

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

	)	Case No. CV 13-2072 SC
	)	
ERIKA COCKRELL, for the Estate	)	ORDER GRANTING MOTION TO
of Dennis F. Cockrell,	)	<u>DISMISS</u>
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WELLS FARGO BANK, N.A., and Does	)	
1-100, inclusive,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

---

This is a foreclosure dispute. Now before the Court is Defendant Wells Fargo Bank, N.A.'s ("Defendant") motion to dismiss Plaintiff Erika Cockrell's ("Plaintiff") first amended complaint. ECF Nos. 23 ("FAC."), 24 ("MTD"). The motion is fully briefed. ECF Nos. 27 ("Opp'n"), 28 ("Reply"). For the reasons discussed below, Defendant's motion is GRANTED.

**I. INTRODUCTION**

The parties are familiar with the facts of this case: Plaintiff brings this action on behalf of her deceased father Mr.

1 Dennis F. Cockrell's estate. Plaintiff's father had obtained a  
2 mortgage loan from Defendant, on which he defaulted. Plaintiff  
3 alleges that her father only defaulted because Defendant tricked  
4 him into doing so. Accordingly Plaintiff asserts the following  
5 claims against Defendant: (1) breach of the covenant of good faith  
6 and fair dealing, (2) promissory estoppel, (3) breach of contract,  
7 (4) intentional infliction of emotional distress, and (5) unfair  
8 competition under California's Unfair Competition Law ("UCL"), Cal.  
9 Bus. & Prof. Code §§ 17200, et seq.

10  
11 **II. LEGAL STANDARD**

12 A motion to dismiss under Federal Rule of Civil Procedure  
13 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
14 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
15 on the lack of a cognizable legal theory or the absence of  
16 sufficient facts alleged under a cognizable legal theory."  
17 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
18 1988). "When there are well-pleaded factual allegations, a court  
19 should assume their veracity and then determine whether they  
20 plausibly give rise to an entitlement to relief." Ashcroft v.  
21 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
22 must accept as true all of the allegations contained in a complaint  
23 is inapplicable to legal conclusions. Threadbare recitals of the  
24 elements of a cause of action, supported by mere conclusory  
25 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.  
26 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
27 complaint must be both "sufficiently detailed to give fair notice  
28 to the opposing party of the nature of the claim so that the party

1 may effectively defend against it" and "sufficiently plausible"  
2 such that "it is not unfair to require the opposing party to be  
3 subjected to the expense of discovery." Starr v. Baca, 652 F.3d  
4 1202, 1216 (9th Cir. 2011).

5  
6 **III. DISCUSSION**

7 **A. Standing**

8 Defendant claims that Plaintiff lacks standing because she has  
9 no legal authority to litigate claims on behalf of her father's  
10 estate. Defendant made this argument in its first motion to  
11 dismiss, but the Court rejected it, partly because Plaintiff had  
12 sufficiently pled that she was the executor and administrator of  
13 her father's estate, and had maintained that position in her brief.  
14 See ECF No. 21 ("July 23 Order") at 4. Plaintiff's opposition  
15 brief contradicts her FAC, stating that there has been no probate  
16 proceeding, so there is no dispute she is not the personal  
17 representative, executor, or administrator of her father's estate.  
18 See ECF No. 27-1 ("Adelaars Decl.") at 1-2. See Miller v.  
19 Campbell, Warburton, Fitsimmons, Smith, Mendel & Pastore, 162 Cal.  
20 App. 4th 1331, 1339-40 (Cal. Ct. App. 2008) ("personal  
21 representative" or executor must be appointed by probate court).

22 In an attempt to mitigate this error, Plaintiff attaches to  
23 her opposition brief a document attesting that she is the successor  
24 trustee to her father's family trust. Id. Ex. A ("Cockrell  
25 Revocable Family Trust"). According to Plaintiff, she alleged that  
26 she was the heir and trustee of her father's estate, but in support  
27 of this contention she cites only the attachments to her opposition  
28 brief. Opp'n at 4.

1 Plaintiff's opposition brief directly contradicts her FAC,  
2 and, moreover, the facts she cites in that brief are not referenced  
3 in or incorporated into her pleadings.<sup>1</sup> See Hal Roach Studios,  
4 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir.  
5 1990) ("Generally, a district court may not consider any material  
6 beyond the pleadings in ruling on a Rule 12(b)(6) motion"); Session  
7 v. PLM Lender Services, Inc., No. 10-04942 WHA, 2011 WL 6748510, \*5  
8 (N.D. Cal. Dec. 22, 2011) ("A plaintiff cannot avoid dismissal of  
9 her complaint by alleging new facts in opposition to a motion  
10 to dismiss.").<sup>2</sup> Plaintiff's FAC pled that she is her father's  
11 executor or administrator under probate law -- nothing else. See  
12 FAC ¶¶ 3-4 16. Accordingly the Court cannot find from Plaintiff's  
13 FAC whether Plaintiff has standing in this case. In fact, in her  
14 brief, "Plaintiff recognizes that her status as Trustee of her  
15 father's property is not included in the Complaint and therefore  
16 requests leave to allege standing." Opp'n at 4.

17 The Court therefore GRANTS Defendant's motion to dismiss  
18 Plaintiff's FAC. Plaintiff has leave to amend in order to correct  
19 her pleading deficiencies with regard to standing. Plaintiff is  
20 reminded that Rule 11 attaches to every filing she makes before the  
21 Court.

22 ///

23 ///

24 \_\_\_\_\_  
25 <sup>1</sup> Another problem is that even if Plaintiff alleged that she was  
26 the trustee, it is not clear whether that capacity gives her the  
right to pursue these causes of action on behalf of the estate or  
the trust.

27 <sup>2</sup> Further, Plaintiff pleads that she presented Defendant with  
28 probate documents showing that Plaintiff was her father's estate's  
administrator -- a highly disturbing allegation now that it is  
clear this is not the case.

1           **B. Plaintiff's Other Claims**

2           In the interests of judicial efficiency and to avoid the  
3 parties' re-litigating certain issues if Plaintiff files an amended  
4 complaint, the Court also makes the following findings as to  
5 Defendant's motion to dismiss.

6           Breach of the Implied Covenant: The Court previously dismissed  
7 this claim with leave to amend, so that Plaintiff could plead facts  
8 showing that Defendant actively hindered Mr. Cockrell's estate.  
9 July 23 Order at 8. In her FAC, Plaintiff continues to assert only  
10 that Defendant advised Mr. Cockrell to stop making payments. See  
11 FAC ¶¶ 22, 25. This fails to cure Plaintiff's pleading defect.  
12 The Court accordingly DISMISSES WITH PREJUDICE Plaintiff's breach  
13 of the implied covenant claim.

14           Intentional Infliction of Emotional Distress ("IIED"): The  
15 Court held that Plaintiff's original allegations as to this claim  
16 were too far removed from Defendant's conduct to support  
17 Plaintiff's claims. July 23 Order at 11-12. Plaintiff now alleges  
18 that Mr. Cockrell told Defendant's agent, when the agent suggested  
19 that Mr. Cockrell stop making payments, that the agent "better be  
20 right, because [Mr. Cockrell] could not handle any more stress in  
21 his life." FAC ¶ 38. The Court finds that this is insufficient to  
22 show that Defendant or its agents intentionally or recklessly  
23 caused harm to Mr. Cockrell, or that the alleged conduct was  
24 intolerably extreme. Therefore, the Court DISMISSES WITH PREJUDICE  
25 Plaintiff's IIED claim.

26           UCL: Plaintiff's UCL unlawfulness claim relies in part on the  
27 two above claims as predicate violations. Since those claims fail,  
28 Plaintiff's UCL claim is DISMISSED WITH PREJUDICE so far as it

1 relies on Plaintiff's breach of the implied covenant and IIED  
2 claims. Plaintiff's UCL unlawfulness claim survives to the extent  
3 that it is based on Plaintiff's promissory estoppel claim, which  
4 remains undisturbed.

5 The Court declines to address Defendant's joinder argument at  
6 this time, as Plaintiff purports to bring this action solely as  
7 trustee. Since the Court has dismissed the FAC so that Plaintiff  
8 can re-plead her standing on those grounds, the Court makes no  
9 finding as to joinder, though if Plaintiff chooses to allege other  
10 grounds for standing, she should account for the joinder rules.

11  
12 **IV. CONCLUSION**

13 As explained above, the Court GRANTS Defendant Wells Fargo  
14 Bank, N.A.'s motion to dismiss Plaintiff Erika Cockrell's first  
15 amended complaint. Plaintiff has thirty (30) days from this  
16 Order's signature date to file a second amended complaint. If she  
17 fails to do so, this case may be dismissed with prejudice.

18  
19 IT IS SO ORDERED.

20  
21 Dated: November 1, 2013



22 UNITED STATES DISTRICT JUDGE

23  
24  
25  
26  
27  
28