

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**

ROBERT WILDE, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FLAGSTAR BANK FSB., et al.,

Defendants.

CASE NO. 18cv1370-LAB (BGS)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS [Dkt. 11]**

Plaintiff Robert Wilde alleges that Defendant Flagstar Bank FSB failed to pay interest on his mortgage escrow account in violation of California Civil Code § 2954.8(a). Flagstar now moves to dismiss, arguing that Wilde did not comply with the loan's "notice-and-cure" provision prior to bringing suit and that, in any event, his complaint fails to state a claim. For the reasons below, Flagstar's motion is **GRANTED**.

BACKGROUND

In 2016, Robert Wilde obtained a mortgage that was serviced by Flagstar Bank. To provide security for the loan, Wilde executed a Deed of Trust, which required him to pay funds into an escrow account. See RJN, Dkt. 11-1, Ex. A at § 3.¹ Section 3 of the

¹ This document, although not attached to the complaint, is a basis for at least some of Wilde's claims and is therefore properly incorporated by reference into his complaint. See *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). Wilde does not dispute this, so Flagstar's request for judicial notice is **GRANTED**. Dkt. 11-1.

1 Deed of Trust provided that “[u]nless an agreement is made in writing or Applicable Law
2 requires interest to be paid on the [escrow] Funds, Lender shall not be required to pay
3 Borrower any interest or earnings on the Funds.” Id. Based on this provision—and
4 despite California Civil Code section 2954.8(a), which generally requires that “financial
5 institutions” pay interest on escrow accounts—Flagstar never paid Wilde interest on his
6 account. Wilde then brought this suit on behalf himself and a putative class of California
7 residents with loans serviced by Flagstar. Specifically, Wilde asserts four causes of
8 action relating to Flagstar’s servicing of his loan: (1) violation of Business and Professions
9 § 17200, et seq. (“UCL”); (2) breach of contract; (3) money had and received; and (4)
10 negligence.

11 ANALYSIS

12 Flagstar argues that the entire complaint must be dismissed because Wilde did not
13 comply with the Deed of Trust’s requirement that he provide Flagstar notice and an
14 opportunity to cure prior to filing suit. Section 20 of the Deed of Trust provides:

15 Neither Borrower nor Lender may commence, join, or be
16 joined to any judicial action (as either an individual litigant or
17 the member of a class) that arises from the other party’s
18 actions pursuant to this Security Instrument or that alleges
19 that the other party has breached any provision of, or any duty
20 owed by reason of, this Security Instrument, until such
21 Borrower or Lender has notified the other party . . . of such
22 alleged breach and afforded the other party hereto a
23 reasonable period after the giving of such notice to take
24 corrective action. RJN, Dkt. 11-1, Ex. A at § 20.

21 The parties agree that Wilde did not provide notice and an opportunity to cure prior to
22 filing suit, so the only question before the Court is whether some or all of his claims fall
23 within this contractual provision such that his failure to provide notice and an opportunity
24 to cure requires dismissal.² Flagstar argues that Wilde’s claims all “arise from [Flagstar’s]
25

26 ² The parties also seem to agree that Flagstar, the loan servicer, is covered by the terms
27 of the Deed of Trust, even though the document speaks only to the “[b]orrower” and
28 “[l]ender.” See also *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App’x 421, 422 (9th Cir.
2017) (construing an identical provision as extending to servicers).

1 actions pursuant to the [Deed of Trust]" or a "duty owed by reason of . . . the [Deed of
2 Trust]" because the claims relate to Flagstar's loan servicing, and specifically whether
3 Flagstar was required to pay interest on the escrow account. Wilde, by contrast, argues
4 that his claims are not subject to the notice-and-cure provision because they arise not
5 from the terms of the Deed of Trust but instead from a separate statutory duty to pay
6 interest that is "independent of any contract between the parties."

7 Recent cases on this issue illustrate the parties' respective views. In *Giotta v.*
8 *Ocwen Fin. Corp.*, 2016 WL 4447150 (N.D. Cal. 2016), plaintiffs, who had signed a deed
9 of trust containing an identical notice-and-cure provision, alleged the defendant
10 companies had artificially inflated fees for mortgage loan servicing that were then billed
11 through to the homeowners. The court found that all of plaintiffs' allegations, which
12 included claims under California's UCL and various other state and federal consumer
13 protection statutes, "[e]ll squarely within the ambit of the notice-and-cure provision"
14 because they "ar[ise] from the property inspections and [broker price opinions] obtained
15 by [a defendant] and charged to Plaintiffs pursuant to the terms of the Deed of Trust." *Id.*,
16 at *4. In an unpublished memorandum disposition, the Ninth Circuit affirmed, holding that
17 the suit was a "judicial action . . . that arises from the other party's actions pursuant to this
18 Security Instrument" because "the Deed of Trust authorized property inspections and
19 valuations to protect the Lender's interest in the property and to pass the fees for those
20 services on to the borrower." *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App'x 421,
21 422 (9th Cir. 2017) (emphases in original).

22 Two district courts recently considered the *Giotta* opinion in the context of the same
23 claim Wilde makes: that a servicer's failure to pay interest on an escrow account is
24 unlawful conduct under California's UCL. In *Smith v. Flagstar Bank, FSB*, 2018 WL
25 3995922, at *4 (N.D. Cal. 2018), the court concluded that, based on *Giotta*, it had "no
26 alternative but to grant the motion to dismiss" where Plaintiff failed to comply with the
27 notice-and-cure provision before bringing a UCL claim based on the lender's failure to
28 pay interest on the escrow account.

1 The court reached the opposite conclusion in a subsequent case, *McShannock v.*
2 *JP Morgan Chase Bank N.A.*, 2018 WL 6439128 (N.D. Cal. 2018). In relevant part, that
3 case held:

4 Per the notice and cure provision, Plaintiffs are obligated to
5 give notice in two circumstances: first, where their grievance
6 “arises from” Chase’s “actions pursuant to” the Deeds of
7 Trust, and second, where they “allege[] that [Chase] has
8 breached any provision of, or any duty owed by reason of,”
9 the Deeds of Trust. As to the first prong, the Deeds of Trust
10 provide that, “Unless an agreement is made in writing or
11 Applicable Law requires interest to be paid on the Funds [in
12 the escrow account], Lender shall not be required to pay
13 Borrower any interest or earnings on the funds.” The
14 “Applicable Law” here is § 2954.8, which requires lenders to
15 pay two percent interest on escrow funds. Cal. Civ. Code §
16 2954.8(a). The Deeds of Trust, by incorporating § 2954.8,
17 arguably require Chase to pay escrow interest to Plaintiffs.
18 Thus, there is a fair argument that Chase’s alleged non-
19 payment of escrow interest is not “pursuant to” the Deeds of
20 Trust, and Plaintiffs were therefore not required to give notice
21 before bringing this suit. *Id.*

22 The Court respectfully disagrees with the analysis in *McShannock* and adopts the
23 reasoning of *Giotta and Smith*. Here, as in each of these other cases, *Wilde* was required
24 provide notice and an opportunity to cure for any claims arising from *Flagstar’s* “actions
25 pursuant to” the Deed of Trust. In turn, the Deed of Trust provided that *Flagstar* had no
26 obligation to pay interest on the escrow account unless “applicable law”—e.g., § 2954.8—
27 provides otherwise. *Flagstar’s* decision not to pay interest on the account was therefore
28 a decision made “pursuant to” the Deed of Trust. Even if that decision was unlawful in
light of § 2954.8 or constituted a breach of the contract, it was a decision made “pursuant
to” terms of that contract, and *Wilde* was required to first give *Flagstar* notice and an
opportunity to cure prior to bringing suit. Had *Wilde* given *Flagstar* notice of the violation,
Flagstar would have had the opportunity to bring its policies into compliance with
California state law, thus avoiding expensive litigation like this. See *Higley v. Flagstar*
Bank, FSB, 910 F. Supp. 2d 1249, 1253 (D. Or. 2012) (“The notice-and-cure provision is

1 intended to give the allegedly breaching party an opportunity to cure its breach.”). On the
2 other hand, had Flagstar not cured the defect after being notified, Wilde would be perfectly
3 entitled to pursue this action (and do so on behalf of a class that was similarly affected).

4 The Court agrees that there are situations in which a statutory right could exist
5 independent of the contract. If, for example, the contract was silent on whether Flagstar
6 was required to pay interest, its failure to do so under § 2954.8 would be a violation that
7 would clearly arise independent of the contract. But where the contract specifically
8 speaks to the issue governed by statute, it is subject to the notice-and-cure provision.

9 While the Court’s focus thus far has been on Wilde’s UCL claim, the determination
10 that his UCL claim is barred by his failure to comply with the notice-and-cure requirement
11 applies with equal force to his other claims. His second cause of action for breach of
12 contract necessarily falls within the scope of the notice-and-cure provision because it
13 directly relates to Flagstar’s performance under the contract. Likewise, his third cause of
14 action for “money had and received” amounts to an allegation that Flagstar wrongfully
15 obtained money (by failing to pay interest) that should have been transferred to Wilde
16 instead. Any failure to pay interest was, again, based on the Deed of Trust and therefore
17 subject to its notice-and-cure provision. Finally, Wilde’s negligence claim is essentially a
18 reiteration of his breach of contract and UCL claims; the argument being that Flagstar
19 had a “duty” to maintain its customers’ escrow accounts in accordance with federal and
20 state laws and that it breached that duty by not paying interest. Because this claim also
21 relates to Flagstar’s decision to withhold interest under the Deed of Trust, it is subject to
22 the notice-and-cure provision and should be dismissed.³

23 ///

24 ///

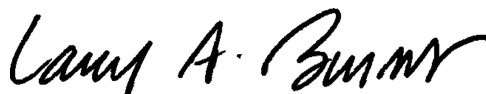
25 ³ Because the Court concludes that Wilde’s failure to comply with the notice-and-cure
26 provision requires dismissal as to all his claims, it does not address Flagstar’s various
27 other arguments as to why Wilde’s third and fourth causes of action should be dismissed.
28 The Court also does not address Flagstar’s request to dismiss co-defendant Flagstar
Bancorp, Inc., which is moot in light of Wilde’s voluntary dismissal of that party. Dkt. 19.

1 **CONCLUSION**

2 Defendant's motion to dismiss is **GRANTED**. Because the time for complying with
3 the notice-and-cure provision expired when Wilde filed suit—and because Wilde does not
4 allege in either his complaint or opposition that he complied with this provision—
5 amendment would be futile. Wilde's claims are **DISMISSED WITH PREJUDICE**. The
6 clerk is directed to enter judgment in favor of Flagstar and close the case.

7 **IT IS SO ORDERED.**

8 Dated: March 8, 2019



9 **HONORABLE LARRY ALAN BURNS**
10 Chief United States District Judge

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