

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF VENTURA  
VENTURA

MINUTE ORDER [X] Amended on 02/07/2012

DATE: 02/07/2012

TIME: 03:25:00 PM

DEPT: 40

Judicial Officer Presiding: Rebecca Susan Riley

CLERK: Sharon Rishel

REPORTER/ERM:

CASE NO: 56-2011-00400168-CU-BT-VTA

CASE TITLE: Aleman vs. Marix Servicing LLC

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

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EVENT TYPE: Ruling on Submitted Matter

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**APPEARANCES**

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The Court, having previously taken the Demurrer (01/30/12) under submission, now rules as follows:

**Grant** the Request for Judicial Notice. Although the documents are not certified, the court has no reason to believe they are not authentic. The documents and the facts of which Defendants ask the court to take judicial notice are proper subjects of judicial notice.

**Sustain** without leave to amend as to the 1st cause of action for Cancellation of Voidable Deed of Trust Under Rev. & Tax Code §§ 23304, 23305A, the 2nd cause of action to Void a Fraudulent Foreclosure Sale and the 3rd cause of action for Quiet Title.

In all causes of action, Plaintiffs seek to have the foreclosure of the property set aside. To seek any relief related to a pending or past foreclosure sale, Plaintiff must show a tender of the amount owing under the loan. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101.) A borrower need not tender the full amount of the mortgage indebtedness as a prerequisite for bringing an action under CC §2923.5 (*Mabry v. Sup. Ct.* (2010) 185 Cal.App.4th 208, 225.) In other words, it appears that tendering the debt may not always be an absolute requirement as lenders' attorneys would frequently have it, and the requirement could be unfair where the very existence of the loan is unlawful such that the illegality should not be enforced and perpetuated, or where the foreclosure sale is void. Here, Plaintiffs have not alleged facts to establish any basis upon which to have the foreclosure set aside (*i.e.*, that they were not in default and that they had the ability to tender the amount due and owing on the loan).

It is not incumbent upon Defendants to show a valid assignment. (See *Fontenot v. Wells Fargo Bank, NA.* (2011) 198 Cal.App.4th 256, 270.) An assignment of a deed of trust is not a prerequisite to foreclosure. (See *Calvo v. HCSB Bank* (2011) 199 Cal.App.4th 118; *Stockwell v. Barnum* (1908) 7 Cal.App. 413.) And without sufficiently pleading prejudice, Plaintiffs cannot challenge the validity of the

foreclosure on the basis of a "void" assignment. (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 86.) Prejudice is not presumed from mere irregularities in the process. (*Meux v. Trezevant* (1901) 132 Cal. 487, 490.)

The failure to register does not give Plaintiffs a cause of action under California law. (See *Perlas v. Mortgage Electronic Registration Systems, Inc.* 2010 U.S. Dist. Lexis 79705.) And MERS is registered to do business in California with the Secretary of State. (RJN, Ex. H.) California courts have held that an unregistered corporation, upon registering, is "restored to full legal competency and has its prior transactions given full effect." (*United Medical Mgmt. v. Gatto* (1996) 49 Cal.App.th 1732, 1741.)

As to Plaintiffs' argument that production of the note is required (see opposition, page 7, lines 25-27), there is no authority in California allowing a borrower to bring a cause of action to determine the chain of title. (See *Gomes v. CountryWide Home Loans, Inc.* (2011) 192 Cal.App.th 1149, 1154.) Courts have rejected arguments that MERS lacks the ability to transfer and assign. (See *Johnson v. Wash. Mut.* (e.D. Cal. Feb 24, 2010 2010 WL 682456; *Fontenot. Wells Fargo Bank, NA* (2011) 198 Cal.App.th 256, 272-273). MERS can be both the beneficiary and for the beneficiary. There is nothing inconsistent in MERS being designated both as a beneficiary and a nominee, i.e., agent for the lender. (*Id.*)

Here, MERS is authorized to assign the deed of trust, which it did to REO. (RJN, Ex. D). Arch Bay then substituted Quality (RJN, Ex. E), who subsequently recorded the Notice of Sale. (RJN, ex. F.) Plaintiffs do not challenge the validity of these instruments nor do they even acknowledge these instruments.

**Sustain** without leave to amend as to the 4th cause of action for Violation of California Bus. & Prof. Code § 17200. Plaintiff does not provide authority for the proposition that a violation of Rev. & Tax Code sections caused direct injury to Plaintiff sufficient for a cause of action under Section 17200. Prop. 64, which limited standing to bring actions under the unfair competition law and false advertising law to governmental parties and injured private parties. After Prop. 64, only those private persons who have suffered injury in fact and have lost money or property (Sections 17204, 17535) may sue to enforce the unfair competition and false advertising laws. Uninjured persons may not sue (17204, 17535) and private persons may no longer sue on behalf of the general public. (Prop. 64, Section 1(t).) (See *Branick v. Downey Savings* (2006) 39 Ca1.4th 235, 241.)

A plaintiff must have suffered an "injury in fact" and have "lost money or property as a result of such unfair competition" to have standing to pursue either an individual or a representative claim under the California unfair competition law, Business and Professions Code section 17200 *et seq.* (UCL). We hold the phrase "as a result of" in the UCL imposes a causation requirement; that is, the alleged unfair competition must have caused the plaintiff to lose money or property. (*Hall v. Time, Inc.* (2008) 158 Cal.App.th 847.)

Without establishing injury in fact, by Defendants, Plaintiff s cannot maintain a claim for violation of section 17200.

**Sustain** without leave to amend as to the 5th cause of action for Declaratory Relief. The failure to state a cause of action for wrongful foreclosure may indicate a failure to state a claim for declaratory relief (or quieting title). (See *McElroy v. Chase Manhattan Mortg. Corp.* (2005) 134 Cal.App.th 388, 394 (Plaintiffs did not make a proper tender to cure the default, and foreclosure was therefore not wrongful, such that there was no adverse claim to the property in order to state a claim of quiet title or declaratory relief.)

**Sustain** without leave to amend as to the 6<sup>th</sup> cause of action for Promissory Estoppel. After a closer

reading of the *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 case, the court determines that, just as in the *Fontenot* case, there was consideration involved making promissory estoppel inapplicable. The court held in that case:

"Finally, plaintiff contends she adequately pleaded a claim for promissory estoppel, based on an alleged promise by Wells Fargo not to foreclose." In California, under the doctrine of promissory estoppel, 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. ...' [Citations.] Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.'" (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 [96 Cal. Rptr. 2d 747, 1 P.3d 63].) "The purpose of this doctrine is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249 [74 Cal. Rptr. 398, 449 P.2d 462].) Accordingly, a plaintiff cannot state a claim for promissory estoppel when the promise was given in return for proper consideration. The claim instead must be pleaded as one for breach of the bargained-for contract. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672-673; see *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1040-1041 [107 Cal. Rptr. 3d 683] [promissory estoppel appropriate only where no consideration for promise].) Here, the only alleged promise not to foreclose is contained in the forbearance agreement. Because Wells Fargo's promise not to foreclose in the forbearance agreement was given for proper consideration, in the form of plaintiff's agreement to resume making payments on the promissory note, the complaint cannot state a claim for promissory estoppel."

**Sustain** without leave to amend the 7th cause of action for Breach of Contract and 8th cause of action for Breach of Third Party Beneficiary Obligations. The court agrees with the Reply argument that follows. Plaintiffs' breach of contract claim allegedly focuses on the Deed of Trust. (See Opposition, page 15, lines 8-14.) Marix does not dispute that the Deed of Trust is a valid contract. However, Plaintiffs' fulfillment of the "breach" prong of their claim is premised on the breach of a HAMP agreement. (See Opposition, page 15, lines 15-22.) Not only was there no HAMP agreement between Marix and Plaintiffs, it is not even alleged that there was such a contract. Plaintiffs identify the Deed of Trust as the underlying contract, not a HAMP plan. Either Plaintiffs have failed to identify the existence of a contract in the form of a HAMP agreement between Plaintiffs and Marix or Plaintiffs have failed to establish a breach of the Deed of Trust.

Plaintiffs are attempting to sue a third party beneficiary based on a HAMP trial payment plan. However, Courts that have considered the argument raised by Plaintiffs have consistently held that the HAMP servicer agreements do not create rights in third party beneficiaries. (See *Grill v. BAC Home Loans Servicing LP* (E.D. Cal. Jan. 14, 2011) 2011 U.S. Dist. LEXIS 3771, at 18.)

Plaintiff to file an amended complaint with the remaining causes of action within 10 days.

Clerk to give notice.

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA**

Ventura  
800 South Victoria Avenue  
Ventura, CA 93009

**SHORT TITLE:** Aleman vs. Marix Servicing LLC

**CLERK'S CERTIFICATE OF SERVICE BY MAIL**

**CASE NUMBER:**  
**56-2011-00400168-CU-BT-VTA**

I certify that I am not a party to this cause. I certify that a true copy of Ruling on Submitted Matter (01/30/12) was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Ventura, California, on 02/08/2012.

Clerk of the Court, by: *S. Schabel*, Deputy

EMMANUEL F FOBI  
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OXNARD, CA 93030

✓ ANDREW E HALL  
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**CLERK'S CERTIFICATE OF SERVICE BY MAIL**