

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEITH PELZEL,

Plaintiff,

v.

LSI TITLE AGENCY, INC., et al.,

Defendants.

No. CV 11-05106RBL

ORDER DENYING MOTION TO
DISMISS [Dkt. #13]

THIS MATTER is before the court on Defendants’ Motion to Dismiss. The underlying case involves a “subprime” mortgage and subsequent foreclosure. Plaintiff is the debtor and the defendants all played some role in the loan and the foreclosure. A subset of the Defendants, including LSI, GMAC, Homecomings, and MERS, argue that Plaintiff’s Complaint does not state a claim under Fed. R. Civ. P. 12(b)(6).

This case differs from more garden variety foreclosure cases in one important respect: the Plaintiff claims that the lender and/or other defendants surreptitiously changed the legal description on the Deed of Trust to encumber not only the home which was the subject of the loan transaction, but also an unrelated vacant parcel also owned by the Plaintiff.

1 Based primarily on this allegation, Plaintiff asserts a number of claims: defective
2 trustee's sale under RCW 61. 24.030; defective foreclosure; quiet title; slander of title; breach of
3 contract; breach of the duty of good faith and fair dealing, violations of the Consumer Protection
4 Act, and unjust enrichment. Plaintiff's claims are also based on the more common array of
5 complaints about the actual ownership of the note, the timing of the notice of default as
6 compared to the dates the note was purportedly assigned, and the role of Defendant MERS as
7 the lender's (or its assigns') "nominee" under Washington's Deed of Trust Act, RCW 61.24.030
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9 Defendants' Rule 12(b)(6) Motion is based on the now familiar *Twombly/Iqbal* standard.
10 They argue that Plaintiff has not sufficiently pled any of the various claims he asserts.
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12 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal
13 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
14 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege
15 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937,
16 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual
17 content that allows the court to draw the reasonable inference that the defendant is liable for the
18 misconduct alleged." *Id.* Although the Court must accept as true the Complaint's well-pled facts,
19 conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper
20 [Rule 12(b)(6)] motion. *Vasquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell*
21 *v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to
22 provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,
23 and a formulaic recitation of the elements of a cause of action will not do. Factual allegations
24 must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*,
25 550 U.S. 544, 555 (2007) (citations and footnote omitted). This requires a plaintiff to plead
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1 “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at
2 1949 (citing *Twombly*).

3 The Defendants’ Motion does not address the Plaintiffs’ claim that his legal description
4 was surreptitiously altered, in a manner that provided additional collateral for the loan without
5 the plaintiff borrower’s knowledge or consent. Their Reply¹ does not address this claim, at all.
6

7 Instead, Defendants stand on their claim that the Plaintiff’s pleading is deficient under
8 Rule 8 and the *Twombly/Iqbal* standard. They claim that the Plaintiff’s allegations about
9 MERSs’ role in the transaction are insufficient. Defendants argue that Plaintiff has not provided
10 “any evidentiary support” for the claim that the Promissory Note was sold to a Securitized Trust.
11 They argue that Plaintiffs’ allegations on these matters do not support a breach of contract claim.
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13 The Plaintiff’s Complaint sufficiently alleges facts in support of all of the claims arising
14 out of the alleged surreptitious addition of a separate parcel to his Deed of Trust. The
15 Defendants do not strenuously or persuasively contend otherwise. All nine of Plaintiff’s causes
16 of action appear to be based at least in part on this factual allegation. The Motion to Dismiss
17 these claims is DENIED.
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19 Plaintiff also asserts a subset of these claims based on his contention that the “separation”
20 of the Note and the Deed of Trust leaves the lender unsecured, and that MERS is not a valid
21 beneficiary under Washington’s Deed of Trust Act. As this Court explained recently in *Bain v*
22 *OneWest Bank, et al*, No. CV09-0149JCC, MERSs’ eligibility to serve as a beneficiary “remains
23 patently unclear” and is an open question in this state. Indeed, that issue is currently working its
24 way through the Washington Courts. See *Vinlaun v. Fidelity National Title & Escrow*, No. 10-2-
25 27688-2 SEA (King County Superior Court).
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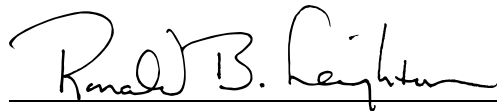
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28 ¹ Defendants’ Reply also argues that the court should Strike the Plaintiff’s Response for being
four days late. This request is DENIED.

1 The Plaintiffs' Complaint sufficiently alleges claims arising out of MERSs' relationship
2 to the transaction, and regarding the timing and efficacy of various assignments, under the Rule
3 12(b)(6) standard articulated above.

4 Specific, fact-based attacks on Plaintiff's various claims under Rule 56 may yield a
5 different result. The Defendants' Motion to Dismiss under Rule 12(b)(6) [Dkt. #13] is
6 DENIED.
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8 **IT IS SO ORDERED.**

9 Dated this 19th day of May, 2011.
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13 RONALD B. LEIGHTON
14 UNITED STATES DISTRICT JUDGE
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