

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

RICHARD SOWINSKI,)	Case No. 11-6431-SC
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART MOTION TO
v.)	DISMISS THIRD AMENDED
)	<u>COMPLAINT</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 ("Defendant") foreclosure of his residential mortgage and the subsequent trustee sale of his residence. Plaintiff recently filed a third amended complaint, ECF No. 50 ("3AC"), which Defendant now moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), ECF No. 51 ("MTD"). It is the fourth motion to dismiss filed in this case. The last motion to dismiss was granted in part and denied in part. ECF No. 49 ("Feb. 26 Order").¹ In the motion to dismiss now before the Court, Defendant argues that the 3AC fails to cure the deficiencies previously identified by the Court and also raises new grounds to

¹ Sowinski v. Wells Fargo Bank, N.A., 11-6431-SC, 2013 WL 706825, 2013 U.S. Dist. LEXIS 26330 (N.D. Cal. Feb. 26, 2013).

1 dismiss claims that were previously left undisturbed. The motion
2 is fully briefed, ECF Nos. 54 ("Opp'n"), 56 ("Reply"), and suitable
3 for determination without oral argument pursuant to Civil Local
4 Rule 7-1(b). For the reasons set forth below, the motion is
5 GRANTED in part and DENIED in part.

6
7 **II. BACKGROUND**

8 As it must on a Rule 12(b)(6) motion to dismiss, the Court
9 takes all well-pleaded factual allegations as true. On February 3,
10 2006 Plaintiff and his wife, Mary B. Sowinski, borrowed \$672,000
11 from World Savings Bank, FSB ("WSB"). Feb. 26 Order at 2. The
12 loan was secured by a deed of trust recorded against Plaintiff's
13 residence in Walnut Creek, California. Id. According to
14 judicially noticeable correspondence from federal banking
15 regulators, WSB later changed its name to Wachovia Mortgage, FSB,
16 which was subsequently converted to Wells Fargo Bank Southwest,
17 N.A., and then merged into Defendant. Id.

18 At the time of the loan transaction, Plaintiff was sixty-eight
19 years old and allegedly suffered from "pre-Alzheimers." Id.
20 Plaintiff alleges that he was intentionally misled as to the terms
21 of the loan transaction. Id. Specifically, Plaintiff alleges
22 that: (1) WSB falsely represented that the interest rate on the
23 loan was fixed rather than adjustable; (2) WSB falsely stated
24 Plaintiff's income and the value of the property on the loan
25 application; (3) Plaintiff was not permitted to read the loan
26 documents and, "because of his weakened mental state," he could not
27 have understood them if he had been. 3AC ¶ 9. As a result of
28 these alleged misrepresentations, Plaintiff took out a loan he

1 could not afford. See id. ¶ 15.

2 In January 2008, Plaintiff contacted Defendant about increases
3 to his monthly loan payments. Id. ¶ 25. One of Wells Fargo's
4 agents offered to assist Plaintiff with a loan modification, and
5 for the next twenty-eight months, Plaintiff submitted and re-
6 submitted loan modification application materials. Id. ¶¶ 25-26.
7 Plaintiff alleges that Wells Fargo never reached a decision on his
8 application. Id. ¶ 26.

9 On August 18, 2011, a notice of default was recorded with the
10 Contra Costa County Recorder's Office, indicating that Plaintiff
11 was over \$46,000 in arrears on his loan. Feb. 26 Order at 3. On
12 December 2, 2011, Plaintiff filed the instant action in California
13 Superior Court, and Defendant timely removed to this Court. Id.
14 On December 12, 2011, a few days after the action was filed, a
15 trustee's sale was conducted, through which Wells Fargo allegedly
16 sold the property to itself at a below-market price. Id.
17 According to the trustee's deed upon sale, the total debt at the
18 time of sale was \$763,042.60. Id.

19 On or about December 13, 2011, Monique Martin met with
20 Plaintiff and his wife at their Walnut Creek residence. 3AC ¶ 29.
21 Martin identified herself as the local agent for Defendant and
22 represented that she was in charge of the foreclosure process. Id.
23 Plaintiff later called a supervisor in Defendant's organization and
24 confirmed Martin's status. Id. Martin offered Plaintiff and his
25 wife \$10,000 "cash for keys" if they vacated the property by
26 January 2, 2012. Id.

27 Plaintiff and his wife later informed Martin that "they had no
28 choice but to accept the offer but would need additional time to

1 move [out]." Id. ¶ 30. Martin agreed that the \$10,000 cash-for-
2 keys offer would remain open through January 20, 2012 and that
3 Defendant would only pay Plaintiff and his wife if they vacated the
4 home by that date in "clean broom" condition. Id. Plaintiff
5 accepted the offer and thoroughly cleaned and vacated the property
6 on January 15, 2012. Id. When Plaintiff gave the keys to Martin,
7 she informed him that Defendant had revoked the offer because there
8 was a lawsuit pending. Id. ¶ 31. Defendant's counsel informed
9 Plaintiff's counsel that Defendant would only pay the \$10,000 if
10 Plaintiff agreed to dismiss this action with prejudice. Id.
11 Plaintiff refused this offer. Id. Defendant subsequently obtained
12 an unlawful detainer judgment against Plaintiff, destroying
13 Plaintiff's credit rating. Id. ¶ 32.

