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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONALD CATHERINE,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

No. 2:19-cv-01487-JAM-DB

**ORDER DENYING MOTION FOR LEAVE
TO AMEND COMPLAINT**

Before the Court is Plaintiff Donald Catherine's ("Plaintiff") motion for leave to amend his first amended complaint. Mot., ECF No. 22, at 2. Defendant Wells Fargo Bank, N.A., ("Defendant" or "Wells Fargo") opposes this motion. Opp'n, ECF No. 25. For the reasons set forth below the Court DENIES Plaintiff's motion.¹

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

In 2004, Plaintiff obtained a refinance loan for his home from Wells Fargo's predecessor-in-interest, World Savings Bank,

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 11, 2020.

1 FSB. Mot., Exh. A, Proposed Second Amended Complaint ("SAC")
2 ¶ 14.

3 In 2014, Plaintiff stopped making payments on the loan and
4 Wells Fargo initiated a non-judicial foreclosure in 2015. Id.
5 ¶ 16. In response, Plaintiff then filed a prior lawsuit against
6 Wells Fargo seeking to challenge the foreclosure proceedings.
7 Opp'n at 3. This lawsuit was dismissed with prejudice in March
8 2017. Plaintiff appealed and the Ninth Circuit affirmed the
9 judgment in favor of Wells Fargo. Opp'n at 1.

10 In February 2018, Wells Fargo once again initiated
11 foreclosure proceedings against Plaintiff's home. Proposed SAC
12 ¶ 16. In May 2018, Plaintiff was able to bring his mortgage
13 current with financial aid from the state-funded Keep Your Home
14 California program. Id. ¶ 23.

15 Although there were no longer any pending foreclosure
16 proceedings, Plaintiff filed a second lawsuit pro se against
17 Wells Fargo in December 2018 in Sacramento Superior Court. Not.
18 of Removal, ECF No 1, at 1. Wells Fargo removed the suit to this
19 court in August 2019. Id. Wells Fargo then moved to dismiss
20 Plaintiff's Complaint. Mot. to Dismiss, ECF No. 4. The
21 Magistrate Judge presiding over the case granted Wells Fargo's
22 motion and gave Plaintiff 28 days to amend his complaint. Order
23 Dismissing Complaint, ECF No. 14. Plaintiff failed to amend his
24 complaint within that allotted time. He thereafter obtained
25 counsel and now seeks leave to file a SAC on the grounds that he
26 inadvertently and mistakenly failed to timely amend his complaint
27 because he was a pro se litigant. Mot. at 2. Plaintiff's
28 proposed SAC alleges four causes of action: (1) violations of

1 Real Estate Settlement of Procedures Act ("RESPA") under 12
2 U.S.C. § 2601 et seq., (2) Negligence, (3) Violations of
3 California Unfair Competition Law under Business and Professions
4 Code § 17200 et seq., and (4) Breach of the Implied Covenant of
5 Good Faith and Fair Dealing. See Proposed SAC.

6 II. JUDICIAL NOTICE

7 In support of its Opposition, Wells Fargo requests judicial
8 notice of various documents related to the subject refinance
9 loan including notes and agreements of the loan, and court
10 filings of Plaintiff's first suit against Defendant. See RJN,
11 ECF No. 26.

12 A court may take judicial notice of a fact that is not
13 "subject to a reasonable dispute" because "it is either
14 (1) generally known within the territorial jurisdiction of the
15 trial court or (2) capable of accurate and ready determination
16 by resort to sources whose accuracy cannot reasonably be
17 questioned." Fed. R. Evid. 201(a). For this reason, courts may
18 take judicial notice of court filings and matters of public
19 record. See e.g., Gamboa v. Tr. Corps & Cent. Mortg. Loan
20 Servicing Co., No. 09-0007 SC, 2009 WL 656285, *2-3 (N.D. Cal.
21 Mar. 12, 2009) (court took judicial notice of recorded documents
22 related to the foreclosure sale, including grant deed and deed
23 of trust: "[t]hese documents are also part of the public record
24 and are easily verifiable").

25 Because the documents for which Defendant requests judicial
26 notice are not subject to reasonable dispute, and because
27 Plaintiff does not oppose, the Court GRANTS Defendant's request.

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1 III. OPINION

2 A. Legal Standard

3 Under Federal Rule of Civil Procedure 15, a litigant may
4 amend his complaint once within twenty-one days of serving it.
5 Fed. R. Civ. P. 15(a)(1)(A). After that deadline has passed, "a
6 party may amend its pleading only with the opposing party's
7 written consent or the court's leave." Fed. R. Civ. P.
8 15(a)(2). "The court should freely give leave when justice so
9 requires." Id. In other words, "this policy is to be applied
10 with extreme liberality." Eminence Capital, LLC v. Aspeon,
11 Inc., 316 F.3d 1048, 1051 (9th Cir. 2003).

12 In deciding a request for leave to amend, a court considers
13 "bad faith, undue delay, prejudice to the opposing party,
14 futility of amendment, and whether the plaintiff has previously
15 amended the complaint." Johnson v. Buckley, 356 F.3d 1067, 1077
16 (9th Cir. 1999). But "not all of the factors merit equal
17 weight." Eminence Capital, 316 F.3d at 1052. Without
18 prejudice, or a strong showing of the other factors, there is "a
19 presumption under Rule 15(a) of granting leave to amend." Id.

20 B. Analysis

21 Wells Fargo argues allowing Plaintiff to amend his
22 complaint "would result in significant prejudice" because
23 amendment would be futile. Opp'n at 4. Futility of amendment
24 alone can justify the denial of a motion for leave to amend.
25 Missouri ex rel. Koster v. Harris, 847 F.3d 646, 656 (9th Cir.
26 2017). Amendment is futile when "no set of facts can be proved
27 under the amendment to the pleadings that would constitute a
28 valid and sufficient claim or defense." Id. (citations

1 omitted). At this stage, the Court "must accept as true all of
2 the allegations contained in a complaint." Ashcroft v. Iqbal,
3 556 U.S. 662, 678 (2009). Wells Fargo has already successfully
4 opposed two prior versions of the complaint and in response to
5 Plaintiff's motion to amend herein requests this Court to deny
6 further leave to amend given the flaws that plague the proposed
7 claims in the SAC. Opp'n at 4. For the reasons detailed below,
8 the Court grants Wells Fargo's request.

9 1. RESPA Claim

10 Under 12 U.S.C. § 2605, a loan servicer has a duty to
11 respond to a borrower's "qualified written request (QWR)" by
12 acknowledging receipt of correspondence within 5 days and taking
13 appropriate action within 30 days. 12 U.S.C. § 2605(e)(1)-(2).
14 A QWR is a written correspondence identifying the name and
15 account of borrower, that either: (1) includes a statement of
16 the reasons the borrower believes the account is in error or
17 (2) provides sufficient detail regarding information sought by
18 the borrower. 12 U.S.C. § 2605(e)(1)(B)(i)-(ii).

19 In his proposed SAC, Plaintiff alleges that he sent Wells
20 Fargo two QWRs, one on March 15, 2018 and the other on June 11,
21 2018. Proposed SAC ¶ 28. He further alleges that Wells Fargo
22 failed to timely acknowledge receipt of the QWRs and to timely
23 take the requested action in violation of RESPA. Id. Plaintiff
24 alleges Wells Fargo's wrongful acts caused him damages. Id.
25 ¶ 30. Wells Fargo argues these allegations suffer from "severe
26 defects" such that granting amendment to this claim would be
27 futile. Opp'n at 4. Specifically, Wells Fargo contends
28 Plaintiff's RESPA claim fails for three reasons: (1) Plaintiff

1 did not submit a legitimate QWR, (2) Wells Fargo responded to
2 the QWRs, and (3) because Plaintiff has not adequately
3 articulated damages.

4 Given that the Court must take Plaintiff's allegations as
5 true for purposes of this motion, Wells Fargo's arguments that
6 Plaintiff did not file legitimate QWR's and that Wells Fargo
7 adequately responded to the purported QWR's fail. See Proposed
8 SAC ¶ 28; see also Reply at 4. But the Court finds that the
9 proposed amendment of this claim is futile because Plaintiff has
10 failed to adequately articulate damages. Opp'n at 7.

11 Servicers are liable to borrowers for damages resulting
12 from a RESPA violation. 12 U.S.C. § 2605(f). Although not
13 explicit, "[C]ourts have read the statute as requiring a showing
14 of pecuniary damages in order to state a claim." Allen v. Fin.
15 Mortg. Corp., 660 F. Supp. 2d 1089, 1097 (N.D. Cal. Sept. 15,
16 2009). Plaintiff contends that Wells Fargo's RESPA violations
17 caused him to incur "excessive interest accumulation, negative
18 amortization, loss of equity, damage to credit, late fees,
19 attorney's fees, litigation costs, and [emotional damages]." Proposed SAC ¶ 30. But Plaintiff fails to specify how these
20 purported damages were incurred directly as a result of Wells
21 Fargo's RESPA violation. Plaintiff merely argues that he was
22 harmed because had Wells Fargo responded in time, he would have
23 been able to "reinstate [his] Subject Mortgage in March 2018."
24 Id. ¶ 24. This does not explain, however, how failing to
25 reinstate his mortgage caused those specific damages. For
26 example, Plaintiff failed to include "facts linking interest and
27 penalties on the loan to the alleged RESPA violations." Panno

1 v. Wells Fargo Bank, N.A., No. SA CV 16-0118-DOC, 2016 WL
2 74955834, *8 (C.D. Cal. Apr.1, 2016). Moreover, while Wells
3 Fargo cites to numerous cases supporting its argument that
4 Plaintiff's allegations are merely conclusory, see Opp'n at 7 n.
5 4, Plaintiff opposes this argument without citing to any cases
6 that support his contention, see Reply at 5-8.

7 In short, Plaintiff has failed to allege "facts sufficient
8 to establish that it is plausible, rather than merely possible,"
9 that his alleged damages resulted from Wells Fargo's RESPA
10 violations. Panno, 2016 WL 74955834, at *9. The Court finds
11 Plaintiff's proposed amendment of this claim is futile.

12 2. Negligence Claim

13 Wells Fargo argues amendment to Plaintiff's negligence
14 claim is also futile because it did not owe Plaintiff a duty of
15 care. Opp'n at 8-10. "The existence of a duty of care owed by
16 a defendant to a plaintiff is a prerequisite to establishing a
17 claim for negligence." Nymark v. Heart Fed. Sav. & Loan Ass'n,
18 231 Cal. App. 3d 1089, 1095 (1991). But financial institutions
19 generally "owe[] no duty of care to a borrower when the
20 institution's involvement in the loan transaction does not
21 exceed the scope of its conventional role as a mere lender of
22 money." Id. at 1095. Plaintiff concedes as much yet asks the
23 Court to consider this to be an instance that exceeded the scope
24 of Wells Fargo's conventional role as a "mere lender of money."
25 Reply at 10. The Court disagrees.

26 Although authority has recently emerged that has deviated
27 from the general duty of care rule, those cases have only
28 imposed a duty of care on lenders "that undertake[] to review a

1 loan for potential modification.” Alvarez v. BAC Home Loans
2 Servicing, L.P., 228 Cal. App. 4th 941, 948 (2014) (stating that
3 Garcia v. Ocwen Loan Servicing, LLC, No. C 10-0290 PVT, 2010 WL
4 1881098, *2-4 (May 10, 2010) “is representative of those
5 cases.”). Those cases are inapplicable to the case at hand.

6 Plaintiff argues that Mahoney v. Bank of Am., N.A., is
7 “particularly analogous to the facts here” but that case is
8 readily distinguishable. No. 13-cv-2530-W(JMA), 2014 WL
9 2197068, at *7 (S.D. Cal. May 27, 2014); Reply at 14. While the
10 plaintiffs in Mahoney were also attempting to obtain a
11 reinstatement quote, they were doing so to liquidate their
12 retirement savings to pay the balance of their mortgage. 2014
13 WL 2197068, at *2. When the plaintiffs attempted to pay the
14 majority of their outstanding loan, defendant accepted but
15 failed to deposit the payment for over a month. Id. Defendant
16 then refused to accept the rest of plaintiffs’ timely mortgage
17 payments but continued to penalize them with late fees and
18 penalties. Id. The court in Mahoney found this behavior was
19 outside the scope of a mere lender of money, and therefore found
20 a duty of care existed. Id. at *7.

21 In the instant case, Wells Fargo was not reviewing
22 Plaintiff’s loan for a potential modification nor rejecting
23 Plaintiff’s mortgage payments. Rather, Plaintiff alleges Wells
24 Fargo was negligent by simply failing to timely respond to his
25 QWR requesting a reinstatement quote. Proposed SAC ¶ 33. This
26 behavior falls squarely within Wells Fargo’s conventional role
27 as a mere lender of money. It therefore owed Plaintiff no duty
28 of care, as prescribed under the well-established general rule

1 in Nymark. Accordingly, the Court finds that amendment would be
2 futile because this claim fails as a matter of law.

3 3. UCL Claim

4 California's Unfair Competition Law ("UCL") prohibits "any
5 unlawful, unfair or fraudulent business act or practice and
6 unfair, deceptive, untrue or misleading advertising." Cal. Bus.
7 & Prof. Code § 17200. An act violates the UCL if it is
8 "unlawful," "unfair" or "fraudulent." McGarvey v. JP Morgan
9 Chase Bank, N.A., No. 2:13-cv-01099-KJM, 2013 WL 5597148, at *8-
10 9 (E.D. Cal. Oct. 11, 2013) (quoting Rubio v. Capitol One Bank,
11 613 F.3d 1195, 1203 (9th Cir. 2010)). Plaintiff's proposed
12 amended UCL Claim is predicated on the "unlawful" prong.
13 Proposed SAC ¶ 45. To establish an unlawful business practice,
14 plaintiff must successfully allege a predicate violation of the
15 law. McGarvey, 2013 WL 5597148, at *8-9.

16 As Defendant argues, this claim fails because Plaintiff's
17 first two claims fail. Opp'n at 14. Plaintiff's failure to
18 successfully allege a predicate violation of the law, makes the
19 proposed amendment of this claim futile.

20 4. Implied Covenant Claim

21 Under contract principles, "California law implies a
22 covenant of good faith and fair dealing in every contract."
23 Mundy v. Household Fin. Corp., 885 F.2d 542, 544 (9th
24 Cir.1989) (citation omitted). "The implied covenant imposes
25 certain obligations on contracting parties as a matter of law-
26 specifically, that they will discharge their contractual
27 obligations fairly and in good faith." Id. (citation omitted).
28 "To state a claim for breach of the implied covenant, a

1 plaintiff must allege performance or excuse for nonperformance
2 under the contract." Berkeley v. Wells Fargo Bank, No. 15-cv-
3 00749, 2015 WL 6126815, at *4 (E.D. Cal. Oct. 19, 2015) (quoting
4 Enuke v. Am.'s Wholesale Lender, No. CV-11-6661 PA (SPx), 2011
5 WL 11651341, at *9 (C.D. Cal. Dec. 18, 2011)).

6 Wells Fargo argues Plaintiff's implied covenant claim fails in
7 part because he cannot establish that he "fufille[d] [his]
8 obligations under the loan contract." Opp'n at 16. While
9 Plaintiff contends this claim is sufficiently plead, he fails to
10 respond to this specific argument in his Reply. See Reply at
11 12-13. It is undisputed that Plaintiff defaulted on his loan in
12 2014 and failed to make mortgage payments until mid-2018. Id.
13 Accordingly, Plaintiff has failed to show, and cannot show, that
14 he substantially performed under the contract. Amending this
15 claim would therefore also be futile.

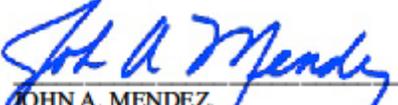
16 Given the Court's findings that the proposed SAC fails to
17 state any viable cause of action, further amendment is futile
18 and denial of Plaintiff's motion to amend is warranted.

19 IV. ORDER

20 For the reasons set forth above, the Court DENIES
21 Plaintiff's Motion for Leave to Amend his complaint.

22 IT IS SO ORDERED.

23 Dated: September 8, 2020

24 
25 JOHN A. MENDEZ,
26 UNITED STATES DISTRICT JUDGE
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