

NOT FOR PUBLICATION

MAY 30 2013

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. SC-11-1541-JuBaPa
)	
ANDREW RALPH BELLO, SR.,)	Bk. No. 10-16981
)	
Debtor.)	Adv. No. 10-90528
)	
<hr/> ANDREW RALPH BELLO, SR.,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
CHASE HOME FINANCE LLC,)	
)	
Appellee.)	
<hr/>)	

Argued and Submitted on May 15, 2013
at Pasadena, California

Filed - May 30, 2013

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

Honorable Peter W. Bowie, Bankruptcy Judge, Presiding

Appearances: Ruben F. Arizmendi, Esq., Arizmendi Law Firm,
argued for Appellant Andrew Ralph Bello, Sr.;
Sung-Min Christopher Yoo, Esq., Adorno Yoss
Alvarado & Smith, argued for Appellee JP Morgan
Chase Bank, N.A., as Successor by Merger to Chase
Home Finance LLC.

Before: JURY, BASON** and PAPPAS, Bankruptcy Judges.

* 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.

** Hon. Neil W. Bason, United States Bankruptcy Judge for
the Central District of California, sitting by designation.

1 Chapter 13¹ debtor, Andrew Ralph Bello, Sr., filed a second
2 amended complaint (SAC) against Ameriquest Home Finance
3 (Ameriquest), Town and Country Title Services, Inc. (TCTSI),
4 JP Morgan Chase Specialty Mortgage, L.L.C. (JPMC) and Mortgage
5 Electronic Registrations System, Inc. (MERS) (collectively,
6 Defendants). Debtor sought declaratory relief and asserted
7 claims for Failure to Perfect Deed of Trust, Unfair and
8 Deceptive Acts and Practices, Violations of the Bankruptcy Code
9 (§§ 362(a) and 105(a)), and Invalid Lien on Property.
10 Defendant, JPMC, as successor by merger to Chase Home
11 Finance LLC (Chase), filed a motion to dismiss the SAC under
12 Civil Rule 12(b)(6), which the bankruptcy court granted with
13 prejudice by order entered on November 30, 2011.² Debtor
14 appeals from that order. We AFFIRM.

15 I. FACTS

16 A. Prepetition Events

17 In August 2004, debtor obtained a residential mortgage loan
18 from Ameriquest. The loan was secured by a deed of trust (DOT)
19 encumbering real property located on Rancho Bernardo Road in San
20 Diego, California. The DOT, recorded in September 2004 in San
21 Diego County, identified Ameriquest as the lender and
22 beneficiary, TCTSI as the trustee, and debtor as the borrower.

24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure and "Civil Rule" references are to the Federal Rules of
28 Civil Procedure.

² JPMC, as successor by merger to Chase, is the only
defendant participating in this appeal.

1 On January 8, 2009, an assignment (Assignment) was recorded
2 showing that MERS was assigned all beneficial interest under the
3 DOT.

4 Debtor defaulted on the loan. On February 23, 2009, a
5 notice of default and election to sell was recorded.

6 On March 18, 2009, JPMC executed a substitution of trustee,
7 naming NDEX West, LLC (NDEX) as trustee under the DOT.

8 On March 19, 2009, MERS assigned JPMC all beneficial
9 interest under the DOT (Second Assignment).

10 On March 30, 2009, the substitution of trustee and Second
11 Assignment were recorded.

12 On January 5, 2010, a notice of trustee's sale in
13 connection with the DOT was recorded.

14 **B. Bankruptcy Events**

15 On September 24, 2010, debtor filed his chapter 13
16 petition.

17 On October 25, 2010, Chase, as Servicing Agent to JPMC,
18 filed a proof of claim asserting a secured claim in the amount
19 of \$322,583.83 based on the amount loaned to debtor by
20 Ameriquest. Debtor did not object to the proof of claim.

21 **The Adversary Complaint**

22 On November 1, 2010, debtor commenced the adversary
23 proceeding out of which this appeal arises.³ On December 27,
24 2010, JPMC filed a motion to dismiss under Civil Rule 12(b)(6)

25
26 ³ We take judicial notice of the complaint and other
27 pleadings docketed and imaged in Bankr. Adv. No. 10-90528.
28 Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 which the bankruptcy court granted without prejudice.

2 On February 28, 2011, debtor filed a first amended
3 complaint (FAC). The FAC asserted five claims for relief:
4 (1) Declaratory Relief; (2) Dischargeability on the Basis of
5 Fraud; (3) Invalid Lien on Property; (4) Securitization of Lien;
6 and (5) Fraud under Securities Exchange Act. On March 31, 2011,
7 JPMC moved to dismiss the FAC under Civil Rule 12(b)(6) which
8 the bankruptcy court granted without prejudice.

9 On June 7, 2011, debtor filed the SAC which is at issue in
10 this appeal. The SAC attached as exhibits the substitution of
11 trustee and the Second Assignment which were recorded on
12 March 30, 2009. Debtor generally alleged that the substitution
13 of trustee dated March 18, 2009, and recorded on March 30, 2009,
14 was defective. According to debtor, JPMC, as alleged
15 beneficiary under the DOT, was not authorized to substitute NDEX
16 as the new trustee on March 18, 2009, because the assignment of
17 the DOT, whereby MERS assigned to JPMC its beneficial interest
18 under the DOT, was not signed before a notary public until the
19 next day, March 19, 2009. This defective transfer, debtor
20 alleged, "reflects in part the deceptive practices that
21 Defendants have engaged in with many other borrowers at a
22 national level."

23 Debtor asserted five claims for relief in the SAC:
24 (1) Declaratory Relief; (2) Failure to Perfect Deed of Trust;
25 (3) Unfair and Deceptive Acts and Practices; (4) Violations of
26 the Bankruptcy Code (§§ 362(a) and 105(a)); and (5) Invalid Lien
27 on Property. The second, third, and fourth claims for relief
28 were new to the adversary; they were not alleged in the FAC.

1 On June 24, 2011, JPMC filed a motion to dismiss the SAC
2 under Civil Rule 12(b)(6). In connection with its motion, JPMC
3 requested that the bankruptcy court take judicial notice of the
4 following: (1) the DOT recorded on September 1, 2004; (2) the
5 Assignment recorded on January 8, 2009; (3) the notice of
6 default recorded on February 23, 2009; (4) the Second Assignment
7 recorded on March 30, 2009; (5) the substitution of trustee
8 recorded on March 30, 2009; and (6) the notice of trustee's sale
9 recorded on January 5, 2010.

10 On August 8, 2011, the bankruptcy court heard the matter
11 and orally dismissed the SAC with prejudice.

12 On September 27, 2011, debtor filed his notice of appeal.

13 On November 30, 2011, the bankruptcy court entered the
14 order dismissing the SAC with prejudice.⁴

15 II. JURISDICTION

16 The bankruptcy court had jurisdiction over this proceeding
17 under 28 U.S.C. §§ 1334 and 157(b)(2)(K). We have jurisdiction
18 under 28 U.S.C. § 158.

19 III. ISSUE

20 Whether the bankruptcy court erred in dismissing the SAC
21 with prejudice under Civil Rule 12(b)(6).

22 IV. STANDARD OF REVIEW

23 We review de novo the bankruptcy court's grant of a motion
24 to dismiss under Civil Rule 12(b)(6). Movsesian v. Victoria
25 Versicherung AG, 629 F.3d 901, 905 (9th Cir. 2010). We may
26 affirm the bankruptcy court's dismissal of a complaint "only if

27
28 ⁴ Debtor's case has since been dismissed.

1 it is clear that no relief could be granted under any set of
2 facts that could be proved consistent with the allegations.'"
3 Cooke, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.,
4 911 F.2d 242, 244 (9th Cir. 1990).

5 V. DISCUSSION

6 A. General Pleading Standards

7 Generally, a plaintiff's burden at the pleading stage is
8 relatively light. Civil Rule 8(a)(2), made applicable to
9 adversary proceedings by Rule 7008, requires only that the
10 complaint contain "a short and plain statement of the claim
11 showing that the pleader is entitled to relief." In turn, this
12 means that the complaint must include "sufficient allegations to
13 put defendants fairly on notice of the claims against them."
14 McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991). When a
15 plaintiff asserts multiple claims against multiple defendants,
16 this fair notice standard requires that the allegations in the
17 complaint must show which defendants are liable to the plaintiff
18 for which wrongs. See Gauvin v. Trombatore, 682 F.Supp. 1067,
19 1071 (N.D. Cal. 1988) (plaintiff must allege the basis of his
20 claim against each defendant to satisfy [Civil Rule] 8(a)(2)).

21 Allegations regarding fraud are subject to a heightened
22 pleading standard. Civil Rule 9(b), made applicable to
23 adversary proceedings by Rule 7009, requires that a plaintiff
24 must state "with particularity the circumstances constituting
25 fraud" The Ninth Circuit has provided guidance for the
26 "with particularity" requirement by stating that to comport with
27 Civil Rule 9(b) the complaint must (1) specify the averred
28 fraudulent representations; (2) aver the representations were

1 false when made; (3) identify the speaker; (4) state when and
2 where the statements were made; and (5) state the manner in
3 which the representations were false and misleading. Lancaster
4 Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405
5 (9th Cir. 1991). Because fraud encompasses a wide variety of
6 circumstances, the requirements of Civil Rule 9(b) – like Civil
7 Rule 8(a)(2) – should provide all defendants with sufficient
8 information to formulate a response. Therefore, the complaint
9 cannot lump multiple defendants together but must “inform each
10 defendant separately of the allegations surrounding [its]
11 alleged participation in the fraud.” Swartz v. KPMB LLP,
12 476 F.3d 756, 764-65 (9th Cir. 2007).

13 **B. Standards for Dismissal Under Civil Rule 12(b)(6)**

14 The rules which set forth the pleading standards under
15 Civil Rules 8(a)(2) and 9(b) overlie the standards for deciding
16 motions to dismiss a complaint under Civil Rule 12(b)(6). When
17 ruling on a motion to dismiss under Civil Rule 12(b)(6), we are
18 instructed first to separate the factual and legal elements of a
19 claim. In examining the factual elements of a claim, “we accept
20 all factual allegations in the complaint as true and construe
21 the pleadings in the light most favorable to the nonmoving
22 party.” Movsesian, 629 F.3d at 905 (quoting Knieval v. ESPN,
23 393 F.3d 1068, 1072 (9th Cir. 2005)(quotation marks omitted)).

24 We then must determine whether the facts alleged are
25 sufficient to show that the plaintiff has a plausible claim for
26 relief. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)(quoting
27 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

28 While a complaint attacked by a Rule 12(b)(6) motion

1 to dismiss does not need detailed factual allegations,
2 a plaintiff's obligation to provide the grounds of his
3 entitlement to relief requires more than labels and
4 conclusions, and a formulaic recitation of the
5 elements of a cause of action will not do. Factual
6 allegations must be enough to raise a right to relief
7 above the speculative level

8 Twombly, 550 U.S. at 555. Determining whether a complaint
9 states a plausible claim for relief will "be a context-specific
10 task that requires the reviewing court to draw on its judicial
11 experience and common sense." Iqbal, 129 S.Ct. at 1950. In the
12 end, the determinative question is whether there is any set of
13 "facts that could be proved consistent with the allegations of
14 the complaint" that would entitle plaintiff to some relief.
15 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); Cooke,
16 Perkiss & Liehe, 911 F.2d at 244. We will not assume that
17 plaintiffs "can prove facts which [they have] not alleged, or
18 that the defendants have violated . . . laws in ways that have
19 not been alleged." Associated Gen. Contractors of Cal., Inc. v.
20 Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

21 With respect to the legal elements of a claim, our mandate
22 is different. We are not "bound to accept as true a legal
23 conclusion couched as a factual allegation." Papasan v. Allain,
24 478 U.S. 265, 286 (1986).

25 We now examine the SAC with the foregoing standards in
26 mind.

27 **C. Motion to Dismiss: The Merits**

28 At oral argument before us debtors' counsel made reference
to claims asserted in debtors' original complaint and the FAC
which alleged facts pertaining to "robo-signing." However,

1 debtor amended the complaint by deleting those facts in his SAC.
2 The complaint which is the subject of this appeal is the SAC.

3 Most of debtor's claims in the SAC arise out of the alleged
4 invalid substitution of trustee. As noted by the bankruptcy
5 court, the fact that the assignment of the DOT to JPMC was
6 executed one day after JPMC executed the substitution of the
7 trustee did not affect the transfer "at that particular time."
8 Hr'g Tr. 8/11/11 at 11. Rather, the substitution of the trustee
9 was effective when JPMC became the beneficiary under the DOT and
10 both the substitution and Second Assignment were recorded on
11 March 30, 2009. "From the time the substitution is filed for
12 record, the new trustee shall succeed to all the powers, duties,
13 authority, and title granted and delegated to the trustee named
14 in the deed of trust." Cal. Civ. Code § 2934a(a)(4).
15 Accordingly, contrary to debtor's assertion, the substitution of
16 trustee was valid.

17 **Failure to Perfect Deed of Trust**

18 Under this claim for relief, debtor alleged that none of
19 the Defendants held a perfected and secured claim against his
20 property. Because this claim arises out of the alleged invalid
21 substitution of trustee, it fails as a matter of law.

22 In addition, debtor failed to show any improprieties in the
23 chain of title. The facts appearing on the face of the
24 documents submitted by JPMC in conjunction with its motion to
25 dismiss⁵ directly contradict debtor's legal conclusion that

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27 ⁵ In deciding a motion to dismiss, the trial court may take
28 judicial notice of matters of public record. United States v.
(continued...)

1 "none of Defendants hold[s] a perfected and secured claim on
2 debtor's property." The documents show that JPMC was the
3 assignee of the beneficial interest of the trust deed and that
4 assignment was duly recorded. Therefore, JPMC had a secured
5 claim against debtor's property.

6 For these reasons, there is no set of "facts that could be
7 proved consistent with the allegations of the complaint" that
8 would entitle plaintiff to some relief. Swierkiewicz, 534 U.S.
9 at 514. The bankruptcy court therefore properly dismissed this
10 claim.

11 **Unfair Deceptive Acts and Practices**

12 Under this claim for relief, debtor alleged that
13 Defendants' acts constituted an unlawful business act or
14 practice within the meaning of the Consumer Legal Remedies Act
15 (CLRA) contained in Cal. Civil Code § 1750 et seq.

16 On appeal, debtor argues that by providing false
17 documentation to the bankruptcy court regarding the defective
18 appointment of NDEX as trustee under the DOT, the actions of
19 Chase constitute an unlawful business act or practice within the
20 meaning of the CLRA. Debtor further contends that because he is
21 the victim of Chase's fraudulent conduct, the CLRA should be
22 found applicable in this case.

23 Debtor's allegations against Defendants under this claim
24 are general and conclusory. Cal. Civil Code § 1770(a) states:
25 "The following unfair methods of competition and unfair or
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27 ⁵(...continued)
28 Corinthian Colleges, 655 F.3d 984, 998-999 (9th Cir. 2011).

1 deceptive acts or practices undertaken by any person in a
2 transaction intended to result or which results in the sale or
3 lease of goods or services are unlawful:" The section
4 then lists twenty-five categories of unfair methods of
5 competition and unfair or deceptive acts or practices. Debtor
6 does not allege facts that fall within any of those categories
7 in support of his claim against Defendants nor does he cite even
8 one of the categories by number. Consequently, there is no
9 factual basis for his claim under the CLRA against each named
10 defendant in violation of Rules 8(a)(2) and 9(b). Gauvin,
11 682 F.Supp. at 1071; Swartz, 476 F.3d at 764-65.

12 Debtor also does not make any argument on appeal
13 demonstrating that Defendants' actions were undertaken "in a
14 transaction intended to result or which results in the sale or
15 lease of goods or services." Rather, as found by the bankruptcy
16 court, the transaction at issue was related to real property.
17 The CLRA is generally inapplicable to real estate transactions.⁶
18 See McKell v. Wash. Mut., Inc., 142 Cal.App. 4th 1457, 1488
19 (Cal. Ct. App. 2006).

20 Finally, as noted above, the substitution of trustee was
21 valid, as a matter of law. Therefore, the alleged defect in the
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23 ⁶ In any event, even if it were applicable, Cal. Civil Code
24 § 1782 provides that prior to filing an action for damages under
25 the CLRA and thirty (30) days or more before the commencement of
26 such action for damages, the consumer must: (1) notify the person
27 alleged to have employed or committed methods, acts, or practices
28 declared unlawful under Cal. Civil Code § 1770; and (2) demand
that the person correct, repair, replace, or otherwise rectify
the goods or services alleged to be violation of Cal. Civil Code
§ 1770. Nowhere does the SAC allege that such notice was given
within the requisite time frame.

1 substitution of trustee could not support an unlawful business
2 act or practice even if the CLRA were applicable.

3 In the end, debtor's allegations under this claim for
4 relief amount to nothing more than a legal conclusion. We are
5 not "bound to accept as true a legal conclusion couched as a
6 factual allegation." Papasan, 478 U.S. at 286. The bankruptcy
7 court properly dismissed this claim.

8 **Violations of the Bankruptcy Code**

9 Under this claim for relief, debtor sought the recovery of
10 actual and punitive damages from Defendants and equitable relief
11 pursuant to §§ 362(a) and 105(a) for intentionally filing a
12 false and fraudulent proof of claim in violation of § 501 and
13 Rules 3001(c) and 3001(d).

14 As noted above, the substitution of trustee was valid as a
15 matter of law. Therefore, the alleged defect in the
16 substitution of trustee cannot support this claim, if indeed
17 this is the factual underpinning for debtor's allegation that
18 the proof of claim filed by Chase was false and fraudulent.

19 Moreover, debtor has not asserted a claim under § 105 that
20 would entitle him to relief because there is no private right of
21 action under the statute. Walls v. Wells Fargo Bank, N.A.,
22 276 F.3d 502 (9th Cir. 2002).

23 Debtor also seeks actual and punitive damages for the
24 Defendants' violation of the stay, but there are no facts
25 alleged that would support a claim for violation of the stay
26 described in any of the categories under § 362(a)(1)-(8). In
27 addition, the filing of a proof of claim alone does not
28 constitute a violation of the stay. See Campbell v. Countrywide

1 Homes Loans, Inc., 545 F.3d 348, 355 (5th Cir. 2008) (legal
2 actions in the bankruptcy court do not amount to violations of
3 the stay). In sum, debtor's allegations fail to state a claim
4 for relief under the statutes cited. Therefore, the bankruptcy
5 court properly dismissed this claim.⁷

6 **Invalid Lien on Property**

7 Under this claim for relief, debtor alleged that the loan
8 in question was not valid as it was obtained as the result of
9 fraud. Debtor further alleged that Defendants, either knowingly
10 or with reckless disregard for the truth, made false statements
11 of material fact, on which he relied.

12 Debtor's allegations relate to the origination of the loan.
13 However, it is plain from the face of the documents provided by
14 JPMC that not all of them were involved in the origination of
15 debtor's loan. Debtor simply lumps Defendants together without
16 specifying the averred fraudulent representations, identifying
17 the speaker, stating when and where the statements were made or
18 stating the manner in which the representations were false and
19 misleading. Lancaster Cmty. Hosp., 940 F.2d at 405. "The
20 allegations fail to show any nexus between the alleged
21 inducement to enter into the note and DOT at the beginning of
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24 ⁷ In the alternative, the bankruptcy court dismissed
25 debtor's second, third and fourth claims for relief under Civil
26 Rule 15(a)(2). Generally, a plaintiff may not add new causes of
27 action or parties without leave of the court or stipulation of
28 the parties pursuant to Civil Rule 15(a)(2). Debtor does not
contend on appeal that the bankruptcy court erred in dismissing
the second, third and fourth claims for relief on this ground.
Those arguments are deemed waived for purposes of this appeal.
Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

1 this transaction and what that has to do with any of the
2 Defendants." Hr'g Tr. 8/8/11 at 13:1-2. In short, no one can
3 tell from reading the allegations in this claim for relief which
4 defendant made what misrepresentation or even what the alleged
5 misrepresentations were. Due to these shortcomings, the
6 heightened pleading requirements for fraud under Civil Rule 9(b)
7 were not met.

8 Debtor does not address any of these issues on appeal,
9 instead stating that because he was seeking to invalidate a lien
10 on his property, the proper procedure was for him to file an
11 adversary proceeding. Debtor then again re-alleges that the
12 substitution of trustee was invalid and thus any lien on the
13 property where NDEX is named as trustee should also be found to
14 be invalid. These conclusory statements do not constitute a
15 viable argument on appeal. Therefore, this claim fails as a
16 matter of law and was properly dismissed.

17 **Declaratory Relief**

18 Under this claim, debtor sought an equitable decree
19 enjoining Defendants from filing false claims and declarations
20 or from continuing to assert any claim as to an enforceable
21 secured or unsecured claim against property of the estate in
22 bankruptcy. As these allegations relate to the alleged invalid
23 substitution of trustee, they fail as a matter of law.

24 Further, the Declaratory Judgment Act (DJA), 28 U.S.C.
25 § 2201, requires that an "actual controversy" before the court
26 may declare the rights and other legal relations of any
27 interested party seeking such declaration, whether or not
28 further relief is or could be sought. The DJA's "operation is

1 procedural only" and does not provide an independent theory for
2 recovery. Team Enters., LLC v. W. Inv. Real Estate Trust,
3 721 F.Supp.2d 898, 911 (E.D. Cal. 2010).

4 Debtor's declaratory relief claim falls with the demise of
5 the other claims and the absence of a cognizable justiciable
6 controversy. Because debtor's declaratory relief claim cannot
7 stand alone, the bankruptcy court properly dismissed this
8 claim.⁸

9 **VI. CONCLUSION**

10 Having determined there is no basis for reversal, we AFFIRM
11 the order on appeal.

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23 ⁸ Although we review a bankruptcy court's decision to
24 dismiss a complaint with prejudice for an abuse of discretion,
25 Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th
26 Cir. 2000), debtor has made no arguments in his briefs that
27 specifically addressed the "with prejudice" aspect of the court's
28 ruling. Those arguments are deemed waived for purposes of this
appeal. Smith v. Marsh, 194 F.3d at 1052. Even if we were to
consider the issue, on this record we cannot conclude that the
court abused its discretion.