

United States District Court
For the Northern District of California

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

AFSHIN SARBAZ,
Plaintiff,

v.

WACHOVIA BANK,
Defendant.

No. C 10-03462 CRB

**ORDER GRANTING MOTION TO
DISMISS**

Wachovia Mortgage¹ (“Defendant”) has filed a Motion to Dismiss Afshin Sarbaz’s (“Plaintiff”) Complaint related to a mortgage loan agreement between the parties. This case has been removed from state court on the basis of diversity jurisdiction. Plaintiff alleges exclusively state causes of action, none of which states a claim. The claims alleging violation of California Civil Code § 2923.5 and § 2923.6 are dismissed with prejudice. All other claims are dismissed without prejudice.

BACKGROUND

On January 22, 2007, Plaintiff entered into a mortgage contract with Defendant for the refinancing of Plaintiff’s home loan. First Am. Cmpl. (“FAC”) (Dkt. 1) ¶ 5. Plaintiff believed that the refinance loan had an affordable interest rate that was lower than the rate of

¹ Wachovia Mortgage is a division of Wells Fargo Bank and the successor in interest in this case through a merger of Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB.

1 his previous loans. Id. ¶ 7. Instead, it was an adjustable rate mortgage with negative
2 amortization. Id. ¶ 8.

3 In January 2008, Plaintiff became unable to make the required payments and began
4 negotiations to modify the loan on or about April 8, 2008. Id. ¶ 10–11. Plaintiff alleges that
5 Defendant’s agents advised Plaintiff that, to get the loan modification, Plaintiff needed to
6 stop making monthly payments. Id. ¶ 12.

7 Plaintiff defaulted on the loan, and a notice of default was posted on June 25, 2008.
8 Mot. to Dismiss (Dkt. 12) at 1. In November 2008, Defendant foreclosed, and a Trustee’s
9 Deed Upon Sale was recorded against the property.² Id.

10 The FAC alleges the following causes of action: (1) Violation of the Duties of Good
11 Faith and Fair Dealing; (2) Violation of California Civil Code § 2923.5; (3) Violation of
12 California Civil Code § 2923.6; (4) Unconscionability- Predatory lending (Violation of
13 Business and Professional Code §§ 17200, et. seq.); (5) Misrepresentation and Fraud
14 (Violation of Business and Professions Code §§ 17500, et. seq.); (6) Unjust Enrichment; and
15 (7) Infliction of Emotional Distress.

16 STANDARD

17 Under Federal Rule of Civil Procedure 12(b)(6), Defendant may move to dismiss a
18 cause of action that fails to state a claim upon which relief may be granted. Dismissals are
19 proper where there is a “lack of a cognizable legal theory” or “the absence of sufficient facts
20 alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dept., 901 F.2d 696,
21 699 (9th Cir. 1990). In evaluating a motion to dismiss, the court “must presume that all the
22 factual allegations in the complaint are true and draw all reasonable inferences in favor of the
23 pleading party.” Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).

24 To survive a motion to dismiss, the complaint must contain sufficient factual
25 allegations to be “plausible on its face.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)

26
27 ² Plaintiff alleges that foreclosure and sale of the property happened in September 2008. The Notice
28 of Trustee’s Sale is dated October 31, 2008, and the Trustee’s Deed Upon Sale is dated November 26,
2008. Request for Judicial Notice (“RJN”) (Dkt. 13) at Ex. E and F. The Court can take judicial notice
of those public records. Fed. R. Evid. 201.

1 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). That requirement is
2 met “when the plaintiff pleads factual content that allows the court to draw the reasonable
3 inferences that the defendant is liable for the misconduct alleged.” Id.

4 DISCUSSION

5 I. State Statutes Not Actionable

6 Plaintiff’s claim for violation of California Civil Code § 2923.5 fails because the
7 statute is only actionable for purposes of delaying a foreclosure sale. See Mabry v. Superior
8 Court, 185 Cal. App. 4th 208, 235 (2010). Because the foreclosure sale has already taken
9 place, this claim is not actionable. RJN (Dkt. 13) at Ex. F.

10 Plaintiff’s claim for violation of California Civil Code § 2923.6 also fails because
11 section 2923.6 “merely expresses the *hope* that lenders will offer loan modifications on
12 certain terms.” Mabry, 185 Cal. App. 4th at 221. It does not provide a private right of
13 action. See Pantoja v. Countrywide Home Loan, Inc., 640 F. Supp. 2d 1177, 1188 (N.D. Cal.
14 2009); Runjah v. Wells Fargo Bank, 667 F. Supp. 2d 1199, 1207 (S.D. Cal. 2009).

15 As such, the section 2923.5 and 2923.6 claims are dismissed with prejudice.

16 II. Failure to State a Claim as to Remaining Counts

17 None of Plaintiff’s remaining counts states a claim.

18 A. Violation of the Duties of Good Faith and Fair Dealing

19 This claim fails because, among other issues, Plaintiff does not specify the contract or
20 agreement to which he is referring, a required element of the claim. See Carma Developers,
21 Inc. v. Marathon Development California, Inc., 2 Cal. 4th 342, 371–75 (1992).

22 B. Unconscionability - Predatory lending (Violation of Business and 23 Professions Code §§ 17200, et. seq.)

24 This claim fails because Plaintiff does not allege facts that plausibly show that
25 Defendant was engaging in an unlawful, unfair, or fraudulent business act or practice. See
26 Khoury v. Maly’s of California, Inc., 14 Cal. App. 4th 612, 619 (1993). Further, to bring
27 claims concerning impropriety in a foreclosure, a plaintiff must allege that he tendered the
28 amount of the secured indebtedness. Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101,
1109 (1996); FPCI RE-HAB01 v. E&G Investments Ltd., 207 Cal. App. 3d 1018, 1021

1 (1989) (citing Arnolds Management Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (1984)).
2 Insofar as this claim attempts to challenge the Deed of Trust and foreclosure sale, it fails
3 because Plaintiff did not allege tender.

4 **C. Misrepresentation and Fraud (Violation of Business and Professions Code**
5 **§§ 17500, et. seq.)**

6 The fraud/misrepresentation claim fails because Plaintiff did not plead sufficient facts
7 to indicate how he was misled and what disclosures were not made. In addition, Plaintiff
8 fails to allege how the statements made would likely deceive the public. See Chern v. Bank
9 of America, 15 Cal. 3d 866, 876 (1976). Plaintiff's allegation that nondisclosure constituted
10 fraud is also insufficient because failure to disclose material facts "is not actionable fraud
11 unless there is some fiduciary or confidential relationship giving rise to a duty to disclose."
12 Kovich v. Paseo Del Mar Homeowners' Ass'n, 41 Cal. App. 4th 863, 866 (1996).

13 **D. Unjust Enrichment**

14 This claim fails because Plaintiff does not explain how Defendant's conduct amounted
15 to unjust retention of property. Plaintiff entered into a loan agreement with Defendant and
16 was required to make payments. He failed to do so, prompting the foreclosure as provided
17 under the Deed of Trust. An unjust enrichment claim must allege "receipt of a benefit and
18 [the] unjust retention of the benefit at the expense of another." Peterson v. Cellco
19 Partnership, 164 Cal. App. 4th 1583, 1593 (2008). Moreover, Plaintiff must, and has not,
20 allege tender because this claim seeks to challenge the foreclosure sale. See Abdallah, 43
21 Cal. App. 4th at 1109; FPCI RE-HAB01, 207 Cal. App. 3d at 1021 (citing Arnolds
22 Management Corp., 158 Cal. App. 3d at 578).

23 **E. Infliction of Emotional Distress**

24 The emotional distress claim fails because Plaintiff does not specify whether it is for
25 negligent infliction of emotional distress or intentional infliction of emotional distress. If
26 Plaintiff is pleading negligent infliction of emotional distress, he must allege facts that
27 Defendant extended its conventional role as a mere lender, giving rise to a duty. See Nymark
28 v. Heart Fed. Savings & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (1991). If the claim is for
intentional infliction of emotional distress, he must allege facts showing Defendant's conduct

1 was “outrageous.” See Corales v. Bennett, 567 F.3d 554, 571 (2009).

2 **III. Statute of Limitations**

3 The Court does not reach Defendant’s statute of limitation arguments because Plaintiff
4 has failed to state a claim. If this defense is raised again in response to an amended
5 complaint, Defendant should consider attaching the relevant loan documents in addition to
6 the Deed of Trust.

7 **IV. Home Owner’s Loan Act (“HOLA”)**

8 The Court also does not reach Defendant’s federal preemption arguments. However,
9 Plaintiff is cautioned to ensure that any claims in the amended complaint can survive a
10 preemption analysis. See Home Owners’ Loan Act, 12 U.S.C. § 1461–1470 (2006).

11 **CONCLUSION**

12 For these reasons, Defendant’s Motion to Dismiss is GRANTED. Plaintiff’s claims
13 under California Civil Code § 2923.5 and § 2923.6 are DISMISSED with prejudice. The rest
14 of the claims are DISMISSED without prejudice.

15
16 **IT IS SO ORDERED.**

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19 Dated: November 10, 2010



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE