

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.
Amor Medina Del ROSARIO; Elvie Canlas Del
Rosario, Plaintiffs-Appellants,

v.

WELLS FARGO BANK, N.A., as Trustee FOR the
MERRILL LYNCH MORTGAGE INVESTORS
TRUST, SERIES 2006-F1.; PNC Mortgage, Inc., FKA
National City Mortgage Company, Defendants-
Appellees.

No. 17-56466

Submitted February 13, 2018*Filed March 1, 2018

Appeal from the United States District Court for the
Southern District of California, Roger T. Benitez,
District Judge, Presiding, D.C. No. 3:16-cv-00649-BEN-
NLS

Attorneys and Law Firms

Amor Medina Del Rosario, Pro Se
Elvie Canlas Del Rosario, Pro Se
David M. Chute, Attorney, Wolfe & Wyman LLP,
Irvine, CA, for Defendants-Appellees

Before: LEAVY, FERNANDEZ, and MURGUIA,
Circuit Judges.

MEMORANDUM**

Amor Medina Del Rosario and Elvie Canlas Del Rosario appeal pro se from the district court's order denying their motion to vacate its judgment dismissing their diversity action alleging claims related to their mortgage. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). We affirm.

The district court did not abuse its discretion by denying appellants' motion to vacate because appellants failed to establish any basis for relief. See id. at 1263 (grounds for reconsideration under Federal Rule of Civil Procedure 60(b)).

We do not consider arguments raised for the first time on appeal or matters not specifically and distinctly raised and argued in the opening brief. See Padgett v. Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

United States District Court, S.D. California.

Amor Medina DEL ROSARIO and Elvie Canlas Del
Rosario, Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL
ASSOCIATION, as Trustee FOR the MERRILL
LYNCH MORTGAGE INVESTORS TRUST,
SERIES 2006-F1; PNC Mortgage, Inc., FKA National
City Mortgage Company, Defendants.

Case No.: 3:16-cv-00649-BEN-NLS

Signed 08/29/2017

Attorneys and Law Firms

Amor Medina Del Rosario, San Diego, CA, pro se.

Elvie Canlas Del Rosario, San Diego, CA, pro se.

David M. Chute, Wolfe & Wyman LLP, Irvine, CA, for
Defendants.

**ORDER DENYING MOTION TO VACATE
DISMISSAL**

Hon. Roger T. Benitez, United States District Judge

Presently before the Court is Plaintiffs' Motion to Vacate the Dismissal. (Mot., ECF No. 30). Plaintiffs contend that Defendants never served them with the Motion to Dismiss the Second Amended Complaint. Defendants oppose the Motion to Vacate, asserting that they properly served Plaintiffs with the Motion to Dismiss. (Opp'n, ECF No. 31).

DISCUSSION

Plaintiffs, proceeding pro se, are not authorized to file on the Court's Case Management/Electronic Case Filing ("CM/ECF") system. Thus, Plaintiffs cannot receive service through the CM/ECF system and must be served in some other way that complies with Federal Rule of Civil Procedure 5. Service by mail is one of the authorized means of service under Rule 5. Fed. R. Civ. P. 5(b)(2)(C).

In this case, Defendants electronically filed their Notice of Motion and Motion to Dismiss Plaintiffs' Second Amended Complaint on May 3, 2017. Defendants served Plaintiffs with the Notice and Motion through U.S. mail at their last known address of 10685 Brookhollow Court, San Diego, CA 92126. Plaintiffs still identify this address as their address. Plaintiffs did not respond to the Motion.

After Plaintiffs' time to oppose the Motion passed, Defendants electronically filed a Notice of Non-Opposition to Defendants' Motion to Dismiss. Defendants served Plaintiffs with the Notice of Non-Opposition by mail at the Brookhollow Court address. Plaintiffs never responded to the Notice of Non-Opposition.

On June 15, 2017, the Court issued a minute order submitting the Motion to Dismiss and vacating the hearing date. The Court mailed the minute order to Plaintiffs at their Brookhollow Court address. Plaintiffs did not respond to the minute order.

