

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

RICHARD SOWINSKI,)	Case No. 11-6431-SC
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	DISMISS AND DENYING MOTION
v.)	<u>TO EXPUNGE LIS PENDENS</u>
)	
WELLS FARGO BANK, N.A., and DOES)	
1-10,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

Plaintiff Richard Sowinski ("Plaintiff") challenges Defendant Wells Fargo Bank, N.A.'s ("Wells") foreclosure of his residential mortgage and the subsequent trustee sale of his residence. On December 2, 2011, Plaintiff filed a complaint in California Superior Court, which Wells timely removed to this Court. ECF No. 1 (notice of removal) Ex. A (complaint). Also on December 2, Plaintiff recorded a lis pendens¹ against the subject property.

¹ "A lis pendens is recorded by someone asserting a real property claim, to give notice that a lawsuit has been filed which may, if that person prevails, affect title to or possession of the real property described in the notice." Fed. Deposit Ins. Corp. v. Charlton, 17 Cal. App. 4th 1066, 1069 (Cal. Ct. App. 1993). "Once a lis pendens is filed, it clouds the title and effectively prevents the property's transfer until the litigation is resolved or the lis pendens is expunged." BGJ Associates, LLC v. Superior Court, 75 Cal. App. 4th 952 (Cal. Ct. App. 1999).

1 RJN Ex. 9 ("Lis Pendens").² The property was sold at public
2 auction on December 12, 2011. RJN Ex. 8 ("Trustee's Deed") at 2.

3 On February 13, 2012, Wells filed two motions: (1) to dismiss
4 the complaint and (2) to expunge the lis pendens. ECF Nos. 12, 13.
5 Plaintiff responded by filing an amended complaint, which is the
6 operative complaint in this case. ECF No. 14 ("Am. Compl."). The
7 amended complaint sets forth four claims: (1) quiet title under
8 Cal. Civ. Proc. Code § 760.020, (2) declaratory relief, (3)
9 injunctive relief, and (4) violation of California's Unfair
10 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.

11 Following the filing of the amended complaint, Wells formally
12 withdrew its motions to dismiss and expunge. ECF Nos. 16, 17.
13 However, on March 9, 2012, Wells filed new motions to dismiss and
14 expunge. ECF Nos. 18 ("MTD"), 19 ("MTE"). Both are pending and,
15 because neither party has submitted further briefing, unopposed.

16 After the time for filing motions passed, but before the Court
17 issued an order, the parties asked to engage in Court-sponsored
18 mediation. Accordingly, the Court referred them to mediation and
19 stayed the instant case pending completion of that process. See
20 ECF No. 28 ("May 24 Order"). The mediation session ended without
21 settlement and the mediator certifies that no further mediation is
22 forthcoming. ECF No. 34. Further, the parties have filed a joint
23 statement signaling mutual intent to continue to litigate the case.
24 ECF No. 33. Accordingly, the Court proceeds to the merits of the
25 pending motions to dismiss and expunge.

26
27 ² Wells submitted a request for judicial notice. ECF No. 20
28 ("RJN"). The RJN is unopposed and the exhibits it contains are
judicially noticeable public documents. Accordingly, the RJN is
GRANTED and the Court takes judicial notice of the documents.

1 **II. DISCUSSION**

2 **A. Motion to Dismiss**

3 Wells's pending motion to dismiss, being unopposed, and good
4 cause appearing, is GRANTED. Having reviewed the amended complaint
5 carefully, the Court concludes that it contains little more than
6 "labels and conclusions," which do not support a viable cause of
7 action. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also
8 Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011). Additionally,
9 Plaintiff's failure to articulate cognizable legal theories with
10 respect to three of his four claims provide another reason for
11 dismissal. See Balistreri v. Pacifica Police Dept., 901 F.2d 696,
12 699 (9th Cir. 1988).

13 As a preliminary matter, the Court notes that Plaintiff
14 improperly asserts two claims styled "declaratory relief" and
15 "injunctive relief." These are types of relief, not claims to
16 relief. The availability of declaratory or injunctive relief
17 depends on the viability of a legal claim entitling Plaintiff to
18 such relief. Thus, Plaintiff's declaratory and injunctive relief
19 "claims" are actually part of his prayer. Accordingly, though
20 Plaintiff may still seek declaratory and injunctive relief in any
21 further pleading, provided that he asserts a claim that could give
22 rise to such relief, his standalone declaratory and injunctive
23 relief "claims" are DISMISSED WITH PREJUDICE.

