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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUNG HAN,

Plaintiff,

v.

NATIONSTAR MORTGAGE LLC, et al.,

Defendants.

CASE NO. C15-5702 BHS

ORDER GRANTING
DEFENDANTS NATIONSTAR
AND MERS' MOTION TO
DISMISS, GRANTING
DEFENDANT NORTHWEST
TRUSTEE'S MOTION TO
DISMISS, AND GRANTING
PLAINTIFF LEAVE TO AMEND

This matter comes before the Court on Defendants Nationstar Mortgage LLC (“Nationstar”) and Mortgage Electronic Registration Systems, Inc.’s (“MERS”) motion to dismiss (Dkt. 10); and Defendant Northwest Trustee Services, Inc.’s (“Northwest”) motion to dismiss (Dkt. 11). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants the motions to dismiss and grants leave to amend for the reasons stated herein.

1 **I. PROCEDURAL HISTORY**

2 On September 3, 2015, Plaintiff Sung Han (“Han”) filed an amended complaint
3 against Defendants Nationstar, MERS, Northwest, First American Trustee, and John
4 Does 1–20 in Thurston County Superior Court. Dkt. 1 at 7–13 (“Comp.”).¹ Han asserts
5 the following claims: (1) injunction to prevent trustee sale; (2) violation of the Truth in
6 Lending Act (“TILA”); (3) violation of the Real Estate Settlement Procedures Act
7 (“RESPA”); (4) breach of fiduciary duty; (5) breach of implied covenant of good faith
8 and fair dealing; and (6) unjust enrichment. Comp. 6:10–7:16. Han seeks damages and
9 other “relief as the Court would deem just and equitable.” Comp. 7:18–20. On
10 September 29, 2015, the suit was removed to this Court. Dkt. 1.

11 On October 6, 2015, Nationstar and MERS moved to dismiss. Dkt. 10. That same
12 day, Northwest moved to dismiss. Dkt. 11. On October 26, 2015, Han responded. Dkt.
13 13. On October 29, 2015, Nationstar, MERS, and Northwest filed their respective
14 replies. Dkts. 14, 15. On November 3, 2015, Han filed a surreply. Dkt. 16.

15 **II. FACTUAL BACKGROUND**

16 In May 2006, Han obtained a loan from Mortgage IT, Inc. Comp. 2:28–3:1. The
17 loan was secured by a deed of trust on Han’s property. *Id.* In February 2013, Han
18 defaulted on his loan. *See* Comp., Ex. A at 2.

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¹ Han’s complaint does not contain paragraph or page numbers. When citing to Han’s
22 complaint, the Court will refer to the page numbers in the order they were filed with the Thurston
County Superior Court, as well as the line numbers.

1 To avoid foreclosure, Han applied for a loan modification with Nationstar. Comp.
2 3:4–5. In March 2014, Han was referred to mediation with Nationstar. Comp. 3:7–11.

3 On May 7, 2015, Northwest issued a Notice of Trustee’s Sale, which set a
4 trustee’s sale for August 14, 2015. Comp., Ex. A. The Notice of Trustee’s Sale
5 estimated the reinstatement amount to be \$37,496.63 as of May 7, 2015, and directed Han
6 to contact Northwest for the exact reinstatement amount. *Id.* at 2.

7 On August 18, 2015, Northwest provided Han with an updated reinstatement
8 amount good through August 27, 2015. Comp., Ex. B at 1. The new amount was
9 \$41,813.11. Comp. 5:13, Ex. B at 2. Han was unable to obtain the funds needed for
10 reinstatement. Comp. 5:13–15.

11 On August 26, 2015, Han filed his initial complaint in Thurston County Superior
12 Court. Dkt. 4-1 at 5–10. Han did not seek a temporary restraining order. *Id.* On August
13 28, 2015, Han’s property was sold at a trustee’s sale. Dkt. 12, Ex. 1.

14 **III. DISCUSSION**

15 Nationstar, MERS, and Northwest (collectively “Defendants”) move to dismiss
16 Han’s claims against them under Federal Rule of Civil Procedure 12(b)(6). Dkts. 10, 11.

17 **A. Rule 12(b)(6)**

18 Motions to dismiss brought under Rule 12(b)(6) may be based on either the lack of
19 a cognizable legal theory or the absence of sufficient facts alleged under such a theory.

20 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Material
21 allegations are taken as admitted and the complaint is construed in the plaintiff’s favor.
22 *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to

1 dismiss, the complaint does not require detailed factual allegations but must provide the
2 grounds for entitlement to relief and not merely a “formulaic recitation” of the elements
3 of a cause of action. *Twombly*, 127 S. Ct. at 1965. A plaintiff must allege “enough facts
4 to state a claim to relief that is plausible on its face.” *Id.* at 1974.

