 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review).

15 “Generally, a district court may not consider any material beyond the pleadings in ruling
16 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
17 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
18 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
19 whose contents are alleged in a complaint and whose authenticity no party questions, but which
20 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
21 motion to dismiss” without converting the motion to dismiss into a motion for summary
22 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
23 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*

1 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
2 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
3 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
4 2001).

5 **b. Summary Judgment**

6 A court must grant summary judgment when “the movant shows that there is no genuine
7 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
8 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*
9 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
10 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*
11 *id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported
12 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

13 In determining summary judgment, a court uses a burden-shifting scheme. The moving
14 party must first satisfy its initial burden. “When the party moving for summary judgment would
15 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
16 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*
17 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks
18 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
19 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
20 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
21 party failed to make a showing sufficient to establish an element essential to that party’s case on
22 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

23 If the moving party fails to meet its initial burden, summary judgment must be denied and
24 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,

1 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the
2 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
8 summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor*
9 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the
10 assertions and allegations of the pleadings and set forth specific facts by producing competent
11 evidence that shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S.
12 at 324.

13 At the summary judgment stage, a court’s function is not to weigh the evidence and
14 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
15 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
16 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
17 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.
18 Notably, facts are only viewed in the light most favorable to the nonmoving party where there is
19 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even
20 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly
21 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not
22 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

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1 **III. ANALYSIS**

2 **a. Plaintiff’s Claim for Quiet Title and Declaratory Relief**

3 Since the briefs have been filed, the Ninth Circuit Court of Appeals denied a petition for
4 en banc rehearing in *Bourne Valley Ct. Tr. v. Wells Fargo Bank, N.A.*, No. 15-15233 (9th Cir.
5 Nov. 4, 2016.). In *Bourne Valley*, the Ninth Circuit ruled that the opt-in notice scheme under
6 Chapter 116 is facially unconstitutional under the Due Process Clause of the Fourteenth
7 Amendment. That ruling is enough to settle the quiet title and declaratory judgment claims in
8 favor of Plaintiff as a matter of law as to the HOA’s foreclosure. The HOA’s foreclosure did not
9 extinguish Plaintiff’s DOT against the Property. Therefore, the Court will grant summary
10 judgment in Plaintiff’s favor with respect to its first cause of action.

11 **b. Plaintiff’s Claims for Violation of NRS 116.1113, Wrongful Foreclosure, and**
12 **Deceptive Trade Practices**

13 In its prayer for relief, Plaintiff requests primarily a declaration that TBR and Airmotive
14 purchased the Property subject to its DOT. The other relief requested—with the exception of the
15 injunctive relief discussed below—is phrased in the alternative. Therefore, because the Court has
16 granted summary judgment for Plaintiff on its first cause of action, Plaintiff has received the
17 relief it requested. Accordingly, the Court dismisses Plaintiff’s second, third, and fifth causes of
18 action as moot.

19 **c. Injunctive Relief**

20 In its fourth cause of action, Plaintiff requests a preliminary injunction pending a
21 determination by the Court concerning the parties’ respective rights and interests. The Court’s
22 grant of summary judgment for Plaintiff moots this claim, and it is therefore dismissed.

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1 **IV. RULE 11 SANCTIONS**

2 Kern has moved for sanctions against Plaintiff, arguing that Plaintiff's claims against it
3 are baseless and therefore improper. Pursuant to Federal Rule of Civil Procedure 11, an attorney
4 signing, filing, advocating, etc., a pleading thereby represents to the court, *inter alia*, that the
5 legal contentions therein are warranted by existing law or a non-frivolous argument for
6 extending existing law, and that the factual claims have evidentiary support. Fed. R. Civ. P.
7 11(b)(2)–(3). A court may upon motion sanction a party or an attorney monetarily or otherwise
8 to the extent sufficient to deter repetition by the violator or others similarly situated. Fed. R. Civ.
9 P. 11(c)(2), (4). Monetary sanctions should be based upon the costs arising out of the violation,
10 Fed. R. Civ. P. 11(c)(4), and may not be awarded against a party for violation of Rule 11(b)(2)
11 by the party's attorney. Fed. R. Civ. P. 11(c)(5)(A).

