

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 SERGEY GAYDUCHIK,

Case No. 2:09-cv-03524 JAM-GGH

11
12 Plaintiff,

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

13 v.

14 COUNTRYWIDE HOME LOANS, INC.;
15 CTC REAL ESTATE SERVICES;
16 CWALT, INC.; BANK OF NEW YORK;
and DOES 1-50, inclusive,

17 Defendants.
18 _____/

19 This matter comes before the Court on Defendants
20 Countrywide Home Loans, Inc., CTC Real Estate Services, CWALT,
21 Inc., and Bank of New York's (collectively "Defendants") Motion
22 to Dismiss Plaintiff Sergey Gayduchik's ("Plaintiff") Complaint
23 for failure to state a claim pursuant to Federal Rule of Civil
24 Procedure 12(b)(6). Plaintiff opposes the motion.¹ Defendants
25
26
27 _____

28 ¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

1 also filed a Request for Judicial Notice ("RJN"), and the Court
2 takes judicial notice of all documents as requested.
3

4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 Plaintiff entered into a loan agreement with Defendant
6 Countrywide Home Loans ("Countrywide"), on December 9, 2004. The
7 loan was secured by the deed of trust to his property at 8430
8 Helsinki Way, Antelope, California ("the subject property"). The
9 Complaint alleges that Defendant CTC Real Estate Services
10 regularly acts as a trustee for mortgage loans issued by
11 Countrywide, and Defendants CWALT, Inc. and Bank of New York
12 perform "special functions in relation to mortgage loans issued
13 by Countrywide." (Complaint ¶¶ 3-6, Exhibit 1 to Doc #1). A
14 Notice of Default and a Notice of Trustee's Sale were recorded
15 in 2008. Plaintiff alleges that he was placed into an improper
16 loan, he does not understand its terms, his income may have
17 been overstated by the loan broker in order to acquire it, and
18 he cannot afford it. Accordingly, Plaintiff brings numerous
19 state statutory and common law causes of action against
20 Defendants.
21

22 Plaintiff originally filed this action in Sacramento
23 Superior Court (Case No. 34-2009-00064837). On December 21,
24 2009, Defendants timely filed a motion to remove the case,
25 claiming this Court has original jurisdiction over the case
26
27
28

1 under 28 U.S.C. § 1331 because Plaintiff alleged violations of
2 federal law within his state claims. Plaintiff then filed a
3 motion to remand and request for attorney's fees on January 5,
4 2010. Plaintiff's motion to remand was denied following a
5 hearing. For the reasons explained below, Defendants' Motion to
6 Dismiss is granted.
7

8 9 II. OPINION

10 A. Legal Standard

11 1. Motion to Dismiss

12 A party may move to dismiss an action for failure to
13 state a claim upon which relief can be granted pursuant to
14 Federal Rule of Civil Procedure 12(b)(6). In considering a
15 motion to dismiss, the court must accept the allegations in the
16 complaint as true and draw all reasonable inferences in favor of
17 the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
18 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
19 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
20 are mere "legal conclusions," however, are not entitled to the
21 assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50
22 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
23 (2007)). To survive a motion to dismiss, a plaintiff needs to
24 plead "enough facts to state a claim to relief that is plausible
25 on its face," Twombly, 550 U.S. at 570, and it is inappropriate
26
27
28

1 to "assume that the [plaintiff] can prove facts that [he or she]
2 has not alleged or that the defendants have violated the . . .
3 laws in ways that have not been alleged." Associated Gen.
4 Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
5 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983).
6 Dismissal is appropriate where the plaintiff fails to state a
7 claim supportable by a cognizable legal theory. Balistreri v.
8 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

10 Upon granting a motion to dismiss, a court has discretion to
11 allow leave to amend the complaint pursuant to Federal Rule of
12 Civil Procedure 15(a). "Dismissal with prejudice and without
13 leave to amend is not appropriate unless it is clear . . . that
14 the complaint could not be saved by amendment." Eminence
15 Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.
16 2002).

18 In general, a court may not consider materials other than
19 the facts alleged in the complaint when ruling on a motion to
20 dismiss. Anderson v. Angelone, 86, F. 3d 932, 934 (9th Cir.
21 1996). A court may, however, consider additional materials if
22 the plaintiff has alleged their existence in the complaint, the
23 documents are central to Plaintiff's claims, and their
24 authenticity is not disputed. See Branch v. Tunnell, 14 F.
25 3d 449, 454 (9th Cir. 1994), overruled on other grounds by
26 Galbraith v. County of Santa Clara, 307 F. 3d 1119 (9th Cir.
27
28

2002). Defendants request the Court judicially notice six exhibits, and Plaintiff does not challenge the authenticity of these exhibits. The exhibits consist of the loan documents related to Plaintiff's loan transaction. Accordingly, the Court takes these exhibits into consideration.

