NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON CODY; DARLENE CODY, Plaintiffs-Appellants, v. SUPERIOR COURT OF CALIFORNIA TRINITY COUNTY; et al., Defendants-Appellees.	No. 20-16233 D.C. No. 2:19-cv-02383-JAM-KJN MEMORANDUM* (Filed Jul. 29, 2021)

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted July 19. 2021**

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

Leon Cody and Darlene Cody appeal pro se from the district court's judgment dismissing their 42 U.S.C. § 1983 action arising out of state court proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo dismissal under Federal Rule of Civil Procedure

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

12(b)(1) and 12(b)(6). *Serra v. Lappin*, 600 F.3d 1191, 1995 (9th Cir. 2010). We affirm.

The district court properly dismissed the Codys' action as barred by the Eleventh Amendment. *See Simmons v. Sacramento County Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) (state courts are "arms of the state" entitled to Eleventh Amendment immunity); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (official capacity suits are "another way of pleading an action against an entity of which an officer is an agent").

The district court did not abuse its discretion in denying further leave to amend because amendment would have been futile. *See Gordon v. City of Oakland*, 627 F.3d 1092, 1094-95 (9th Cir. 2010) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

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

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

LEON CODY, ET AL.,

v.

CALIFORNIA SUPERIOR COURT IN AND FOR TRINITY COUNTY, ET AL.,

CASE NO:
2:19-CV-02383-JAM-KJN

(Filed May 27, 2020)

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 5/27/2020

Keith Holland
Clerk of Court

ENTERED: **May 27, 2020**

by: /s/ H. Huang
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEON CODY, ET AL., Plaintiffs, v. CALIFORNIA SUPERIOR COURT IN AND FOR TRINITY COUNTY, ET AL., Defendants.	No. 2:19-cv-02383-JAM-KJN PS ORDER (Filed May 27, 2020)

On March 25, 2020, the magistrate judge filed findings and recommendations (ECF. No. 55) herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. On April 6, 2020, plaintiffs filed objections to the proposed findings and recommendations (ECF. No. 56), which have been considered by the court.

This court reviews de novo those portions of fie proposed findings of fact to which an objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); see also Dawson v. Marshall, 561 F.3d 930, 932 (9th Cir. 2009). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's

conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the proposed findings and recommendations in full. Accordingly, IT IS ORDERED that:

1. The Proposed Findings and Recommendations filed March 25, 2020, are ADOPTED.
2. Defendants' motions to dismiss are GRANTED (ECF Nos. 34, 36, 39).
3. Plaintiffs' motion to amend (ECF No. 43) is DENIED.
4. Plaintiffs' complaint is DISMISSED WITH PREJUDICE.
5. The Clerk of Court is directed to close this case.

DATED: May 26, 2020

/s/ John A. Mendez
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARLENE CODY et al., Plaintiffs, v. CALIFORNIA SUPERIOR COURT IN AND FOR TRINITY COUNTY, et al., Defendants.	No. 2:19-cv-02383-JAM-KJN PS FINDINGS AND RECOMMENDATIONS AND ORDER (ECF Nos. 33, 34, 36, 39, 43) (Filed Mar. 25, 2020)

Presently before the court are motions to dismiss filed by California Superior Court in and for Trinity County ("Superior Court") and Nationstar Mortgage LLC. (ECF Nos. 34, 39.) Defendant Bank of America, N.A. ("BANA") has joined the Superior Court's motion to dismiss and filed its own motion to drop BANA as a party in this action. (ECF Nos. 35, 36.) Plaintiffs filed oppositions to these motions and a motion to amend. (ECF Nos. 41, 42, 43). For the reasons set forth below, the court recommends granting defendants' motions and dismissing plaintiffs' complaint without leave to amend.

BACKGROUND[1]

On March 4, 2013 Plaintiffs, acting pro se, filed suit in state court "alleging a violation of California's

[1] Unless otherwise indicated the factual assertions come from plaintiffs' First Amended Complaint. (ECF No. 24.)

Homeowner's Bill Of Rights against Back of America, N.A., and Nationstar Mortgage[.]" (ECF No. 24 at 3.) Plaintiffs' state-court complaint alleged these two corporations were not authorized to provide mortgage servicing to Countrywide loan # 19100947. (Id. at 3-4.) Plaintiffs also asserted Nationwide trespassed into their residence and took their property. (Id. at 4.) While plaintiffs' present complaint does not address the substance of the state action, plaintiffs allege judicial impropriety by the state court judge(s) as the foundation of the present suit. (See generally id.)

In the state action, plaintiffs filed a motion for Judge Johnson to recuse herself, which she granted on June 21, 2016. (Id. at 4). On July 13, 2016, Judge Harper, who replaced Judge Johnson, on his own motion disqualified himself. (Id. at 5.) On July 14, 2016, Judge Johnson "amended an order which was under appeal[.]"[2] (A) On September 15, 2016, Judge Johnson made "findings and orders" in the state case. (Id.) These "findings and orders" vacated a hearing on plaintiffs' preliminary injunction motion, due to the judges' recusal, and reset that motion before a non-recused judge. (Id., at 5-6.)

As a result of these orders, plaintiffs claim the Superior Court violated California Code of Civil Procedure Section 170.8,[3] and plaintiffs were therefore

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[2] The docket sheet, attached to plaintiffs' complaint, lists the order as "Order: AMENDED MINUTE ORDER."

[3] Section 170.8 provides: "When there is no judge of a court qualified to hear an action or proceeding, the clerk shall forthwith notify the Chairman of the Judicial Council of that fact. The judge

deprived of their rights to a fair trial, Due Process, and Equal Protection. (Id. at 7.)

Plaintiffs originally named Nationstar and BANA as defendants in this action. (ECF No. 1). However, in their First Amended Complaint, plaintiffs name these parties as "necessary, involuntary Plaintiffs." (ECF No 24.)[4]

All defendants filed motions to dismiss. (ECF Nos. 34, 36, 39). Plaintiffs responded and requested leave to amend should their complaint be dismissed. (ECF Nos. 41, 42, 43.)

LEGAL STANDARDS

Legal Standards for Rule 12(b)(6)

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see also

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assigned by the Chairman of the Judicial Council shall hear the action or proceeding at the time fixed therefor or, if no time has been fixed or good cause appears for changing the time theretofore fixed, the judge shall fix a time for hearing in accordance with law and rules and hear the action or proceeding at the time so fixed."

[4] For sake of clarity the court addresses these parties as defendants herein.

Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss, 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, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "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." Id.

In considering a motion to dismiss for failure to state a claim, the court accepts all of the facts alleged in the complaint as true and construes them in the light most favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in her complaint and give plaintiff an opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that "pro se pleadings are liberally construed, particularly where civil rights claims are involved"); see also Hebbe v. Pliler, 627 F.3d 338,

342 n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings liberally even when evaluating them under the standard announced in Iqbal).

In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

Legal Standards for Rule 12(b)(1)

A motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) or 12(h)(3) challenges the court's subject matter jurisdiction. Federal district courts are courts of limited jurisdiction that "may not grant relief absent a constitutional or valid statutory grant of jurisdiction," and "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." A–Z Int'l v. Phillips, 323 F.3d 1141, 1145 (9th Cir.2003) (citations and quotation marks omitted); see also Fed. R. Civ. P.

12(h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.").

When a party brings a facial attack to subject matter jurisdiction, that party contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994); Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Nonetheless, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment" when resolving a facial attack. Safe Air for Everyone, 373 F.3d at 1039.

DISCUSSION

I. SUPERIOR COURT'S MOTION TO DISMISS

Plaintiffs' claim against the Superior Court is barred pursuant to the Eleventh Amendment. The

Eleventh Amendment precludes federal jurisdiction over suits by individuals against a state and its instrumentalities, unless either the state consents to waive its sovereign immunity or Congress abrogates it. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99-100 (1984).

Contrary to plaintiffs' assertions, Congress has not abrogated state sovereign immunity through 42 U.S.C. § 1983. Thus, the Ninth Circuit has consistently held that state courts are immune from suit pursuant to the Eleventh Amendment, and 42 U.S.C. § 1983 does not affect this immunity. See Simmons v. Sacramento Cty. Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state a claim against the Sacramento County Superior Court . . . because such suits are barred by the Eleventh Amendment"); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1110 (9th Cir. 1987) (holding that state courts are arms of the state for Eleventh Amendment purposes); Dittman v. California, 191 F.3d 1020, 1025-26 (9th Cir. 1999) ("The State of California has not waived its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court.").