5 Generally, the scope of review on a motion to dismiss is limited to the contents of
6 the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court
7 may consider documents submitted as part of the complaint without converting the
8 motion to dismiss into a motion for summary judgment. *Id.* Han attached several
9 documents to his complaint, including the Notice of Trustee’s Sale and a letter regarding
10 reinstatement from Northwest. Comp., Exs. A, B. The authenticity of these documents is
11 not contested. The Court will consider these documents when reviewing the motions to
12 dismiss. The Court may also take judicial notice of “matters of public record.” *Lee*, 250
13 F.3d at 689. The Court takes judicial notice of the trustee’s deed, which is a matter of
14 public record.

15 **B. Injunction to Prevent Trustee’s Sale**

16 Han first seeks to restrain the sale of his property. Comp. 6:10–17. Han’s
17 property was sold at a trustee’s sale on August 28, 2015. Dkt. 12, Ex. 1. Because the
18 trustee’s sale has already occurred, Han’s claim for injunctive relief is moot. *See Olson*
19 *v. JPMorgan Chase Bank, N.A.*, C13-5681-RJB, 2014 WL 2712032, at *5 (W.D. Wash.
20 June 16, 2014) (“When there is no [trustee’s] sale pending there is nothing to enjoin and
21 injunctive relief claims are moot.”). The Court dismisses this claim with prejudice.
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1 **C. Federal Law Claims**

2 **1. Violation of Truth in Lending Act**

3 Han seeks damages for alleged violations of TILA. Comp. 6:19–22, 7:18. Under
4 TILA, creditors must provide borrowers with “clear and accurate disclosures of terms
5 dealing with things like finance charges, annual percentage rates of interest, and the
6 borrower’s rights.” *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). If a creditor
7 fails to comply with TILA’s requirements, the borrower may seek damages. 15 U.S.C.
8 § 1640(a). The statute of limitations for a TILA damages claim is one year. *See id.*
9 § 1640(e). Generally, the limitations period begins to run from the date the loan
10 documents are executed. *See Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th
11 Cir. 2003).

12 Han asserts that “Defendants by and through their actions have committed
13 violation of the Truth in Lending Act” Comp. 6:21–22. Han does not allege any
14 facts to support this conclusory statement. Mere labels and conclusions are insufficient to
15 state a claim for relief. *Twombly*, 550 U.S. at 555.

16 Even assuming Han adequately stated a TILA damages claim, his claim would be
17 barred by TILA’s statute of limitations. Han alleges he executed the loan documents in
18 May 2006. Han, however, did not file this suit until August 2015—more than nine years
19 after the loan documents were executed. Han does not argue that the alleged TILA
20 violations took place after May 2006 or that he could not have discovered the violations
21 within one year. The Court therefore dismisses Han’s TILA claim with prejudice.
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1 **2. Violation of Real Estate Settlement Procedures Act**

2 Next, Han alleges Defendants violated RESPA. Comp. 6:21–22. “Congress
3 enacted RESPA in 1974 in response to abusive practices that inflate the cost of real estate
4 transactions.” *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1033 (9th Cir. 2014)
5 (citing 12 U.S.C. § 2601(a)). “RESPA requires advance disclosure of settlement costs,
6 the elimination of kickbacks or referrals fees, and a reduction of the amount that buyers
7 are required to place in escrow accounts for taxes and insurance.” *Bloom v. Martin*, 865
8 F. Supp. 1377, 1381 (N.D. Cal. 1994).

9 Han generally asserts “Defendants by and through their actions have committed
10 violation of the . . . Real Estate Settlement [Procedures] Act.” Comp. 6:21–22. Han does
11 not specify which provision of RESPA was allegedly violated and by which Defendant.
12 Han also does not allege sufficient facts to support a RESPA claim. Given the scant
13 allegations in Han’s complaint, Han fails to state a RESPA claim. The Court dismisses
14 this claim without prejudice.

15 **D. State Law Claims**

16 Han also alleges state law claims for breach of fiduciary duty, breach of implied
17 covenant of good faith and fair dealing, and unjust enrichment. Comp. 6:26–7:15.
18 Defendants argue Han waived these claims by failing to properly enjoin the trustee’s sale.
19 Dkts. 10, 11.

20 The Washington Deed of Trust Act governs the procedures for nonjudicial
21 foreclosure sales. *Vawter v. Quality Loan Serv. Corp.*, 707 F. Supp. 2d 1115, 1121
22 (W.D. Wash. 2010). “The sole method to contest and enjoin a foreclosure sale is to file

1 an action to enjoin or restrain the sale in accordance with RCW 61.24.130.” *CHD, Inc. v.*
2 *Boyles*, 138 Wn. App. 131, 137 (2007). A borrower who fails to comply with RCW
3 61.24.130 waives the right to contest the underlying debt and invalidate the trustee’s sale.
4 *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003); *CHD*, 138 Wn. App. at 139. Waiver occurs
5 where a party “(1) received notice of the right to enjoin the sale, (2) had actual or
6 constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to
7 bring an action to obtain a court order enjoining the sale.” *Frizzell v. Murray*, 179 Wn.2d
8 301, 306–07 (2013). “The statutory notices of foreclosure and trustee’s sale will usually
9 be sufficient.” *CHD*, 138 Wn. App. at 137.

10 All three elements of waiver are present in this case. First, Han’s complaint
11 acknowledges he received the Notice of Trustee’s Sale and knew his property would be
12 sold. *See* Comp.4:19, 5:6–9. Indeed, Han attached the Notice of Trustee’s Sale to his
13 complaint. Comp., Ex. A. Second, Han does not dispute that the Notice of Trustee’s
14 Sale advised him of his defenses to foreclosure prior to sale. Although Han sought an
15 injunction to prevent the sale in the instant suit, Han did not seek an order to restrain the
16 sale in accordance with RCW 61.24.130. *See* Dkt. 4-1 at 5–10. “Simply bringing an
17 action to obtain a permanent injunction will not forestall a trustee’s sale that occurs
18 before the end of the action is reached.” *Plein*, 149 Wn.2d at 227. Because Han failed to
19 comply with RCW 61.24.130, the waiver doctrine applies.

20 Although the waiver doctrine applies, it is unclear whether Han’s state law claims
21 fall within the scope of the waiver doctrine based on his complaint. As noted above, the
22 waiver doctrine bars claims that contest the underlying debt or seek to invalidate the

1 trustee's sale. *Plein*, 149 Wn.2d at 312. Here, the Court is unable to determine the nature
2 of Han's claims given the threadbare allegations in his complaint. Han merely recites
3 legal conclusions for each state law claim. For example, Han generally alleges there is an
4 implied duty of good faith and fair dealing in every contract, but does not identify any
5 contractual provision that was not performed. *See* Comp. 7:7–9. Han's complaint is too
6 conclusory for the Court to determine whether he is challenging the underlying debt and
7 trustee's sale. Because Han's breach of fiduciary duty, breach of implied covenant of
8 good faith and fair dealing, and unjust enrichment claims are insufficiently pled, the
9 Court dismisses these claims without prejudice. Although the Court grants Han leave to
10 amend, the Court notes that these claims are most likely waived if Han is challenging the
11 underlying debt and trustee's sale.

12 **E. Leave to Amend**

13 Leave to amend shall be freely given when justice so requires. Fed. R. Civ. P.
14 15(a). "If the underlying facts or circumstances relied upon by a plaintiff may be a
15 proper subject of relief, he ought to be afforded an opportunity to test his claim on the
16 merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). On a Rule 12(b)(6) motion, "a
17 district court should grant leave to amend even if no request to amend the pleading was
18 made, unless it determines that the pleading could not possibly be cured by the allegation
19 of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

20 The Court finds Han's injunctive relief and TILA claims cannot be cured by any
21 amendment. However, it appears possible that Han could cure the defects in his
22 remaining claims by providing more specific factual allegations. The Court therefore

1 grants Han leave to amend his RESPA, breach of fiduciary duty, breach of implied
2 covenant of good faith and fair dealing, and unjust enrichment claims. In addition to
3 providing more factual allegations, Han should specify which claims he is asserting
4 against which Defendants.

5 In his surreply, Han asserts he is also alleging a misrepresentation claim under
6 RCW 61.24.127(1). Dkt. 16 at 2. The waiver doctrine does not bar a damages claim for
7 common law fraud or misrepresentation. RCW 61.24.127(1). However, a
8 misrepresentation claim is not clearly alleged in Han's complaint. The Court will grant
9 Han leave to add a misrepresentation claim.

10 IV. ORDER

11 Therefore, it is hereby **ORDERED** that Nationstar, MERS, and Northwest's
12 respective motions to dismiss (Dkts. 10, 11) are **GRANTED**. Han is **GRANTED leave**
13 **to amend** his complaint as stated herein. Han shall file an amended complaint no later
14 than December 18, 2015.

15 Dated this 1st day of December, 2015.

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BENJAMIN H. SETTLE
United States District Judge