

NOV 29 2012

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-11-1600-DHKi
ROBERT HARRIS,)	Bk. No. 10-15804-SB
Debtor.)	Adv. No. 10-01238-SB
<hr/>		
ROBERT HARRIS,)	
Appellant,)	
v.)	M E M O R A N D U M¹
BANK OF AMERICA N.A., as)	
successor by merger to)	
LaSalle Bank NA; JP MORGAN)	
CHASE; CALIFORNIA)	
RECONVEYANCE COMPANY,)	
Appellees.)	

Submitted without Oral Argument

Filed - November 29, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: Appellant Robert Harris, pro se, on brief;
S. Christopher Yoo, Esq., Theodore E. Bacon, Esq.,
and T. Matthew Hansen, Esq. of Alvarado Smith APC
on brief for appellees.

Before: DUNN, HOLLOWELL and KIRSCHER, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 The debtor, Robert Harris, appeals the bankruptcy court's
2 dismissal of his adversary proceeding on a motion filed by
3 appellee, JPMorgan Chase Bank ("JPMorgan"), under Rule 12(b)(6)
4 of the Federal Rules of Civil Procedure.² We AFFIRM.

5
6 **FACTS³**

7 Three years prepetition, the debtor purchased real property
8 located in Venice, California ("Venice property"), through a loan
9 with Washington Mutual Bank ("WAMU"). When he defaulted on
10 payments, WAMU initiated foreclosure proceedings, recording a
11 notice of default ("default notice") and publishing a notice of
12 trustee's sale ("trustee's sale notice"). A foreclosure sale of
13 the Venice property ("foreclosure sale") apparently was completed
14 prior to the debtor's bankruptcy filing. JPMorgan ultimately

15
16 ² Unless otherwise indicated, all chapter, section and rule
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
18 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
19 The Federal Rules of Civil Procedure are referred to as "Civil
20 Rules."

21 ³ Rule 8009(b) requires that appellants provide an appendix
22 containing excerpts of the record ("appendix"), including copies
23 of transcripts of relevant hearings. The debtor did not provide
24 an appendix as required under Rule 8009(b), and the motions panel
25 waived this requirement under an order entered on June 15, 2012.
26 Although JPMorgan provided an appendix, it did not include in the
27 appendix copies of the transcripts of the hearings relevant to
28 the instant appeal.

29 We gleaned some of the facts relevant to this appeal from
30 JPMorgan's appendix, as well as from the documents electronically
31 filed in the dockets of the underlying bankruptcy case and
32 adversary proceeding. We take judicial notice of those
33 documents, relevant to our appeal, but not included by JPMorgan
34 in its appendix. See Atwood v. Chase Manhattan Mortg. Co.
35 (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 acquired WAMU's interests with respect to the Venice property
2 through assignment.⁴

3 The debtor filed his chapter 7 bankruptcy petition, pro se,
4 on February 18, 2010. Five days later, he initiated an adversary
5 proceeding by filing a complaint against JPMorgan ("original
6 complaint") to challenge the validity of the foreclosure sale.⁵
7 He asserted eight claims for relief, including wrongful
8 foreclosure, fraud and a request to vacate, void or set aside the
9 foreclosure sale ("set aside order").⁶ The debtor contended that
10 the foreclosure sale was invalid because it was not consistent
11 with the requirements of California foreclosure procedures, and
12 he did not receive notice of the foreclosure sale pursuant to
13 California law. He also asserted that JPMorgan defrauded him of
14 the Venice property by inducing him to believe that it would
15 accept from the debtor a payoff of the debt owed to it when he
16 managed to obtain a new loan.

17 Following a status conference, the bankruptcy court
18 dismissed the adversary proceeding without prejudice for failure
19 to prosecute. The debtor quickly moved to set aside the
20 dismissal ("first motion to reconsider"), which the bankruptcy
21

22 ⁴ JPMorgan acquired certain assets and liabilities of WAMU
23 from the FDIC; these assets and liabilities apparently included
24 the loan to the debtor.

25 ⁵ The debtor also named Bank of America and California
26 Reconveyance as defendants. All of the defendants were
27 represented by the same counsel.

28 ⁶ The debtor also asserted violation of the federal Truth in
Lending Act ("TILA"), conversion, intentional and negligent
infliction of emotional distress, and requested an accounting.

1 court granted ("first reconsideration order").⁷

2 Before the bankruptcy court entered the first
3 reconsideration order, the debtor filed an amended complaint
4 ("first amended complaint"). He reiterated the same eight claims
5 for relief set forth in the original complaint and added quiet
6 title as a ninth claim for relief.

7 JPMorgan moved to dismiss the first amended complaint under
8 Civil Rule 12(b)(6) ("first motion to dismiss") without leave to
9 amend. It contended that the debtor failed to state claims upon
10 which relief could be granted because he did not allege facts
11 sufficient to support the elements necessary for each claim.⁸

12 The debtor opposed the first motion to dismiss ("first
13 opposition"). He asked that the bankruptcy court deny JPMorgan's
14 first motion to dismiss because he could and would prove at trial
15 every allegation. Alternatively, he asked that the bankruptcy
16 court allow him to amend the first amended complaint.

17 After a hearing on JPMorgan's first motion to dismiss, the
18

19 ⁷ The bankruptcy court construed the debtor's motion to set
20 aside the dismissal as a motion to reconsider the order
21 dismissing the adversary proceeding.

22 ⁸ JPMorgan also sought dismissal of the debtor's first
23 amended complaint under Civil Rule 12(e), arguing that the
24 allegations therein did not identify the particular defendant(s)
25 against which the allegations were made. The bankruptcy court
did not rule on that ground, but based its ruling entirely on
Civil Rule 12(b)(6).

26 JPMorgan subsequently filed two additional motions to
27 dismiss, both of which also sought dismissal under Civil
28 Rule 12(e) and 12(b)(6). The bankruptcy court did not rule on
the former ground with respect to either of those subsequent
motions to dismiss, but based its ruling on the latter ground.

1 bankruptcy court dismissed without leave to amend all but the
2 following three claims for relief: (1) wrongful foreclosure,
3 (2) fraud and (3) claim for set aside order.

4 The debtor thereafter filed a second amended complaint,
5 repeating the claims for relief for wrongful foreclosure, fraud
6 and set aside order, as set forth in the first amended
7 complaint.⁹ He also added two new claims for relief: breach of
8 the implied covenant of good faith and fair dealing; and unfair
9 competition (i.e., fraudulent business acts or practices).

10 JPMorgan moved to dismiss the second amended complaint under
11 Rule 12(b)(6) ("second motion to dismiss"), again arguing that the
12 debtor failed to allege facts sufficient to support his claims
13 for relief. The debtor opposed the second motion to dismiss
14 ("second opposition"), echoing the same arguments contained in
15 the first opposition. Following a hearing, the bankruptcy court
16 dismissed without leave to amend the complaint as to the two
17 newest claims for relief but allowed the debtor to amend the
18 complaint as to the remaining claims.

19 The debtor filed a third amended complaint, alleging only
20 claims for relief for fraud, wrongful foreclosure and set aside
21 order. He added more facts to the third amended complaint,
22 describing how he obtained the new loan, that JPMorgan failed to
23 follow California foreclosure procedures and how he made various
24

25
26 ⁹ The debtor expanded on his claim for set aside order. He
27 alleged that WAMU lacked authority under the trust deed to assign
28 it to JPMorgan. Because WAMU lacked authority to make the
assignment, the debtor claimed that the foreclosure sale to
JPMorgan was invalid.

1 improvements to the Venice property.

2 JPMorgan moved to dismiss the third amended complaint under
3 Civil Rule 12(b)(6) ("third motion to dismiss"), repeating the
4 same arguments that supported its second motion to dismiss. The
5 debtor predictably opposed the third motion to dismiss ("third
6 opposition"). He did not request leave to amend the third
7 amended complaint, however. Instead, the debtor simply asked
8 that the bankruptcy court deny the third motion to dismiss and
9 allow him to proceed to discovery.

10 On August 23, 2011, the bankruptcy court held a hearing on
11 the third motion to dismiss. At the hearing, it granted the
12 third motion to dismiss without leave to amend and dismissed the
13 entire adversary proceeding.

14 Before the bankruptcy court entered its order, the debtor
15 moved for reconsideration ("reconsideration motion"). He argued
16 that the bankruptcy court "did not give any weight" to his
17 allegations, even though he had advised it that JPMorgan failed
18 to provide him notice of the foreclosure sale and that he had
19 substantial equity in the Venice property.

20 The bankruptcy court noted that the debtor made arguments
21 previously raised in his third opposition, which the bankruptcy
22 court already had rejected. It denied the reconsideration
23 motion, determining that the debtor did not: (1) provide newly
24 discovered evidence; (2) identify any intervening change of law;
25 or (3) contend that the bankruptcy court clearly erred in
26 granting the third motion to dismiss.

27 The bankruptcy court entered its order denying the
28 reconsideration motion on October 7, 2011. It entered its order

1 granting the third motion to dismiss ("dismissal order") on
2 December 8, 2011. It did not set forth any findings in the
3 dismissal order, simply stating that it was granting JPMorgan's
4 third motion to dismiss without leave to amend the complaint, and
5 dismissing the entire adversary proceeding.¹⁰

6 The debtor timely appealed the dismissal order.¹¹

7
8 **JURISDICTION¹²**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
11 § 158.

12
13 ¹⁰ The bankruptcy court required JPMorgan to submit a
14 proposed order on the third motion to dismiss. See adv. proc.
15 docket no. 39. Instead, the debtor submitted a proposed order on
16 the third motion to dismiss, which the bankruptcy court signed
17 and entered.

18 ¹¹ The debtor filed his notice of appeal on October 25,
19 2011, six weeks before the bankruptcy court entered the dismissal
20 order. Although his notice of appeal was premature, it is
21 treated as timely. See BAP Rule 8002(a).

22 ¹² Under the issue statement of his opening brief, the
23 debtor questions whether the bankruptcy court "[had] jurisdiction
24 [to] grant a motion for summary judgment that was never filed by
25 [BOA]."

26 We are unsure as to the precise meaning of the debtor's
27 contention. We note that, in his first opposition, the debtor
28 claimed that JPMorgan's first motion to dismiss was "[a] thinly
veiled attempt to file a motion for judgment on [the] pleadings
and [was] really meant to be a motion for summary judgment." He
goes on to argue that the bankruptcy court was "required under
law" to treat the first motion to dismiss as a motion for summary
judgment. The debtor then claims that, in such an event, the
bankruptcy court must deny JPMorgan's first motion to dismiss,
especially as JPMorgan did not answer the first amended
complaint.

1 Holdings Ltd., 416 F.3d at 946 ("The district court's dismissal
2 of a complaint without leave to amend is reviewed de novo and is
3 improper unless it is clear that the complaint could not be saved
4 by any amendment.") (citation omitted). We apply a two-part test
5 to determine objectively whether the bankruptcy court abused its
6 discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62
7 (9th Cir. 2009) (en banc). First, we "determine de novo whether
8 the bankruptcy court identified the correct legal rule to apply
9 to the relief requested." Id. Second, we examine the bankruptcy
10 court's factual findings under the clearly erroneous standard.
11 Id. at 1262 & n.20. We must affirm the bankruptcy court's
12 factual findings unless those findings are "(1) 'illogical,'
13 (2) 'implausible,' or (3) without 'support in inferences that may
14 be drawn from the facts in the record.'" Id.

15 We may affirm on any ground supported by the record. Shanks
16 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

18 DISCUSSION

19 A. Dismissal of the debtor's adversary proceeding

20 1. Standards for Civil Rule 12(b)(6) Dismissal

21 Under Civil Rule 12(b)(6), applicable through Rule 7012, a
22 court must dismiss a complaint if it fails to state a claim upon
23 which relief can be granted. The court may base its dismissal
24 either "on a lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory."

26 Johnson, 534 F.3d at 1121-22 (quoting Balistreri v. Pacifica
27 Police Dept., 901 F.2d 696, 699 (9th Cir. 1990) (quotation marks
28 omitted)). Although the court must accept a plaintiff's

1 allegations as true and construe them in a light most favorable
2 to him, it need not accept as true allegations that are merely
3 conclusory, or unreasonable inferences. In re Gilead Sciences
4 Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (citing Sprewell
5 v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)).

6 A plaintiff must provide more than "unadorned,
7 the-defendant-unlawfully-harmed-me accusation[s]" in his
8 complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing
9 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). He
10 cannot offer "labels and conclusions" or "a formulaic recitation
11 of the elements of a cause of action." Iqbal, 556 U.S. at 678
12 (citing Twombly, 550 U.S. at 555). Nor can he simply offer
13 "naked assertions devoid of further factual enhancement." Iqbal,
14 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557) (quotation
15 marks omitted)).

16 Therefore, to avoid dismissal under Civil Rule 12(b)(6), the
17 plaintiff must allege in his complaint "sufficient factual
18 matter, accepted as true, to state a claim for relief that is
19 plausible on its face." Iqbal, 556 U.S. at 678 (quoting Twombly,
20 550 U.S. at 570) (quotation marks omitted)). A claim is facially
21 plausible "when the plaintiff pleads factual content that allows
22 the court to draw the reasonable inference that the defendant is
23 liable for the misconduct alleged." Iqbal, 556 U.S. at 678. The
24 plausibility standard seeks more than "a sheer possibility that a
25 defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (quoting
26 Twombly, 550 U.S. at 557) (quotation marks omitted)). "In sum,
27 for a complaint to survive a motion to dismiss, the
28 non-conclusory 'factual content' and reasonable inferences from

1 that content, must be plausibly suggestive of a claim entitling
2 the plaintiff to relief." Moss v. U.S. Secret Srvcs., 572 F.3d
3 962, 989 (9th Cir. 2009) (citing Iqbal, 556 U.S. at 677-78).

4 Two principles run through a court's consideration of a
5 motion to dismiss. Iqbal, 556 U.S. at 678. First, the axiom
6 that a court must accept as true all of the complaint's
7 allegations does not apply to legal conclusions. Id.
8 "Threadbare recitals of the elements of a cause of action,
9 supported by mere conclusory statements, do not suffice." Id.
10 Second, "only a complaint that states a plausible claim for
11 relief survives a motion to dismiss." Id. at 679. Such a
12 determination is a "context-specific task" that requires the
13 court "to draw on its judicial experience and common sense." Id.
14 But dismissal is appropriate where the "well-pleaded facts"
15 prevent the court from inferring "more than the mere possibility
16 of misconduct, the complaint has alleged - but it has not
17 'shown'" - that the plaintiff is entitled to relief. Id.

18 In keeping with these principles, a court considering a
19 motion to dismiss therefore may choose to identify first
20 pleadings "that, because they are not more than conclusions, are
21 not entitled to the assumption of truth." Id. Though legal
22 conclusions provide the framework of a complaint, they must be
23 supported by factual allegations. Id. When well-pleaded factual
24 allegations are present, a court "should assume their veracity
25 and then determine whether they plausibly give rise to an
26 entitlement to relief." Id.

27 "[The] court may not look beyond the complaint to a
28 plaintiff's moving papers, such as a memorandum in opposition to

1 a defendant's motion to dismiss." Schneider v. Cal. Dep't. of
2 Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in
3 original). "The complaint cannot be amended by the briefs filed
4 by the plaintiff in opposition to the motion to dismiss." Gomez
5 v. Ill. State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987)
6 (citation omitted). Thus, the focus of any Civil Rule 12(b)(6)
7 dismissal - both in the trial court and on appeal - is the
8 complaint. Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

9 2. The debtor's claims for relief in the third amended
10 complaint

11 On appeal, the debtor argues that the bankruptcy court's
12 dismissal of his third amended complaint under Civil
13 Rule 12(b)(6) was neither "statutorily [nor] equitably fair." He
14 does not explain how or why the dismissal was unfair. Rather, he
15 simply contends that, by dismissing the adversary proceeding
16 "[so] abruptly," the bankruptcy court allowed JPMorgan to "steal"
17 the Venice property from him. As JPMorgan notes, the debtor
18 provides no other argument and cites no legal authority in
19 support of his one contention on appeal.

20 The debtor did not provide a copy of the transcript of the
21 hearing on the third motion to dismiss (or any other hearing
22 transcripts, for that matter). The motions panel earlier entered
23 an order waiving the requirement that he submit an appendix,
24 including copies of transcripts of relevant hearings. Still,
25 without a copy of the transcript of the hearing on the third
26 motion to dismiss, we have no access to the bankruptcy court's
27 reasoning, which hampers our review.

28 The debtor advances three claims in the third amended

1 complaint, all of which the bankruptcy court dismissed without
2 leave to amend. We look at each of the claims, as stated in the
3 third amended complaint, in turn.

4 a. Fraud

5 The debtor contended in the third amended complaint that
6 JPMorgan defrauded him of the Venice property by inducing him to
7 believe that it would accept from him a payoff of the debt owed
8 to it. As additional "factual allegations" in support of his
9 claim for relief, he described the source of a new loan. He also
10 offered, as a witness, the loan officer who was helping to
11 facilitate the new loan and who agreed to testify that the
12 "payoff to the [mortgagor] was already at hand."

13 Generally, a complaint need only plead facts sufficient to
14 give notice of the claim being asserted and the grounds on which
15 it rests. See Dominguez v. Miller (In re Dominguez), 51 F.3d
16 1502, 1508 (9th Cir. 1995) (explaining that within the context of
17 bankruptcy, courts construe deficient pleadings liberally, if the
18 pleading substantially complies with requirements of a complaint
19 under Civil Rule 9(b) by providing "fair notice of what the
20 plaintiff's claim is and the grounds upon which it rests."). But
21 a claim for relief for fraud requires that the circumstances
22 constituting the fraud be pled with particularity to give the
23 defendant notice of the specific misconduct so that he can defend
24 against the charge. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d
25 1097, 1105-06 (9th Cir. 2003) (comparing Civil Rules 9(b) and
26 12(b)(6)). "Averments of fraud must be accompanied by the 'who,
27 what, when, where, and how' of the misconduct charged." Id.
28 (citation omitted).

1 Here, the debtor alleges that, though JPMorgan knew of the
2 new loan, it "secretly conspired with [the other defendants],
3 [sic] to undercut this transaction with this bogus and illegal
4 interference of this transaction to deny [him] his right [to
5 proceed with the new loan] and to steal his property." The
6 debtor does not provide the "when, where and how" of this alleged
7 "illegal interference" carried out by JPMorgan. He simply makes
8 broad accusations with no specific facts to support them.

9 Because the debtor failed to provide the specific
10 circumstances giving rise to the alleged fraud, we determine that
11 the bankruptcy court did not err in dismissing the fraud claim
12 for relief.

13 b. Wrongful foreclosure

14 The debtor also alleged that the foreclosure sale was
15 invalid because JPMorgan failed to comply with the notice
16 procedures set forth under Cal. Civ. Code § 2924. In California,
17 before a secured creditor may sell collateral after a debtor
18 defaults, it must satisfy certain statutory requirements.
19 Shahani v. United Commercial Bank, 457 B.R. 775, 788 (N.D. Cal.
20 2011). These statutory requirements include sending the debtor a
21 notice of default that alerts the debtor to the nature of the
22 default. Id. (citing Cal. Civ. Code § 2924). The statutory
23 requirements must be complied with strictly. Accordingly, a sale
24 based on a statutorily deficient notice of default is invalid and
25 voidable. Id. (quoting Miller v. Cote, 127 Cal. App. 3d 888, 894
26 (1982)). Here, according to the debtor, JPMorgan failed to serve
27 him properly with the default notice and the trustee's sale
28 notice.

1 Yet, the debtor does not explain in the third amended
2 complaint how JPMorgan failed to serve him properly with the
3 default notice and the trustee's sale notice. It is only in the
4 third opposition and the accompanying declaration that the debtor
5 describes alleged defect(s) in the notice(s). The debtor claimed
6 that JPMorgan improperly served him with the default notice by
7 placing it on the ground near the front gate of the Venice
8 property. Yet, this specific allegation is not stated in the
9 third amended complaint. Because the debtor did not mention any
10 specific failures to satisfy the notice requirements of
11 California foreclosure procedures in any of the iterations of his
12 complaint, the bankruptcy court did not err in not mining
13 allegations from the third opposition to graft to the debtor's
14 wrongful foreclosure claim. See Schneider, 151 F.3d at 1197 n.1.

15 In addition, as discussed more fully infra, the debtor did
16 not allege tender of performance. "California courts have held
17 that a defaulted borrower is required to allege tender of the
18 amount of the lender's secured indebtedness in order to maintain
19 a cause of action for irregularity in the sale procedure."
20 Cedano v. Aurora Loan Srvcs., LLC (In re Cedano), 470 B.R. 522,
21 529 (9th Cir. BAP 2012).

22 The debtor failed to assert a facially plausible claim
23 showing that he was entitled to relief under his wrongful
24 foreclosure claim. He did not allege facts sufficient to allow
25 the bankruptcy court to infer that JPMorgan was liable for
26 wrongful foreclosure or that he could comply with the tender
27 requirement. To quote Twombly, the debtor simply made "naked
28 assertion[s]" of wrongful foreclosure with no facts supporting

1 them. Accordingly, we conclude that the bankruptcy court
2 properly dismissed the debtor's wrongful foreclosure claim.

3 c. Set aside order

4 The debtor also sought to set aside the foreclosure sale on
5 the ground that it was invalid as WAMU lacked the authority
6 and/or standing to transfer/assign its rights with respect to the
7 Venice property to JPMorgan. JPMorgan contends on appeal that
8 the debtor's claim for set aside order necessarily fails because
9 he did not allege that he made tender - a factual allegation
10 necessary to maintain a claim for relief for irregularities in
11 foreclosure sale procedures.¹³

12 "A tender is an offer of performance made with the intent to
13 extinguish the obligation." Saldate v. Wilshire Credit Corp.,
14 686 F. Supp. 2d 1051, 1059 (E.D. Cal. 2010) (quoting Arnolds Mgmt.
15 Corp. v. Eschen, 158 Cal. App. 3d 575, 580 (1984) (quotation marks
16 omitted)). The rules governing tenders are strictly applied.
17 Saldate, 686 F. Supp. 2d at 1060 (quoting Nguyen v. Calhoun,
18 105 Cal. App. 4th 428, 439 (2003)).

19 An action to set aside a foreclosure sale for irregularities
20 in the sale notice or procedure should be accompanied by an offer
21 to pay the full amount of the lender's secured indebtedness. Id.
22 at 1059-60 (quoting FPCI RE-HAB 01 v. E&G Inv., Ltd., 207 Cal.
23 App. 3d 1018, 1021 (1989)). A valid and viable tender of payment
24 of the owed indebtedness is essential to an action to set aside a
25 voidable sale under a trust deed. Saldate, 686 F. Supp. 2d at

26 _____

27 ¹³ JPMorgan extends this argument to the debtor's wrongful
28 foreclosure claim, as we noted supra.

1 1059 (quoting E&G Inv., Ltd., 207 Cal. App. 3d at 1021). A
2 tender has no legal force or effect if the tenderer lacks the
3 funds necessary to make the offer good and knows it. Saldate,
4 686 F. Supp. 2d at 1060 (quoting Karlsen v. Am. Sav. & Loan
5 Ass'n, 15 Cal. App. 3d 112, 118 (1971)). "The tenderer must do
6 and offer everything that is necessary on his part to complete
7 the transaction, and must fairly make known his purpose without
8 ambiguity, and the act of tender must be such that it needs only
9 acceptance by the one to whom it is made to complete the
10 transaction." Saldate, 686 F. Supp. 2d at 160 (quoting Gaffney
11 v. Downey Sav. & Loan Ass'n, 200 Cal. App. 3d 1154, 1165 (1988)).

12 The debtor alleged in his third amended complaint that he
13 had obtained a new loan which he intended to use to pay off
14 JPMorgan. He averred that he had the payoff amount "already at
15 hand." (He even offered testimony of the loan officer who
16 handled the loan as a witness to substantiate this allegation.)
17 The debtor claimed that JPMorgan had agreed to accept a payoff
18 from him, but then used his reliance on this agreement to
19 "defraud" him of the Venice property.

20 Although the debtor alleged that he had managed to secure a
21 new loan to pay off JPMorgan, he said nothing about whether he
22 actually could make good on the payoff. He merely said that he
23 could provide a witness who would testify that the payoff "was
24 already at hand." Without a sufficient allegation of meaningful
25 tender, the debtor failed to state a viable claim for a set aside
26 order. The bankruptcy court therefore properly dismissed his
27 claim for a set aside order.

28

1 B. Dismissal of the third amended complaint without leave to
2 amend

3 The bankruptcy court's orders granting the debtor leave to
4 amend his complaint are basic. The bankruptcy court neither
5 provided the reasoning behind its determinations nor any
6 explanations as to the nature of the deficiencies in the debtor's
7 complaint. Still, the bankruptcy court gave the debtor three
8 opportunities to cure the deficiencies in his complaint, and they
9 were not cured through four versions of the complaint. It also
10 held several hearings on the motions to dismiss, which the debtor
11 apparently attended. In the absence of any hearing transcripts,
12 we cannot determine what instructions or guidance the bankruptcy
13 court provided to the debtor regarding curing the deficiencies in
14 his complaint.

15 Under these circumstances, we conclude that the bankruptcy
16 court did not err in dismissing the third amended complaint
17 without leave to amend.

18
19 **CONCLUSION**

20 Having determined that the debtor failed to set forth
21 sufficient grounds for reversal of the dismissal of his adversary
22 proceeding, we AFFIRM.