

DEC 23 2014

NOT FOR PUBLICATION

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. CC-13-1505-KuPaTa  
 )  
 VICTOR ORLANDO RIVERA, ) Bk. No. 13-14646  
 )  
 Debtor. ) Adv. No. 13-01650  
 )  
 \_\_\_\_\_ )  
 VICTOR ORLANDO RIVERA, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 MORTGAGE ELECTRONIC REGISTRATION )  
 SYSTEMS, INC.; OCWEN LOAN )  
 SERVICING, LLC; WELLS FARGO )  
 BANK N.A., Trustee for Soundview )  
 Home Loan Trust 2007-OPT1, )  
 Asset-Backed Certificates, )  
 Series 2007-OPT1, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on November 20, 2014  
at Los Angeles, California

Filed - December 23, 2014

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

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

Appearances: Appellant Victor Orlando Rivera argued pro se;  
Robert W. Norman, Jr. of Houser & Allison, APC,  
argued for appellees Ocwen Loan Servicing, LLC and  
Wells Fargo Bank N.A., as Trustee for Soundview  
Home Loan Trust 2007-OPT1, Asset-Backed

\*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 Certificates, Series 2007-OPT1; Stefan Perovich of  
2 Keesal, Young & Logan argued for appellee Mortgage  
3 Electronic Registration Systems, Inc.

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4 Before: KURTZ, PAPPAS and TAYLOR, Bankruptcy Judges.  
5

6 **INTRODUCTION**

7 Debtor Victor Orlando Rivera filed a chapter 13<sup>1</sup> bankruptcy  
8 case and an adversary proceeding seeking to derail nonjudicial  
9 foreclosure proceedings pending against his residence. Rivera's  
10 complaint identified the defendants, including Wells Fargo  
11 Bank N.A. as trustee for a mortgage securitization trust, as the  
12 parties responsible for the foreclosure proceedings. In support  
13 of his challenge to the foreclosure proceedings, Rivera alleged  
14 that Wells Fargo and its agents were not legally entitled to  
15 foreclose. According to Rivera, Wells Fargo's asserted  
16 foreclosure rights were based on an invalid assignment of a deed  
17 of trust.

18 With certain exceptions not applicable here, California law  
19 does not permit a borrower in default to challenge pending  
20 nonjudicial foreclosure proceedings by seeking an advance  
21 judicial determination of the foreclosing party's right to  
22 foreclose. Accordingly, we AFFIRM the bankruptcy court's Civil  
23 Rule 12(b)(6) dismissal of Rivera's adversary proceeding.  
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25  
26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 **FACTS**

2 Rivera refinanced his home in Los Angeles, California in  
3 February 2007 by executing a \$875,000 note and a deed of trust in  
4 favor of Option One Mortgage Corporation. Option One thereafter  
5 conveyed its rights as beneficiary under the deed of trust to  
6 Wells Fargo, as the trustee for a mortgage securitization trust.  
7 This conveyance is documented by an assignment of deed of trust  
8 dated December 27, 2007, and recorded in the Official Records of  
9 Los Angeles County on February 22, 2008.

10 Rivera's complaint did not dispute that he had fallen behind  
11 on his loan payments and that he was in default on the loan. In  
12 fact, at oral argument, Rivera confirmed that, after his 2007  
13 refinancing, he made only two or three monthly loan payments and  
14 that he has not made any loan payments for roughly the last seven  
15 years. Based on his default, Rivera indicates, Wells Fargo and  
16 its agents caused nonjudicial foreclosure proceedings to be  
17 commenced against his residence. In furtherance of these  
18 proceedings, Rivera alleges, Wells Fargo or its agents recorded a  
19 notice of default, a substitution of trustee, a notice of  
20 trustee's sale and other documents. Rivera did not attach copies  
21 of these foreclosure documents as exhibits to his complaint, but  
22 they are referenced therein and are attached to other adversary  
23 proceeding filings.

24 The complaint, which Rivera filed pro se, is difficult to  
25 understand as a whole. At times, it is incomprehensible. It  
26 contains no distinct claims for relief, but instead generally  
27 relies on phrases irregularly disbursed throughout the body of  
28 the document - phrases like "declaratory relief," "quiet title,"

1 "fraud table," and "Robbo [sic] Signature." Even so, the  
2 complaint in essence alleged that the foreclosure documents  
3 should be set aside and the defendants enjoined from further  
4 pursuing foreclosure because the assignment of the deed of trust  
5 to Wells Fargo was invalid and, hence, Wells Fargo and its agents  
6 had no right to foreclose.<sup>2</sup>

7 Several of the defendants filed motions to dismiss Rivera's  
8 complaint. Among other things, the defendants pointed out that  
9 California law generally permits nonjudicial foreclosures to  
10 proceed without requiring the foreclosing party to first prove in  
11 a judicial action that they are entitled to foreclose.

12 At the hearing on the dismissal motions, Rivera confirmed  
13 that his complaint sought to attack the foreclosure proceedings  
14 by challenging the right of Wells Fargo and its agents to  
15 foreclose:

16 THE COURT: . . . it seems that Mr. Rivera is attempting  
17 to challenge a foreclosure sale and he is asserting  
18 that somehow the Defendants involved in this motion to  
19 dismiss, Ocwen Loan Servicing and Wells Fargo Bank, are  
20 not -- do not have the legal authority to conduct the  
21 foreclosure sale.

22 MR. RIVERA: Exactly.

23 Hr'g Tr. (Sept. 26, 2013) at 7:14-19.

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24 <sup>2</sup>On appeal, Rivera apparently claims that his loan  
25 obligations were somehow satisfied, and he points to two  
26 documents entitled "Full Reconveyance" as supporting his claim.  
27 However, the reconveyance documents on which Rivera relies, one  
28 dated in 2006 and the other dated in 2007 do not reflect the  
satisfaction of the secured loan that is the subject of the  
foreclosure proceedings Rivera currently is challenging. Rather,  
the reconveyance documents indicate that Rivera paid off prior  
secured loans by refinancing his home.

1 In ruling on the dismissal motions, the bankruptcy court in  
2 relevant part adopted the defendants' argument that California  
3 law generally does not permit borrowers to challenge nonjudicial  
4 foreclosure proceedings by seeking an advance judicial  
5 determination of the foreclosing party's right to foreclose.

6 The bankruptcy court also expressed concern that Rivera's  
7 bankruptcy case appeared to suffer from numerous serious  
8 deficiencies and that Rivera appeared to have filed bankruptcy  
9 solely for the purpose of filing an adversary proceeding  
10 challenging the foreclosure proceedings.

11 Based on these circumstances, the bankruptcy court entered  
12 an order on October 24, 2013, dismissing Rivera's complaint  
13 without leave to amend and dismissing the entire adversary  
14 proceeding with prejudice. Rivera timely filed a notice of  
15 appeal.

#### 16 JURISDICTION

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
18 §§ 1334 and 157(b)(2)(A) and (O). We have jurisdiction under  
19 28 U.S.C. § 158.

#### 20 ISSUE

21 Did the bankruptcy court err when it dismissed the claims  
22 for relief stated in Rivera's first amended complaint?

#### 23 STANDARD OF REVIEW

24 We review de novo the bankruptcy court's Civil Rule 12(b)(6)  
25 dismissal. Barnes v. Belice (In re Belice), 461 B.R. 564, 572  
26 (9th Cir. BAP 2011).

#### 27 CIVIL RULE 12(b)(6) STANDARDS AND JUDICIAL NOTICE STANDARDS

28 When we review a matter de novo, we consider the matter anew

1 as if the bankruptcy court had not previously ruled. Sachan v.  
2 Huh (In re Huh), 506 B.R. 257, 262 (9th Cir. BAP 2014) (en banc).  
3 Therefore, we apply the same standards to Civil Rule 12(b)(6)  
4 dismissal motions that all other federal courts are required to  
5 apply. In re Belice, 461 B.R. at 572-73.

6 Under Civil Rule 12(b)(6), made applicable in adversary  
7 proceedings by Rule 7012, we may dismiss a complaint for  
8 "failure to state a claim upon which relief can be granted."  
9 To survive a Civil Rule 12(b)(6) dismissal motion, a complaint  
10 must present cognizable legal theories and sufficient factual  
11 allegations to support those theories. See Johnson v. Riverside  
12 Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008). As  
13 the Supreme Court has explained:

14 a complaint must contain sufficient factual matter,  
15 accepted as true, to state a claim to relief that is  
16 plausible on its face. . . . A claim has facial  
17 plausibility when the plaintiff pleads factual content  
18 that allows the court to draw the reasonable inference  
19 that the defendant is liable for the misconduct  
20 alleged. . . . Threadbare recitals of the elements of  
21 a cause of action, supported by mere conclusory  
22 statements, do not suffice.

23 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations and  
24 internal quotation marks omitted).

25 In reviewing the sufficiency of a complaint under Civil  
26 Rule 12(b)(6), we must accept as true all facts alleged in the  
27 complaint and draw all reasonable inferences in favor of the  
28 plaintiff. See Newcal Indus., Inc. v. Ikon Office Solutions,  
513 F.3d 1038, 1043 n. 2 (9th Cir. 2008). However, we do not  
need to accept as true conclusory allegations or legal  
characterizations cast in the form of factual allegations. See  
Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

1 We may use judicially noticed facts to establish that a  
2 complaint does not state a claim for relief. Skilstaf, Inc. v.  
3 CVS Caremark Corp., 669 F.3d 1005, 1016 n.9 (9th Cir. 2012). In  
4 addition, we can take judicial notice of the existence, filing  
5 and content of documents filed in Rivera's underlying bankruptcy  
6 case. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
7 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

8 We also may consider the existence and content of documents  
9 attached to and referenced in the complaint as exhibits. Lee v.  
10 City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Durning v. First  
11 Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Even when a  
12 document is not physically attached to the complaint, we may  
13 consider its existence and contents when its authenticity is not  
14 contested and when it necessarily is relied upon by the  
15 plaintiffs in their complaint. See United States v. Ritchie,  
16 342 F.3d 903, 907-08 (9th Cir. 2003); Lee, 250 F.3d at 688.

17 Of course, just because a judicially-noticed document states  
18 a "fact" does not necessarily mean that this fact is true. Roth  
19 v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007). Whether the facts  
20 stated in a judicially noticed document are reasonably subject to  
21 dispute depends on the nature of the facts stated and the nature  
22 and purpose of the document as a whole. See Ferguson v. Wells  
23 Fargo Bank, N.A., 2013 WL 504709, at \*\*2-3 (E.D. Cal. 2013); see  
24 also Lee, 250 F.3d at 690.

## 25 DISCUSSION

26 As set forth above, Rivera's complaint challenges the  
27 foreclosure proceedings and hinges on his allegation that the  
28 assignment of deed of trust was invalid. On its face, the

1 assignment of deed of trust duly assigned to Wells Fargo the  
2 original lender's rights under Rivera's note and deed of trust,  
3 including the right to foreclose. Nonetheless, Rivera has  
4 offered three different arguments why, in his view, the  
5 assignment of deed of trust was invalid. We will address each of  
6 these arguments in turn.

7 First, Rivera contends that the attempted securitization of  
8 his loan effectively rendered his note and deed of trust  
9 unenforceable. While his reasoning on this point is difficult to  
10 follow, Rivera appears to rely on alternate legal theories.  
11 According to Rivera, either the attempted assignment to Wells  
12 Fargo as trustee failed because the securitization trust did not  
13 actually exist or the attempted assignment was successful but  
14 resulted in the original lender being "paid off" and thereby  
15 "satisfied" Rivera's note and deed of trust. Under either  
16 theory, California law does not permit a borrower to attack  
17 nonjudicial foreclosure proceedings by invoking either the  
18 alleged failure or the alleged success of the securitization  
19 process. See Jenkins v. JP Morgan Chase Bank, N.A.,  
20 216 Cal.App.4th 497, 514-15 (2013); Nordeen v. Bank of Am., N.A.  
21 (In re Nordeen), 495 B.R. 468, 479-81 (9th Cir. BAP 2013) (citing  
22 Lane v. Vitek Real Estate Indus. Grp., 713 F.Supp.2d 1092, 1099  
23 (E.D. Cal. 2010)). Both Jenkins and In re Nordeen stand for the  
24 general proposition that the borrower is not a party to the  
25 securitization transaction and has no right to invoke the  
26 securitization as a defense against nonjudicial foreclosure.

27 Second, Rivera contends that Wells Fargo and its agents had  
28 no right to foreclose unless and until Wells Fargo established



1 that it is the holder of the note or otherwise is entitled to  
2 enforce the note under California's version of the Uniform  
3 Commercial Code governing negotiable instruments. See Cal. Com'l  
4 Code § 3101, et seq. Assuming without deciding that Rivera's  
5 note qualifies as a negotiable instrument governed by the Uniform  
6 Commercial Code, Rivera's second argument lacks merit.  
7 California courts do not permit a borrower to impede nonjudicial  
8 foreclosure proceedings by demanding an advance judicial  
9 determination of the foreclosing beneficiary's right to enforce  
10 the note. Debrunner v. Deutsche Bank Nat'l Trust Co.,  
11 204 Cal.App.4th 433, 442 (2012); see also Jenkins,  
12 216 Cal.App.4th at 511 (citing Debrunner and stating: "California  
13 courts have refused to delay the nonjudicial foreclosure process  
14 by allowing trustor-debtors to pursue preemptive judicial actions  
15 to challenge the right, power, and authority of a foreclosing  
16 'beneficiary' or beneficiary's 'agent' to initiate and pursue  
17 foreclosure.").

18 In Rivera's third and final argument, he complains that the  
19 assignment of the deed of trust to Wells Fargo was fraudulent and  
20 was executed by "Robbo Signature." However, Rivera's fraud  
21 allegations are insufficient to state a cognizable legal claim.  
22 In federal court, fraud allegations must be stated with  
23 particularity. See Rule 7009 (incorporating Civil Rule 9(b));  
24 In re Nordeen, 495 B.R. at 483. Moreover, under California law,  
25 a fraud cause of action requires allegations of  
26 misrepresentation, knowledge of falsity, intent to defraud,  
27 justifiable reliance, and resulting injury. See Lazar v. Super.  
28 Ct., 12 Cal.4th 631, 638 (1996). Assuming the truth of Rivera's

1 factual allegations, there is no indication that any form of  
2 misrepresentation occurred in conjunction with the assignment.  
3 More importantly, there is no indication that Rivera was a party  
4 to or even aware of the assignment at the time it was made and  
5 hence there is no rational basis to infer from Rivera's  
6 allegations that Rivera relied on the so-called fraudulent  
7 assignment or suffered damages as a result of any such reliance.

8 As for Rivera's robo-signing allegations, a bare assertion  
9 that a document has been robo-signed does not give rise to a  
10 fraud claim, especially when, as here, the borrower has not  
11 disputed that he has defaulted on his loan obligations. See  
12 Sandri v. Capital One, N.A. (In re Sandri), 501 B.R. 369, 373-74  
13 (Bankr. N.D. Cal. 2013); see also Pratap v. Wells Fargo Bank,  
14 N.A., 2014 WL 3884413, at \*5 (N.D. Cal. 2014) ("numerous courts  
15 have found that where a plaintiff alleges that a document is void  
16 due to robo-signing, yet does not contest the validity of the  
17 underlying debt, and is not a party to the assignment, the  
18 plaintiff does not have standing to contest the alleged  
19 fraudulent transfer.").

20 In the parlance of Iqbal, Rivera has not stated a plausible  
21 claim for relief based on fraud. He has not pled sufficient  
22 factual content that would allow the bankruptcy court or us to  
23 draw the reasonable inference that the assignment of deed of  
24 trust was fraudulent.

#### 25 **CONCLUSION**

26 For the reasons set forth above, we AFFIRM the bankruptcy  
27 court's dismissal with prejudice of Rivera's adversary  
28 proceeding.