

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LA COBY PHILLIPS,)	Case No.: 10-CV-04561-LHK
)	
Plaintiff,)	ORDER GRANTING DEFENDANT’S
v.)	MOTION TO DISMISS WITH LEAVE
)	TO AMEND
BANK OF AMERICA CORP.,)	
)	(re: docket #7)
Defendant.)	

Plaintiff brings suit under two counts: (1) for failure to respond to a Qualified Written Request (“QWR”) under the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2605; and (2) based on that purported RESPA violation, for “unfair business practices” under the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200. Defendant Bank of America Corporation (“Defendant” or “Bank of America”) moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. Plaintiff, through counsel, has filed an Opposition. Pursuant to Civil Local Rule 7-1(b), the Court finds this motion appropriate for resolution oral argument. For the reasons set forth below, Defendant’s motion to dismiss is GRANTED WITH LEAVE TO AMEND.

I. BACKGROUND

A. Procedural History

On December 9, 2009, Plaintiff filed her original complaint against Bank of America in the

1 Santa Clara County Superior Court alleging four claims for relief: violation of RESPA for failure
2 to respond to a purported QWR dated October 22, 2009; breach of implied covenant of good faith
3 and fair dealing; unfair business practices; and breach of fiduciary duty. Bank of America removed
4 that action to federal court on January 28, 2010, and then moved to dismiss on February 4, 2010.
5 On April 9, 2010, the Honorable Jeremy Fogel granted Bank of America’s motion to dismiss
6 Plaintiff’s federal claim under RESPA without leave to amend, and remanded Plaintiff’s state-
7 based claims. See April 9, 2010 Order Granting Defendant’s Motion to Dismiss and Remanding
8 Act to State Court in *La Coby Phillips v. Bank of America*, Case Number 10-CV-0400-JF (“April
9 9, 2010 Order”). In the April 9, 2010 Order, Judge Fogel ruled that Plaintiff failed to state a claim
10 for a violation of RESPA because Plaintiff’s October 22, 2009 communication to Bank of
11 America: (1) was not a valid QWR since it related solely to origination documents, and not to
12 “servicing” of the loan as required under RESPA; (2) did not allege any “servicing errors” as
13 required by RESPA; and (3) did not allege any actual damages other than “an amount to be
14 determined at trial.” See April 9, 2010 Order at 5-6.

15 On remand, Bank of America demurred to each cause of action, and in the alternative,
16 moved to strike the RESPA claim. Plaintiff’s counsel did not file an opposition to that motion, nor
17 did Plaintiff’s counsel appear at the September 9, 2010 demurrer hearing at the Santa Clara County
18 Superior Court. At that hearing, the Superior Court ruled from the bench that it was granting Bank
19 of America’s motion to strike the RESPA claim and was sustaining the demurrer to other three
20 claims.

21 Plaintiff’s counsel, without informing counsel for Bank of America or the Superior Court
22 Judge deciding the demurrer motion at the September 9, 2010 hearing, filed a First Amended
23 Complaint (“FAC”) on September 8, 2010 with only two claims. Although Judge Fogel’s April 9,
24 2010 Order dismissed Plaintiff’s RESPA claim without leave to amend, Plaintiff’s FAC included a
25 RESPA claim based on: (1) the same October 22, 2009 communication already dismissed; and (2)
26 a second QWR allegedly sent on May 17, 2010, during the pendency of the litigation. The FAC
27 also included a claim under the California UCL, wholly derivative of Plaintiff’s RESPA claim.
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1 Bank of America then, again, removed the action to federal court based on federal question
2 subject matter jurisdiction over the new RESPA claim. Plaintiff's FAC is at issue in this action.

3 **B. Factual Background**

4 Plaintiff's FAC alleges that she is an individual that owns the property at 7051 Livery Lane,
5 San Jose, California. FAC ¶ 1. Plaintiff alleges that Defendant Bank of America is a "mortgage
6 lender," and is "engaged in wrongful acts under the rubric of unfair business practices." *Id.* at
7 ¶¶ 7-8. Plaintiff further alleges that, on October 22, 2009, "a request was made for specific loan
8 origination documents," but these documents have not been received. *Id.* at ¶ 9. Finally, Plaintiff
9 alleges that, on May 17, 2010, "Qualified Written Request was made" for loan documents, which
10 Defendant has not acknowledged or responded to in any way. *Id.* at ¶ 10. Plaintiff attached the
11 May 17, 2010 communication, which is signed by Plaintiff's counsel in this action, as Exhibit B to
12 the FAC. Plaintiff contends that the May 17, 2010 letter is a QWR as defined by RESPA. *Id.* at
13 ¶ 12.

14 **II. LEGAL STANDARDS**

15 **A. Motion to Dismiss**

16 Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is
17 "proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to
18 support a cognizable legal theory." *Shroyer v. New Cingular Wireless Services, Inc.*, 606 F.3d 658,
19 664 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In considering
20 whether the complaint is sufficient to state a claim, the court must accept as true all of the factual
21 allegations contained in the complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). However,
22 the court need not accept as true "allegations that contradict matters properly subject to judicial
23 notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or
24 unreasonable inferences." *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d
25 1049, 1055 (9th Cir. 2008). While a complaint need not allege detailed factual allegations, it "must
26 contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its
27 face." *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
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1 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference
2 that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949.

3 If the court concludes that the complaint should be dismissed, it must then decide whether
4 to grant leave to amend. “[A] district court should grant leave to amend even if no request to
5 amend the pleading was made, unless it determines that the pleading could not possibly be cured
6 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe*
7 *v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

8 **B. Documents Considered by the Court**

9 A court may take judicial notice of facts that are not subject to reasonable dispute and are
10 either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of
11 accurate and ready determination by resort to resources whose accuracy cannot be reasonably
12 questioned. Fed. R. Evid. 201(b). The Court may consider, under the incorporation by reference
13 doctrine, documents that are connected to the loan transaction at issue, as to which both Plaintiffs
14 and Defendants make unopposed requests for judicial notice. For purposes of ruling on a motion to
15 dismiss under Rule 12(b)(6), the pleadings are deemed to include “documents whose contents are
16 alleged in a complaint and whose authenticity no party questions, but which are not physically
17 attached to the pleading.” See *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). The Court
18 may also take judicial notice of matters of public record, including prior federal and state court
19 proceedings. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); see also *Dawson v.*
20 *Mahoney*, 451 F.3d 550, 551 (9th Cir. 2006) (allowing for judicial notice in federal court of state
21 court orders and proceedings).

22 Here, the Court takes judicial notice of: (1) Plaintiff’s original Complaint filed in Santa
23 Clara Superior Court bearing the case name *La Coby Phillips v. Bank of America Corp., et al.*,
24 Case Number 100CV158953; (2) Plaintiff’s executed Deed of Trust, which was publicly recorded
25 in the Office of the Santa Clara County Recorder on September 20, 2006; (3) Bank of America’s
26 prior removal of this action to this Court on January 29, 2010, which was assigned the Case
27 Number 10-CV-0400-JF; (4) Judge Fogel’s prior April 9, 2010 Order granting Bank of America’s
28 motion to dismiss Plaintiff’s federal claim under RESPA and remanding state-based claims; and

1 (5) the Demurrer Transcript in the Santa Clara County Superior Court reflecting that Bank of
2 America's demurrer was sustained.

3 **III. DISCUSSION**

4 **A. The RESPA Claim**

5 Defendants contend that Plaintiff has failed to state a RESPA claim with respect to the May
6 22, 2010 alleged QWR for three reasons: (1) Plaintiff does not allege that Defendant Bank of
7 America is the "servicer" of loan; (2) the letter does not allege any "errors" in the servicing of the
8 loan; and (3) even if the letter is a QWR, Plaintiff failed to allege any pecuniary harm arising from
9 Defendant's failure to respond.¹

10 **1. Whether Plaintiff Failed to Identify Defendant as a "Loan Servicer"**

11 Under RESPA, the "servicer of a federally related mortgage loan" must acknowledge
12 receipt of a QWR within twenty days and must respond substantively to the QWR within sixty
13 days. 12 U.S.C. § 2605(e)(1)(A), (e)(2). The term "servicer" means the person responsible for
14 servicing of a loan (including the person who makes or holds a loan if such person also services the
15 loan). *Id.* at § 2605(i)(2).

16 Defendants rightly contend that Section 2605(e) of RESPA imposes a duty upon a "loan
17 servicer" to respond to QWR's. Here, however, Plaintiff has only alleged that Defendant Bank of
18 America is the "mortgage lender." *See* FAC ¶ 8. Absent any allegation that Bank of America is
19 Plaintiff's loan servicer, as opposed to just the mortgage lender and beneficiary of a deed of trust,
20 Plaintiff cannot state a claim under RESPA. *See Consumer Solutions Reo, LLC v. Hillery*, 658 F.
21 Supp. 2d 1002, 1013 (N.D. Cal. 2009) (dismissing RESPA claim against loan owner because
22 "because § 2605(e) imposes a duty upon the loan servicer only.").

23 Accordingly, Defendant's motion to dismiss the RESPA claim is granted with leave to
24 amend. In any amended complaint, Plaintiff must identify the servicer of her loan.

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27 ¹ Plaintiff's October 22, 2009 letter cannot provide a basis for Plaintiff's RESPA claim because
28 Judge Fogel's April 9, 2010 Order dismissed that claim *without leave to amend*. Accordingly, the
Court will limit its review to analysis of the May 22, 2010 letter as a ground for a RESPA
violation.

1 servicer regarding other information sought by the borrower.”). For example, after identifying
2 Plaintiff’s property and account number on page one, page six of the letter asks for “all account
3 servicing transaction records” and page ten asks servicing-related questions such as whether
4 servicing rights to the loan have been reassigned to another entity. *See* May 22, 2010 Letter,
5 attached as Exh. B to FAC. Plaintiff’s letter does seek much additional information beyond the
6 servicing of the loan. However, it is not clear, at least at this stage of the litigation, whether the
7 May 22, 2010 letter cannot qualify as a QWR because it seeks information beyond the scope of the
8 RESPA statute. *See Luciw v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 111420, *8-10 (N.D. Cal.
9 Oct. 6, 2010) (declining to dismiss RESPA claim where purported QWR included request for
10 information beyond scope of statute, but provided specific detail with respect to information sought
11 regarding servicing of loan).

12 Accordingly, Defendant’s motion to dismiss on the ground that the May 22, 2010 letter is
13 not a QWR is denied.

14 **3. Whether Plaintiff Failed to Allege Actual Damages**

15 Section 2605(f)(1)(A) of RESPA requires a plaintiff to allege that actual damages flowed
16 from the alleged violation. Defendant contends that, regardless of whether the May 22, 2010 letter
17 constitutes a QWR, Plaintiff has not alleged any pecuniary harm arising from Bank of America’s
18 alleged failure to respond. Defendant’s argument is correct. Plaintiff merely alleges an “amount to
19 be determined at trial.” *See* FAC ¶ 13. This allegation is insufficient under RESPA. *See, e.g.*,
20 *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (in order to state a
21 RESPA claim, a “Plaintiff must, at a minimum, also allege that the breach resulted in actual
22 damages.”).

23 Accordingly, Defendant’s motion to dismiss for failure to allege actual damages is granted.
24 In any amended complaint, Plaintiff must identify, with specificity, the exact damages that flowed
25 from Defendant’s failure to respond to the May 22, 2010 letter.

26 **B. The UCL Claim**

27 The UCL prohibits any “unlawful, unfair or fraudulent business practices.” *See Cel-Tech*
28 *Commc'ns, Inc. v Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973

1 P.2d 527 (1999). “By proscribing ‘any unlawful’ business practice, [the UCL] ‘borrows’ violations
2 of other laws and treats them as unlawful practices that the unfair competition law makes
3 independently actionable.” See *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048
4 (9th Cir. 2000) (quoting *Cel-Tech*, 20 Cal. 4th at 180). Plaintiff claims that Defendant violated the
5 UCL based on the predicate RESPA violation.

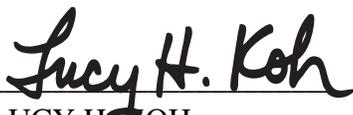
6 As discussed above, Plaintiff’s RESPA claim will be dismissed with leave to amend.
7 Accordingly, Plaintiff has failed to state a UCL claim predicated upon a RESPA violation and
8 Defendant’s motion to dismiss the UCL is granted with leave to amend.

9 **IV. CONCLUSION**

10 For the reasons described above, Defendants’ motion to dismiss is GRANTED WITH
11 LEAVE TO AMEND. Plaintiff shall file an amended complaint, if any, within 30 days of this
12 Order to cure the deficiencies identified herein. Plaintiff may not add new claims or parties
13 without seeking leave of the Court pursuant to Federal Rule of Civil Procedure 15. Failure to
14 timely amend will result in dismissal of Plaintiff’s claims with prejudice. The January 20, 2011
15 Motion Hearing and Case Management Conference are vacated.

16 **IT IS SO ORDERED.**

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18 Dated: January 14, 2011

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20 LUCY H. KOH
21 United States District Judge
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