While plaintiffs assert that "local government may be held liable under Section 1983" (ECF No. 41 at 5), plaintiffs overlook that municipal governments do not enjoy the same Eleventh Amendment protection as states. See Ray v. Cty. of Los Angeles, 935 F.3d 703, 709 (9th Cir. 2019) ("[An] important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not

extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."). Rather, state courts are arms of the state entitled to Eleventh Amendment immunity. See Simmons v. Sacramento Cty. Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003). Accordingly, plaintiffs' argument is unavailing.

Therefore, plaintiffs' claim against the Superior Court is precluded by the Eleventh Amendment and is properly subject to dismissal.

II. LEAVE TO AMEND

As a result of plaintiffs' amended complaint, the parties disagree whether BANA and Nationstar are currently involuntary plaintiffs or still defendants. However, in the present case there is no threat of "inconsistent judgments" because plaintiffs' complaint against the Superior Court should be dismissed, meaning BANA and Nationstar are not "necessary plaintiffs" in this matter. See Fed. R. Civ. P. Rule 19(a)(1). Thus, only question becomes whether plaintiffs should be permitted to amend their complaint again, as they have requested. Due to the Superior Court's Eleventh Amendment immunity and the Rooker-Feldman doctrine, the undersigned finds that leave to amend would be futile as to all defendants.

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, courts "need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad

faith; (3) produces an undue delay in the litigation; or (4) is futile." AmerisourceBergen Corp. v. Dialysist W. Inc., 465 F.3d 946, 951 (9th Cir. 2006). Leave to amend "is properly denied . . . if amendment would be futile." Carrico v. City and Cnty. of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011) (citing Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010)). Further, "[a] party cannot amend pleadings to 'directly contradict an earlier assertion made in the same proceeding." Air Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc., 744 F.3d 595, 600 (9th Cir. 2014) (quoting Russell v. Rolls, 893 F.2d 1033, 1037 (9th Cir. 1990)).

A. Rooker-Feldman bars plaintiffs' claims

The court lacks subject matter jurisdiction over plaintiffs' complaint due to the Rooker-Feldman doctrine. As the Ninth Circuit Court of Appeals explained:

> The Rooker-Feldman doctrine recognizes that federal district courts generally lack subject matter jurisdiction to review state court judgments. The doctrine also precludes a federal district court from exercising jurisdiction over general constitutional challenges that are "inextricably intertwined" with claims asserted in state court. A claim is inextricably intertwined with a state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it or if the relief requested in the federal action would effectively reverse the state court decision or void its ruling. The only court with

> jurisdiction to review challenges to the constitutionality of such judgments is the United States Supreme Court.

Fontana Empire Center, LLC v. City of Fontana, 307 F.3d 987, 992 (9th Cir. 2002) (internal citations and quotation marks omitted).

Here, plaintiffs' federal claim is inextricably intertwined with the state court judgment. Plaintiffs, in an attempt to avoid this conclusion, take two opposing positions. While in their opposition they claim they are not "trying to relitigate their state law claim" (ECF No. 41 at 6), plaintiffs' complaint seeks "Federal Injunctive relief to restore plaintiffs' federal right to a fair trial and impartial judge[.]" (ECF No. 24 at 8.) Plaintiffs' only other requested relief is "any further relief the court may deem appropriate." (Id.) It is obvious that this federal court cannot restore plaintiffs' right to a fair trial without overturning a state court judgment, something clearly precluded by Rooker-Feldman. Plaintiffs make no additional availing argument as to why an amended complaint would not be similarly precluded.

Accordingly, the undersigned finds that plaintiffs cannot maintain suit against any defendant due to the Rooker-Feldman doctrine, and therefore leave to amend would be futile.

III. OTHER MOTIONS

Plaintiffs also filed a motion to electronically file in this matter and a request for the court to reconsider its prior order. (ECF Nos. 33, 38.)

Due to the undersigned recommending that plaintiffs' complaint be dismissed without leave to amend, the court DENIES plaintiffs' request to electronically file in this matter. (ECF No. 33.)

Plaintiffs also filed an "Objection to Matters Before Magistrate Judge Kendall J. Newman" (ECF No. 38), wherein they request that the court modify its prior order (ECF No. 25). Specifically, plaintiffs argue that the prior order that granted them leave to amend should have been made under Federal Rule of Civil Procedure 15(a)(1) (amendments as a matter of course) and not 15(a)(2) (other amendments).