The Court granted the unopposed Motion to Dismiss on June 20, 2017. The Court deemed Plaintiffs' failure to oppose as consent to granting the Motion. *See* CivLR 7.1.f.3. The Clerk of Court issued a judgment on June 22, 2017, dismissing all claims and causes of action

asserted by Plaintiffs against Defendants. On June 29, 2017, Plaintiffs filed the present motion, seeking to vacate the dismissal under Rule 60(b) on the ground that Defendants never served Plaintiffs with the Motion.

Under Rule 60(b), a party may seek relief from judgment for certain reasons, including fraud, misrepresentation, or misconduct by the opposing party. Fed. R. Civ. P. 60(b)(3). Plaintiffs seek relief on this ground, contending that Defendants never served them with the Motion to Dismiss. However, the proofs of service submitted with the Motion and Notice of Non-Opposition demonstrate that Defendants served Plaintiffs by mail. Defendants further support this evidence with sworn declarations from David Chute, the attorney representing Defendants, and Mr. Chute's assistant, Kathy Hagmaier, who mailed the Motion and Notice of Non-Opposition to Plaintiffs. When service is made by mail, "service is complete upon mailing." Fed. R. Civ. P. 5(b)(2)(C). Plaintiffs do not dispute the proofs of service or declarations.

The Court finds that Defendants properly served their Motion to Dismiss on Plaintiffs. Plaintiffs failed to respond, which this Court deemed consent to the Motion and subsequently granted the Motion and dismissed the case. Plaintiffs have not set forth circumstances warranting vacatur of the dismissal. Plaintiffs' Motion to Vacate is **DENIED**.

IT IS SO ORDERED.

United States District Court, S.D. California.
Amor Medina DEL ROSARIO and Elvie Canlas Del
Rosario, Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL
ASSOCIATION, as Trustee for the Merrill Lynch
Mortgage Investors Trust, Series 2006-F1.; PNC
Mortgage, Inc., fka National City Mortgage Company,
Defendants.

Case No.: 3:16-cv-00649-BEN-NLS

Signed 04/05/2017

Attorneys and Law Firms

Amor Medina Del Rosario, San Diego, CA, pro se.
Elvie Canlas Del Rosario, San Diego, CA, pro se.
David M. Chute, Wolfe & Wyman LLP, Irvine, CA, for
Defendants.

**ORDER GRANTING DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Hon. Roger T. Benitez, United States District Judge

Defendants Wells Fargo Bank, National Association, as
Trustee for the Merrill Lynch Mortgage Investors
Trust, Series 2006-F1, and PNC Bank, N.A.
(erroneously sued as PNC Mortgage, Inc., FKA
National City Mortgage Company) ("Defendants") have
filed a Motion to Dismiss Plaintiffs Amor Medina Del
Rosario and Elvie Canlas Del Rosario's ("Plaintiffs")

First Amended Complaint. (Mot., ECF No. 13.) For the reasons discussed below, the Motion is **GRANTED**.

BACKGROUND¹

Plaintiffs, proceeding pro se, have filed a complaint, seeking to avoid nonjudicial foreclosure on a piece of residential property at 10685 Brookhollow Court, San Diego, California (the “Subject Property”) that they own and occupy. On October 20, 2016, this Court granted Defendants’ motion to dismiss Plaintiffs’ original complaint on several grounds. Plaintiffs thereafter filed a First Amended Complaint. (FAC, ECF No. 12.) The First Amended Complaint repeats the allegations of the initial complaint.

On or about December 29, 2005, Plaintiffs executed a promissory note in the amount of \$499,000 for the Subject Property, secured by a deed of trust. (FAC ¶ 14; Defs.’ Request for Judicial Notice (“RJN”) Ex. C.)² The lender and beneficiary of the deed of trust was National City Mortgage, a division of National City Bank of Indiana, and now known as PNC Mortgage Inc. (*Id.* ¶¶ 15, 17; RJN Ex. C.) National City Bank of Indiana was the named trustee on the note and deed of trust. (*Id.* ¶ 16; RJN Ex. C.) Plaintiffs allege that there has been “no documented assignment of the Note.” (FAC ¶ 24.)

