

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KHOA DANG NGUYEN,
Plaintiff,
v.
WELLS FARGO BANK, NA, et al.
Defendants.

Case No. 16-CV-03043-LHK
**ORDER CONSTRUING PLAINTIFF'S
MOTION TO AMEND LAW SUIT AS
PLAINTIFF'S FIRST AMENDED
COMPLAINT; GRANTING
DEFENDANT'S MOTION TO DISMISS
WITHOUT LEAVE TO AMEND**
Re: Dkt. Nos. 36, 40

Plaintiff Khoa Dang Nguyen ("Plaintiff"), proceeding pro se, sues Defendants Wells Fargo Bank, N.A. ("Wells Fargo"), and John G. Stumpf (collectively, "Defendants"). ECF No. 1 ("Compl."). Before the Court is Plaintiff's "Motion to Amend the Law Suit," ECF No. 36 ("Pl. Mot."), and Defendants' motion to dismiss, ECF No. 40 ("Mot. to Dismiss"). Pursuant to Civil Local Rule 7-1(b), the Court finds the matters suitable for decision without oral argument and hereby VACATES the motions hearing set for March 9, 2017. The Court also VACATES the March 8, 2017 case management conference. Having considered the parties' submissions, the relevant law, and the record in this case, the Court hereby construes Plaintiff's "Motion to Amend the Law Suit" as Plaintiff's First Amended Complaint ("FAC"), and the Court GRANTS

1 Defendants’ motion to dismiss the FAC without leave to amend.

2 **I. BACKGROUND**

3 **A. Factual Background**

4 The following facts are discerned from Plaintiff’s pro se complaint and the judicially
5 noticeable documents submitted by Defendants.¹ On March 8, 2002, Plaintiff borrowed
6 \$272,400.00 from Defendant Wells Fargo and executed a deed of trust, encumbering the property
7 at 741 East Julian Street in San Jose, California (hereinafter, “the Property.”). ECF No. 41
8 (Request for Judicial Notice, or “RJN”), Ex. A. On July 15, 2009, Plaintiff executed an Individual
9 Grant Deed granting the Property to Theresa Ziemkowski. RJN, Ex. B.

10 According to Plaintiff, “[s]uddenly on [July 12, 2011] Wells Fargo Bank stopped
11 immediately my mortgage account at Wells Fargo bank thereon I have not paid my monthly
12 mortgage \$1,699.43 any more.” Compl. at 2. Plaintiff states that “[d]uring ten years I have had
13 thirteen times to turn in my application for refinance, modification, repayment plan or
14 modification plan, or reverse plan . . . for rate mortgage lowering, . . . but I never have been
15 successful or approved.” *Id.* at 3.

16 Plaintiff lists thirteen dates, spanning from April 23, 2009 to May 27, 2016, in which
17 Plaintiff submitted applications to Wells Fargo for home loan modifications. *Id.* at 3–4. However,
18 Wells Fargo denied Plaintiff’s application each time. *Id.*; *see also, e.g., id.*, Ex. 5 (denying
19 Plaintiff’s request for a modification under the Home Affordable Modification Program because
20 Wells Fargo was “unable to create an affordable mortgage payment” given Plaintiff’s monthly
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22 ¹ A court generally may not look beyond the four corners of a complaint in ruling on a Rule
23 12(b)(6) motion, with the exception of documents incorporated into the complaint by reference,
24 and any relevant matters subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th
25 Cir. 2007). “[M]atters of public record” are the appropriate subject of judicial notice. *Lee v. City*
26 *of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001), *overruled on other grounds by Galbraith v.*
27 *City of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002). The Court GRANTS Defendants’
unopposed request for judicial notice of the Deed of Trust, the Individual Grant Deeds, the Notice
of Default, the Rescission of Notice of Default, and documents relating to Plaintiff’s earlier
lawsuit in the Northern District of California. *See* ECF No. 41. These documents are matters of
public record and are the proper subject of judicial notice.

1 gross income). Plaintiff states that “more than five times . . . Wells Fargo Bank post my home
2 [o]n the foreclosure and Notice of Trustee’s Sale,” including on June 20, 2012; February 28, 2013;
3 and June 11, 2013. Compl. at 4.

4 On November 22, 2016, during the pendency of the instant case, Theresa Ziemkowski
5 executed an Individual Grant Deed granting the Property back to Plaintiff. *See* RJN, Ex. 3.

6 **B. Procedural History**

7 On June 6, 2016, Plaintiff filed a Complaint against Defendants in this Court. *See* Compl.
8 On August 31, 2016, Defendants filed a motion to dismiss the Complaint pursuant to Federal Rule
9 of Civil Procedure 12(b)(6). ECF No 8.

10 On September 12, 2016, Plaintiff filed a document titled “Motion on the Discrimination
11 and the Damage has caused by the Lender and Argue on the Defendant’s Motion to Dismiss Can’t
12 be Granted.” ECF No. 17. Plaintiff stated that he had asked Wells Fargo to reduce his mortgage
13 rate, but that Plaintiff “can’t made it due to the DISCRIMINATION.” *Id.* at 2.

14 On September 19, 2016, Defendants filed a response to Plaintiff’s September 12, 2016
15 motion, arguing that Plaintiff’s filing was procedurally defective and, in any event, lacked merit.
16 ECF No. 19.

17 On September 26, 2016, Plaintiff filed a document entitled “Motion on the Discrimination
18 and the Damage Has Caused by Wells Fargo Bank.” ECF No. 22. Plaintiff asserted that he
19 “didn’t argue about the [m]odification, I want to argue about the Discrimination[.] But right now I
20 didn’t want Modification any more” *Id.* at 1. Plaintiff stated that he was asking the Court
21 “for trial about the damage on [his] emotional” and physical health. *Id.* at 2.

22 On October 3, 2016, Plaintiff filed a document entitled “Motion on Ownership was
23 Confirmed by Wells Fargo Bank; Argue on the Defendant’s Denial of Ownership.” ECF No. 25.

24 On October 6, 2016, Defendants filed a response to Plaintiff’s two filings discussed above.
25 ECF No. 27. Again, Defendants contended that Plaintiff’s filings were “procedurally defective” as
26 separate motions and, if construed as responses to Defendants’ motion to dismiss, Plaintiff’s
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1 responses were untimely and lacked merit. *Id.* at 1–5.

2 On November 28, 2016, the Court dismissed Plaintiff’s complaint with leave to amend.
3 ECF No. 35; *Nguyen v. Wells Fargo Bank, N.A.*, 2016 WL 6947592 (N.D. Cal. Nov. 28, 2016).
4 The Court construed Plaintiff’s variously titled “motions” as oppositions to Defendants’ motion to
5 dismiss, and the Court considered Plaintiff’s filings even though Plaintiff’s filings were untimely
6 as oppositions to Defendant’s motion to dismiss. *Id.* at 6. In doing so, this Court instructed
7 Plaintiff that “Plaintiff is now on notice of the Civil Local Rule’s filing requirements.” *Id.* at *4.
8 Turning to the merits of Defendants’ motion to dismiss, the Court found that Plaintiff failed to
9 state a claim. The Court explained that the Court was “unable to discern the cause of action that
10 Plaintiff seeks to bring against Defendants,” and thus Plaintiff’s Complaint failed to give
11 Defendants’ “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *See*
12 *id.* at 7 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). The Court granted
13 Plaintiff leave to amend and instructed Plaintiff to file an amended complaint within 30 days of
14 the Court’s order. *Id.* at 8–9.

15 On December 21, 2016, Plaintiff filed a “Motion to Amend the Law Suit filed on
16 06/06/2016.” *See* Pl. Mot. Plaintiff’s “Motion to Amend the Law Suit” stated that Plaintiff had
17 filed applications for modifications of his mortgage, but that Wells Fargo had consistently denied
18 Plaintiff’s applications. *See id.* at 2. Plaintiff stated that “all the notice of ‘Public Home Sale’ . . .
19 has threaten me, coerce me, stress me duress me[] into emotional distress and physical disability
20 totally.” *Id.* at 3. Plaintiff requested that “the court order a Punitive Damage \$2,500[,]000.00
21 dollars for my Emotional Distress, and my physical disability that Wells Fargo Bank being fully
22 responsibility about my damage.” *Id.* at 4.

23 On January 4, 2017, Defendants filed an opposition to Plaintiff’s “Motion to Amend the
24 Law Suit.” ECF No. 38. Defendants asserted that “[i]t is unclear whether this filing is a separate
25 motion for relief, or Plaintiff’s first amended complaint.” *Id.* at 1. The Defendants argued that
26 Plaintiff’s filing was procedurally defective and, in any event, lacked merit. *See id.* at 2.

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B. Leave to Amend

If the court concludes that a motion to dismiss should be granted, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) (alteration in original).

III. DISCUSSION

As set forth above, this Court dismissed Plaintiff’s original Complaint because the Court was “unable to discern the cause of action that Plaintiff s[ought] to bring against Defendants.” *Nguyen*, 2016 WL 6947592, at *4. The Court granted Plaintiff leave to amend his Complaint within 30 days of the Court’s order “so that Plaintiff c[ould] clearly identify the factual basis of his allegations, specify which allegations [we]re brought against which Defendants, and clearly identify the relief that Plaintiff” sought. *Id.* at *5. The Court stated that “[f]ailure to meet the thirty-day deadline to file an amended complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice of Plaintiff’s claims.” *Id.* at *5.

Plaintiff did not file an amended complaint within the 30 days provided by this Court. Thus, Plaintiff’s claims are subject to dismissal with prejudice on this basis alone. *Id.* at *5. However, as stated above, Plaintiff filed a “Motion to Amend the Law Suit” on December 21, 2016. *See* Pl. Mot. Plaintiff’s “Motion to Amend the Law Suit” stated that “Wells Fargo Bank professional officers . . . were promised so much as ‘good help’ . . . but finally the result i[s] nothing.” *Id.* at 2. Plaintiff stated that “[a]ll the Notice of ‘Public Home Sale’ [] has threaten[ed]

1 [him]” and “duress[ed] [him] . . . into emotional distress and physical disability totally.” *Id.* at 3.
2 Plaintiff further alleged that “[m]odification application for lower interest of mortgage is quite
3 discrimination and my modification must be grant as others.” *Id.* Plaintiff requested that the
4 Court award \$2,500,000.00 to Plaintiff in punitive damages. *Id.*

5 Because Plaintiff is proceeding pro se, the Court construes Plaintiff’s “Motion to Amend
6 the Law Suit” as Plaintiff’s FAC because Plaintiff has otherwise not filed an amended complaint
7 in this action within the 30 days provided by the Court in its November 28, 2016 order. Moreover,
8 Defendants’ motion to dismiss construed Plaintiff’s “Motion to Amend the Law Suit” as
9 Plaintiff’s FAC, and Plaintiff responded to Defendants’ motion to dismiss and did not contest
10 Defendants’ characterization of Plaintiff’s filing as Plaintiff’s FAC. *See* Pl. Opp.; *see also* *Lipsey*
11 *v. Norum*, 2015 WL 1433705, at *1 (N.D. Cal. Mar. 30, 2015) (construing pro se plaintiff’s
12 motion to file an amended complaint as the plaintiff’s amended complaint where the plaintiff had
13 otherwise not filed an amended pleading).

14 Construing Plaintiff’s “Motion to Amend the Law suit” as Plaintiff’s FAC, and construing
15 Plaintiff’s pro se filings liberally, *see Bernhardt v. Los Angeles Cty*, 339 F.3d 920, 925 (9th Cir.
16 2003), the Court remains unable to discern “the cause of action that Plaintiff seeks to bring against
17 Defendants,” *Nguyen*, 2016 WL 6947592, at *4. As the Court explained in its order dismissing
18 Plaintiff’s original Complaint, Federal Rule of Civil Procedure 8 requires that the complaint
19 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
20 Fed. R. Civ. P. 8(a)(2). The purpose of this Rule is to “give the defendant fair notice of what the
21 plaintiff’s claim is and the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512 (internal
22 quotation marks omitted).

