

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**October 5, 2017, at 11:00 a.m.**

---

1. <a href="#"><u>11-37716-E-13</u></a> <b>MILTON/TANISHA FLOWERS</b> <a href="#"><u>17-2138</u></a> JCW-1 <b>FLOWERS ET AL V. U.S. BANK</b> <b>NATIONAL ASSOCIATION ET AL</b>	<b>MOTION TO DISMISS ADVERSARY PROCEEDING</b> <b>8-25-17 [8]</b>
--	---

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor and Plaintiff-Debtor’s Attorney on August 25, 2017. By the court’s calculation, 41 days’ notice was provided. 28 days’ notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion to Dismiss Adversary Proceeding is denied.</b>
--

Select Portfolio Servicing, Inc., servicing agent for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA2 Trust, its assignees and/or successors (“Defendant”) moves for the court to dismiss all claims against it in Milton Flowers, Jr., and Tanisha Gordon-Flowers’s (“Plaintiff-Debtor”) Complaint according to Federal Rule of Civil Procedure 12(b)(6).

**October 5, 2017, at 11:00 a.m.**

## REVIEW OF MOTION

As with all motions, the court begins its consideration with the grounds upon which the relief is based that are stated with particularity in the Motion. FED. R. CIV. P. 7(b); FED. R. BANKR. P. 7007. The Motion responds to the Complaint's claims with the following ground:

“The causes of actions asserted by Plaintiffs’ [*sic*] are moot as Defendant has already released the lien and recorded a discharge of the lien on 03/13/2017.”

Such are the sum total of all the “grounds” stated with “particularity” as required by the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

While making a factual contention that is outside the pleadings filed by Plaintiff-Debtor in the Complaint, no evidence is offered to support the contention that the lien was released by a recording on March 13, 2017 (to the extent that such extra-pleading “evidence” is proper in support of a motion made under Federal Rule of Civil Procedure 12(b)).

## PLAINTIFF-DEBTOR’S OPPOSITION

Plaintiff-Debtor filed an Opposition on September 20, 2017. Dckt. 21. Plaintiff-Debtor states that the parties do not disagree about a duty to reconvey a lien upon discharge. Plaintiff-Debtor emphasizes, though, that Defendant’s delay in reconveying the lien within thirty days caused damage to Plaintiff-Debtor in the form of attorney fees from Plaintiff-Debtor’s counsel reaching out to Defendant throughout January, February, and March 2017 about reconveying the discharged lien.

## APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”)).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court’s formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot “plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his

complaint to survive a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”).

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court “required to ‘accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.’” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

## DISCUSSION

In the Opposition to the Motion, Plaintiff-Debtor argues various “facts” and asserts that such “facts” must be determined under the standard used for summary judgment motions. The court is unsure why Plaintiff-Debtor has pointed to the evidentiary standard to be used in determining motions for summary judgment in light of this being a Motion to Dismiss based on insufficient pleadings. The court reviews the Complaint to determine what has been alleged, and then applies the standards most recently refined by the Supreme Court in the *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) line of cases, whether the mere allegations are sufficient.

The court’s review of the allegations in the Complaint discloses the following. Plaintiff-Debtor has filed a complaint seeking to state claims for relief for:

- (1) Breach of Contract
- (2) Quiet Title (California Code of Civil Procedure § 706.040 & 706.050)
- (3) Violation of California Civil Code § 2941(d)
- (4) Attorney Fees and Costs

In the First Cause of Action, Plaintiff-Debtor states that there is a contractual relationship between Plaintiff-Debtor and Defendant pursuant to a first deed of trust and note. Plaintiff-Debtor then alleges that the note became property of the bankruptcy estate when Plaintiff-Debtor filed a Chapter 13 case, which in turn created another contract with Defendant. Plaintiff-Debtor alleges that both of those contracts were breached when Defendant failed to release the property lien after Plaintiff-Debtor received a discharge in the Chapter 13 case.

In the Second Cause of Action, Plaintiff-Debtor seeks to quiet title to real property commonly known as 18442 Nadol Drive, Southfield, Michigan. Plaintiff-Debtor alleges that the Chapter 13 Plan has been completed but that Defendant has not reconveyed the first deed of trust to it.

The Third Cause of Action alleges that Plaintiff-Debtor has suffered monetary damages from Defendant's failure to reconvey the first deed of trust within thirty days. Plaintiff-Debtor asserts that California Civil Code § 2941(b)(1) requires Defendant to reconvey property within thirty days of an obligation secured by a deed of trust being satisfied. Under California Civil Code § 2941(d), Plaintiff-Debtor asserts that a violation of California Civil Code § 2941 incurs a statutory penalty of \$500.00 and that Defendant is subject to that penalty for failing to reconvey the deed of trust within thirty days.

Finally, Plaintiff-Debtor alleges in the Fourth Cause of Action that they are entitled to statutory reimbursement for attorney fees under California Civil Code §§ 1717 & 2941 and pursuant to the contract between the parties.

### **Ruling on Motion**

Defendant argues in the Motion that all four causes of action are moot because of the additional factual contention of Defendant that it released the lien and recorded such on March 13, 2017, which would be prior to the July 26, 2017 filing of the Complaint in this Adversary Proceeding.

In the Motion, Defendant does not assert that Plaintiff-Debtor's contention that the Chapter 13 Plan was completed (and thereby the modified contractual rights between the Plaintiff-Debtor and creditors were fixed) on August 25, 2016—which is 199 days after the Plan was completed and the Deed of Trust at issue rendered void—is incorrect. See discussion of effect of Chapter 13 Plan completion and 11 U.S.C. § 506(a) \$0.00 secured claim valuation in *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013) and in *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff'd*, 469 B.R. 803 (E.D. Cal. 2012).

Though it may be that if the reconveyance of the Deed of Trust has been recorded, then there may not be a quiet title issue to be adjudicated, such reconveyance is not alleged and the court is not adjudicating evidence (and has not been presented with evidence of such reconveyance).

As to the Breach of Contract, Violation of California Civil Code § 2941(d), and Request for Contractual and Statutory Attorney's Fees (which, with the 2015 amendment to Federal Rule of Bankruptcy Procedure 7008(b) are the subject of a post-judgment motion and no longer required to be pleaded as a separate claim for relief—though such pleading clearly identifies for opposing parties the basis for, and risk of, such fees), even if the court were to take as true that the Deed of Trust was reconveyed 199 days after the Deed of Trust was rendered void, there is not a failure to state a claim that such delay is not a possible statutory and contractual breach by Defendant.

The Complaint does not include as an exhibit the polite letter from Plaintiff-Debtor's counsel "reminding" the sophisticated loan servicer and creditor of their federal and state statutory and contractual obligations to reconvey the Deed of Trust. In connection with the Motion to Dismiss, the sophisticated loan servicer Defendant did not include a polite letter to the (least-sophisticated consumer) Plaintiff-Debtor that

the Deed of Trust has been reconveyed and that the void Deed of Trust no longer clouds title to Plaintiff-Debtor's property.

If the reconveyance of the void Deed of Trust has been recorded resolving the Cause of Action for Quiet Title, the court expects that counsel for Plaintiff-Debtor and the respective counsel for each of the defendants in this Adversary Proceeding filed their stipulation pursuant to Federal Rule of Bankruptcy Procedure 41(a)(1)(A)(ii) to dismiss that cause of action, rather than waste time, money, and judicial resources with a summary judgment motion to dismiss that Cause of Action.

The court notes that co-defendant JPMorgan Chase Bank, N.A. has appeared in this Adversary Proceeding to file its own Motion to Dismiss. Dckt. 14. That motion is not designated with a docket control number. LOCAL BANKR. R. 9014-1(c)(1). The motion states the legal conclusion that relief should be granted pursuant to Federal Rule of Bankruptcy Procedure 12(b)(5) and 12(b)(6). The motion itself does not state with particularity the grounds upon which such legal conclusion is based (as required by Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007), but directs the court to read all of the other pleadings filed in connection with the motion, all documents in the court's file, and whatever else JPMorgan Chase Bank, N.A. chooses to submit at any time, including the hearing, and assemble whatever grounds the court believes that JPMorgan Chase Bank, N.A. should state in the "motion." Further, JPMorgan Chase Bank, N.A. has filed a fourteen-page "Mothorities," in which the legal conclusion "motion" is appended to a twelve-page points and authorities (for which a three-page table of contents is required by JPMorgan Chase Bank, N.A.) in which possible grounds are included in the extensive citations, quotations, arguments, speculation, and conjecture of JPMorgan Chase Bank, N.A. The combining of the motion into the points and authorities does not comply with new Local Bankruptcy Rule 9004-2 and prior Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents (which were in effect when the JPMorgan Chase Bank, N.A. motion was filed) that require the motion to be a separate document from the points and authorities, which must be separate from each declaration, which must be separate from the exhibits (which may be combined into one exhibit document. FN.1.

---

FN.1. Under new Local Bankruptcy Rule 9004-2 the Local Rules now allow a simple "Mothorities" to be filed, combining the motion with the points and authorities, when that pleading does not exceed six pages in length (including the caption page, table of contents, and signature page).

---

Counsel for Defendant may want to confer with counsel for co-defendant JPMorgan Chase Bank, N.A. to review practice in the Eastern District of California, compliance with the basic rules of pleading (Federal and Local Rules) that are enforced in this District. That will ensure that the parties and court stay focused on the issues presented and not raise ancillary issues that one party may be given to derail consideration of what would be an otherwise meritorious proceeding.

The Complaint asserts Causes of Action that have not yet been resolved by Defendant reconveying a deed of trust. As Plaintiff-Debtor argues, Defendant may be liable for statutory damages caused by reconveying the deed of trust outside of thirty days. The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss Adversary Proceeding filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is denied.

**IT IS FURTHER ORDERED** that Defendant Select Portfolio Servicing, Inc., servicing agent for U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to LaSalle Bank, National Association as Trustee for WaMu Mortgage Pass-Through Certificates Series 2007-OA2 Trust, shall file and serve its answer to the Complaint on or before **October xxxx, 2017**.