12 Where the propriety of a complaint is at issue, Rule 11 sanctions are appropriate only if
13 the plaintiff's claims are frivolous. *See Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987).
14 “The word ‘frivolous’ does not appear anywhere in the text of the Rule; rather, it is a shorthand
15 [the Ninth Circuit] has used to denote a filing that is both baseless and made without a
16 reasonable and competent inquiry.” *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362
17 (9th Cir. 1990). “Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.”
18 *Operating Eng's Pension Tr. v. A-C Co.*, 8859 F.2d 1336, 1345 (9th Cir. 1988).

19 The Court will not impose sanctions on Plaintiff. First, Kern asserts that it owed no duty
20 to Plaintiff with respect to the foreclosure because Plaintiff was a third party and Kern was acting
21 as the HOA's attorney; therefore, Plaintiff has no legal basis upon which to sue Kern. However,
22 the Complaint specifically alleges that Kern “conducted the foreclosure at issue in this case on
23 behalf of the HOA.” (Compl. ¶ 6, ECF No. 1.) Moreover, correspondence between Kern and
24 Plaintiff's attorney supports Plaintiff's allegation that Kern was also acting as the HOA's

1 collection agent, (ECF No. 39 at 23–26), and recorded documents in the chain of title support the
2 allegation that Kern was acting on behalf of the HOA as foreclosure trustee, (*see, e.g.*,
3 Foreclosure Deed, ECF No. 8 at 29–30). In these capacities, Kern would have had an obligation
4 to conduct the foreclosure in a fair and lawful manner, in accordance with Nevada statute and the
5 applicable CC&Rs. Courts in this district have allowed claims against the HOA trustee when the
6 propriety of a foreclosure sale is at issue. *See, e.g., SRMOF II 2012–1 Trust v. SFR Investments*
7 *Pool 1, LLC*, No. 2:15-cv-01677-GMN-CWH, 2016 WL 3606786, at *3 (D. Nev. June 30, 2016)
8 (granting leave to amend complaint and add HOA trustee as defendant). The Court need not
9 opine as to whether Plaintiff’s theories of Kern’s liability would have ultimately been successful;
10 it is enough that the Court is satisfied that such theories were not frivolous.

11 Next, Kern argues that sanctions are appropriate because Plaintiff failed to exhaust
12 administrative remedies under NRS 38.310 prior to filing suit. The Nevada Supreme Court has
13 held that claims under NRS 116.1113 and for wrongful foreclosure are subject to the mediation
14 requirement of NRS 38.310, though quiet title claims are not. *McKnight Family, L.L.P. v. Adept*
15 *Mgmt.*, 310 P.3d 555, 558 (Nev. 2013) (en banc); *see also, e.g., Carrington Mortg. Servs., LLC*
16 *v. Saticoy Bay, LLC*, No. 2:15-cv-01852-APG-PAL, 2016 WL 4051268, at *2 (D. Nev. July 25,
17 2016); *Nationstar Mortg., LLC v. Desert Shores Cmty. Ass’n*, No. 2:15-cv-01776-KJD-CWH,
18 2016 WL 4134538, at *3–4 (D. Nev. Aug. 1, 2016). Therefore, if Plaintiff’s NRS 116.1113 and
19 wrongful foreclosure claims were not mooted by the Court’s grant of summary judgment, they
20 would be dismissed due to Plaintiff’s failure to pursue mediation under NRS 38.310 prior to
21 bringing this action. However, a simple failure to exhaust administrative remedies, without more,
22 is not a sufficient basis on which to award sanctions under Rule 11, and Kern has cited no case in
23 which sanctions were awarded merely for a plaintiff’s failure to exhaust. Furthermore, Plaintiff
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1 has presented non-frivolous arguments for its position, albeit incorrect, that exhaustion under
2 NRS 38.310 is not required in this case. (See Mot. Summ. J. 14–17, ECF No. 21.)

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 8, 18) and
5 Countermotion for Summary Judgment (ECF No. 21) are each GRANTED IN PART AND
6 DENIED IN PART. The Court grants summary judgment in Plaintiff's favor on its claim of quiet
7 title and declaratory judgment. TBR and Airmotive purchased the Property subject to Plaintiff's
8 first deed of trust. Plaintiff's remaining claims are dismissed as moot.

9 IT IS FURTHER ORDERED that Kern's Motion for Sanctions (ECF No. 39) is
10 DENIED.

11 The Clerk of Court shall enter judgment accordingly.

12 IT IS SO ORDERED December 6, 2016.

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16 ROBERT C. JONES
17 United States District Judge
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