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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ross Chambers,
Plaintiff,
vs.
Wells Fargo Home Mortgage; Tiffany &
Bosco, P.A., et. al.,
Defendants.

No. CV 11-00957-PHX-FJM

ORDER

The court has before it plaintiff's motion for a preliminary injunction (doc. 2), Wells Fargo's response (doc. 19), and Wells Fargo's motion to dissolve the temporary restraining order (doc. 32). We also have before us Tiffany & Bosco's motion to dismiss (doc. 15), plaintiff's response (doc. 25), and Tiffany and Bosco's reply (doc.28). In addition we have, Wells Fargo's motion to dismiss (docs. 22 and 35)¹, plaintiff's response (doc. 24), and Wells Fargo's reply (doc. 28).

I. Background

This action concerns plaintiff's purchase of real property in Gilbert, Arizona on February 1, 2008. Plaintiff purchased the property after receiving a loan secured by a Deed of Trust from Shae Mortgage in the principal amount of \$185,415. On October 7, 2010, Shae

¹ Docs. 22 and 35 are the same document.

1 Mortgage, through MERS, assigned all beneficial interest under the Note and Deed of Trust
2 to Wells Fargo. Michael Bosco was then appointed as Successor Trustee pursuant to the
3 Deed of Trust. Around January 2010, plaintiff alleges that he began to experience certain
4 financial hardship and contacted Wells Fargo to inquire about a loan modification. After
5 being informed that loan modifications were only considered for delinquent homeowners,
6 plaintiff defaulted on his home loan in January 2010. On February 9, 2010, plaintiff was
7 placed on a temporary repayment plan which reduced his payments for three months, after
8 which a balloon payment was due. Plaintiff made the temporary payments but defaulted on
9 the balloon payment. To explain this default, plaintiff submitted a hardship letter to Wells
10 Fargo. Plaintiff alleges that Wells Fargo then instructed him that he would be granted a
11 permanent loan modification. On September 3, 2010, plaintiff received a letter from Wells
12 Fargo informing him that no loan modification would be granted. Plaintiff claims that Wells
13 Fargo miscalculated his debt to income ratio and improperly denied his modification,
14 although plaintiff fails to specify how the calculation was incorrect.

15 On October 7, 2010, plaintiff received a Notice of Trustee's Sale from the offices of
16 Tiffany & Bosco ordering the Trustee's sale for January 6, 2011. On November 1, 2010,
17 however, Wells Fargo offered plaintiff a Special Forbearance Agreement under which he
18 could pay a reduced loan payment for three months beginning on December 1, 2010.
19 Plaintiff eventually defaulted on this payment plan. Plaintiff alleges that he filed a Qualified
20 Written Request with "defendants," regarding improper fees in his "settlement statement."
21 However, plaintiff fails to specify what defendant he filed this with or when. Plaintiff claims
22 that defendants failed to respond and thus he is entitled to relief.

23 Plaintiff filed this action on May 13, 2011. The only defendants served are Tiffany
24 & Bosco and Wells Fargo. We heard plaintiff's motion for preliminary injunction on June
25 3, 2011. Since Wells Fargo was not present at the hearing we issued an order temporarily
26 staying the sale of the house pending our ruling on plaintiff's request for a temporary
27 restraining order (doc. 13). We address that motion and the ripe motions to dismiss now.

28 Plaintiff's complaint fails to specify what claims are asserted against what defendant.

1 Both Wells Fargo and Tiffany & Bosco move to dismiss the complaint pursuant to Rules 8,
2 9, 10, and 12(b)(6), Fed. R. Civ. P. Plaintiff's responses are substantially similar and non-
3 responsive. Instead, plaintiff objects to defendants' arguments, asserting that such
4 "affirmative defenses" are not at issue in a Rule 12(b)(6) motion but must be saved for
5 discovery and trial. Plaintiff misunderstands the purpose of a Rule 12(b)(6) motion to
6 dismiss. Such a motion properly may challenge the legal sufficiency of the complaint. See
7 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Defendants are well within
8 their authority to argue that the facts as pled fail to entitle plaintiff to relief as a matter of law.
9 We therefore deny plaintiff's motions for sanctions against both Wells Fargo and Tiffany &
10 Bosco. See docs. 24 and 25.

11 We next turn to whether the complaint satisfies the pleading standards. Rule 8(a),
12 Fed. R. Civ. P. requires a "short and plain statement of the claim showing that the pleader is
13 entitled to relief." Rule 10(b) requires a complaint to state its claims "in numbered
14 paragraphs, each limited as far as practicable to a single set of circumstances." This
15 complaint lacks numbered paragraphs and a short and plain statement of a claim. To the
16 contrary, it is a rambling narrative that requires both defendants and the court to sift through
17 conclusory allegations to discover what causes of action are at issue and against which
18 defendant. We construe plaintiff's complaint liberally, when evaluating it under the pleading
19 standards of Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937 (2009) and Bell Atl. Corp. v.
20 Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007). However, those pleading standards still
21 apply. See Hebbe v. Pliler, 627 F.3d 338, 341-42 (9th Cir. 2001) (applying Twombly
22 standard to pro se plaintiff). Plaintiff fails to meet these pleading standards and dismissal is
23 appropriate. Because plaintiff also fails to state any plausible claim for relief, we dismiss the
24 complaint on Rule 12(b)(6) grounds as well.

25 **II. Wells Fargo**

26 Plaintiff alleges claims for fraud, negligent misrepresentation, fraudulent concealment,
27 and conspiracy to commit fraud based on allegations that various individuals falsely induced
28 plaintiff to enter into a loan which he could not afford, concealed certain material facts about

1 that loan, and prior to closing, failed to make proper disclosures. Although Wells Fargo was
2 not involved at all in the loan origination, plaintiff claims that it is jointly and severally liable
3 for the original lender's fraud because it took over the loan and demands payments.
4 Defendants argue that it is not jointly and severely liable for the purported torts of Shae
5 Mortgage, or anyone else. The only possible false statements made by Wells Fargo, are its
6 alleged promises to modify plaintiff's loan. Wells Fargo argues that those claims, however,
7 are not pled with particularity and fail to entitle plaintiff to relief.

8 Plaintiff cannot hold Wells Fargo liable for the purported fraud committed by the
9 original loan company, real estate agent, or broker. Plaintiff's claims for joint and several
10 liability fail as a matter of law.² See Schayes v. BAC Home Loans Serv., No. CV-10-1893-
11 PHX-GMS, 2011 WL 2746322, * 2 (D. Ariz. July 15, 2011) (discussing how plaintiff's
12 various claims against the loan servicer were not plausible because the allegations all
13 concerned acts by the original lender). As for Wells Fargo's alleged promises to modify, the
14 complaint fails to state the nine elements required to plead common law fraud in Arizona.
15 Nielson v. Flashberg, 101 Ariz. 335, 338, 419 P.2d 514, 517 (1966). Plaintiff does not allege
16 who made the statements or damages. Having postponed the Trustee's Sale, plaintiff could
17 not have suffered damages. Absent an underlying claim for fraud, plaintiff cannot prevail
18 on his claim for conspiracy to commit fraud. Grisham v. Philip Morris USA, 403 F.3d 631,
19 635 (9th Cir. 2000). Accordingly, we dismiss these claims.

20 Plaintiff asserts claims for unjust enrichment and breach of the covenant of good faith
21 and fair dealing. The factual underpinnings of the fraud and the breach of the covenant
22 claims are undifferentiated. Similarly, plaintiff alleges that defendants were unjustly
23 enriched by inducing plaintiff to enter into an unaffordable loan and later securitizing that
24 loan. Such claims fail as a matter of law. Wells Fargo was not involved in the loan
25

26 ² Plaintiff's claim for intentional infliction of emotional distress against Wells Fargo
27 is also premised on a theory of joint and several liability. We dismiss this claim because
28 there are no allegations that Wells Fargo committed any extreme or outrageous conduct,
having not been involved in the loan origination.

1 origination so it could not have been unjustly enriched. As for the breach of the covenant
2 claim, the Note and Deed of Trust is the contractual agreement between plaintiff and Wells
3 Fargo. Plaintiff wholly fails to allege how Wells Fargo impaired plaintiff's right to "receive
4 the benefits which flow from their agreement or contractual relationship." See Rawlings v.
5 Apodaca, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). Plaintiff admits that he is in default
6 and points to no provision in either document which Wells Fargo has impaired. Dismissal
7 of these claims is granted.

8 Next, plaintiff alleges that Wells Fargo is liable for negligence because it breached a
9 general duty of care under the Truth in Lending Act ("TILA"), Home Ownership Equity
10 Protection Act ("HOEPA"), and the Real Estate Settlement Procedures Act ("RESPA") with
11 respect to plaintiff's loan transaction. This claim again fails because Wells Fargo was not
12 involved in the loan origination. See e.g., 12 U.S.C. § 2602 (stating that the term "creditor"
13 under TILA refers to a person . . . to whom the debt arising from the consumer credit
14 transaction is initially payable on the face of the evidence of indebtedness"). Moreover,
15 plaintiff's loan originated on February 1, 2008. Any negligence claims arising out of the loan
16 against any defendant are barred by the two year statute of limitations. A.R.S. § 12-542.

17 Many of plaintiff's other claims also are time barred. Plaintiff generally alleges
18 violations of the TILA and the HOEPA. Actions for damages under the TILA and the
19 HOEPA must be commenced within one year after the occurrence of the alleged violation.
20 See 15 U.S.C. § 1640(e); Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902 (9th Cir.
21 2003). Here, the loan originated over three years ago on February 1, 2008. Therefore, these
22 claims are time barred. Similarly, to the extent that plaintiff alleges a violation of RESPA
23 based on 12 U.S.C. §§ 2607-2608, it is time barred by the one year statute of limitations in
24 § 2614.

25 Plaintiff argues that his claims are subject to equitable tolling stemming from a
26 fiduciary duty and fraud. Wells Fargo is not, however, a fiduciary to plaintiff because there
27 is nothing indicating that their relationship is anything other than creditor and debtor. See
28 Valley Natl. Bank of Phoenix v. Elect. Dist. No. 4, 90 Ariz. 306, 316, 367 P.2d 655, 662

1 (1961) (stating that "the relationship between a Bank and an ordinary depositor, absent any
2 special arrangement, is that of debtor and creditor"). Nor does plaintiff plead any facts, other
3 than conclusory allegations, showing fraudulent concealment by Wells Fargo that would
4 have prevented him from discovering any wrongdoing. See Guerro v. Gates, 442 F.3d 697,
5 706-07 (9th Cir. 2006); see also Cervantes v. Countrywide Home Loans, Inc., No. CV 09-
6 571-PHX-JAT, 2009 WL 3157160, *4 (D. Ariz. Sept. 24, 2009) (dismissing a similar claim
7 for equitable estoppel).

8 Plaintiff alleges other violations of RESPA, including assertions that defendants
9 breached their duty to provide a response to plaintiff's qualified written request ("QWR").
10 Wells Fargo argues that plaintiff's alleged inquiry was not a QWR. Pursuant to 12 U.S.C.
11 § 2605(e)(1)(B), a QWR must be: 1) a written correspondence, other than notice on a
12 payment coupon or other payment medium supplied by the servicer, that 2) includes, or
13 otherwise enables the servicer to identify the name and account of the borrower; and 3)
14 includes a statement of the reasons for the borrower's belief that the account is in error or
15 provides sufficient detail to the servicer regarding other information sought. It must also be
16 related to the servicing of the loan, and plaintiff must allege actual damages. § 2605(e)(1)(A),
17 (f)(1).

18 Here, the purported QWR claimed that plaintiff's "settlement statement" did not
19 contain documentation to show that certain fees were forbidden, that the amounts were
20 reasonable, and that there was no markup by the lender. Such inquiries are not related to the
21 servicing of the loan, see § 2605(i)(e), nor does plaintiff include a statement showing how
22 the account is in error. Instead, plaintiff relies on conclusory statements to demonstrate a
23 RESPA violation. Dismissal is appropriate because no relief is available under RESPA.

24 Plaintiff also seems to allege that Wells Fargo violated the Fair Credit Reporting Act
25 ("FCRA"), 15 U.S.C. § 1681, by releasing false information and failing to provide certain
26 information such as credit scores, notices of adverse action, notices of risk-based pricing, and
27 Investigative Consumer Report disclosures. The complaint, however, lacks any allegations
28 about who allegedly furnished such false information, much less what the information was.

1 As for plaintiff's claims regarding failure to produce information, the complaint does not
2 specify how Wells Fargo was obligated to provide such notices or how plaintiff has been
3 damaged. Moreover, much of the information sought relates to plaintiff's loan origination,
4 of which Wells Fargo was not involved. Plaintiff simply lists certain provisions of the FCRA
5 and states that defendants, in general, violated them. Like many of the other claims, such
6 generalized allegations do not state plausible claims for relief.

7 Finally, we dismiss any and all other causes of action vaguely asserted throughout the
8 complaint. For example, plaintiff makes generalized and conclusory statements that by
9 securitizing the Note and Deed of Trust a "permanent cloud on the title of plaintiff's
10 property" was created. Complaint at 41. Or that the "Lender and Appraiser harmed Plaintiff
11 by violating the federal Racketeering Influenced and Corrupt Practice Act." Id. at 16.
12 Simply adding in one sentence accusations, devoid of any factual underpinnings or legal
13 theory, does not state a plausible claim for relief. The same holds true for plaintiff's
14 assertions that Wells Fargo, or Tiffany & Bosco, is incapable of foreclosing absent actual
15 possession of the note, that the Deed of Trust is invalid, or that defendants lack standing to
16 conduct a non-judicial foreclosure. The court has repeatedly held that such claims are legally
17 insufficient. See e.g., Diessner v. MERS, 618 F. Supp. 2d 1184, 1187-88 (D. Ariz. 2009).
18 We therefore dismiss all claims asserted against Wells Fargo with prejudice.

19 **III. Tiffany & Bosco**

20 Plaintiff makes various claims against Tiffany & Bosco in relation to its duties as
21 trustee. Tiffany & Bosco, however is simply a law firm and not the trustee. Instead, non-
22 party Michael A. Bosco, Jr., an attorney at Tiffany & Bosco, was appointed as the substitute
23 trustee. He is named in the complaint but has not been served. Because Tiffany & Bosco
24 is not the trustee, and therefore none of the allegations asserted against it are plausible, we
25 dismiss the claims with prejudice.

26 Even though Mr. Bosco has yet to be served, we would dismiss him pursuant to
27 A.R.S. § 33-807(E), which provides that "the trustee need only be joined as a party in legal
28 actions pertaining to a *breach of the trustee's obligations under this chapter or under the*

1 *deed of trust*. . . . If the trustee is joined as a party in any other action, the trustee is entitled
2 to be immediately dismissed" (emphasis added). Here, none of the allegations asserted
3 against Tiffany & Bosco contain allegations that it, or Mr. Bosco, breached its obligations
4 as trustee. The claims asserted against Tiffany & Bosco, rather, are the same claims asserted
5 against all defendants (fraudulent concealment, negligence, unjust enrichment, and breach
6 of the covenant of good faith and fair dealing). Accordingly, we dismiss all claims against
7 Tiffany & Bosco with prejudice.³

8 **IV. Conclusion**

9 Therefore, we dismiss plaintiff's complaint against Wells Fargo and Tiffany & Bosco
10 with prejudice because amendment would be futile. We note that plaintiff has failed to serve
11 any other defendant. The current complaint does not comply with Rule 8, 9, or 10, Fed. R.
12 Civ. P., and therefore we dismiss it against all defendants without prejudice.

13 Should plaintiff seek to bring a new amended complaint against the defendants that
14 have not been served, such as the original lender, he must file a motion for leave to file an
15 amended complaint by August 22, 2011. The motion must attach the proposed amended
16 complaint and must comply with Arizona Local Rules of Civil Procedure 15.1. Plaintiff must
17 also serve defendants in compliance with Rule 4(m), Fed. R. Civ. P.

18 Plaintiff is advised that we will not authorize the filing of an amended complaint that
19 is similar to the original. It must be a "short and plain statement of the claim showing that
20 the pleader is entitled to relief" and not simply based on conclusory allegations. It must state
21 claims, in numbered paragraphs, and specify which defendant it is asserted against. Plaintiff
22 shall not set forth claims that we have rejected already as insufficient as a matter of law.

23 Accordingly, **IT IS ORDERED GRANTING** Wells Fargo and Tiffany & Bosco's
24 motions to dismiss (docs. 22, 35, and 15) with prejudice, **GRANTING** Wells Fargo's motion
25 to dissolve the temporary restraining order (doc. 32), and **DENYING** plaintiff's motion for
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27 ³ We note that Tiffany & Bosco requests an award of attorneys' fees pursuant to § 33-
28 807(E). They must do so in a separate motion. See LRCiv. 54.2.

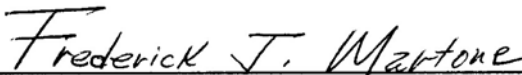
1 preliminary injunction (doc. 2). The temporary restraining order (doc. 13) is dissolved.

2 **IT IS FURTHER ORDERED** that plaintiff must seek leave of court to file an
3 amended complaint. If no such motion is filed by August 22, 2011, the Clerk is directed to
4 dismiss the case with prejudice in its entirety.

5 Finally, **IT IS ORDERED DENYING** the motion to strike (doc. 20), the motion for
6 discovery (doc. 27), and motion for summary disposition (doc. 33) as **MOOT**.

7 DATED this 22nd day of July, 2011.

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Frederick J. Martone
United States District Judge