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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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DAVID KIRSTEN,

No. 2:13-cv-01215 JAM-KJN

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Plaintiff,

12

v.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

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OCWEN LOAN SERVICING, LLC, a
Delaware limited liability
company, and DOES 1 through
20, Inclusive,

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Defendants.

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This matter is before the Court on Defendant Ocwen Loan Servicing, LLC's ("Defendant") Motion to Dismiss Plaintiff's complaint (Doc. #5). Plaintiff David Kirsten ("Plaintiff")

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opposes the motion (Doc. #7) and Defendant replied (Doc. #10).¹

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For the reasons set forth below, Defendant's motion is GRANTED.

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I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

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Plaintiff originally filed this action on May 6, 2013, in San Joaquin County Superior Court against Defendant (Doc. #1).

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for August 21, 2013.

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1 Defendant removed this action to this Court on June 17, 2013 and
2 filed its motion to dismiss on July 1, 2013 (Doc. #5). In the
3 complaint, Plaintiff alleges three causes of action against
4 Defendant: (1) slander of title;
5 (2) defamation; and (3) unfair credit reporting. Id. ¶¶ 36-51.

6 In or about December 2007, Plaintiff obtained a mortgage
7 loan from Taylor, Bean & Whitaker Mortgage Corp. ("TBW") to
8 purchase a property in Lodi, California ("Property"). Id. ¶ 5.
9 Plaintiff alleges that he timely made all payments on his loan.
10 Id. ¶ 6. In 2009, Plaintiff alleges that TBW filed for
11 bankruptcy, which disrupted TBW's processing of customer's loan
12 payments. Id. ¶ 7. Even though Plaintiff allegedly made all
13 his payments, TBW failed to timely receive and post his payments
14 for August 2009 and September 2009. Id.

15 In 2009, Cenlar Agency, Inc. ("Cenlar") allegedly began
16 servicing Plaintiff's loan. Id. ¶ 8. On or about December 8,
17 2009, Cenlar allegedly sent a Notice of Default to Plaintiff and
18 his tenant at the Property. Id. ¶ 9. Plaintiff responded to
19 Cenlar and provided documentation to show that the payments were
20 made. Id. ¶ 10. Cenlar allegedly acknowledged in a letter that
21 Plaintiff made the payments. Id. Cenlar allegedly sent another
22 Notice of Default on or about July 6, 2010, which Plaintiff
23 disputed and Cenlar again acknowledged that Plaintiff made the
24 payments. Id. ¶¶ 11-12.

25 In or about 2010, Defendant allegedly became the loan
26 servicer. Id. ¶ 13. Defendant allegedly asserted that
27 Plaintiff was in default on the loan because it did not have a
28 record of his August and September 2009 payments. Id. ¶ 15.

1 Plaintiff allegedly responded and provided documentation again.
2 Id. On February 23, 2011, Defendant allegedly sent Plaintiff a
3 letter acknowledging the payments. Id. ¶ 19.

4 One month later, Defendant allegedly reported the loan
5 "past due" because it did not have record of the August and
6 September 2009 payments. Id. ¶¶ 20-21. As a result, Defendant
7 declared Plaintiff delinquent on the loan, improperly assessed
8 late fees and other charges, recorded one or more Notice of
9 Default, and falsely reported negative information about him to
10 credit reporting agencies. Id. ¶ 23. Plaintiff attempted to
11 resolve this problem but Defendant allegedly did not cooperate.
12 Id. ¶¶ 25-26.

13 Plaintiff allegedly paid the delinquent amount. Id. ¶ 26.
14 On or about April 16, 2012, Defendant recorded a "Rescission of
15 Notice of Default and Election to Sell under Deed of Trust,"
16 which stopped the foreclosure. Id.

18 II. OPINION

19 A. Legal Standard

20 A party may move to dismiss an action for failure to state a
21 claim upon which relief can be granted pursuant to Federal Rule
22 of Civil Procedure 12(b)(6). To survive a motion to dismiss a
23 plaintiff must plead "enough facts to state a claim to relief
24 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
25 556 U.S. 662, 570 (2007). In considering a motion to dismiss, a
26 district court must accept all the allegations in the complaint
27 as true and draw all reasonable inferences in favor of the
28 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),

1 overruled on other grounds by *Davis v. Scherer*, 468 U.S. 183
2 (1984); *Cruz v. Beto*, 405 U.S. 319, 322 (1972). “First, to be
3 entitled to the presumption of truth, allegations in a complaint
4 or counterclaim may not simply recite the elements of a cause of
5 action, but must sufficiently allege underlying facts to give
6 fair notice and enable the opposing party to defend itself
7 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
8 2011), *cert. denied*, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S.
9 2012). “Second, the factual allegations that are taken as true
10 must plausibly suggest an entitlement to relief, such that it is
11 not unfair to require the opposing party to be subjected to the
12 expense of discovery and continued litigation.” *Id.* Assertions
13 that are mere “legal conclusions” are therefore not entitled to
14 the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009) (citing *Twombly*, 550 U.S. at 555). Dismissal is
16 appropriate when a plaintiff fails to state a claim supportable
17 by a cognizable legal theory. *Balistreri v. Pacifica Police*
18 *Department*, 901 F.2d 696, 699 (9th Cir. 1990).

19 Upon granting a motion to dismiss for failure to state a
20 claim, a court has discretion to allow leave to amend the
21 complaint pursuant to Federal Rule of Civil Procedure 15(a).
22 “Dismissal with prejudice and without leave to amend is not
23 appropriate unless it is clear . . . that the complaint could not
24 be saved by amendment.” *Eminence Capital, L.L.C. v. Aspeon,*
25 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

26 B. Judicial Notice

27 Defendant requests judicial notice of the deed of trust,
28 notice of default, assignment of the deed of trust, substitution

1 of trustee, and rescission of notice of default. Request for
2 Judicial Notice ("RJN"), Doc. #6, at 2. These documents are
3 appropriate for judicial notice because they are public records
4 and are "not subject to reasonable dispute." Fed. R. Evid.
5 201(b).

6 C. Discussion

7 1. Unfair Credit Reporting Claim

8 Defendant argues that Plaintiff's unfair credit reporting
9 claim is in essence a claim under the Fair Credit Reporting Act
10 ("FCRA") and moves to dismiss Plaintiff's claim because he
11 failed to adequately allege the claim, there is no private cause
12 of action, and the claim is time barred. Plaintiff argues that
13 his claim for unfair reporting arises under the FCRA and
14 California Civil Code Section 1785.25(a) ("Section 1785.25(a)").
15 Plaintiff also argues that both claims are adequately alleged
16 and not time barred.

17 a. Failure to State a Claim under the FCRA

18 Defendant argues that the FCRA claim fails because
19 Plaintiff failed to allege that he first gave written notice of
20 a dispute to the credit reporting agencies ("CRAs") and that he
21 failed to allege that Defendant knew or should have known that
22 the information was false. Plaintiff argues that the degree
23 with which a plaintiff must plead notification to state a claim
24 under FRCA varies and he requests the Court to either leave this
25 issue to be determined by discovery or allow him leave to amend.

26 Title 15 U.S.C. § 1681s-2(b) outlines the duties of a
27 furnisher of information after receiving notice of a dispute.
28 While a private right of action is permitted for a violation of

1 the § 1681s-2(b) duties, those duties “arise only after the
2 furnisher receives notice of dispute from a CRA; notice of a
3 dispute received directly from the consumer does not trigger
4 furnishers’ duties under subsection (b).” Gorman v. Wolpoff &
5 Abramson, LLP, 584 F.3d 1147, 1154 (9th Cir. 2009) (citing Nelson
6 v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059 (9th Cir.
7 2002)).

8 Here, Plaintiff has alleged that he, “through his attorney,
9 demanded that [Defendant] notify each of the credit reporting
10 agencies . . . that the negative information . . . is false and
11 request that they withdraw such information from his credit
12 report.” Compl. ¶ 28. He also alleges that he repeatedly
13 informed Defendant that the information was false and demanded
14 Defendant retract the information. Id. ¶ 49. Based on these
15 allegations, Plaintiff alleges that he notified Defendant, the
16 furnisher of the credit information, of his dispute directly, but
17 does not allege that he reported his dispute to a CRA.
18 Therefore, Plaintiff has failed to allege the requisite
19 notification to state a claim under the FCRA.

20 Accordingly, the Court dismisses Plaintiff’s FCRA claim.
21 The Court addresses Defendant’s other two arguments to determine
22 whether leave to amend should be granted.

23 b. Private Right of Action

24 Defendant contends that Plaintiff’s FCRA claims must be
25 dismissed without leave to amend because there is no private
26 right of action under 15 U.S.C. § 1682s-2(a). Section 1681s-2(a)
27 sets forth the duty for furnishers of information to provide
28 accurate information to a CRA. 15 U.S.C. § 1681s-2(a). In his

1 complaint, Plaintiff does not specify which provision of the FCRA
2 governs his allegations, but clarifies in his opposition that his
3 claims are limited to § 1681s-2(b). Opp. at 14. As mentioned
4 above, a private right action exists under § 1681s-2(b).
5 Therefore, because Plaintiff's claim is under § 1681s-2(b) and
6 not § 1681s-2(a), the Court finds that Plaintiff may bring his
7 FCRA claim.

8 c. Statute of Limitations FCRA

9 Defendant also argues that Plaintiff's FCRA claim must be
10 dismissed without leave to amend because Plaintiff discovered the
11 purported violation in or about 2010 and filed this action in
12 2013 more than 3 years after the discovery of the purported
13 violation. Plaintiff argues that the claim should not be
14 dismissed because dismissal can be granted "only if the assertion
15 of the complaint, read with the required liberality, would not
16 permit the plaintiff to prove the statute had been tolled." Opp.
17 at 14 (citing Cervantes v. City of San Diego, 5 F.3d 1273, 1275
18 (9th Cir. 1993)).

19 A claim under FCRA may be brought "no[] later than the
20 earlier of (1) 2 years after the date of discovery by the
21 plaintiff of the violation that is the basis for such liability;
22 or (2) 5 years after the date on which the violation that is the
23 basis for such liability occurs." 15 U.S.C. § 1681p. "The date
24 on which liability arises depends on which provision was
25 allegedly violated." Forester v. Pennsylvania Higher Educ.
26 Assistance Agency, SACV 09-0930DOCRNBX, 2009 WL 3710517, at *3
27 (C.D. Cal. Oct. 30, 2009) (quoting Acton v. Bank One Corp., 293
28 F. Supp. 2d 1092, 1097 (D. Ariz. 2003)). A § 1681s-2(b)

1 violation "is triggered only after the consumer notifies the CRA,
2 and the CRA then notifies the furnisher of credit." Id. (citing
3 Nelson v. Equifax Information Services, LLC, 522 F. Supp. 2d
4 1222, 1231 (C.D. Cal. 2007)). Because Plaintiff has not alleged
5 that he notified a CRA or when the notification occurred, the
6 Court cannot determine at this time whether the claim is time
7 barred.

8 Accordingly, for the reasons mentioned above, the Court
9 grants Defendant's motion to dismiss Plaintiff's FCRA claim.
10 However, because Plaintiff may be able to allege that he notified
11 a CRA pursuant to § 1681s-2(b) within the statute of limitations,
12 the Court grants Plaintiff leave to amend.

13 d. California Civil Code § 1785.25(a)

14 Plaintiff argues that his unfair credit reporting claim is
15 also under the California Consumer Credit Reporting Act ("CCRA"),
16 specifically Section 1785.25(a). Plaintiff does not specify in
17 the complaint that his claim is under the CCRA. Nevertheless,
18 Defendant argues that this claim is untimely.

19 Section 1785.25(a) provides that "[a] person shall not
20 furnish information on a specific transaction or experience to
21 any consumer credit reporting agency if the person knows or
22 should know the information is incomplete or inaccurate." Cal.
23 Civ. Code § 1785.25(a). Plaintiff states that the statute of
24 limitations for claims under Section 1785.25(a) is three years
25 pursuant to California Civil Procedure Code Section 338(a). Opp.
26 at 13. However, claims under the CCRA are governed by California
27 Civil Code Section 1785, which provides that a claim brought
28 under the CCRA must be filed within two years after a plaintiff

1 knows or should have known of the violation but no more than
2 seven years after the earliest violation. Cal. Civ. Code
3 § 1785.33. In addition, when "a defendant has materially and
4 willfully misrepresented any information required under this
5 chapter to be disclosed to a consumer, . . . the action may be
6 brought at any time within two years after the discovery by the
7 consumer of the misrepresentation." Id.

8 Plaintiff alleges that at "various times in 2010, 2011,
9 2012, and 2013, [Defendant] reported to the credit reporting
10 agencies . . . negative credit information about plaintiff."
11 Compl. ¶ 47. Defendant argues that Plaintiff should have filed
12 this claim in 2012, or at the latest February 23, 2013, two years
13 after the latest letter Plaintiff purportedly received from
14 Defendant acknowledging that Plaintiff made all of his payments,
15 but Plaintiff filed passed the statute of limitations. Reply at
16 9. However, according to the allegations, Defendant furnished
17 information to CRAs several times with the earliest alleged
18 violation being in 2010 and the latest in 2013. Because
19 Plaintiff filed his claim on May 6, 2013, only transmissions of
20 information before May 6, 2011, are time barred.

21 Therefore, the Court finds that the alleged violations that
22 occurred in 2010 are time barred, but the alleged violations in
23 2012 and 2013 are not. Because it is unclear when the alleged
24 violations occurred in 2011, the Court cannot determine whether
25 they are time barred at this time. Therefore, the Court grants
26 Defendant's motion to dismiss Plaintiff's Section 1785.25(a).
27 The Court grants Plaintiff leave to amend to clarify his Section
28 1785.25(a) claim and to specify when in 2011 Defendant furnished

1 the information to CRAs.

2 2. Slander of Title

3 Defendant argues that Plaintiff's claim for slander of title
4 fails because the recorded documents are privileged publications,
5 and because Plaintiff has failed to alleged facts that he
6 suffered pecuniary damages.

7 For a slander of title claim, Plaintiff must allege the
8 following four elements: (1) a publication, (2) which is without
9 privilege or justification, (3) which is false, and (4) which
10 causes direct and immediate pecuniary loss. Manhattan Loft, LLC
11 v. Mercury Liquors, Inc., 173 Cal.App.4th 1040, 1051 (2009)
12 (citing Howard v. Schaniel, 113 Cal.App.3d 256, 263-264 (1980)).

13 a. Privilege

14 Defendant argues that Plaintiff has not sufficiently pled
15 the second element, that is, that the publication was done
16 "without privilege or justification." Under California Civil
17 Code Section 2924(d), privilege extends to the "mailing,
18 publication, and delivery of notices as required by this section"
19 and to the "[p]erformance of the procedures set forth in this
20 article." Cal. Civ. Code § 2924(d). Thus, the filing of a notice
21 of default in a nonjudicial foreclosure is privileged, except
22 when published with malice. Barrionuevo v. Chase Bank, N.A.,
23 C-12-0572 EMC, 2013 WL 4103606, at *5 (N.D. Cal. Aug. 12, 2013).
24 Malice requires "that the publication was motivated by hatred or
25 ill will towards the plaintiff or by a showing that the defendant
26 lacked reasonable grounds for belief in the truth of the
27 publication and therefore acted in reckless disregard of the
28 plaintiff's rights." Kachlon v. Markowitz, 168 Cal.App.4th 316,

1 336 (2008) (citations and internal quotations omitted).

2 Because Plaintiff premises his claim on the recording of the
3 notice of default (Compl. ¶ 31), which is a privileged
4 publication under Section 2924, Plaintiff must allege that the
5 recording was made with malice. In his opposition, Plaintiff
6 relies on two cases: Sumner Hill Homeowners' Assn., Inc. v. Rio
7 Mesa Holdings, LLC, 205 Cal.App.4th 999, 1030 (2012), review
8 denied (July 18, 2012), as modified on denial of reh'g (May 30,
9 2012), and Gudger v. Manton, 21 Cal. 2d at 545 (1943). In Sumner
10 Hill, the Court noted that "slander or disparagement of title
11 occurs when a person, without a privilege to do so, publishes a
12 false statement that disparages title to property and causes the
13 owner thereof some special pecuniary loss or damage." 205
14 Cal.App.4th 999, 1030 (citation and internal quotation marks
15 omitted). Plaintiff also relies on Gudger, for the proposition
16 that an "express finding of lack of good faith, or of actual
17 malice. . . would destroy the privilege or justification here
18 discussed." Gudger, 21 Cal. 2d at 546. Based on Sumner Hill and
19 Gudger, Plaintiff argues that he can overcome the privilege by
20 alleging lack of good faith or actual malice.

21 Plaintiff alleges that Defendant's conduct "was intentional,
22 wrongful, malicious and despicable and carried out with a willful
23 and conscious disregard for plaintiff's rights." Compl. ¶ 35.
24 In addition, throughout the complaint, Plaintiff alleges that
25 Defendant failed to investigate or view the file and documents
26 relating to Plaintiff's loan from the previous servicers prior to
27 recording the notice of default and that Defendant knew Plaintiff
28 was not in default because Plaintiff received a letter

1 acknowledging that Plaintiff's payments were received and applied
2 to his loan. See Compl. ¶¶ 17, 19.

3 Defendant argues that Plaintiff failed to provide the
4 correspondence as evidence and even if these allegations are
5 true, it shows mere negligence and it is insufficient to
6 establish the malice requirement. Reply at 4. Although
7 Plaintiff did not provide copies of the correspondence, he is not
8 required to provide evidence to oppose a motion to dismiss
9 because generally, the Court may not consider any material beyond
10 the pleadings in ruling on a motion to dismiss under Federal
11 Rules of Civil Procedure without converting it to a motion for
12 summary judgment. See Fed. R. Civ. P. 12(d) ("If, on a motion
13 under Rule 12(b)(6) or 12(c), matters outside the pleadings are
14 presented to and not excluded by the court, the motion must be
15 treated as one for summary judgment under Rule 56.")

16 Therefore, accepting Plaintiff's allegations as true for the
17 purposes of this motion, Plaintiff has alleged that Defendant
18 filed a notice of default even though it knew Plaintiff was not
19 in default. These allegations are sufficient to establish
20 malice. See e.g., Cerezo v. Wells Fargo Bank, N.A., 13-1540 PSG,
21 2013 WL 4029274, at *6 (N.D. Cal. Aug. 6, 2013)(holding that the
22 plaintiff's allegation that defendant knew that it did not have
23 the requisite interest to initiate foreclosure amounted to
24 reckless disregard of the truth); Albano v. Cal-W. Reconveyance
25 Corp., 4:12-CV-4018 KAW, 2012 WL 5389922, at *9 (N.D. Cal. Nov.
26 5, 2012) (holding that plaintiff's allegation that defendant knew
27 that a third party was not the beneficiary for the deed trust was
28 sufficient to defeat a motion to dismiss).

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b. Damages

Defendant argues that Plaintiff has also failed to allege that he suffered pecuniary damages as a result of the publication of these documents—the fourth element of a slander of title claim. Plaintiff argues that the false publication caused him damages.

“‘Pecuniary loss’ is an essential element of a slander of title cause of action.” Manhattan Loft, LLC v. Mercury Liquors, Inc., 173 Cal.App.4th 1040, 1057 (2009). Pecuniary loss is restricted to “(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.” Ghuman v. Wells Fargo Bank, N.A., 1:12-CV-00902-AWI, 2013 WL 552097, at *4 (E.D. Cal. Feb. 13, 2013) (emphasis omitted)(quoting Restatement (Second) of Torts § 633 (1977)).

Here, Plaintiff has alleged that “all of this had a significant adverse [effect] on Mr. Kirsten’s credit and caused him substantial damage.” Compl. ¶ 23. However, this allegation is conclusory. Plaintiff has failed to allege sufficient facts to show he suffered a monetary loss because of the publication of the notice of default, such as a reduction of the value of the property.

Accordingly, the Court dismisses Plaintiff’s slander of title cause of action. The Court grants Plaintiff leave to amend

1 because Plaintiff may be able to allege a pecuniary loss.

2 3. Defamation

3 Defendant moves to dismiss Plaintiff's defamation claim
4 because federal law preempts this claim and because it is time
5 barred. Plaintiff disagrees, arguing that his defamation claim
6 is not preempted or time barred because the claim is brought
7 under California Civil Code Section 1785.25(a). Opp. at 12-13.

8 In the complaint, Plaintiff does not specify that he brings
9 his defamation claim under Section 1785.25(a). However, in his
10 opposition, Plaintiff requests leave to amend to refer to the
11 statute to avoid preemption of this claim. Opp. at 12. If
12 Plaintiff's claim is a Section 1785.25(a) claim, then it is
13 duplicative of Plaintiff's unfair credit reporting claim
14 discussed above and would be unnecessary. Accordingly, the Court
15 grants Defendant's motion to dismiss Plaintiff's defamation
16 claim. The Court will, however grant Plaintiff leave to amend in
17 order to try to properly plead this cause of action. The Court
18 need not address Defendant's arguments that Plaintiff's
19 defamation claim is time barred and preempted at this time.

20 III. ORDER

21 For the reasons set forth above, Defendant's Motion to
22 Dismiss is GRANTED WITH LEAVE TO AMEND. Plaintiff must file his
23 Amended Complaint or notice of dismissal within twenty (20) days
24 from the date of this Order. Defendant shall file its
25 responsive pleading within twenty (20) days thereafter.

26 IT IS SO ORDERED.

27 Dated: September 20, 2013

28 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE