UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES M. BREWSTER and KAORI T. BREWSTER,

Plaintiffs,

v.

SEASIDE TRUSTEE of WASHINGTON, INC., et al.,

Defendants.

CASE NO. C16-5732BHS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Fidelity National Title's ("Fidelity") motion to dismiss or in alternative for summary judgment (Dkt. 6). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part and denies the motion in part for the reasons stated herein.

I. PROCEDURAL HISTORY

On July 18, 2016, Plaintiffs James Brewster and Kaori Brewster's ("Brewsters") filed a complaint in Clark County Superior Court for the State of Washington asserting numerous causes of action against numerous defendants. Dkt. 1-1 at 5–95 ("Comp.").

On August 19, 2016, Defendants Bayview Loan Servicing, LLC, Mortgage Electronic Registration Systems, Inc., and The Bank of New York Mellon removed the matter to this Court. Dkt. 1.

On August 25, 2106, Fidelity filed the instant motion. Dkt. 8. On September 13, 2016, the Brewsters responded. Dkt. 16. On September 16, 2016, Fidelity replied. Dkt. 17.

II. FACTUAL BACKGROUND

In December 2005, the Brewsters executed a promissory note ("Note") that was secured by a Deed of Trust ("DOT") on their current residence. Comp., ¶ 3.1. Fidelity was the original trustee on the DOT. *Id.*, ¶ 3.5. Defendants contend that the Brewsters have been delinquent on their payments "since at least December 2007." Dkt. 25 at 3. The Brewsters filed this action to enjoin a pending foreclosure sale and assert causes of action against various companies involved in the original transaction as well as companies currently attempting to foreclose the subject property.

III. DISCUSSION

A. Motion to Dismiss

Fidelity moves to dismiss the Brewsters' complaint for failure to state a claim and for insufficient service of process. Dkt. 6. Regarding the Brewsters' failure to state a claim, motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the

complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974.

In this case, the Brewsters have alleged sufficient allegations to put Fidelity on notice of their claims. *See* Dkt. 16 at 4–5. All of the claims are based on the allegation that Fidelity was not a legal holder of the Brewsters' Note. While the claims may be deficient for other reasons, the Court finds that the Brewsters have sufficiently alleged claims against Fidelity. Therefore, the Court denies Fidelity's motion on this issue.

Regarding the Brewster's failure to serve Fidelity, a "Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or lack of delivery of the summons and complaint." *Wasson v. Riverside Cty.*, 237 F.R.D. 423, 424 (C.D. Cal. 2006). The "Court has the discretion to dismiss the action against [the defendant] or to quash service of process on [the defendant.]" *Id*. (citing *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976)).

In this case, Fidelity has shown that the Brewsters failed to properly serve Fidelity. The Brewsters do not contest this failure arguing that the time for service has not expired. Dkt. 16 at 6. The Court accepts this argument as a request to quash service instead of dismissing the action. The Court concludes that quashing service is the appropriate remedy at this time. Therefore, the Court grants Fidelity's motion on this issue.

B. Motion for Summary Judgment

In the alternative, Fidelity moves for summary judgment on the Brewsters' claims. Dkt. 6 at 5. Fidelity provides one paragraph arguing that it is entitled to summary judgment because it "has not been the Trustee on the Deed of Trust that is the subject of this lawsuit since July 2008, over eight years ago." *Id*. While this appears to be a statute of limitations defense, Fidelity provides no authority in support of its position on the merits. The Court declines to *sua sponte* analyze the timeliness issue because it would violate the Brewsters' due process rights. Therefore, the Court denies Fidelity's motion for summary judgment for failing to show that they are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

IV. ORDER

Therefore, it is hereby **ORDERED** that Fidelity's motion to dismiss or in alternative for summary judgment (Dkt. 6) is **GRANTED in part** and **DENIED in part** as stated herein.

Dated this 2nd day of November, 2016.

BENJAMIN H. SETTLE
United States District Judge