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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HERBERT MILLER,

 Plaintiff,

 v.

BAYVIEW LOAN SERVICING, LLC, &
PLACER TITLE COMPANY,

 Defendants.

No. 2:17-cv-0136-JAM-KJN PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Plaintiff Herbert Miller initially commenced this wrongful foreclosure action against defendants Bayview Loan Servicing, LLC (“Bayview”) and Placer Title Company (“Placer Title”) on January 20, 2017, and paid the filing fee. (ECF No. 1.) Presently pending before the court is a motion to dismiss and motion to strike filed by Bayview. (ECF Nos. 17, 18.) Plaintiff has opposed the motions, and Bayview filed reply briefs. (ECF Nos. 22, 23, 24.) After carefully considering the written briefing, the court’s record, and the applicable law, the court recommends that Bayview’s motion to dismiss be GRANTED IN PART, that the action be DISMISSED on the terms outlined below, and that Bayview’s motion to strike be DENIED WITHOUT PREJUDICE as moot. The court consequently also recommends that plaintiff’s request for approval of a notice of lis pendens be DENIED.

1 BACKGROUND

2 The background facts are taken from plaintiff’s operative complaint (see Complaint, ECF
3 No. 1 [“Compl.”]) and the public records attached to Bayview’s request for judicial notice (see
4 Request for Judicial Notice, ECF No. 19 [“RJN”]).¹

5 On April 27, 2007, plaintiff executed a Deed of Trust in the amount of \$1,000,000.00 as a
6 security instrument for a loan to purchase property located at 11356 Alta Mesa East Road in
7 Wilton, California (hereafter, the “Property”). (RJN, Ex. A.) The Deed of Trust identified
8 plaintiff as the borrower, Reward Mortgage as the lender, Placer Title as the trustee, and
9 Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for the lender and the
10 lender’s successors and assigns, as well as the beneficiary under the Deed of Trust. (Id.) The
11 Deed of Trust was recorded on April 30, 2007. (Id.) Plaintiff contends that the Deed of Trust
12 was void as an illegal contract at the loan’s origination, because the loan was actually funded not
13 by Reward Mortgage, but by an unknown pre-securitized special purpose entity as part of a table-
14 funded transaction prohibited by California law. (Compl. ¶¶ 11-28.)

15 On December 15, 2009, MERS, as nominee for Reward Mortgage, assigned the Deed of
16 Trust to CitiMortgage, Inc. (“CitiMortgage”). (RJN, Ex. C.) The Assignment of Deed of Trust
17 was recorded on December 30, 2009. (Id.) Several years later, on March 9, 2012, CitiMortgage
18 substituted the Law Offices of Les Zieve for Placer Title as the trustee under the Deed of Trust.
19 (RJN, Ex. D.) Shortly thereafter, on March 23, 2012, the Law Offices of Les Zieve, pursuant to
20 CitiMortgage’s instruction, executed a Notice of Default indicating that plaintiff was \$415,224.11
21 in arrears on his loan. (RJN, Ex. E.) Both the March 9, 2012 Substitution of Trustee and the
22 March 23, 2012 Notice of Default were recorded on March 27, 2012. (RJN, Exs. D, E.)

23 On May 8, 2012, CitiMortgage substituted Northwest Trustee Services, Inc. (“Northwest
24 Trustee”) as trustee in place of the Law Offices of Les Zieve. (RJN, Ex. F.) Subsequently, on
25 June 27, 2012, Northwest Trustee executed a Notice of Sale for the Property. (RJN, Ex. G.) Both
26 the May 8, 2012 Substitution of Trustee and the June 27, 2012 Notice of Sale were recorded on

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28 ¹ The court may take judicial notice of court filings and other matters of public record. Reyn’s
Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

1 July 3, 2012. (RJN, Exs. F, G.)

2 A few years later, on April 1, 2014, Northwest Trustee executed another Notice of Sale
3 for the Property, which was recorded on April 3, 2014. (RJN, Ex. H.) Thereafter, on October 11,
4 2014, CitiMortgage substituted Clear Recon Corp as the trustee in place of Northwest Trustee,
5 and the Substitution of Trustee was recorded on October 30, 2014. (RJN, Ex. I.)

6 On January 21, 2015, Clear Recon Corp executed yet another Notice of Sale for the
7 Property, which was recorded on January 28, 2015. (RJN, Ex. J.) Subsequently, on June 3, 2015,
8 CitiMortgage assigned the Deed of Trust to Bayview, and that assignment was recorded on June
9 16, 2015. (RJN, Ex. K.) Clear Recon Corp ultimately conducted a trustee's sale on November
10 17, 2016, at which the Property was sold to Bayview, and a Trustee's Deed Upon Sale was
11 recorded on December 5, 2016. (RJN, Ex. L.)

12 Plaintiff then commenced the instant action against Bayview and Placer Title on January
13 20, 2017. (ECF No. 1.) Plaintiff asserts the following claims: (1) violation of the federal Fair
14 Debt Collection Practices Act ("FDCPA") against Bayview; (2) violation of the federal Truth in
15 Lending Act ("TILA") against Bayview; (3) violation of California's Rosenthal Fair Debt
16 Collection Practices Act against Bayview; (4) violation of California's Unfair Competition Law
17 against Bayview and Placer Title; (5) cancellation of instrument against Bayview and Placer
18 Title; (6) negligence against Bayview and Placer Title; (7) slander of title against Bayview and
19 Placer Title; (8) quiet title against Bayview and Placer Title; and (9) wrongful foreclosure against
20 Bayview and Placer Title. (*Id.*)

21 The instant motion to dismiss and motion to strike by Bayview followed.

22 DISCUSSION

23 The court first addresses Bayview's motion to dismiss, before turning to Bayview's
24 motion to strike.

25 Motion to Dismiss

26 *Legal Standard*

27 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
28 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase

1 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
2 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
3 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
4 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to dismiss,
5 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
6 is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.
7 Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
8 factual content that allows the court to draw the reasonable inference that the defendant is liable
9 for the misconduct alleged.” Id.

10 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
11 facts alleged in the complaint as true and construes them in the light most favorable to the
12 plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is “not,
13 however, required to accept as true conclusory allegations that are contradicted by documents
14 referred to in the complaint, and [the court does] not necessarily assume the truth of legal
15 conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559 F.3d at
16 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim and,
17 prior to dismissal, tell a plaintiff of deficiencies in her complaint and give plaintiff an opportunity
18 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.
19 Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police
20 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally construed,
21 particularly where civil rights claims are involved”); see also Hebbe v. Pliler, 627 F.3d 338, 342
22 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings liberally even when
23 evaluating them under the standard announced in Iqbal). However, the court need not grant leave
24 to amend where amendment would be futile. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,
25 339 (9th Cir. 1996).

26 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally
27 consider only allegations contained in the pleadings, exhibits attached to the complaint, and
28 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506

1 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not
2 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the
3 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,
4 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding
5 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.
6 2003).

7 *Analysis*

8 The court considers plaintiff’s claims in the order asserted in the complaint.

9 In support of plaintiff’s first FDCPA claim against Bayview, plaintiff alleges that
10 Bayview made false representations and used unfair/unconscionable means to collect a debt when
11 it claimed that plaintiff’s mortgage was secured, claimed that the Property was subject to
12 foreclosure, threatened to foreclose against the Property, and filed a Notice of Default against the
13 title of the Property. (Compl. ¶¶ 40-48.) However, as Bayview points out, plaintiff’s FDCPA
14 claim is time barred. A FDCPA claim must be brought “within one year from the date on which
15 the violation occurs.” 15 U.S.C. § 1692k(d). In this case, the allegedly improper Notice of
16 Default was executed on March 23, 2012, and recorded in the public records of Sacramento
17 County on March 27, 2012, but plaintiff did not bring his FDCPA claim until almost 5 years later
18 on January 20, 2017. (RJN, Ex. E.)² Plaintiff provides no legal authority for his unfounded
19 assertion that the FDCPA’s limitations period does not apply, because the entire loan and deed of
20 trust is purportedly void. Nor does plaintiff’s complaint or opposition brief provide any facts
21 suggesting that equitable tolling is appropriate. Indeed, the Notice of Default was publically
22 recorded on March 27, 2012, and plaintiff also received further notice of foreclosure efforts on
23 the Property when the June 27, 2012 Notice of Trustee’s Sale was mailed to plaintiff and posted
24 at the Property, which plaintiff allegedly occupied as his home and primary residence at all times

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26 ² In any event, the public records of Sacramento County indicate that it was CitiMortgage, and
27 not Bayview, that directed the then-trustee, the Law Offices of Les Zieve, to execute and record
28 the March 23, 2012 Notice of Default. (RJN, Ex. E.) Moreover, beyond bald assertions and
conclusory allegations, plaintiff has not alleged any facts suggesting that Bayview violated any
specific provision of the FDCPA in the course of its involvement with plaintiff’s loan.

1 relevant to this action. (RJN, Exs. E, G; Compl. ¶ 2.) Therefore, the FDCPA claim against
2 Bayview should be dismissed with prejudice as time barred.

3 In support of plaintiff's second TILA claim against Bayview, plaintiff alleges that
4 Bayview failed to appropriately notify plaintiff that his mortgage was transferred to Bayview
5 within 30 days of that transfer as required by 15 U.S.C. § 1641(g). Bayview correctly contends
6 that this claim is also time barred, because plaintiff failed to bring the claim "within one year
7 from the date of the occurrence of the violation." See 15 U.S.C. § 1640(e). In this case,
8 plaintiff's complaint alleges that the deed of trust was assigned to Bayview on December 15,
9 2009, whereas the public records indicate that the deed of trust was actually assigned to Bayview
10 on June 3, 2015. (Compl. ¶ 32; RJN, Ex. K.) Even assuming the latter date, the notice required
11 by 15 U.S.C. § 1641(g) would have been due July 3, 2015, and plaintiff did not file his claim until
12 January 20, 2017. Furthermore, plaintiff's complaint or opposition brief does not provide any
13 facts suggesting that equitable tolling is appropriate. The Assignment of Deed of Trust was
14 publicly recorded on June 16, 2015. (RJN, Ex. K.) Plaintiff's complaint also alleges that
15 Bayview "asserted to PLAINTIFF, through U.S. Mail, that it was the recipient of the Mortgage by
16 assignment from MERS," although that letter purportedly did not comply with all the
17 requirements of 15 U.S.C. § 1641(g). (Compl. ¶¶ 51, 52.) Moreover, plaintiff's opposition brief
18 notes that he received billing statements from Bayview. (ECF No. 22 at 15.) Therefore, even
19 assuming, without deciding, that Bayview failed to provide the required notice under 15 U.S.C.
20 § 1641(g), plaintiff was well aware of Bayview's claims to ownership of the loan and the facts
21 necessary to support a potential TILA violation, and nonetheless failed to bring a timely TILA
22 claim. Thus, plaintiff's TILA claim should likewise be dismissed with prejudice as time barred.

23 The court notes that all of plaintiff's remaining claims are state law claims. Additionally,
24 there is no complete diversity of citizenship, because both plaintiff and defendant Placer Title are
25 citizens of California. Therefore, the court finds it appropriate to decline to exercise
26 supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(c)(3) ("The district
27 courts may decline to exercise supplemental jurisdiction over a claim...if – the district court has
28 dismissed all claims over which it has original jurisdiction"); see also Acri v. Varian Associates,

1 Inc., 114 F.3d 999, 1000-01 (9th Cir. 1997) (“in the usual case in which all federal-law claims
2 are eliminated before trial, the balance of factors . . . will point toward declining to exercise
3 jurisdiction over the remaining state-law claims”), quoting Carnegie-Mellon University v. Cohill,
4 484 U.S. 343, 350 n.7 (1988). Here, given that the only federal claims have dropped out in the
5 context of a motion to dismiss and that a trial date has not yet been set, dismissal of the state law
6 claims without prejudice is appropriate.³

7 Motion to Strike

8 In light of the court’s conclusion that the case should be dismissed, the court finds it
9 unnecessary to address the pending motion to strike, which should be denied without prejudice as
10 moot.

11 Request for Approval of Notice of Lis Pendens

12 Given the court’s conclusion that the case should be dismissed, the court also recommends
13 that plaintiff’s request for approval of a notice of lis pendens (ECF No. 9), which was opposed by
14 Bayview (ECF No. 14), be denied.

15 CONCLUSION

16 Accordingly, IT IS HEREBY RECOMMENDED that:

- 17 1. Bayview’s motion to dismiss (ECF No. 18) be GRANTED IN PART.
- 18 2. Plaintiff’s federal claims for violation of the FDCPA and TILA be DISMISSED
19 WITH PREJUDICE.
- 20 3. The remaining state law claims be DISMISSED WITHOUT PREJUDICE.
- 21 4. Bayview’s motion to strike (ECF No. 17) be DENIED WITHOUT PREJUDICE as
22 moot.
- 23 5. Plaintiff’s request for approval of a notice of lis pendens (ECF No. 9) be DENIED.
- 24 6. The Clerk of Court be directed to close this case.


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26 ³ Because the dismissal of the state law claims would be without prejudice, plaintiff may be able
27 to pursue such claims in state court. Nevertheless, and although the court does not adjudicate the
28 merits of those claims, those claims appear to be frivolous. Therefore, to avoid the potential
imposition of sanctions in the state court forum, plaintiff should carefully consider whether
refiling the action in state court is appropriate.

1 In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
2 discovery, and motion practice in this action are STAYED pending resolution of the findings and
3 recommendations. With the exception of objections to the findings and recommendations or non-
4 frivolous motions for emergency relief, the court will not entertain or respond to motions or other
5 filings until the findings and recommendations are resolved.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
8 days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
11 shall be served on all parties and filed with the court within fourteen (14) days after service of the
12 objections. The parties are advised that failure to file objections within the specified time may
13 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th
14 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

15 IT IS SO ORDERED AND RECOMMENDED.

16 Dated: October 20, 2017

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19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE
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