24 Plaintiff's two other claims, quiet title and UCL, are
25 DISMISSED WITH LEAVE TO AMEND. Plaintiff's quiet title claim fails
26 because Plaintiff does not allege tender. "A quiet title action
27 must include: (1) a description of the property in question; (2)
28 the basis for plaintiff's title; and (3) the adverse claims to

1 plaintiff's title." Ananiev v. Aurora Loan Servs., LLC, C 12-2275
2 SI, 2012 WL 4099568, at *3 (N.D. Cal. Sept. 17, 2012) (citing Cal.
3 Civ. Proc. Code § 760.020). "In order to satisfy the second
4 requirement, plaintiff must allege that he has discharged his debt,
5 regardless to whom it is owed." Id. (citing Kelley v. Mort. Elec.
6 Registration Sys., Inc., 642 F. Supp. 2d 1048, 1057 (N.D. Cal.
7 2009)). That is, to state a claim, Plaintiff must allege a valid
8 and viable offer of tender. See Chancellor v. OneWest Bank, C 12-
9 01068 LB, 2012 WL 3834951, at *10 (N.D. Cal. Sept. 4, 2012)
10 (rejecting argument that California law excuses tender requirement
11 for quiet title claims). Nowhere in Plaintiff's amended complaint
12 does he do so. See Am. Compl. ¶¶ 10-23 [sic 24] (general
13 allegations), 24-27 [sic 25-28] (quiet title claim). Accordingly,
14 his quiet title claim fails as insufficiently pled.

15 Plaintiff's UCL claim also misses the mark. Plaintiff alleges
16 only legal conclusions and generalities. E.g., id. ¶ 39 (alleging,
17 without specifics, that Wells engaged in "a systematic, methodical,
18 and general practice of defrauding [its] customers, the general
19 public and the state and local government"). Moreover, Plaintiff's
20 allegations sound in fraud, but fall far short of satisfying the
21 heightened pleading standard of Rule 9(b). See Cafasso, U.S. ex
22 rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir.
23 2011) ("To satisfy Rule 9(b), a pleading must identify the who,
24 what, when, where, and how of the misconduct charged, as well as
25 what is false or misleading about the purportedly fraudulent
26 statement, and why it is false.") (internal quotation marks and
27 brackets omitted). Additionally, while Plaintiff incorporates the
28 amended complaint's general allegations by reference, he fails to

1 specify how these support his UCL claim. See Am. Compl. ¶¶ 37-41.
2 He also fails to identify on which "prong" of the UCL his claim
3 rests. See id.; see also Saunders v. Superior Court, 27 Cal. App.
4 4th 832, 838-39 (1994) (distinguishing three prongs). In short,
5 Plaintiff's UCL claim fails because he has yet to articulate a
6 cognizable theory of recovery or to plead specific facts supporting
7 it. Accordingly, his UCL claim is DISMISSED WITH LEAVE TO AMEND.

8 **B. Motion to Expunge Lis Pendens**

9 Due to Plaintiff's failure to oppose Defendant's motion to
10 expunge, the Court would be well within its discretion to grant the
11 motion. Plaintiff bore the burden of proving that the lis pendens
12 should not be expunged, notwithstanding Wells being the moving
13 party. Cal. Civ. Proc. Code § 405.30; Cua v. Mortgage Elec.
14 Registration Sys., Inc., C 09-01605 SBA, 2012 WL 2792437, at *1
15 (N.D. Cal. July 9, 2012). By failing to oppose Wells's motion,
16 Plaintiff failed to carry his burden and effectively consented to
17 expungement. See Cua, 2012 WL 2792437, at *2; Sencion v. Saxon
18 Mortg. Services, Inc., C 10-03108 SBA, 2012 WL 1355691, at *4 (N.D.
19 Cal. Apr. 17, 2012). Additionally, Plaintiff's deficiently pled
20 complaint does not show "by a preponderance of the evidence the
21 probable validity of [his] real property claim." Hunting World,
22 Inc. v. Superior Court, 22 Cal. App. 4th 67, 70 (1994); see also
23 Carnero v. Fed. Home Loan Mortg. Corp., C 11-1029 WHA, 2012 WL
24 195408, at *3 (N.D. Cal. Jan. 23, 2012) (expunging lis pendens
25 because complaint failed to state a real property claim).

26 Because Plaintiff has leave to amend, however, the Court
27 exercises its discretion to deny the motion to expunge without
28 prejudice. Compare Meneses v. CitiMortgage, Inc., 5:11-CV-05227

1 EJD, 2012 WL 1428908, at *3 (N.D. Cal. Apr. 24, 2012) (complaint
2 dismissed with leave to amend; motion to expunge denied without
3 prejudice) with Unlu v. Wells Fargo Bank NA, 5:10-CV-5422 EJD, 2011
4 WL 6141036 (N.D. Cal. Dec. 9, 2011) (complaint dismissed without
5 leave to amend; motion to expunge granted). The Court is inclined
6 to give Plaintiff one last chance to establish the "probable
7 validity" of a claim concerning the real estate at issue.

8

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendant Wells Fargo Bank N.A.'s
11 motion to dismiss is GRANTED and its motion to expunge lis pendens
12 is DENIED WITHOUT PREJUDICE.

13 Plaintiff Richard Sowinski's amended complaint is DISMISSED.
14 His injunctive relief and declaratory relief "claims," because they
15 are prayers for relief rather than claims for relief, are dismissed
16 WITH PREJUDICE. Plaintiff's quiet title and UCL claims are
17 dismissed WITHOUT PREJUDICE.

18 Plaintiff may file a second amended complaint within thirty
19 (30) days from the signature date of this order. Failure to do so
20 may result in final dismissal of this case.

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22 IT IS SO ORDERED.

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24 Dated: November 26, 2012

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UNITED STATES DISTRICT JUDGE

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