IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOSEPH ABRUZZO, ET AL.	§	
	§	
V.	§	ACTION NO. 4:11-CV-735-Y
	§	
PNC BANK, N.A., ET AL.	§	

ORDER GRANTING MOTION TO DISMISS

Pending before the Court is Defendants' Motion to Dismiss (doc. 18), filed April 12, 2012. The Court GRANTS the motion.

I. BACKGROUND[1]

On July 20, 2004, Plaintiffs bought property located at 9144 River Falls Drive, Fort Worth, Texas ("the property"). To facilitate the purchase, Plaintiffs executed a promissory note in favor of First Franklin Financial Corporation ("First Franklin"). Payment of the note was secured by a deed of trust encumbering the property.

On April 26, 2010, First Franklin assigned the note and deed of trust to defendant Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates Series 2005-1 ("the trust"). The trust is governed by a pooling-and-servicing agreement, which establishes how the trust is set up, how its is managed, how it acquires its assets, and the date by which the trust must acquire its assets. On March 15, 2011, the trust transferred and assigned the deed of trust to defendant PNC Bank, N.A. ("PNC"). Defendant Select Portfolio Servicing, Inc. ("Select"), serviced the mortgage for PNC. At some point, Plaintiffs apparently defaulted on their repayment obligations, and Select began to attempt to accelerate the note and conduct a foreclosure

[1]These facts are derived from Plaintiffs' state-court petition. (Notice of Removal Ex. C-1.)

sale of the property.

On September 2, 2011, Plaintiffs filed a petition in a Texas state court against Defendants arguing that because the 2010 assignment to the trust was defective, the trust had no interest in the deed of trust or the note to assign to PNC. Plaintiffs raised claims for estoppel/declaratory judgment, to quiet title, and for "refund, fees and costs." Defendants removed the action to this Court and now seek dismissal of Plaintiffs' claims.

II. RULE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." This rule must, however, be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court. Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions). As a result, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The Court must accept as true all well pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *See id.* The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 556 (2007). In short,

a plaintiff must "nudge[] his claims across the line from conceivable to plausible." *Id.* at 570. This requires a plaintiff to establish more than a "sheer possibility" a defendant has acted unlawfully. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. DISCUSSION

Plaintiffs' claims rely solely on the theory that the assignment of Plaintiffs' mortgage from First Franklin to the trust was ineffective because it violated the pooling-and-servicing agreement. In short, Plaintiffs attack the process by which their mortgage was securitized. As argued by Defendants, Plaintiffs do not have standing to raise this type of challenge because they were not parties to the pooling-and-servicing agreement. *See Davis v. Bank of Am., N.A.*, No. 3:11-CV-3276-B, 2012 WL 2679452, at *3 (N.D. Tex. July 6, 2012) (Boyle, Dist. J.); *Metcalf v. Deutsche Bank Nat'l Trust Co.*, No. 3:11-CV-3014-D, 2012 WL 2399369, at *4 (N.D. Tex. June 26, 2012) (Fitzwater, C.J.); *see also Bittinger v. Wells Fargo Bank N.A.*, 744 F. Supp. 2d 619, 625-26 (S.D. Tex. 2010).

Plaintiffs acknowledge that they do not have standing to challenge the validity of the assignment to the trust and the trust's assignment to PNC based on alleged violations of the pooling-and-servicing agreement. (Resp. 4.) However, Plaintiffs argue they are not trying to invalidate the assignments but rather Defendants' rights to foreclose on the property. Plaintiffs' attempted distinction are mere semantic arguments. But even if Plaintiffs' arguments go outside an attempt to enforce the pooling-and-servicing agreement, they are, likewise, without merit. *See Kiggundu v. Mortg. Elec. Registration Sys.*, No. 4:11-1068, 2011 WL 2606359, at *4 (S.D. Tex. June 30, 2011). Defendants' dismissal arguments are apt and compel dismissal of Plaintiffs' claims. (Mot. 8-14; Reply 3-7.) Thus, Plaintiffs have failed to plead a plausible claim attacking the securitization

of the mortgage or their "flawed chain of title." (Notice of Removal Ex. C-1 at ¶ 17.)

Plaintiffs' claim to quiet title also is implausible. In seeking to quiet title in the property, Plaintiffs necessarily are challenging an adverse interest that impacts title and possession only indirectly. *See Florey v. Estate of McConnell*, 212 S.W.3d 439, 449 (Tex. App.—Austin 2006, pet. denied). A claim is sufficiently adverse if its assertion would cast a cloud on the owner's enjoyment of the property. *See Katz v. Rodriguez*, 563 S.W.2d 627, 629 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). To remove such a cloud, Plaintiffs must "allege right, title, or ownership in [themselves] with sufficient certainty to enable the court to see [they have] a right of ownership that will warrant judicial interference." *See Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied).

It appears that Plaintiffs allege the cloud on their title arises from their allegations of violations of the pooling-and-servicing agreement, rendering the assignments and subsequent foreclosure sale void. But as discussed above, Plaintiffs' theory is not plausible. *See Lamb v. Wells Fargo Bank, NA*, No. 3:12-CV-680-L, 2012 WL 1888152, at *4-5 (N.D. Tex. May 24, 2012) (Lindsay, Dist. J.). Thus, Plaintiffs have failed to raise a plausible claim to quiet title. Further, these claims are derivative of Plaintiffs' other claims that have been discussed and dismissed above, which would seem to foreclose any recovery raised in a quiet-title suit. *Cf. Richardson v. Wells Fargo Bank, N.A.*, ___ F. Supp. 2d ___, 2012 WL 2511169, at *13 (N.D. Tex. June 29, 2012) (trespass-to-try-title suit) (McBryde, Dist. J.).

Likewise, because Plaintiffs' claims under the Texas declaratory-judgment act are remedial or dependent on their other claims, it is not an independent cause of action. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (West 2008); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

IV. CONCLUSION

Plaintiffs have failed to state a plausible claim. Although Plaintiffs request leave to amend, Plaintiffs' claims are based on untenable theories rendering any amendment futile. Thus, the Court DENIES Plaintiffs' request to amend their claims. *See Lamb*, 2012 WL 1888152, at *6. Plaintiffs' claims are DISMISSED.

SIGNED July 30, 2012.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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