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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CALEB WICKMAN,
Plaintiff,
v.
AURORA LOAN SERVICES, LLC, *et.*
al.,
Defendants.

Civil No. 12cv1702 JAH (DHB)
**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANT’S MOTION TO
DISMISS THE COMPLAINT
[Doc. No. 19]**

INTRODUCTION

Pending before this Court is defendant Aurora Loan Services, LLC’s (“Aurora”) motion to dismiss the complaint. The motion has been fully briefed by parties. After a thorough review of the parties’ submissions, and for the reasons set forth below, this Court **GRANTS IN PART** and **DENIES IN PART** Defendant’s motion to dismiss.

BACKGROUND

Plaintiff originally filed a complaint in Superior Court of California, County of San Diego on June 29, 2012, against Aurora Loan Services, LLC, Aurora Bank, FSB and Does 1 through 20, asserting claims for fraud, negligent misrepresentation, promissory estoppel, and accounting. Complaint (Doc. No. 1-1). Plaintiff alleges he sought to modify his home loan for his property located at 3212 Goldsmith Street, San Diego, California with his loan servicer and was told he had to default on the loan to secure a modification. Relying on the representation, Plaintiff failed to make loan payments, submitted a

1 modification application and was later told he would not qualify due to his unemployment
2 status. Plaintiff eventually received a Notice of Trustee Sale for the property.

3 Defendants removed the action to federal court on July 10, 2012. Thereafter,
4 Plaintiff sought a temporary restraining order, which this Court granted. Following a
5 hearing, the Court issued a preliminary injunction and enjoined Defendants and their
6 successors from proceeding with a Trustee's Sale, or otherwise foreclosing, selling or
7 transferring the real property at issue. Defendants now move to dismiss the complaint.

8 DISCUSSION

9 I. Legal Standard

10 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
11 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
12 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter
13 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319,
14 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a
15 dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents
16 a cognizable legal theory yet fails to plead essential facts under that theory. Robertson,
17 749 F.2d at 534. While a plaintiff need not give "detailed factual allegations," he must
18 plead sufficient facts that, if true, "raise a right to relief above the speculative level." Bell
19 Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

20 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
21 accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,
22 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
23 plausible when the factual allegations permit "the court to draw the reasonable inference
24 that the defendant is liable for the misconduct alleged." Id. In other words, "the non-
25 conclusory 'factual content,' and reasonable inferences from that content, must be
26 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
27 572 F.3d 962, 969 (9th Cir. 2009). "Determining whether a complaint states a plausible
28 claim for relief will ... be a context-specific task that requires the reviewing court to draw

1 on its judicial experience and common sense.” Iqbal, 129 S.Ct. at 1950.

2 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
3 truth of all factual allegations and must construe all inferences from them in the light most
4 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.
5 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However,
6 legal conclusions need not be taken as true merely because they are cast in the form of
7 factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western
8 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion
9 to dismiss, the Court may consider the facts alleged in the complaint, documents attached
10 to the complaint, documents relied upon but not attached to the complaint when
11 authenticity is not contested, and matters of which the Court takes judicial notice. Lee
12 v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that
13 a complaint fails to state a claim, the court should grant leave to amend unless it
14 determines that the pleading could not possibly be cured by the allegation of other facts.
15 See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

16 **II. Analysis**

17 Defendants argue the complaint should be dismissed because the claims are
18 preempted by federal law, the claims are barred for failure to tender and none of the claims
19 are sufficiently pled.

20 **A. Preemption**

21 Defendants argue Plaintiff’s claims are preempted by the Home Owner’s Loan Act
22 (“HOLA”), 12 U.S.C. section 1461, and the regulations promulgated thereunder by the
23 Office of Thrift Supervision (“OTS”).

24 Under 12 CFR §560.2, OTS provides for federal preemption of state law which
25 regulates federal savings associations as follows:

26 OTS hereby occupies the entire field of lending regulation for federal savings
27 associations. OTS intends to give federal savings associations maximum
28 flexibility to exercise their lending powers in accordance with a uniform
federal scheme of regulation. Accordingly, federal savings associations may
extend credit as authorized under federal law, including this part, without
regard to state laws purporting to regulate or otherwise affect their credit

1 activities

2 Section 560.2(b) sets forth the types of state laws that are preempted by HOLA.
3 Among the ten categories of state laws preempted are those that regulate the following
4 aspects of federal savings associations:

5 [t]he terms of credit, including amortization of loans and the deferral and
6 capitalization of interest and adjustments to the interest rate, balance,
7 payments due, or term to maturity of the loan, including the circumstances
under which a loan may be called due and payable upon the passage of time
or a specified event external to the loan;

8 12 CFR §560.2(b)(4). Additionally, state laws purporting to impose requirements
9 regarding “[p]rocessing, origination, servicing, sale or purchase of, or investment or
10 participation in, mortgages” are preempted by HOLA. 12 CFR § 560.2(10). State tort
11 laws are not preempted by HOLA, “to the extent that they only incidentally affect the
12 lending operations of Federal savings associations. . .” 12 CFR §560.2(c).

13 Defendants contend all of Plaintiff’s claims are service related and thus, fall within
14 the scope of 12 CFR §560.2(b). Specifically, Defendants argue the basis of Plaintiff’s
15 fraud, negligent misrepresentation, and promissory estoppel claims stem from four alleged
16 statements made by ALS loan specialist Daniel to Plaintiff: 1) Defendant promised to
17 work with Plaintiff on a loan modification in good faith; 2) defaulting on the loan would
18 not hurt Plaintiff’s credit or cause a less favorable loan modification; 3) representing
19 Plaintiff could qualify for a loan modification; and 4) stating Plaintiff’s unemployment
20 status would make it easier to qualify for a modification, which all involve the manner in
21 which Defendant serviced the loan.

22 Plaintiff argues his claims invoke only the general duty not to engage in fraud in a
23 manner that only incidentally affects lending activities. He contends his claims do not
24 impose additional requirements on Defendants, nor do they depend on the contention
25 that all homeowners are entitled to loan modifications.

26 In the instant case, Plaintiff’s fraud, negligent misrepresentation, and promissory
27 estoppel claims stem from the same allegations, namely Defendants’ false statements to
28 Plaintiff regarding a possible loan modification that ultimately caused Plaintiff to default

1 on his loan, ruined his credit score, and caused him to lose his tenant. Construing all
2 inferences in the light most favorable to the non-moving party, Plaintiff's claims rely on
3 general allegations of misrepresentation and are only incidental to Defendants' lending
4 practices. See Plastino v. Wells Fargo Bank, 873 F.Supp.2d 1179, 1185 (N.D.Cal. 2012).
5 Accordingly, Plaintiff's claims are not preempted by HOLA.

6 **B. Tender**

7 Defendants argue Plaintiff is procedurally barred from bringing this action because
8 he failed to tender the amount due on the mortgage loan prior to bringing the lawsuit.

9 Generally, tender of the amount owed is a condition precedent to any claim for
10 wrongful foreclosure or challenge to the validity of a foreclosure sale. See Abdallah v.
11 United Savings Bank, 43 Cal.App.4th 1101, 1109 (1996); Arnold's Management Corp.
12 v. Eischen, 158 Cal.App. 3d 575, 578 (1984); Gardner v. Am. Home Mtg. Servicing, Inc.,
13 2010 WL 582117 (E.D.Cal. 2010). This Court notes that the majority of California
14 district courts recognize that plaintiffs seeking to set aside a completed foreclosure must
15 allege the ability to tender. See, e.g., Lipscomb v. Mortgage Elec. Registration Sys., Inc.,
16 2011 WL 3361132 *7 (E.D.Cal. 2011); Davidson v. Countrywide Home Loans, Inc.,
17 2011 WL 1157569 *3 (S.D.Cal. 2011); Grant v. Aurora Loan Services, Inc., 736
18 F.Supp.2d 1257, 1269-70 (C.D.Cal. 2010); Pantoja v. Countrywide Home Loans, Inc.,
19 640 F.Supp. 2d 1177, 1184 (N.D.Cal. 2009).

20 Courts have recognized exceptions to the tender rule, such as when it is inequitable
21 to do, when a party is seeking to prevent a sale rather than set aside a completed sale, and
22 where the sale is void rather than voidable. See Tamburri v. Suntrust Mortg., Inc., 2011
23 WL 6294472 *3 (N.D.Cal. 2011).

24 In this action, Plaintiff seeks to prevent a sale rather than set aside a completed sale,
25 as such, failure to tender is not fatal to the complaint.

26 **C. Sufficiency of Plaintiff's Claims**

27 Defendant argues each of Plaintiff's claims are "without merit" and seeks dismissal
28 of the complaint with prejudice. Because Defendant seeks dismissal of the claims under

1 Rule 12(b)(6), the proper inquiry is the sufficiency of Plaintiff's allegations to state the
2 asserted claims. See Navarro, 250 F.3d at 732.

3 **1. Fraud**

4 To state a claim for fraud, Plaintiff must allege: (1) a misrepresentation (false
5 representation, concealment, or non-disclosure); (2) the defendant's knowledge the
6 misrepresentation is false; (3) intent to induce reliance on the misrepresentation; (4)
7 justifiable reliance; and (5) resulting damages. Cadlo v. Owens-Illinois, Inc., 125 Cal. App.
8 4th 513, 519 (2004).

9 Defendants argue Plaintiff's claim for fraud is deficient. They contend it is not clear
10 what Plaintiff believes was misrepresented to him, but most likely it was the alleged
11 statements made by Daniel: (1) Plaintiff had to default on the loan in order to be
12 considered for a modification; (2) the default would not affect Plaintiff's credit score; and
13 (3) Plaintiff was more than likely to be approved for a modification given his financial
14 situation. Defendants argue Plaintiff fails to allege the first statement is false, Plaintiff
15 does not identify who made the second statement, and as to the third statement, Plaintiff
16 fails to allege a promise, knowledge of falsity or intent to defraud.

17 Plaintiff argues the allegations of fraud are sufficiently pled. He contends the claim
18 centers around four misrepresentations: (1) Defendant promised to work with Plaintiff on
19 a loan modification in good faith; (2) Defendant claimed that defaulting on the loan
20 would not hurt Plaintiff's credit score or cause a less favorable loan modification; (3)
21 Defendant represented that Plaintiff could qualify for the loan modification program; and
22 (4) Defendant represented that Plaintiff's unemployment status would make it easier to
23 qualify for loan modification. As to the four statements, Plaintiff argues he alleges Daniel
24 made the statements and he provides the dates of the statements. He further argues he
25 pleads the statements were false when he alleges Defendants refused to work with Plaintiff
26 because he was unemployed and could not qualify for a loan modification. Plaintiff points
27 to specific paragraphs of his complaint and contends he sufficiently pleads knowledge,
28 intent, reliance and damages in support of his claim for fraud.

1 In his complaint, Plaintiff alleges he spoke with Daniel, when he contacted ALS to
2 inquire about refinancing or a modification. Complaint ¶¶ 20, 21. Plaintiff alleges he
3 informed Defendant ALS of his financial situation including, that he was receiving
4 unemployment assistance, and he had an option to continue leasing his property if he was
5 unable to modify his loan. Id. ¶ 22. After several conversations with Daniel during
6 February 2011, and March 2011, ALS informed Plaintiff that modification was his only
7 option. Id. ¶¶ 21, 23. Daniel stated, in order to work with Plaintiff to secure a
8 modification, Plaintiff would have to default on his loan payments. Id. ¶ 24. Plaintiff did
9 not make his April 2011, May 2011, and June 2011, loan payments in reliance on
10 Daniel's statements. Id. ¶¶ 25, 48. On or about May 15, 2011, Plaintiff received
11 correspondence from ALS informing Plaintiff he was in default and had a reinstatement
12 amount of \$5,359.90. Id. ¶ 27. Plaintiff contacted Daniel and stated he could pay the
13 reinstatement amount but Daniel told him that would take him out of default and he
14 would not be eligible for a loan modification. Id. When Plaintiff expressed concern about
15 his credit for defaulting on loan payments, Daniel assured Plaintiff that was "just how the
16 process worked" and the missed payments would not be factored into the terms of the
17 modified loan. Id. ¶ 28. He also alleges Daniel told him being on unemployment would
18 make the loan modification process easier due to financial hardship. Id. ¶ 32. However,
19 in June 2011, an unknown ALS representative told Plaintiff that ALS would not qualify
20 a homeowner loan modification application if the applicant was on unemployment. Id.
21 Plaintiff alleges Defendant's agents knew the statements were false or had no intention of
22 keeping the promises at the time the statements were made. Id. ¶ 48. He further alleges
23 at the time he was told his modification was more than likely to be approved by July 2011,
24 Defendant had a policy they would not modify any loan if the borrower was receiving
25 unemployment benefits. Id. ¶ 49.

26 Plaintiff does not sufficiently state a claim as to each statement made by Daniel.
27 However, assuming the truth of Plaintiff's non-conclusory allegations and making all
28 reasonable inferences in his favor, Plaintiff sufficiently alleges a claim of fraud based upon

1 the statement that a loan modification was an option for Plaintiff and he could qualify for
2 a loan modification despite the fact he was receiving unemployment benefits. Accordingly,
3 the motion to dismiss the fraud claim pursuant to Rule 12(b)(6) is denied.

4 **2. Negligent Misrepresentation**

5 Negligent misrepresentation requires the same elements as a claim for fraud, except
6 that the plaintiff is not required to allege intent to induce reliance. Cadlo, 125
7 Cal.App.4th at 519.

8 Defendants argue Plaintiff's negligent misrepresentation claim fails because Plaintiff
9 fails to plead a clear misrepresentation or knowledge of falsity. As discussed above, the
10 Court finds Plaintiff sufficiently alleges a misrepresentation and knowledge of falsity.

11 Defendants also argue the claim fails because Plaintiff fails to allege day-to-day
12 control by Defendants demonstrating a duty owed to Plaintiff by Defendants as required
13 to support a negligent misrepresentation claim. Plaintiff contends Defendants' "arguments
14 do not apply under the facts."

15 Negligent misrepresentation requires the existence of a legal duty. Eddy v. Sharpe,
16 199 Cal.3d 858, 864 (1988). "[A] financial institution owes no duty of care to a borrower
17 when the institution's involvement in the loan transaction does not exceed the scope of
18 its conventional role as a mere lender of money." Nymark v. Heart Fed. Savings & Loan
19 Assoc., 231 Cal.App.3d 1089, 1096 (1991). Plaintiff's allegations that Defendants
20 misrepresented his ability to obtain a loan modification despite the fact he was receiving
21 unemployment benefits does not allege conduct that exceeds Defendants' role as a lender
22 of money. As such, Plaintiff fails to state a claim for negligent misrepresentation.

23 **3. Promissory Estoppel**

24 To state a claim for promissory estoppel, a plaintiff must allege: (1) a promise clear
25 and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3)
26 his reliance must be both reasonable and foreseeable; and (4) the party asserting the
27 estoppel must be injured by his reliance. Laks v. Coast Fed. Sav. & Loan Ass'n, 60 Cal.
28 App. 3d 885, 890 (1976).

1 Defendant argues the claim is subject to dismissal because Plaintiff fails to plead “a
2 promise clear and unambiguous in its terms” as required, promissory estoppel does not
3 apply because the parties’ conduct was governed by the deed of trust and the note
4 evidencing the loan, and the statute of frauds bars the claim. Motion at 7.

5 Plaintiff argues that the promissory estoppel claim rests upon Defendants’ promise
6 to engage in the modification process free of intentional misrepresentations and in good
7 faith. Plaintiff also argues that Defendant’s statute of frauds argument is misplaced.

8 Upon review of the complaint, this Court finds Plaintiff fails to allege a promise in
9 clear and unambiguous terms. As such, the claim is subject to dismissal.

10 4. Accounting

11 An accounting “may be sought where the accounts are so complicated that an
12 ordinary legal action demanding a fixed sum is impracticable.” Civic Western Corp. v. Zila
13 Industries, Inc., 66 Cal.App.3d 1, 14 (1977). The right to an accounting is derivative of
14 other claims. Janis v. California State Lottery Com., 68 Cal.App.4th 824, 833 - 34
15 (1998). To state a claim for an accounting, a plaintiff must allege a relationship that
16 requires an accounting and a balance due from the defendant to the plaintiff that can only
17 be ascertained by an accounting. Teselle v. McLouglin, 173 Cal. App. 4th 156, 179
18 (2009).

19 Defendants argue that Plaintiff’s claim for an accounting fails because there is no
20 fiduciary relationship between lenders and borrowers. Plaintiff argues the special
21 circumstances surrounding Defendants’ numerous miscalculations of the loan balance
22 support his claim for an accounting. He further contends a balance is due to him for
23 making payments on the repayment plan.

24 In his complaint, Plaintiff alleges Aurora sent correspondence informing him the
25 payoff amount of the loan was \$818,782.01, which Plaintiff disputed. Complaint ¶ 38.
26 After Plaintiff called Aurora and attempted to negotiate a repayment plan on the past due
27 balance, Aurora sent a notice to Plaintiff on September 14, 2011, informing Plaintiff he
28 had a right to cure for \$13,332.22, and sent another notice on September 26, 2011,

1 informing Plaintiff of his right to cure for \$10,407.49. Id. ¶ 39. When Plaintiff called to
2 discuss the discrepancies in the cure notices, he could not get a straight answer on what
3 the reinstatement pay-off amount was or how to cure the default. Id. ¶ 40. Plaintiff
4 further alleges Defendant Aurora could not determine the proper reinstatement amount
5 and instructed Plaintiff it would set up a payment plan. Id. ¶ 41. Although Aurora never
6 informed him of the exact amount required to cure the default, Plaintiff made a \$3,000
7 payment. Id. Plaintiff alleges that an accounting is necessary to determine any off-sets
8 between the parties, because the claims asserted will result in an amount owed to him. Id.
9 ¶ 76.

10 Plaintiff does not sufficiently allege how an accounting is derivative of the fraud
11 claim, the only surviving claim. Additionally, while Plaintiff argues there is a balance due
12 to him for making payments on the repayment plan, this is not alleged in the complaint.
13 As such, Plaintiff fails to sufficiently plead a claim for an accounting.

14 **5. Punitive Damages**

15 Pursuant to California Civil Code §3294(a), a plaintiff may recover punitive
16 damages “in an action ... where it is proven by clear and convincing evidence that
17 defendant is guilty of fraud , oppression or malice. . .” When seeking punitive damages
18 against corporate entities, a plaintiff must show “the advance knowledge and conscious
19 disregard, authorization, ratification or act of oppression, fraud, or malice must be on the
20 part of an officer, director, or managing agent of the corporation.” California Civil Code
21 §3294(b).

22 Defendants argue Plaintiff fails to plead his claim for punitive damages with
23 anything but the most perfunctory and conclusory language and he does not attempt to
24 argue managerial authorization or ratification of the alleged bad acts. Plaintiff argues his
25 claim complies with California Civil Code sections 3294(a) and (b). He further argues
26 that he properly argued managerial authority in the complaint when he alleges Daniel was
27 appointed as an ALS loan specialist with the authority to bind ALS. See Complaint ¶¶ 44,
28 57.

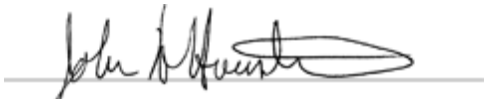
1 Plaintiff's allegation that Daniel was provided the authority to bind ALS does not
2 allege authorization or ratification as required to support a claim for punitive damages.
3 Accordingly, the prayer for punitive damages is not sufficiently pled.

4 **CONCLUSION AND ORDER**

5 Based on the foregoing, **IT IS HEREBY ORDERED:**

- 6 1. Defendant's motion to dismiss the complaint is **GRANTED IN PART AND**
7 **DENIED IN PART.** The motion is **DENIED** as to the claim for fraud. The
8 motion is otherwise **GRANTED.** Plaintiff's claims for negligent
9 misrepresentation and promissory estoppel, and requests for an accounting
10 and punitive damages are **DISMISSED without prejudice.**
- 11 2. If Plaintiff wishes to amend his complaint to address the deficiencies noted
12 above, he shall file a First Amended Complaint **no later than**
13 **September 12, 2013.**

14 DATED: August 23, 2013

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16 JOHN A. HOUSTON
17 United States District Judge

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