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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA

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10 John L. Sweet, a married man,
11 Plaintiff,

No. CV-13-01251-PHX-GMS

ORDER

12 v.

13 JPMorgan Chase Bank, N.A., a New York
14 corporation,

15 Defendant.

16 Pending before the Court is Defendant JPMorgan Chase Bank's Motion to
17 Dismiss. (Doc. 8.) For the following reasons, the Motion is granted.

18 **BACKGROUND**

19 This case arises from the trustee sale of Plaintiff's real property after he defaulted
20 on a mortgage loan serviced by Defendant bank. Plaintiff and his wife purchased the
21 relevant real property ("Property") in Anthem, Arizona, on or about August 14, 2003.
22 (Doc. 1, ¶ 7.) Plaintiff and his wife received a mortgage loan to facilitate the purchase of
23 the Property. (*Id.*) On or about that same date, Plaintiff and his wife executed a
24 promissory note ("Note") in the amount of \$180,000, payable over 30 years to their
25 lender, and executed a Deed of Trust ("Deed") naming the Property as security for re-
26 payment of the Note. (*Id.* at ¶¶ 8–9.) Three months later, Plaintiff received written notice
27 that Defendant JP Morgan Chase ("Chase") had become the servicer of the mortgage loan
28 and that all payments were now due to them. (*Id.* at ¶ 10.)

1 Plaintiff made all payments on the loan to Chase until June 2008, when he fell
2 behind on his payments due to financial hardship. (*Id.* at ¶ 12.) On or about November
3 28, 2008, Chase initiated foreclosure proceedings on the property by causing the trustee
4 under the Deed of Trust to record a Notice of Trustee’s Sale, alleging that Plaintiff had
5 defaulted on the loan under the terms of the Note and Deed. (*Id.* at ¶ 13.) Pursuant to the
6 terms of the Deed, Plaintiff had the right to reinstate the loan by paying Defendant all
7 amounts in arrears and expenses incurred in enforcing the Deed on or before the period
8 specified under Arizona law. (*Id.* at ¶ 14.) According to Arizona law, Plaintiff had until
9 5:00 p.m. mountain standard time on the last day before the date of the sale of the
10 Property to tender the amounts required to reinstate the loan. Ariz. Rev. Stat. Ann. § 33-
11 813A.

12 Plaintiff alleges that on June 25, 2009, the day before the scheduled trustee sale on
13 June 26, 2009, he spoke with both the Trustee and Defendant and “clearly communicated
14 his intention to exercise the right of reinstatement.” (Doc. 1, ¶ 16.) However, it is
15 uncontested that Plaintiff did not actually pay any funds to Chase on that date. Instead,
16 Plaintiff asserts that he offered to immediately transfer all necessary funds for
17 reinstatement to Chase, but indicated that he preferred to pay with his pension fund using
18 funds that would become available for distribution on July 1, 2009. (*Id.* at ¶ 17.) He
19 claims that Chase agreed to accept the funds for reinstatement on July 1 and asked him to
20 fax proof that such funds would be available from his pension fund on that date. (*Id.*)
21 Plaintiff sent a fax to Chase on June 25 with documentation of the funds available in his
22 pension fund, to be paid out July 1. (Doc. 1-7.) Beyond this fax to Defendant that shows
23 Plaintiff was to receive funds from the pension fund on July 1, Plaintiff neither alleges
24 nor provides any evidence that his agreement from Chase to accept the reinstatement
25 after the deadline was ever put in writing.

26 On June 26, 2009, Chase proceeded to complete the foreclosure sale of the
27 Property as scheduled. (Doc. 1, ¶ 20.) Plaintiff now alleges that in going forward with
28 the sale despite the alleged verbal agreement to accept reinstatement payment after the

1 statutory deadline, Defendant breached both the mortgage contract and the covenant of
2 good faith and fair dealing implied in that contract. (Doc. 1, ¶¶ 21–33.) Plaintiff seeks
3 consequential damages. (*Id.* at ¶¶ 25, 33.) Defendant Chase moves to dismiss on the
4 grounds that Plaintiff waived his claims as a matter of law, or, in the alternative, that
5 Plaintiff fails to allege facts that state a cognizable claim. (Doc. 8.)

6 DISCUSSION

7 I. Legal Standard

8 Rule 12(b)(6) is designed to “test the legal sufficiency of a claim.” *Navarro v.*
9 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim
10 pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain more than
11 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action”;
12 it must contain factual allegations sufficient to “raise a right to relief above the
13 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a
14 complaint need not contain detailed factual allegations ... it must plead ‘enough facts to
15 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,
16 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has
17 facial plausibility when the plaintiff pleads factual content that allows the court to draw
18 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
19 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility
20 requires “more than a sheer possibility that a defendant has acted unlawfully.” *Twombly*,
21 550 U.S. at 555. Accordingly, a plaintiff must do more than employ “labels,”
22 “conclusions,” or a “formulaic recitation of the elements of a cause of action.” *Id.*

23 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
24 allegations of material fact are taken as true and construed in the light most favorable to
25 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,
26 legal conclusions couched as factual allegations are not given a presumption of
27 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
28 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.

1 1998).

2 **II. Statutory Waiver**

3 Under Arizona law, a trustor waives all defenses and objections to challenge the
4 validity of a trustee's sale that he did not raise in an action resulting in the issuance of
5 injunctive relief by 5:00 p.m. mountain standard time on the last business day before the
6 scheduled date of the sale. Ariz. Rev. Stat. Ann. § 33-811. Here, Plaintiff does not allege
7 he secured such relief. While Arizona state and federal courts have found the statute to
8 bar a variety of claims challenging the validity of a trustee's sale, it is unclear whether the
9 statute bars the claims here. For instance, in *Madison v. Groseth*, the Plaintiff attempted
10 to challenge the scheduled trustee's sale of her home, but she did not secure the
11 injunction required to preserve later claims under the statute. 230 Ariz. 8, 10–11, 279
12 P.3d 633, 635–36 (Ct. App. 2012). After the sale was complete, she brought an action
13 against the purchasers of her property for various tort claims, premised on her continued
14 assertion that the trustee's sale had been invalid. *Id.* There, the Arizona Court of Appeals
15 affirmed the trial court's decision that Madison's tort claims were barred by the statutory
16 waiver. In that case, Madison's claims were based on alleged deficiencies of the trustee's
17 sale that she could have asserted, and actually did assert, before the date of the sale. As
18 such, her only way to preserve her claims under the statute was to secure an injunction by
19 5:00 p.m. on the day before the sale. She did not succeed in doing so, and thus her later
20 claims premised on the validity of the sale were barred.

21 Here, Plaintiff had no such claims before the date of the sale. As of the day before
22 the sale, he claimed to be under the impression that Chase had agreed to wait for
23 reinstatement payment until July 1. He arguably had no basis on which to seek an
24 injunction before the statutory deadline. Instead, Plaintiff's current claims did not
25 actually arise until the sale occurred despite the alleged agreement. Plaintiff's claims are
26 thus distinguishable from those barred in *Madison*. However, the Court need not decide
27 this issue as Plaintiff fails to state any cognizable claim.

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1 **III. Breach of Contract**

2 Plaintiff alleges that Defendant breached the terms of the mortgage contract by
3 failing to reinstate the loan and by failing to honor the alleged agreement under which
4 Plaintiff would pay the necessary funds by July 1. (Doc. 1, ¶ 23.) Pursuant to the Deed of
5 Trust, a borrower could reinstate the loan after acceleration if he met certain conditions
6 by either a deadline imposed in the Deed or in applicable law. (Doc. 1-5 at § 19.) These
7 conditions include that the borrower “pays Lender all sums which would then be due
8 under this Security Instrument and the Note as if no acceleration had occurred” and pay
9 other expenses incurred in enforcing the Note. (*Id.*) As described above, the applicable
10 deadline for meeting these conditions under state law was by 5:00 p.m. on June 25, the
11 last business day before the scheduled trustee’s sale on June 26. Here, Plaintiff alleges
12 that Defendant breached the contract by failing to reinstate the loan. However, Plaintiff
13 does not allege that he ever paid Defendant any of the money required to entitle him to
14 reinstatement. Instead, he suggests that he “indicated that he was ready, willing, and able
15 to pay all amounts due and owing” by the deadline. (Doc. 1, ¶ 16.) He claims he also
16 “expressed a preference” to pay using funds from his pension fund that would be
17 available on July 1, after the deadline. (*Id.* at ¶ 17.) Looking only to the contract as
18 written, Plaintiff did not meet the conditions to receive reinstatement simply by offering
19 to pay or saying he could pay. Plaintiff therefore fails to allege facts that could constitute
20 a breach of the contract.

21 Next, Plaintiff alleges that Chase agreed to modify the loan agreement to accept
22 reinstatement payment after the statutory deadline and that Chase then breached the
23 contract as modified by going forward with the trustee’s sale. Plaintiff does not assert that
24 this alleged modification was ever memorialized in writing. He provides the Court with a
25 fax dated June 26, 2009, that he alleges he sent to Chase the day before the sale that
26 shows he provided Chase with documentation that he was to have funds available from
27 his pension fund on July 1, 2009. (Doc. 1-7.) A cover sheet attached to the documentation
28 states, “I confirmed yesterday with Safeway Benefits Service Center, that my lump sum

1 distribution request was received, and will be distributed as requested on the earliest
2 possible date, which is July 1, 2009.” (Doc 1-7 at 1.) While this could imply that Plaintiff
3 was under the impression that Chase would be interested in this information or had even
4 requested the information, the fax does not actually mention any agreement between the
5 parties. Plaintiff does not allege that the agreement was otherwise described in any
6 writing. The Arizona statute of frauds states that “[n]o action shall be brought in any
7 court in the following cases unless the promise or agreement upon which the action is
8 brought, or some memorandum thereof, is in writing and signed by the party to be
9 charged ...[u]pon an agreement... for the sale of real property or an interest therein.”
10 Ariz. Rev. Stat. Ann. §§ 44-101, 44-101(6). A mortgage is an interest in real property for
11 purposes of the statute of frauds. *Fremming Const. Co. v. Sec. Sav. & Loan Ass’n*, 115
12 Ariz. 514, 516, 566 P.2d 315, 317 (Ct. App. 1977). The same goes for any modification
13 of the terms of a mortgage loan. *See Diaz-Amador v. Wells Fargo Home Mortgages*, 856
14 F.Supp.2d 1074, 1080 (D. Ariz. 2012); *Best v. Edwards*, 217 Ariz. 497, 176 P.3d 695 (Ct.
15 App. 2008); *Executive Towers v. Leonard*, 439 P.2d 303 (Ariz. Ct. App. 1968). As such,
16 both the mortgage loan and alleged modification of that loan fall within the statute of
17 frauds.

18 In order for Plaintiff to enforce the agreement against Defendant, he would need a
19 writing describing the agreement, signed by Defendant. As Plaintiff has neither provided
20 such a document nor alleged that such a document exists, he cannot establish a breach of
21 this agreement as the agreement was never legally binding.

22 **IV. Breach of the Covenant of Good Faith**

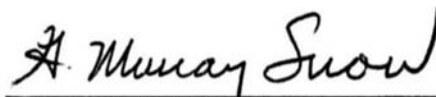
23 Plaintiff next alleges that Defendant breached the covenant of good faith and fair
24 dealing by “disregarding its undertaking to accept reinstatement on the agreed terms and
25 treating the Plaintiff in the same manner as if he had not tendered performance of the
26 reinstatement obligations at all.” (Doc. 1, ¶ 29.) As explained above, Plaintiff does not
27 allege that he ever met the written contract’s requirements to actually pay the amounts
28 due in order to receive reinstatement. Further, any alleged oral modification of these

1 requirements was never legally binding under the statute of frauds.

2 A breach of the duty of good faith can occur only if Defendant did something “to
3 prevent [Plaintiff] from receiving the benefits and entitlements of the agreement.” *Wells*
4 *Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension*
5 *Fund*, 201 Ariz. 474, 490, 38 P.3d 12, 28 (2002). Here, Defendant had no obligation to
6 reinstate the loan because Plaintiff never met the required conditions. Without such an
7 obligation, there can be no breach. Therefore,

8 **IT IS ORDERED** that Defendant’s Motion to Dismiss (Doc. 8) is **granted**. The
9 Clerk of Court is directed to terminate this action and enter judgment accordingly.

10 Dated this 12th day of November, 2013.

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14 G. Murray Snow
15 United States District Judge
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