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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

THADDEUS J. POTOCKI and KELLY R. DAVENPORT,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.; FIRST AMERICAN SERVICING SOLUTIONS, LLC; U.S. BANK, N.A.; and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 34-2014-00160873

PLAINTIFFS' OPPOSITION TO DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Filed Concurrently With Plaintiffs' Objection To Defendants' Request For Judicial Notice.*]

Date: February 3, 2015
Time: 2:00 p.m.
Dept.: 53

Plaintiffs Thaddeus J. Potocki and Kelly R. Davenport ("Plaintiffs"), by and through counsel, respectfully submit this opposition to Wells Fargo Bank, N.A. and U.S. Bank, N.A.'s (Collectively "Wells Fargo" or "Defendants") demurrer to Plaintiffs' First Amended Complaint:

INTRODUCTION

Wells Fargo reported $159,000,000.00 in legal fees in the first quarter of 2014[1] and the reason is simple; it refuses to work with homeowners. Borrowers are required to file suit simply to make arrangements to get caught up on their mortgage. Then, instead of simply modifying the mortgage, Wells Fargo uses stall tactics such as frivolously removing the case to federal court and challenging the simple allegations with unfounded demurrers. Borrowers, like Plaintiffs, are reaching out and saying "please take my money" and instead of taking it and turning the loan into a performing one, Wells Fargo irrationally drives up the fees, costs and time for reasons unknown.

Unfortunately for borrowers like Plaintiffs, there is no immunity to a bad economy and are not availed to federal bailout plans when times are tough like big banks, including Wells Fargo. As such, the foreclosure rates are staggering.

Plaintiffs own and operate a small business. Business slowed down and picked back up. They fell a few months behind on their mortgage payment. Since then, Plaintiffs have persistently tried to work out some type of agreement with Wells Fargo to begin repaying the mortgage. Due to the lack of cooperation from Wells Fargo, Plaintiffs were forced to file bankruptcy twice, retain two separate law firms and file two separate actions. This is nothing compared to the countless hours of researching, gathering and submitting documentation to provide to Wells Fargo in a joke of a loan modification process that has been dragging on for nearly *six years*!

Plaintiffs naively believed they finally had help when they were offered a "forbearance agreement" and were promised it would lead to a permanent loan modification if they made several trial payments. Unfortunately, they have been attempting to get Wells Fargo to make good on that promise for years to no avail.

[1] http://www.thewire.com/business/2014/04/heres-how-much-americas-biggest-banks-spent-on-legal-bills-this-quarter/360773/

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For the reasons set forth herein, Wells Fargo's demurrer should be overruled. In the event that the demurrer is sustained, Plaintiff respectfully requests leave to amend his pleadings.

FACTUAL BACKGROUND

The Defendants have an interesting take on the facts. They suggest that Plaintiffs have been merely delaying the foreclosure in some bizarre attempt to get out of paying it. This suggestion artfully leaves out one important detail: Plaintiffs have been diligently seeking payment arrangements for years and the Defendants are to blame for the mortgage not being paid.

The actual facts are simple. Plaintiffs took out a mortgage with the Defendants and fell behind in 2009 in the heart of the recession. When contacting Wells Fargo for help, they were told to gather up a plethora of documentation and transmit it in. They complied. They were then told to make several trial payments and a permanent loan modification would be presented to them. They again complied. They never received that permanent modification and Wells Fargo refused their attempts to contact the large unorganized bank. Wells Fargo ultimately instituted foreclosure proceedings. Had the offer not been made, Plaintiffs would not have made the payments. Now, Plaintiffs have spent years attempting to work this seemingly simple issue out with Wells Fargo without success.

Now, many years after the mortgage was taken out, the reason why the process to modify is impossible is because U.S. Bank, a complete stranger to the loan transaction, was allegedly transferred the mortgage and is now directing Wells Fargo to service and foreclose on the mortgage. U.S. Bank is acting as trustee to a securitized trust that is subject to a pool of investors. This non-traditional mortgage creates another set of barriers when a borrower is attempting to work out a repayment plan. Nevertheless, under California law, U.S. Bank is required to prove its right to foreclose and it cannot.