1. Breach of Covenant of Good Faith and Fair Dealing

Defendants correctly assert that Plaintiff's claim for a breach of the covenant of good faith and fair dealing is not based on alleged violations of any of the express terms of the contract, and therefore Plaintiff's claim fails as a matter of law. Indeed, the implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." Agosta v. Astor, 120 Cal. App. 4th 596, 607 (2004)). Because Plaintiff has not, and cannot based on the circumstances of this case, state a claim for a breach of the covenant of good faith and fair dealing, Plaintiff's claim is dismissed with prejudice.

2. Deceit

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce

1 reliance; (d) justifiable reliance; and (e) resulting damage."
2 Lazar v. Superior Court, 12 Cal.4th 631, 638 (quoting 5 Witkin,
3 Summary of Cal.Law (9th ed. 1988) Torts, § 676, p. 778).

4 Defendants properly assert that an alleged statement that
5 the loan provided to Plaintiff was the "best loan" for him is
6 not actionable. Though Plaintiff claims he was deceived
7 regarding the terms of the loan, a person who knows the true
8 facts cannot be said to have reasonably relied on a misstatement
9 of those facts. Ostayan v. Serrano Reconveyance Co., 77 Cal.
10 App. 4th 1411, 1418-19 (2000). Fraud allegations can be
11 contradicted by judicially noticeable documents. Lomboy v. SCME
12 Mortg. Brokers, 2009 WL 1457738 at *4 (N.D. Cal. May 26, 2009).
13 Plaintiff signed the loan documents and is accordingly deemed to
14 be aware of the terms he assented to. See Randas v. YMCA of
15 Metro. L.A., 17 Cal. App. 4th 158, 163 (1993). Therefore
16 Plaintiff has not, and cannot, state a claim for deceit.
17 Plaintiff's claim for deceit is dismissed with prejudice.
18
19
20
21

22 3. Violation of California's Unfair Competition Law

23 Plaintiff alleges violation of the Unfair Competition
24 Law, however Defendants' alleged conduct does not fall within
25 the proscribed conduct of California Civil Code §§ 17200, et
26 seq. Accordingly, Plaintiff's claim for a violation of
27
28

1 California's Unfair Competition Law fails as a matter of law and
2 is dismissed with prejudice.

3
4 4. Promissory Estoppel

5 Plaintiff alleges that he justifiably and detrimentally
6 relied on false promises, representation, and assurances of
7 Defendants. However, the complaint fails to provide any facts to
8 substantiate his promissory estoppel claim, providing nothing
9 more than mere legal conclusions. Furthermore, as explained
10 above, a person who knows the true facts cannot be said to have
11 reasonably relied on a misstatement of those facts. Ostayan v.
12 Serrano Reconveyance Co., 77 Cal. App. 4th 1411, 1418-19 (2000).
13
14 As Defendants note, Plaintiff fails to respond to the dismissal
15 of promissory estoppel argument in his reply to Defendants'
16 motion. Plaintiff's conclusory allegations cannot withstand a
17 motion to dismiss, and Plaintiff's claim for promissory estoppel
18 is dismissed with prejudice.
19
20

21
22 5. Fraud by Intentional Misrepresentation

23 Plaintiff's claim for fraud by intentional
24 misrepresentation fails for the same reasons as Plaintiff's
25 deceit claim. Accordingly, Plaintiff's fraud by intentional
26 misrepresentation is dismissed with prejudice.
27
28

1 6. Fraud by Concealment

2 To state a claim for fraud by concealment, a plaintiff
3 must assert that the "defendant [was] under a duty to disclose
4 the fact to the plaintiff." See Blickman Turkus, LP v. MF
5 Downtown Sunnyvale, L.L.C., 162 Cal. App. 4th 858, 868 (2008).
6 Because Plaintiff did not, and cannot, establish this essential
7 element, as Defendants properly assert, Plaintiff's claim for
8 fraud by concealment is dismissed with prejudice.
9

10
11 7. Restitution for Unjust Enrichment

12 Defendants properly assert that Plaintiff has not, and
13 cannot, allege that Plaintiff conferred some kind of unjust
14 benefit on Defendants, as demonstrated by the documents provided
15 by Defendants. Accordingly, Plaintiff's claim for restitution is
16 dismissed with prejudice.
17
18

19
20 8. Slander of Title

21 The recording of a Notice of Default and Notice of
22 Trustee's sale cannot support a slander of title claim, as these
23 are privileged acts. Accord Lal v. American Home Servicing, 2010
24 WL 225524 at *5 (E.D. Cal. Jan. 19, 2010). As Defendants
25 properly assert, Plaintiff has not, and cannot, meet the
26 requisite elements to sustain a claim for slander of title.
27
28

1 Accordingly, Plaintiff's claim for slander of title is dismissed
2 with prejudice.

3
4 9. Quiet Title

5 Plaintiff has not alleged in his complaint that he is
6 able to tender, a prerequisite to a claim to quiet title. Accord
7 Pagtalunan v. Reunion Mortgage, Inc., 2009 WL 961995 at *5 (N.D.
8 Cal. April 8, 2009). Moreover, Plaintiff bases his claim to
9 quiet title on his slander of title claim, which is not
10 cognizable. Accordingly, Plaintiff's claim to quiet title is
11 dismissed with prejudice.
12
13
14

15 10. Violation of California's Rosenthal Act

16 Plaintiffs bring a claim under the Rosenthal Fair Debt
17 Collection Practices Act. However, foreclosure does not
18 constitute debt collection under California's Rosenthal Fair
19 Debt Collection Practices Act. Izenberg v. ETS Servs., L.L.C.,
20 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (citations
21 omitted)). Accordingly, Plaintiff's claim for a violation of
22 California's Rosenthal Act is dismissed with prejudice.
23
24
25

26 11. Civil Conspiracy

27 Defendants properly assert that Plaintiff cannot maintain
28 a cause of action for civil conspiracy, as "it is not an

1 independent tort." See Applied Equipment Corp. v. Litton Saudi
2 Arabia, Ltd., 7 Cal.4th 503, 510-11 (1994). As the California
3 Court of Appeal stated: "By its nature, tort liability arising
4 from conspiracy presupposes that the coconspirator is legally
5 capable of committing the tort, i.e., that he or she owes a duty
6 to plaintiff recognized by law and is potentially subject to
7 liability for breach of that duty." Id. at 511. As previously
8 mentioned, Defendants do not owe a duty to Plaintiff based on
9 their relationship. Plaintiff therefore cannot maintain a claim
10 for civil conspiracy. Accordingly, Plaintiff's claim for civil
11 conspiracy is dismissed with prejudice.
12
13
14

15 12. Declaratory Relief

16 Defendants properly assert that "Plaintiff's declaratory
17 relief claim involves Defendants' right to foreclosure and power
18 of sale. These issues are resolved by other claims." Def. Mo. to
19 Dismiss at 16. Moreover, declaratory relief does not serve to
20 "furnish a litigant with a second cause of action for the
21 determination of identical issues." General of Am. Ins. Co. v.
22 Lilly, 258 Cal. App. 2d 465, 470 (1968). Accordingly,
23 Plaintiff's claim for declaratory relief is dismissed with
24 prejudice.
25
26
27
28

13. Rescission/Cancellation of Void Instrument

The Court agrees with Defendants that Plaintiff's claim for rescission/cancellation of a void instrument fails.

"[R]escission is not a cause of action; it is a remedy." Nakash v. Superior Court, 196 Cal. App. 3d 59, 70 (1987) (citations omitted). Moreover, as discussed above, Plaintiff cannot allege tender in order to properly seek a remedy of rescission. Accordingly, Plaintiff's claim for rescission/cancellation of a void instrument is dismissed with prejudice.

14. Preliminary and Permanent Injunctive Relief

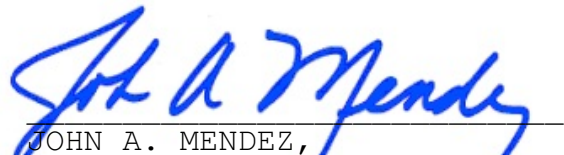
Injunctive relief is a remedy which must rely upon underlying claims. Hafiz v. Greenpoint Mortgage Funding, Inc., 652 F.Supp.2d 1039 (N.D. Cal. 2009). Because all of Plaintiff's claims have been dismissed with prejudice, the cause of action for injunctive relief cannot stand. Accordingly, Plaintiff's claim for injunctive relief is dismissed with prejudice.

III. ORDER

For the reasons set forth above, Defendant's motion to dismiss is hereby GRANTED, WITH PREJUDICE.

IT IS SO ORDERED.

Dated: April 22, 2010


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE