IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TONY A. LUCERO,

Plaintiff,

v.

AMERICAN HOME MORTGAGE,

Defendant.
_____/

No. C 09-02879 CRB

ORDER GRANTING MOTION TO DISMISS

This case involves a refinancing loan and allegations of impropriety by various institutions, largely in connection with the loan's origination. Now pending is a motion to dismiss the Second Amended Complaint (SAC) filed by the subsequent assignee of the Deed of Trust (Citibank), its substituted trustee (AHMSI Default), and the loan servicer (AHMSI). Because the SAC fails to state a claim against these Defendants, the Court will grant the motion, with prejudice.

I. BACKGROUND

In July 2004, Plaintiff purchased a home for $352,000 in Oakley, California. SAC ¶ 1. The home was 100% financed and Plaintiff's annual income at the time was about $61,000. Id. By the next year, Plaintiff had refinanced the loan for this home and purchased a second property as an investment. Id. ¶ 2. In July 2006, Plaintiff refinanced the Oakley property again. Id. ¶ 2. Less than a year after the July 2006 refinancing, Plaintiff owed more

than the market value of the properties. Id. ¶ 3. The July 2006 refinancing "is the subject matter of [the SAC]." Id. ¶ 5.

Plaintiff alleges that his "personal housing bubble certainly would have burst . . . even if the housing market had stayed strong" because he was "steered into an inappropriate exotic mortgage package, an interest-only loan, that created an illusion that the mortgage was within his financial means." Id. ¶ 4. The terms of the loan included interest-only payments for five years with an interest rate that adjusted monthly, and a "pick a pay" option, allowing him to make lower monthly payments resulting in negative amortization. Id. ¶ 5. Plaintiff alleges that "further unlawful conduct was used in the creation of the Subject Loan," including intentionally misleading origination documents that were doctored without his knowledge to make him look like a more attractive loan candidate. Id. ¶ 6.

Plaintiff defaulted, and on April 8, 2009, a trustee sale was conducted in which Defendant Citibank purchased the subject property. Id. ¶ 8.

Plaintiff initially filed suit in state court in June 2009. See dckt. no. 1 at 1. Defendants removed. Id. Defendants' first motion to dismiss was to be heard on August 21, 2009. See dckt. no. 9. When Plaintiff failed to file an opposition, this Court vacated the hearing date and issued an order to show cause. See dckt. no. 11. Plaintiff responded, stating that he had not anticipated removal from state court and that his counsel was not admitted to practice in federal court. See dckt. no. 13. Though he initially sought to remand the case, he subsequently filed a non-opposition to removal, acknowledging the Court's diversity jurisdiction. See dckt. no. 15.

Plaintiff then filed a First Amended Complaint (FAC) on October 23, 2009. See dckt. no. 26. On January 8, 2010, the Court dismissed the FAC without prejudice for failure to prosecute, and provided Plaintiff 20 days to amend. See dckt. no. 35. Plaintiff failed to do so, and so on April 29, 2010 the Court dismissed the case with prejudice. See dckt. no. 37. In May 2010 Plaintiff moved to set aside the judgment, and attached the SAC. See dckt. no. 39. The SAC alleges (1) fraud; (2) breach of fiduciary duty; (3) breach of good faith and fair dealing; (4) negligence; (5) unjust enrichment; (6) violation of TILA; (7) wrongful

foreclosure; (8) violation of California Business & Professions Code section 17200; and (9) tortious interference with economic advantage. See id. Ex. 2. The Court granted Plaintiff's motion to set aside judgment in July, 2010. See dckt. no. 46. In February 2011, Defendants AHMSI Default, AHMSI, and Citibank moved to dismiss the SAC. See dckt. no. 57.

II. LEGAL STANDARD

Under Rule 12(b)(6), a party may move to dismiss a cause of action which fails to state a claim upon which relief can be granted. On a motion to dismiss, all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Wyler-Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). To survive a Rule 12(b)(6) motion to dismiss, the complaint must state a claim to relief that is "plausible on its face." Ashcroft v. Iqbal, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A claim has "facial plausibility" when the pleaded factual allegations "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In the context of fraud claims, Rule 9(b) requires a party to "state with particularity the circumstances constituting fraud . . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." To comply with Rule 9(b), a plaintiff must plead "with particularity" the time and place of the fraud, the statements made and by whom made, an explanation of why or how such statements were false or misleading when made, and the role of each defendant in the alleged fraud. KEMA, Inc. v. Koperwhats, No. C-09-1587 MMC, 2010 WL 3464737, at *3 (N.D. Cal. Sept. 1, 2010) (citations omitted).

Under Federal Rule of Civil Procedure 12(f), the Court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Immaterial matter is defined as "statements that do not pertain, and are not necessary, to the issues in question." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993). A motion to strike may be granted if allegations are so unrelated to a plaintiff's claims as to be unworthy of any consideration, and their presence in the pleading will be prejudicial to the moving party. Id. at 1527-28.

III. DISCUSSION

A. Motion to Dismiss

The SAC includes causes of action for (1) fraud; (2) breach of fiduciary duty; (3) breach of good faith and fair dealing; (4) negligence; (5) unjust enrichment; (6) violation of TILA; (7) wrongful foreclosure; (8) violation of California Business & Professions Code section 17200; and (9) tortious interference with economic advantage. However, in his Opposition, Plaintiff states that he does not oppose the Motion to Dismiss as to the breach of fiduciary duty, breach of good faith and fair dealing, and unjust enrichment claims. Accordingly, the Motion to Dismiss as to those claims will be GRANTED with prejudice. This Order will now address the remaining six causes of action.

1. Fraud

The Complaint alleges that the Defendants engaged in actual fraud, misrepresentation and concealment "during the origination of the loan, including the terms of the loan and Plaintiff's ability to repay." SAC ¶ 82. Under Fed. R. Civ. P. 9(b), "[i]n alleging fraud . . ., a party must state with particularity the circumstances constituting fraud." To meet this standard, the complaint must include "particularized allegations of the circumstances constituting fraud," including the "time, place, persons, statements made, [and an] explanation of why or how such statements are false or misleading." In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547-48 n.7 (9th Cir. 1994) (en banc) (superceded by statute on other grounds). A plaintiff bringing a fraud action against a corporation must allege the "names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal. App. 4th 153, 157 (1991).

The Complaint fails to meet this standard. Though it alleges that Plaintiff "reasonably relied on the misrepresentations and nondisclosures," that Plaintiff would not have entered into the loan had he known the truth, and that he suffered damages as a result of his reliance, SAC ¶¶ 85-87, the Complaint does not include the "time, place, persons, statements made, explanation of why or how such statements are false or misleading." The most specific

descriptions the Complaint gives of representations dealing with the July 2006 loan are that "the disclosures required under [TILA] and [RESPA] were grossly inaccurate," failing to account for a $8,446.88 fee paid to the broker, id. ¶ 44, and that the information listed on the loan application "was false and contrary to the accurate and truthful information and documentation provided by Plaintiff," making Plaintiff look like a more attractive loan candidate than he was; such information "was intentionally and fraudulently misrepresented .. . in order to qualify Plaintiff for the Subject Loan," id. ¶¶ 47-48.

Logically, the allegations as to the loan application cannot be a basis of a fraud action by Plaintiff, as Plaintiff knew the "accurate and truthful information" about his finances and did not rely on the false information– if anything, the lenders might have a claim for fraud. As for the failure to account for the broker fee, it is unclear how that alleged fraud could be attributable to the moving Defendants. Any representations about the origination of the loan took place before the moving Defendants were involved. Defendants were not responsible for the July 2006 loan that was brokered well before they were involved, and that is the "subject matter of this Complaint." See SAC ¶ 5.

Plaintiff argues, however, that the moving Defendants are liable for the origination of the loan because they

> aided and abetted the mortgage broker in perpetration of the fraud against Plaintiff, acting in concert as part of a common scheme to generate predatory loans for lucrative sale on the secondary market. These Defendants provided substantial assistance in the preparation of the fraud by, inter alia, creating a demand for stated income loans and option arms and failing to adequately screen loan documents.

Id. ¶ 83. This allegation is both impermissibly vague and implausible; creating a demand for loans is hardly aiding and abetting. As this is now Plaintiff's third Complaint, the Court finds that amendment would be futile, and dismisses this claim with prejudice. See Chaset v. Fleer/Skybox Intern., LP, 300 F.3d 1083, 1088 (9th Cir. 2002).

2. Negligence

The claim for negligence is not alleged against these Defendants. See SAC ¶¶ 104-111.

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3. TILA

The Complaint raises an unusual TILA claim: it alleges that "the inaccurate disclosure of the true cost of financing the Subject Loan created an extended right of rescission under 15 U.S.C. § 1635(f)," that "Plaintiff exercised his legal right to rescind the Subject Loan prior to the Trustee Sale," and that "Defendants refused to acknowledge or respond to Plaintiff's letters, and proceeded with foreclosure." Id. ¶¶ 119-120. Plaintiff then uses the rejected rescission as a basis to demand damages under 15 U.S.C. § 1635(g). Id. ¶ 121.

One threshold issue which neither party addresses is that 15 U.S.C. § 1635, which provides for a right of rescission, does not apply to "a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property." See 15 U.S.C. § 1635(e)(2); Kucera v. Citizens Bank & Trust Co., 754 F.2d 280, 281 (8th Cir. 1985) ("the . . . refinancing transactions are exempt from coverage under the right-of-rescission"); and Ordonez v. Saxon Mortg. Servs.., Inc., No. CV F 08-1148 LJO GSA, 2009 WL 395488 at *6 (E.D. Cal. Feb. 17, 2009) (dismissing TILA rescission cause of action based on refinancing loan). Given Plaintiff's assertion that "[t]he loan created in July 2006 by [ABC] to refinance Plaintiff's Oakley residence is the subject matter of this Complaint," SAC ¶ 5, it would appear that section 1635(e)(2) applies.

Notwithstanding that section, Defendants argue that the TILA claim should be dismissed because "to rescind, a borrower must tender the amount borrowed." Mot. at 9 (citing Farmer v. Countrywide Fin. Corp., No. SACV08-1075 AG (RNBx), 2009 WL 1530973, at *5 (C.D. Cal. May 18, 2009) ("This court embraces the policy that a plaintiff cannot state a claim for rescission under TILA without at least alleging that she is financially capable of returning the principal of the loan")). This Court concurs. While the SAC alleges that Plaintiff was "ready, willing and able to surrender the property as tender [but] because AHMSI failed to comply with the requirements of 1635(b), Plaintiff's obligation to tender

did not arise," SAC ¶ 60, this is not sufficient; he must allege that he is able to return the principal of the loan, and he has not done so.[1]

In addition, it is doubtful that counsel's September 12, 2008 letter purporting to rescind the loan constituted an unequivocal notification of rescission under TILA. See 12 C.F.R. § 226.23(a)(2) (emphasis added) ("To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication"). Plaintiff's own characterization of the letter describes only a conditional intent to rescind. See SAC ¶ 57 (describing letter from counsel relaying "Plaintiff's desire to negotiate a loan modification rather than seek legal redress" and stating "Plaintiff's intent to rescind if AHMSI proceeded with foreclosure") (emphasis added).

For each of these reasons, the Court dismisses the TILA claim with prejudice.

4. Wrongful Foreclosure

The Complaint further alleges that Defendants "violated California Civil Codes governing non-judicial foreclosure." SAC ¶123. It argues first that California Civil Code § 2932.5 required that the assignee, Defendant Citibank, "duly acknowledge and record an assignment of deed of trust prior to exercising the power of sale," but that the assignment of interest in Citibank was "not recorded until just prior to the Notice of Trustee Sale." Id. at ¶ 79. Even according to the language of the Complaint, Citibank's assignment of interest was recorded prior to the sale, thus complying with the statute. See Reynoso v. Paul Financial, LLC, No. 09-3225 SC, 2009 WL 3833298, at *3 (N.D. Cal. Nov. 16, 2009) ("All necessary documents were recorded by the time the trustee's sale occurred"). This is not a basis of wrongful foreclosure claim.

The Complaint's second argument on this point is that under California Civil Code § 2934a(b), Defendants were required to mail a copy of the Substitution of Trustee at the same time as the default notice, but did so over a month later. Id. ¶ 124. Even if this rose to the level of actionable conduct, Plaintiff cannot succeed in an action for wrongful foreclosure

[1] As defense counsel reasoned at the argument, if the law was as Plaintiff claims, then a borrower could get a loan, buy a house, live in it for a few years, and then, if the house was underwater, simply give the house back– a potential windfall to the borrower.

without tendering his debt. See Williams v. Countrywide Home Loans, Inc., No. C 99-0242 SC, 1999 WL 740375, at *2 (N.D. Cal., Sept. 20, 1999) ("It is well settled law in California that an action to set aside a trustee's foreclosure sale under a deed of trust must be accompanied by a valid and viable tender of payment of the indebtedness owing.") (citing Karlsen v. Amercian Sav. & Loan Ass'n., 15 Cal. App. 3d 112, 117 (1971)); and Yazdanpanah v. Sacramento Valley Mortg. Group, No. C 09-02024 SBA, 2009 WL 4573381, at *7 (N.D. Cal. Dec. 1, 2009) ("When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secure debt to maintain any cause of action for wrongful foreclosure."). Though Plaintiff protests that he is not seeking to rescind the trustee sale, Opp. at 6, and instead asks for damages for this cause of action, a challenge to the validity of a trustee's sale is a suit in equity, and requires that a Plaintiff do equity. See Miller & Starr, California Real Estate 3D § 10:212 (2009). Because Plaintiff has not alleged that he has the ability to tender, this claim is also dismissed with prejudice.

5. California Business & Professions Code § 17200

A claim under section 17200 is "derivative of some other illegal conduct or fraud committed by a defendant, and '[a] plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation.'" See Benham v. Aurora Loan Servs., No. C-09-2059 SC, 2009 WL 2880232, at *4 (N.D. Cal. Sept. 1, 2009). The gravamen of the Complaint is the origination of the July 2006 loan; the moving Defendants were not involved in that origination, and Plaintiff has failed to allege in a non-conclusory manner how the moving Defendants are liable for the lender's conduct at origination. Accordingly, this conduct cannot be the basis for a UCL claim against the moving Defendants, and this claim is also dismissed with prejudice.

6. Tortious Interference with Economic Advantage

The Complaint alleges that although Plaintiff alerted AHMSI to incidents of fraud, Defendants foreclosed on Plaintiff's property, thus tortiously interfering with "Plaintiff's right and opportunity to negotiate a meaningful modification from the true note holders of

their loans." SAC ¶¶ 132-136. To state a claim for interference with economic advantage, a plaintiff must allege, among other things, an economic relationship with a third party, with which the defendant interferes. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153-54 (2003). Because the law is clear that a party cannot interfere with its own contract, see Rachford v. Air Line Pilots Ass'n., No. C 03-3618PJH, 2006 WL 1699578, at *5 (N.D. Cal. June 16, 2006) ("Only a stranger to a contract may be liable for tortious interference"), Plaintiff hedges in his Opposition, asserting: "Defendants interfered with the relationship between Plaintiff and the investors." Opp. at 11.

This fails to state a viable claim again the moving Defendants for two reasons. First, it runs counter to the earlier assertion in the Complaint that in response to his counsel's letter, Plaintiff received a letter from AHMSI on November 12, 2008 "requesting that Plaintiff call to discuss possible alternatives to foreclosure." SAC ¶ 61. Second, despite Plaintiff's novel argument, the "true note holder" of his loan– with which Defendants were alleged to have interfered– was Citibank, not an amorphous group of "investors." Plaintiff's own Complaint states that Citibank "purports to be the beneficiary of the Subject Deed of Trust." Id. ¶ 14. Though not attached to the Complaint, Defendants ask the Court to take judicial notice of the Assignment of Deed of Trust. See RFJ Ex. 4. The Court does so. See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006) ("court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion"). That assignment names Citibank, not "investors."

Defendants cannot interfere with themselves. This claim is therefore also dismissed with prejudice.

B. Motion to Strike

Defendants further seek to have all mention of punitive damages stricken from the complaint. Mot. at 12. Under Federal Rule of Civil Procedure 12(f), the Court may strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter." In Rosales v. Citibank, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001), the district court recounted the

Ninth Circuit's longstanding disdain for strike motions, "because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice." Id. The Court agrees and finds that the Complaint does not rise to the level of immateriality or impertinence. The Motion to Strike is denied.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Dismiss with prejudice, and DENIES the Motion to Strike.

IT IS SO ORDERED.

Dated: March 21, 2011

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE