JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 23-8044-KK-JPRx**	Date:	February 15, 2024
Title:	*William Zepeda v. BMO Harris Bank N.A., et al.*		

Present: The Honorable KENLY KIYA KATO, UNITED STATES DISTRICT JUDGE

Noe Ponce	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **(In Chambers) Order GRANTING Defendant's Motion to Dismiss [Dkt. 26]**

I. INTRODUCTION

On December 7, 2023, plaintiff William Zepeda ("Plaintiff") filed the operative First Amended Complaint ("FAC") against defendant BMO Harris Bank, N.A. ("Defendant"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and Real Estate Settlement Practices Act ("RESPA") along with related state claims. Dkt. 22. On January 11, 2024, Defendant filed the instant Motion to Dismiss certain claims in the FAC for failure to state a claim upon which relief can be granted ("Motion"). Dkt. 26. On January 18, 2024, Plaintiff filed an Opposition and Request for Judicial Notice. Dkt. 28. On January 25, 2024, Defendant filed a Reply. Dkt. 29. The matter thus stands submitted.

The Court finds this matter appropriate for resolution without oral argument. See FED. R. CIV. P. 78(b); L.R. 7-15. For the reasons set forth below, the Motion is **GRANTED**. Plaintiff's claims for violations of the FDCPA and RESPA are **DISMISSED WITH PREJUDICE**. Plaintiff's remaining state claims are **DISMISSED WITHOUT PREJUDICE**.

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II.
BACKGROUND

The instant action arises out of Defendant's alleged attempt to force foreclosure on Plaintiff's property located at 1809 West Madison Avenue in Montebello, California. Dkt. 22 ("FAC"). As alleged in the FAC, in 2009, Plaintiff's mother – the prior property owner – executed a deed of trust in the amount of $146,000.00[1] on the property, with Bank of the West as the lender. FAC ¶¶ 7, 9, 11; see also dkt. 22-2 (Ex. B to the FAC) at 2. The deed of trust named Mortgage Electronic Registration Systems, Inc. as the beneficiary "solely as a nominee for [Bank of the West] and [Bank of the West's] successors and assigns." Dkt. 22-2 (Ex. B to the FAC) at 3.

Following his mother's death in 2010, Plaintiff continued to make monthly mortgage payments on the deed of trust. FAC ¶¶ 12-14.

In April or May 2023, Defendant – Bank of the West's successor by merger – sent a "Notice of Default and Intent to Accelerate and Foreclose" to Plaintiff. Id. ¶¶ 9, 14; see also dkt. 22-7 (Ex. G to the FAC). The notice stated Plaintiff had "failed to make the payments due on 02/01/2023 and every month thereafter" and, thus, owed $3,237.30 in past-due mortgage payments. FAC ¶ 14; see also dkt. 22-7 (Ex. G to the FAC).

Plaintiff alleges he had not missed any payments and "did not believe he was in default[.]" FAC ¶¶ 14, 16. Nevertheless, on June 8, 2023, Plaintiff paid $3,237.30 to Defendant. Id. ¶ 16.

On June 26, 2023, through trustee Quality Trustee Service Corporation, Defendant recorded a Notice of Default against the property. Id. ¶¶ 1, 17-18. In addition, "[a]round" August 1, 2023, Defendant stopped accepting Plaintiff's mortgage payments. Id. ¶ 20.

On August 30, 2023, Plaintiff sent a letter to Defendant requesting a copy of the original promissory note underlying the deed of trust as well as a loan payoff amount. Id. ¶¶ 23-24; see also dkt. 22-4 (Ex. D to the FAC).

On September 18, 2023, Plaintiff received a letter from Defendant dated September 1, 2023, indicating Defendant had "received [Plaintiff's] inquiry" and would "provide a response[.]" FAC ¶ 26; see also dkt. 22-13 (Ex. M to the FAC).

On September 21, 2023, Plaintiff received a letter from Defendant dated September 6, 2023, stating Defendant had "accelerated [the] loan" and was "returning [Plaintiff's] funds[.]" FAC ¶ 28. However, Defendant did not return any funds to Plaintiff. Id.

On September 26, 2023, Plaintiff initiated the instant action against Defendant.[2] Dkt. 1.

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[1] Plaintiff's statement that the amount of the loan was $149,000.00, see FAC ¶¶ 1, 11, is inaccurate, see dkt. 22-2 (Ex. B to the FAC) at 3.

[2] The original Complaint additionally named Quality Loan Service Corporation as a defendant. See dkt. 1. However, Quality Loan Service Corporation was not named as a defendant in the operative FAC. See dkt. 22.

On October 25, 2023, through substituted trustee MTC Financial Inc., doing business as Trustee Corps, Defendant recorded a Notice of Trustee's Sale against the property. FAC ¶ 31.

On October 27, 2023, Plaintiff received a letter from Trustee Corps indicating the loan payoff amount was $84,049.68. Id. ¶ 32; see also dkt. 22-18 (Ex. R to the FAC). On October 30, 2023, Plaintiff made a payment of $84,049.68 to Trustee Corps. FAC ¶ 33.

On November 9, 2023, Defendant recorded a Full Reconveyance stating the deed of trust had been paid in full. Id. ¶ 34; see also dkt. 22-20 (Ex. T to the FAC).

On December 7, 2023, Plaintiff filed the operative FAC against Defendant, asserting the following causes of action:

(1) First Cause of Action for violation of the FDCPA, 15 U.S.C. § 1692f;
(2) Second Cause of Action for violation of RESPA, 12 U.S.C. § 2605;
(3) Third Cause of Action for failure to rescind a Notice of Default in violation of Section 2924c(a)(2) of the California Civil Code;
(4) Fourth Cause of Action for negligence;
(5) Fifth Cause of Action for slander of title;
(6) Sixth Cause of Action for breach of the implied covenant of good faith and fair dealing; and
(7) Seventh Cause of Action for intentional infliction of emotional distress.

FAC at 13-28.

III.
LEGAL STANDARD

A complaint may be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) "only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). In considering whether a complaint states a claim, a court must "construe the pleadings in the light most favorable to the nonmoving party," Capp v. Cnty. of San Diego, 940 F.3d 1046, 1052 (9th Cir. 2019) (quoting Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005)), accepting as true all factual allegations in the complaint and drawing all reasonable inferences in the nonmoving party's favor. Moreno v. UtiliQuest, LLC, 29 F.4th 567, 573 (9th Cir. 2022). The court, however, need not accept as true "a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

Although a complaint need not include detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting Iqbal, 556 U.S. at 678). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

A court should freely grant leave to amend a complaint dismissed for failure to state a claim, except where amendment "would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit," Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990); see also FED. R. CIV. P. 15(a)(2); Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009). The court may dismiss without leave to amend, "if it determines that 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,' or if the plaintiff had several opportunities to amend its complaint and repeatedly failed to cure deficiencies." Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010) (citations omitted).

IV.
DISCUSSION

A. PLAINTIFF'S FIRST CAUSE OF ACTION UNDER THE FDCPA IS DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

1. Applicable Law

Under the FDCPA, a debt collector is prohibited from collecting, or attempting to collect, "any amount . . . unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1). The FDCPA defines the term "debt collector" to include (1) "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts," or (2) "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6); accord. Rockridge Trust v. Wells Fargo, N.A., 985 F. Supp. 2d 1110, 1136 (N.D. Cal. 2013). The FDCPA further states the term "debt collector" does not apply to a person collecting or attempting to collect a debt which "was originated by such person" or "was not in default at the time it was obtained by such person[.]" 15 U.S.C. § 1692a(6)(F).

Thus, the FDCPA does not apply to "the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985). In addition, district courts have concluded an entity that acquires a debt through its merger with another creditor or loan servicer is not a "debt collector" under the FDCPA even if the merger occurred following the borrower's default on the debt. See Chung v. U.S. Bank, N.A., 250 F. Supp. 3d 658, 683 (D. Haw. 2017) (stating a debt acquired through merger following a borrower's default "is not considered to have been acquired after the default"); Fenello v. Bank of Am., N.A., 926 F. Supp. 2d 1342, 1350-51 (N.D. Ga. 2013) (concluding defendant loan servicer was not "debt collector" under FDCPA because it acquired right to service loan through merger with company that serviced loan prior to default); Esquivel v. Bank of Am., N.A., No. 2:12-CV-2502-GEB-KJN, 2013 WL 682925, at *2 (E.D. Cal. Feb. 21, 2013) (concluding defendant bank that merged with prior loan servicer "'obtained' the debt when its predecessor in interest . . . obtained the debt" and, thus, was not "debt collector" under FDCPA).

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2. Analysis

Here, Plaintiff fails to state a claim for violation of the FDCPA, because the allegations in the FAC fail to establish Defendant is a debt collector subject to the FDCPA's provisions. According to the FAC, Defendant acquired the loan at issue through its merger with Bank of the West, the lender that originated the loan. See FAC ¶ 9. Hence, Defendant is the successor of Plaintiff's creditor and, therefore, is not a "debt collector" under the FDCPA. See Chung, 250 F. Supp. 3d at 683; Fenello, 926 F. Supp. 2d at 1350-51; Esquivel, 2013 WL 682925, at *2; see also 15 U.S.C. § 1692a(6)(F) (excluding person collecting or attempting to collect debt which "was originated by such person" or "was not in default at the time it was obtained by such person" from FDCPA's definition of "debt collector").

Plaintiff contends Defendant is a debt collector within the meaning of the FDCPA because "Defendant [] received an assignment of the servicing rights to Plaintiff's loan on July 11, 2023" and, thus, acquired the loan following Plaintiff's purported default in February 2023. Dkt. 28 at 8 (emphasis omitted). In support of this argument, Plaintiff requests that the Court take judicial notice of (1) a search result from the Mortgage Electronic Registration Systems, Inc. ("MERS") registry identifying Defendant as the "servicer" for the loan at issue, and (2) an Assignment of Deed of Trust executed by MERS, "as nominee for [Defendant], successor by merger to Bank of the West," transferring all interest and rights in the deed of trust to Defendant. Dkt. 28-1. However, consideration of these documents would not change the Court's analysis. First, the relevance of the MERS registry search result is unclear. Second, the Assignment of Deed of Trust confirms Defendant acquired the loan at issue through its merger with Bank of the West. In the original instrument, MERS was named as the beneficiary of the deed of trust "solely as a nominee for [Bank of the West] and [Bank of the West's] successors and assigns[,]" dkt. 22-2 (Ex. B to the FAC) at 3, and through the subsequent assignment, MERS, "as nominee for [Defendant], successor by merger to Bank of the West[,]" transferred all interest and rights in the deed of trust back to Defendant, dkt. 28-1 at 8-9. The Court, therefore, rejects Plaintiff's contention that Defendant acquired the loan at issue through an assignment of the servicing rights on July 11, 2023.[3] Hence, because Defendant acquired the loan at issue through its merger with the original creditor, Plaintiff fails to establish Defendant is a debt collector within the meaning of the FDCPA.

The Motion is, therefore, **GRANTED** as to Plaintiff's First Cause of Action. Furthermore, amendment of this claim would be futile because Plaintiff cannot allege facts consistent with the FAC establishing Defendant is a debt collector subject to the FDCPA's provisions. Accordingly, Plaintiff's First Cause of Action is **DISMISSED WITH PREJUDICE**. See Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010) (holding dismissal without leave to amend is appropriate when amendment "could not possibly cure the deficiency").

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[3] Plaintiff's Request for Judicial Notice is, thus, **DENIED AS MOOT**.

B. PLAINTIFF'S SECOND CAUSE OF ACTION UNDER RESPA IS DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

1. Applicable Law

Under RESPA, a mortgage loan servicer that receives a "qualified written request" from a borrower "for information relating to the servicing of [the borrower's] loan" must "provide a written response acknowledging receipt" within five days. 12 U.S.C. § 2605(e)(1)(A). In addition, within thirty days, the servicer shall "make appropriate corrections in the account of the borrower, . . . and transmit to the borrower a written notification of such correction"; "provide the borrower with a written explanation or clarification that includes . . . a statement of the reasons for which the servicer believes the account of the borrower is correct"; or "after conducting an investigation, provide the borrower with a written explanation or clarification that includes . . . information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained[.]" 12 U.S.C. § 2605(e)(2).

A borrower's written inquiry constitutes a "qualified written request" under RESPA when the inquiry "(1) reasonably identifies the borrower's name and account, (2) either states the borrower's 'reasons for the belief . . . that the account is in error' or 'provides sufficient detail to the servicer regarding other information sought by the borrower,' and (3) seeks 'information relating to the servicing of [the] loan.'" Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 666 (9th Cir. 2012). The requirement that a qualified written request seek information relating to loan servicing "ensures that the statutory duty to respond does not arise with respect to all inquiries or complaints from borrowers to servicers." Id. (emphasis in original). RESPA defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, . . . and making the payments of principal and interest and such other payments[.]" 12 U.S.C. § 2605(i)(3). Hence, RESPA's definition of "servicing" does not encompass "the transactions and circumstances surrounding a loan's origination[.]" Medrano, 704 F.3d at 666-67.

2. Analysis

Here, Plaintiff fails to state a claim for violation of RESPA, because the allegations in the FAC do not establish Plaintiff's August 30, 2023 letter to Defendant constituted a qualified written request triggering Defendant's obligations under RESPA to respond. Specifically, the August 30, 2023 letter to Defendant did not seek "information relating to servicing[.]" Medrano, 704 F.3d at 666.

In the August 30, 2023 letter described in and attached to the FAC, Plaintiff requested a copy of the original promissory note underlying the deed of trust as well as a loan payoff amount. FAC ¶¶ 23-24; see also dkt. 22-4 (Ex. D to the FAC). However, a request for a copy of a promissory note concerns "the transactions and circumstances surrounding a loan's origination" and, therefore, is not a qualified written request under RESPA. See Medrano, 704 F.3d at 666-67; see also Hueso v. Select Portfolio Servicing, Inc., 527 F. Supp. 3d 1210, 1222 (S.D. Cal. 2021) (stating servicer had no duty under RESPA to respond to borrower's request for original security instruments and promissory note); Junod v. Dream House Mortg. Co., No. CV 11-7035-ODW (VBKx), 2012 WL 94355, at *3-4 (C.D. Cal. Jan. 5, 2012) (stating promissory note, deed of trust, and loan transactional history were "not the type of information RESPA contemplates"). Likewise, a

request for a loan payoff amount does not relate to the servicer's receipt of a borrower's "scheduled periodic payments" and, therefore, also is not a qualified written request under RESPA See 12 U.S.C. § 2605(i)(3); see also 12 C.F.R. § 1024.36 (stating a servicer need not treat "[a] request for a payoff balance" as a "request for information" under RESPA); Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232, 264 (D. Conn. 2017) (concluding servicer had no duty under RESPA to respond to payoff amount request because, "in its official commentary on [the regulations implementing RESPA], the [Consumer Financial Protection Bureau] states that it intended the Truth in Lending Act . . . to be the sole source of servicers' obligations concerning payoff statements"). Hence, Plaintiff's August 30, 2023 request for a copy of the promissory note underlying the deed of trust and loan payoff amount was not a qualified written request triggering Defendant's obligations under RESPA to respond.

The Motion is, therefore, **GRANTED** as to Plaintiff's Second Cause of Action. Furthermore, amendment of this claim would be futile, because Plaintiff cannot allege facts consistent with the FAC establishing Defendant had a duty under RESPA to respond to Plaintiff's August 30, 2023 inquiry. Accordingly, Plaintiff's Second Cause of Action is **DISMISSED WITH PREJUDICE**. See Telesaurus, 623 F.3d at 1003.

C. THE COURT DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S THIRD THROUGH SEVENTH CAUSES OF ACTION

A district court may decline to exercise supplemental jurisdiction over state claims when "the district court has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c)(3). The general rule is, "[w]hen federal claims are dismissed before trial[,] pendent state claims also should be dismissed." Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367-68 (9th Cir. 1992) (ellipsis omitted). Considering the early procedural posture of this case, as well as judicial economy, fairness, and comity, the Court will exercise its discretion and decline to entertain supplemental jurisdiction over the remaining state claims. See 28 U.S.C. § 1367(c)(3); Religious Tech., 971 F.2d at 367-68.

V. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED**. Plaintiff's First and Second Cause of Action are **DISMISSED WITH PREJUDICE**. Plaintiff's Third through Seventh Causes of Action are **DISMISSED WITHOUT PREJUDICE**. The Clerk of Court shall close this action. (JS-6)

IT IS SO ORDERED.