

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

MINUTE ORDER Amended on 09/29/2020

DATE: 09/29/2020

TIME: 12:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Brown

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

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

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Hearing on Demurrer to Fourth Amended Complaint) taken under submission on 09/24/2020

TENTATIVE RULING

Effective June 16, 2020, hearings for Department 53 will be held at 1:30 p.m.

Until further notice, **NO IN-PERSON APPEARANCES WILL BE PERMITTED**. All Civil Law and Motion hearings will be conducted remotely via CourtCall or Zoom [which includes telephonic and teleconferencing options]. This will also apply to "Appearance Required" matters. The Department 53 Zoom ID is: 841 204 6267.

Consistent with Local Rule 1.06(B), any party requesting oral argument on any matter on this calendar must comply with the following procedure.

To request oral argument, you must call the Department 53 clerk at (916) 874-7858 and opposing party by 4:00 p.m. the court day before the hearing. At the time of requesting oral argument, the requesting party shall leave a voice message to advise the clerk that it has notified the opposing party of the following: a) its intention to appear and b) that opposing party may appear via Zoom using the Zoom ID indicated above or by CourtCall. If no request for oral argument is made, the tentative ruling becomes the final order of the Court.

The hearings will also be live-streamed on the Court's YouTube page for the benefit of the public. Although the hearings will be live-streamed on the Court's YouTube page, the broadcast will not be saved/preserved. Thus, if any party wishes to preserve the hearing for future use, a court reporter will be required. During the COVID-19 emergency, the Court will supply a court reporter upon request. Any party desiring a court reporter shall so advise the clerk upon request for oral argument. Unless a fee waiver has been granted, the reporter's fee must be paid to the Court prior to the hearing. Local Rule 1.12 and Government Code § 68086.

Defendants Wells Fargo Bank, N.A. and U.S. Bank National Association, as Trustee for WFASC

DATE: 09/29/2020

MINUTE ORDER

Page 1

DEPT: 53

Calendar No.

2005-AR1 (collectively, "Defendants") demur to Plaintiffs Thaddeus J. Potocki and Kelly R. Davenport's (collectively, "Plaintiffs") fourth amended complaint ("4AC"). The demurrer is ruled on as follows.

Defendants' request for judicial notice is granted. (See *Poseidon Devel., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118; see also *Stratford Irrig. Dist. v. Empire Water Co.* (1941) 44 Cal.App.2d 61, 68 (recorded land documents are the subject of judicial notice on demurrer). The Court does not accept the truth of any facts within the judicially noticed documents except to the extent such facts are beyond reasonable dispute. (See *Poseidon*, 152 Cal.App.4th at 1117-1118; 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 recoded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity."))

Defendants demur to each cause of action in the 4AC on the grounds that they fail to state facts sufficient to constitute a cause of action: (1) the first cause of action for violation of Civil Code section 2923.6; (2) the second cause of action for violation of Civil Code section 2924(a)(6); and (3) the third cause of action for wrongful foreclosure.

Factual Background

Plaintiffs' 4AC alleges the following: Plaintiffs Thaddeus J. Potocki and Kelly R. Davenport (collectively, "Plaintiffs") purchased the subject property in 2004. (4AC ¶ 13; Defendants' RJN, Exh. A.) Plaintiffs fell several months behind on their mortgage on the subject property in early 2009. Plaintiffs contacted Defendant Wells Fargo and were offered a modification in exchange for their agreement to make three trial payments in the amount of \$1,633.53 beginning in September 2009. (*Id.* ¶ 14.) On September 11, 2009, Plaintiffs made their first installment payment in the trial payment plan; the next two payments were made on September 30, 2009, and November 3, 2009. Plaintiffs made payments totaling \$4,900.49. All payments were accepted by Wells Fargo. (*Id.* ¶ 15.)

