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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TERRENCE TAYLOR,

Plaintiff,

v.

CITIMORTGAGE, INC.; NATIONAL
DEFAULT SERVICING
CORPORATION; and DOES 1 through
20, inclusive,

Defendants.

No. 1:17-cv-01231-DAD-JLT

ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS

(Doc. No. 35)

This matter is before the court on defendants’ motion to dismiss. (Doc. No. 19.) On August 7, 2018, that motion came before the court for hearing. Attorney Michael Avanesian appeared on behalf of plaintiff Terrence Taylor. Attorney Matthew Nazareth appeared on behalf of defendant CitiMortgage, Inc. (“CitiMortgage”). Attorney Robert P. Zahradka appeared on behalf of defendant National Default Servicing Corporation (“NDSC”). All parties appeared telephonically. Having reviewed the parties’ briefing and heard arguments, and for the reasons that follow, defendants’ motion to dismiss will be granted.

BACKGROUND

In his second amended complaint, plaintiff alleges as follows. Plaintiff resides at 6301 Phyllis Street, Bakersfield, California, the property which is the subject of this suit (hereinafter the “property”). (Doc. No. 34 (“SAC”) at ¶ 1.) Plaintiff’s mother Beverly Hicks (“Hicks”)

1 purchased the property on or around September 9, 1991, and it was her primary residence until
2 her death on August 7, 2016. (*Id.* at ¶ 11.) On or about January 28, 1992, Hicks obtained a loan
3 secured by the property in the amount of \$92,000, and concurrently executed a deed of trust as
4 security for the loan. (*Id.* at ¶ 12.) That deed was recorded in the Kern County Recorder’s Office
5 on January 31, 1991.¹ (*Id.*) The named trustee in the deed of trust was Stan-Shaw Corporation,
6 while the named lender and beneficiary in the deed of trust was Directors Mortgage Loan
7 Corporation. (*Id.*) Interest in the deed of trust was thereafter assigned to various parties; as of
8 May 3, 2017, defendant CitiMortgage was the beneficiary of the deed of trust, while defendant
9 NDSC was the trustee. (*Id.* at ¶¶ 13–21.)

10 On or about June 6, 2017, defendant NDSC executed a Notice of Default (the “NOD”)
11 and Election to Sell Under Deed of Trust, which was recorded in the Kern County Recorder’s
12 Office the following day. (*Id.* at ¶ 22.) On or about June 28, 2017, defendant NDSC executed a
13 Notice of Rescission of the NOD, which was recorded in the Kern County Recorder’s Office the
14 following day. (*Id.* at ¶ 23.)

15 Plaintiff alleges that he is the successor in interest to his mother Hicks and that, as such,
16 he has the same rights and remedies as her under provisions of the California Homeowners Bill of
17 Rights (“HBOR”). (*Id.* at ¶¶ 24–25.) On this basis, plaintiff alleges three causes of action. First,
18 plaintiff alleges that he was not provided a single point of contact in seeking available foreclosure
19 prevention alternatives, in violation of California Civil Code § 2923.7. (*Id.* at ¶¶ 44–48). Second,
20 plaintiff alleges that defendants are in material violation of California Civil Codes §§ 2923.55,
21 2923.6, and 2923.7, as a result of which plaintiff may seek relief under § 2924.12. (*Id.* at ¶¶ 49–
22 53.) Third, plaintiff alleges a violation of California Business and Professions Code § 17200.
23 (*Id.* at ¶¶ 54–59.)

24 Plaintiff’s SAC was filed on June 4, 2018. On June 25, 2018, defendant CitiMortgage
25 moved to dismiss and that motion was joined by defendant NDSC. (Doc. Nos. 35,
26 36.) Plaintiff filed no opposition.

27 ¹ The correct date would appear to be January 31, 1992, although plaintiff’s complaint states that
28 this occurred in 1991.

1 **LEGAL STANDARD**

2 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
3 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.
4 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
5 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901
6 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
7 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A
8 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
9 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
10 *Iqbal*, 556 U.S. 662, 678 (2009).

11 In determining whether a complaint states a claim on which relief may be granted, the
12 court accepts as true the allegations in the complaint and construes the allegations in the light
13 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*
14 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth
15 of legal conclusions cast in the form of factual allegations. *United States ex rel. Chunie v.*
16 *Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed
17 factual allegations, “it demands more than an unadorned, the defendant-unlawfully-harmed-me
18 accusation.” *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere “labels and
19 conclusions” or “a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S.
20 at 555; *see also Iqbal*, 556 U.S. at 676 (“Threadbare recitals of the elements of a cause of action,
21 supported by mere conclusory statements, do not suffice.”). Moreover, it is inappropriate to
22 assume that the plaintiff “can prove facts which it has not alleged or that the defendants have
23 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors of Cal.,*
24 *Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

25 **DISCUSSION**

26 Defendants have moved to dismiss all three causes of action in the SAC, arguing that as to
27 each, plaintiff has failed to state a cognizable claim for relief.

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1 **A. Violation of California Civil Code § 2923.7**

2 Plaintiff’s first cause of action alleges a violation of California Civil Code § 2923.7,
3 which provides that “[u]pon request from a borrower who requests a foreclosure prevention
4 alternative, the mortgage servicer shall promptly establish a single point of contact and provide to
5 the borrower one or more direct means of communication with the single point of contact.” Cal.
6 Civ. Code § 2923.7(a). Plaintiff contends that he was never given a single point of contact,
7 constituting a violation of that provision. (SAC at ¶ 47.)

8 The statutory language of § 2923.7 is plain that in order to trigger any obligation on the
9 part of the mortgage servicer to establish a single point of contact, the borrower must first make a
10 request for a foreclosure prevention alternative. *Williams v. Wells Fargo Bank, NA*, No. EDCV
11 13-02075 JVS (DTBx), 2014 WL 1568857, at *8 (C.D. Cal. Jan. 27, 2014) (affirming that
12 § 2923.7 by its terms “requires that the borrower make a specific request for a single point of
13 contact”); *see also Mobley v. Wilmington Tr., N.A.*, No. CV 15-4201 PA (AJWX), 2016 WL
14 7234099, at *3 (C.D. Cal. Sept. 9, 2016); *Hart v. Select Portfolio Servicing, Inc.*, No. CV 15-
15 7953-R, 2015 WL 8374926, at *2 (C.D. Cal. Dec. 9, 2015). Plaintiff has not alleged in the SAC
16 that he ever made such a request of any of the defendants. Accordingly, the first cause of action
17 alleging a violation of § 2923.7 will be dismissed.

18 **B. Violations of California Civil Code § 2924.12**

19 Plaintiff’s second cause of action alleges a violation of California Civil Code § 2924.12.
20 Section 2924.12 states in relevant part that “[i]f a trustee’s deed upon sale has not been recorded,
21 a borrower may bring an action for injunctive relief to enjoin a material violation of Section
22 2923.5, 2923.7, 2924.11, or 2924.17.” Cal. Civ. Code § 2924.12(a)(1). It also provides that
23 “[a]fter a trustee’s deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee,
24 beneficiary, or authorized agent shall be liable to a borrower for actual economic damages” if it
25 has violated those same statutory provisions. *Id.* § 2924.12(b). In other words, if a notice of sale
26 has not yet been recorded, a plaintiff is limited to injunctive relief. By contrast, if the notice of
27 sale has already been recorded, a plaintiff may seek monetary damages. *See Jent v. N. Tr. Corp.*,
28 Civ. No. 2:13-1684 WBS CKD, 2014 WL 172542, at *4 (E.D. Cal. Jan. 15, 2014). Here, plaintiff

1 does not allege that any Notice of Sale has ever been recorded. Accordingly, plaintiff may not
2 recover any monetary damages under this provision.