Plaintiffs fell behind on their payments. On August 6, 2009, Cal-Western Reconveyance Company (“Cal-Western”) recorded a Notice of Default. (*Id.* ¶ 76 & Ex. F.) The Notice states that Cal-Western is “either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under [the] deed of trust.” (*Id.* Ex. F) Plaintiffs claim that Cal-Western acted ultra vires and was never

substituted as trustee or authorized to act as an agent. (*Id.* ¶ 80.)

The Notice of Default further states that “the mortgagee, beneficiary or the mortgagee’s or beneficiary’s authorized agent has either contacted the borrower or tried with due diligence to contact the borrower as required by California Civil Code 2923.5.” (*Id.*) But Plaintiffs allege that they were never contacted prior to the recording of the Notice of Default. (*Id.* ¶ 79.) They claim that Defendants “did not review Plaintiffs’ financial situation and further did not advise them of all options available to avoid foreclosure.” (*Id.* ¶ 81, 83-84, 90-91.) Plaintiffs contend these and other failures violated California law, thereby nullifying Defendants’ authority to foreclose. (*Id.* ¶ 82.)

In 2010, Plaintiffs sued PNC Bank, Cal-Western, and Pacific Data Mortgage in California state court to stop foreclosure on the home. (*Id.* ¶ 49 & Ex. C.) In that lawsuit, Plaintiffs alleged that the defendants fraudulently induced them to enter the loan agreement on inferior terms and wrongfully sought to foreclose on Plaintiffs when they were not in default. (*See id.* Ex. C.) Plaintiffs allege that “both parties agreed to settle the manner by PNC agreeing to provide Plaintiffs with an acceptable loan modification, in exchange for Plaintiffs’ agreement to voluntarily dismiss the lawsuit.” (*Id.* ¶ 52.) However, Plaintiffs contend that “PNC reneged on the agreement, and failed to provide Plaintiffs with the loan modification they were promised.” (*Id.* ¶ 54.) Plaintiffs claim that this conduct by PNC constitutes fraud. (*See id.* ¶¶ 55-61.)

On or about May 9, 2012, Cal-Western Reconveyance Company recorded a Notice of Trustee Sale, bearing instrument number 2012-0273037. (*Id.* ¶ 97 & Ex. G.) Plaintiffs again contend that Cal-Western

acted without authority (*id.* ¶ 99-100), and that Defendants did not review Plaintiffs' financial situation or advise them of their options to avoid foreclosure (*id.* ¶¶ 101-02). Plaintiffs once more claim these failures nullify Defendants' authority to foreclose. (*Id.* ¶ 101.)

At some point, "Plaintiffs' loan was ... sold into a securitized Trust, entitled the Merrill Lynch Mortgage Investors Inc., 2006-F1." (*Id.* ¶ 23.) The trust had a "cut-off date" of April 1, 2006, and a "closing date" of April 28, 2006. (*Id.* ¶¶ 23, 29, 38.) "Plaintiffs' note and loan were not transferred to the Merrill Lynch Securitized Trust prior to its closing date." (*Id.* ¶ 29.)

On September 25, 2015, PNC Bank recorded an Assignment of Deed of Trust to "Wells Fargo Bank, N.A., as Trustee, for Merrill Lynch Mortgage Investors Trust, Series MLMI 2006-F1" ("Wells Fargo"). (*Id.* ¶ 70, Ex. E.) The assignment made Wells Fargo the beneficiary of the deed of trust. (*Id.* Ex. E.) Plaintiffs allege that the assignment of the deed of trust was ineffective, invalid, and void because it occurred after the closing date of the Merrill Lynch securitized trust. (*See id.* ¶ 29-30, 34-35.) They also contend that because "there has been no documented assignment of the Note, ... the [deed of trust] and note were not properly transferred together, which consequently has bifurcated the [deed of trust] and note, rendering them unenforceable." (*Id.* ¶ 24.)