LEGAL STANDARD REGARDING DEMURRERS

The purpose of a demurrer is to test the legal sufficiency of a pleading, i.e., it raises issues of law, *not a contest of facts*. (*See* C.C.P. § 589; *emphasis* added.) Properly alleged material facts in a complaint are presumed to be true. (*See Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Thus, a general demurrer, based on a failure to state a cause of action may not be sustained if the complaint states any underlying cause of action, even if not the one plaintiff intended. (*See Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572.)

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The sole issue raised by this demurrer is whether the facts pleaded state a cause of action – not whether they are true. Thus, no matter how unlikely or improbable, Plaintiffs' allegations must be accepted as true for the purpose of ruling on this demurrer. (*See Dell E. Webb Corp. v. Structural Material Co.* (1981) 123 Cal.3d 593, 604.)

Code of Civil Procedure section 452 provides, in pertinent part, that: "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." Courts generally hold a cause of action valid against demurrer on the well-established theory that "though not a model of pleading," its allegations, liberally construed, are sufficient to apprise the defendant of the issues that it is to meet. (*See generally* 5 Witkin, California Procedure, Pleading (5th Ed., 2008) Pleading, § 947, p. 360.).)

Further, in determining whether the complaint states facts sufficient to constitute a cause of action, the trial court may consider all material facts arising by reasonable implication therefrom. (*See McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.)

Applying these basic principles to the causes of action in the Complaint that are at issue now, it is evident that Wells Fargo is provided with ample, precise facts that support Plaintiffs' statutory and common law claims to apprise Wells Fargo of the activities upon which Plaintiffs seek relief, which is all that is required of Plaintiffs at this pleading stage.

LEGAL ARGUMENT

Wells Fargo argues that Plaintiffs allegations, *even taken as true*, are insufficient for the following reasons: 1) Plaintiffs have no standing to challenge the securitization; 2) even if so, the claims are time barred; 3) Civil Code section 2924(a)(6) does not afford Plaintiffs protection since the Notice of Default was recorded prior to its enactment; 4) even if it did, Plaintiffs were not prejudiced; 5) even if prejudiced, the claim is time-barred; 6) Civil Code section 2924.17 does not apply as no declarations were recorded post enactment; 7) Plaintiffs' breach of contract claims are barred as Plaintiffs did not perform as payments were made late (factual question); 8) even if timely made, the claims are time-barred (generally a factual question); and 9) based on the other arguments, the declaratory relief claim is barred.

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A. Legislature Provided Standing To Challenge The Subject Securitization.

In the years leading up to the mortgage crisis, a large percentage of mortgages were pooled into trusts that were traded on Wall Street. Due to the astronomical numbers of mortgages contained in these trusts, lenders and servicers neglected to follow procedural guidelines in transferring these mortgages. They swept the issues under the carpet so that the trusts could still enjoy the tax benefits (essentially tax free income) and only created a "paper trail" upon foreclosure, mainly through the phenomenon known as "robo-signing."

Unfortunately for the banks, in 2013, California Courts and Legislature had had enough. (*See Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079; *see also* Cal. Civ. Code 2924(a)(6).)

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Under *Glaski, supra*, any interest in a mortgage must be assigned to a trust prior to the closing of the trust or the assignment is void and the parties are not authorized to foreclose. As set forth in the Complaint, this mortgage originated through Wells Fargo but was purportedly assigned to a securitized trust managed by U.S. Bank. As alleged in the Complaint, a review of the trust's governing document or prospectus will reveal that the trust closed several years before the purported assignment. Accordingly, the 2010 assignment was executed several years too late, did not make the cutoff, and is void. The *Glaski* court opined:

> California's version of the principle concerning a third party's ability to challenge an assignment has been stated in a secondary authority as follows: "Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot ... successfully challenge the validity or effectiveness of the transfer." (Citation omitted.)
>
> This statement implies that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would void the assignment. (Citation)...We adopt this view of the law and turn to the question whether Glaski's allegations have presented a theory under which the challenged assignments are void, not merely voidable.
>
> We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position "paint with too broad a brush." (Citation.) Instead, courts should proceed to the question whether the assignment was void.

(*See Glaski, supra*, 218 Cal.App.4th 1079; at 1094-1095.)

The Court went on to state that "factual allegations regarding post-closing date attempts to transfer" deeds of trust "are sufficient to state a basis for concluding the attempted transfers were void"

for the purposes of demurrer. Wells Fargo requests Judicial Notice of a variety of recordings to attempt to prove that the foreclosure is valid.[2]

Wells Fargo attempts to mislead the Court by directing it to authority that distinguishes *Glaski*. An in-depth reading of the two cases cited by Wells Fargo only bolsters Plaintiffs' allegations.

Wells Fargo cites to *Jenkins v. JPMorgan Chase Bank, N.A.* (4th Dist. 2013) 216 Cal.App.4th 497 and *Kan v. Guild Mortgage Co.* (2nd Dist. 2014) 230 Cal.App.4th 736. It suggests these cases are dispositive of any allegations challenging authority to foreclose. Wells Fargo's suggestions are misguided for two reasons; first, *Jenkins* was decided prior to *Glaski*; second, neither of these cases allege defects in foreclosures post-enactment of the Homeowner Bill of Rights and Civil Code section 2924(a)(6); third, neither of the cases overrule *Glaski*; and fourth, *Kan* was decided based almost solely on the fact that the legislation governing this foreclosure was not enacted in time to protect the *Kan* plaintiffs during their foreclosure and the Court did not want to interject itself into Legislature's framework.

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As set forth above, California Legislature was fully aware of the Judiciary's reluctance to allow borrowers to challenge foreclosure documents when it enacted the Homeowner Bill of Rights ("HBOR"). The statute is an attempt to give borrowers a fighting chance to challenge illegitimate and "robo-signed" foreclosures such as the subject foreclosure. The new laws place the burden on the foreclosing party to prove that the interest was properly assigned to it. Until the HBOR, the only forum to challenge these fraudulent foreclosures was in bankruptcy, at which point, there was no funds to hire an attorney to set forth the argument. However, the HBOR includes an attorneys' fee provision to help homeowners challenge these fraudulent foreclosures.

When the Courts considered the arguments in *Jenkins* and *Kan*, *supra*, the plaintiffs in those cases were not armed with the statutory protections the Plaintiffs here are.

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[2] Plaintiffs have submitted an objection to the Request for Judicial Notice as to entire items and as to the truth of certain items. (*See* Objection filed herewith.)

In fact, *Kan* was determined based almost primarily on the fact that foreclosures could not be challenged pre-sale as there was no such legislation in place:

> [A]llowing a plaintiff to assert a preemptive action like the one Kan proposes would result in the impermissible interjection of the courts into a non-judicial scheme enacted by the California Legislature. (Citation.)

(*See Kan v. Guild Mortgage Co.* (2nd Dist. 2014) 230 Cal.App.4th 736, at 743.)

Thus, since the Court issued this finding based on the then lack of a judicial scheme that was ultimately implemented by the HBOR, this ruling is not persuasive.

1. 2924(A)(6) Applies To The Notice Of Trustee's Sale Recorded In 2014 And The Claims Are Well Within Any Applicable Statutes Of Limitations.

Wells Fargo's contention that Civil Code section 2924(a)(6) does not apply to the instant foreclosure since the Notice of Default was recorded prior to its enactment is bizarre as it ignores plain language contained in the statute.

The code reads in pertinent part:

> No entity shall record...a notice of default...or *otherwise initiate* the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust...No...holder of the beneficial interest under the mortgage or deed of trust...may record a notice of default *or otherwise commence the foreclosure process.*

(*See* Civ. Code 2924(a)(6); *emphasis* added.)

The language of the statute makes it abundantly clear that a Notice of Default is not the only action that can "initiate" or "commence" foreclosure proceedings. Here, as set forth in the Complaint, Defendants recorded a Notice of Trustee's sale in March of 2014. The recording is believed to be at the direction of Wells Fargo and U.S. Bank. As such, the recording was subject to the protections of the HBOR. Since the wrongdoing occurred in 2014 and the case was filed in 2014, Plaintiffs have brought timely claims.