Pursuant to Rule 15(a)(1)(B) a party may amend its pleading once as a matter of course "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Here, plaintiffs were served with Nationstar's motion to dismiss on December 23, 2019. (ECF No. 5-2 (noting service via email and mail).) Because Nationstar served plaintiffs by mail, "3 days are added" to the 21-day time period of Rule 15(a)(1)(B). See Fed. R. Civ. P. 6(d). Plaintiffs filed a motion to amend their complaint on January 27, 2020, outside of the 24 days

allowed under Rule 15(a)(1)(B). Therefore, the court granted plaintiffs leave to amend pursuant to Rule 15(a)(2). (See ECF No. 25.)

Plaintiffs assert that because the Superior Court served its motion to dismiss on plaintiffs on January 10, 2020, they filed their amended complaint within the Rule 15(a)(1) timeframe. (ECF No. 38.) However, Rule 15(a)(1) does not create multiple 21-day periods to file an amended complaint. Rather, the Rule states that amendments are permitted "21 days after service of a motion under Rule 12(b), (e), or (f)." Fed R. Civ. P. 15(a)(1)(B) (emphasis added). That period began to run on December 23, 2019, the date Nationstar served plaintiffs with **a** Rule 12(b) motion, and ran 24 days, as discussed above. Accordingly, the court properly granted plaintiffs leave to amend under Rule 15(a)(2), not Rule 15(a)(1). The court therefore DENIES plaintiffs' motion (ECF No. 38) to modify its prior order.

CONCLUSION

For the reasons sets forth above, the undersigned recommends plaintiffs' complaint be dismissed. While leave to amend should be freely granted, amendment would be futile due to the Superior Court's Eleventh Amendment immunity and the Rooker-Feldman doctrine. Therefore, the undersigned recommends that leave to amend should not be granted and this case should be dismissed with prejudice.

Accordingly, it is HEREBY RECOMMENDED that:

1. Defendants' motions to dismiss be GRANTED (ECF Nos. 34, 36, 39).

2. Plaintiffs' motion to amend (ECF No. 43) be DENIED.

3. Plaintiffs' complaint be DISMISSED WITH PREJUDICE.

4. The Clerk of Court be directed to close this case.

Additionally, it is HEREBY ORDERED that:

1. Plaintiffs' motion to electronically file (ECF No. 33) is DENIED.

2. Plaintiffs' motion for the court to reconsider its prior order (ECF No. 38) is DENIED.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan,

158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading, discovery, and motion practice in this action are stayed pending resolution of the findings and recommendations. With the exception of objections to the findings and recommendations and any non-frivolous motions for emergency relief, the Court will not entertain or respond to any motions and other filings until the findings and recommendations are resolved.

IT IS SO ORDERED AND RECOMMENDED.

Dated: March 24, 2020

/s/ Kendall J. Newman
KENDALL J. NEWMAN
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEON CODY; DARLENE CODY, Plaintiffs-Appellants, v. SUPERIOR COURT OF CALIFORNIA TRINITY COUNTY; et al., Defendants-Appellees.	No. 20-16233 D.C. No. 2:19-cv-02383-JAM-KJN Eastern District of California, Sacramento ORDER (Filed Nov. 8, 2021)

Before: SCHROEDER, SILVERMAN, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en bane and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The Codys' petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 26) are denied.

No further filings will be entertained in this closed case.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

LEON CODY, Plaintiff and Appellant, v. NATIONSTAR MORTGAGE LLC, Defendant and Respondent.	C084603 (Super. Ct. No. 13CV011) (Filed Aug. 27, 2019)

In a prior appeal, Leon Cody and Darlene Cody attempted to challenge the granting of a motion for summary judgment. We dismissed the appeal as having been taken from a nonappealable order. (*Cody v. Bank of America, N.A.* (July 17, 2017, C081544) [nonpub. opn.].) In this appeal, the Codys have timely appealed from an appealable judgment of dismissal in favor of respondent Nationstar Mortgage LLC (Nationstar). However, nearly all of the Codys' contentions are

forfeited for lack of timely objection in the trial court, inadequate record on appeal, or deficient briefing.

The Codys argue (1) the presiding judge violated Code of Civil Procedure section 170.8 by failing to contact the Judicial Council after their peremptory challenge was granted under Code of Civil Procedure section 170.6, (2) the trial court abused its discretion by refusing to grant leave to amend the Codys' operative complaint, (3) the Codys alleged a viable cause of action under Civil Code 2923.7 based on Nationstar's failure to provide them with a single point of contact, (4) the Codys had viable causes of action for trespass and conversion, and (5) the trial court abused its discretion in imposing discovery sanctions.

We conclude the Codys have not preserved their challenge to Judge Murray on grounds of bias for lack of timely objection. The Codys have forfeited their argument regarding denial of leave to amend in the absence of an adequate record or developed argument on the issue. The Codys' operative complaint does not allege that lack of a single point of contact materially affected them, which is a prerequisite for a cause of action under Civil Code section 2923.7. The record on this issue is also inadequate to allow further review. Regarding the causes of action for trespass and conversion, these causes of action are not in the operative complaint and the Codys have not demonstrated error in the trial court's refusal to allow them to amend. Finally, the discovery sanctions issue is forfeited for want of any legal authority in support. Accordingly, we affirm.

BACKGROUND

In light of appellants' forfeiture of almost all of their issues on appeal, we set forth only a brief recitation of the background of this case.

The Codys filed their third amended complaint in July 2014. The third amended complaint is the operative complaint. The operative complaint alleges two causes of action for (1) "violation of the California Homeowner Bill of Rights," and (2) cancellation of instruments. Defendants demurred, and the trial court sustained the demurrer as to the second cause of action. Only the cause of action asserted under the Homeowner Bill of Rights remained.

In April 2016, the trial court allowed the Codys "to file their 'proposed Fourth Amended Complaint' " pending defendants' chance to respond and the trial court's opportunity to read the proposed pleading. The trial court, however, denied leave to amend upon concluding it attempted to revive abandoned claims.

Nationstar moved for summary judgment on the remaining single cause of action. The Codys opposed the motion. After a hearing, the trial court granted summary judgment in favor of Nationstar. The trial court found the evidence showed "the allegation that [Nationstar] failed to respond" to the Codys' application after January 1, 2013 "is simply not true." The trial court further found no foreclosure had occurred. The trial court dismissed the claim concerning the lack of a single point of contact on grounds the Codys had not alleged the materiality of the fact regarding single

point of contact or even that they had requested a single point of contact.

From the judgment of dismissal, the Codys timely filed a notice of appeal.

DISCUSSION

I

Code of Civil Procedure section 170.8

The Codys assert Judge Dennis Murray was biased against them. They also argue Judge Murray was improperly assigned to their case because the presiding judge of Trinity County Superior Court did not follow the requirements of Code of Civil Procedure section 170.8. However, the record does not show and the Codys do not assert they ever objected to Judge Murray's assignment.

As a general rule," [i]n order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court.' (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) 'The party also must cite to the record showing exactly where the objection was made.' (*Ibid.*) As the California Supreme Court [has] reaffirmed, 'a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court.' (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.' (*Ibid.*)" (*K.C.*

Multimedia, Inc. v. Bank of America Technology & Operations, Inc. (2009) 171 Cal.App.4th 939, 948–949.)

In *People v. Lewis and Oliver* (2006) 39 Cal.4th 970 (*Lewis*), Albert Lewis appealed his criminal conviction on grounds of judicial bias without having made an objection in the trial court on that ground. (*Id.* at p. 994.) The California Supreme Court rejected the argument, explaining that "the complaining party must seek disqualification at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. In doing so, the party must bring to the trial court's attention 'all of the facts' later cited on appeal in support of the judicial bias claim. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) By failing to do so when the relevant events occurred, [the complaining party] has forfeited the right to complain about them on appeal. (*Ibid.*) For similar reasons, [the complaining party] has lost any additional claims that the trial court's alleged bias affected subsequent rulings." (*Lewis, supra*, 39 Cal.4th at p. 994.)

Here, the Codys assert that the judge against whom they filed a peremptory challenge – the Trinity County Superior Court presiding judge – failed to follow the requirement of Code of Civil Procedure section 170.8 that the Chair of the Judicial Council must be notified when the entire bench of a superior court has been recused. The Codys, however, did not object to any procedural irregularity. Consequently, the procedural irregularity – if any – was forfeited. (*Lewis, supra*, 39 Cal.4th at p. 994.)

