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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jeanette Andasola,
Plaintiff,
v.
Capital One Bank NA; and Quality Loan
Service Corporation,
Defendants.

No. CV 12-02467-PHX-JAT

ORDER

Pending before the Court are: (1) Defendant Capital One National Association’s Motion to Dismiss (Doc. 7); (2) Plaintiff’s Motion to Amend/Correct (Doc. 10); (3) Defendant Capital One National Association’s Motion to Strike Plaintiff’s Sur-Reply (Doc. 19); and (4) Defendant Quality Loan Service Corporation’s Motion to Dismiss (Doc. 20). The Court now rules on the Motions.

I. BACKGROUND

On October 29, 2012, Plaintiff filed a Complaint against Defendants in Maricopa County Superior Court. (Doc. 1-1 at 5). In her Complaint, Plaintiff alleges “No equal consideration and lawful holder of both the note and mortgage that involves and affects title to real property” located at 1725 East Verde Lane, Phoenix Arizona 85016 (the “Property”). (*Id.* at 6). Plaintiff further alleges that “Defendant” has failed to respond to any letters in reference to the Property. (*Id.*). Plaintiff further alleges that “MERS doesn’t have standing to do anything [and] MERS could not assign the note because it never held it.” (*Id.* at 7). Plaintiff further alleges that an unspecified contract is “null and void ‘ultra

1 vires' due to the fact that bank [sic] lent its credit to Lucky G. NG on behalf of above
2 described property, with no lawful authority to do so," and that the debt was settled
3 lawfully. (*Id.*). As a result of the foregoing allegations, Plaintiff seeks "Property Title,
4 release of lien, damages, overages and interest in overages." (*Id.* at 8).

5 Although there are several attachments to the Complaint, the Complaint itself
6 contains no other facts.

7 Defendants now move to dismiss the Complaint pursuant to Federal Rules of Civil
8 Procedure 12(b)(6) and 8.

9 II. LEGAL STANDARD

10 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must
11 meet the requirements of Rule 8. Rule 8(a)(2) requires a "short and plain statement of the
12 claim showing that the pleader is entitled to relief," so that the defendant has "fair notice
13 of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*,
14 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

15 Although a complaint attacked for failure to state a claim does not need detailed
16 factual allegations, the pleader's obligation to provide the grounds for relief requires
17 "more than labels and conclusions, and a formulaic recitation of the elements of a cause
18 of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The
19 factual allegations of the complaint must be sufficient to raise a right to relief above a
20 speculative level. *Id.*

21 Rule 8's pleading standard demands more than "an unadorned, the-defendant-
22 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
23 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than blanket assertions
24 will not suffice. To survive a motion to dismiss, a complaint must contain sufficient
25 factual matter, which, if accepted as true, states a claim to relief that is "plausible on its
26 face." *Id.* Facial plausibility exists if the pleader pleads factual content that allows the
27 court to draw the reasonable inference that the defendant is liable for the misconduct
28 alleged. *Id.* Plausibility does not equal "probability," but plausibility requires more than

1 a sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads
2 facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line
3 between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550
4 U.S. at 557). Because Plaintiff is proceeding *pro se*, the Court must construe her
5 Complaint liberally, even when evaluating it under the *Iqbal* standard. *Johnson v. Lucent*
6 *Technologies Inc.*, 653 F.3d 1000, 1011 (9th Cir. 2011). However, “[s]omething labeled
7 a complaint but written more as a press release, prolix in evidentiary detail, yet without
8 simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails
9 to perform the essential functions of a complaint.” *McHenry v. Renne*, 84 F.3d 1172,
10 1180 (9th Cir. 1996). “Prolix, confusing complaints . . . impose unfair burdens on
11 litigants and judges.” *Id.* at 1179.

12 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the
13 facts alleged in a complaint in the light most favorable to the drafter of the complaint, and
14 the Court must accept all well-pleaded factual allegations as true. *Shwarz v. United*
15 *States*, 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept
16 as true a legal conclusion couched as a factual allegation, *Papasan*, 478 U.S. at 286, or an
17 allegation that contradicts facts that may be judicially noticed by the Court, *Shwarz*, 234
18 F.3d at 435.

19 **III. ANALYSIS**

20 **A. Plaintiff’s Motion to Amend**

21 On December 14, 2012, Plaintiff filed a Motion to Amend her Complaint. In her
22 Motion to Amend, Plaintiff requests leave to amend to “join an additional Defendant.”
23 (Doc. 10 at 1). Although it is not entirely clear, it appears that Plaintiff seeks leave to
24 amend to add Quality Loan Service Corporation as a Defendant in this case. Defendant
25 Capital One opposes the motion as unnecessary because Quality Loan Service
26 Corporation was named a Defendant in the original complaint. Indeed, on January 14,
27 2013, Quality Loan Service Corporation filed a Motion to Dismiss the Complaint.
28 Accordingly, Plaintiff’s Motion to Amend her Complaint to add Quality Loan Service

1 Corporation as a Defendant in this case is denied as moot.

2 **B. Defendant's Motion to Strike**

3 Defendant Capital One moves to strike Plaintiff's "Opposition to Defendants' 2nd
4 Motion to Dismiss," which appears to be an attempt to file an unauthorized sur-reply.
5 Such replies are not permitted under the Federal Rules of Civil Procedure or the Court's
6 local rules. In light of Plaintiff's pro se status, the Court will nonetheless consider the
7 additional material in the sur-reply as discussed below. Accordingly, Defendant Capital
8 One's Motion to Strike is denied.

9 **C. Defendant Capital One's Motion to Dismiss**

10 Defendant Capital One identifies two principal allegations in Plaintiff's Motion to
11 Dismiss, namely (1) that Defendant failed to tender consideration to support the Note,
12 and therefore, the Deed of Trust is null and void and (2) that Plaintiff submitted an
13 alleged Electronic Funds Transfer to Defendant and the debt was paid. Defendant Capital
14 One argues that these claims fail as a matter of law pursuant to Federal Rule of Civil
15 Procedure 12(b)(6) and are not pled with sufficient factual matter, which states a claim
16 that is plausible on its face as required by Federal Rule of Civil Procedure 8(a).

17 On August 20, 2005, non-party Lucky NG¹ obtained a loan from lender Chevy
18 Chase Bank, F.S.B. in the amount of \$182,000. (Doc. 7-1 at 2).² The Note was secured

19 _____
20 ¹ In her Response to Defendant Quality Loan Corporation's Motion to Dismiss,
21 Plaintiff states that Plaintiff and Lucky NG are "lawful owners" of the Property. (Doc.
22 25 at 1).

23 ² Plaintiff has incorporated the Note and Deed of Trust by reference into the
24 Complaint. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) ("On
25 a motion to dismiss, [courts] may consider materials incorporated into the complaint or
26 matters of public record. . . . We have extended the doctrine of incorporation by reference
27 to consider documents in situations where the complaint necessarily relies upon a
28 document or the contents of the document are alleged in a complaint, the document's
authenticity is not in question and there are no disputed issues as to the document's
relevance.") (internal citations omitted).

1 by a Deed of Trust encumbering the Property. (Doc. 7-1 at 10). The Deed of Trust was
2 later assigned to Capital One, N.A. and Quality Loan Service Corporation was substituted
3 as the trustee. (Doc. 7-1 at 26, 29). On July 25, 2012, Quality Loan Service Corporation
4 noticed a Trustee's Sale of the Property to take place on October 20, 2012 at 10:00 a.m.
5 (Doc. 7-1 at 32).

6 Defendant Capital One argues that Plaintiff has failed to plead any facts that
7 support her conclusions that Defendant failed to tender consideration to support the Note
8 or that the \$182,000 that Lucky NG received was not consideration. Defendant Capital
9 One further argues that Plaintiff's allegation that she sent an electronic funds transfer to
10 Defendant is insufficiently pled because Plaintiff does not make any allegations that an
11 electronic funds transfer was actually delivered to, accepted and/or processed by
12 Defendant and, thus, Plaintiff has failed to raise any claim relating to such transfer above
13 the speculative level.

14 In Response, Plaintiff argues that "the Defendant has failed to provide the court
15 with the document which would grant it standing to pursue a foreclosure in this court,"
16 including a "Certificate with this Court's Seal on its acknowledging its standing to
17 foreclose in this arena," "Minutes and terms of the parties' face-to-face interview which
18 would have taken place in late May or Early June," and "evidence of compliance of the
19 National Housing Act." (Doc. 8 at 3-4). Plaintiff then cites to several statutes that she
20 alleges Defendants have violated without explaining how Defendants have violated those
21 statutes. (*Id.* at 4).

