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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re JOE SANCHEZ and CAROLYN SANCHEZ, Debtor(s).	Case No. 09-41756-E-13
JOE SANCHEZ and CAROLYN SANCHEZ, Plaintiff(s), v. AURORA LOAN SERVICES, LLC, Defendant(s).	Adv. Pro. No. 10-2529 Docket Control No. PD-1

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

Before the Court is Defendant Aurora Loan Services, LLC's ("Aurora") Motion for Judgment on the Pleadings, which the court converted to a Motion for Summary Judgment at the initial hearing on August 25, 2011. Fed. R. Civ. P. 12(d), Fed. R. Bankr. P. 7012. The court's decision to convert the Motion was based on Aurora requesting the court take judicial notice of several documents,

relying on materials outside the pleadings. The Motion for Summary Judgment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1), Joe Sanchez and Carolyn Sanchez ("Plaintiff-Debtors") filing their opposition and oral argument was taken on the Motion. The court's September 3, 2011 order setting the final hearing afforded the Plaintiff-Debtors the opportunity to file and serve their evidence and supplemental pleadings on or before September 23, 2011. Dckt. 75.

Overview of Adversary Proceeding

Plaintiff-Debtors commenced the instant proceeding by filing their Complaint on August 30, 2010, objecting to Aurora's proof of claim asserting a lien against the Plaintiff-Debtors' property, contending that Aurora lacks standing to enforce the note and deed of trust because Aurora is not the true holder of the note, alleging that Aurora has engaged in drafting improper assignments and improperly submitted a proof of claim, and that illegal attorneys' fees and other costs have been improperly included in the proof of claim. Additionally, Plaintiff-Debtors claim that the assignment of mortgage filed after the bankruptcy proceeding is a voidable transfer, is in violation of the automatic stay as set forth in 11 U.S.C. s 362(a)(3), (4), and (5), and the filing of the allegedly fraudulent proof of claim constituted fraud on the court for which defendant should be in contempt of court.

In its Motion for Summary Judgment, Aurora pleads that the Plaintiff-Debtors':

1. First claim for relief fails because a post-petition assignment of a beneficial interest in a deed of trust is not a transfer of property of the estate or an act to create, perfect or enforce a lien;

2. Second claim for relief fails because Aurora did not file an improper proof of claim, as they are the entity entitled to enforce the note because they are in possession of the note indorsed-in-blank and that the proof of claim did not include impermissible fees;

3. Third claim for relief fails because the post-petition assignment of a beneficial interest in a deed of trust is not a violation the automatic stay;

4. Fourth claim for relief fails because the post-petition assignment of a beneficial interest in a deed of trust is not a violation the automatic stay;

5. Fifth claim for relief for common law fraud fails because it is preempted by the Bankruptcy Code and plaintiffs fail to plead the necessary elements; and

6. Sixth claim for relief for contempt fails because, as all claims supporting the request for contempt fail as a matter of law, the claim for contempt also fails.

Aurora further argues that as the possessor of the indorsed-in-blank note, Aurora is qualified as a proper creditor and, as the note holder, is entitled to file a proof of claim. Furthermore, the note and deed of trust provide that Aurora is entitled to add any amounts expended for property inspections, appraisal fees, and reasonable attorneys fees to the balance of the loan. Aurora submitted the Declaration of Neva Hall, who summarized the loan transaction, that Aurora Loan Services provided its counsel with the original note, and that Plaintiff-Debtors' counsel has reviewed the original note, including the blank indorsement.

Plaintiff-Debtors responded to Aurora's arguments, maintaining that Defendants do not have standing in Federal Court as they are not the holders of the note. Plaintiff-Debtors allege it is undisputed that the owner of the note is U.S. Bank, N.A., in trust for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-7N. Defendant deny this allegation.

Additionally, documentation in support of Plaintiff-Debtors'

assertion that U.S. Bank, N.A., as trustee, is the true holder of the note is not included in the evidence filed with the court. The Complaint alleges that Aurora included this information in a TILA Response attached in Exhibit E to the Complaint. However, no such document was included in the exhibits attached to the Complaint filed with the court and no other documentation has been provided as evidence regarding this assertion in opposition to the Motion for Summary Judgment.

Plaintiff-Debtors further argue that the Corporate Assignment of Deed of Trust ("Assignment") did not transfer any kind of interest to Defendant because American Brokers Conduit's license to operate in California was revoked in 2007 and thus did not have the authority to assign any interest. Further, MERS did not have the authority to transfer any interest to the Defendant and any assignment from it is a legal nullity. They argue that the Assignment was fraudulently created by Defendant to support its claim to enforce the note.

Further, the Plaintiff-Debtors argue that they have properly pled fraud and contempt as the Assignment is invalid and in violation of the automatic stay. Additionally, Plaintiff-Debtors claim that improper fees and costs were included in the deed of trust. Plaintiff-Debtors object to the submission of Neva Hall's declaration on the grounds of hearsay and relevancy, as she failed to establish the sources of information and the manner and time of preparation to support the trustworthiness of Defendant's Exhibits. Ultimately, Plaintiff-Debtors claim that the entity possessing the note is a matter in dispute and as such the summary judgment should not be granted.

JUDICIAL NOTICE

In the prior hearing for the Motion for Judgment on the Pleadings, the court determined that it was proper to take judicial notice of the Deed of Trust, the Corporate Assignment of Deed of Trust, Aurora's Proof of Claim, and the Amended Chapter 13 plan.

Plaintiff-Debtors have now requested that the court take judicial notice of two documents offered in support of their opposition to Defendant's motion for Summary Judgment:

A. An unsigned order revoking American Brokers Conduit's residential mortgage lender licence.

B. An unsigned order revoking American Brokers Conduit's Finance Lenders License.

Where certain indisputable facts are so within the common and general knowledge of the community, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the judicial notice doctrine serves as a substitute for formal proof. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Even where a fact may not be of common knowledge, so long as the fact is capable of immediate and accurate determination from a credible source, a court may take judicial notice. *Id.* at 201(b)(2).

No formula exists for determining the appropriate use of judicial notice under Federal Rule of Evidence 201(b)(2). Frequently, courts utilize judicial notice with regard to information contained in public records. *Mack v. Bay Beer*

Distrib., 798 F. 2d 1279, 1282 (9th Cir. 1986), *abrogated in part on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

The documents labeled as Exhibits A and B do not show they were a part of a public record and are not signed or executed by any person. There is no evidence that these documents are contained in public records or are from a reliable source. Plaintiff-Debtors have not provided the court with an explanation or legal authority for what weight, if admitted, the court could give to unsigned documents. The court does not take judicial notice of Exhibits A and B and as such, the request is denied.

Undisputed Facts and Testimony Presented to the Court

The undisputed facts before the court include:

1. Plaintiff-Debtors obtained a mortgage loan from American Brokers Conduit ("ABC") in the original principal sum of #393,100.00, which was reflected in a promissory note secured by a deed of trust encumbering Plaintiff-Debtors' property commonly known as 9479 Kilcolgan Way, Elk Grove, California.

2. The deed of trust was recorded on February 16, 2007, in Sacramento County, California. A Corporate Assignment of Deed of Trust was recorded in Sacramento County, California, on October 28, 2009. The beneficiary under the Assignment was Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for lender ABC and its successors and assigns.

3. Plaintiff-Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code on October 7, 2009. On October 30, 2009, Aurora filed a Proof of Claim on account of the loan.

4. Plaintiff-Debtors filed an objection to Aurora's claim on May 28, 2010.

The only testimony provided to the court in support or opposition to the Motion for Summary Judgment is the Neva Hall Declaration, Dckt. 76, 79 (duplicate copy filed). On her declaration, Ms. Hall testifies to the following:

1. Effective July 21, 2011, Aurora Bank took over all servicing activities of Aurora Loan Services, LLC, and is authorized to provide this declaration on behalf of Aurora Loan Services, LLC, the Defendant.

a. The power of attorney provided to Aurora Bank by Aurora Loan Services is Exhibit 1 to the declaration of Neva Hall.

2. Aurora Bank's books and records state that the obligation for a loan made to the Plainitff-Debtors is evidenced by a promissory note executed by the Plaintiff-Debtors dated February 12, 2007, in the original principal amount of $393,100.00.

a. The Note is Exhibit 2 to the declaration of Neva Hall.

3. The Note is secured by a Deed of Trust against real property commonly know as 9479 Kilcolgan Way, Elk Grove, California.

a. The Deed of Trust is Exhibit 3 to the declaration of Neva Hall.

4. On October 28, 2009, the Deed of Trust was assigned to Aurora Loan Services.

a. The assignment of the Deed of Trust is Exhibit 4 to the declaration of Neva Hall.

5. Aurora Loan Services filed a proof of claim in the secured amount of $444,815.88, computed as of October 7, 2009, which sets forth an alleged pre-petition arrearage consisting of (1) eight pre-petition payments of $1,477.67 each (for the months of March 2009 through October 2009), (2) late charges in the amount of $221.64, (3) property inspection fees of $60.00, and (4) an appraisal fee of $95.00. Aurora Loan Services also asserted the right to include $300.00 in legal fees for filing the proof of claim, reviewing the Plaintiff-Debtors' Chapter 13 Plan, and filing a request for Courtesy Notice. The proof of claim includes a copy fo the Note which is endorsed and payable in blank and the Deed of Trust stamped with the recording information.

6. Counsel for Aurora Loan Services has the original Note.

ANALYSIS

Federal Rule of Civil Procedure 56, made applicable to this proceeding by Bankruptcy Rule 7056, provides that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and declarations, if any, show

that there is "no genuine issue of fact and that the moving party is entitled to judgment as a matter of law." "The initial burden of showing the absence of a material factual issue is on the moving party. Once that burden is met, the opposing party must come forward with specific facts, and not allegations, to show a genuine factual issue remains for trial." *DeHorney v. Bank of America N.T.&S.A.*, 879 F.2d 459, 464 (9th Cir. 1989); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986).

In both their objections and responses, Plaintiff-Debtors argue that a genuine dispute of material fact still exists in this proceeding since Defendant has failed to show it is the holder of the note. The remainder of the causes of action essentially rely on this fact. The claims asserted by Plaintiff-Debtors focus on recordation of the Assignment and the subsequent proof of claim being fraudulent and void based on the lack of ownership of Aurora to the note. Defendant, in its responses, challenges this allegation repeatedly, arguing that they in fact are in possession of the note indorsed-in-blank, have filed a declaration stating that Plaintiff-Debtors' counsel has inspected that note and no factual issue remains.

I. Ownership of the Note

Under the California Commercial Code, the person or entity entitled to enforce a negotiable instrument is the holder. Cal. Com. Code § 3301. A person or entity in possession of an instrument is the holder of the instrument if the instrument is payable to that person or entity, or payable to the bearer. Cal. Com. Code § 1201(21)(a). An instrument is payable to the bearer if it does not state a payee (i.e. indorsed-in-blank). Cal. Com. Code

§ 3109(a)(2).

Aurora claims their counsel currently holds physical possession of the original "blue-ink" note for Aurora. Aurora filed the Declaration of Neva Hall, who testified to the validity of the note, that Aurora's counsel was currently in possession of that note, and that counsel for Plaintiff-Debtors inspected the same. Plaintiff-Debtors objected to the Declaration of Neva Hall on the grounds of relevancy and hearsay. Rule 401 of the Federal Rules of Evidence defines the test for relevancy as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

The Neva Hall Declaration provides testimony as to the validity of the documentation, which Plaintiff-Debtors have questioned, and that Aurora does in fact possess the note. Therefore, the Declaration makes it more likely that Aurora is in fact the holder of the note, and the relevancy objection is overruled. Additionally, the Declaration is not hearsay. Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(d)(2)(A). The Declaration of Neva Hall merely cites and directs the court to portions of the documents themselves. It does not ask the court to consider testimony consisting of a summary of the documents, which would be inadmissible hearsay. Therefore, the hearsay objection is overruled.[1]

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[1] The court also notes that the Plaintiff-Debtors have not presented any evidence that they have requested to inspect the

The entity in possession of an indorsed-in-blank note qualifies as the note holder. Cal. Com. Code § 1201(21)(a). Additionally, as the parties are well be aware, California law has the long-established principle that the security always follows the debt, notwithstanding attempts to sever one from the other (absent a voluntary release of the lien).

> The note and the mortgage are inseparable; the former as essential, the later as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.

Carpenter v. Longan, 83 U.S. 271, 274 (1872) (stating the common-law rule); *accord Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ. Code § 2936. Therefore, if one party receives the note and another receives the deed of trust, the holder of the note prevails regardless of the order in which the interests were transferred. *Adler v. Sargent*, 109 Cal. 42, 49-50 (1895). Aurora, as the holder of the Note endorsed-in-blank, regardless of whether it is the "owner" of the note or a document has been recorded showing an assignment of the Deed of Trust to Aurora, is entitled to enforce both the Note and Deed of Trust. *See In re Hwang*, 438 B.R. 661 (C.D. Cal. 2010).[2]

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original note from counsel and it was not presented or that what was presented did not appear to be the original note. Ms. Hall's testimony on this point is uncontradicted.

[2] Having the legal right to enforce the Deed of Trust does not necessarily equate with utilizing the nonjudicial foreclosure procedures provided in the Deed of Trust and applicable California law. One must comply with the recording requirements for the assignment of the Deed of Trust to exercise the power of sale. *See Macklin v. Deutsche Bank Nat'l Trust Co. (In re Macklin)*, No. 11-02024-E, 2011 WL 2015520 (Bankr. E.D. Cal. May 19, 2011).

It has been argued by the Plaintiff-Debtors that by virtue of a note being secured by a deed of trust, the note is rendered nonnegotiable and thereon Aurora cannot attempt to enforce the rights thereunder. In support of this proposition, Plaintiff-Debtors cite the court to a 1925 California District Court of Appeal decision, *Central Savings Bank of Oakland v. Coulter*, 72 Cal. App. 78 (3rd App. Dist 1925). This decision states that a "note and mortgage are to be construed together as constituting one agreement or instrument, and as said in that case of the note, 'being inseparably connected with the mortgage, and affected by the conditions therein, the note is not negotiable." *Id*, p. 82, citing to *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, ("the note and mortgage are one inseparable contract").

The court's review of *Central Savings Bank of Oakland v. Coulter*, reveals that it has never been cited as legal authority for the proposition that securing a note with a deed of trust renders the note nonnegotiable. This most likely has occurred because prior to the 1923 amendment of California Civil Code § 3265 a note, though negotiable in form, was not negotiable in law if secured by a mortgage and the purchaser took the note with knowledge of the mortgage. However, since the 1923 amendment, a negotiable note is not rendered nonnegotiable merely because it is secured by a mortgage or deed of trust. *Hayward Lumber & Investment v. Nasund*, 125 Cal. App. 34, 38 (4th App. Dist 1932). *See Wilson v. Steele*, 211 Cal. App. 3d 1053, 1061 (2nd App. Dist. 1989), discussing negotiability of notes under the Commercial Code and the substance of former California Civil Code § 3265 being continued into California Commercial Code § 3104 which provides

that an unconditional promise to pay is not made conditional by a statement that it is secured. The Plaintiff-Debtors' contention that the Note could not be negotiated under the Commercial Code is incorrect.

In the testimony and exhibits filed in support of the Motion, Defendant Aurora has successfully shown that it is the current holder of the indorsed-in-blank Note which is secured by the Plaintiff-Debtors' Kilcolgan Way property. Copies of the Note, Deed of Trust, and Assignment have been presented to the court. Plaintiff-Debtors, on the other hand, have failed to provide any evidence to dispute that the Note, indorsed-in-blank, is held by Aurora.

Rather than the substance of the enforcement of the Note, Plaintiff-Debtors have focused on the asserted invalidity of the Assignment of the Deed of Trust and Proof of Claim. Even to the extent these contentions were accurate, they are ancillary issues as to whether Aurora is the current holder of the Note which is indorsed-in-blank and may be enforced, including any lien rights, by such holder of the Note.

The court has not been presented with any evidence contradicting that Aurora is the holder of the Note indorsed-in-blank. Though Aurora may have to "clean up" record title as to the beneficiary under the Deeds of Trust before it may attempt to proceed with a nonjudicial foreclosure, or elect to proceed with a judicial foreclosure sale to enforce its rights, the propriety or validity of a nonjudicial foreclosure sale is not now before the court. Aurora has established that it is the current holder of the Note indorsed-in-blank which it is attempting to enforce. Having

the right to enforce the Note, Aurora is also the correct party to assert any lien rights, such as the Deed of Trust, which secure the Note.

II. Second Claim for Relief – Violation of Automatic Stay, Filing of Proof of Claim

As Plaintiff-Debtors' second claim for relief in the Complaint is based on the purported improper filing of a proof of claim because Aurora was not an entity entitled to enforce the note, and Defendant has shown it in fact is the holder of the Note indorsed-in-blank, Defendant is granted Summary Judgment as to the second claim for relief.

Even more importantly, Plaintiff-Debtors have show no legal basis for a contention that filing a proof of claim can constitute a violation of the automatic stay. While citing to a Fifth Circuit case stating the basic grounds for finding that a violation of the stay exists, the Plaintiff-Debtors have missed the cases holding that filing a proof of claim with the bankruptcy court is not a violation of the automatic stay. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008); *In re Rodriguez*, 629 F.3d. 136, 143-144 (3rd Cir. 2010)

Further, Plaintiff-Debtors' argument that Defendant failed to attach sufficient documentation pursuant to Rule 3001 to its proof of claim lacks merit. A proof of claim is *prima facie* evidence of the claim or interest. Rule 3001 requires the creditor to file the writing on which the claim is based, which would be the note and deed of trust in this case. The note and deed of trust were attached to the filing and indicated a contractual right to attorney's fees and costs. The Plaintiff-Debtors are provided with

all of the essential information necessary to know how and why Aurora was asserting a claim in the bankruptcy case. With that information, the Plaintiff-Debtors could then proceed to exercise their rights to object to that claim, to the extent that they had a good faith, bona fide objection.

Summary judgment is granted for Aurora on the Second Cause of Action for violation of the automatic stay.

III. Assignment of Creditor's Property and Rights Not A Transfer of the Plaintiff-Debtors' or Estate's Property

Plaintiff-Debtors' First, Third, and Fourth causes of action are based on the argument that the Assignment of the Deed of Trust is void and an attempt to perfect the lien against property of the bankruptcy estate. That contention is not based upon the facts or law, and Defendant is granted Summary Judgment as to each of the First, Third, and Fourth Causes of Action.

The Plaintiff-Debtors contend that the Assignment of Mortgage which was recorded after the commencement of the bankruptcy case is void because it violates the automatic stay and violates 11 U.S.C. § 549(a)(1)(B) as a prohibited post-petition transfer of property of the estate. Both contentions fail as a transfer of pre-petition perfected collateral between creditors is not an action against the debtor, property of the debtor, property of the estate, or a transfer of property of the estate.

Property of the Estate is defined in 11 U.S.C. §§ 541 and 1306 (which includes post-petition property of the kind described in § 541 and post-petition earnings). This term is very broadly and simply defined in § 541(a) to be "all legal or equitable interests of the debtor as of the commencement of the case;" including

community property; property recovered under the avoiding powers; specified inheritances; products, proceeds, offspring, rents or profits from property of the Estate, and post-petition assets acquired by the Estate.

In this adversary proceeding, the Plaintiff-Debtors are challenging the transfer of the creditor's property, the Note secured by the Deed of Trust. No contention has been asserted that the Note is not the one stated in the Deed of Trust as the obligation secured or that the Deed of Trust was not recorded and perfected before the commencement of the bankruptcy case. No contention is made by Aurora that it transferred title to the Kilcolgan Way Property, only that the Note which belonged to a creditor and secured by that property had been transferred.

The recordation of the assignment does not violate the automatic stay. The transfer of a beneficial interest in a deed of trust is not an act of perfection of a lien. *In re Patton*, 314 B.R. 826, 834 (Bankr. D. Kan. 2004). The lien on the property is perfected at the time the Deed of Trust is recorded, which in the present case was well before the filing of the bankruptcy petition. *See* Cal. Civ. Code § 1213. Additionally, the Plaintiff-Debtors do not have an interest in the Note which is secured by the Deed of Trust encumbering the property and thus, the Note and Deed of Trust are not property of the estate.[3] Therefore, a post-petition assignment of the deed of trust and related Note from one holder to

[3] Schedules A and B filed by the Plaintiff-Debtors do not assert any interest in the Note or the Deed of Trust which secures the Note. EDC Case No. 09-41756, Dckt. 1. Plaintiff-Debtors do not assert in the present Complaint that they own or have an interest in the Note which is secured by the Deed of Trust.

another is not a transfer of the Plaintiff-Debtors' interest in a property right and does not constitute a violation of the automatic stay or subject to avoidance. *See In re Samuels*, 2010 WL 2651909 (Bankr. D. Mass. 2010).

Additionally, Plaintiff-Debtors appear to allege that the Assignment is invalid because MERS is named as the beneficiary. The Deed of Trust contains a common paragraph identifying MERS as the nominee of the Lender (ABC), and Lender's successors and assigns. MERS is then identified as the "beneficiary" under the Deed of Trust. The beneficiary is identified on page 2 of the Deed of Trust, as the nominee of the Lender and Lender's successors and assigns. The Deed of Trust secures the repayment of the Note to Lender and Plaintiff-Debtors' performance under the Deed of Trust and Note. Page 3 of the Deed of Trust continues to state that Plaintiff-Debtors understand and agree that MERS holds only legal title to the interests granted to Lender, but MERS, as the nominee for the Lender and Lender's successors and assigns, may exercise the interests of the lender and take any action of Lender.

Courts have widely found that MERS may act as an agent for the owner of a note secured by the deed of trust, including assigning the beneficial interest in the deed of trust. *See Baisa v. Indymac Fed. Bank*, No CIV-09-1464 WBS JMR, 2009 WL 3756682, *3 (E.D. Cal. Nov. 6, 2009) ("MERS had the right to assign its beneficial interest to a third party"); *Weingartner v. Chase Home Finance, LLC*, 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010) ("Courts often hold that MERS does not have standing as a beneficiary because it is not one, regardless of what a deed of trust says, but that it *does have standing as an agent of the beneficiary* where it is the nominee of

the lender (who is the 'true' beneficiary)." (emphasis added)).

Additionally, this argument misses the mark because the focus has to remain on who owns or has the right to enforce the Note. The security, irrespective of what the Deed of Trust originally states, will follow the Note. Here, Aurora has shown that it is holding bearer paper, the Note endorsed-in-blank, which it can enforce as the holder of the bearer paper.

Because the Assignment does not violate the automatic stay, nor is voidable under the Bankruptcy Code, Defendant is granted Summary Judgment as to the First, Third and Fourth Causes of Action.

IV. Fraud

In their opposition, Plaintiff-Debtors argue that they have stated a claim for fraud as they have clearly asserted that Aurora filed a fraudulent proof of claim, knowing it is in fact not the owner of the note in an unlawful attempt to collect debt. Additionally, the Plaintiff-Debtors assert Defendant may have "created" the Assignment to support their allegedly fraudulent proof of claim.

The court is unsure how this would constitute fraud as Plaintiff-Debtors have failed to assert any reasonable reliance upon the alleged misrepresentation and any damages arising therefrom. The elements of fraud are well established under California law. The Plaintiff-Debtors must allege and show that there were:

(1) misrepresentations (false representation, concealment, nondisclosure);

(2) which were known to be false by the person making the misrepresentation;

(3) which were made with an intent to induce reliance by the Plaintiff-Debtors;

(4) the Plaintiff-Debtors reasonably relied upon the misrepresentation, and

(5) the Plaintiff-Debtors were damaged having relied upon the misrepresentation.

Lazar v. Superior Court, 12 Cal.4th 631, 638 (1996); *Buckland v. Threshold Entersl, Ltd.*, 155 Cal. App. 4th 798, 806-807 (2007). Under the Federal Rules of Civil Procedure there is a heightened pleading standard requiring that, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9 and Fed. R. Bankr. P. 7009.

"A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so a defendant can prepare an adequate answer from the allegations." *In re Van Wagoner Funds, Inc. Securities Litigation*, 382 F.Supp. 2d 1173, 1180 (N.D. Cal. 2004). "The plaintiff must state precisely the time, place, and nature of misleading statements, misrepresentations, and specific acts of fraud." *Kaplan v. Rose*, 49 F. 3d 1363, 1370 (9th Cir. 1994). The only facts that Plaintiff-Debtors assert in their Complaint is that through the proof of claim Aurora misrepresented itself as the holder of the note. Plaintiff-Debtors have not shown the circumstances in which they reasonably relied on Aurora's allegedly false proof of claim and/or Assignment. Nor have Plaintiff-Debtors stated any damages arising from the reliance upon the misrepresentation. No acts have been alleged by the Plaintiff-Debtors to show they detrimentally relied on the alleged

misrepresentation by Aurora. This does not meet the heightened standard under the Federal Rules.

Further, the Plaintiff-Debtors have not offered evidence sufficient to support a claim of fraud. Rather, they continue with a more generalized "fraud on the court" theory that Aurora did not properly file a proof of claim. These Plaintiff-Debtors seem to believe that they should not exercise their rights to object to the claim, but instead move to a fraud claim to protect the court. They wish to ignore having to litigate the objection to claim issue, but immediately be entitled to damages because they disagree with Aurora having filed a proof of claim.

Furthermore, Aurora has shown evidence it is in fact the true holder of the Note indorsed-in-blank and entitled to enforce the obligation. If the only misrepresentation pled in the Plaintiff-Debtors' claim for fraud is the lack of ownership of the note, then the claim lacks essential elements of a fraud claim - the false representation of a material fact, knowing that it is false, intending to induce reliance by the other party, the other party then reasonably relying on the misrepresentation, and incurring damages because of the reasonable reliance on the misrepresentation.[4]

Plaintiff-Debtors fail to plead sufficiently for a claim of fraud, as such, the Defendant is granted Summary Judgment as to

[4] The "damages" stated by Plaintiff-Debtors is the time and expense they have expended in opposing Aurora asserting a claim in the bankruptcy case. Rather than fraud damages, this sounds in common contract right to attorneys' fees, which a party may recover even if it is ultimately determined that the asserted contract does not exist between the two parties. Cal. Civ. Code § 1717; *see also North Associates v. Bell*, 184 Cal. App. 3d 869 (1986).

this cause of action.

V. Contempt

Plaintiffs request the court to find Aurora in contempt of court for its numerous alleged violations of the automatic stay and fraud on the court. As the claims for violation of the automatic stay and fraud were found by the court to be unsustainable, as discussed above, Defendant is granted Summary Judgment as to the contempt cause of action.

In jumping to a conviction of Aurora and seeking to have the court hold it in contempt, the Plaintiff-Debtors appear to forget that they are parties in a judicial proceeding – the bankruptcy case. They have certain rights and responsibilities to prosecuting that case. These include objecting to claims in the event that they believe the claim to be excessive, misstated, or not an obligation owed by the Plaintiff-Debtors. The Bankruptcy Code and federal procedure does not elevate debtors to a special status in which all other parties in interest will be held in contempt if the Plaintiff-Debtors disagree with that party in interest.

CONCLUSION

As Plaintiff-Debtors have failed to provide evidence or support their arguments to contradict Aurora's claim, or put any genuine issues of material fact in dispute for the court, the Motion for Summary Judgment filed by the Defendant is granted in favor of Aurora Loan Services, LLC on all claims in the Complaint. The court shall issue a separate order granting the Motion for Summary Judgment and a judgment thereon.

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This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law.

Dated: December 16, 2011

/s/ RONALD H. SARGIS
RONALD H. SARGIS, Judge
United States Bankruptcy Court