23 Plaintiff’s FAC, like Plaintiff’s original Complaint, identifies no cause of action. Rather,
24 Plaintiff states that Wells Fargo has denied Plaintiff’s home loan modification applications,
25 Plaintiff refers to the 2008 financial crisis, Plaintiff states that he has suffered emotional and
26 physical distress from the foreclosure of his home, and Plaintiff asserts that “[m]odification
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1 application for lower interest of mortgage is quite discrimination.” *See* Pl. Mot., at 2–4. These
2 allegations “fail[] to give Defendants’ ‘fair notice’ of Plaintiff’s claims,” and thus Plaintiff’s FAC
3 fails to comply with Rule 8. *Nguyen*, 2016 WL 6947592, at *4 (quoting *Swierkiewicz*, 534 U.S. at
4 512); *see also Wiskind v. JPMorgan Chase Bank, N.A.*, 2015 WL 400549, at *1–2 (N.D. Cal. Jan.
5 29, 2015) (dismissing complaint for failure to comply with Rule 8 because the “legal theories
6 [were] unclear” and the complaint was “infused with extraneous statements”); *Bertuccio v. San*
7 *Benito Cty* (“*Bertuccio I*”), 2013 WL 2147421, at *2 (N.D. Cal. May 15, 2013) (dismissing pro se
8 complaint because “the Court [was] unable to determine which parts of the Complaint show that
9 Plaintiff is entitled to relief”).

10 Furthermore, to the extent that Plaintiff’s FAC alleges that Wells Fargo intentionally
11 inflicted emotional distress on Plaintiff by foreclosing on Plaintiff’s home, Plaintiff is not entitled
12 to relief. *See* Pl. Mot. at 3 (“I ask the court to give the punitive damage on the defendant being
13 fully responsible for my total lost in emotional distress.”). “Where a plaintiff alleges an emotional
14 distress claim predicated on foreclosure or threatened foreclosure, courts have found as a matter of
15 law that foreclosing on property or acts normally associated therewith do not amount to the
16 outrageous conduct required to support a claim for intentional infliction of emotional distress.”
17 *Reyes v. Nationstar Mortg. LLC*, 2015 WL 4554377, at *8 (N.D. Cal. July 28, 2015) (internal
18 quotation marks omitted). “The act of foreclosing on a home (absent other circumstances) is not
19 the kind of extreme conduct that supports an intentional infliction of emotional distress claim.”
20 *Quinteros v. Aurora Loan Servs.*, 740 F. Supp. 2d 1163, 1172 (E.D. Cal. 2010). Thus, to the
21 extent that Plaintiff seeks to assert a claim against Defendants for intentional infliction of
22 emotional distress, Plaintiff’s allegations that Wells Fargo caused Plaintiff emotional distress by
23 foreclosing on Plaintiff’s home are not sufficient as a matter of law. *Id.*

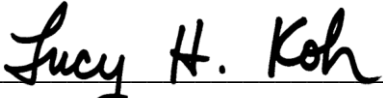
24 Accordingly, the Court GRANTS Defendants’ motion to dismiss the FAC. In dismissing
25 Plaintiff’s original Complaint, this Court instructed Plaintiff that “[f]ailure to meet the thirty-day
26 deadline to file an amended complaint or failure to cure the deficiencies identified in this Order
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1 will result in a dismissal with prejudice of Plaintiff’s claims.” *Nguyen*, 2016 WL 6947592, at *5.
2 Thus, regardless of how this Court construes Plaintiff’s “Motion to Amend the Law Suit,” the
3 Court dismisses Plaintiff’s claims with prejudice. If the Court construes Plaintiff’s “Motion to
4 Amend the Law Suit” as a motion, Plaintiff failed to file an amended pleading within the 30 days
5 provided by this Court. If the Court construes Plaintiff’s filing as Plaintiff’s FAC, Plaintiff has
6 failed to correct the deficiencies that this Court identified in its order dismissing the original
7 Complaint, and the Court concludes that further amendment would be futile. *See Bertuccio v. San*
8 *Benito Cty (“Bertuccio II”)*, 2013 WL 3803907, at *2 (N.D. Cal. July 19, 2013) (dismissing pro se
9 complaint with prejudice after the plaintiff amended the complaint once but “the Court remain[ed]
10 unable to discern which substantive claims Plaintiff s[ought] to pursue”). Thus, the Court
11 GRANTS Defendants’ motion to dismiss with prejudice. The Clerk shall close the file.

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13 Dated: March 3, 2017

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LUCY H. KOH
United States District Judge

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