Plaintiffs were not provided the loan modification paperwork as promised. On February 4, 2010, a notice of default ("NOD") was recorded against the subject property. (See Defendants' RJN, Exh. B.) The NOD was filed by First American and believed to be filed on behalf of US Bank. (*Id.* ¶ 16.) A substitution of trustee was recorded on April 9, 2010, designating First American LoanStar Trustee Services LLC ("First American") as the new trustee. (Defendants' RJN, Exh. C.) An Assignment of the deed of trust to "US Bank National Association, as Trustee for WFASC 2005-AR1" ("ADOT") was recorded on May 4, 2010. (*Id.*, Exh. D.) First American noticed a trustee's sale for June 1, 2010 in a notice of trustee's sale on May 11, 2010 ("NOTS #1"). (*Id.*, Exh. E.)

On September 13, 2010, Plaintiffs filed a lawsuit against Wells Fargo alleging causes of action related to the alleged wrongful foreclosure. The case was pending for nearly four years and was dismissed without prejudice by Plaintiffs on February 7, 2014. (*Id.* ¶ 17.)

First American re-noticed the trustee's sale for June 27, 2011 in a notice of trustee's sale recorded on June 3, 2011 ("NOTS #2"). (Defendants' RJN, Exh. F.) After a delay resulting from Plaintiff's bankruptcy filing, First American re-noticed the trustee's sale for April 1, 2014, in a notice of trustee's sale recorded on March 11, 2014. (4AC ¶ 18; Defendants' RJN, Exh. G.)

The Court is familiar with the action. Plaintiffs filed their complaint in the instant litigation on March 27, 2014. It has undergone various iterations, and the pleading has been to the Third District Court of Appeal and back. (See *Potocki v. Wells Fargo Bank, N.A.*, (2019) 38 Cal. App. 5th 566.)

On or about December 8, 2014, Plaintiffs submitted a completed loan modification application along with

supporting documents requested by Wells Fargo. After several months, Plaintiffs were reviewed for two separate modifications. The first was a modification under the Making Home Affordable Program ("HAMP"); the second was another Trial Payment Plan ("TPP"). (*Id.* ¶ 19.) On February 3, 2015, Plaintiffs were denied on their HAMP modification review. The denial stated Wells Fargo could not modify that mortgage under HAMP because they "do not have the contractual authority to modify your loan because of limitations in our servicing agreement." Plaintiffs allege they never reviewed or agreed to any terms contained in the servicing agreement and should not be bound by them, and challenge the denial as containing no detailed information as to why Wells Fargo came to this conclusion and did not allow modification. (*Id.* ¶ 20.)

Also on February 3, 2015, Plaintiffs received a separate letter from Wells Fargo regarding the TPP review. (*Id.* ¶ 21.) In the letter, Wells Fargo requested three trial payments with the first in the amount of **\$171,745.78**. The purported workout amount was an initial payment of the past due total arrearages on the account. Plaintiffs allege this was a constructive denial. (*Id.* ¶ 22.)

Plaintiffs appealed both denials and the denials were affirmed. (*Id.* ¶ 23.) Plaintiffs allege the contract according to the modify according to the trial payment plan was effectively repudiated by Wells Fargo by way of its March 11, 2014 NTS. (*Id.* ¶ 24.) Plaintiffs claim the recording of the NTS put Plaintiffs on notice for the first time that Wells Fargo had no intentions of allowing a modification to the mortgage. (*Id.* ¶ 25.)

Defendants previously successfully demurred to an earlier version of Plaintiffs' complaint. As noted, Plaintiffs appealed to the Third District Court of Appeal. During the pendency of the appeal, First American again re-noticed the trustee's sale for June 23, 2015, in a notice of trustee's sale recorded on June 1, 2015 ("NOTS #3"). (Defendants' RJN, Exh. H.) Defendants US Bank and Wells Fargo sold the subject property at auction for \$387,000 on or about May 16, 2016. (*Id.* ¶ 26; see Defendants' RJN, Exh. I (Trustee's Deed Upon Sale).) Plaintiffs' appeal was successful and the case was remanded. (*Id.* ¶ 27.)

Plaintiffs contend that they have suffered severe stress and were subjected to multiple trespassers on the subject property, constant harassment and visitation by realtors and others as the subject property was listed for foreclosure sale. (*Id.* ¶ 28.)

Plaintiffs contend the subject property was foreclosed on in violation of California law, and they incurred thousands in late fees, delinquency charges, and foreclosure fees charged by Wells Fargo, US Bank, and First American. Plaintiffs claim US Bank and Wells Fargo never provided a fair loan modification review and the subject property was sold while simultaneously reviewing Plaintiffs for a loan modification. (*Id.* ¶ 29.)

Plaintiffs claim they were "fully capable" of paying the mortgage if the payment could have been modified and the arrearages were worked out. (*Id.* ¶ 30.)

Plaintiffs contend Defendants' conduct deprived Plaintiffs of resolving the default prior to sustaining damages, and had Wells Fargo and US Bank "fairly and carefully reviewed them for the modification," Plaintiffs would have been approved and would not have suffered the alleged damages. Plaintiffs claim that, at a minimum, they would have been able to pursue other viable foreclosure alternatives such as short sale, equity sale, bankruptcy, etc. (*Id.* ¶ 31.)

Legal Standard

The function of a demurrer or motion to strike is to test the legal sufficiency of the pleading it challenges by raising questions of law. (*Salimi v. State Comp. Ins. Fund* (1997) 54 Cal.App.4th 216, 219; *Nordlinger v. Lynch* (1990) 225 Cal.App.3d 1259, 1271.)

A demurrer "tests the pleadings alone and not the evidence or other extrinsic matters." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.) The purpose of a demurrer is to test the legal sufficiency of a claim. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal. App. 4th 968, 994.) For the purpose of determining the effect of a complaint, its allegations are liberally construed, with a view toward substantial justice. (Code Civ.Proc. § 452; *Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140-141; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, fn. 7.) In this respect, the Court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law, and considers matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1111-1112.) A general demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint; facts impossible in law; or allegations contrary to facts of which a court may take judicial notice. (*Blank*, 39 Cal. 3d at 318, *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal. App. 3d 1612, 1616 fn.2.) Extrinsic evidence may not properly be considered on demurrer or on a motion to strike. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal. App. 3d 868, 881; *Hibernia Savings & Loan Soc. v. Thornton* (1897) 117 C. 481, 482.)

A demurrer may be sustained *only* if the complaint lacks any sufficient allegations to entitle the plaintiff to relief. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal. App. 3d 764, 778.) "Plaintiff need only plead facts showing that he may be entitled to some relief . . . , we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint." (*Highlanders, Inc. v. Olsan* (1978) 77 Cal. App. 3d 690, 696-697.) "[Courts] are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal. App. 4th 726.) A demurrer admits the truth of all material facts properly pled and the sole issue raised by a general demurrer is whether the facts pled state a valid cause of action - not whether they are true. (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 591.)

Analysis

First Cause of Action for Violation of Civil Code § 2923.6

Defendants contend that Plaintiffs fail to state a claim under Civil Code section 2923.6(c), (e), or (f).

While Defendants argue these subsections in this order, the Court first turns to subsection (f), as that was discussed in the Court of Appeals ruling. (See *Potocki v. Wells Fargo Bank, N.A.* (2019) 38 Cal.App.5th 566.)

Section 2923.6(f) provides: "Following the denial of a first lien loan modification application, the mortgage servicer shall send a written notice to the borrower identifying the reasons for denial." (See 4AC ¶ 35.)

Defendants argue that Plaintiffs' 4AC includes a claim for a violation of Civil Code section 2923.6(f), but that, where a trustee's deed has been recorded, as is the case here, a violation of section 2923.6 is limited to "actual economic damages . . . resulting from a material violation[.]" (Civ. Code § 2923.6(b).) Defendants argue that Plaintiffs "still fail to plead facts showing that any violation was material, or that Plaintiffs were damaged thereby. (See *id.* § 2924.12(b) (borrowers are required to prove the violation was material).) Materiality is a violation that "affected [the [plaintiff's] loan obligations or the loan modification process." (*Cardens v. Caliber Home Loans, Inc.* (N.D. Cal. 2017) 281 F.Supp.3d 862, 869.)

As noted by the Third District Court of Appeal in its opinion in this case: "Without knowing the investor's actual reason for denying the HAMP modification, we cannot say for certain that the failure to provide "specific reasons for the investor disallowance" was not material." (*Potocki*, 38 Cal.App.5th at 571.)

Apropos of that, in opposition, Plaintiffs allege that courts often hold that materiality is a factual question that which should not be resolved at the pleadings stage, citing *Hestrin v. Citimortgage, Inc.* (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 23547, at *7-8; *Garcia v. PNC Mortg.* (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 15422, at *12; *Hixson v. Wells Fargo Bank* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 108617, at *15.

Plaintiffs argues that other courts suggest that any violation undermining the purpose of HBOR is a material violation, citing *Greene v. Wells Fargo Bank, N.A.* (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 60203, at *6-9; *Hendricks v. Wells Fargo Bank, N.A.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 49118, at *18-21; *Rizk v. Residential Credit Solutions, Inc.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 20179, at *27-28.

Plaintiffs then additionally set forth they have *alleged a material violation(s)* and significant damages sustained by Plaintiffs as a result.

Regardless, the Court finds that Plaintiff has sufficiently alleged a cause of action sufficient to survive demurrer. As the Third District stated in the appellate decision, "[a]s to their claim under section 2923.6 of the Homeowner Bill of Rights, plaintiffs contend the denials as alleged are not sufficiently detailed. We agree a claim has been stated." (*Potocki*, 38 Cal.App.5th at 569.) The decision further states: "Here, a claim was stated as to the denial of the HAMP modification. The explanation that '[we] do not have the contractual authority to modify your loan because of limitations in our servicing agreement,' does not suffice as an explanation-at least for purposes of a demurrer. The statement is ambiguous and appears to imply the investor has not allowed the modification. If that is the cause, section 2923.6, subdivision (f)(2) requires 'the specific reasons for the disallowance.' As is, the explanation appears to communicate little more than the modification was denied because the investor did not want to approve it. [¶] . . . Without knowing the investor's actual reason for denying the HAMP modification, we cannot say for certain that the failure to provide 'specific reasons for the investor disallowance' was not material." (*Id.* at 570-571.)

Accordingly, the Court overrules the demurrer on this basis. Since a defendant cannot demurrer to a part of a cause of action, the Court need not address Defendants' additional arguments related to this cause of action.

Second Cause of Action for Violation of Civil Code § 2924(a)(6)

Civil Code section 2924(a)(6) provides that an entity shall not record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. An agent of the holder of the beneficial interest under the mortgage or deed or trust, original trustee or substituted trustee under the deed of trust shall not record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.

Essentially, Plaintiffs' 4AC alleges Defendants lacked standing to foreclose. (4AC ¶¶ 39-40.)

Defendants argue the deed of trust names Wells Fargo, N.A. as the lender. (Defendants' RJN, Exh. A, p. 1.) The deed of trust allows the note or a partial interest in the note, together with the deed of trust, to be "sold one or more times without prior notice" to Plaintiffs. (*Id.* ¶ 20.) Defendants assert that, on May 4, 2010, a corporate assignment of deed of trust ("ADOT") was recorded, whereby Wells Fargo assigned the deed of trust to Defendant U.S. Bank. (Defendants RJN, Exh. D.) The notice of default and notices of trustee's sale were recorded by First American as the agent of the current beneficiary, or as the

substituted trustee, as allowed by statute. (Defendants' RJN, Exhs. B-H.) The sale was conducted by First American as the current trustee. (Defendants' RJN, Exh. I.) Defendants claim Plaintiffs "do not even attempt to plead facts showing a violation of the relevant statutes at any point in the process."

In opposition, Plaintiffs state "[t]hrough the allegations are not completely detailed, they rest on case law that holds that U.S. BANK and WELLS FARGO lacked beneficial interest and authority to direct the foreclosure sale due to the mortgage being pooled after the closing date of the trust in which it was pooled." Plaintiffs also argue "[t]hrough perhaps the allegations could be amended to further outline this issue, the Complaint is not entirely devoid of the allegations. Paragraph 20 discusses the mortgage being pulled into a trust. The actual cause of action alleges they were not authorized to foreclose. Finally, Defendants' own Request for Judicial Notice confirms the mortgage was pulled into a [pooled] securitized trust well after its closing date. (Ex. D.) ¶¶ Simply put, since US BANK and WELLS FARGO actually sold the home at auction without actual authority, they have violated 2924(a)(6)."

On reply, Defendants reiterate the chain of authority and argue the Plaintiffs argue, without any factual authority, that their loan was "pooled after the closing date of the trust in which it was pooled." Defendants also distinguish the case law cited by Plaintiffs in their opposition.

The demurrer to the second cause of action is SUSTAINED, with leave to amend. Plaintiffs have failed to adequately allege that Defendants lacked standing pursuant to Civil Code section 2924(a)(6).

Third Cause of Action for Wrongful Foreclosure

Defendants argue Plaintiffs' wrongful foreclosure claim is duplicative of their other claims, and that Plaintiffs fail to plead a claim on the merits or tender.

To state a wrongful foreclosure cause of action, a plaintiff must show: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Miles v. Deutsche Bank Nat'l Trust Co.* (2015) 236 Cal.App.4th 394, 408-409.) Defendant argues "[b]ecause Plaintiffs' HBOR and standing claims are without merit, . . . Plaintiffs cannot establish the first element of a wrongful foreclosure claim. Further, even if there was a technical violation, Plaintiffs have not and cannot plead facts showing that they were prejudiced thereby. (4AC ¶¶ 43-45; *Kalnocki v. First Am. Tr. Servicing Sol., LLC* (2017) 8 Cal.App.5th 23, 48 ([A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests.) (internal quotations omitted)."

Defendants also argue Plaintiffs cannot establish the element of tender, which is required to show that the borrower could give proof he or she could redeem the property.

In opposition, Plaintiffs argue the allegations support that the violations were material and proximately caused Plaintiffs to suffer significant damages and ultimately the loss of their home. Plaintiffs also argue the claim is not duplicative because it provides for different remedies.

In response to the tender argument, Plaintiffs argue they are excused from that requirement because it is not required in instances where the foreclosure sale is void because the foreclosing parties lacked beneficial interest and authority in conducting the sale, or when requiring tender would be inequitable. The argument related to standing is not persuasive as the Court has sustained the demurrer to the second cause of action on that basis. Defendants also argue Plaintiffs cannot appeal to equity because Defendants are under no legal obligation to modify the loan, citing *Pantoja v. Countrywide Home Loans*,

Inc. (N.D. Cal. 2009) 640 F.Supp.2d 1177, 1188. Defendants contend "Plaintiff also cannot seek equity because they have not done equity - no mention is made in the Opposition of their failure to pay a six figure sum due and owing over nearly eleven years," citing *Farmers Ins. Exchange v. Zerin* (1997) 53Cal.App.4th 445, 453.

Regardless, since the demurrer to the first cause of action is overruled, and both parties are in agreement that this cause of action is predicated on either cause of action, the demurrer to the wrongful foreclosure cause of action is overruled.

Conclusion

The demurrer is **OVERRULED** as to the first cause of action for violation of Civil Code section 2923.6 and third cause of action for wrongful foreclosure, and **SUSTAINED**, with leave to amend, as to the second cause of action for violation of Civil Code section 2924(a)(6).

Plaintiffs shall file and serve an amended complaint no later than October 7, 2020. Defendants shall file and serve a response within 30 days thereafter, 35 days if the amended complaint is served by mail as modified by the Code of Civil Procedure section 430.41 extension if necessary.

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

COURT RULING

The matter was argued and submitted.

The matter was taken under submission.

Having taken the matter under submission on 09/24/2020, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling with the following modification:
Plaintiffs shall file and serve an amended complaint no later than October 13, 2020. Defendants shall file and serve a response within 30 days thereafter, 35 days if the amended complaint is served by mail as modified by the Code of Civil Procedure section 430.41 extension if necessary.

MEGAN FARRELL
REED SMITH LLP
GLOBAL CUSTOMER CENTER
20 STANWIX STREET, SUITE 1200
PITTSBURG, PA 15222-4899

RAAGINI SHAH
REED SMITH LLP
355 SOUTH GRAND AVENUE, SUITE 2900
LOS ANGELES, CA 90071-1514

CHRISTOPHER FRY
FRY LAW CORPORATION
980 9TH STREET, 16TH FLOOR
SACRAMENTO, CA 95814

