

APPENDIX “A”

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-2783

Ed Teague, II

Plaintiff - Appellant

v.

Regent Financial Group, Inc.; Ginnie Mae; Ginnie Mae, as Trustee for Securitized Trust Ginnie Mae REMIC 2011-066 Trust; Flagstar Bank, FSB; Mortgage Electronic Registration Systems, Inc. ("MERS"); Planet Home Lending, LLC

Defendants - Appellees

**Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:17-cv-00416-JFB)**

JUDGMENT

Before ERICKSON, WOLLMAN, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 21, 2019

**Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.**

/s/ Michael E. Gans

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Trust Ginnie Mae REMIC 2011-066 Trust; Flagstar Bank, FSB; Mortgage
Electronic Registration Systems, Inc. ("MERS"); Planet Home Lending, LLC

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: May 15, 2019
Filed: May 21, 2019
[Unpublished]

Before ERICKSON, WOLLMAN, and GRASZ, Circuit Judges.

PER CURIAM.

In this foreclosure-related action, Ed Teague, II, appeals after the district court¹ dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6). Upon careful de novo review, we conclude the district court did not err in determining that Teague failed to state a claim upon which relief could be granted. *See Kelly v. City of Omaha*, 813 F.3d 1070, 1075 (8th Cir. 2016) (standard of review). We further conclude the court did not abuse its discretion in failing to sua sponte allow Teague to amend his complaint before the court dismissed it with prejudice. *See Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1034 (8th Cir. 2012) (dismissal with prejudice is appropriate where the party never submitted proposed amended complaint or clarified what one might have contained); *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1162 (8th Cir. 1999) (“A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted proposed amended pleading.”).

Accordingly, the judgment of the district court is affirmed. *See* 8th Cir. R. 47B.

¹The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

APPENDIX “B”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ED TEAGUE II,

Plaintiff,

vs.

REGENT FINANCIAL GROUP, INC.,
GINNIE MAE, GINNIE MAE, as Trustee for
Securitized Trust Ginnie Mae REMIC
2011-066 Trust; FLAGSTAR BANK, FSB,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
("MERS"), and PLANET HOME LENDING,
LLC,

Defendants.

8:17CV416

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). In particular, defendants Planet Home Lending, LLC ("PHL"), Filing No. 16, Flagstar Bank ("FSB"), Filing No. 18, Mortgage Electronic Registration Systems ("MERS"), Filing No. 18, Ginnie Mae, Ginnie Mae as Trustee for Securitized Trust Ginnie Mae REMIC 2011-066 ("Ginnie Mae"), Filing No. 20, and Regent Financial Group, Inc. ("RFG"), Filing No. 24, move to dismiss the claims as presented in plaintiff's pro se complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Additionally, defendants Ginnie Mae, Filing No. 20, and RFG, Filing No. 24, move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Ginnie Mae has also moved in the alternative for summary judgment pursuant to Fed. R. Civ. P. 56. Filing No. 20. The plaintiff in this matter, Ed Teague II, is proceeding pro se.

The initial lender on the loan was RFG. MERS is a separate corporation that secured the Note, as nominee for RFG. Ginnie Mae "operates a mortgage-backed security program to attract investors into the secondary mortgage market." Filing No. 23. Plaintiff's loan was placed into a Ginnie Mae pool to back a Security created by FSB. FSB is the bank that transferred the servicing of this pool of mortgages to PHL. PHL is a for-profit lending institution who was responsible for the foreclosure.

I. BACKGROUND

The plaintiff acquired the subject property on February 2, 2011, which he recorded on February 24, 2011. The plaintiff received a loan from RFG on February 22, 2011, in the original principal sum of \$122,521 secured through a promissory note with a deed of trust on the property. RFG recorded the deed of trust with the Scotts Bluff County Register of Deeds on February 24, 2011. Filing No. 1, Complaint, Ex. B, Deed of Trust, at 1-9. RFG later assigned the deed of trust to PHL who duly recorded the assignment on November 30, 2015. Filing No. 17, PHL's Brief in Support of Motion to Dismiss, Ex. A, Assignment of Deed of Trust. The deed of trust explicitly provides that the note may be transferred or assigned. Filing No. 1, Complaint, Ex. B, Deed of Trust, at 7, ¶ 20. The deed of trust also expresses the role of MERS as a separate corporation acting solely as a nominee for the lender and the lender's successors and assigns, and describes MERS as the beneficiary allowing them to exercise any or all of the interests granted by the deed of trust. *Id.* at 1-2.

In March 2011, the loan was placed in a Ginnie Mae pool (pool # 748030) to back a security created by FSB. Filing no. 22-1, Declaration of Paul St. Laurent, III, ¶ 7. FSB transferred the servicing of this pool of mortgages to PHL in October 2014. *Id.* As

of August 2017, PHL was still servicing the loan; however, the last payment made by the plaintiff on the loan was in July 2015.

On the plaintiff's request, Certified Forensic Loan Auditors, LLC prepared a Property Securitization Analysis Report dated March 14, 2016. Filing No. 1, Complaint, Ex. G, Property Securitization Analysis Report.

Later, in 2016, the plaintiff executed a quitclaim deed transferring "all right, title, interest, and claim" to Lighting the Path Christian Trust. The parties duly recorded this transfer with the Scotts Bluff County Register of Deeds on December 23, 2016. Filing No. 17, PHL's Brief in Support of Motion to Dismiss, Ex. C, Quit Claim Deed.

PHL later purchased the property at a Trustee's Sale on May 18, 2017, pursuant to the Nebraska Trust Deeds Act and subsequently recorded the transfer with the Scotts Bluff County Register of Deeds the same day. *Id.*, Ex. B, Trustee's Deed. On the date of the sale, the plaintiff did not own the property. However, Lighting the Path Christian Trust conveyed the property back to the plaintiff on October 1, 2017, which the Scotts Bluff County Register of Deeds recorded on October 13, 2017. Filing No. 1, Complaint, Ex. A, Quit Claim Deed. The plaintiff subsequently filed his complaint on October 30, 2017. Filing No. 1, Complaint.

In summary, plaintiff alleges causes of action relating to the origination and servicing of a mortgage loan obtained on February 22, 2011 in order to purchase residential real estate. Filing No. 1, Complaint at 12-28. The plaintiff claims he was not aware of the sale, transfer, or assignment of the loan after it was originally made and that the Deed of Trust securing the loan was wrongfully foreclosed. Filing No. 1, Complaint, at 12-15. The plaintiff organized his allegations into nine distinct counts.

Filing No. 1, Complaint at 12-28.¹ In response to the plaintiff's complaint, defendants state that a fair interpretation of the plaintiff's claims are that they contest the ability of lienholders to foreclose on the property due to the alleged securitization of the loan. See Filing No. 17, PHL's Brief in Support of Motion to Dismiss; Filing No. 19, FSB & MER's Brief in Support of Motion to Dismiss; Filing No. 23, Ginnie Mae's Brief in Support of Motion to Dismiss.

Count I – Wrongful Foreclosure

The plaintiff's first count alleges that all defendants illegally commenced a foreclosure sale of the subject property through false or fraudulent documents. Further, plaintiff alleges that the defendants knew or should have known that PHL had no authority to sell the property at a foreclosure sale. Filing No. 1, Complaint at 14-15. Defendants generally respond by stating wrongful foreclosure is not a recognized claim in Nebraska, and that the plaintiff lacks standing because he did not hold title to the property at the time of foreclosure. The parties also generally state the Deed of Trust from the trustees' sale establishes that all requirements of the Nebraska Trust Deeds Act were complied with, eliminating any potential claim on behalf of the plaintiff. Independent of the other defendants, Ginnie Mae asserts that it was not involved at all in the foreclosure process.

¹ Though some counts specify a particular party to which they apply, the plaintiff uses the general term "defendants" to refer to all parties rather than identifying particular parties when making most of the allegations laid out in the complaint. See Filing No. 1, Complaint.

The only jurisdictional references set forth in the plaintiff's complaint are for diversity jurisdiction under 28 U.S.C. §1332 and the Declaratory Judgment Act under 28 U.S.C. § 2201. Filing No. 1, Complaint at 1, 27-28.

Count II – Fraudulent Concealment

The plaintiff's second count alleges that RFG fraudulently concealed records. Filing No. 1, Complaint at 15–18. RFG argues that the fraud claims were not pled with sufficient particularity to state a claim upon which relief may be granted. The remaining defendants argue that this claim was only brought against RFG. Again, Ginnie Mae asserts that they were not at all involved with the events surrounding this claim.

Count III – Fraudulent Misrepresentation

The plaintiff's third count asserts a claim for fraudulent misrepresentation based on statements made by non-specific "defendants." Filing No. 1, Complaint at 18-19. Specifically, the plaintiff alleges that unspecified defendants misrepresented to other parties that the defendants "were entitled to exercise the power of sale provision contained in the Deed of Trust"; that the defendants made misrepresentations by stating they were the "holder and owner" of the Tangible Note and the beneficiary of the Deed of Trust; and that the defendants failed to disclose material terms of the transaction which induced the plaintiff to enter into the arrangement. *Id.* The defendants generally state that the claim was not pled with sufficient particularity to state a claim upon which relief could be granted. Further, defendants argue that the plaintiff failed to allege cognizable claims. Ginnie Mae asserts different grounds contesting plaintiff's third count.

First, Ginnie Mae states it was never involved with the plaintiff concerning the loan or security instruments nor involved in the foreclosure. Second, Ginnie Mae also contends that, as a corporation wholly owned by the United States and within the Department of Housing and Urban Development, the misrepresentation claim fails

because it is explicitly excluded under the Federal Tort Claims Act, 28 U.S.C. § 2680(h).
See 12 U.S.C. § 1717(a)(2)(A).

Count IV – Unconscionable Contract

The plaintiff's fourth count essentially alleges that the mortgage loan contract that the plaintiff entered into with RFG was unconscionable. Filing No. 1, Complaint at 20–21. RFG claims that this contract defense fails because the promissory note has merged into the title of the property because of the foreclosure, thus eliminating the contract and any controversy surrounding it. The remaining defendants argue that the plaintiff only brought this claim against RFG, and that RFG was the only defendant involved in the transaction.

Count V – Breach of Contract

The plaintiff's fifth count asserts a breach of contract claim against RFG and "their electronic agent," MERS, alleging that RFG "was paid in full" when RFG sold its interest in the property to an unidentified "depositor." Filing No. 1, Complaint at 21–22. RFG argues that the breach of contract claim misstates the plain language of the Deed of Trust and that the count fails to state a claim upon which relief may be granted. The remaining defendants argue that the plaintiff only brought this claim against RFG and MERS, and that RFG was the only defendant involved in the transaction.

Count VI – Breach of Fiduciary Duty

The plaintiff's sixth count claims that the "defendants" breached their fiduciary duties. The basis of this claim is RFG's failure to disclose to the plaintiff that the defendants "were not the legitimate creditor." Filing No. 1, Complaint at 22–23. As alleged by plaintiff, RFG and MERS, failed to, "satisfy, release and reconvey the Real Property Lien Deed of Trust and the beneficial security interest". Filing No. 1, Complaint

at 23. Additionally, plaintiff insists that the defendants failed in their duty to be truthful to the plaintiff. *Id.* RFG argues that Nebraska law does not recognize a claim between a debtor and creditor without the existence of a special relationship between the parties giving rise to a fiduciary obligation. Because the plaintiff failed to allege the existence of a special relationship, RFG insists that the complaint fails to state a claim upon which relief may be granted. The remaining defendants claim that the count fails to allege cognizable claims against them. Ginnie Mae further asserts that it was not involved in a contract with the plaintiff.

Count VII – Quiet Title

The plaintiff's seventh count seeks an order quieting title to the plaintiff because all defendants' claims to the property are "without any legal right whatsoever". Filing No. 1, Complaint at 24–25. RFG argues that any interest the plaintiff had in the property would have been extinguished by the Trustee's sale under Neb. Rev. Stat. § 76-1010(2). Further, RFG claims that the plaintiff lacked standing at the time of the sale; therefore, no controversy exists between the plaintiff and RFG. Furthermore, plaintiff claims that RFG does not currently have title to the property. The remaining defendants claim that the count fails to allege cognizable claims against them.

Count VIII – Infliction of Emotional Distress

The plaintiff's eighth count asserts a claim for the intentional infliction of emotional distress. Filing No. 1, Complaint at 25–27. The defendants generally claim that the count fails to state a claim upon which relief can be granted. Ginnie Mae adds that the claim against them must fail because Federal Tort Claims Act jurisdiction has

not been pled, meaning the court lacks subject matter jurisdiction over the issue. 28 U.S.C. § 2671 *et seq.*

Count IX – Declaratory Relief under the Declaratory Judgment Act

The plaintiff's ninth and final count requests action under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* seeking, "a judicial determination of the rights, obligations and interest of the parties regarding the subject property". Filing No. 1, Complaint at 27–28. The defendants generally claim that the plaintiff's ninth count fails to allege cognizable claims against the defendants and that the issue should be dismissed for want of subject matter jurisdiction.

II. STANDARD OF REVIEW

A. 12(b)(6) Motion to Dismiss

Under the Federal Rules, a complaint must contain "a short and plain statement of the claim[s] showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The rules require a "showing," rather than a blanket assertion, of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.3. (2007) (quoting Fed. R. Civ. P. 8(a)(2)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555). In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the plaintiff's obligation to provide the grounds for his entitlement to relief necessitates that the complaint contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

The factual allegations of a complaint are assumed true and construed in favor of the plaintiff, "even if it strikes a savvy judge that actual proof of those facts is

improbable, and "that a recovery is very remote and unlikely." *Id.* at 556. (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "[O]n the assumption that all the allegations in the complaint are true (even if doubtful in fact)," the allegations in the complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56, 545. In other words, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that the plausibility standard does not require a probability, but asks for more than a sheer possibility that a defendant has acted unlawfully.).

Twombly is based on the principles that (1) the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions and (2) only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 678-79 (citations omitted). Determining whether a complaint states a plausible claim for relief is "a context-specific task" that requires the court "to draw on its judicial experience and common sense." *Id.* at 679. Although legal conclusions "can provide the framework of a complaint, they must be supported by factual allegations." *Id.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.*

Thus, the court must find "enough factual matter (taken as true) to suggest" that "discovery will reveal evidence" of the elements of the claim. *Twombly*, 550 U.S. at 556; *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (explaining that something

beyond a faint hope that the discovery process might eventually lead to some plausible cause of action must be alleged). When the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, the complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Twombly*, 550 U.S. at 558; *Iqbal*, 556 U.S. at 679.

Finally, a district court generally may not consider materials outside the pleadings when ruling on a motion to dismiss under Rule 12(b)(6). *Porous Media Corp. v. Pall Corp.*, 186 F. 3d 1077, 1079 (8th Cir. 1999). However, public records that do not contradict the complaint and materials that are "necessarily embraced by the pleadings" may be considered. *Id.* Judicial notice of a fact is only to be taken when that fact is not subject to reasonable dispute. Fed R. Evid. 201(b); *Kushner v. Beverly Enters., Inc.*, 317 F. 3d 820 (8th Cir. 2003). Accordingly, it is appropriate for this Court to consider documents filed with the Register of Deeds of Scotts Bluff County, Nebraska for purposes of deciding this motion.

B. 12(b)(1) Motion to Dismiss

Jurisdiction is a threshold issue for this Court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998); see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). The party seeking to invoke federal jurisdiction carries the burden of proof on that issue. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

A complaint can be challenged under Fed. R. Civ. P. 12(b)(1) either "on its face or on the factual truthfulness of its averments." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Id.* (citations omitted). In a factual attack on the jurisdictional allegations of the complaint, the court can consider competent evidence such as affidavits and deposition testimony in order to determine the existence of a factual dispute. *Id.* In reviewing a pleading, the court may generally consider documents attached to it. *Brown v. Green Tree Servicing LLC*, 820 F.3d 371, 372 (8th Cir. 2016) (regarding mortgage and notice); *Great Plains Trust Co. v. Union Pac. R.R.*, 492 F.3d 986, 990 (8th Cir. 2007) (stating the court may consider documents attached to the complaint and matters of public and administrative record referenced in the complaint) (citations omitted); see also Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

C. Pro Se Pleadings

A federal district court holds a complaint of a self-represented litigant to a less stringent standard than those drafted by lawyers. See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008). When a federal court is evaluating a complaint of a self-represented litigant, the plaintiff's allegations are assumed to be true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555-56 (2007)).

Further, a federal district court must liberally construe a complaint filed by a self-represented litigant to allow the development of a potentially meritorious case. *Id.* "[I]f

the essence of an allegation is discernible, even though it is not pleaded with legal nicety, then the district court should construe the complaint in a way that permits the layperson's claim to be considered within the proper legal framework," then the court has met its obligation to construe the pro se complaint liberally. *Stone v. Harry*, 364 F.3d 912, 915 (8th Cir. 2004). However, liberal construction does not mean that a court can ignore a clear failure in the pleading to allege facts that set forth a cognizable claim. See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

III. DISCUSSION

A. Planet Home Lending, LLC ("PHL")

The defendant, PHL, asserts that the plaintiff's complaint fails to state a cognizable claim upon which relief may be granted, requiring dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The only claim within the plaintiff's complaint that explicitly alleges misconduct by defendant PHL, Count VIII, fails to show the elements of Intentional Infliction of Emotional distress. In such a claim, a plaintiff must plead and prove: (1) intentional or reckless conduct; (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable; and (3) that the conduct caused emotional distress that no reasonable person should be expected to endure. *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 910 (Neb. 1993) (citations omitted).

After carefully reviewing the facts and complaint, the Court finds that plaintiff does not assert any cognizable claims against defendant PHL. PHL's motion to dismiss is granted on all counts.

B. Mortgage Electronic Registration Systems ("MERS") & Flagstar Bank ("FSB")

Defendants MERS and FSB argue that the plaintiff's complaint fails to state a claim against them requiring dismissal under Fed. R. Civ. P. 12(b)(6). The plaintiff's Count VI, breach of a fiduciary duty by FSB, requires a showing of a special relationship. *Bloomfield v. Nebraska State Bank*, 465 N.W.2d 144, 149 (Neb. 1991). In order to establish a fiduciary duty in a debtor and creditor relationship, the plaintiff must establish a "special relationship" that would indicate that the defendants owed a duty to the plaintiff. *Bucktail I Ranch v. Farm Credit Bank of Omaha*, No. A-91-286, 1993 WL 70942, at *4 (D.Neb. March 16, 1993). The plaintiff fails to allege a special relationship that would give rise to MERS or FSB owing plaintiff a duty. Even if the court accepts the plaintiff's factual allegations as true, with inferences made in favor of the plaintiff, the allegations pled do not present a duty owed to the plaintiff by MERS or FSB. The Court finds that, given the facts surrounding the case, the relationship between MERS or FSB and the plaintiff do not rise to the level of a special relationship.

Plaintiff also implicates MERS in Count V, breach of contract. Plaintiff contends that MERS should be liable for a contract breached between plaintiff and RFG; however, under Nebraska law, "an agent, acting for a disclosed principal, is not liable for the principal's contract." *RSUI Indem. Co. v. Bacon*, 810 N.W.2d 666, 671 (Neb. 2011). As long as MERS was acting as an "agent" to RFG, the breach of contract claim cannot be pursued against this defendant. *Mueller v. Union Pacific R.R.*, 371 N.W.2d 732, 748 (Neb. 1985). The Court finds that even if the plaintiff's allegation that MERS is an agent of RFG is true, the plaintiff failed to state a cognizable claim for breach of contract against the defendant because MERS, the agent, is not liable for the contract signed by the RFG, the principal. *Id.*

The court holds that the plaintiff's failure to state a cognizable claim against the defendants, MERS and FSB, warrants dismissal under Fed. R. Civ. P. 12(b)(6). The Court finds that MERS' and FSB's motion to dismiss is granted as it relates to these defendants.