22 In Reply, Defendant Capital One argues that Plaintiff failed to respond to
23 Defendant's arguments regarding the allegations contained in the Complaint and
24 improperly included new allegations that were not in the original Complaint in response
25 to the Motion to Dismiss. Defendant requests that the Court strike the new allegations in
26 the Response, but argues that, even if the Court does not strike the new allegations, the
27 new allegations likewise do not state a claim upon which relief can be granted.

28 The Court agrees that Plaintiff has failed to state a claim upon which relief can be

1 granted in her Complaint. In her Complaint, Plaintiff does not identify her legal theories.
2 Although Plaintiff makes some reference to a contract being “null and void,” Plaintiff
3 does not identify the contract or explain why it is null and void. Likewise, Plaintiff has
4 not pled sufficient facts about any contract and the consideration for any such contract for
5 the Court to conclude, that if Plaintiff’s allegations were true, she has stated a claim upon
6 which relief can be granted.

7 Further, in Response to Defendant’s Motion to Dismiss, Plaintiff repeatedly argues
8 that Defendant is required to establish that it has standing to foreclose on the Property.³
9 Plaintiff appears to confuse judicial foreclosures with the power of sale to conduct a non-
10 judicial foreclosure granted to trustees under Arizona’s Deed of Trust statutes. *See* Ariz.
11 Rev. Stat. § 33-807. Further, Plaintiff has failed to provide any legal support for her
12 contention that Defendant is required to provide her with certain documentation. To the
13 extent Plaintiff is attempting to allege that Defendant is required to “show the note”
14 before commencing a non-judicial foreclosure, that argument has been rejected by the
15 Arizona Supreme Court. *See Hogan v. Washington Mutual Bank, N.A.*, 277 P.3d 781,
16 783 (Ariz. 2012) (“the deed of trust statutes impose no obligation on the beneficiary to
17 “show the note” before the trustee conducts a non-judicial foreclosure.”).

18 Accordingly, Plaintiff has failed to state a claim upon which relief can be granted
19 against Defendant Capital One in her Complaint and Capital One’s Motion to Dismiss is
20 granted.

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22 ³ The Court has not considered the allegations first raised in the Response to
23 Defendant’s Motion to Dismiss in deciding whether Plaintiff has stated a claim upon
24 which relief can be granted in her Complaint. However, as discussed more fully below,
25 the Court has considered those arguments in determining whether Plaintiff is entitled to
26 leave to amend. Accordingly, Defendant’s Motion to Strike the new allegations is
27 denied. Likewise, in her sur-reply to Defendant Capital One’s Motion to Dismiss,
28 Plaintiff has failed to address any of the allegations made in her Complaint, but rather,
makes new allegations against Defendants. The Court will likewise address any
arguments made in Plaintiff’s sur-reply in determining whether Plaintiff is entitled to
leave to amend.

D. Defendant Quality Loan Service's Motion to Dismiss

1 Defendant Quality Loan Service Corporation ("Quality") moves to dismiss
2 Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because it is
3 "nonsensical," does not allege any breach of the trustee's duties pursuant to Arizona
4 Revised Statutes section 33-801, et seq., and, aside from the caption, Defendant Quality
5 is not specifically mentioned in any of the allegations in the Complaint. (Doc. 20).
6 Defendant Quality requests attorneys' fees pursuant to Arizona Revised Statutes section
7 33-807(E) because the complaint fails to allege any breach of the trustee's duties.

8 In Response, Plaintiff does not address Quality's Motion to Dismiss, but rather
9 asserts new allegations against Quality. The Court will only consider these new
10 allegations in determining whether Plaintiff is entitled to leave to amend. Because
11 Plaintiff has not included any allegations in her Complaint specifically against Quality,
12 Plaintiff has failed to state a claim upon which relief can be granted against Quality in her
13 Complaint and, thus, Quality's Motion to Dismiss is granted. Defendant Quality's
14 Motion for Attorney Fees is denied without prejudice to Quality filing a Motion for
15 Attorneys' Fees pursuant to LRCiv 54.2.

IV. LEAVE TO AMEND

16 Under previous Ninth Circuit Court of Appeals precedent, the court would *sua*
17 *sponte* grant leave to amend when granting a motion to dismiss, unless a pleading could
18 not be cured by the allegation of other facts. *See Lacey v. Maricopa County*, 693 F.3d
19 896, 927 (9th Cir.2012) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995)).
20 However, this precedent has been called into question by the Court of Appeals, in light of
21 the recent changes to the Federal Rule of Civil Procedure 15, which now allows parties
22 twenty-one days from responsive pleadings and motions to dismiss to amend as of right.
23 *See id.* In this case, Plaintiff did not amend her complaint within twenty-one days of
24 either motion to dismiss as allowed by Federal Rule of Civil Procedure 15. Further,
25 although Plaintiff generally request leave to amend if "the Court determines Plaintiff has
26 failed to state a claim," Plaintiff has failed to comply with LRCiv 15.1 in requesting leave
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1 to amend.

2 Nonetheless, when a plaintiff requests leave to amend, the Court must consider the
3 following factors: (1) undue delay, (2) bad faith, (3) prejudice to the opposing party, (4)
4 futility of amendment, and (5) whether plaintiff has previously amended her complaint.
5 *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991).

6 In this case, granting leave to amend the complaint would be futile. In Response
7 to Defendants' Motions to Dismiss, Plaintiff has included numerous new allegations
8 against all Defendants. As with her original complaint, Plaintiff has failed to state a
9 claim upon which relief can be granted against Defendants in any of the new allegations.
10 Specifically, in her sur-reply to Defendant Capital One's Motion to Dismiss, Plaintiff
11 alleges that Defendant Capital One has violated the Truth in Lending Act ("TILA"), the
12 Fair Debt Collection Practices Act ("FDCPA"), and the Consumer Collection Practices
13 Act. Plaintiff alleges that "Defendants have violated such laws by repeated harassing
14 Plaintiff in attempts to foreclose on an alleged loan but cannot bring forth evidence of the
15 loan." Plaintiff's only factual allegation relating to any of these claims is her allegation
16 that "Defendants never complies [sic] with Plaintiff's demands for validation of the
17 alleged debt they were attempting to collect yet continued their foreclosure and collection
18 activities." (Doc. 14 at 6). These claims are premised on Plaintiff's argument that
19 Defendant is required to show the note at Plaintiff's request. As described above,
20 Defendant is not required to show the note before commencing a non-judicial foreclosure
21 under Arizona law. Plaintiff has pled no other facts that state a claim upon which relief
22 can be granted against Defendant Capital One under the statutes that she cited.

23 Likewise, in Response to Quality's Motion to Dismiss, Plaintiff includes
24 generalized allegations against Defendant Quality without identifying the basis for her
25 claims in this case. For instance, Plaintiff alleges that Quality engaged in "numerous
26 unfair acts and practices," such as failing to "conduct foreclosures as a neutral third
27 party." However, Plaintiff fails to plead any specific facts supporting these conclusory
28 allegations.

1 Accordingly, the Court finds that granting Plaintiff leave to amend would be futile.

2 **V. CONCLUSION**

3 Based on the foregoing,

4 **IT IS ORDERED** that Plaintiff's Motion to Amend/Correct (Doc. 10) is denied as
5 moot.

6 **IT IS FURTHER ORDERED** that Defendant Capital One National
7 Association's Motion to Strike Plaintiff's Sur-Reply (Doc. 19) is denied.

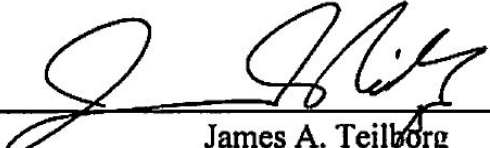
8 **IT IS FURTHER ORDERED** that Defendant Capital One National
9 Association's Motion to Dismiss (Doc. 7) is granted.

10 **IT IS FURTHER ORDERED** that Defendant Quality Loan Service
11 Corporation's Motion to Dismiss (Doc. 20) is granted.

12 **IT IS FURTHER ORDERED** that Defendant Quality's Motion for Attorney
13 Fees (Doc. 20) is denied without prejudice to Quality filing a Motion for Attorneys' Fees
14 pursuant to LRCiv 54.2.

15 The Clerk of the Court shall enter judgment for Defendants accordingly.

16 Dated this 18th day of March, 2013.

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21 James A. Teilborg
22 Senior United States District Judge
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