

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

MINUTE ORDER

DATE: 06/26/2012

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Brown

REPORTER/ERM: S. Adams CSR# 12554

BAILIFF/COURT ATTENDANT: V. Carroll

CASE NO: **34-2011-00095616-CU-OR-GDS** CASE INIT.DATE: 01/24/2011

CASE TITLE: **Ziolkowski vs. HSBC Mortgage Services**

CASE CATEGORY: Civil - Unlimited

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

APPEARANCES

Michael Yesk, counsel, present for Plaintiff(s) telephonically.

Sara Karubian, counsel, present for Defendant(s) telephonically.

Nature of Proceeding: Hearing on Demurrer

TENTATIVE RULING

Defendants HSBC Mortgage Services, Inc.'s and Housekey Financial Corporation's demurrer to Plaintiffs Brian Ziolkowski's and Mary Ziolkowski's First Amended Complaint is ruled upon as follows.

Plaintiffs allege they obtained residential mortgage loan in November of 2005 from Accredited Home Loans, Inc. (FAC ¶¶1, 6.) In approximately December of 2010, Plaintiffs received a Notice of Default in connection with the loan. (FAC ¶27.) However, Plaintiffs allege that the property has not been sold at a trustee sale because "[n]one of the mortgage defendants qualify as an unrelated third party purchaser, so that they could not acquire title to the property as a bona fide purchaser for value..." (FAC ¶5.)

First Cause of Action - Wrongful Foreclosure

Defendants first demurrer on the grounds that Plaintiff failed to allege tender of the outstanding debt. Plaintiffs challenging a completed foreclosure proceeding "are required to allege tender of the amount of [the] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure." (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109.) Here, Plaintiffs do not dispute that they have not tendered or alleged tender of the amount due on their loan, but argue that because they are challenging Defendant's authority to foreclose and thus it would be inequitable to require Plaintiffs to tender. Plaintiffs cite *Onofrio v. Rice* (1997) 55 Cal.App.4th 413 for this proposition. In *Onofrio*, however, the plaintiff sought rescission of the underlying deed of trust, a remedy Plaintiffs are not seeking here. Plaintiffs also cite *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, [a tender may not be required where it would be inequitable to impose such a condition on the party challenging the sale] which sets forth the following exceptions to the tender rule: (1) where the borrower attacks the validity of the underlying debt; (2) where the person seeking to set aside the trustee's sale has a counterclaim or set-off against the beneficiary tender is not due to the extent the offset is equal to or greater than the amount due; (3) where it would be inequitable to impose a tender requirement; and (4) where the trustee's deed is void on its face. (*Lona*, supra, at 112-113.)

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Plaintiffs argue that the tender requirement should not apply because they allege that their loan was sold to a securitization trust, and that Defendants "failed to follow the Pooling and Servicing Agreements, failed to endorse the note and assign the deed of trust in a timely manner as set forth in the Pooling and Servicing Agreement, and failed to properly identify the true party of interest in their foreclosure action." (FAC ¶5.) Thus, Plaintiffs allege, Defendants cannot establish that they lawfully acquired an interest in Plaintiffs' loan that authorizes them to initiate foreclosure. (See FAC Exh. A, 4:18-20.) Plaintiffs cite *Javaheri v. JPMorgan Chase Bank, N.A.* (C.D. Cal. June 11, 2011) 2011 U.S. Dist. LEXIS 62152 for their contention that these allegations are sufficient to allege that Defendants lack the authority to foreclose. In *Javaheri*, the plaintiff alleged that the loan at issue was "sold to an investment trust and became part of, or was subject to, a Loan Pool, a Pooling and Servicing Agreement, a Collateralized Debt Obligation, a Mortgage-Backed Security, a Mortgage Pass-Through Certificate, a Credit Default Swap, an Investment trust and/or a Special Purchase Vehicle" and that the defendant never properly recorded its claim of ownership in the subject property. (*Id.* at 13-14.) The *Javaheri* court noted that "the Court must accept these facts as true when deciding a motion to dismiss." (*Id.* at 14.) The same standard applies to this Court's review of the instant demurrer. The court found these allegations were sufficient to allege that the defendant "did not own [plaintiff's] Note and therefore did not have the right to foreclose." (*Id.* at 14.)

The Court agrees that under *Javaheri*, the allegations in the FAC are sufficient to "raise [Plaintiffs'] right to relief above a speculative level," and thus invoke the equity exception to the tender rule. The allegations are also sufficient to state claim for wrongful foreclosure. (See *Javaheri, supra.*) The Court notes that Defendants *offer no judicially-noticeable evidence that they received a proper assignment of the deed of trust or otherwise obtained authority to foreclose.* Defendants argue only that they need not produce the original note in order to initiate foreclosure, and that the mere fact that the loan was securitized does not extinguish the right to foreclose. However, these contentions, even if taken as true, do not refute Plaintiffs' specific allegations regarding defects in the transfer of rights under the Deed of Trust.

Accordingly, the demurrer to the first cause of action for wrongful foreclosure is overruled.

Second Cause of Action - Declaratory Relief

The Court having overruled Defendants' demurrer to the first cause of action, the Court concludes that Plaintiffs have sufficiently alleged the existence of an actual controversy appropriate for declaratory relief. The demurrer to the second cause of action is overruled.

Third Cause of Action - Quiet Title

Defendants demur on the grounds that the complaint is unverified. In order to maintain a cause of action for quiet title, "the complaint shall be verified." (CCP §761.020.) Plaintiffs concede that the FAC is not verified, and request leave to file a verified amended complaint. The demurrer is therefore sustained with leave to amend.

Fourth Cause of Action - Slander of Title

Defendants demur to the fourth cause of action on the grounds that it is based on the recording of the Notice of Default, which Defendants contend is privileged conduct under Civil Code §§ 47 and 2924(d)(1). In opposition, Plaintiffs concede that the recording of a Notice of Default may fall privileges provided for in §§ 47 and 2924(d)(1), but argue the privilege is inapplicable here because they have alleged Defendants acted with malice. (See *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333-334.) Plaintiffs allege that "Defendants acted with malice as they knew they had no ownership interest in the

note or Deed of Trust as of the date of the Notice of Default and Defendants proceeded with the foreclosure activity against Plaintiff's property despite this knowledge." (FAC ¶43.) Contrary to Defendants' argument, this allegation is not conclusory and is sufficient to allege that Defendants' acted with malice, such that the alleged improper filing of the Notice of Default cannot be deemed privileged as a matter of law.

The demurrer to the fourth cause of action is overruled.

Fifth Cause of Action - Breach of Contract

Defendants demur to the cause of action for breach of contract on the grounds that Plaintiffs failed to identify the alleged contract that was breached or the material terms thereof. "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co* (2002) 29 Cal.4th 189, 198-199.) As explained by the California Supreme Court over 100 years ago, "[where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in haec verba, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient." (*Gilmore v. Lycoming Fire Ins. Co.* (1880) 55 Cal. 123, 124; *Otworth v. Southern Pac. Transportation Co.* (1985)166 Cal.App.3d 452, 458 ("the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference.") Here, however, Plaintiffs allege only that "the Plaintiffs did not receive a fixed-rate loan, nor the promised APR which clearly signals a lack of mutual assent." (FAC ¶48.) The Court agrees that this is insufficient to put Defendants on notice of the contract at issue and what terms were allegedly breached, as this allegation appears to state that no contract was formed at all due to a lack of mutual assent. Although Plaintiffs argue that they have attached a report containing a forensic loan audit to the FAC, this is not sufficient to identify a contract between Plaintiffs and Defendants or state the legal effect thereof. The demurrer is sustained with leave to amend on this ground.

Defendants also demur on the grounds that to the extent Plaintiffs allege a contract was breached when they did not receive certain loan terms when they entered into the loan agreement in November of 2005, such a claim is barred by the four year statute of limitations for claims for breach of contract. (CCP §337.) Plaintiffs did not file their complaint in this action until January of 2011, more than five years after the origination of the loan. The demurrer is also sustained with leave to amend on this ground.

Sixth Cause of Action - Injunctive Relief

Defendants demur on the grounds that injunctive relief is a remedy, not an independent cause of action. Plaintiffs concede this ground, and request leave to amend to request injunctive relief in their prayer for relief. The demurrer to the sixth cause of action is therefore sustained with leave to amend.

Plaintiff may file and serve an amended complaint no later than July 6, 2012. (Although not required by statute or court rule, plaintiff is directed to present the clerk a copy of this ruling at the time of filing the amended complaint.) Defendants to respond within 10 days, 15 if the complaint is served by mail.

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

COURT RULING

After hearing oral argument the Court affirmed its tentative ruling with the following modification:

Plaintiff may file and serve an amended complaint within 20 days.

Defendant to respond within 20 days.