On November 25, 2015, Wells Fargo, as beneficiary under the deed of trust, recorded a Notice of Rescission of Notice of Default, bearing instrument number 2015-0613850. (*Id.* ¶ 103 & Ex. H.) The Notice states that Wells Fargo "does hereby rescind, cancel and withdraw said Declaration of Default and Demand for Sale and said Notice of Breach and Election to Cause Sale." (*Id.* Ex. H.) The Notice is signed by Bernis M. Gonyea of

Clear Recon Corp. (*Id.*) Plaintiffs allege that Clear Recon Corp. is “the new foreclosing trustee” but there is no “evidence of a recorded Substitution of Trustee document authorizing Clear Recon. Corp. to be substituted as trustee.” (*Id.* ¶ 104.)

On April 29, 2016, PNC denied Plaintiffs hardship assistance on their loan. (*Id.* ¶ 63 & Ex. D.) The letter from PNC states that Plaintiffs’ “loan on the related property has received the maximum number of foreclosure alternative options that are permitted by the assignee or mortgage owner of your loan.” (*Id.* Ex. D.) Challenging this decision, Plaintiffs contend that they made “the requisite 3 trial payments which should have resulted in a full and final modification.” (*Id.* ¶ 63.)

Plaintiffs bring three claims for relief. The first claim for relief alleges wrongful foreclosure. The second claim for relief alleges negligence. The third claim for relief alleges fraud.

LEGAL STANDARD

“[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009). “A claim is facially plausible ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ ” Zixiang Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013) (quoting Iqbal, 556 U.S. at 678). When considering a Rule 12(b)(6) motion, the court must “accept as true facts alleged and draw inferences from them in the light most favorable to the plaintiff.” Stacy v. Rederite Otto Danielsen, 609 F.3d 1033, 1035 (9th Cir. 2010) (citing Barker v. Riverside Cnty. Office of Educ., 584 F.3d 821, 824 (9th Cir. 2009)).

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

DISCUSSION

Like Plaintiffs' original complaint, their First Amended Complaint fails to plead sufficient facts to state plausible claims.

1. Wrongful Foreclosure Claim

Plaintiffs allege wrongful foreclosure “due to the void [deed of trust] assignment, and the promissory fraud committed [by PNC], pursuant to the voluntary dismissal of the 2010 action resulting in the acceleration of the Note.” (FAC ¶ 115.) A wrongful foreclosure is a common law tort claim to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper. *Sciarratta v. U.S. Bank Nat'l Ass'n*, 247 Cal. App. 4th 552, 561 (2016). As an initial matter, Plaintiffs' claim fails because they have not alleged that a foreclosure sale has occurred.

Furthermore, as explained in the Court's order granting Defendants' motion to dismiss Plaintiffs' original complaint, Plaintiffs lack standing to challenge the assignment under *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (2016). *Saterbak* explained that plaintiffs who bring pre-foreclosure lawsuits challenging defendants' authority to foreclose lack standing to bring such preemptive suits. *Id.* at 814. Likewise here, to the extent Plaintiffs challenge Defendants' authority to foreclose, such claims fail because Plaintiffs lack standing. See *Tjaden v. HSBC*

Bank USA, — Fed.Appx. —, 2017 WL 943943, at *1 (9th Cir. Mar. 10, 2017) (holding that plaintiffs' pre-foreclosure action to challenge the foreclosing entity's right to initiate a nonjudicial foreclosure fails under *Saterbak*).

To the extent that Plaintiffs bring a wrongful foreclosure claim based on alleged fraud that occurred in 2010, Federal Rule of Civil Procedure 9(b) requires Plaintiffs to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Plaintiffs fail to meet this standard. Rather, they rely on conclusory allegations that PNC reneged on an agreement to offer Plaintiffs a loan modification. Plaintiffs further fail to explain how PNC's actions in 2010 led to Plaintiffs' apparent present inability to pay.

The wrongful foreclosure claim is **DISMISSED**.

2. Negligence

Plaintiffs allege that "PNC, acting as Plaintiffs' alleged lender and/or servicer, had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting, and servicing of loan records." (FAC ¶ 122.) "PNC further had a duty to Plaintiffs to disclose its true interest in the Subject Property and communicate with and provide Plaintiffs with proof of who owned or had any liens on the Subject Property, refraining from taking any action against Plaintiffs outside its legal authority, not charging any improper fees and/or charges on Plaintiffs' account, accurately crediting payments made by Plaintiffs and providing all relevant and accurate information regarding Plaintiffs' loan accounts to Plaintiffs." (*Id.* ¶ 123.)

To state a cause of action for negligence, a plaintiff must allege: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 62 (2013). Under California law, "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Nymark v. Heart Fed. Savings & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (1991). "Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender.'" *Id.* (internal citation omitted). Here, Plaintiffs make only conclusory allegations that Defendants exceeded the scope of a traditional lender's responsibility. See Barcarse v. Central Mortg. Co., 661 Fed.Appx. 905, 907 (9th Cir. 2016) (affirming dismissal where plaintiffs failed to plead facts showing that defendants exceeded the scope of a lender's conventional role).

The negligence claim is **DISMISSED**.

3. Fraud

Plaintiffs allege that "PNC fraudulently misrepresented to Plaintiffs the nature of its scheme to sell bearer notes into securitization, submitted fraudulent documents in the record, in an attempt to commit fraud upon the Court, in its attempt to commit wrongful foreclosure, and committed promissory fraud when it failed to honor an agreement to provide Plaintiffs' [sic] with an acceptable loan modification in

lieu of the voluntary dismissal of the 2010 lawsuit, and induced Plaintiffs' [sic] to rely on Defendant PNC's prior reputation as a traditional 'loan to hold' lender, and Plaintiffs justifiably relied on said misrepresentation." (FAC ¶ 131.)

Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). "In order to plead fraud with particularity, the complaint must allege the time, place, and content of the fraudulent representation; conclusory allegations, do not suffice." *Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010) (citing *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (requiring plaintiffs plead who, what, when, where, and how). "Rule 9(b) does not allow a complaint to merely lump multiple defendants together, but 'requires plaintiffs to differentiate their allegations when suing more than one defendant ... and to inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Swartz v. KPMG LLP*, 476 F.3d 759, 765 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D. Fla. 1998)). "[G]eneral allegations that the 'defendants' engaged in fraudulent conduct," with only specific allegations as to some, "patently fail[s] to comply with Rule 9(b)." *Id.* at 765. Here, Plaintiffs do not meet these heightened pleading requirements. The First Amended Complaint fails to include the specific details of the alleged misrepresentations and, instead, relies on conclusory assertions. Moreover, Plaintiffs' allegations only speak to Defendant PNC, but they seek to hold each Defendant liable for fraud. (See FAC ¶ 135.)

The fraud claim is **DISMISSED**.

CONCLUSION

For the above reasons, the Court **GRANTS** the Motion to Dismiss.

The Court will grant Plaintiffs leave to file a second amended complaint that corrects the deficiencies noted by the Court and Defendants. *See Fed. R. Civ. P. 15* (“The court should freely give leave [to amend] when justice so requires.”) Plaintiffs may file a second amended complaint no later than fourteen (14) days after the signature date of this Order. An amended complaint must clearly set out the facts, Plaintiffs' theory of the case, and what claims are asserted. Plaintiffs must attempt to address the pleading deficiencies identified in this Order and the Court's previous order granting Defendants' motion to dismiss Plaintiffs' original complaint.

IT IS SO ORDERED.

16a

United States Court of Appeals, Ninth Circuit.
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ORDER

FILED JUL 9 2018

Before: LEAVY, FERNANDEZ, and MURGUIA,
Circuit Judges.

The Del Rosarios' petition for panel rehearing (Docket
Entry No. 10) is denied.

No further filings will be entertained in this closed case.