So too, the Codys have not preserved a contention that Judge Murray – who assumed the case from the presiding judge – was actually biased against them. The Codys appeared before Judge Murray without objection. After Judge Murray denied their discovery motion, they asked for reconsideration on the merits. In other words, the Codys appealed without any timely objection on the grounds they now allege for the first time on appeal. In the absence of timely objection in the trial court, the issue has not been preserved for appeal. (*Lewis, supra*, 39 Cal.4th at p. 994; *In re S.C., supra*, 138 Cal.App.4th at p. 406.)

II

Denial of Leave to Amend

The Codys assert the trial court abused its discretion in denying them leave to amend their operative complaint (the third amended complaint). In support of their argument, the Codys do not include in their appellant's appendix the trial court's order denying them leave to amend their third amended complaint. Moreover, the Codys do not develop their argument to explain how the trial court's denial constituted an abuse of discretion.

The respondent's appendix on appeal shows the trial court stated the following reasons for denying the Codys' leave to amend their third amended complaint:

"At the hearing on April 19, 2016, the Court also considered Plaintiffs' Motion for Leave to Amend.

Bank[1] orally opposed the motion on procedural grounds, since the proposed pleading had not been filed together with the motion, as required by California Rules of Court, rule 3.1324(a). The Court allowed plaintiffs to file their 'proposed Fourth Amended Complaint,' and authorized Bank to file further opposition once counsel had a chance to read it. Bank duly filed its written opposition. The Court, having read the parties' papers and reviewed the file, concludes that the 'proposed Fourth Amended Complaint' comprises nothing more than a repeat of earlier generations of the complaint, and contains no new evidence that could not have been discovered prior to the motion for summary judgment. The latest of these pleadings did not survive the Bank's motion for summary judgment. Further, the 'new' allegation of conspiracy was included in previous versions of the complaint, but was dropped from the Third Amended Complaint, i.e., the version examined by the Court in the context of the summary judgment motion. When the plaintiff has been 'long aware of the facts on which the amendment was based, . . . it is patently unfair to permit the plaintiff to defeat the summary judgment motion by, in effect, allowing the plaintiff to present a "moving target," and not to be bound by the pleadings.' (Thompson Reuters, Cal. Judges. Benchbook, Civil Proceedings—Before Trial (2015 ed.) Update, p. 524; citing *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263,

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[1] At the time of the ruling on the motion to amend the third amended complaint, the trial court had granted summary judgment in favor of Bank of America.

1280.) The plaintiff's conspiracy cause of action was abandoned in the Third Amended Complaint. It will not be revived absent a showing sufficient to warrant relief, which has not been offered. Accordingly, the motion to amend is denied."

In their briefing on appeal, the Codys do not develop any argument to explain why the trial court's reasoning might constitute an abuse of discretion. However, "[t]o demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error." (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) Thus, it is well settled that the "failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal." *(Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Here, the Codys have forfeited their issue because they have not introduced a sufficient appellate record or demonstrated error in the trial court's denial of the motion to amend the operative complaint.

III

Single Point of Contact

The Codys contend the trial court erred in granting summary judgment on their claim that Nationstar

did not provide them with a single point of contact as required by Civil Code section 2923.7. The contention is forfeited because (1) the Codys submitted an inadequate appellate record, and (2) their operative complaint is insufficient to plead a cause of action under Civil Code section 2923.7.

The Codys' third amended complaint alleges that "Nationstar Mortgage LLC failed to have a single point of contact person (spoc) to assist [them] in the modification process, but changed that person on a monthly basis." Later in the third amended complaint, the Codys clarified that Nationstar "failed, after January 1, 2013, to give [them] a Single Point of Contact (spoc) in violation of Calif. Civil Code 2923.7."[2]

Although the Codys included their third amended complaint in their appellants' appendix, they omitted any of the moving papers submitted by Nationstar in support of summary judgment and any papers filed in opposition. Their record is inadequate to review the merit of their claim on appeal. " 'Failure to provide an adequate record on an issue requires that the issue be resolved against [the appellant].' " (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609, quoting *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

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[2] Civil Code section 2923.7, subdivision (a), provides: "When a borrower requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact."

Even on the face of the third amended complaint, the Codys' claim based on Civil Code section 2923.7 cannot prevail. Nowhere in their operative complaint do they allege how the lack of a single point of contact might have adversely affected them. However, "a violation of [Civil Code] § 2923.7 is actionable only when that violation is material. A material violation is one where 'the alleged violation affected a plaintiff's loan obligations or the modification process.'" (*Shupe v. Nationstar Mortgage LLC* (E.D. Cal. 2017) 231 F.Supp.3d 597, 603, quoting *Cornejo v. Ocwen Loan Servicing, LLC* (E.D. Cal. 2015) 151 F.Supp.3d 1102, 1113.) Thus, the operative complaint was insufficient to establish a viable cause of action under Civil Code section 2923.7. (*Shupe*, at p. 603.)

IV

Trespass and Conversion

For their fourth argument, the Codys rely on the trial court's statement in its summary judgment ruling that Nationstar's entry into the real property "may have been a trespass or a conversion, but it is not a foreclosure." The Codys appear to use the trial court's statement to assert summary judgment should not have been granted. We are not persuaded.

Causes of action for trespass and conversion were not alleged in the Cody's operative complaint. And, in part II above, we have explained the Codys have not demonstrated error in the trial court's denial of leave to amend the operative complaint. The Codys cannot

show it was error for the trial court to dismiss their complaint based on the strength of causes of action that were not actually alleged in that complaint.

V

Discovery Sanctions

In its entirety, the Codys' final argument states: "The imposition of Discovery sanctions against [them] by the Hon. Judge Murray were an abuse of discretion resulting from a disregard of the pro per plaintiffs California statutory discovery rights." The Codys have forfeited this issue because they do not identify the sanctions they challenge, develop any argument, or cite legal authority in support. (*City of Lincoln v. Barringer, supra*, 102 Cal.App.4th at p. 1239, fn. 16; *Berger v. Godden, supra*, 163 Cal.App.3d at p.1119.)

DISPOSITION

The judgment is affirmed. Nationstar Mortgage LLC shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/ Hoch
HOCH, J.

We concur:

/s/ Raye
RAYE, P. J.

/s/ Blease
BLEASE, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

LEON CODY,
Plaintiff and Appellant,
v.
NATIONSTAR MORTGAGE L.L.C.
Defendant and Respondent.

C084603
Thrifty County
No. 13CV011

REMITTITUR TO TRIAL COURT CLERK

I, ANDREA K. WALLIN-ROHMANN, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached opinion or order, concurrently provided to the parties, is a true and correct copy of the original opinion or order entered in the above entitled cause that has now become final.

Respondent to recover costs on appeal.

WITNESS my hand and the seal of the Court affixed at my office this 14th day of November 2019.

ANDREA K. WALLIN-ROHMANN
Clerk

[SEAL]

/s/ Christie Doutherd
By: Christie Doutherd Deputy Clerk

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

Trial Court Clerk

By:
Deputy Clerk

cc: See Mailing List

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TRINITY
Department 1

JUDICIAL OFFICER: Elizabeth W. Johnson
COURT CLERK: Michele Hubbard-Richer
COURT REPORTER: Not Reported
BAILIFF: Garth Pedrotti

DATE OF PROCEEDINGS: April 21, 2015
CASE NO: 13CV0011

Leon Cody et al (P) Plaintiff vs. Bank of America et al Defendant.	Counsel Appearing: Plaintiff: In Pro Per Defendant Bank of America: S. Whittemore (P. Court Call) Defendant Cal-Western: Y. Caytoh

NATURE OF PROCEEDINGS: **MOTION FOR PRELIMINARY INJUNCTION / CASE MANAGEMENT CONFERENCE**

The Case Management Statement, prepared by Leon Cody has been read and considered by the Court.

The Case Management Statement, prepared by Attorney Whittemore has been read and considered by the Court

Plaintiff argues his Motion for a Preliminary Injunction.

Attorney Whittemore argues against the Plaintiff's Motion for Preliminary Injunction.

COURT MAKES. THE FOLLOWING FINDINGS AND ORDERS:

The Court grants the Plaintiff's Motion for Preliminary Injunction.
Possession of the property is restored to the plaintiff.

Trial Setting is set on July 14, 2015, at 10:00 a.m., in Department 1.

I certify that the foregoing constitutes the judgment/order rendered

/s/ Michele Hubbard-Richer
Michele Hubbard-Richer
Judicial Clerk II

cc.
Brian Whittemore, Attorney at Law, One Embarcadero Center, Ste 2600, San Francisco, Ca. 94111 Leon Cody, PO Box 1835, Weaverville Ca., 96093