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

RODOLFO VELASQUEZ,

Plaintiff,

No. CIV 2:11-cv-1019-GEB-JFM

vs.

CHASE HOME FINANCE LLC, *et al.*,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /
This matter is before the court on defendants’ motion to dismiss and on plaintiff’s motion to determine venue, motion for leave to file a first amended complaint and motion to remand. All four motions are scheduled for hearing on August 4, 2011. The court has determined that the matter shall be submitted upon the record and briefs on file and accordingly, the date for hearing of these matters shall be vacated. Local Rule 230. Upon review of the motions and documents filed in support and opposition, THE COURT FINDS AS FOLLOWS:

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from foreclosure proceedings initiated against real property located at 426 Idora Avenue, Vallejo, California 94591 (“the Property”). On October 28, 2003, plaintiff obtained a mortgage for \$173,000.00 secured by the Property.¹ Req. for Judicial Notice

¹ Defendants filed a request for judicial notice in support of their motion to dismiss. Defendants submit multiple documents, including a copy of the deed of trust (“DOT”)

1 (“RJN”), Ex. 1. A Deed of Trust (“DOT”) was recorded on November 7, 2003 with the Solano
2 County’s Official Records office. Id. On February 13, 2009, a Notice of Default and Election to
3 Sell Under DOT was recorded. Id., Ex. 2. On March 23, 2009, a Substitution of Trustee was
4 recorded. Id., Ex. 3. On May 18, 2009, a Notice of Trustee’s Sale was recorded. Id., Ex. 4.

5 This is plaintiff’s fourth judicial action related to the Property against defendants
6 Chase Home Finance LLC (“Chase”) and Federal National Mortgage Association (“Fannie
7 Mae”). Plaintiff, proceeding pro se and in forma pauperis, first filed suit on June 1, 2009 in the
8 Northern District of California against Chase (case No. 3:09-cv-2409-WHA). See RJN, Ex. 5.
9 Chase filed a motion to dismiss, but prior to the district court’s consideration of the motion,
10 plaintiff filed a request to withdraw the complaint. Id. On August 19, 2009, the Honorable
11 William Alsup granted the request and dismissed the action. Id.

12 On April 16, 2010, plaintiff filed his second suit in the Northern District of
13 California against both defendants (case No. 3:10-cv-1641-SI) (“Velasquez I”). RJN, Ex. 7. On
14 June 14, 2010, plaintiff filed a first amended complaint (“FAC”). Id., Ex 7. The FAC set forth
15 the following causes of action: (1) loan reduction; (2) discrimination against a home owner; (3)
16 quiet title; (4) conspiracy to defraud; (5) fraud-concealment; (6) breach of fiduciary duty; (7)
17 damages; (8) fraudulent misrepresentation; (9) wrongful attempt to foreclose; (10) breach of
18 contract and implied covenant of good faith and fair dealing; (11) unlawful business practice;
19 (12) declaratory and injunctive relief; (13) rescission pursuant to the Truth in Lending Act
20 (“TILA”), 12 U.S.C. § 1601, *et seq.*; and (14) violation of the Real Estate Settlement Procedures
21 Act (“RESPA”), 12 U.S.C. § 2601, *et seq.* Id. Defendants filed a motion to dismiss the FAC.
22 See id., Ex. 7.

23 _____
24 encumbering the Property; a copy of the Notice of Default in connection with the DOT; a copy
25 of the substitution of trustee and various court orders in cases filed by plaintiff against
26 defendants. A court may take judicial notice of “‘matters of public record’ without converting a
motion to dismiss into a motion for summary judgment.” Lee v. City of Los Angeles, 250 F.3d
668, 689 (9th Cir. 2001) (quoting MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir.
1986)). Accordingly, defendants request will be granted.

1 On August 11, 2010, the Honorable Susan Illston granted defendants' motion
2 with leave to amend eleven of the fourteen claims. RJN, Ex. 7. Judge Illston dismissed with
3 prejudice plaintiff's causes of action for discrimination against homeowner, damages and TILA
4 violations. Id.

5 On August 26, 2010, plaintiff filed a second amended complaint ("SAC") without
6 correcting the deficiencies noted in Judge Illston's August 11, 2010 order. RJN, Ex. 8.
7 Defendants filed a motion to dismiss the SAC. Id., Ex. 9. On January 10, 2011, Judge Illston
8 granted the motion with prejudice for failure to state a claim. Id., Ex. 9. Judgment was entered
9 accordingly. Id., Ex. 10. On January 12, 2011, plaintiff filed a notice of appeal.

10 On January 19, 2011, plaintiff initiated an adversary proceeding against defendant
11 Chase in United States Bankruptcy Court, Northern District of California, Bankruptcy Case No.
12 08-31219DM, Adversary Proceeding No. 11-3006DM. RJN, Ex. 12. In his prayer for relief,
13 plaintiff sought an order directing Chase to grant plaintiff a loan modification. Id. at 3. On
14 February 24, 2011, the Bankruptcy Court dismissed the Adversary Proceeding for lack of subject
15 matter jurisdiction. Id., Ex. 13.

16 On February 23, 2011, plaintiff filed the underlying complaint in the Solano
17 County Superior Court ("the instant action"). Therein, plaintiff alleges that defendants denied
18 his request to reduce the amount of his existing home loan, refused to sell the property to
19 plaintiff at the same price they were willing to sell it to a third-party in a short sale and
20 wrongfully opted to foreclose on the Property. The instant action is based on (1) consumer
21 fraud; (2) common law fraud; (3) unjust enrichment; (4) violation of the Fair Debt Collection
22 Practices Act, 15 U.S.C. § 1692, *et seq.*; (5) negligence; (6) breach of implied warranties; (7) set
23 aside and vacate trustee's sale; (8) violation of TILA; (9) violation of RESPA; (10) promissory
24 estoppel; (11) declaratory relief; (12) action for an accounting; (13) injunctive relief and
25 disgorgement; and (14) application for temporary restraining order.

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1 On April 15, 2009, defendants removed the action to this court. On April 25,
2 2011, defendants filed the instant motion to dismiss.

3 On June 1, 2011, plaintiff filed a first amended complaint in which he sought to
4 dismiss his federal claims and have this action remanded to state court. See Doc. No. 11. On
5 June 14, 2011, defendants filed a motion to dismiss the first amended complaint. Pursuant to
6 Federal Rule of Civil Procedure 15(a) and Local Rule 137(c), the undersigned dismissed
7 plaintiff's amended complaint and defendants' amended motion to dismiss was denied as moot.

8 On July 6, 2011, plaintiff filed three motions: (1) motion to determine venue, (2)
9 motion for leave to file a first amended complaint and (3) motion to remand the first amended
10 complaint.

11 On July 7, 2011, plaintiff filed an opposition to defendants' motion to dismiss.

12 On July 21, 2011, defendants filed an opposition to plaintiff's motions.

13 STANDARDS

14 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
15 sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.
16 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of
17 sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901
18 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to
19 relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct.
20 1955, 1974 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to
21 grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

22 In determining whether a complaint states a claim on which relief may be granted,
23 the court accepts as true the allegations in the complaint and construes the allegations in the light
24 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.
25 United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

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1 two suits involve infringement of the same right; and (4) whether substantially the same
2 evidence is presented in the two actions.” ProShipLine Inc. v. Aspen Infrastructures Ltd., 594
3 F.3d 681, 688 (9th Cir. 2010) (emphasis omitted). “Whether two suits arise out of the same
4 transactional nucleus depends upon whether they are related to the same set of facts and whether
5 they could conveniently be tried together.” Id. at 688-89 (citations, quotation marks and
6 emphasis omitted).

7 Here, the undersigned finds that the two lawsuits arise from the same
8 transactional nucleus of facts. The claims and factual allegations at issue in Velasquez I and
9 those alleged here all relate to foreclosure proceedings initiated against the Property and
10 plaintiff’s attempt to rescind the mortgage and/or obtain a loan modification.

11 In addition, the rights and interests established in Velasquez I would be destroyed
12 or impaired by prosecution of this action. Velasquez I concluded that plaintiff failed to state a
13 claim as a matter of law as to any of his causes of action related to foreclosure proceedings
14 initiated against the Property. Permitting prosecution of the instant action, which raises these
15 same issues, would plainly eviscerate the rights and interests established in Velasquez I.

16 Furthermore, the two lawsuits involve the infringement of the same rights. In
17 both actions, plaintiff alleged that he was wrongfully deprived of a loan modification and that
18 defendants conspired to fraudulently foreclose on the Property.

19 Finally, although evidence was not submitted in Velaquez I due to the fact that
20 the action was dismissed at the pleading stage, the fact that the allegations at issue in the two
21 actions are essentially identical demonstrates that substantially the same evidence would be
22 presented relevant in both actions.

23 Following review of the relevant factors, the undersigned concludes that
24 Velaquez I and the instant action present identical issues.

25 2. Final Judgment on the Merits

26 As to the second claim preclusion element, the judgment in Velaquez I, which

1 dismissed plaintiff's complaint for failure to state a cognizable claim constitutes a "final
2 judgment on the merits." The Ninth Circuit Court of Appeals has held that dismissals entered
3 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief
4 can be granted is a "judgment on the merits" to which the doctrine of claim preclusion applies.
5 Stewart v. U.S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002) (citing Federated Dep't Stores v.
6 Moitie, 452 U.S. 394, 399 n. 3 (1981)); accord Gasho v. United States, 39 F.3d 1420, 1438 n.17
7 (9th Cir. 1994).

8 In his opposition to defendants' motion to dismiss, plaintiff argues only that the
9 judgment in Velasquez I should be deemed void because venue was improper in the Northern
10 District of California.² This argument lacks merit. Venue is not a jurisdictional requirement.
11 See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 154-55 (1939). Because it is for
12 the convenience of litigants, it is a personal privilege of the defendants and can be waived by
13 them. Id. In Velasquez I, defendants waived the privilege by failing to object for improper
14 venue when they filed their motion to dismiss. See Fed. R. Civ. P. 12(b)(3), 12(h)(1).

15 3. Identity or Privity Between the Parties

16 Regarding the last element of the claim preclusion doctrine, there is no question
17 that there is an identity of parties between the earlier actions and the present one. See Cell
18 Therapeutics, Inc., 586 F.3d at 1212.

19 Based on the foregoing, the undersigned concludes that the doctrine of claim
20 preclusion applies to plaintiff's lawsuit and this action should be dismissed with prejudice.
21 Because the court finds dismissal is warranted on this ground, it declines to consider defendants'
22 alternative argument that plaintiff fails to state a claim as to each individual cause of action.

23 Additionally, for the reasons set forth above, plaintiff's motion to determine
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25 ² Plaintiff also attaches to his opposition correspondence between himself and defendants
26 concerning attempts to informally resolve this matter. The court agrees with defendants that
these exhibits are not subject to judicial notice or otherwise appropriate for consideration on this
motion to dismiss.

1 venue, motion for leave to file an amended complaint and motion to remand will be denied.

2 Accordingly, IT IS HEREBY ORDERED that:

- 3 1. The August 4, 2011 hearing is vacated;
- 4 2. Plaintiff's motion to determine venue is denied;
- 5 3. Plaintiff's motion to file an amended complaint is denied;
- 6 4. Plaintiff's motion to remand is denied;
- 7 5. The initial scheduling conference set for September 15, 2011 is vacated; and

8 IT IS HEREBY RECOMMENDED that defendants' motion to dismiss be granted
9 with prejudice.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
12 one days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
15 objections shall be filed and served within fourteen days after service of the objections. The
16 parties are advised that failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: August 1, 2011.

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21 UNITED STATES MAGISTRATE JUDGE

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