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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES P. BARAJAS,)	Case No. CV 10-07961 DDP (AGRx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS' MOTION
)	TO DISMISS
v.)	
)	
COUNTRYWIDE HOME LOANS,)	[Motion filed on 3/28/11]
INC.; BANK OF AMERICA, NA;)	
MORTGAGE ELECTRONIC)	
REGISTRATIONS SYSTEMS, INC.,)	
)	
Defendants.)	
_____)	

Presently before the court is the Motion to Dismiss filed by defendants Countrywide Home Loans, Inc. ("Countrywide"), BAC Home Loans Servicing, LP ("BAC"), and Mortgage Electronic Registration Systems, Inc. ("MERS"). Having considered the parties' moving papers and heard oral argument, the court grants the motion and adopts the following order.

I. Background

In 2007, Plaintiff obtained a loan from defendant Countrywide and purchased real property at 6847 Thornlake Avenue, Whittier, California 90606. (First Amended Complaint ("FAC") ¶¶ 14-15). Plaintiff executed a Promissory Note in favor of Countrywide and

1 made a Trust Deed listing Countrywide as "Lender" and MERS as
2 "nominee for lender" and "beneficiary."¹ (FAC ¶¶ 18- 19).

3 Plaintiff later learned that BAC was the successor in interest to
4 the Note and servicer of Plaintiff's loan. (FAC ¶¶ 19, 92).

5 Sometime in 2008, Plaintiff began experiencing economic
6 difficulties and sought to renegotiate the terms of his loan. (FAC
7 ¶¶ 90-91). Plaintiff alleges that BAC representatives led him to
8 believe that he "would likely qualify" for a loan modification.
9 (FAC ¶ 94). Plaintiff's requests for a loan modification were
10 ultimately denied. (FAC ¶¶ 96, 99).

11 Plaintiff alleges that he does now know who currently owns his
12 note. (FAC ¶ 64). Through this action, Plaintiff seeks to
13 "prevent the improper taking and/or foreclosure of his family home"
14 and "to establish whom 'owns the debt' secured by the Plaintiff's
15 Trust Deed and who has the right to notice a default and
16 foreclose." (FAC ¶ 4). In his First, Fourth, and Fifth claims
17 (collectively, the "foreclosure claims"), Plaintiff seeks (1) a
18 declaration that no defendant has authority to foreclose, (2) to
19 quiet title against Countrywide, and (3) damages for BAC's alleged
20 breach of the implied covenant of good faith and fair dealing in
21 connection with its acquisition of Plaintiff's debt and authority
22 to foreclose. Plaintiff's Second and Third Claims (collectively,
23 the "misrepresentation claims") allege misrepresentation against
24 BAC in connection with Plaintiff's attempts to obtain a loan
25 modification. Defendants now move to dismiss all claims.

26
27 ¹ Plaintiff has not attached any exhibits to his First Amended
28 Complaint or Opposition to Defendants' Motion for Summary Judgment.

1 **II. Discussion**

2 A. Wrongful Foreclosure Claims

3 Defendants argue that Plaintiff's foreclosure claims must be
4 dismissed for failure to allege ability to tender. (Motion at 3).
5 The court agrees. "When a debtor is in default of a home mortgage
6 loan, and a foreclosure is either pending or has taken place, the
7 debtor must allege a credible tender of the amount of the secured
8 debt to maintain any cause of action for wrongful foreclosure."
9 Alicea v. GE Money Bank, 2009 WL 2136969 *3 (N.D. Cal. 2009). The
10 tender requirement spares courts from being called upon to "order a
11 useless act performed" in cases where plaintiffs would be unable,
12 even under proper sale procedures, to redeem a property. FPCI RE-
13 HAB 01 v. E & G Investments, Ltd., 207 Cal.App.3d 1018, 1021-22
14 (1989).

15 Plaintiff correctly points out that district courts need not
16 dismiss all foreclosure cases as a matter of law for failure to
17 plead ability to tender. (Opposition at 5). For example, a trial
18 court has discretion to apply the tender requirement where
19 plaintiffs seek to rescind a loan under the Truth in Lending Act,
20 15 U.S.C. § 1625(b). Yamamoto v. Bank of New York, 329 F.3d 1167,
21 1171 (9th Cir. 2003); Del Valle v. Mortgage Bank of Col., 2010 WL
22 1813505 at *6, 9 (E.D. Cal. 2010).²

23 Nor is tender required when plaintiffs bring suit under
24 California Civil Code section 2923.5. Das v. WMC Mortgage Corp.,
25 2010 WL 4393885 *2 (N.D. Cal. 2010). Section 2923.5 requires loan
26

27 ² Notably, both the Yamamoto and Del Valle courts did apply
28 the tender requirement. Yamamoto, 329 F.3d at 1173; Del Valle,
2010 WL 1813505 *12.

1 holders to contact borrowers to "assess the borrower's financial
2 situation and explore options for the borrower to avoid
3 foreclosure."³ Cal. Civ. Code § 2923.5(a)(2). As the Das court
4 observed, voiding a foreclosure for failure to comply with Section
5 2923.5 would not be futile, even absent ability to tender, because
6 the very purpose of Section 2923.5 is to facilitate loan
7 modifications, avoid foreclosure, and thus obviate the need for the
8 plaintiff to redeem the property. Das, 2010 WL 4393885 * 3.

9 Here, however, Plaintiff has not raised a California Civil
10 Code section 2923.5 claim or a TILA claim. Though Plaintiff
11 contends in his opposition that he is "not seeking to set aside the
12 foreclosure sale," that assertion is flatly contradicted by
13 Plaintiff's complaint, which states that Plaintiff seeks to
14 "prevent the improper taking and/or foreclosure of his family
15 home." (FAC ¶ 4). To maintain his wrongful foreclosure action,
16 Plaintiff must allege ability to tender. Accordingly, Plaintiff's
17 First, Fourth, and Fifth claims are dismissed, with leave to amend.

18 B. Misrepresentation Claims

19 Defendants argue that Plaintiff's misrepresentation claims
20 should be dismissed for failure to comply with Federal Rule of
21 Civil Procedure 9(b). The court agrees. To comply with Rule 9(b),
22 a complaint alleging misrepresentation must state the time, place,
23 and content of misrepresentations, as well as the misrepresenting
24 parties. Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir.
25 2010). The complaint must be sufficiently specific "to give
26 defendants notice of the particular misconduct so that they can

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28 ³ Section 2923.5 became effective January 1, 2010.

1 defend against the charge." Id. (quotation, alteration, and
2 citation omitted).

3 Plaintiff does not plead his misrepresentation claims with
4 sufficient detail. Plaintiff alleges that "[i]n or about 2008" an
5 unknown representative of BAC told Plaintiff he "likely qualified
6 for a loan modification." (FAC ¶ 93). Plaintiff alleges that he
7 was approved for a trial modification, but that ultimately his
8 modification request was denied. (FAC ¶¶ 95-96). BAC later told
9 Plaintiff that he "might be eligible" for a modification, then
10 again denied his request. (FAC ¶ 98-99). Plaintiff alleges that
11 BAC provided false information (FAC ¶ 134), but does not specify
12 which of BAC's statements were false. Plaintiff's complaint
13 provides no information about the size or terms of his loan, let
14 alone payment history, while making bare assertions that BAC never
15 intended to grant Plaintiff a loan modification . (FAC ¶ 123).
16 Plaintiff's allegations are not sufficiently particular to satisfy
17 Rule 9(b), and are therefore dismissed with leave to amend.

18 **III. Conclusion**

19 For the reasons stated above, Defendants' Motion to Dismiss is
20 granted with respect to all claims, with leave to amend.
21 Therefore, the plaintiff has 20 days from the date of this order to
22 file a Second Amended Complaint. Failure to respond to the Court's
23 Order may result in the dismissal of the action.

24 IT IS SO ORDERED.

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26 Dated: May 24, 2011

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DEAN D. PREGERSON
United States District Judge