14 There have been several rounds of motion practice in
15 connection with Plaintiff's pleading. Defendant's last motion to
16 dismiss was granted in part and denied in part. The Court declined
17 to dismiss Plaintiff's claim for quiet title to the extent that it
18 was not premised on deficiencies in the foreclosure process. Feb.
19 26 Order at 9. Plaintiff's claim for breach of oral contract,
20 which was brought in connection with the parties cash-for-keys
21 agreement, was dismissed with leave to amend so that Plaintiff
22 could plead the exact terms of the oral contract and Defendant's
23 agent's authority to enter into it. Id. at 11. The Court also
24 dismissed with leave to amend Plaintiff's claim for elder abuse,
25 finding that Plaintiff's allegations were implausible as pled. Id.
26 at 12-13. All other claims were dismissed with prejudice.

27 Plaintiff's 3AC asserts claims for (1) quiet title, (2) breach
28 of oral contract, and (3) elder abuse. Defendant now moves to

1 dismiss all three claims pursuant to Federal Rule of Civil
2 Procedure 12(b)(6) for failure to state a claim.

3

4 **III. LEGAL STANDARD**

5 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency
6 of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
7 "Dismissal can be based on the lack of a cognizable legal theory or
8 the absence of sufficient facts alleged under a cognizable legal
9 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
10 (9th Cir. 1988). "When there are well-pleaded factual allegations,
11 a court should assume their veracity and then determine whether
12 they plausibly give rise to an entitlement to relief." Ashcroft v.
13 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
14 must accept as true all of the allegations contained in a complaint
15 is inapplicable to legal conclusions. Threadbare recitals of the
16 elements of a cause of action, supported by mere conclusory
17 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.
18 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
19 complaint must be both "sufficiently detailed to give fair notice
20 to the opposing party of the nature of the claim so that the party
21 may effectively defend against it" and "sufficiently plausible"
22 such that "it is not unfair to require the opposing party to be
23 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
24 1191, 1204 (9th Cir.2011).

25 ///

26 ///

27 ///

28 ///

1 **IV. DISCUSSION**

2 **A. Quiet Title**

3 Despite the fact that the Court left Plaintiff's quiet title
4 claim largely undisturbed in its February 26 Order on Defendant's
5 previous motion to dismiss, Defendant moves to dismiss that claim
6 again. Defendant argues (1) that Plaintiff cannot now attack the
7 validity of the underlying debt because he previously affirmed its
8 validity by agreeing to the alleged cash-for-keys agreement; (2)
9 Plaintiff failed to allege the necessary elements of a claim for
10 quiet title; and (3) pursuant to Rule 12(b)(7), Plaintiff failed
11 to join a necessary party, his wife, who is also a title-holder.²
12 Mot. at 1, 3-5.

13 These arguments were not raised in any of Defendant's three
14 previous motions to dismiss. See ECF Nos. 11, 18, 39.
15 Accordingly, Federal Rule of Civil Procedure 12(g)(2) bars
16 Defendant from raising them now. Rule 12(g)(2) provides: "Except
17 as provided in Rule 12(h)(2) . . . , a party that makes a motion
18 under this rule must not make another motion under this rule
19 raising a defense or objection that was available to the party but
20 omitted from its earlier motion." Rule 12(h)(2) provides: "Failure
21 to state a claim upon which relief can be granted to join a person
22 required by Rule 19(b), or to state a legal defense to a claim may
23 be raised" in any Rule 7(a) pleading, by a Rule 12(c) motion, or at
24 trial.

25 ² The Court notes that Defendant's arguments regarding Rule
26 12(b)(7) and the joinder of Plaintiff's wife are cursory at best.
27 The entirety of Defendant's argument is contained in two short
28 sentences in the introduction to its motion. Defendant does not
cite to any law concerning joinder or cite to any judicially
noticeable documents showing that Plaintiff's wife was also a title
holder.

1 In sum, under Rule 12(g), Defendant was required to
2 consolidate all Rule 12 defenses in a single pre-answer motion to
3 dismiss. Defendant failed to do so with respect to its new
4 arguments concerning Plaintiff's quiet title claim. Accordingly,
5 its motion to dismiss that claim is denied.

6 **B. Breach of Oral Contract**

7 Defendant contends that Plaintiff's breach of oral contract
8 claim remains flawed. First, Defendant asserts that Plaintiff has
9 not articulated Martin's authority to bind Defendant to the cash-
10 for-keys agreement. Mot. at 5. However, Plaintiff has
11 specifically alleged that Martin represented that she was in charge
12 of the foreclosure process and that Plaintiff confirmed this fact
13 with one of Defendant's supervisors. 3AC ¶ 29. Defendant suggests
14 that Plaintiff could not have reasonably believed that Martin had
15 authority because the foreclosure process was complete by the time
16 she made the cash-for-keys offer. Mot at 5-6. Defendant appears
17 to be clutching at straws. If Martin was in charge of the
18 foreclosure of Plaintiff's home, as Defendant's own agents
19 allegedly confirmed, it was reasonable for Plaintiff to believe
20 that she would also have the authority to make arrangements for
21 Defendant to take possession of the property.

22 Defendant's remaining arguments seek to hold Plaintiff to a
23 curiously high pleading standard. Despite the fact that Plaintiff
24 alleges that he and his wife accepted the cash-for-keys offer
25 sometime around January 15, 2012, see 3AC ¶¶ 29-30, Defendant
26 argues that Plaintiff cannot state a claim because he failed to
27 allege when or how he accepted the offer. Mot. at 6. Defendant
28 also argues that Plaintiff failed to plead that he left the

1 property in "clean broom condition" or relinquished possession of
2 the property, id., in spite of Plaintiff's allegations that he
3 thoroughly cleaned and vacated the property on or around January
4 15, 2012, 3AC ¶ 30. Plaintiff need not plead every single detail
5 related to the alleged cash-for-keys agreement. He need only plead
6 a plausible claim for relief. See Iqbal, 556 U.S. at 664. The
7 Court finds that Plaintiff has met that burden.³

8 Accordingly, the Court declines to dismiss Plaintiff's claim
9 for breach of an oral contract.

10 **C. Elder Abuse**

11 As pled, Plaintiff's claim for elder abuse is predicated on:
12 (1) the 2006 loan transaction, which Plaintiff claims was
13 unconscionable; (2) the foreclosure process, which allegedly
14 amounted to illegal "double-tracking"; and (3) the cash-for-keys
15 agreement, which was allegedly intended to trick Plaintiff to
16 vacate the property without a fight. The Court has already held
17 that Plaintiff's conclusory double-tracking allegations are
18 insufficient. Feb. 26 Order at 12. Accordingly, that aspect of
19 Plaintiff's claim for elder abuse is DISMISSED WITH PREJUDICE.

20 Defendant argues that Plaintiff's elder abuse claim is time-
21 barred to the extent that it is predicated on the 2006 loan
22 transaction. Mot. at 6. Plaintiff responds that the statute of
23 limitations is not relevant because his elder abuse claim relates
24 to ongoing conduct over a series of years. Opp'n at 5. Defendant

25 _____
26 ³ Defendant raises a number of other arguments for the first time
27 in its reply brief. Reply at 4-6. As Plaintiff was not provided
28 an opportunity to respond to these arguments, the Court does not
consider them. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir.
1999) ("[A]n argument raised for the first time in a reply brief,
. . . is not an argument that we may consider here.").

1 argues that the court should apply the "separate accrual rule,"
2 whereby the statute of limitations applies separately to causes of
3 action arising out of distinct injuries or occurrences. Reply at 7
4 (citing Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996)
5 (applying the separate accrual rule in the RICO context)).
6 However, Defendant has not cited any California authority applying
7 the separate accrual rule in this context, and thus has failed to
8 meet its burden as the moving party.

9 Plaintiff also alleges that Defendant violated the elder abuse
10 statute, Cal. Welf. & Inst. Code § 15600 et al., by tricking him
11 into giving up possession of his property by offering the cash-for-
12 keys agreement. Defendant argues that it did not obtain possession
13 of the property through the cash-for-keys agreement, but through an
14 unlawful detainer action, proceedings that Defendant claims are
15 privileged under California law. Mot. at 7. Consistent with his
16 pleading, Plaintiff responds that Defendant took possession of the
17 property before the unlawful detainer judgment was rendered. Opp'n
18 at 6-7. The dispute over when and how Defendant took possession of
19 the property is a factual issue, not amenable for determination on
20 a motion to dismiss.

21 Defendant also argues that Plaintiff has failed to plead that
22 the abusive conduct alleged was authorized or ratified by an
23 officer, director, or managing agent of Defendant, as required by
24 the elder abuse statute. Mot. at 7 (citing Cal. Welf. & Inst. Code
25 § 15657(c)). The Court finds that it is plausible that an officer,
26 director, or managing agent of Defendant authorized the acts
27 alleged in the complaint. Whether or not the conduct at issue was
28 actually ratified may be determined through discovery and is not

1 appropriate for resolution here.

2 Accordingly, Plaintiff's claim for elder abuse is DISMISSED
3 WITH PREJUDICE to the extent that it is predicated on the double-
4 tracking allegations in the Complaint. It remains undisturbed in
5 all other respects.

6
7 **V. CONCLUSION**

8 For the foregoing reasons, Defendant Wells Fargo Bank, N.A.'s
9 motion to dismiss is GRANTED in part and DENIED in part.
10 Plaintiff's elder abuse claim is DISMISSED WITH PREJUDICE to the
11 extent discussed in Section IV.C supra. Plaintiff's other claims
12 remain undisturbed.

13

14 IT IS SO ORDERED.

15

16 Dated: June 4, 2013



UNITED STATES DISTRICT JUDGE

17

18

19

20

21

22

23

24

25

26

27

28