3 The next question is whether plaintiff has alleged a cognizable claim for injunctive relief
4 to prevent defendants from foreclosing upon and selling the property. A separate provision of
5 § 2924.12 provides that “[a] mortgage servicer, mortgagee, trustee, beneficiary, or authorized
6 agent shall not be liable for any violation that it has corrected and remedied prior to the
7 recordation of a trustee’s deed upon sale.” Cal. Civ. Code § 2924.12(c). This provision functions
8 as a “safe harbor” for defendants, and allows them to avoid liability under HBOR to the extent
9 any past violations have been cured. *See Pearson v. Green Tree Servicing, LLC*, No. 14-cv-
10 04524-JSC, 2014 WL 6657506, at *2 (N.D. Cal. Nov. 21, 2014) (“[I]f the servicer takes action to
11 correct the violation before proceeding to foreclosure, no liability results.”). The court must
12 therefore examine whether, even if defendants have allegedly violated certain provisions of
13 HBOR, defendants have subsequently remedied those claimed violations. If so, plaintiff may not
14 seek to enjoin the sale of the property at this time.

15 Defendants point out that, as plaintiff concedes in his second amended complaint,
16 defendant NDSC rescinded the NOD less than a month after it was originally filed. (*See* SAC at
17 ¶ 23; Doc. No. 35 at 5–6.) This is sufficient to constitute remediation under § 2924.12(c), since
18 there is no longer any legally operative notice of default. Because a notice of default is a
19 prerequisite in order for a plaintiff to bring an action under this provision, the fact that the NOD
20 has been rescinded is fatal to plaintiff’s claim. *See Jent*, 2014 WL 172542, at *5; *Vasquez v.*
21 *Bank of Am., N.A.*, No. 13-cv-02902-JST, 2013 WL 6001924, at *7 (N.D. Cal. Nov. 12, 2013)
22 (confirming that a plaintiff “may not seek remedies under Section 2924.12 that do not apply to the
23 present status of the property”). Plaintiff’s second cause of action will therefore also be
24 dismissed.

25 **C. Violation of California’s Unfair Competition Law**

26 Plaintiff’s third cause of action alleges unfair competition in violation of California
27 Business and Professions Code § 17200, which outlaws any unfair, unlawful, or fraudulent
28 business act or practice. A claim under § 17200 is derivative, and will “stand or fall depending

1 on the fate of the antecedent substantive causes of action.” *Krantz v. BT Visual Images, L.L.C.*,
2 89 Cal. App. 4th 164, 178 (2001). As the SAC makes clear, plaintiff’s unfair competition claim
3 is predicated on the alleged violation of California Civil Code § 2923.7. (SAC at ¶ 56.) Because
4 the court has already found that plaintiff has failed to state claim for relief under § 2923.7, it must
5 dismiss his unfair competition claim as well. *Beall v. Quality Loan Serv. Corp.*, No. 10-CV-
6 1900-IEG WVG, 2011 WL 1044148, at *5 (S.D. Cal. Mar. 21, 2011) (“Plaintiff’s UCL claims
7 derive from her allegations of fraud and violations of federal lending laws. Where those claims
8 are deficient, Plaintiff’s UCL claim must also fail.”); *Pantoja v. Countrywide Home Loans, Inc.*,
9 640 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009). Accordingly, plaintiff’s third cause of action will
10 be dismissed.

11 **D. Leave to Amend**

12 Defendants previously moved to dismiss the First Amended Complaint (“FAC”), which
13 motion was granted by the undersigned. (Doc. No. 32.) However, at oral argument on that
14 motion, plaintiff’s counsel requested that leave to amend be granted in order to remedy the
15 deficiencies identified by the court. The court therefore granted leave to amend, but in doing so
16 advised plaintiff “that absent the presentation of compelling circumstances, no further leave to
17 amend will be granted in this action.” (*Id.* at 6.) Far from remedying the deficiencies of the FAC,
18 the SAC is a nearly verbatim copy, and alleges the same three causes of action based upon the
19 same factual allegations. Indeed, plaintiff has not even filed an opposition to the instant motion
20 to dismiss. Under the circumstances, the court is persuaded that leave to amend would be futile.

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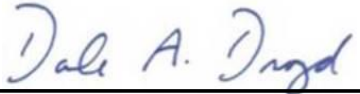
CONCLUSION

For the reasons set forth above,

1. Defendants’ motion to dismiss (Doc. No. 35) is granted;
2. This action is dismissed with prejudice for failure to state a claim upon which relief may be granted; and
3. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: August 7, 2018



UNITED STATES DISTRICT JUDGE