


(18)

ORDER AFTER HEARING

FILED
JUL 01 2011
FRESNO SUPERIOR COURT
By  DEPT. 97D - DEPUTY

Re: **Charles Smith v. Bank of America, N.A., et al.**
Case no. 11CECG00843

Hearing Date: **May 25, 2011 (Dept. 403); TUA**

Motion: Demurrer to the complaint brought by defendants Bank of America, N.A. (BAC), ReconTrust Company, N.A., and Mortgage Electronic Registration Systems, Inc. (MERS)

Ruling:

- (1) To sustain without leave to amend the demurrer to all causes of action as to defendant MERS.
- (2) To sustain without leave to amend the demurrer to the 5th, 6th, 9th and 10th causes of action as to the remaining moving party defendants.
- (3) To sustain with leave to amend the demurrer to the 1st, 2nd, 3rd, 4th, 7th and 8th causes of action as to the remaining moving party defendants.

The court grants plaintiff 20 days leave to amend. Boldface type must indicate any new text in the first amended complaint, and strikethrough font should indicate any text deleted from the complaint.

Explanation:

In this proceeding the deed of trust designates MERS as the beneficiary. Plaintiff agreed by executing that document that MERS has the authority to initiate a foreclosure. (*Jose Gomes v. Countrywide Home Loans, Inc.* 2011 Cal.App.LEXIS 187, at pp. 16-17.) Even if MERS is not technically considered a beneficiary, it is acting as a nominee, and thus an agent of the beneficiary. (*Id.* at pp.17-18.) Since plaintiff granted MERS the right to foreclose in their contract, her argument that MERS cannot initiate foreclosure proceedings is meritless. (*Id.* at 19.) Therefore, as to defendant MERS, the court sustains without leave to amend the demurrer to all causes of action.

Plaintiff's 5th cause of action is for "infliction of emotional distress." The allegations in this cause of action address plaintiff's emotional reactions to BAC's foreclosure efforts. The attempted collection of a debt by its very nature often causes the debtor to suffer emotional distress. (*Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 745.) But, a prima facie case of intentional infliction of emotional distress requires extreme and outrageous conduct by the defendant, intended to cause extreme mental suffering; failure to allege facts showing such conduct fails to state a cause of action. (*Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236, 1248.) A direct victim may bring a negligent infliction of emotional

distress cause of action for, among other instances, negligent breach of a duty arising out of preexisting relationship. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076.) The court sustains the demurrer to this cause of action without leave to amend.

In the 6th cause of action plaintiff contends that defendants agreed among themselves to take the illegal and improper actions described in connection with RESPA and TILA violations and that this violates 18 USC section 241. This statute makes it a crime for two or more persons to conspire to deprive another of rights secured by the Constitution or laws of the United States. (*Moore v. Kamikawa*, 940 F. Supp. 260, 265 (D. Haw. 1995).) "Section 242 makes it a crime to deprive another of such rights, under color of law, on account of alienage, color or race." (*Ibid.*) This criminal provision, however, provides no basis for civil liability. (*Ibid.*, citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).) Plaintiff's 10th cause of action is for concealment, removal or mutilation of records in violation of federal law. 18 USC section 2071 is a criminal statutory provision. "Criminal statutes cannot be enforced by civil actions." (*Winslow v. Romer*, 759 F. Supp. 670, 673 (D. Colo. 1991).) The court sustains the demurrer to this cause of action without leave to amend.

The 9th cause of action is for injunctive relief and damages. To the extent that the complaint pleads injunctive relief as a cause of action, pleading it as such is incorrect because injunctive relief is a form of relief that is dependent on other causes of action. (*Marlin v. Venezia, LLC* (2007) 154 Cal.App.4th 154, 162.) "Injunctive relief is a remedy, not a cause of action." (*Guessous v. Chrome Hearts, LLC* (2009) 179 Cal. App. 4th 1177, 1187.) The court sustains the demurrer without leave to amend to this cause of action.

The 1st cause of action is for fraud. "To plead fraud against a corporation, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Lazar v. Superior Court (Rykoﬀ-Sexton, Inc.)* (1996) 12 Cal.4th 631, 645, citing *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal. App.4th 153, 157.) The elements of fraud, which give rise to the tort action for deceit, are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud—i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481.) The tort of negligent misrepresentation does not require scienter or intent to defraud, but it does, of course, require proof of justifiable reliance and resulting damage. (*Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603.) Plaintiff fails to plead fraud with the requisite specificity so the court grants leave to amend.

Plaintiff's 2nd cause of action is for violations of the federal Truth in Lending Act (TILA). "TILA requires borrowers to file an action 'within one year from the date of the occurrence of the violation.'" (*Pacific Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1355.) "An action for damages under TILA must be brought within one year of the alleged violation....The violation occurs upon consummation of the loan."

(*Betancourt v. Countrywide Home Loans, Inc.* (D.Colo. 2004) 344 F.Supp.2d 1253, 1258; order superseded by *Conder v. Home Savings of Amer.* (C.D. Cal. 1/27/10) No. CV 07-7051 AG (CTX).) The limitations period may be equitably tolled "until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." (*King v. California* 784 F.2d 910, 915 (9th Cir. Cal. 1986) Due to the possibility of equitable tolling, the court sustains with leave to amend the demurrer to this cause of action.

The 3rd cause of action alleges RESPA violations. Section 2605, *et seq.* of RESPA, in relevant part, governs mortgage loan servicing. Plaintiff fails to allege which actions resulted in a violation of RESPA or how he was damaged in connection with any such actions. "RESPA, as codified at 12 U.S.C. § 2605(f)(1)(A), authorizes 'actual damages to the borrower as a result of the failure [to comply with RESPA requirements]." (*Lal v. American Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010).) Thus, even if a RESPA violation exists, plaintiff must show that the losses alleged are causally related to the RESPA violation itself to state a valid claim under RESPA. (*Ibid.*) Allegations made under a separate cause of action are insufficient to sustain a RESPA claim for actual damages as they are not a direct result of the failure to comply. (*Ibid.*) The court grants plaintiff leave to amend this cause of action.

In the 4th cause of action plaintiff alleges that defendant BAC violated the federal Fair Debt Collection Practices Act (FDCPA). The legislative history of the FDCPA (at section 1692a(6)) indicates conclusively that a debt collector does not include 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).) Plaintiff fails to allege sufficient facts to comply with the holding in *Perry v. Stewart Title Co.* The court notes that plaintiff has not named BAC Home Loans Servicing, LP (BACHLS) as a defendant, and BACHLS may be a wholly-owned subsidiary of BAC.

Plaintiff's 8th cause of action is to quiet title. A quiet title complaint must be verified and shall include all of the following: (a) Both the legal description of the property and its street address. (See CCP section 761.020(a)); (b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession. (See CCP section 761.020(b)); (c) The adverse claims to the title of the plaintiff against which a determination is sought. (See CCP section 761.020(c)); (d) The date as of which the determination is sought. (See CCP section 761.020(d)); and (e) A prayer for the determination of the title of the plaintiff against the adverse claims. (See CCP section 761.020(e)). (See 5 Witkin, *Calif. Procedure* (5th ed. 2008) "Pleading," section 663.) Because title or interest is the issue, and the action may be brought by an owner out of possession, the plaintiff does not have to plead either that he is in possession or that he is not. (*Thornton v. Middletown Educational Corp.* (1937) 21 Cal.App.2d 707, 710.) Leave to amend is granted because plaintiff has failed to comply with the aforementioned requirements.


The 7th cause of action is for unfair business practices. California Business and Professions Code section 17204 limits standing to bring a cause of action under the Unfair Competition Law (UCL) to specified public officials and a private person “who has suffered injury in fact and has lost money or property as a result of the unfair competition.”

The UCL prohibits “unlawful” practices that are “forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.” (*Saunders v. Superior Court* (1999) 27 Cal. App. 4th 832, 838.) California’s unfair competition statute prohibits any unfair competition, which means any unlawful, unfair or fraudulent business act or practice. (*Rosario Tina and Jesus G. Tina v. Countrywide Home Loans, Inc.* 2008 WL 4790906 at 8 (S.D. Cal.). [Citations omitted.]) Virtually any law—federal, state, or local—can serve as a predicate for a section 17200 claim. (*Ibid.*) In addition to injunctive relief, section 17203 affords restitutionary relief. (*Ibid.*) According to the California Supreme Court, the UCL “borrows” violations of other laws and treats them as unlawful practices independently actionable under the UCL. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.)

The UCL defines unfair as “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 187.) Under the UCL to establish fraud plaintiff must “show deception to some members of the public, or harm to the public interest,” *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001), or to allege that members of the public are likely to be deceived. The California Supreme Court has held that “something more than a single transaction,” either on-going wrongful business conduct or a pattern of wrongful business conduct, must be alleged in order to state a cause of action under the Unfair Business Practices Act.” (*Newman v. Checkrite California*, 912 F.Supp. 1354, 1375 (E.D. Ca. 1995).) “The use of the phrase ‘business practice’ in section 17200 indicates that the statute is directed at ongoing wrongful conduct.” *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 519, 63.) “[T]he ‘practice’ requirement envisions something more than a single transaction . . . ; it contemplates a ‘pattern of conduct’ [citation], ‘on-going . . . conduct’ [citation], ‘a pattern of behavior’[citation], or ‘course of conduct.’ . . .” (*State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169-1170.) “A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation.” (*Khoury v. Maly’s of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Plaintiff has failed to plead a predicate violation for unfair business practices. The court notes, that one such predicate may exist under Civil Code section 2923.5. Although it is not clear when plaintiff’s loan was recorded, the subject loan originated in 2005, and he engaged in loan modification efforts in 2009. Legislation effective July 8, 2008 requires following a new process involving pre-foreclosure notification, consultation, and work out as a condition precedent to filing and mailing a notice of

default under Civil Code section 2924. Civil Code section 2923.5(i) governs loans recorded between January 1, 2003 and December 31, 2007. A borrower is not required to tender the full amount of the mortgage indebtedness due as a prerequisite to bringing an action under Civil Code section 2923.5. (*Mabry v. Superior Court* (2010) 185 Cal. App. 4th 208, 214.) Therefore, the court grants leave to amend as to the cause of action for unfair business practices.

Issued By:  on 6/30/11.
(Judge) (Date)

SUPERIOR COURT OF CALIFORNIA COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, CA 93724 (559)	FOR COURT USE ONLY
TITLE OF CASE: Charles Smith vs Bank of American N.A.	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 11CECG00843 MWS

Name and address of person served:

Charles Smith
2399 Megan Avenue
Clovis, CA 93611

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the **June 30, 2011** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at, California, on:

Date: **July 1, 2011**

Clerk, by *Danielson*, Deputy

Charles Smith, 2399 Megan Avenue, Clovis CA 93611