UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-15-06413-MWF (DTBx) **Date: January 25, 2016**
Title: Joseph E. Norris III -*v*- Bayview Loan Servicing, LLC, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendants:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [15]

Before the Court is Defendants Bayview Loan Servicing, LLC ("Bayview") and The Bank of New York Mellon's ("BONY") Motion to Dismiss Plaintiff Joseph E. Norris III's First Amended Complaint (the "Motion"), filed on December 9, 2015. (Docket No. 15). Plaintiff Joseph E. Norris III submitted an Opposition to the Motion on January 4, 2016, and Defendants' Reply followed a week later. (Docket Nos. 17, 19). The Court reviewed and considered the papers on the Motion, and held a hearing on **January 25, 2016**.

The Motion is **GRANTED *in part*** and **DENIED *in part***:

The First Amended Complaint ("FAC") successfully pleads a claim for relief under California Civil Code section 2923.6. Plaintiff alleges that Defendants had not issued a "written determination" on his loan modification application when they recorded the Notice of Trustee's Sale. Section 2923.6 prohibits such conduct.

Plaintiff's claim under California Civil Code section 2923.7 is deficient because the FAC's allegations contradict Plaintiff's conclusory assertion that his "single point of contact" with Defendant Bayview was inadequate. Because the Court already provided Plaintiff an opportunity to remedy this deficiency, the claim under section 2923.7 is **DISMISSED *without leave to amend***.

Plaintiff successfully pleads a negligence claim only as to the allegation that Defendant Bayview breached its duty of care by "mishandling Plaintiff's application [and] relying on incorrect information." All other purported breaches are contradicted by the remaining allegations and are **DISMISSED *without leave to amend***.

Plaintiff's allegations that Defendant Bayview's responses to the Requests for Information nos. 4, 5, 9 and the Notices of Error were inaccurate are not supported by any facts in the FAC. Because the Court already provided Plaintiff an opportunity to cure this deficiency, these allegations are **DISMISSED *without leave to amend***.

Finally, Plaintiff's UCL claim, which is based on alleged violations of other laws, is **DISMISSED *without leave to amend*** only insofar as it is rooted in independently deficient allegations.

I. BACKGROUND

On October 26, 2015, the Court issued an Order dismissing with leave to amend most claims asserted in the original Complaint. (Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("October Order") at 1-2 (Docket No. 12)). Although Plaintiff has amended the Complaint to include additional allegations, the background of the dispute remains the same and can be briefly summarized as follows:

Plaintiff filed this action to prevent foreclosure of his home in Ventura, California (the "Property"). (First Amended Complaint ("FAC") ¶¶ 30, 65). In early 2007, Plaintiff obtained a mortgage in the amount of $604,000 (the "Loan"), securing it with a deed of trust on the Property. (*Id.* ¶ 31). Defendant BONY owns the Loan, Defendant Bayview services the Loan, and Defendant Law Office of Les Zieve serves as the trustee on the Loan. (*Id.* ¶¶ 3-5). When the Great Recession shocked the nation's economy, Plaintiff lost his job and was forced to use his savings to make timely mortgage payments. (*Id.* ¶ 39). And after those funds ran out, Plaintiff began pursuing foreclosure prevention alternatives in an effort to keep his home. (*Id.* ¶ 42). It is out of those efforts that the claims asserted in this action arise.

Because the chronology of pertinent events is important to the viability of Plaintiff's claims, the FAC's central allegations are best viewed on a timeline:

- **May 19, 2014**: Plaintiff submits an application for a loan modification (the "May Application") to Defendant Bayview. (*Id.* ¶ 56).

- **June 13, 2014**: Plaintiff calls Jeff Critchfield, a representative of Defendant Bayview, to inquire about the status of the Application. Critchfield informs Plaintiff orally—but never in writing—that the May Application was denied. (*Id.* ¶¶ 58, 59).

- **November 5, 2014**: Defendants record a Notice of Trustee's Sale. (*Id.* ¶ 63).

- **November 25, 2014**: Plaintiff mails ten Requests for Information ("RFIs") to Defendant Bayview. (*Id.* ¶ 116).

- **December 1, 2014**: Defendant Bayview receives the RFIs but does not provide timely responses. (*Id.* ¶¶ 117-28).

- **December 30, 2014**: Plaintiff submits a complete loss mitigation application (the "December Application") to Defendant Bayview. (*Id.* ¶ 216).

- **January 13, 2015**: Defendant Bayview denies the December Application in writing. (*Id.*).

- **January 29, 2015**: Plaintiff mails ten Notices of Error ("NOEs") to Defendant Bayview. (*Id.* ¶ 129).

- **February 2, 2015**: Defendant Bayview receives the NOEs but does not provide accurate responses or correct the identified errors. (*Id.* ¶ 140).

- **February 11, 2015**: Plaintiff appeals the denial of his December Application. (*Id.* ¶ 218).

- **March 25, 2015**: Defendant Bayview denies the appeal. (*Id.* ¶ 220).

- **June 24, 2015**: Plaintiff initiates this action. (Docket No. 1).

The FAC asserts six claims for relief: (1) violations of California Civil Code § 2923.6; (2) violations of California Civil Code § 2923.7; (3) violation of California Business & Professions Code § 17200 ("UCL"); (4) negligence; (5) violations of Regulation X of RESPA and Regulation Z of TILA; (6) negligence per se. (FAC ¶¶ 54-221).

II. LEGAL STANDARD

In ruling on a motion under Federal Rule of Civil Procedure 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citation omitted). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 937 (9th Cir. 2008) (holding that a plaintiff had plausibly stated that a label referring to a product containing no fruit juice as "fruit juice snacks" may be misleading to a reasonable consumer). The Court need not accept as true, however, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal*, 556 U.S. at 678. Using its judicial experience and common-sense, the Court must determine whether a complaint plausibly states a claim for relief. *Id*. at 679.

III. REQUEST FOR JUDICIAL NOTICE

Because the extrinsic materials Defendants submit for the Court's consideration have no bearing on this ruling, Defendants' Request for Judicial Notice (Docket No.

16) is **DENIED *as moot*** and Plaintiff's objections thereto (Docket No. 18) are **OVERRULED *as moot***.

IV. DISCUSSION

A. Violations of California Civil Code section 2923.6

California's Homeowner's Bill of Rights ("HBOR") prohibits a mortgage servicer or mortgagee to "record a notice of default or notice of sale" while a loan modification application is pending. Cal. Civ. Code § 2923.6(c)(1). But if the mortgage servicer "makes a written determination" that the borrower is not eligible for loan modification, a notice of sale may be recorded. *Id*. Plaintiff alleges that Defendants violated section 2923.6(c) by recording the Notice of Trustee's Sale without first denying the May Application in writing. (FAC ¶ 64).

In the October Order, the Court dismissed this claim because the Complaint did not "contain any allegations . . . that a Notice of Trustee's Sale was recorded on November 5, 2014." (October Order at 6, n. 1). Because Plaintiff now explicitly makes that allegation, and reiterates that Defendant Bayview never issued a "written determination" of the May Application (FAC ¶ 64), the FAC states a plausible claim under section 2923.6.

In arguing to the contrary, Defendants point out that section 2923.6 does not require a mortgage servicer to "evaluate applications from borrowers who have already been evaluated for a first lien loan modification . . . or afforded a fair opportunity to be evaluated." Cal. Civ. Code § 2923.6(g). Defendants deduce from this provision that a mortgage servicer need not make a "written determination" of a loan modification application as long as the borrower's request had been evaluated in the past. (Reply at 3). And because Plaintiff does not allege that the May Application was his first modification application, Defendants conclude that the claim under section 2923.6(c) must be dismissed. (*Id.*).

The Court is not persuaded for two reasons:

First, it is far from clear section 2923.6(g) obviates a mortgage servicer's duty to make a "written determination" of repeated loan modification applications. True enough, the mortgage servicer need not "evaluate" such applications, but it still must, according to the plain words of section 2923.6(c), inform the borrower of that decision. Otherwise, the borrower would not know when to appeal the denial of his request and when to argue that "there has been a material change in the borrower's financial circumstances since the borrower's [first] application"—an explicit exception to the general rule of section 2923.6(g). Defendants present no authority whatsoever supporting their contrary interpretation of the statutory language.

Second, even if Defendants' interpretation were correct, Plaintiff need not plead that the May Application was the first application he submitted to Defendant Bayview. This purported requirement is not an element of a claim under section 2923.6(c); at most, it is an affirmative defense. And it is well-established that Rule 8 does not require a plaintiff to plead around every possible affirmative defense, unless, of course, a particular defense is apparent on the face of the complaint. *See* 5 Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedure* § 1277 (3d ed. 2015) ("Since the facts necessary to establish an affirmative defense generally must be shown by matter outside the complaint, the defense technically cannot be adjudicated on a motion under Rule 12."). Since nothing in the FAC indicates that the May Application ***was not*** the first time Plaintiff applied for a loan modification, Defendants' challenge is better suited for a summary judgment motion.

In sum, Plaintiff has successfully pleaded a claim under section 2923.6(c) against all Defendants. Although Defendants argue in passing that the FAC does not allege that Defendant BONY "committed any acts in connection with this claim" (Motion at 4), the allegation that "Defendants" improperly recorded the Notice of Trustee's Sale is equally applicable to the bank. Surely Defendant BONY, as the mortgagee and owner of the Loan, had at least some (if not exclusive) control over the decision to record the Notice of Trustee's Sale before a written determination of the May Application.

Accordingly, the Motion is **DENIED** as to Plaintiff's claim under section 2923.6.

B. Violations of California Civil Code § 2923.7

Another provision of HBOR requires the mortgage servicer, "[u]pon request from a borrower, . . . [to] promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." Cal. Civ. Code § 2923.7(a). The single point of contact ("SPOC") must be "knowledgeable about the borrower's situation and current status in the alternatives to foreclosure process." *Id.* § 2923.7(e). Plaintiff claims that Defendant Bayview failed to appoint a knowledgeable SPOC under section 2923.7. (FAC ¶¶ 82-85).

The Court previously dismissed Plaintiff's claim on two grounds. (October Order at 7-8). The Court first noted that Plaintiff failed to allege that he actually requested a SPOC. (*Id.*). But more important, Plaintiff did not assert sufficient facts to make it plausible that Defendant Bayview's SPOC, Jeff Critchfield, failed to properly advise and inform Plaintiff regarding the "alternatives to foreclosure." (*Id.*).

As to the first deficiency, Plaintiff now alleges that he called Defendant Bayview and "asked to speak to his assigned point of contact for his file." (FAC ¶ 71). While Defendants argue that the allegation does not specifically state that Plaintiff requested a SPOC, the difference between "requesting a SPOC" and "asking to speak with a SPOC" is too trivial to warrant dismissal at this juncture. It is at least plausible that both Defendant Bayview and Plaintiff reasonably understood Plaintiff to be requesting an appointment of a SPOC for his account.

As to the second deficiency, Plaintiff alleges no new facts indicating that the appointed SPOC was inadequate. Instead, Plaintiff asserts only conclusions that are directly contradicted by the FAC's allegations: "Plaintiff's SPOC was unable to adequately inform Plaintiffs [sic] of the current status of the review, . . . refused to answer Plaintiff's inquiries about the status of his [May Application,] . . . [and] failed

to provide Plaintiff with accurate information about the status of the [May Application . . . .” (*Id.* ¶¶ 82-85). But on that same page, the FAC alleges that the SPOC informed Plaintiff that his May Application was denied, represented that the denial letter has been mailed, and suggested that Plaintiff’s only option was a short sale. (*Id.* ¶¶ 77-80). The SPOC also kept Plaintiff up-to-date and called “to inform him that Bayview had appraised the property.” (*Id.* ¶ 81). In light of these allegations, neither the Court nor Defendant Bayview is able to determine what it is that the SPOC is alleged to have done wrong.

Plaintiff’s Opposition is just as conclusory as his allegations. It simply sets forth the requirements of section 2923.7 and asserts that “Plaintiff alleges sufficient facts to support this claim.” (Opposition at 4). And although Plaintiff points to some allegations indicating that he was directed to speak with a few other representatives before reaching his SPOC, Plaintiff does not explain how those allegations are relevant to what his SPOC did or did not do. (*Id.* at 4-5). If Plaintiff means that the SPOC was not really a “single” point of contact when Plaintiff first began communicating with Defendant Bayview, Plaintiff fails to articulate or allege in what way he was prejudiced by being forced to speak with multiple people for a short period of time. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011) (sustaining a demurrer because “a plaintiff in a suit for wrongful foreclosure [is] required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests”). Even affording Plaintiff all reasonable inferences, the Court does not perceive any harm to Plaintiff’s interests from Defendant Bayview’s alleged failure to connect Plaintiff with his SPOC right away.

Accordingly, the Motion is **GRANTED** as to Plaintiff’s claim under section 2923.7. Because Plaintiff was already afforded two opportunities to plead a viable claim, the dismissal is ***without leave to amend.***

C. Negligence Claim

The elements of a common law negligence claim are familiar to all: (1) an existing duty of care; (2) breach of that duty; (3) causation; and (4) damages. *See*

Merrill v. Navegar, Inc., 26 Cal. 4th 465, 500, Cal. Rptr. 2d 370 (2001) (discussing the elements of negligence).

In the October Order, the Court determined that Defendant Bayview owed Plaintiff a duty of care. (October Order at 10). The parties nonetheless devote a substantial part of their briefs to this element of the claim, making the same arguments they made on Defendants' previous motion to dismiss. (Motion at 7-8; Opposition at 7-11). The Court declines the invitation to revisit this legal issue.

More important is the element of breach. The Court previously concluded that Plaintiff successfully alleged only that Defendant Bayview acted unreasonably when it "used an incorrect property value in evaluating his [December Application]." (October Order at 10). Plaintiff makes the same allegation in the FAC along with three additional assertions that the Court explicitly rejected in the October Order: Defendant Bayview breached its duty by (1) failing to review Plaintiff's May Application in a timely manner; (2) misplacing Plaintiff's application documents; and (3) misrepresenting the status of the May Application. (FAC ¶ 106).

All three of these additional grounds are contradicted, much less supported, by the facts alleged in the FAC. Defendant Bayview informed Plaintiff that his May and December Applications were denied less than a month after their submission. (FAC ¶¶ 77, 216). Defendant Bayview, moreover, neither misplaced the application documents nor mispresented the status of the May Application—it simply issued a denial. (*Id.* ¶¶ 77-81). Given these allegations, it is simply not plausible that Defendant Bayview breached its duty of care with respect to the timeliness, status, and handling of the May Application.

Because Plaintiff failed to cure the deficiencies identified in the October Order, his negligence claim is **DISMISSED *without leave to amend*** to the extent it is based on allegations other than Defendant Bayview's use of an incorrect property value in its review of the December Application.

D. Violations RESPA and TILA and Negligence Per Se

1. Requests for Information

The FAC claims that Defendant Bayview failed to provide accurate responses to Plaintiff's RFIs in violation of 12 C.F.R. § 1024.36(d) and 12 U.S.C. § 2605(e). (FAC ¶ 128). Defendants argue that these allegations fail as to RFIs nos. 2, 4, 5, 8, 9, and 10 because they do not explain in what way Defendant Bayview's responses were inaccurate. (Motion at 9-10).

As to RFIs nos. 4, 5, and 9, the FAC contains no allegations other than the catchall assertion that Defendant Bayview did not "provide accurate and complete responses." (FAC ¶ 128). The Court previously ruled that this general assertion is insufficient to state a claim under Rule 8. (October Order at 17). Because Plaintiff has not cured this deficiency, his claims that Defendant Bayview's responses to RFIs nos. 4, 5, and 9 were inadequate are **DISMISSED *without leave to amend***. This ruling has no bearing on Plaintiff's claim that the responses were untimely.

As to RFIs nos. 2 and 8, which requested itemized payoff statements, the FAC's allegations are more detailed. Defendant Bayview's response, alleges Plaintiff, did not identify "when charges and fees were applied to loan [and listed only] amounts charged without further detail." (FAC ¶ 139). Defendants argue briefly that there is no requirement that such information be provided to a borrower. (Motion at 9-10). But since Defendants cite no authority for that proposition, the Court reads section 1024.36(d) according to its plain meaning: a mortgage servicer is required to provide, or conduct a reasonable search for, the information a borrower properly requests. The FAC plausibly alleges that RFIs nos. 2 and 8 requested such information but that Defendant Bayview failed to comply. As a matter of course, Defendants may argue on a motion for summary judgment that RFIs nos. 2 and 8 did not request Defendant Bayview to list the charges and fees applied to the Loan, and even if they did, some authority permits Defendant Bayview to withhold such information.

As to RFI no. 10, which requested a periodic billing statement, Plaintiff claims not that the response was inaccurate but that he received no information at all. (FAC ¶ 198). This allegation is sufficient under Rule 8.

2. Notices of Error

Defendant Bayview, Plaintiff alleges, neither corrected the identified errors in its responses to the NOEs nor conducted a reasonable investigation in an effort to correct those errors. (FAC ¶ 212). The Court dismissed these conclusory allegations in its previous Order. (October Order at 18). Because Plaintiff has alleged no new facts in the FAC, the allegations are **DISMISSED *without leave to amend***. As the Court indicated in the October Order, however, Plaintiff has successfully alleged that Defendant Bayview's responses to the NOEs were untimely.

E. UCL Claim

Plaintiff's UCL claim is based on violations of other laws alleged in the FAC. (FAC ¶ 93; October Order at 9). To the extent the claim, therefore, is rooted in section 2923.7 or Defendant's purportedly inaccurate responses to RFIs nos. 4, 5, 9 and the NOEs, it is **DISMISSED *without leave to amend***.

The Court's previous ruling, moreover, dismissed the UCL claim without leave to amend to the extent it was based on the allegation that "Defendants imposed improper and marked-up fees upon disclosure." (October Order at 11). Seeing that the same statement appears in the FAC (FAC ¶ 93(e)), the allegation is once again **DISMISSED *without leave to amend***.

Defendants argue that the UCL claim should be dismissed in its entirety because it lumps all Defendants together. But it is quite clear that the claim is brought against Defendants BONY and Law Office of Les Zieve only insofar as they are alleged to have violated section 2923.6. The remaining allegations pertain solely to Defendant Bayview.

V. CONCLUSION

For the foregoing reasons, the Motion is **DENIED *in part*** and **GRANTED *in part***. Defendants shall file an Answer on or before **February 8, 2016**.

IT IS SO ORDERED.