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

CHARLES DAY,)	
)	
Plaintiff,)	2:09-CV-02676-GEB-KJM
)	
v.)	<u>ORDER GRANTING AND DENYING</u>
)	<u>IN PART DEFENDANT AMERICAN</u>
AMERICAN HOME MORTGAGE)	<u>HOME MORTGAGE SERVICING, INC.'S</u>
SERVICING, INC., AMERICAN BROKERS)	<u>MOTION TO DISMISS AND DENYING</u>
CONDUIT and DOES 1-50, inclusive,)	<u>ITS MOTION FOR A MORE DEFINITE</u>
)	<u>STATEMENT</u> *
)	
Defendants.)	
)	

Defendant American Home Mortgage Servicing, Inc. ("Defendant") moves for dismissal of Plaintiff's First-Amended Complaint (incorrectly titled as "Second-Amended Complaint") with prejudice under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), arguing that Plaintiff has failed to allege sufficient facts to state viable claims. In the alternative, Defendant moves for a more definite statement under Federal Rule of Civil Procedure 12(e) ("Rule 12(e)"). For the reasons stated below, Defendant's dismissal motion is granted in part and denied in part, and Defendant's Rule 12(e) motion is denied.

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

1 **I. LEGAL STANDARD**

2 **A. Standard for a Motion to Dismiss under Rule 12(b)(6)**

3 A Rule 12(b)(6) dismissal motion tests the legal sufficiency
4 of the claims alleged in the complaint. Novarro v. Black, 250 F.3d
5 729, 732 (9th Cir. 2001). A pleading must contain "a short and plain
6 statement of the claim showing that the pleader is entitled to relief
7" Fed. R. Civ. P. 8(a)(2). The complaint must "give the
8 defendant fair notice of what the [plaintiff's] claim is and the
9 grounds upon which relief rests" Bell Atlantic Corp. v.
10 Twombly, 550 U.S. 544, 555 (2007).

11 Dismissal of a claim under Rule 12(b)(6) is appropriate only
12 where the complaint either 1) lacks a cognizable legal theory, or 2)
13 lacks factual allegations sufficient to support a cognizable legal
14 theory. Balistreri v. Pacific Police Dept., 901 F.2d 696, 699 (9th
15 Cir. 1988). To avoid dismissal, the plaintiff must allege "only enough
16 facts to state a claim to relief that is plausible on its face."
17 Twombly, 550 U.S. at 547.

18 In deciding a Rule 12(b)(6) motion, the material allegations
19 of the complaint are accepted as true and all reasonable inferences
20 are drawn in favor of the plaintiff. See al-Kidd v. Ashcroft, 580
21 F.3d 949, 956 (9th Cir. 2009). However, neither conclusory statements
22 nor legal conclusions are entitled to a presumption of truth. See
23 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Twombly, 550 U.S.
24 at 555.

25 If a Rule 12(b)(6) motion is granted, the "district court
26 should grant leave to amend even if no request to amend the pleadings
27 is made, unless it determines that the pleading could not possibly be
28 cured by the allegation of other facts." Lopez v. Smith, 203 F.3d

1 1122, 1127 (9th Cir. 2000) (quoting Doe v. U.S., 58 F.3d 484, 497 (9th
2 Cir. 1995)).

3 **B. Standard for a Motion for a More Definite Statement**

4 "[A] party may move for a more definite statement of a
5 pleading [under Rule 12(e) when the pleading] ... is so vague or
6 ambiguous that the party cannot reasonably prepare a response." A
7 Rule 12(e) motion should not be granted unless the challenged pleading
8 is so indefinite that the responding party cannot determine the nature
9 of the claim(s) asserted. See Famolare, Inc. v. Edison Bros. Stores,
10 Inc., 525 F.Supp. 940, 949 (E.D.Cal. 1981).

11 **II.**

12 **REQUEST FOR JUDICIAL NOTICE**

13 Defendant's motion includes a request that the Court take
14 judicial notice of a grant deed and a deed of trust, both recorded on
15 September 2, 2005 in the Yolo County Recorder's Office. However, since
16 defendant has not shown how these documents are relevant to its
17 motion, the request is denied.

18 **III. DISCUSSION**

19 Defendant filed a previous dismissal motion of Plaintiff's
20 original complaint, which was granted with leave to amend. Plaintiff
21 subsequently filed his First-Amended Complaint ("FAC") in which he
22 alleges four state law claims: violation of the Rosenthal Fair Debt
23 Collections Practices Act ("Rosenthal Act"), breach of the implied
24 covenant of good faith and fair dealing, California Business &
25 Professions Code section 17200, and "breach of statutory duties."

26 **A. The Rosenthal Act**

27 Defendant argues Plaintiff's Rosenthal Act claim should be
28 dismissed arguing that Plaintiff's allegations are conclusory, and

1 that the portion of Plaintiff's Rosenthal Act claim premised on
2 Defendant contacting debtor Plaintiff when Plaintiff was represented
3 by an attorney fails to "allege that [Plaintiff's] attorney notified
4 [Defendant] of the representation in writing[, and] request[ed] that
5 all communications concerning the Plaintiff be directed to his
6 attorney," citing California Civil Code § 1788.14(c). (Mot. 4:5-10.)

7 Plaintiff alleges Defendant's following conduct supports his
8 Rosenthal Act claim: 1) "Defendant contacted Plaintiff, a known
9 represented party... by sending letters and calling Plaintiff after
10 Defendant knew Plaintiff was represented by an attorney;" 2)
11 "Defendant falsely stated the amount of the debt... by overstating the
12 alleged arrearage owed by Plaintiff;" 3) "Defendant increased the
13 amount of the debt by including amounts not owed by contract... by
14 including costs that are not allowed for in any contract between
15 Plaintiff and Defendant, including mailing costs of multiple,
16 harassing letters;" and 4) "Defendant used unfair and unconscionable
17 means in an attempt to collect the debt... by making numerous and
18 repeated telephone calls to Plaintiff designed to annoy or harass
19 Plaintiff." (FAC ¶¶ 11-14.)

20 Plaintiff's allegation that Defendant "falsely stated the
21 amount of the debt... by overstating the alleged arrearage owed by
22 Plaintiff," concerns misrepresentations, and therefore, is an
23 "averment of fraud" governed by Federal Rule of Civil Procedure 9(b)'s
24 heightened pleading standard. See OSEI v. Countrywide Home Loans, No.
25 2:09-cv-01981-LKK-JMF, 2010 WL 727831, at * 5 (E.D. Cal. March 3,
26 2010). Rule 9(b) provides, "in alleging fraud or mistake, a party
27 must state with particularity the circumstances constituting fraud or
28 mistake." Allegations of fraud must be accompanied by the "who, what,

1 when, where and how of the misconduct charged. A plaintiff must set
2 forth more than the neutral facts necessary to identify the
3 transaction. The plaintiff must set forth what is false or misleading
4 about a statement, and why it is false." Vess v. Ciba-Gieigy Corp.,
5 USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

6 Rule 9(b)'s heightened pleading standard applies to
7 allegations of fraud in all civil cases, regardless of whether or not
8 "fraud" is an essential element of the claim. Id., at 1104-1105. In
9 cases where a claim alleges some fraudulent and some non-fraudulent
10 conduct, only the allegations of fraud are subject to Rule 9(b)'s
11 standard. Id., at 1104. "The proper route is to disregard averments
12 of fraud not meeting Rule 9(b)'s standard and then ask whether a claim
13 has been stated." Id., at 1105.

14 Plaintiff has not alleged the time, place or manner of the
15 misrepresentation with sufficient detail to satisfy Rule 9(b)'s
16 heightened pleading standard. Therefore, this allegation cannot be
17 considered in determining if Plaintiff has stated a Rosenthal Act
18 Claim. Id.

19 Plaintiff's remaining Rosenthal Act allegations are not
20 governed by Rule 9(b) and sufficiently state violations of the Act.
21 The Rosenthal Act is designed to "prohibit debt collectors from
22 engaging in unfair or deceptive acts or practices in the collection of
23 consumer debts and to require debtors to act fairly in entering into
24 and honoring such debts." Cal. Civil Code § 1788.1(b). The act
25 prohibits multiple particular debt collection practices and regulates
26 the form and content of communications by debt collectors to debtors
27 and third parties. (Cal. Civil Code §§ 1788, et seq.) In addition to
28 proscribing specific conduct in the act itself, the Rosenthal Act

1 incorporates violations of the federal Fair Debt Collection and
2 Practices Act, 15 USC §§ 1692, et seq. Cal. Civ. Code § 1788.17.

3 Since the Rosenthal Act incorporates violations of the
4 federal Fair Debt Collection and Practices Act, Plaintiff's allegation
5 that Defendant contacted Plaintiff when Plaintiff was represented by
6 an attorney survives Defendant's dismissal motion. Although section
7 1788.14(c) of the Rosenthal Act prohibits a debt collector from
8 communicating with a represented debtor only after the debt collector
9 has been "notified in writing by the debtor's attorney that the debtor
10 is represented," the relevant incorporated section of the federal Fair
11 Debt Collection Practice Act is not as narrow. See 15 U.S.C. §
12 1692c(a)(2). Section 1692c(a)(2) prohibits a debt collector from
13 contacting a debtor whenever the debt collector "knows the consumer is
14 represented by an attorney with respect to such debt..." Thus,
15 Plaintiff has sufficiently alleged a Rosenthal Act claim predicated
16 upon communication with a represented debtor.

17 Therefore, Defendant's motion to dismiss this claim is
18 granted and denied in part. The portion of Plaintiff's Rosenthal Act
19 claim predicated upon the allegation that Defendant "falsely stated
20 the amount of the debt... by overstating the alleged arrearage owed by
21 Plaintiff" is dismissed.

22 **B. Breach of the Covenant of Good Faith & Fair Dealing**

23 Defendant seeks dismissal of Plaintiff's claim for breach of
24 the covenant of good faith and fair dealing, arguing Plaintiff does
25 not identify or establish the existence of a contract between
26 Plaintiff and Defendant, and does not allege the existence of a
27 fiduciary relationship between the parties. (Mot. 4:14-4:19.)
28 Plaintiff admits "this cause of action probably does not survive in

1 tort," but argues "it should survive in its derivative nature in
2 contract." (Opp'n 3:28-4:1.)

3 "There is an implied covenant of good faith and fair dealing
4 in every contract that neither party will do anything which will
5 injure the right of the other to receive the benefits of the
6 agreement." Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 658
7 (1958). The implied covenant "rests upon the existence of some
8 specific contractual obligation. [It] is read into contracts in order
9 to protect the express covenants or promises of the contract, not to
10 protect some general public policy interest not directly tied to the
11 contract's purpose." Racine Laramie, Ltd. v. Dept. of Parks &
12 Recreation, 11 Cal.App.4th 1026, 1031 (1992). The implied covenant
13 "cannot impose substantive duties or limits on the contracting parties
14 beyond those incorporated in the specific terms of [the parties']
15 agreement." McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 799
16 (2008). Since the implied covenant is based in contract, compensation
17 for its breach is almost always limited to contractual remedies. Foley
18 v. Interactive Data Corp., 47 Cal.3d 654, 684 (1988). Tort remedies
19 are only available in limited circumstances where a "special
20 relationship" exists between the contracting parties, such as the
21 relationship between an insurer and an insured. See Johnathan Neil &
22 Assoc. v. Jones, 33 Cal.4th 917, 932 (2004).

23 Plaintiff alleges in this claim that "Plaintiff and
24 Defendant had a contract wherein Defendant would service a mortgage
25 owned by American Brokers Conduit for Plaintiff's property located at
26 885 Wedgewood Ct, West Sacramento, CA 95605," and that "[a] duty of
27 good faith and fair dealing was implied by law into the contract of
28 insurance that is at issue in this action." (FAC ¶ 18.) Plaintiff

1 further alleges, "[Defendant's] duties of good faith and fair dealing
2 included, but were not limited to, the following: a) Defendants had a
3 duty to pay at least as much consideration to Plaintiff's financial
4 interests as to Defendants' financial interest; b) Defendants had a
5 duty to comply with all applicable laws in the State of California."
6 (Id., ¶ 19.) However, Plaintiff does not allege the terms of the
7 contract(s) entered into between the parties or how Defendant's
8 conduct frustrated any of its specific provisions. Therefore, whether
9 Plaintiff is seeking tort or contract remedies, Plaintiff's breach of
10 the implied covenant of good faith and fair dealing claim is
11 dismissed.

12 **C. Business & Professions Code § 17200**

13 Defendant argues Plaintiff's California Business and
14 Professions Code section 17200 ("§ 17200") claim should be dismissed
15 because Plaintiff's allegations are conclusory, and Plaintiff fails to
16 allege he suffered an injury in fact and lost either money or property
17 as a result of any § 17200 violation. (Mot. 7:16-8:5.)

18 California's Unfair Competition Law, Cal. Bus. & Prof. Code
19 § 17200, prohibits "unlawful, unfair or fraudulent" business acts and
20 practices. To state a § 17200 claim, Plaintiff must allege he
21 "suffered injury in fact and has lost money or property." Cal. Bus. &
22 Prof. Code § 17204. A plaintiff suffers an "injury in fact" when he
23 or she has "1) expended money due to the defendant's acts of unfair
24 competition, 2) lost money or property; or 3) been denied money to
25 which he or she has a cognizable claim." Hall v. Time Inc., 158
26 Cal.App.4th 847, 854 (2008).

1 Plaintiff does not allege any facts showing that he has
2 suffered "an injury in fact". Therefore, Plaintiff's \$ 17200 claim is
3 dismissed.

4 **D. Breach of Statutory Duties**

5 Defendant also seeks dismissal of Plaintiff's breach of
6 "statutory duties" claim. Plaintiff agrees in his Opposition that
7 this claim should be dismissed, stating, "[a]fter reviewing
8 Defendant's motion, Plaintiff will dismiss this claim. (Opp'n 5:6.)
9 Therefore, Plaintiff's breach of statutory duties claim is dismissed.

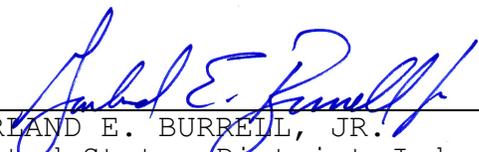
10 **E. Alternative Rule 12(e) Motion**

11 Defendant also seeks a more definite statement of each of
12 Plaintiff's claims. (Mot. ¶ 9:15-24.) The portion of this motion
13 concerning each claim upon which Defendant prevailed on its Rule
14 12(b)(6) dismissal motion is denied as moot, and the remainder of the
15 motion is denied. Plaintiff's allegations are not "so vague or
16 ambiguous that [Defendant] cannot reasonably prepare a response."
17 Fed.R.Civ.P. 12(e).

18 **IV. CONCLUSION**

19 For the stated reasons, Defendant's motion to dismiss is
20 granted and denied in part. Defendant's motion for a more definite
21 statement is denied. Plaintiff is granted ten (10) days from the date
22 on which this order is filed to file a Second-Amended Complaint.

23 Dated: June 2, 2010

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GARLAND E. BURRELL, JR.
United States District Judge