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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH A. BURROWS,)	
)	
Plaintiff,)	2:09-cv-01813-GEB-DAD
)	
v.)	<u>ORDER GRANTING DEFENDANT'S</u>
)	<u>MOTION TO DISMISS PLAINTIFF'S</u>
BAC HOME LOANS SERVICING, LP,)	<u>FIRST AMENDED COMPLAINT</u> *
)	
Defendant.)	
)	

On November 13, 2009, Defendant BAC Home Loan Servicing, LP filed a motion under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") in which it seeks dismissal of Plaintiff's first amended complaint. Plaintiff did not file an opposition. For the reasons stated below, Defendant's motion to dismiss is GRANTED.

I. LEGAL STANDARD

A motion under Rule 12(b)(6) "challenges a complaint's compliance with . . . pleading requirements." Champlaie v. BAC Home Loans Servicing, LP, No. S-09-1316 LKK/DAD, 2009 WL 3429622, at *1 (E.D. Cal. Oct. 22, 2009). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the [plaintiff's] claim is and the

* This matter is deemed to be suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 grounds upon which relief rests” Bell Atlantic Corp. V.
2 Twombly, 550 U.S. 544, 555 (2007). “A pleading that offers labels and
3 conclusions or a formulaic recitation of the elements of a cause of
4 action will not do. Nor does a complaint suffice if it tenders naked
5 assertions devoid of further factual enhancement.” Ashcroft v. Iqbal,
6 129 S. Ct. 1937, 1949 (2009).

7 In deciding a motion under Rule 12(b)(6), the material
8 allegations of the complaint are accepted as true and all reasonable
9 inferences are drawn in favor of the plaintiff. See al-Kidd v.
10 Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). However, neither
11 conclusory statements nor legal conclusions are entitled to a
12 presumption of truth. See Iqbal, 129 S. Ct. at 1949-50. To avoid
13 dismissal, the plaintiff must allege “only enough facts to state a
14 claim to relief that is plausible on its face.” Twombly, 550 U.S. at
15 547. “A claim has facial plausibility when the plaintiff pleads
16 factual content that allows the court to draw the reasonable inference
17 that the defendant is liable for the misconduct alleged.” Iqbal, 129
18 S. Ct. at 1949. Plausibility, however, requires more than “a sheer
19 possibility that a defendant has acted unlawfully.” Id. “When a
20 complaint pleads facts that are merely consistent with a defendant’s
21 liability, it stops short of the line between possibility and
22 plausibility of entitlement to relief.” Id. (quotations and citation
23 omitted).

24 **II. BACKGROUND**

25 Plaintiff alleges he “entered into a contract with the owner of
26 the real property located at 1283 Prospector Trail in South Lake
27 Tahoe, California to purchase” the property at that address (the
28 “Subject Property”). (First Amended Compl. (“FAC”) ¶ 4.) To execute

1 the transaction, "Plaintiff entered into negotiations with [Defendant]
2 and Guaranty Bank." (Id.) Plaintiff alleges that while negotiations
3 were ongoing, the Subject Property "was in foreclosure and . . .
4 scheduled to be sold at an auction on more than one occasion"
5 (Id. ¶ 5.) Plaintiff further alleges Defendant "orally agreed to
6 extend the date of the foreclosure sale on [the Subject Property]" to
7 June 4, 2009 to allow Plaintiff time to complete the purchase. (Id.)
8 However, Plaintiff alleges Defendant allowed the Subject Property to
9 be sold on or about May 4, 2009. (Id. ¶ 7.) Plaintiff alleges the
10 sale of the Subject Property at the auction "caus[ed] [him] financial
11 loss as well as emotional stress and duress." (Id. ¶¶ 5, 7.)

12 Plaintiff's original complaint was dismissed in a Minute Order
13 filed September 25, 2009, and Plaintiff was granted leave to file a
14 first amended complaint. Plaintiff's first amended complaint alleges
15 five claims under California law: breach of contract, fraud,
16 intentional infliction of emotional distress, negligent infliction of
17 emotional distress, and breach of the covenant of good faith and fair
18 dealing.

19 **III. DISCUSSION**

20 **A. Breach of Contract Claim**

21 Plaintiff's breach of contract claim is premised upon Defendant's
22 oral promise to postpone the foreclosure sale. Defendant's argue this
23 claim should be dismissed under the "law of the case doctrine" since
24 the September 25, 2009 Minute Order found this claim was an
25 unenforceable oral contract under the statute of frauds. However,
26 since it is unclear whether this reason was a basis for dismissal in
27 the Minute Order, the "law of the case doctrine" is not applicable.
28

1 However, Plaintiff has not alleged consideration was given for
2 the oral promise on which he relies. Absent consideration,
3 Defendants' promise was "simply [a] gratuitous oral promise[]" and an
4 unenforceable agreement. Beggerly v. Gbur, 112 Cal. App. 3d 180, 190
5 (1980). Since Plaintiff has not alleged that any consideration
6 supported Defendant's oral promise to postpone the foreclosure sale,
7 Defendant's motion to dismiss Plaintiff's breach of contract claim is
8 granted.

9 **B. Plaintiff's Fraud Claim**

10 Defendant also seeks dismissal of Plaintiff's fraud claim,
11 arguing Plaintiff has failed to satisfy the pleading requirements of
12 Federal Rule of Civil Procedure Rule 9(b) ("Rule 9(b)"). Rule 9(b)
13 requires that "in alleging fraud . . . a party . . . [must] state with
14 particularity the circumstances constituting fraud or mistake." Fed.
15 R. Civ. P. 9(b). "Rule 9(b)'s particularity requirement applies to
16 state-law causes of action" brought in federal court. Vess-Ciba-Geigy
17 Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). Plaintiff's sole
18 allegation in support of this claim is that Defendant "orally agreed
19 to extend the date of the foreclosure sale" to June 4, 2009, and
20 despite this representation, Defendant allowed the Subject Property to
21 be sold at an auction on an earlier date. (FAC ¶ 5.) This single
22 allegation is insufficient to satisfy the heightened pleading standard
23 of Rule 9(b). Therefore, this claim is dismissed.

24 **C. Plaintiff's Claims of Intentional & Negligent Infliction of**
25 **Emotional Distress**

26 Defendant argues Plaintiff's intentional and negligent infliction
27 of emotional distress claims should be dismissed since "Plaintiff['s]
28 [first amended complaint] lacks any facts to support" these claims.

1 Under California law, to state a claim for "intentional
2 infliction of emotional distress a plaintiff must show: (1) outrageous
3 conduct by the defendant; (2) the defendant's intention of causing or
4 reckless disregard of the probability of causing emotional distress;
5 (3) the plaintiff's suffering severe or extreme emotional distress;
6 and (4) actual and proximate causation of the emotional distress by
7 defendant's outrageous conduct. Conduct, to be outrageous, must be so
8 extreme as to exceed all bounds of that usually tolerated in a
9 civilized society." Huntingdon Life Sciences, Inc. v. Stop Huntingdon
10 Animal Cruelty, USA, Inc., 129 Cal. App. 4th 1228, 1259
11 (2005) (quotations and citations omitted).

12 Plaintiff alleges in his intentional infliction of emotional
13 distress claim, "[D]efendant['s] actions constitute extreme and
14 outrageous conduct that have caused him to suffer headaches,
15 sleeplessness, and other physical symptoms of extreme stress"
16 (FAC ¶ 13.) However, the only conduct attributed to Defendant is
17 breach of an oral contract. This alleged breach is insufficient to
18 state an intentional infliction of emotional distress claim, since it
19 does not satisfy the extreme or outrageous element of the tort.
20 Therefore, Defendant's dismissal motion on this claim is granted.

21 Defendant also seeks dismissal of Plaintiff's negligent
22 infliction of emotional distress claim. Under California law, "the
23 negligent causing of emotional distress is not an independent tort,
24 but the tort of negligence." Burgess v. Superior Court, 2 Cal. 4th
25 1064, 1072 (1992) (emphasis omitted). Therefore, Plaintiff was
26 required to allege the traditional elements of a negligence claim;
27 that is, duty, breach of duty, causation and damages. See id.
28 However, "[t]he existence of a legal duty to use reasonable care in a

1 particular factual situation is a question of law for the court to
2 decide." Vasquez v. Residential Invs. Inc., 118 Cal. App. 4th 269,
3 278 (2004).

4 Plaintiff merely alleges Defendant "has negligently caused him to
5 suffer general damages by breaching their general duty to him"
6 (FAC ¶ 16.) This allegation is insufficient to demonstrate Defendant
7 owed Plaintiff a legal duty of care that could give rise to a claim
8 for negligent infliction of emotional distress. Therefore, this
9 portion of Defendant's motion is also granted.

10 **D. Plaintiff's Claim of Breach of the Implied Covenant of Good Faith**
11 **And Fair Dealing**

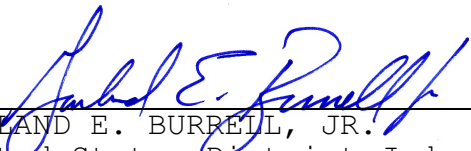
12 Defendant also seeks dismissal of Plaintiff's breach of the
13 implied covenant of good faith and fair dealing claim because of
14 Plaintiff's failure to plead an enforceable contract. Under
15 California law, in "every contract there is an implied covenant that
16 neither party shall do anything which will have the effect of
17 destroying or injuring the right of the other party to receive the
18 fruits of the contract." Locke v. Warner Bros., Inc., 57 Cal. App.
19 4th 354, 363 (1997) (quotations omitted). However, a claim for "breach
20 of the implied covenant of good faith and fair dealing . . . depends
21 on the existence of an enforceable contract. In the absence of a
22 contract, there is no cause of action for breach of the implied
23 covenant." Ali v. L.A. Focus Publication, 112 Cal. App. 4th 1477,
24 1489 (2003). Since Plaintiff has not alleged that an enforceable
25 contract existed between the parties, he cannot state a claim for
26 breach of the implied covenant of good faith and fair dealing.
27 Therefore, Defendant's motion to dismiss this claim is granted.

28

1 **IV. CONCLUSION**

2 For the stated reasons, Defendant's motion to dismiss is GRANTED.
3 Plaintiff, however, is granted ten (10) days from the date on which
4 this order is filed within which to file a second amended complaint
5 curing any deficiencies he opines he can remedy.

6 Dated: January 11, 2010

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GARLAND E. BURRELL, JR.
United States District Judge

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