2. There Is No Authority Suggesting That Prejudice Is Required To Assert The HBOR Claims.

Wells Fargo suggests that Plaintiffs' claims are not sufficiently stated as there is no prejudice from the "robo-signed" foreclosure. Unfortunately, Wells Fargo does not, nor can it, cite to any authority standing for the proposition that a 2924(a)(6) claim requires any prejudice whatsoever.

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Nevertheless, as stated and taken as true, Plaintiffs have been prejudiced.

Plaintiffs have made continued payments that have been directed towards parties not legally entitled to receive them. Further, Plaintiffs are improperly being charged fees and their overall indebtedness is increasing as a result of the uncertain identity of who is entitled to payments. (*See* Com. p. 5, ll. 11, 25; p. 6, l. 13.)

In addition to the actual monetary losses, Plaintiffs now hold a clouded property title as there is a question of whether or not the property in encumbered by the original lender or U.S. Bank and as to the actual amount owed. This results in severe difficulty in the event Plaintiffs wish to sell the property.

Moreover, the plain language of the statute indicates that it is designed to grant injunctive relief against improper foreclosures. As such, the main remedy is an injunction and no actual prejudice is required.

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B. 2924.17 Does Not Require Actual Declarations And Applies To Notices Of Trustee's Sales.

Yet again, Wells Fargo attempts to mislead the Court by leaving out crucial portions of the HBOR enacted by Legislature. It suggests that because the Notice of Trustee's Sale contained no declarations, it is not governed by 2924.17. However, a plain reading of the statute reveals that notices of sale are included. The code reads:

> 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…shall be accurate and complete and supported by competent and reliable evidence.

(See Civ. Code § 2924.17(a); *emphasis* added.)

As alleged the Notice of Trustee's sale recorded in 2014 is not supported by competent and reliable evidence showing that U.S. Bank is entitled to foreclose on the property. Further, the Defendants cannot judicially notice any documents supporting otherwise.

C. Plaintiffs' Breach Of Contract Claims Are Sufficiently Stated And Not Time-Barred.

Wells Fargo employs the "throw everything at the wall and see what sticks" approach to get out of its promise of a permanent loan modification. It suggests that Plaintiffs did not perform, a factual issue, and that if they did, Plaintiffs' claims are time-barred.

1. Performance Is A Factual Issue; Nevertheless, Plaintiffs Substantially Performed.

Wells Fargo relies on a non-judicially noticeable copy of a forbearance agreement to show that Plaintiffs did not perform their obligations. Aside from the fact that this is clearly a factual issue and the document is not judicially noticeable (*see* Objection filed herewith), Plaintiffs substantially performed and Wells Fargo excused the alleged breach by accepting the payments anyway.

To obtain remedies for defendant's breach of contract, plaintiff must normally plead and prove it performed its own obligation under the contract or was excused from doing so. (*See Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181 (affirming summary judgment where moving party negated "performance" element); *see also* 1 Witkin, Summary of California Law, Contracts § 848.) Notwithstanding, substantial performance may suffice. (*See Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291–1292 (holding that a failure to make timely progress payments on a construction project did not give rise to a breach of contract claim.) As such, the alleged delay in payments sufficiently constitutes substantial performance.

In addition to substantial performance, Wells Fargo's acceptance of the payment is a valid accord and satisfaction. An accord and satisfaction substitutes a new agreement for, and in satisfaction of, a preexisting agreement between the parties and can be implied. (*See Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058–1059; *see also* Civ. Code §§ 1521, 1523; 1 Witkin, Summary of California Law, §§ 950–960; Rest.2d Contracts § 281.)

There is no basis in which Wells Fargo can suggest that the improperly judicially noticed contract is void as a matter of law.

2. The Statute of Limitations Should Be Tolled Based On Equitable Principles.

As set forth in the Complaint, the initial promise was made in 2009. However, as set forth in the Complaint and herein, various principles apply to toll the statute and Wells Fargo should not be able to raise any statute of limitation defenses based on its own conduct.

Plaintiffs allege that the contract breached was a written agreement. An action on "any contract, obligation or liability founded upon an instrument in writing" must typically be commenced within 4 years after accrual of the action. (*See* Cal. Code Civ. Pro. § 337(1).)

The statute of limitations for breach of contract generally accrues when the contract is breached.

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(*See Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 488.) The issue here is when exactly was the contract breached? Of course, Wells Fargo suggests that it was breached when the Notice of Default was recorded in February of 2010 causing the statute of limitations to expire in February of 2014, prior to the instant suit. However, Wells Fargo ignores the allegations at page 4, line 17 describing the promises made by Wells Fargo to honor the agreement with a modification (Plaintiffs are even STILL being reviewed for a permanent modification). Based on these facts and the below theories, the claims cannot be time-barred as a matter of law.

Equitable tolling is a judge-made doctrine "which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*See Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) Equitable tolling of the statute of limitations has been recognized in California if a plaintiff is pursuing an alternative remedy in another forum. Equitable tolling "fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court." (*See Addison v. State of Calif.* (1978) 21 Cal.3d 313, 320–321.) As set forth in the Complaint, Plaintiffs filed a prior case which lasted from September of 2010 up through February of 2014 which acts to extend the statute of limitations almost 4 years.

Finally, the doctrine of equitable estoppel applies. In appropriate cases, a defendant may be equitably estopped to assert the statute of limitations as a defense: "(O)ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." (*See Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) As set forth in the Complaint and herein, Wells Fargo continued to represent that it intended to honor its promise of a modification as it has been continuously reviewing Plaintiffs' loan for a modification for the past 5 years.

Moreover, statutes of limitations have been found to not be triggered by a breach that produces no immediate harm or only nominal damages. Rather, the limitations period begins when a plaintiff suffers appreciable and actual harm, however uncertain in amount. (*See Davies v. Krasna* (1975) 14 Cal.3d 502, 514.) As set forth in the Complaint, only minimal damage has occurred because Wells

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Fargo continues to seemingly attempt to make good on its promise. The home has not been sold and the loan is currently under review for a modification, giving Wells Fargo the opportunity to essentially eliminate damages all together. As such, no immediate harm has occurred and the statute of limitations has yet to expire.

Additionally, the delayed discovery rule applies to a contract breach where the breach is difficult for plaintiff to detect and the harm flowing from the breach will not be reasonably discoverable by plaintiff until a future time. In such circumstances, the limitations period commences when plaintiff knew or should have known of the breach. (*See April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832.) Plaintiffs to this day have not been advised that Wells Fargo does not intend to make good on its promise and the home has yet to be foreclosed upon.

Based on these principles, the claims cannot be time-barred as a matter of law.

D. Declaratory Relief.

Wells Fargo contends that the claims supporting the declaratory relief claim fail. Specifically, Plaintiffs lack standing to challenge the foreclosure and their contract claims are time-barred. As set forth above, California has enacted statutory standing to challenge the ability to foreclose and Plaintiffs' claims can be reasonably tolled to bring them well within any applicable statutes of limitations.

CONCLUSION

Based on the foregoing, Defendants' Demurrer should be overruled. In the alternative, if the Demurrer is sustained, Plaintiff respectfully requests leave to amend the pleadings herein.

DATED: January 23, 2015

Respectfully submitted,

GREENE | FRY, APLC

By: _____
Christopher J. Fry, Esq.
Attorney for Plaintiffs

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PROOF OF SERVICE
CALIFORNIA SUPERIOR COURT

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1912 F Street, Suite 110, Sacramento, California 95811.

On January 23, 2015, I served the foregoing document(s) described as:

PLAINTIFFS' OPPOSITION TO DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

On all interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

Attorneys for Wells Fargo Bank, N.A.:

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[X] BY MAIL and E-MAIL: I caused such envelope to be deposited in the mail at Sacramento, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. A copy was also emailed to their email address of record, if available.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of California that the above is true and correct.

Executed on January 23, 2015, at Sacramento, California.

Christopher J. Fry

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