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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DENNIS R. LARKIN,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

1:09-CV-01280-OWW-DLB

MEMORANDUM DECISION ON
DEFENDANTS' MOTION TO
DISMISS (Doc. 5)

I. INTRODUCTION

Before the court for decision is Defendant Select Portfolio Servicing, Inc.'s motion to dismiss Plaintiff's Complaint for failure to state a claim or, alternatively, for a more definite statement. Plaintiff Dennis R. Larkin, proceeding pro se, did not oppose the motion.

II. BACKGROUND

This matter involves a dispute between Plaintiff Dennis R. Larkin ("Larkin") and Defendant Select Portfolio Servicing, Inc. ("SPS"), a residential mortgage servicing company headquartered in Salt Lake City, Utah. The dispute concerns a mortgage loan obtained by Plaintiff on real property located at 6627 West Morris Avenue, Fresno, California. According to the complaint, SPS serviced the mortgage and was unresponsive to Plaintiff's attempts

1 to avoid delinquency and obtain an "in-house loan modification."

2 On June 2, 2009, Plaintiff filed the instant action in the
3 Superior Court of California, County of Fresno, alleging four
4 causes of action: (1) Non-Compliance; (2) Violation of California
5 Civil Code 1288; (3) Breach of Fiduciary Duty; and (4) Legal True
6 Beneficiary. Plaintiff seeks to recover costs of suit and a
7 "declaration that the Defendant must produce a copy of the
8 servicing agreement to identify the true beneficiary." Plaintiff
9 also requests preliminary and permanent injunctions to prevent
10 Defendant "from foreclosing on Plaintiff's home or from conducting
11 a trustee's sale or causing a trustee's sale to be conducted
12 relative to Plaintiff's home."

13 On July 22, 2009, this case was removed on the basis of
14 federal question jurisdiction. The notice of removal asserts that
15 Plaintiff's action is founded on claims arising under federal laws,
16 including the Federal Fair Debt Collection Practices Act, 15 U.S.C.
17 § 1692, *et seq.* Alternatively, the notice provides that removal is
18 proper because "this is a civil action between citizens of
19 different states and the manner [sic] in controversy exceeds the
20 sum of \$75,000."

21 Defendant filed this motion on July 27, 2009. Plaintiff did
22 not oppose the motion.

23
24 **III. LEGAL STANDARD**

25 Defendant SPS attacks Plaintiff's claims as incognizable and
26 lacking necessary elements and factual allegations. Under Federal
27 Rule of Civil Procedure 12(b)(6), a motion to dismiss can be made
28 and granted when the complaint fails "to state a claim upon which

1 relief can be granted." Dismissal under Rule 12(b)(6) is
2 appropriate where the complaint lacks a cognizable legal theory or
3 sufficient facts to support a cognizable legal theory. *Balistreri*
4 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

5 To sufficiently state a claim for relief and survive a
6 12(b)(6) motion, a complaint "does not need detailed factual
7 allegations" but the "[f]actual allegations must be enough to raise
8 a right to relief above the speculative level." *Bell Atl. Corp. v.*
9 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
10 Mere "labels and conclusions" or a "formulaic recitation of the
11 elements of a cause of action will not do." *Id.* Rather, there
12 must be "enough facts to state a claim to relief that is plausible
13 on its face." *Id.* at 570. In other words, "[t]o survive a motion to
14 dismiss, a complaint must contain sufficient factual matter,
15 accepted as true, to state a claim to relief that is plausible on
16 its face." *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949,
17 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "The
18 plausibility standard is not akin to a probability requirement, but
19 it asks for more than a sheer possibility that a defendant has
20 acted unlawfully. Where a complaint pleads facts that are merely
21 consistent with a defendant's liability, it stops short of the line
22 between possibility and plausibility of entitlement to relief."
23 *Id.* (internal citation and quotation marks omitted).

24 In deciding whether to grant a motion to dismiss, the court
25 must accept as true all "well-pleaded factual allegations." *Iqbal*,
26 129 S.Ct. at 1950. A court is not, however, "required to accept as
27 true allegations that are merely conclusory, unwarranted deductions
28 of fact, or unreasonable inferences." *Sprewell v. Golden State*

1 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*
2 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at *3 (9th
3 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart
4 exercised control over their day-to-day employment is a conclusion,
5 not a factual allegation stated with any specificity. We need not
6 accept Plaintiffs' unwarranted conclusion in reviewing a motion to
7 dismiss.").

8 The Ninth Circuit has summarized the governing standard, in
9 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint
10 to survive a motion to dismiss, the non-conclusory factual content,
11 and reasonable inferences from that content, must be plausibly
12 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
13 *U.S. Secret Service*, 572 F.3d 962, 2009 WL 2052985, at *6 (9th Cir.
14 July 16, 2009) (internal quotation marks omitted).

15 16 IV. DISCUSSION

17 A. Non-Compliance (Count I)

18 The complaint's first claim alleges that Defendant was "non-
19 complaint" because it "refused to negotiate in good faith [and] a
20 proper assessment by the Defendant would have shown the Plaintiffs
21 financial situation prohibits him from committing to any increase
22 of the current mortgage." The complaint alleges that this conduct,
23 Defendant's purported failure to negotiate in good faith, violated
24 California Civil Code §§ 2823.6(b), 2923.6, 2924b(b)1, and
25 2924b(b) (2).¹ Defendant moves to dismiss Plaintiff's first claim

26
27 ¹ It appears Plaintiff intended to bring his claim under
28 California Civil Code § 2923.6(b), not § 2823.6(b). Section
2823.6(b) is not part of California's Civil Code. Plaintiff also

1 because "[b]eyond mere recitation of the section number and text of
2 the statute, Plaintiff fails to state any facts in support of the
3 purported violations." Defendant is correct.

4 Defendant observes the absence of any factual allegations to
5 identify a violation of §§ 2823.6(b), 2923.6, 2924b(b)1, and
6 2924b(b)2. For example, to support a violation of §§ 2924b(b)1 and
7 2924b(b)2, which set forth the notice requirements for a "Notice of
8 Default" and "Notice of Sale," the complaint alleges only that
9 Defendant "did not comply" with §§ 2924b(b)1 and 2924b(b)2. No
10 other facts are alleged. The complaint does not allege Defendant
11 participated in the notice of default or notice of trustee sale;
12 the complaint also fails to identify who issued and recorded the
13 notice of default, if it occurred. Under *Iqbal*, because the
14 complaint does not include a single factual allegation that
15 Defendant was the "person or party authorized to record the notice
16 of default or the notice of sale," the claim does not provide
17 sufficient allegations for a viable claim under § 2924b(b)1 or §
18 2924b(b)2.

19 The same is true as to the remaining allegations of the first
20 claim. Section 2923.6 states that a loan servicer acts in the best
21 interests of the all parties if it agrees to or implements a loan
22 modification where the (1) loan is in payment default, and (2)
23 anticipated recovery under the loan modification or workout plan
24 exceeds the anticipated recovery through foreclosure on a net
25 present value basis. Section 2923.6(b), states that "it is the
26 intent of the Legislature that the mortgagee, beneficiary, or

27 _____
28 sets forth the text of § 2923.6(b) in his complaint.

1 authorized agent offer the borrower a loan modification or workout
2 plan if such a modification or plan is consistent with its
3 contractual or other authority." Although the complaint references
4 Plaintiff's attempts to "mediate" and/or "negotiate," it fails to
5 specify how Defendant's purported conduct is actionable under §§
6 2923.6 and 2923.6(b). There are no facts bearing on Defendant's
7 failure to "act in the best interest of the parties" or whether
8 Defendant's loan modifications, if they occurred, triggered §
9 2923.6. The complaint is equally silent to how and why Defendant's
10 purported conduct violated the "legislative intent" enumerated in
11 § 2923.6(b).

12 A claim is plausible only "when the plaintiff pleads factual
13 content that allows the court to draw the reasonable inference that
14 the defendant is liable for the misconduct alleged." *Iqbal*, 129
15 S.Ct. 1937, 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
16 544, 570.). The complaint's first claim for non-compliance does
17 not meet this burden. The motion to dismiss is GRANTED.

18
19 B. Violation of California Civil Code § 1788 (Count II)

20 The complaint's second claim alleges that "Defendants violated
21 the Rosenthal Act [and] 15 U.S.C.A. 1962d by engaging in conduct
22 the natural consequence of which is to harass, oppress, and abuse
23 persons in connection with the collection of an alleged debt."
24 Although unclear, the complaint appears to allege that Defendant
25 engaged in abusive debt collection practices in violation of
26 federal and state laws regulating debt collection. In this
27 context, however, the complaint's second claim fails for the same
28 reasons as its first, namely that Plaintiff has not pled any facts

1 that would even suggest that Defendant engaged in unlawful debt
2 collection practices.

3 Although the complaint alleges that Defendant used "unfair or
4 unconscionable means to collect a debt," these are conclusions of
5 law. Plaintiff has not alleged one fact concerning the frequency,
6 timing, or methods of Defendant's debt collection practices - or
7 even that it was a "debt collector." The only debt collection
8 "fact" asserted against Defendant is that "Plaintiff has not
9 received any communication regarding the loan modification or work
10 out plan," which is not indicative of improper debt collection
11 practices under either federal or state debt collection statutes.
12 In addition, the complaint's allegations that Defendant "used
13 deceptive means" to collect a debt are conclusory and severely
14 underdeveloped. There is not one fact to indicate how or in what
15 matter Defendant regularly engaged in the challenged practice.

16 It also appears that Defendant is not a "debt collector"
17 under the federal Fair Debt Collection Practices Act ("FDCPA"), 15
18 U.S.C. §§ 1692, et seq. FDCPA regulates only "debt collectors."
19 *See 15 U.S.C. §§ 1692(e)-(f)*. "Debt collector" is defined as "any
20 person who uses any instrumentality of interstate commerce or the
21 mails in any business the principal purpose of which is the
22 collection of any debts, or who regularly collects or attempts to
23 collect, directly or indirectly, debts owed or due or asserted to
24 be owed or due another." § 1692a(6). "Debt Collector" does not
25 include persons who collect debt "to the extent such activity ...
26 (ii) concerns a debt which was originated by such person; [or]
27 (iii) concerns a debt which was not in default at the time it was
28 obtained by such person" § 1692a(6)(F). FDCPA's definition of

1 debt collector "does not include the consumer's creditors, a
2 mortgage servicing company, or any assignee of the debt, so long as
3 the debt was not in default at the time it was assigned." *Perry v.*
4 *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985). Nothing in
5 the complaint suggests that Defendant is a "debt collector" under
6 the FDCPA. Plaintiff's allegations do not trigger the FDCPA.

7 The complaint's second claim neither identifies Defendant as
8 a "debt collector" nor that Defendant's purported wrongs violate
9 any federal or state debt collection statutes. While Rule 8 does
10 not demand detailed factual allegations, "it demands more than an
11 unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*,
12 129 S.Ct. 1937, 1949. "Threadbare recitals of the elements of a
13 cause of action, supported by mere conclusory statements, do not
14 suffice." *Id.* The complaint's second claim states no cognizable
15 claim and is DISMISSED.

16 17 C. Breach of Fiduciary Duty (Count III)

18 The complaint's breach of fiduciary duty claim alleges that
19 Defendant breached its fiduciary duty by "plac[ing] themselves in
20 a position of great trust by virtue of expertise represented by and
21 through its employees [and] act[ing] and continu[ing] to act for
22 their own benefit and to the detriment of Plaintiff."

23 Fatal to Plaintiffs' fiduciary duty claim is the absence of a
24 fiduciary duty between lender and borrower. "The relationship
25 between a lending institution and its borrower-client is not
26 fiduciary in nature." *Nymark*, 231 Cal. App. 3d at 1093, n. 1
27 (citing *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476-478
28 (1989)). A commercial lender is entitled to pursue its own

1 economic interests in a loan transaction. *Nymark*, 231 Cal. App. 3d
2 at 1093, n. 1 (citing *Kruse v. Bank of America*, 202 Cal. App. 3d
3 38, 67, 1988)). Absent "special circumstances" a loan transaction
4 is "at arms-length and there is no fiduciary relationship between
5 the borrower and lender." *Oaks Management*, 145 Cal. App. 4th at
6 466 ("the bank is in no sense a true fiduciary").

7 "[T]o plead a cause of action for breach of fiduciary duty,
8 there must be shown the existence of a fiduciary relationship, its
9 breach, and damage proximately caused by that breach. The absence
10 of any one of these elements is fatal to the cause of action."
11 *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1101 (1991).

12 Here, the complaint fails to demonstrate existence of a
13 fiduciary duty. In the absence of alleged special circumstances
14 and a legal duty owed by Defendant, the breach of fiduciary duty
15 claim fails. Defendant's motion to dismiss the breach of fiduciary
16 claim is GRANTED.

17
18 D. Legal True Beneficiary (Count IV)

19 The complaint's fourth claim is comprised of one paragraph
20 entitled "Legal True Beneficiary":

21 The proper true beneficiary has not be identified,
22 Plaintiff has requested documentation that
23 demonstrates the Defendant is the true beneficiary,
24 this request includes all transfers and proper
recording of those transfers and a copy of the
25 Defendants servicing agreement that will outline all
rights and authorities given to the defendants.

26 (Compl. 7:5-7:11.)

27 The complaint's fourth cause of action for "Legal True
28 Beneficiary" requests "documentation" demonstrating that Defendant

1 is the true beneficiary. It also requests all transfers, the
2 proper recording of such transfers, and copies of the servicing
3 agreements. Defendant correctly notes that this claim merely
4 states a request for relief, not a cause of action. It fails for
5 that reason. It also fails because it appears to be premised on
6 the complaint's other flawed claims. The fourth claim is
7 DISMISSED.

8
9 E. Attempt At Amendment

10 Plaintiff's claims are incognizable or barred as a matter of
11 law. Plaintiff is unable to cure his claims by allegation of other
12 facts and thus is not granted an attempt to amend. Defendant
13 Select Portfolio Servicing, Inc.'s motion is GRANTED WITH
14 PREJUDICE.

15
16 F. Motion For a More Definite Statement

17 Defendant, in the alternative, moves for a more definite
18 statement under Fed. R. Civ. Proc. 12(e) on grounds that the
19 complaint consisted of "conclusive statements which are not enough
20 to state a claim for relief." Any issues concerning sufficiently
21 pled causes of action have been addressed in the 12(b)(6) analysis
22 above. Defendant's alternative motion for more definite statement
23 is MOOT.

24
25 V. CONCLUSION.

26 For the reasons stated:

27 (1) The action against Select Portfolio Servicing, Inc. is
28 DISMISSED with prejudice.

1 Defendant Select Portfolio Servicing, Inc. shall submit a form
2 of order consistent with, and within five (5) days following
3 electronic service of, this memorandum decision.

4 IT IS SO ORDERED.

5 **Dated: October 21, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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