C. Regent Financial Group ("RFG")

Defendant, RFG, insists that the Court should dismiss the plaintiff's complaint in its entirety for the failure to state a claim upon which relief may be granted. The plaintiff first alleges in Count II that RFG engaged in fraudulent concealment. In order to meet the elements of fraudulent concealment, the plaintiff must allege and prove (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within reasonable diligent attention or judgment of the plaintiff; (4) that the defendant concealed the fact with intention to induce the plaintiff to act; (5) that the concealment reasonably misled the plaintiff; and (6) that the plaintiff suffered damages. *In re Estate of Stephenson*, 503 N.W.2d 540, 547 (Neb. 1993).

The plaintiff must plead the circumstances surrounding and constituting the fraud "with particularity" pursuant to Fed. R. Civ. P. 9(b). *Bennet v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982). This would include the time, place and contents of the false representation, including the "identity of the person making the misrepresentation and what was obtained or given up thereby." *Id.* (citations omitted).

The plaintiff's claim that RFG concealed the fact that they are not a "legitimate creditor" or a "Federal Reserve Depository Bank," if taken as true, is a fact that is within the diligent attention of the plaintiff. The Court finds that the plaintiff's pleadings do not

amount to a cognizable claim for fraudulent concealment. Second, the plaintiff claims that the signed loan documents which entitled RFG to assign or transfer the Note and Deed of Trust to a third party was beyond his knowledge. If taken as true, these facts were within the, "reasonably diligent attention, observation and judgment" of the plaintiff. *Stephenson*, 503 N.W.2d at 547. In other words, RFG did not conceal the fact that they were not a "Federal Reserve Depository Bank" because the plaintiff could have reasonably observed this fact. When viewed in light most favorable to the plaintiff, the allegations within the claims are legally insufficient to provide a basis for entitlement to relief based on a fraudulent concealment claim against defendant RFG.

In Count III, the plaintiff asserts general claims against the defendant, RFG, for fraudulent misrepresentation. In order for a plaintiff to plead fraud, the complaint must be made "with particularity." *Stephenson*, 503 N.W.2d at 547. Due to the general nature of the claim against RFG, the defendant lacks adequate notice of the charges, impeding their ability to defend themselves properly.

Alternatively, the Court has the discretion to review documents attached to the proceeding and reference them in determining facts. *Great Plains Trust*, 492 F.3d at 990. After carefully reviewing the Deed of Trust, the Court does not believe that the plaintiff can prove standing because he did not have title to the property during the foreclosure or thereafter. Filing No. 1, Complaint, Ex. B, Deed of Trust. Therefore, the plaintiff did not suffer any damage caused by the alleged misrepresentation.

The plaintiff's fourth cause of action, unconscionability, is an affirmative defense raised by a party seeking to rescind a contract. *Myers v. Neb. Inv. Council*, 272 Neb. 669, 692-93 (2006). Further, a contract is not unconscionable unless the terms are

grossly unfair under the relevant circumstances at the time the parties entered into the contract. *Adams v. American Cyanamid Co.*, 498 N.W.2d 577, 589 (Neb. 1992). In order to render a commercial contract void, the party asserting the claim or defense must prove substantive unconscionability and procedural unconscionability. *Id.* The plaintiff fails to meet this burden because the complaint did not state that the terms or circumstances surrounding the Deed of Trust or any contract between plaintiff and RFG were unfair.

The plaintiff then claims that RFG breached a contract. The plaintiff contends that RFG was required to release the Deed of Trust when it sold the Loan. In further support, the plaintiff attached an Exhibit "B", which encompasses the Deed of Trust. Filing No. 1, Complaint, Ex. B, Deed of Trust. The Court analyzes the document based on the plain language when deciding on the breach of contract claim. *Reichert v. Rubloff Hammond, LLC*, 645 N.W.2d 519, 525 (Neb. 2002) (citations omitted). The Deed states that "[t]he Note or a partial interest in the Note can be sold one or more times without prior notice to Borrower" and that "[u]pon payment of all sums secured by this Security Instrument, Lender shall request Trustee to re-convey the property and shall surrender this Security Instrument and all notes evidencing the debt secured by this Security Instrument to the Trustee." Filing No. 1, Complaint, Ex. B, Deed of Trust. The "sums" secured by the Deed include the debt within the Note. *Id.* However, the complaint does not assert that the plaintiff paid off the Note. Further, RFG had no obligation to re-convey or release the Deed when it sold the Note. When considering the claims in a light most favorable to plaintiff, the breach of contract claim fails as it pertains to RFG because the complaint failed to set forth a cognizable claim.

Plaintiff's Count VI alleges a breach of fiduciary duty. In order to assert this claim, the plaintiff must establish that a "special relationship" exists. Superiority in bargaining power, alone, does not create a fiduciary duty. *Bloomfield*, 465 N.W.2d at 149. A "special relationship" must be established before imposing such a duty. *Bucktail I Ranch v. Farm Credit Bank of Omaha*, No. A-91-286, 1993 WL 70942, at *4 (D.Neb. March 16, 1993). The plaintiff fails to show any type of relationship with RFG that would establish a fiduciary duty between the plaintiff and RFG; therefore, plaintiff's claim fails to state a claim for breach of fiduciary duties against RFG.

Defendant contends that plaintiff's claim of quiet title, Count VII, should be dismissed because RFG was not the foreclosing party, nor the purchaser at the Trustee's sale. RFG also states that the plaintiff was not the property holder at the time of foreclosure. Generally, in an action to quiet title, the plaintiff has the burden of proof and must recover on the strength of his own current title. *Schaneman v. Wright*, 470 N.W.2d 566, 572 (Neb. 1991). A plaintiff cannot recover based on the weakness of his adversary's title. *Lunzmann v. Yost*, 153 N.W.2d 294, 296 (Neb. 1967).

Here, the plaintiff had quit claimed his interest in the subject property to Lighting the Path Christian Trust as of the date of the Trustee's sale. Thus, even if the facts alleged by plaintiff are taken as true, plaintiff had no interest in the property when the sale occurred. The plaintiff has failed to state a cognizable claim against RFG as related to the quiet title action. The defendant's motion to dismiss should be granted as it pertains to RFG.

D. Ginnie Mae

After carefully reviewing the facts and the complaint, the Court finds that only Count VIII and Count IX have the potential to apply to defendant Ginnie Mae. Defendant asserts that the plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(b)(1). Ginnie Mae insists that the Court lacks subject matter jurisdiction in this case based on a sovereign immunity claim.

The United States, as the sovereign, is immune from suit, except where immunity is expressly waived by statute. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). Ginnie Mae is a federal corporation within the Department of Housing and Urban Development, 12 U.S.C. § 1717(a)(2)(A). Notwithstanding, the Court reads the plaintiff's allegations liberally; however, subject matter jurisdiction fails. Where sovereign immunity exists, it deprives the Court of subject matter jurisdiction over claims against the United States and its agents. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The Declaratory Judgment Act does not confer a basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). The plaintiff has not met his burden to assert a basis for jurisdiction over claims against Ginnie Mae. The Court lacks jurisdiction to issue injunctions against Ginnie Mae. In the alternative, the Court finds that the plaintiff fails to plead a cognizable claim for relief against Ginnie Mae under any circumstances; therefore, the action would also be dismissed under Fed. R. Civ. P. 12(b)(6).

The plaintiff's claim of intentional infliction of emotional distress, a tort claim, requires administrative filing under the Federal Tort Claims Act ("FTCA") prior to bringing this action. *Mader v. United States*, 654 F.3d 794, 807-08 (8th Cir. 2011). The Court lacks jurisdiction over Ginnie Mae for this claim. Aside from the plaintiff's failure to

assert a jurisdictional basis over the tortious claim, the facts surrounding the case do not support a finding of intentional infliction of emotional distress. In order to prove intentional infliction of emotional distress, the plaintiff must plead and prove: (1) intentional or reckless conduct; (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable; and (3) that the conduct caused emotional distress that no reasonable person should be expected to endure. *Schieffer*, 508 N.W.2d at 910 (citations omitted). There are no facts within the plaintiff's complaint that show these elements.

Lastly, the plaintiff alleges fraudulent misrepresentation against Ginnie Mae, which is also a tortious state claim. This claim is an explicit exception within the Federal Tort Claims Act. 28 U.S.C. § 2680(h). The Court lacks jurisdiction over Ginnie Mae for this claim.

E. Wrongful Foreclosure

After careful research, the Court finds wrongful foreclosure is not a recognized cause of action within Nebraska law. However, if the Court recognized this claim as a matter of law, the plaintiff would lack standing to bring such claim. Generally, the borrower is not a party or third-party beneficiary to the lender's assignments of the mortgage. *Marcuzzo v. Bank of the W.*, 862 N.W2d 281, 290 (Neb. 2015). "[A] borrower who is not a party to a mortgage assignment, or a party intended to benefit from the assignment, lacks standing to challenge the assignment." *Id.* Here, plaintiff would lack standing because the borrower is not a party or beneficiary to the lender's assignment

of the mortgage; therefore, the defendants' motions to dismiss are granted as related to Count I.

F. Infliction of Emotional Distress

The intentional infliction of emotional distress claim within Count VIII requires a plaintiff to plead and prove: (1) intentional or reckless conduct; (2) the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable; and (3) that the conduct caused emotional distress that no reasonable person should be expected to endure. *Schieffer*, 508 N.W.2d at 910 (citations omitted).

After carefully reviewing the complaint and the facts surrounding the case, the Court finds that the circumstances lack sufficiency to plead this claim against any party. The defendants' motions to dismiss are each granted as it pertains to Count VIII.

G. Declaratory Judgment

The plaintiff seeks a declaratory judgment in Count IX of the complaint. In order for the Court to grant declaratory judgment, a justiciable issue must exist. *City of Fremont v. Kotas*, 781 N.W.2d 456, 462 (Neb. 2010). "A justiciable issue requires a present substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement." *Id.* The plaintiff fails to allege facts that give rise to a justiciable issue between the plaintiff and the defendants. For the foregoing reasons, the defendants' motions to dismiss are granted in regards to Count IX.

Generally, the Court has the discretion to allow the plaintiff to file an amended complaint to cure deficiencies in the pleading; however, in this case the Court does not believe amendments could cure said deficiencies. Accordingly,

THEREFORE, IT IS ORDERED THAT:

1. The defendant, PHL's, motion to dismiss, Filing No. 16, is granted.
2. The defendants, MERS and FSB's, motion to dismiss, Filing No. 18, is granted.
3. The defendant, RFG's, motion to dismiss, Filing No. 24, is granted.
4. The defendant, Ginnie Mae's, motion to dismiss or, alternatively, for summary judgment, Filing No. 20, is granted.
5. This case is dismissed. A separate judgment will be entered in accordance with this memorandum and order.

Dated this 14th day of June, 2018.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ED TEAGUE II,

Plaintiff,

vs.

REGENT FINANCIAL GROUP, INC.,
GINNIE MAE, GINNIE MAE, as Trustee for
Securitized Trust Ginnie Mae REMIC
2011-066 Trust; FLAGSTAR BANK, FSB,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.
("MERS"), and PLANET HOME LENDING,
LLC,

Defendants.

8:17CV416

JUDGMENT

In accordance with the Memorandum and Order entered herein, judgment is
entered in favor of the defendants and against the plaintiff.

Dated this 14th day of June, 2018.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge