UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PERNARDO V GALANG,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

Case No.16-cv-03468-HSG

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 15

Pending before the Court is Defendant Wells Fargo Bank, N.A.'s motion to dismiss the complaint filed by Plaintiff Pernardo Galang. Dkt. No. 15. Having considered Defendant's motion to dismiss, Plaintiff's opposition, and all related papers, the Court finds the matter appropriate for decision without oral argument. See Civil L.R. 7-1(b). For the reasons set forth below, the Court **GRANTS** Defendant's motion to dismiss.

I. BACKGROUND

A. Factual Allegations

For purposes of deciding the motion, the Court accepts the following as true:

In or about February 2006, Plaintiff and his wife, Teresita Galang, obtained a mortgage loan from World Savings Bank, which subsequently became Wells Fargo Bank, N.A. Dkt. No. 4 ("Compl.") ¶¶ 8, 10, 13. Plaintiff and his wife executed a promissory note and deed of trust secured against their home at 898 Camaritas Circle, South San Francisco, California (the "Property"). Id. ¶ 10.

Plaintiff defaulted on the loan and contacted Defendant sometime in November 2011 to discuss refinancing. Id. ¶¶ 14, 15. On December 9, 2011, Defendant recorded a notice of default against the Property. Id. ¶ 16. Defendant did not contact Plaintiff beforehand. Id. ¶ 17. In response to the notice of default, Plaintiff submitted a loan modification application to Defendant.

Id. ¶ 19. Defendant then sent Plaintiff a letter stating that if he was ineligible for the modification program, someone would contact him to discuss other options. Id. ¶ 20. Plaintiff received a denial letter in 2013. Id. ¶ 21. Yet Defendant never contacted Plaintiff — before or after — to discuss his application or his right to appeal. Id. For the next three years, Defendant did not contact Plaintiff. Id. Then on February 26, 2016, Defendant recorded a second notice of default. Id. ¶ 22.

B. Procedural History

Plaintiff filed this action on June 22, 2016. Dkt. No. 4. Based on the allegations set forth above, Plaintiff asserts five claims under California state law: (1) violation of California Civil Code § 2923.5; (2) violation of California Civil Code § 2924.17(a); (3) negligence; (4) breach of the implied covenant of good faith and fair dealing; and (5) violation of California Business and Professions Code §§ 17200 et seq. ("UCL"). Id. Plaintiff seeks rescission of the most recent notice of default; preliminary and permanent injunctions barring Defendant from conducting a trustee's sale of the Property under California Civil Code § 2924.12(a); compensatory and actual damages; punitive damages; and attorneys' fees and costs. Id. at 22.

II. LEGAL STANDARD

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 540, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the

complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, Courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Secs. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

B. Rule 12(b)(7)

A party may move to dismiss a complaint for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). It is designed "to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights." *CP Nat'l* Corp. v. Bonneville Power Admin., 928 F.2d 905, 911 (9th Cir. 1991). Rule 19 requires a three-step inquiry: (1) whether the absent party is necessary under Rule 19(a) (i.e., required to be joined if feasible); (2) if so, whether it is feasible to order that absent party be joined; and (3) if joinder is not feasible, whether the case can proceed without the absent party or whether the action must be dismissed. Salt River Project Agr. Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012).

III. ANALYSIS

Defendant has moved to dismiss the complaint based on a failure to state a claim and on a failure to join a necessary party. Because the Court finds that most of Plaintiff's claims are time-barred, it addresses this argument first, then turns to the substance of the few remaining claims.

A. Statute of Limitations

1. California Civil Code §§ 2923.5 and 2924.17(a)

Plaintiff's first two causes of action against Defendant are premised on the 2011 notice of default. Plaintiff first claims that Defendant violated Cal. Civ. Code § 2923.5 by failing to contact him either in person or by telephone before recording the notice of default on December 9, 2011.[1] Compl. ¶ 30. Next, Plaintiff alleges that Defendant violated Cal. Civ. Code § 2924.17(a) because

[1] In opposition, Plaintiff concludes that he alleges two violations of § 2923.5, one that occurred in 2011 and another in 2015. See Dkt. No. 21 at 12. This conclusion, however, is not supported by the plain language of the complaint, which explicitly references only the December 2011 notice of default.

the declaration accompanying its December 9, 2011, notice of default was inaccurate and incomplete. Id. ¶ 44. Defendant "did not make any attempt to contact Plaintiff" despite the declaration's assertion that Defendant "tried with due diligence" to do so. Id. ¶¶ 44–46.

The parties agree that the applicable statute of limitations for both claims is three years. See Cal. Civ. Proc. Code § 338(a) ("An action upon a liability created by statute" must be brought "[w]ithin three years."). Defendant consequently argues that the claims are time-barred because Plaintiff did not file this complaint until June 22, 2016, four and a half years after the 2011 notice of default. See Dkt. No. 15 at 3. In response, Plaintiff asserts that the "delayed discovery" rule tolled the statute of limitations. The Court disagrees and finds these claims are time-barred.

a. Delayed Discovery Rule

Under California law, the delayed discovery rule postpones the running of a statute of limitations until "the time the plaintiff learns, or should have learned, the facts essential to his claim." Norgart v. Upjohn Co., 21 Cal. 4th 383, 397–98 & n.2 (Cal. 1999). To invoke the delayed discovery rule, a plaintiff must "specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 808 (Cal. 2005) (quotation omitted). It is axiomatic, however, that ignorance of the law is no excuse and will not toll a statute of limitations. See Norgart, 21 Cal. 4th at 398 n.2 (1999) ("It is irrelevant that the plaintiff is ignorant of . . . the legal theories underlying his cause of action. . . . [T]he fact that an attorney has not yet advised him does not postpone commencement of the limitations period."); see also McGee v. Weinberg, 97 Cal. App. 3d 798, 803 (Cal. Ct. App. 1979) ("The statute of limitations is not tolled by belated discovery of legal theories, as distinguished from belated discovery of [f]acts.").

First, the Court notes that it is not even clear that this rule applies to violations of California Civil Code §§ 2923.5 and 2924.17. Plaintiff does not cite a single case in which a court used this rule to toll a statute of limitations in a similar context.[2] Instead, the parties cite tort and

[2] Plaintiff's reliance on Hutchins v. Bank of Am., N.A., No. 13-CV-03242-JCS, 2013 WL 5800606, at *7 (N.D. Cal. Oct. 28, 2013), is unavailing for several reasons. First, the court rejected the application of the discovery rule in that case. Id. at *7. Second, although the plaintiff brought claims for violations of Cal. Civ. Code §§ 2923 et seq., the court was considering the discovery

fraud cases where the defendant's conduct or the resulting harm is somehow concealed. See, e.g., Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1024 (9th Cir. 2008) (fraudulent concealment in products liability case for defective gasket); Fox, 35 Cal. 4th at 807 (products liability case for defective surgical staples); cf. 3 Witkin, Cal. P. 5th Actions § 497 (2008) (listing contexts in which courts have applied discovery rule).

Second, Plaintiff does not argue that he was unaware of the factual predicates of his claims. He certainly knew that Defendant did not contact him prior to recording the 2011 notice of default. Instead, he argues that he was unaware of the legal import of these facts: "Plaintiff only learned of his potential claims against [Defendant] after he read an article about [Defendant's] fraudulent foreclosure practices on or about March 12, 2014." Dkt. No. 21 at 12. Only then did he seek legal advice. Id. These allegations are not in the complaint and are conclusory at best. Yet even if these facts were properly alleged, they are still insufficient. A statute of limitations is not tolled simply because Plaintiff is a layperson who waited to consult an attorney regarding potential legal bases for a claim. Such an interpretation would render statutes of limitations largely meaningless and is inconsistent with established law.

2. Negligence

Plaintiff's third cause of action against Defendant is for negligence in its processing of Plaintiff's loan modification application. See Compl. ¶ 51. Plaintiff alleges that Defendant failed to contact him at all after sending a letter denying the modification application in 2013. Id. ¶¶ 55, 66–67. As a result, he was unaware of any appeals process or foreclosure alternatives. Id. ¶ 67.

The parties agree that the applicable statute of limitations for negligence is two years. See Cal. Civ. Proc. Code § 335.1. But Plaintiff argues that his negligence claim is not time-barred because the Defendant's inaction has continued through the filing of his complaint. See Dkt. No. 21 at 6–7. The Court disagrees and finds the negligence claim is similarly time-barred.

a. Continuing Violation & Accrual Doctrines

Under the "continuing violation" doctrine, "the statute of limitations does not begin to run

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rule's application to a fraud claim alleging that defendant had altered the assets and net worth in a loan modification application. Id. at *6–*7.

until the date of the last injury or when the tortuous [sic] acts cease." Pugliese v. Superior Court, 146 Cal. App. 4th 1444, 1452 (Cal. Ct. App. 2007) (applying doctrine in context of ongoing domestic violence); see also Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1192 (Cal. 2013) ("The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations . . . ."). Underlying this doctrine is a concern that those injured incrementally "should not be handicapped by the inability to identify with certainty when harm has occurred or has risen to a level sufficient to warrant action." Id. at 1197–98. Instead, courts permit plaintiffs to "treat[] the acts as an indivisible course of conduct actionable in its entirety, notwithstanding that the conduct occurred partially outside and partially inside the limitations period." Id.

Similarly, under the "continuing accrual" doctrine, a court will view a "series of wrongs or injuries . . . as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." Aryeh, 55 Cal. 4th at 1192. It "limits the amount of retroactive relief a plaintiff or petitioner can obtain to the benefits or obligations which came due within the limitations period." Id. at 1199. These doctrines have no application to the facts of this case.

Although Plaintiff's complaint is short on precise dates, Defendant's allegedly wrongful conduct occurred when it sent the loan modification denial letter in 2013 without first contacting Plaintiff or providing information on his right to appeal the decision. Compl. ¶¶ 20–22. And the resulting injury — the specter of foreclosure — has remained constant since that time. See id. ¶ 59. He could have filed suit upon receipt of the letter. Yet Plaintiff did not do so until June 22, 2016. See Dkt. No. 4. Even assuming the denial occurred on the last day of 2013, Plaintiff's negligence still falls well outside the two-year statute of limitations. Plaintiff points to Bassam v. Bank of Am., No. CV 15-00587 MMM FFMX, 2015 WL 4127745, at *6 (C.D. Cal. July 8, 2015), where a court found an intentional infliction of emotional distress claim was not time-barred because of a continuing wrong. This case does not salvage Plaintiff's claim. Far from tolling the statute of limitations indefinitely, the court concluded that it started to run "when defendants first refused to accept modified payments . . . ." Id. (emphasis added).

To the extent Plaintiff's claim is based on some ongoing duty of care, the Court rejects this argument as well. Generally, in a lender-borrower relationship, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." Nymark v. Heart Fed. Sav. *& Loan Ass'n*, 231 Cal. App. 3d 1089, 1096 (Cal. Ct. App. 1991).

The California Court of Appeal recognized in Alvarez v. BAC Home Loans Servicing, that there may be some limited circumstances in which a lender owes a borrower a duty of care. See 228 Cal. App. 4th 941, 944 (Cal. Ct. App. 2015) (finding that lenders owe borrowers a "duty to exercise reasonable care in the review of their loan modification applications once they had agreed to consider them."). Yet the Ninth Circuit has narrowed these circumstances still further. In an unpublished opinion, the Court held that lenders do not owe borrowers a duty of care to process a loan modification application within a particular time frame. Anderson v. Deutsche Bank Nat. Trust Co. Americas, Case No. 14–55822, 2016 WL 2343248, at *1 (9th Cir. May 4, 2016); cf. Badame v. J.P. Morgan Chase Bank, N.A., 641 F. App'x 707, 709 (9th Cir. 2016) (finding no duty of care because "a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money") (quoting Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 67 (Cal. Ct. App. 2013)).[3] The Ninth Circuit reasoned that, while harm to borrowers is a foreseeable result of delays, such harm is "neither certain nor primarily attributable to the lender's delay in the processing." Id. Rather, the borrowers' own default makes the modification necessary. Id. (quoting Lueras, 221 Cal. App. 4th at 67). This analysis is persuasive and holds true here. Any resulting harm from Defendant's failure to follow up with Plaintiff is attributable to his default and "not . . . closely connected to the lender's conduct." Id. Further, Plaintiff has cited no authority for a broad duty that continues through the processing of the application and the Court declines to find one here.

B. Insufficient Facts to State A Claim

Because Plaintiff's claims for breach of the implied covenant of good faith and fair dealing

[3] As unpublished Ninth Circuit decisions, Anderson and Badame are not precedent, but the Court may still consider them for their persuasive value. See Fed. R. App. P. 32.1; CTA9 Rule 36-3.

and for violation of California's Unfair Competition Law ("UCL") claim are premised, at least in part, on the 2013 loan modification denial rather than the 2011 notice of default, they are not time-barred in their entirety.[4] Nevertheless, these claims still fail.

1. Implied Covenant of Good Faith and Fair Dealing

Plaintiff alleges that his original promissory note and deed of trust contained an implied covenant of good faith and fair dealing that Defendant broke when it (1) failed to contact Plaintiff before initiating foreclosure proceedings and (2) failed to afford him a right to appeal the denial of his loan modification application. Compl. ¶¶ 74, 76.

The implied covenant protects the express promises in a contract by "prevent[ing] one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." Avidity Partners, LLC v. State, 221 Cal. App. 4th 1180, 1204 (Cal. Ct. App. 2013) (quotation omitted). It does not create any rights. See Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 327, 349–52 (Cal. 2000). Accordingly, to state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiff must identify the specific contractual provision that Defendant frustrated. See Avidity, 221 Cal. App. 4th at 1204 ("The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation."); Levy v. State Farm Mut. Auto. Ins. Co., 150 Cal. App. 4th 1, 5 (Cal. Ct. App. 2007) ("Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity.").

Plaintiff has not pointed to any specific contractual provision that was frustrated here. This claim is therefore dismissed. Plaintiff may amend if he can identify a specific contractual provision of the deed of trust that was violated by Defendant's alleged conduct. The Court cautions, however, that a violation must still fall within the applicable statute of limitations.

2. Unfair Competition Law

Plaintiff's allegations under the UCL are derivative of his other claims. He argues that Defendant's business practices were unlawful and unfair because they violated California Civil

[4] Both claims are subject to four-year statutes of limitations. See Cal. Civil Code § 337 (implied covenant); Cal. Bus. & Profs. Code § 17208 (UCL).

Code § 2923.5 (recording a notice of default without contacting borrower), § 2924.17 (providing a deficient declaration to accompany notice of default), and § 1714 (negligence). Specifically, Plaintiff alleges that Defendant:

- Recorded the 2011 notice of default without first contacting Plaintiff;
- Intentionally recorded a false declaration with the 2011 notice of default;
- Failed to provide Plaintiff with any appeal process for his loan modification application; and
- Failed to keep Plaintiff informed about his loan

Compl. ¶ 90; Dkt. No. 21 at 17.

California's UCL prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The three "prongs" of the UCL are independent of each other and may be asserted as separate claims. Cel-*Tech Commc'*ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (Cal. 1999). The "unlawful" prong of the UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1474 (Cal. Ct. App. 2006). The "unfair" prong treats as actionable conduct that "violates established public policy or . . . is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." Id. at 1473.

As an initial matter, the Court finds that Plaintiff has standing to bring such claims. "[A] § 17200 claim must be brought 'by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" Sullivan v. Washington Mut. Bank, FA, Case No. C-09-2161 EMC, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009) (quoting Cal. Bus. & Profs. Code § 17204). To establish injury in fact in the context of a home foreclosure, it is enough that foreclosure proceedings have been initiated. Id. Plaintiff need not wait until the house itself is sold. Id.

Nevertheless, Plaintiff must also allege unfair, unlawful, or fraudulent conduct by Defendant that caused the foreclosure. He has failed to do so here. As already discussed in Section III.A, Defendant's alleged failure to contact Plaintiff before recording the notice of default

occurred in 2011. This conduct falls outside even the UCL's four-year statute of limitations. See Cal. Bus. & Profs. Code § 17208. What remains are the allegations that Defendant should have contacted Plaintiff after denying his loan modification application.

Plaintiff has failed to identify how this specific conduct is unlawful or unfair. It does not violate either California Civil Code § 2923.5 or § 2924.17 as neither section discusses the loan modification application process or lenders' general obligation to stay in contact with borrowers. Nor does it violate § 1714 as negligent conduct. In California, the requirements for a claim of negligence are (1) facts showing that Defendant owed a duty of care; (2) negligence constituting a breach of that duty; and (3) injury to Plaintiff. Peter W. v. San Francisco Unified Sch. Dist., 60 Cal.App.3d 814, 820 (1976). Lenders do not categorically owe borrowers a duty of care and Plaintiff has not provided any other basis for the Court to find one here. See Section III.A.2. As with all his claims, Plaintiff may amend if he can identify a specific practice that was unlawful or unfair.

C. Necessary Parties

Defendant also argues that the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(7) because Plaintiff has failed to join a necessary party — Teresita Galang — Plaintiff's wife and a co-borrower. In response, Plaintiff asserts that his wife's interests are "well-represented and adequately protected by him." Dkt. No. 21 at 8–9. Plaintiff similarly asserts that Defendant is not prejudiced because Plaintiff's claims are the same as his wife's and she would "likely [be] bound" by this case. Id. at 9–10.

Under Rule 19(a), a party is "necessary" if "that person claims an interest relating to the subject of the action" such that it would "impair or impede the person's ability to protect the interest" or would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B).

Here, the Deed of Trust reveals that Plaintiff and Mrs. Galang are both listed as

co-borrowers. Dkt. No. 16, Ex. A.[5] Because both Plaintiff and his wife hold the loan and pledged their interest in the Property as security for the loan, Mrs. Galang appears to be a "required party" under Rule 19(a). Plaintiff claims damages as a result of Defendant's wrongful conduct in recording a notice of default and processing Plaintiff's loan modification application. Compl. at 22. These are damages for which Mrs. Galang would also be entitled to recover. The Court accepts Plaintiff's contention that he would adequately protect Mrs. Galang's interests in her absence. Nevertheless, Defendant may still be at risk of multiple and potentially inconsistent obligations without Mrs. Galang's participation. Accord Edwards v. Fed. Home Loan Mortg. Corp., No. C 12-04868 JSW, 2012 WL 5503532, at *3 (N.D. Cal. Nov. 13, 2012). The general rule is that absent parties are not bound by judgments in personam in litigation to which they are not parties, even if the issues are the same. See Taylor v. Sturgell, 553 U.S. 880 (2008). The parties do not argue, and the Court does not find any reason, why joinder of Mrs. Galang would not be feasible here. See Salt River Project, 672 F.3d at 1179. Plaintiff concedes that, if given the opportunity, he could add Mrs. Galang to the action. Dkt. No. 21 at 10. As detailed above, the Court is dismissing all of Plaintiff's claims, but is doing so with leave to amend. Plaintiff will have an opportunity to join Mrs. Galang as a party if he elects to file an amended complaint.

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[5] Defendant's unopposed request for judicial notice, Dkt. No. 16, is granted. See Fed. R. Evid. 201(b)(2).

IV. CONCLUSION

For the reasons set forth above, the Court GRANTS WITH LEAVE TO AMEND Defendant's motion to dismiss. Plaintiff may file an amended complaint within 21 days of the date of this Order if he is able to allege claims against Defendant that are not barred by the applicable statutes of limitations. Because Plaintiff's claims as currently alleged are deficient as a matter of law, Plaintiff must either (1) plead a different and sufficient basis for these claims if he can do so consistent with his obligations under Rule 11; or (2) confirm that he does not wish to amend and request dismissal with prejudice, see Edwards v. Marin Park, Inc., 356 F.3d 1058, 1063–66 (9th Cir. 2004).

IT IS SO ORDERED.

Dated: 4/3/2017

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California