

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

MARGARET SCHUSTER

Plaintiff,

VS.

IRWIN MORTGAGE
CORPORATION, et al.

Defendants.

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Case No. 4:15cv518

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants Mortgage Electronic Registration Systems, Inc. (“MERS”), CitiMortgage, Inc. (“CitiMortgage”), and Federal National Mortgage Association’s (“Fannie Mae”) Motion to Dismiss (Dkt. 5). As set forth below, the Court finds that the motion should be GRANTED.

BACKGROUND

This suit involves real property located at 10462 Bobbie Lane, Pilot Point, Texas 76258 (the “Property”). On or about May 31, 2005, Lloyd D. Schuster executed a Texas Home Equity Note (“Note”) originally payable to Defendant Irwin Mortgage Corporation (“Irwin”) for \$219,000. Dkt. 4 at 24. Irwin endorsed the Note in blank. Lloyd D. Schuster and his spouse, Plaintiff Margaret Schuster, also executed a Texas Home Equity Security Instrument granting a security interest in the Property, listing MERS as the original beneficiary of the Deed of Trust solely as nominee for Irwin and its successors and assigns (collectively “Deed of Trust”).

The Deed of Trust further provides that: “The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.” Dkt. 4 at 36, ¶ 19. On June 30, 2011, MERS as nominee for Irwin and its successors and assigns formally assigned the Deed of Trust to CitiMortgage. Dkt. 4 at 44-45.

In this suit, Plaintiff challenges the validity of the Assignment and contests Defendants’ interest in, and authority to foreclose on, the security instrument encumbering the Property. Plaintiff’s Original Petition for Declaratory Judgment – which has not been amended since removal – asserts the following claims: (1) breach of contract against Defendants Irwin, MERS, CitiMortgage, and Fannie Mae; (2) quiet/try title action against Defendants Irwin, MERS, CitiMortgage, and Fannie Mae; (3) “void assignment” claim against Defendants Irwin, MERS, CitiMortgage; and (4) fraud against Defendants Irwin, MERS, CitiMortgage, and Fannie Mae. Dkt. 4. Plaintiff also seeks an automatic stay of the foreclosure sale and declaratory relief against Defendants MERS, CitiMortgage, and Fannie Mae to determine whether Defendants have filed forged and fraudulent documents in the public records in violation of Texas Civil Practice and Remedy Code §12.002(a) and a decree that Plaintiff owns the Property and is entitled to the quiet and peaceful possession of the Property and that Defendants have no interest in it.

Defendants have argued that Plaintiff’s petition fails to state a claim. Plaintiff has filed a response in opposition. Defendants argue that the Court should not consider Plaintiff’s response because it was filed after the deadline and because it asserts facts outside of the petition. The Court declines to strike the response as untimely. However, Plaintiff is cautioned that the Court is limited to the facts stated in Plaintiff’s petition to determine whether she has stated a claim. *Southwest Bell*

Tel. LP v. City of Houston, 529 F.3d 257, 263 (5th Cir. 2008).¹ The deadline to amend pleadings has passed, and the motion is ripe for resolution.

STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A claim will survive an attack under Rule 12(b)(6) if it "may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 1969, 167 L. Ed.2d 929 (2007). In other words, a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely "to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 563 n.8.

Although detailed factual allegations are not required, a plaintiff must provide the grounds of his entitlement to relief beyond mere "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. The complaint must be factually suggestive, so as to "raise a right to relief above the speculative level" and into the "realm of plausible liability." *Id.* at 555, 557 n.5. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570,

¹To the extent Plaintiff's response contains allegations that do not pertain to this case, the Court has disregarded them. *See, e.g.*, Dkt. 19 at 2-3 (referencing Property located in Aubrey rather than Pilot Point); Dkt. 19 at 6 (referencing "Defendants, Wells").

127 S. Ct. 1955). For a claim to have facial plausibility, a plaintiff must plead facts that allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). Therefore, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” *Id.* (internal quotations omitted).

ANALYSIS

Void Assignment

The Court first addresses Plaintiff’s “void assignment” claim as it forms the basis of much of Plaintiff’s complaint. Plaintiff argues that the June 30, 2011 assignment of the underlying security instrument was void because it was not recorded and because the individual executing it lacked authority to do so on behalf of MERS. Defendants argue that the Court should dismiss this claim. The Court agrees.

Primarily, as noted by Defendants, Texas does not recognize an independent cause of action for a “void assignment.” The Court further agrees that, even if otherwise construed, Plaintiff has not stated any claim in her challenge of the assignment.

The Deed of Trust, which names Plaintiff and her spouse as Borrowers and Irwin Mortgage Corporation as Lender, provides:

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (I) the repayment of the

Extension of Credit, and all extensions and modification of the Note and; (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, **with power of sale**, the following described Property....

Dkt. 4 at 27 (Exhibit C to Plaintiff's Petition, emphasis added). Plaintiff's petition also attaches the June 30, 2011 Assignment of Deed of Trust naming CitiMortgage, Inc. as the Assignee. Dkt. 4 at 44 (Exhibit E to Plaintiff's Petition).

Plaintiff does not challenge validity of the Deed of Trust and indeed relies on it in (and attaches it to) her petition. According to the June 30, 2011 Assignment of Deed of Trust attached to Plaintiff's petition, MERS, as nominee for Irwin Mortgage Corporation, grants, assigns and transfers over to CitiMortgage, Inc. all rights accrued and to accrue under the Deed of Trust to Plaintiff's Property. *See* Dkt. 4 at 44. The assignment is executed by Athena Salone Assistant Secretary of MERS and, according to Plaintiff's own Exhibit E, was recorded in the Denton County records on July 22, 2011. *See* Dkt. 4 at 43.

Simply stated, the plain language of document signed by Plaintiff and her spouse on May 31, 2005 grants MERS and its assigns the power of sale. As the Fifth Circuit has noted, "[n]umerous federal district courts have addressed [the] question, and each one to analyze Texas law has concluded that Texas recognizes assignment of mortgages through MERS and its equivalents as valid and enforceable...." *Martins v. BAC Home Loans Serv., L.P.*, 722 F. 3d 249, 253 (5th Cir. 2013). *See, e.g., Richardson v. CitiMortgage, Inc.*, 2010 WL 4818556, at *5 (E.D. Tex. 2010) (rejecting the plaintiff's attack on MERS, and noting that "[u]nder Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale")

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