

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GARTH E. STABLEY,)
)
Plaintiff,)
vs.)
)
BANK OF AMERICA, N.A., et al.,)
)
Defendants.)
)

Case No.: 2:11-cv-00635-GMN-RJJ

ORDER

This is a civil suit filed by Plaintiff Garth Stabley against Defendants Bank of America, N.A.; Countrywide Financial Corp. d/b/a BAC Home Loans Servicing; Countrywide Home Loans, Inc.; ReconTrust Co., N.A.; and CTC Real Estate Services (collectively “Defendants”). Pending before the Court is Plaintiff’s Motion for Preliminary Injunction (ECF No. 3) and Defendants’ Motion to Dismiss (ECF No. 6).

I. BACKGROUND

Plaintiff filed suit on April 22, 2011, and also filed a motion/application for leave to proceed in forma pauperis. (ECF No. 1.) On June 3, 2011, the Magistrate Judge ordered Plaintiff to pay the filing fee by July 6, 2011. (ECF No. 15.) Plaintiff requested an extension of time to pay the filing fee, which was granted, and Plaintiff paid his filing fee on July 28, 2011. (ECF Nos. 17, 18, 19.)

Plaintiff’s Complaint was filed using a handwritten fill-in-the-blank form provided to prisoners who wish to file a civil rights complaint. (See Complaint, ECF No. 1-1.) Plaintiff’s Complaint states three Counts upon which his suit is based: “COUNT I – Fraud, Deception and Concealment; COUNT II – Predatory Lending, Civil Rights and Constitutional Rights; COUNT III – Fair Housing Complaint, HUD Complaint, Securitization Contaminated and Prejudice Due

1 to age and Income being prayed [sic] upon.” (Complaint, ¶1, ECF No. 1-1.) Defendants filed a
2 Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

3 **II. LEGAL STANDARD**

4 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
5 that fails to state a claim upon which relief can be granted. See *North Star Int’l. v. Arizona Corp.*
6 *Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
7 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
8 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See
9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
10 sufficient to state a claim, the Court will take all material allegations as true and construe them in
11 the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
12 Cir. 1986).

13 The Court, however, is not required to accept as true allegations that are merely conclusory,
14 unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden State*
15 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with
16 conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is
17 plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550
18 U.S. at 555).

19 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
20 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police*
21 *Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff’s complaint
22 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
23 Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because “they
24 impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th
25 Cir.1996). Mindful of the fact that the Supreme Court has “instructed the federal courts to

1 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132,
2 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of
3 leniency.

4 “Generally, a district court may not consider any material beyond the pleadings in ruling
5 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
6 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner
7 & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents
8 whose contents are alleged in a complaint and whose authenticity no party questions, but which
9 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
10 motion to dismiss” without converting the motion to dismiss into a motion for summary
11 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence
12 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*,
13 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside
14 of the pleadings, the motion to dismiss is converted into a motion for summary judgment. See
15 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

16 If the court grants a motion to dismiss, it must then decide whether to grant leave to
17 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
18 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
19 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman v.*
20 *Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that
21 the deficiencies of the complaint cannot be cured by amendment. See *DeSoto v. Yellow Freight*
22 *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

23 **III. DISCUSSION**

24 In his Complaint, Plaintiff alleges as background that “the mortgage lien alleged to exist
25 against his particular property is null and void ab initio” and that through Defendants’ deception

1 Plaintiff was induced to enter into mortgages “from March 2007 to present w/ Countrywide – B
2 of A.” (Complaint, 3:¶1, ECF No. 1-1.) Plaintiff also alleges that Defendants breached his
3 “constitutionally and statutorily protected rights of privacy” and that their “continuing tortious
4 conduct intended to deprive Plaintiff of his rights and remedies.” (Id.) Plaintiff continues,
5 alleging “a massive fraud perpetrated upon Plaintiff and other borrowers by Countrywide
6 Defendants that devastated the values of their residences, in most cases resulting in Plaintiffs’
7 loss of all or substantially of their net worth!” (Id.) Plaintiff further alleges that “Countrywide
8 founder & CEO Angelo Mozilo Systems created false & inflated property appraisals to obtain
9 mortgages later to pool them together then selling them to the highest bidder therefore resulting
10 in the Plaintiff losing his equity in his home allowing his credit rating to plummet, destroying
11 credit, his credit ratings and histories damaging & destroying permanently incurring material
12 other costs and expenses on all causes of action for such other & further relief as this Court may
13 deem just & proper.” (Id.)

14 **Count I. “Fraud, Deception and Concealment”**

15 Under Count I, Plaintiff alleges that he “didn’t fully understand [his] loan in it’s original
16 form and neither did the person selling [him] the loan representing Countrywide.” (Id. at 4.)
17 Plaintiff alleges that the person selling him the loan “tried to rush [Plaintiff] through it as an
18 auctioneer would an auction sale and talked like one as well and [Plaintiff kept] stopping him to
19 have him explain it but never got the information [he] should have received.” (Id.) Plaintiff
20 states that if he had gotten the information he “would of never signed it, but [the person selling
21 the loan] keep telling [Plaintiff] this was as new to him as it was to [Plaintiff].” (Id.) Plaintiff
22 states that at that point he “was starting to question the legality of [variable Adjustable-Rate
23 Mortgages (“ARMs”)] as well, at which point [the person selling the loan] said if [Plaintiff]
24 didn’t sign that day [Plaintiff] would lose the house [Plaintiff] was closing on that [Plaintiff]
25 wanted to buy, so [Plaintiff] signed, since they were granting [Plaintiff] the loan...” (Id.)

1 Plaintiff alleges that “they insisted that if [he] didn’t go through them Countrywide we would
2 lose their supposedly wonderful package deal, that they practically forced down my throat.” (Id.)
3 Plaintiff alleges that he “was subjected to bait and switch tactics” and that his “opening offer of
4 5.75% turned into over 6% at signing!” (Id.)

5 A claim of “fraud or mistake” must be alleged “with particularity.” Fed. R. Civ. P. 9(b);
6 see also *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1023 (9th Cir. 2000) (“Federal Rule of Civil
7 Procedure 9(b) ... require[s] [plaintiff] to plead her case with a high degree of meticulousness.”).
8 A complaint alleging fraud or mistake must include allegations of the time, place, and specific
9 content of the alleged false representations and the identities of the parties involved. See *Swartz*
10 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Plaintiff must also “set forth an explanation as
11 to why the statement or omission complained of was false and misleading.” *In re GlenFed, Inc.*
12 *Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). Here, Plaintiff’s fraud claims fail to
13 allege with particularity the time, place and substance of the fraud, including details as to
14 Defendants’ wrongful acts, the identities of those involved and when they occurred.

15 **Count II. “Predatory Lending, Civil Rights and Constitutional Rights”**

16 Under Count II, Plaintiff alleges that his “modification has been a repeat of Count I.” (Id.
17 at 5.) Despite the heading of Count Two, and the form on which the Complaint was filed,
18 Plaintiff does not appear to allege any constitutional or civil rights violations. Instead, Plaintiff
19 appears to allege violations relating to a HAMP (“Home Affordable Modification Program”)
20 modification. Plaintiff’s description includes statements that “while [Plaintiff] was in the
21 hospital [Bank of America] sent [Plaintiff] a modification, one in which [Plaintiff] didn’t agree to
22 in the first place” and also that “[Bank of America] ended up denying [Plaintiff] a HAMP
23 modification...stating that [Plaintiff] didn’t qualify since [Plaintiff] failed to make the three
24 months trial payments.” (Id.) Plaintiff alleges that a modification was “supposedly sent certified
25 mail” and that “six months ago they did the same thing again, after to talking to [Bank of

1 America] on the phone and not coming to an agreement they sent me another modification not
2 based on my current income.” (Id.) Plaintiff alleges that “it appears that they are setting me up
3 for failure, as I was with my original loan with Countrywide.” (Id.)

4 As pointed out by Defendants, there is no private right of action under HAMP. See Simon
5 v. Bank of America, N.A., No. 2:10-CV-00300-GMN-LRL, 2010 WL 2609436, at *7 (D. Nev.
6 June 23, 2010). To the extent that Plaintiff is alleging any other violation relating to a loan
7 modification, Plaintiff fails to sufficiently state any legal claim or facts supporting a claim.

8 **Count III. “Fair Housing Complaint, HUD Complaint, Securitization Contaminated**
9 **and Prejudice Due to age and Income being prayed upon”**

10 Under Count III, Plaintiff begins by stating that “this brings me to dual tracking...never
11 allowed a hardship affidavit or principle forbearance under HAMP guidelines along with several
12 other violations!” (Id. at 6.) Plaintiff alleges that “every one to date that I have spoken to around
13 the country including Senators Dodd, Reid & Ensign of Nevada from Washington D.C. who have
14 intervened and helping with 2 of the 5 stays to date all have said that I have been victimized by
15 their Countrywide – B of A & subsidiaries illegal practices and fraud!” (Id.) Plaintiff continues
16 to state that “75 to 80 billion of our tax payers dollars that was earmarked for loan modification
17 to date hasn’t been used the way it was appropriated by the government intended it to be used
18 which was modifying the American Peoples Loans on their homes!” (Id.) Plaintiff then alleges
19 that “Countrywide – B of A has committed racketeering, embezzlement, fraud, theft, obstruction
20 of justice and have invested my mortgage and millions of others into the stock market without
21 granting myself and other a return, and they can’t produce a note legally stating that they own my
22 mortgage!!!” (Id.) Plaintiff concludes by stating, “I’m sure after tomorrows news has ended I’ll
23 have more to add then!!!!” (Id.)

24 As noted by Defendants, Plaintiff’s allegations in this count are so vague and conclusory
25 as to fail to provide adequate notice to Defendants of the claims against which they must defend.

1 Liberally construing Plaintiff's statements, Plaintiff appears to attempt to allege claims invoking
2 the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., and the U.S. Dept. of Housing and
3 Urban Development ("HUD"). Plaintiff also throws out the terms "racketeering, embezzlement,
4 fraud, theft, obstruction of justice" and "securitization," while also mentioning non-production of
5 the loan note. To the extent that Plaintiff is stating any legal claims in Count III, Plaintiff does
6 not appear to allege any facts in support of these claims.

7 For the reasons discussed above, and even liberally construing Plaintiff's Complaint due
8 to his pro se status, and construing all material allegations in the light most favorable to the
9 Plaintiff, Plaintiff's Complaint does not give Defendants fair notice of legally cognizable claims
10 and the grounds on which the claims rest. The facts alleged by Plaintiff do not show that a
11 violation is plausible instead of merely possible, and his allegations are mostly conclusory,
12 unwarranted deductions of fact, or unreasonable inferences. Therefore, the Court will grant
13 Defendants' Motion to Dismiss, without prejudice. Although it is not clear whether amendment
14 would be futile, the Court does not find any undue delay, bad faith, or dilatory motive on the part
15 of Plaintiff, nor undue prejudice to Defendants should amendment be permitted. In addition to
16 requirements discussed above, any amendment must clearly state each legal claim, which
17 Defendant is subject to that claim, and detailed factual support for the elements of the claims
18 alleged.

19 **IV. CONCLUSION**

20 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 6) is **GRANTED**,
21 **without prejudice.**

22 **IT IS FURTHER ORDERED** that if Plaintiff wishes to file an Amended Complaint
23 consistent with this opinion, he must do so **by Friday, February 3, 2012**; otherwise, the case
24 will be closed.

25 DATED this 11th day of January, 2012.



Gloria M. Navarro
United States District Judge