

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 02/03/2015

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: K. Pratchen

REPORTER/ERM:

BAILIFF/COURT ATTENDANT: C. Chambers, J. Green

CASE NO: **34-2014-00160873-CU-OR-GDS** CASE INIT.DATE: 03/27/2014

CASE TITLE: **Potocki vs. Wells Fargo Bank NA**

CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,12098067

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

MOVING PARTY: Wells Fargo Bank NA, U S Bank National Association as Trustee for WFASC
2005-AR1

CAUSAL DOCUMENT/DATE FILED: Demurrer to First Amended Complaint, 12/23/2014

APPEARANCES

Christopher J Fry, counsel, present for Plaintiff(s).

Daska Babcock, counsel, present telephonically for the Defendants.

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendants Wells Fargo Bank, NA and U.S. Bank NA's Demurrer to the Plaintiffs' First Amended Complaint is **OVERRULED**, in part, and **SUSTAINED**, in part, with leave to amend.

Defendants' Request for Judicial Notice is **GRANTED**. However, in taking judicial notice of these documents, the Court accepts the fact of their existence, not the truth of their contents. (See *Professional Engineers v. Dep't of Transp.* (1997) 15 Cal.4th 543, 590 (judicial notice of findings of fact does not mean that those findings of fact are true); *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.) In taking judicial notice of recorded land documents, the court accepts the fact of their existence, not the truth of their contents. (*Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 ("While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein."); see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 ("[A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity.").)

Plaintiffs' First Amended Complaint sets forth six causes of action: the 1st for Negligence Per Se, the 2nd for violation of California Business and Professions Code, sec. 17200, et seq.; the 3rd for Violation of California Civil Code, sec. 2924(a) (6); the 4th for violation of California Civil Code, sec. 2924.17; the 5th for Breach of Contract and the 6th for Declaratory Relief. Defendants demur to each cause of action for failure to state facts sufficient to constitute a cause of action.

In this foreclosure action, the NOD was recorded on Feb. 4, 2010 and the Trustee's Sale was initially noticed for June 1, 2010, then re-noticed for June 27, 2011 and noticed a third time for April 1, 2014.

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Securitization

Plaintiff alleges that US Bank has no beneficial interest in the subject mortgage, yet noticed the sale of the property at a trustee's sale.

Defendants assert that Wells Fargo, the original beneficiary, recorded an assignment of its beneficial interest under the Deed of Trust to U.S. Bank on May 4, 2010. (RJN, Ex. 5.) Based on the recorded instruments, U.S. Bank has standing to foreclose.

Plaintiff's alleges that "Securitized trusts require the mortgage be pooled in prior to the closing date." (FAC, 4:13.) This theory propounded in greater detail in other cases both in and out of California has largely been rejected. Improper securitization does not adequately support these causes of action, because regardless of the validity of assignments/transfers during the securitization process, Plaintiff's obligation to pay her mortgage debts remained the same. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515.) Nor does plaintiff have standing to challenge the various assignments and transfer of the deed of trust and promissory note during the securitization process. *Id.*

Procedurally, a promissory note is a negotiable instrument, and a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff here, an assignment merely substituted one creditor for another, without changing their obligations under the note; thus, any impropriety in the transfer would only affect the parties to the transaction, and not the plaintiff/borrower. As specifically noted in *Jenkins, supra*, at p. 515, the borrower lacks standing to enforce any agreements relating to such transactions.

Plaintiffs essentially allege that Defendants lacked the authority to assign the note or deed of trust because they attempted to pool the loan into a securitized trust but such attempt failed because the attempted transfers by way of assignments of the Deed of Trust in 2010 was executed too late. This theory is based upon *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079.

Glaski has been roundly criticized in both the state and federal courts in California. The weight of current authority is contrary to *Glaski*. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 514-515.) "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note." [citation] As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions.") The federal courts in the Ninth Circuit have generally rejected *Glaski* and embraced *Jenkins* noting that *Glaski* represents a minority view. (*Lanini v. JP Morgan Chase Bank* (E.D.Cal. April 3, 2014) 2014 U.S.Dist.LEXIS 47348 at *13.) Of note, "Every court in [the Northern] district that has evaluated *Glaski* has found it is unpersuasive and not binding authority. See also: (to name but a few federal cases) *Subramani v. Wells Fargo Bank N.A.*, No. C 13-1605, 2013 U.S. Dist. LEXIS 156556, 2013 WL 5913789, at *3 (N.D. Cal. Oct. 31, 2013) (Judge Samuel Conti); *Dahnken v. Wells Fargo Bank, N.A.*, No. C 13-2838, 2013 U.S. Dist. LEXIS 160686, 2013 WL 5979356, at *2 (N.D. Cal. Nov. 8, 2013) (Judge Phyllis J. Hamilton); *Maxwell v. Deutsche Bank Nat'l Trust Co.*, No. C 13-3957, 2013 U.S. Dist.LEXIS 164707, 2013 WL 6072109, at *2 (N.D. Cal. Nov. 18, 2013) (Judge William H. Orrick Jr.); *Apostol v. Citimortgage, Inc.*, No. C 13-1983, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6140528, at 6 (N.D. Cal. Nov. 21, 2013) (Judge William H. Orrick Jr.)." (*Zapata v. Wells Fargo Bank, N.A.* (N.D.Cal., Dec. 10, 2013, No. C 13-04288 WHA) 2013 U.S.Dist. Lexis 173187 at *5.) This Court follows *Jenkins* and finds that Plaintiffs have not alleged any valid theory based on allegations that the Loan was improperly transferred to a securitized trust.

Demurrer to the 1st for Negligence Per Se, the 2nd for violation of California Business and Professions

Code, sec. 17200, et seq. and 3rd for Violation of California Civil Code, sec. 2924(a) (6) are OVERRULED.

Statute of Limitations

Moving party defendants contend that Plaintiffs' first and second causes of action are also time-barred. Negligence has a two-year statute of limitations, while a claim under the Unfair Competition Law has a four-year statute of limitations. (Cal. Code Civ. P., § 335.1; Bus. & Prof. Code, § 17208.) Plaintiffs complain of a transfer allegedly not completed by 2005, with the alleged harm being the nonjudicial foreclosure proceedings initiated by no later than February 4, 2010, when the Notice of Default ("NOD") was recorded. (FAC, 3:20-21.) Plaintiffs did not file the present action until March 27, 2014, after both statutes of limitations had expired.

Similarly, as to the third cause of action that U.S. Bank, Wells Fargo, and First American recorded the notice of default in violation of Civil Code section 2924, subdivision (a)(6), in that as they "are not beneficiaries, trustees, or otherwise authorized to initiate foreclosure proceedings." (FAC at p. 6, lines 10-12, 25-27.)

Moving party demurs on the grounds that Section 2924 (a) (6) had not been enacted in its present form when the NOD was recorded on Feb. 4, 2010.

However, the statute precludes a party from "otherwise commenc[ing] the foreclosure process..." Civ. Code § 2924(a) (6). As the moving parties have failed to address the Notice of Trustee's Sale for April 1, 2014, the demurrer to these causes of action on this ground is overruled.

Defendants also demur on the grounds that no prejudice from the form of the NOD has been alleged. Again, it is not only the NOD that is at issue in this cause of action.

A "plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate [that] the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal. App. 4th 433, 443.

Plaintiffs oppose on the grounds that they have suffered prejudice from payments made to parties not entitled to receive them, improperly being change fees, holding clouded title to their real property, causing difficulty if they want to sell the property. The demurrer on this ground is overruled.

Thirdly, defendants demur to the 3rd cause of action on the grounds of the statute of limitations. Section 2924, subdivision (a), is, at minimum, subject to the four-year, catch-all statute of limitations. (C.C.P., sec. 343.) The limitations period begins to run once the cause of action has accrued. As argued by defendants, Plaintiffs' claim under Civil Code section 2924, subdivision (a), accrued with the recording of the NOD in February 2010. Plaintiffs did not file this action until March 27, 2014, more than four years later. Plaintiffs' claim is time-barred.

Again, in opposition, plaintiff asserts that its cause of action is not addressed to the NOD but to the April 2014 Notice of Trustee's sale and is therefore timely, and not barred by the statute of limitations. The Court therefore overrules the demurrer on this ground.

Demurrer to the 4th for violation of California Civil Code, sec. 2924.17 is OVERRULED.

Defendants' demurrer is based upon the Jan. 1, 2013 effective date of Civil Code, sec. 2924.17.

Civil Code § 2924.17(a) provides: "A *declaration* recorded pursuant to Section 2923.5 or, until January 1,

2018, pursuant to Section 2923.55, *a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure* subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding *shall be accurate and complete and supported by competent and reliable evidence.*

Demurring defendants assert that no "declaration" has been filed after the effective date of the statute, thus plaintiff cannot state a cause of action.

In opposition, plaintiffs asserts that they have alleged that "notice of sale" is also required to be accurate and complete but here the Notice of Sale does not comply with the statute.

On the record before it the Court overrules the demurrer.

Demurrer to the 5th for Breach of Contract is SUSTAINED, with leave to amend.

Plaintiff's FAC alleges "In connection with the subject mortgage loan, Plaintiffs and defendant Wells Fargo entered into a written contract whereby defendant Wells Fargo agreed to modify the subject mortgage loan in exchange for Plaintiffs' three trial payments. Plaintiffs fully performed their promise and made the trial payments. Without excuse, defendant Wells Fargo effectively breached the contract in April of 2014 by the acts and omissions set forth above."

Defendants demur on the grounds that plaintiff have failed to allege all of the material terms or attach a written copy of the contract. Additionally, defendants demur on the grounds that the breach of contract action is barred by the statute of limitations. The cause of action accrued when Wells Fargo repudiated the contract by recording the NOD on Feb. 4, 2010. The four year limitations period for written contracts set forth in C.C.P., sec. 337(1) expired prior to the filing of the original complaint on March 27, 2014.

The demurrer on this ground is sustained, with leave to amend.

In opposition, plaintiff points to the allegations of the FAC that "From the date of the Notice of Default to the date of this Complaint, Wells Fargo continued to make promises of the previously offered loan modification and in fact, is currently reviewing Plaintiffs for same. Based on these representations, Plaintiffs forewent breach of contract allegations until now. Plaintiffs allege that the contract to modify according to the trial payment plan was effectively repudiated by Wells Fargo by way of its March 11, 2014 NTS." (FAC, 4:17-21.)

The Court must accept the allegations as true, therefore the demurrer on the ground of the limitations period are overruled.

Demurrer to the 6th for Declaratory Relief is SUSTAINED, with leave to amend.

This cause of action seeks declarations regarding the identical issues that are the subject of Plaintiffs' other causes of action in the FAC. "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." (*General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470.) Plaintiffs have not alleged any facts showing that declaratory relief is proper under the circumstances given they merely seek declarations regarding the identical issues in their other causes of action. Further, to the extent that the cause of action essentially seeks to challenge Defendants' standing to foreclose under the non-judicial foreclosure statutes the cause of action is

deficient as Plaintiffs are impermissibly attempting to "interject the courts into this comprehensive nonjudicial scheme...Nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1155.) The demurrer is sustained with leave to amend.

Plaintiffs shall file and serve their Second Amended Complaint not later than Friday, Feb. 13, 2015. The responsive pleading shall be due filed and served 10 days later (15 days if service is by mail).

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.