

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

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RONALD MAJOR, et al.,

vs.

WELLS FARGO BANK, N.A., et al.,

Defendants.

CASE NO. 14cv998-LAB (RBB)

**ORDER GRANTING IN PART AND
DENYING IN PART WELLS FARGO'S
MOTION TO DISMISS**

This action arises out of the Majors' default on their mortgage and Wells Fargo's subsequent initiation of foreclosure proceedings. The Court dismissed the Majors' original complaint, and the Majors filed a First Amended Complaint (FAC). (Docket no. 19.) Wells Fargo has filed a motion to dismiss the FAC. (Docket no. 20.)

I. Factual Background

After the Majors defaulted on their mortgage, Wells Fargo recorded a Notice of Default and Election to Sell Under Deed of Trust ("NOD") on February 1, 2013, a Notice of Trustee's Sale on May 2, 2013, and a second Notice of Trustee's Sale on March 10, 2014. The Majors' lawsuit is based primarily on Wells Fargo's alleged violations of the California Homeowner Bill of Rights (HBOR). Specifically, the Majors allege that defendants:

- (1) never contacted them, or attempted to contact them to explore options of avoiding foreclosure, as required by California Civ. Code § 2923.55;

- 1 (2) noticed a sale on their home without first making a determination regarding
- 2 their eligibility for a loan modification, in violation of California Civil Code §
- 3 2923.6;
- 4 (3) haven't provided them a single point of contact regarding the sale of their
- 5 home, in violation of California Civil Code § 2923.7;
- 6 (4) failed to provide the notice of sale required by California Civil Code §§ 2924
- 7 and 2924f; and
- 8 (5) violated California Business and Professions Code § 17200 by violating the
- 9 above-referenced statutes.

10 The Majors' FAC adds factual allegations and addresses many of the deficiencies the
11 Court previously noted. Wells Fargo moves to dismiss. It contends that, after commencing
12 this lawsuit, the Majors submitted a loan modification application and their home has not
13 been sold. Wells Fargo also alleges that the Majors previously modified their loan, making
14 them ineligible for relief under California Civil Code § 2923.6.

15 **II. Discussion**

16 **A. Legal Standard**

17 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
18 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept
19 all factual allegations as true and construe them in the light most favorable to the Majors.
20 *Cedars Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.
21 2007). To defeat Wells Fargo's motion to dismiss, the Majors' factual allegations need not
22 be detailed, but they must be sufficient to "raise a right to relief above the speculative
23 level. . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While the Court must draw
24 all reasonable inferences in the Majors' favor, it need not "necessarily assume the truth of
25 legal conclusions merely because they are cast in the form of factual allegations." *Warren*
26 *v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotations
27 omitted).

28 ///

1 **B. Cal. Civ. Code § 2923.55**

2 The Majors allege that defendants violated § 2923.55 by recording the NOD without
3 establishing contact to discuss alternatives to foreclosure. Section 2923.55(b) requires that:

4 A mortgage servicer shall contact the borrower in person or by telephone in
5 order to assess the borrower's financial situation and explore options for the
6 borrower to avoid foreclosure. During the initial contact, the mortgage servicer
7 shall advise the borrower that he or she has the right to request a subsequent
8 meeting and, if requested, the mortgage servicer shall schedule the meeting
9 to occur within 14 days. The assessment of the borrower's financial situation
10 and discussion of options may occur during the first contact, or at the
11 subsequent meeting scheduled for that purpose. In either case, the borrower
12 shall be provided the toll-free telephone number made available by the United
13 States Department of Housing and Urban Development (HUD) to find a
14 HUD-certified housing counseling agency. Any meeting may occur
15 telephonically.

16 Section 2923.55(f) sets out the "due diligence" requirements for reaching a borrower prior
17 to recording a notice of default. "A mortgage servicer, mortgagee, trustee, beneficiary, or
18 authorized agent may not record a notice of default pursuant . . . until . . . [e]ither 30 days
19 after initial contact is made as required by paragraph (2) of subdivision (b) or 30 days after
20 satisfying the due diligence requirements as described in subdivision (f)." Cal. Civ. Code §
21 2923.55(a)(2). "The only relief available for a violation of § 2923.55 is the postponement of
22 a foreclosure sale until there has been compliance with the statute." *Croschal v. Aurora Bank,*
23 *FSB*, 2014 WL 2796529, at *7 (N.D. Cal. June 19, 2014).

24 Wells Fargo argues that the Majors' § 2923.55 claim should be dismissed because
25 the defendants complied with the contact requirement, and, in any event, the Majors have
26 not been prejudiced by the alleged violation.

27 **1. Certificate of Compliance**

28 Wells Fargo contends that its declaration of compliance with § 2923.55's contact
requirement defeats the Majors' generic claim that there was no compliance. The Court
agreed with this argument when it dismissed the Majors' initial complaint, explaining:

The allegation that Wells Fargo did not contact them prior to initiation of
foreclosure proceedings is a formulaic recitation of the statutory requirements
framed as a cause of action. Additional facts need to be alleged, such as: (1)
whether the Majors were purposefully avoiding corresponding with Wells
Fargo; (2) whether Wells Fargo exercised due diligence in trying to reach the

1 Majors; or (3) whether the Majors received any telephone calls or personal messages
2 from Wells Fargo.

3 (Docket no. 18 at 5:14-21.) (citations omitted). But, the FAC specifically addresses these
4 deficiencies. It alleges:

5 The Plaintiff was not avoiding correspondence with Defendants. Indeed,
6 Plaintiff needed help as Plaintiff was undergoing a separation and divorce,
7 which was the cause of Plaintiff's financial hardship. WELLS FARGO did not
8 exercise due diligence in trying to reach Plaintiff as WELLS FARGO did not
9 send a letter by first class mail that included a toll free number made available
10 by HUD to the Plaintiff. Additionally, WELLS FARGO did not make three (3)
11 attempts to contact the Plaintiff by phone to the primary number on the file.
12 Additionally, WELLS FARGO did not send a certified letter to the borrowed,
13 with return receipt requested.

14 (Docket no. 19, 27.) Accepting the Majors' factual allegations as true and construing the
15 pleadings in the light most favorable to them, the Majors' allegations are sufficient to defeat
16 a motion to dismiss on their § 2923.55 claim. See *Davis v. U.S. Bank Nat. Ass'n*, 2015 WL
17 2124938, at *7 (C.D. Cal. May 6, 2015) ("the mere existence of an NOD Declaration that
18 references § 2923.55 's requirements, or contradicts allegations in Plaintiff's Complaint, does
19 not entitle Defendant to dismissal of Plaintiff's claim.").

20 **2. Prejudice to the Majors**

21 Wells Fargo argues that the Majors have not been prejudiced by the alleged
22 § 2923.55 violation because, after this lawsuit was filed, they submitted a loan modification
23 application to Wells Fargo and their home has not been sold at public auction. But, this
24 argument relies on facts that the Court can't consider because they are not presented in the
25 FAC or the proper subject of judicial-notice. See *Shaver v. Operating Engineers Local 428
26 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003). While Wells Fargo submits the
27 loan modification application as evidence, the document was not publicly recorded or
28 otherwise judicially-noticeable. Thus, the Court **DENIES** Wells Fargo's motion to dismiss the
§ 2923.55 claim.

29 **C. Cal. Civ. Code § 2923.6**

30 The HBOR attempts to eliminate the practice commonly known as "dual tracking,"
31 whereby financial institutions continue to pursue foreclosure while evaluating a borrower's

1 loan modification application. *Rockridge Trust v. Wells Fargo, NA*, 2013 WL 5428722 at *3
2 (N.D. Cal. Sept. 25, 2013). To that end, California Civil Code § 2923.6 provides: "[i]f a
3 borrower submits a complete application for a first lien loan modification offered by, or
4 through, the borrower's mortgage servicer, a mortgage servicer . . . shall not record a notice
5 of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan
6 modification application is pending." Cal. Civ. Code § 2923.6(c). The Majors allege that
7 Wells Fargo noticed a sale on their home without first making a determination regarding their
8 eligibility for a loan modification.

9 Wells Fargo's motion to dismiss alleges that the Majors' loan was modified on May 13,
10 2008 and, therefore, their § 2923.6 claim fails. See Cal. Civ. Code § 2923.6(c)(3) (providing
11 that § 2923.6 doesn't apply when a borrower accepts and defaults on a modification); see
12 also Cal. Civ. Code § 2923.6(g) (exempting loan servicers from evaluating a modification
13 application if the borrowers were evaluated for a loan modification prior to January 1, 2013).
14 But the FAC makes no mention of the Majors' alleged prior modification or default, and the
15 Court is bound to review only the pleadings and any judicially-noticeable documents at this
16 stage of the litigation. *Corvello v. Wells Fargo, NA*, 728 F.3d 878, 885 (9th Cir. 2013) (per
17 curiam) (noting that while facts in the defendant's possession might indicate it properly
18 denied plaintiffs' loan modifications, they could not be considered at the motion to dismiss
19 stage). The 2008 loan modification was not publicly recorded and contradicts the allegations
20 made in the FAC. It is not judicially-noticeable. See Fed. R. Evid. 201(b) (providing that a
21 court may not take judicial notice of a fact that is "subject to reasonable dispute"). The Court
22 **DENIES** Wells Fargo's motion to dismiss the § 2923.6 claim.

23 **D. Cal. Civ. Code § 2923.7**

24 California Civil Code § 2923.7 states that "[u]pon request from a borrower who
25 requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish
26 a single point of contact and provide to the borrower one or more direct means of
27 communication with the single point of contact." An alleged § 2923.7 violation can be
28 remedied by postponement of the foreclosure sale. *Ha v. Bank of Am., NA*, 2014 WL

1 3616133, at *7 n.75 (N.D. Cal. July 22, 2014). The Majors allege that they haven't been
2 provided with a single point of contact.

3 Wells Fargo argues that the Majors' § 2923.7 claim should be dismissed because the
4 FAC doesn't allege that they requested a single point of contact. However, the statute isn't
5 triggered by a request for a single point of contact; it's triggered by a request for a foreclosure
6 prevention alternative. *Mungai v. Wells Fargo, NA*, 2014 WL 2508090, at *9 (N.D. Cal. June
7 3, 2014) ("Under the plain meaning of the statute, a mortgage servicer's obligation to
8 establish a single point of contact is triggered 'upon request from a borrower who requests
9 a foreclosure prevention alternative,' not upon request from a borrower who requests a single
10 point of contact."). The FAC alleges that the Majors requested a foreclosure prevention
11 alternative. The Court **DENIES** Wells Fargo's motion to dismiss the § 2923.7 claim.

12 **E. Cal. Civ. Code §§ 2924 and 2924f**

13 California Civil Code §§ 2924 and 2924f prescribe notice requirements for the sale of
14 property after a default. Section 2924f explains

15 [a] copy of the notice of sale shall also be posted in a conspicuous place on the
16 property to be sold at least 20 days before the date of sale, where possible and
17 where not restricted for any reason. If the property is a single-family residence
the posting shall be on a door of the residence, but, if not possible or restricted,
then the notice shall be posted in a conspicuous place on the property.

18 "However, the notice requirements are waived if actual notice is received." *Manantan v. Nat'l*
19 *City Mortgage*, 2011 WL 3267706, at *9 (N.D. Cal. July 28, 2011). "[T]he remedy for a
20 violation of § 2924 is the postponement of the foreclosure sale." *Bennett v. Wells Fargo, NA*,
21 2013 WL 4104076, at *5 (N.D. Cal. Aug. 9, 2013).

22 The Majors allege that Wells Fargo never provided this required notice. (Docket no.
23 19, 38.) But, they attach the two notices as exhibits to the FAC, demonstrating that they had
24 sufficient notice of the documents on the date that they filed the FAC, at the latest. See
25 *Manantan*, 2011 WL 3267706, at *9. The Majors don't allege that their home was sold within
26 20 days before they received this notice. Thus, the FAC doesn't state a claim under §§ 2924
27 and 2924f . The Court **GRANTS** Wells Fargo's motion to dismiss the §§ 2924 and 2924f
28 claims.

1 **F. Cal. Bus. & Prof. Code § 17200**

2 California Business and Professions Code § 17200 prohibits "unfair competition,"
3 which encompasses "any unlawful, unfair or fraudulent" acts. Cal. Bus. & Prof. Code §
4 17200. Each "prong" provides a "separate and distinct theory of liability." *Rubio v. Capital*
5 *One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010). An act is "unlawful" under Section 17200
6 where the conduct violates another "borrowed" law. *Cel-Tech Comms. Inc. v. L.A. Cellular*
7 *Tel. Co.*, 20 Cal.4th 163, 180 (1999). The Majors base their § 17200 claim on Wells Fargo's
8 alleged violations of the HBOR. Because the Court denies Wells Fargo's motion to dismiss
9 the Majors' claims under §§ 2923.55, 2923.6, and 2923.7, the Court **DENIES** its motion to
10 dismiss the § 17200 claim as well.

11 **G. Cautionary Note**

12 Although the Court cannot dismiss some of the Majors' claims because Wells Fargo's
13 evidence can't be considered at this stage of the case, the Court observes that the Majors'
14 counsel has both an obligation to investigate his clients' allegations and an obligation not to
15 plead a claim that he learns is without factual or legal support. Fed. R. Civ. P. 11(b). If
16 counsel is aware of facts that bar the Majors' claims—such as a prior loan modification or the
17 postponement of the sale of the Majors' home, as Wells Fargo contends in its motion—and
18 pursues the claim without a non-frivolous argument that the claim is nevertheless viable,
19 "counsel treads on perilous ground." *Medrano v. Caliber Homes Loans, Inc.*, 2014 WL
20 7236925, at *8 (C.D. Cal. Dec. 19, 2014); see also Fed. R. Civ. P. 11(c).

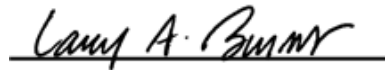
21 **III. Conclusion**

22 Wells Fargo's motion to dismiss is **GRANTED IN PART AND DENIED IN PART**. The
23 FAC sufficiently states a claim under California Civil Code §§ 2923.55, 2923.6, and 2923.7
24 and California Business and Professions Code § 17200. If the Majors think they can
25 successfully amend their complaint, they must seek leave by ex parte motion no later than
26 June 8, 2015. Their proposed second amended complaint must be attached as an exhibit
27 to the motion. If they file such a motion, Wells Fargo shall have until June 22, 2015 to
28 oppose it. No reply should be filed unless leave is obtained in advance. The Majors and

1 their counsel should consider the Court's cautionary note if they file a second amended
2 complaint, or otherwise continue to pursue this action.

3 **IT IS SO ORDERED.**

4 DATED: May 21, 2015

5 

6 **HONORABLE LARRY ALAN BURNS**
7 United States District Judge

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28