

**FILED**

**NOT FOR PUBLICATION**

FEB 15 2012

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOSS C. CABALLERO, suing  
individually, on behalf of the general  
public and on behalf of all others similarly  
situated,

Plaintiff - Appellant,

v.

BANK OF AMERICA, a National  
Association; et al.,

Defendants - Appellees.

No. 10-17818

D.C. No. 5:10-cv-02973-LHK

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
Lucy Koh, District Judge, Presiding

Argued and Submitted February 13, 2012  
San Francisco, California

Before: GRABER, BERZON, and TALLMAN, Circuit Judges.

Plaintiff Moss Caballero appeals from the district court's dismissal on the pleadings of this diversity action against Defendants Bank of America, Federal National Mortgage Association, NDex West, LLC, and Does 1-100. Reviewing de

---

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

novo the interpretation of state law, Lahoti v. Vericheck, Inc., 636 F.3d 501, 505 (9th Cir. 2011), we affirm.

The district court correctly held that California Civil Code section 2932.5 does not apply to deeds of trust. After the district court issued its decision, the California Court of Appeal reached the same conclusion in a thorough and well-reasoned decision, and the California Supreme Court denied review. Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815 (Ct. App. 2011), rev. denied (Cal. S. Ct. Jan. 4, 2012). For the reasons stated in Calvo and the many district-court decisions that have reached the same conclusion, e.g., Roque v. Suntrust Mortg., Inc., No. 09-00040, 2010 WL 546896 (N.D. Cal. 2010) (order), we find no "convincing evidence" that the California Supreme Court would hold that California Civil Code section 2932.5 applies to deeds of trust. See Hayes v. County of San Diego, 658 F.3d 867, 870 (9th Cir. 2011) (order) ("In deciding an issue of state law, when there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." (internal quotation marks omitted)).

**AFFIRMED.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MOSS C. CABALLERO,	)	Case No.: 10-CV-02973-LHK
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS'
	)	MOTION TO DISMISS WITH LEAVE
v.	)	TO AMEND IN PART
	)	
BANK OF AMERICA, a National Association;	)	(re: docket #6 and #14)
FEDERAL NATIONAL MORTGAGE	)	
ASSOCIATION, a Government-Sponsored	)	
Enterprise; NDEX WEST, LLC, a Limited	)	
Liability Corporation; and Does 1-100, inclusive,	)	
Defendants.	)	

Plaintiff Moss C. Caballero, for himself and on behalf of all those similarly situated, brings suit under California law in relation to foreclosure proceedings that resulted in the non-judicial sale of his property. Specifically, Plaintiff claims that Defendants violated California law by: 1) failing to record a substitution of trustee prior to the foreclosure sale; and 2) failing to record assignment of the beneficial interest in the deed of trust prior to the foreclosure sale. Before the Court is Defendants' motion to dismiss Plaintiff's complaint for failure to state a claim under Fed. R. Civ. 12(b)(6). Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument. For the reasons discussed below, Defendants' motion to dismiss is GRANTED WITH LEAVE TO AMEND IN PART.

**I. Background**

1  
2 In January 2001, Plaintiff purchased real property commonly known as 894 Brookside  
3 Drive, Felton, California (the “Property”). Compl. ¶ 12. In November 2006, Plaintiff obtained a  
4 30-year conventional mortgage loan from Bank of America for a sum of \$407,800. *Id.* The loan  
5 was evidenced by a promissory note and secured by a deed of trust, the latter of which was  
6 recorded in Santa Cruz County on November 14, 2006. Caballero’s deed of trust named “PRLAP,  
7 Inc.” as the trustee. *Id.* at ¶ 15. In late 2008, Plaintiff failed to pay his monthly mortgage payment  
8 as required by the mortgage loan. *Id.* at ¶ 14. Soon thereafter, Bank of America declared the loan  
9 to be in default. On or about October 6, 2009, NDEX West recorded a “Notice of Trustee’s Sale”  
10 that set a trustee sale date of October 22, 2009. *Id.* at ¶ 15. Plaintiff’s complaint alleges that no  
11 substitution of trustee (i.e., NDEX West for PRLAP, Inc.) was ever recorded, in violation of  
12 California Civil Code § 2934a.

13 On March 10, 2010, NDEX West conducted a trustee’s sale of Plaintiff’s Property, and sold  
14 the Property to the Federal National Mortgage Association (“Fannie Mae”). *Id.* According to  
15 Plaintiff’s allegations, Fannie Mae was the beneficiary of his promissory note and trust deed with  
16 Bank of America, as back on May 25, 2009, Bank of America sold, negotiated, or assigned to  
17 Fannie Mae Plaintiff’s promissory note and trust deed. *Id.* at 13. On March 10, 2010, *after the*  
18 foreclosure sale, NDEX West recorded the May 25, 2009 assignment of the beneficial interest in  
19 Plaintiff’s promissory note and trust deed to Fannie Mae. *Id.* at ¶ 16. Plaintiff’s complaint alleges  
20 that the foreclosure sale was in violation of California Civil Code § 2932.5 because Defendants did  
21 not record the assignment prior to the foreclosure sale.

22 Plaintiff, on behalf of himself and all persons similarly situated, filed his complaint in  
23 Superior Court for the County of Santa Cruz on May 24, 2010. Plaintiff asserted three causes of  
24 action: 1) declaratory relief for violation of California Civil Code § 2934a and § 2932.5;  
25 2) violation of California Business and Professions Code § 17200 on the basis of the violations in  
26 the first cause of action; and 3) injunctive relief on behalf of all purported class members enjoining  
27 Defendants from further violations of § 2934a and § 2932.5.  
28

1 Defendants removed on two bases: 1) 12 U.S.C. § 1723a(a), which is part of Fannie Mae's  
2 federal charter, permits Fannie Mae to remove to federal court actions in which it is named as a  
3 defendant; and 2) diversity jurisdiction, in which the amount in controversy exceeds \$75,000.

## 4 II. Legal Standards

5 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
6 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under  
7 Rule 12(b)(6) may be based on either a lack of a cognizable legal theory or the absence of  
8 sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare System,*  
9 *LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). In considering whether the complaint is sufficient to  
10 state a claim, the court must accept as true all of the factual allegations contained in the complaint.  
11 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). However, the court need not accept as true  
12 "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations  
13 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *St. Clare*  
14 *v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008). While a  
15 complaint need not allege detailed factual allegations, it "must contain sufficient factual matter,  
16 accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949  
17 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible  
18 when it "allows the court to draw the reasonable inference that the defendant is liable for the  
19 misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. If a court grants a motion to dismiss, leave to  
20 amend should be granted unless the pleading could not possibly be cured by the allegation of other  
21 facts. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

## 22 III. Discussion

23 Plaintiff's complaint alleges that Defendants conducted foreclosure on the Property, and on  
24 numerous other properties, in violation of California Civil Code § 2934a and § 2932.5. Defendants  
25 contend that the foreclosure sale of Plaintiff's Property violated neither section of the Civil Code,  
26 and, in addition, fault Plaintiff for failing to plead the ability to tender the amount owed on the  
27 loans secured by the foreclosed deed of trust.

1                   **A. California Civil Code § 2934a**

2                   Under California Civil Code § 2934a, a new trustee may be substituted in place of the  
3 trustee on the deed of the trust “by the recording in the county in which the property is located of a  
4 substitution executed and acknowledged by the beneficiary.” The substitution must “contain the  
5 date of recordation of the trust deed, the name of the trustor, the book and page or instrument  
6 number where the trust deed was recorded, and the name of the new trustee.” Cal. Civ. Code  
7 § 2934a(a)(4). If a substitution of trustee is proper, the “new trustee shall succeed to all the  
8 powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust.”  
9 *Id.*

10                   Plaintiff’s complaint alleged that Defendants did not record a substitution of trustee.  
11 Defendants, however, request judicial notice of a copy of the substitution of a May 11, 2009 trustee  
12 document naming NDEX as the new trustee on Plaintiff’s deed of trust, in place of PRLAP, Inc.  
13 *See* Defs.’ Request for Jud. Notice [dkt. 6-1]. Plaintiff has not opposed the request for judicial  
14 notice. The Court finds it appropriate to take judicial notice of this recorded document under  
15 Federal Rule of Evidence 201(b). *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.1998)  
16 (internal quotation marks omitted), *superseded by statute on other grounds as recognized in*  
17 *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) (court may take judicial  
18 notice of documents “whose contents are alleged in a complaint and whose authenticity no party  
19 questions, but which are not physically attached to the [plaintiff’s] pleading.”).

20                   In response to Defendants’ submission of the recorded document establishing a substitution  
21 of trustee prior to the foreclosure sale, Plaintiff has conceded that he has no claim based upon a  
22 violation of California Civil Code § 2934a. Accordingly, the Court grants Defendants’ motion to  
23 dismiss that cause of action with prejudice.

24                   **B. California Civil Code § 2932.5**

25                   California Civil Code § 2932.5 provides:

26                   Where a power to sell real property is given to a mortgagee, or other  
27 encumbrancer, in an instrument intended to secure the payment of money,  
28 the power is part of the security and vests in any person who by assignment  
becomes entitled to payment of the money secured by the instrument. The

1 power of sale may be exercised by the assignee if the assignment is duly  
2 acknowledged and recorded.

3 Plaintiff alleges that § 2932.5 requires the recordation of an assignment of the beneficial interest in  
4 a deed of trust prior to a foreclosure sale. In the sale of Plaintiff's Property, NDEX did not record  
5 Bank of America's May 25, 2009 assignment of the beneficial interest to Fannie Mae until after the  
6 foreclosure sale on March 10, 2010.

7 The problem with Plaintiff's argument is that § 2932.5 does *not* require the recordation of  
8 an assignment of a beneficial interest for a *deed of trust*, as opposed to a mortgage. A deed of trust  
9 grants the power of sale to the proper trust deed trustee, here NDEX West. *See Roque v. Suntrust*  
10 *Mortg., Inc.*, 2010 U.S. Dist. LEXIS 11546, \*7 (N.D. Cal. Feb. 9, 2010) (Whyte, J.) ("Section  
11 2932.5 applies to mortgages, not deeds of trust. It applies only to mortgages that give a power of  
12 sale to the creditor, not to deeds of trust which grant a power of sale to the trustee."); *see also*  
13 *Parcray v. Shea Mortg., Inc.*, 2010 U.S. Dist. LEXIS 40377 (E.D. Cal. Apr. 23, 2010) (citing  
14 *Roque* and ruling that "[t]here is no requirement under California law for an assignment to be  
15 recorded in order for an assignee beneficiary to foreclose."). The only California state court  
16 decision on point similarly distinguishes between a deed of trust and a mortgage. *See Stockwell v.*  
17 *Barnum*, 7 Cal. App. 413, 416-17 (Cal. App. 1908). Despite Plaintiff's policy arguments to the  
18 contrary, California courts have not eliminated the distinction between deeds of trusts and  
19 mortgages. *See Bank of Italy Nat. Trust and Savings Ass'n v. Bently*, 217 Cal. 644, 655 (1933)  
20 ("[A] deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of  
21 trust, while in case of a mortgage, the mortgagor retains title."); *see also Dimock v. Emerald*  
22 *Properties*, 81 Cal. App. 4th 868, 877 (2000) (same).

23 And, as Plaintiff concedes, NDEX West was properly substituted as the trustee for  
24 Plaintiff's Property. *See Pl.'s Opp'n* at 3 ("Plaintiff concedes NDEX recorded a substitution of  
25 trustee prior to the foreclosure sale and as such Plaintiff will amend his complaint to remove the  
26 claim based upon a violation of CC § 2934a."). Thus, NDEX West succeeded to all the powers  
27 and duties of a trustee, including the power of sale. Accordingly, Defendants' motion to dismiss  
28 Plaintiff's cause of action under California Civil Code § 2932.5 is granted with prejudice.

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**C. Failure to Allege Tender**

Defendants also move to dismiss on the ground that Plaintiff has not alleged tender the amount owed on his defaulted loan. As Plaintiff acknowledges (see Pl.’s Opp’n at 14), a defaulted borrower is generally “required to allege tender of the amount of [the lender’s] secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure.” See *Abdallah v. United Savings Bank*, 43 Cal. App. 4th 1101, 1109 (1996). Plaintiff argues that because the foreclosure sale was not in compliance with California Civil Code, tender is not required. See, e.g., *Dimock*, 81 Cal. app. 4th at 876 (where defendant did not have power to conduct sale because of violation of statutory procedures, plaintiff did not need to allege ability to tender). Here, however, the Court has found that Plaintiff’s complaint fails to state a claim for violation of the California Civil Code. Accordingly, under California law, Plaintiff must adequately allege tender.

**D. California Business & Professions Code § 17200**

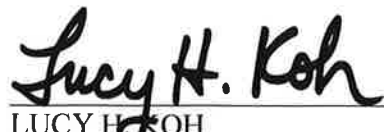
Neither side discusses the §17200 cause of action in its briefing before the Court. The only grounds for Plaintiff’s § 17200 cause of action are the violations of California Civil Code § 2934a and § 2932.5. As the Court has found that Plaintiff has failed to state a claim for both of those sections of the Civil Code, Plaintiff also necessarily fails to state a claim for his § 17200 cause of action. The Court grants Defendants’ motion to dismiss this cause of action with leave to amend.

**IV. Conclusion**

Accordingly, Defendants’ motion to dismiss Plaintiff’s complaint is GRANTED with leave to amend as set forth above. Any amended pleading must be filed within thirty (30) days of this Order. Failure to timely amend will result in dismissal of this case with prejudice.

**IT IS SO ORDERED.**

Dated: November 4, 2010

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge