JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:21-CV-00001-DOC-(KESx) Date: July 30, 2021

Title: ANTHONY CHERIFI v. SELECT PORTFOLIO SERVICING, INC. & JP MORGAN CHASE BANK, NA

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kelly Davis	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANTS: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT [21][22]

Before the Court are Defendant JP Morgan Chase's ("Chase") Motion to Dismiss the Case ("Chase Mot.") (Dkt. 18) and Defendant Select Portfolio Servicing, Inc.'s ("SPS") Motion to Dismiss the Case ("SPS Mot.") (Dkt. 21) (collectively Chase and SPS are called "Defendants"). The Court finds this matter suitable for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. After considering all relevant filings, the Court **GRANTS** both Defendants' motions to dismiss the case.

II. BACKGROUND

A. Facts

The following facts are drawn from the First Amended Complaint ("FAC") (Dkt. 17). Around 2004, Plaintiff Anthony Cherifi ("Plaintiff" or "Cherifi") entered into a fixed-rate mortgage agreement with Washington Mutual Bank. FAC ¶ 11. The mortgage had a principal balance of $650,000 and its maturity date was 2034. *Id.*, Ex. 1. In 2008, the FDIC became Washington Mutual's receiver, and Defendant Chase purchased many of Washington Mutual's assets, including (allegedly) Plaintiff's mortgage. *Id.* ¶ 12. This made Chase Washington Mutual's successor in interest to Plaintiff's mortgage. *Id.* ¶ 14.

In 2011, Plaintiff filed a complaint in Orange County Superior Court (the "2011 Action") seeking a loan modification after Chase filed a Notice of Default on Plaintiff's mortgage. Request for Judicial Notice ("RJN") Ex. B (Dkt. 19).[1] To resolve the 2011 Action, the parties modified Plaintiff's mortgage and the suit was dismissed with prejudice. RJN Ex. C.[2]

In June 2013, Plaintiff found numerous entries marked "unknown" on his credit score. FAC ¶ 17. In 2019, Transunion reported that Plaintiff was late on many of his mortgage payments, even though Plaintiff maintains that he had always made his payments on time. *Id.* ¶ 18. Plaintiff maintains these "unknowns" and alleged missed payments are the only cause of his poor credit score. *Id.* ¶ 33.

On April 1, 2020, Chase transferred the servicing of Plaintiff's mortgage to Defendant SPS. FAC, Ex. 2.

B. Procedural History

Plaintiff filed their First Amended Complaint on February 25, 2021. On the Court's reading, Plaintiff claims they were harmed when (1) Chase "unjustifiably" added amounts to the balance of the loan when it was modified, FAC ¶¶ 33-35, (2) Chase failed to properly transfer the loan to SPS, *Id.* ¶¶ 22, 37, 88-91 and (3) false reports were made to credit reporting agencies. *Id.* ¶ 33. Plaintiff seeks to redress these injuries through sixteen causes of action:

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[1] The Court takes judicial notice of Plaintiff's 2011 complaint because it is a matter of public record. Matters of public record, like court filings, are judicially noticeable. *See U.S. v. Wilson*, 631 F.2d 118, 120 (9th Cir. 1980).
[2] The Court takes judicial notice of the order in the 2011 Action because it is a matter of public record. Matters of public record, like judicial opinions, are judicially noticeable. *See U.S. v. Wilson*, 631 F.2d 118, 120 (9th Cir. 1980).

1) Violation of the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 801 *et seq.*
2) Violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*
3) Violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*
4) Violation of the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788 *et seq.*
5) Violation of the California Consumer Credit Reporting Act ("CCCRA"), Cal. Civ. Code § 17200 *et seq.*
6) Violation of the California Unfair Business Practices Act ("CUBPA"), Cal. Civ. Code § 17200 *et seq.*
7) Gross Negligence
8) Intentional Infliction of Emotional Distress
9) Negligent Infliction of Emotional Distress
10) Violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*
11) Intentional Interference with Prospective Economic Advantage
12) Negligent Interference with Prospective Economic Advantage
13) Misrepresentation
14) Breach of Contract
15) Violation of Unfair Businesses Practices Act, Cal. Civ. Code § 3333
16) Fraudulent Concealment

See generally FAC.

Defendants moved to dismiss Plaintiff's FAC on March 11, 2021. Plaintiff opposed both motions on April 5, 2021. Opposition to Chase's Motion ("Opp'n. to Chase") (Dkt. 29); Opposition to SPS's Motion ("Opp'n to SPS") (Dkt. 30). Defendants replied on April 12, 2021.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a

court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

IV. DISCUSSION

A. Ten of Plaintiff's Causes of Action are Barred by the Doctrine of Res Judicata

The 2011 Action precludes Plaintiff's FDCPA, TILA, RESPA, RFDCPA, Unfair Businesses Practices Act, negligence, intentional and negligent interference with prospective economic advantage, misrepresentation, and fraudulent concealment claims.

"The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Res judicata protects against "the expense and vexation attending

multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana v. United States*, 440 U.S. 147, 153-154 (1979). These policy goals are equally realized when the allegedly preclusive action was in state court. So, federal courts give preclusive effect to state courts' adjudications. *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984). In such cases, federal courts apply the preclusion law of the state that adjudicated the original action. *Palomar Mobilehome Park Ass'n. v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993). Here, the 2011 Action was filed in California state court, so the Court applies California's preclusion law.

1. Issue Preclusion (aka Collateral Estoppel)

"Collateral estoppel, or issue preclusion, precludes relitigation of issues argued and decided in prior proceedings." *Estate of Redfield*, 193 Cal. App. 4th 1526, 1534 (2011). It operates "as a shield against one who was a party to the prior action to prevent" that party from relitigating an issue already settled in a previous case. *Rice v. Crow*, 81 Cal. App. 4th 725, 735 (2000). "The prerequisites to applying collateral estoppel are '(1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceedings resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.'" *People v. Burns*, 198 Cal. App. 4th 726, 731 (2011) (quoting *People v. Barragan*, 32 Cal. 4th 236, 253 (2004)).

Plaintiff's TILA cause of action is collaterally estopped. Plaintiff alleges Defendants "violated TILA through their implementation of high-priced mortgage loans" in the 2011 settlement. FAC ¶ 44. This claim is identical to the claim decided in the 2011 Action, because the 2011 Action was brought to achieve a loan modification, and the settlement agreement secured this modification. RJN Ex. B. Plaintiff cannot challenge a binding settlement ten years later. Thus, the first prerequisite for collateral estoppel is present. Second, the 2011 Action resulted in a final judgment on the merits because the case was settled and dismissed with prejudice. In California, "a dismissal with prejudice following a settlement agreement constitutes a final judgment on the merits." *Estate of Redfield*, 193 Cal. App. 4th at 1533. Finally, Chase Bank and Plaintiff were parties to the 2011 Action, satisfying the final prong of the collateral estoppel test. Accordingly, the Court DISMISSES Plaintiff's TILA claim because it is issue precluded by the 2011 Action. Defendants' motions are granted.

3. Claim Preclusion

Claim preclusion "bar[s] claims that were, *or should have been*, advanced in a previous suit involving the same parties." *DKN Holdings v. Faerber*, 61 Cal. 4th 813, 824 (2015) (emphasis added). For the 2011 Action to claim preclude any of Plaintiff's current causes of action, this suit must contain (1) the same cause of action (2) between the same parties (3) after a final judgments on the merits in the 2011 Action. *Busick v. Workmen's Comp. Appeals Bd.*, 7 Cal. 3d 967, 975 (1972).

With respect to the first element, California courts do not require the two causes of actions to be on all fours with one another. Instead, "California courts apply the 'primary rights' theory in assessing whether two proceedings involve identical causes of action." *State Comp. Ins. Fund v. ReadyLink Healthcare, Inc.*, 50 Cal. App. 5th 422, 447 (2020). "The plaintiff's primary right is the right to be free from a particular injury." *Federation of Hillside & Canyon Assns. v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004). Therefore, causes of action are "identical," for purposes of claim preclusion, if they seek to address the same injury. *See id.* "If the matter was within the scope of the [original action], related to the subject-matter and relevant to the issues, so it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." *Aerojet-General Corp. v. American Express Ins. Co.*, 97 Cal. App. 4th 387, 402 (2002).

Here, Plaintiff's FDCPA, RESPA, RFDCPA, Unfair Businesses Practices Act, negligence, negligent and intentional interference with prospective economic advantage, misrepresentation, and fraudulent concealment claims are "identical" causes of action as those raised in the 2011 Action. Each cause of action is predicated on Chase not being the rightful owner of Plaintiff's debt. *See* FAC ¶¶ 41, 48, 52, 58, 61, 75, 82, 89-91. The 2011 Action involved a mortgage adjustment because of Chase's "onerous" terms. RJN Ex. B. That action, therefore, conceded the fact that Chase was the rightful owner of Plaintiff's debt. If Plaintiff believed otherwise, this claim could have easily been litigated in the 2011 Action. Therefore, for purposes of claim preclusion, the Court finds the 2011 Action and the above eight claims are identical. Additionally, as described above, the two other elements of claim preclusion—identical parties and final judgment on the merits—are met. Therefore, Plaintiff's FDCPA, RESPA, RFDCPA, Unfair Businesses Practices Act, negligence, negligent and intentional interference with prospective economic advantage, misrepresentation, and fraudulent concealment claims are precluded and hereby DISMISSED. Defendants' motions are granted.

C. Plaintiff's Emotional Distress Claims

Plaintiff's eighth and ninth causes of action, respectively, are for intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED").

IIED and NIED claims require the plaintiff to suffer "severe emotional distress." *Crouch v. Trinity Christian Ctr. of Santa Ana, Inc.*, 39 Cal. App. 5th 995, 1006 (2019); *see also Wong v. Jing*, 189 Cal. App. 4th 1354, 1376 (2010) (ruling the level of emotional distress for NIED is "functionally the same" as that required for IIED). California courts have "set a high bar" for this requirement. *Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009). "Severe emotional distress means emotional distress of such substantial quality of enduring quality that no reasonable [person] in society should be expected to endure it." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993) (internal quotations omitted). "Discomfort, worry, anxiety, upset stomach, concern, and agitation" are not enough to surpass this high bar. *Hughes*, 46 Cal. 4th at 1051. Rather, sufficiently severe emotional distress usually manifests itself in physical or other observable ways, like chronic vomiting, loss of bladder function, or inability to work. *See Hailey v. California Physicians' Serv.*, 158 Cal. App. 4th 452, 476 (2007).

Here, the FAC is devoid of any allegations that Plaintiff suffered the "severe" emotional distress necessary to make out an IIED or NIED claim. The FAC only conclusory states Plaintiff suffered a "great deal of distress" without any additional supporting facts. Since Plaintiff failed to plausibly plead they suffered *severe* emotional distress, their IIED and NIED claims are hereby DISMISSED. Defendants' motions are granted.

D. Plaintiff's Credit Reporting Claims & UCL Claims

Plaintiff brings two causes of action related to his credit score—one under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*; the other under the California Consumer Credit Reporting Act ("CCCRA"), Cal. Civ. Code § 17200 *et seq*. *See generally* FAC.

The FCRA requires "furnishers," that is entities, like banks, that "furnish" credit information to credit reporting agencies, to conduct an investigation "after receiving notice [from a credit reporting agency] of a dispute with regard to the completeness or accuracy of any information provided . . . to a consumer reporting agency." 15 U.S.C. § 1681s-2(b). The FCRA's statutory language makes clear a furnisher's duty to investigate

only arises after the creditor receives a communication from a credit reporting agency. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1154 (9th Cir. 2009) (holding a furnisher's "obligations are triggered" only when the furnisher "receives notice from the [credit reporting agency] that the consumer disputes the information"); *Woods v. Protection One Alarm Monitoring, Inc.*, 628 F. Supp. 2d 1173, 1186 (E.D. Cal. 2007) (holding the FCRA can be enforced by private litigants only if the litigant reported the alleged inaccuracy to their credit reporting agency first).

Here, Plaintiff fails to state a claim under the FCRA because the FAC does not allege they ever contacted their credit reporting agency regarding alleged inaccuracies. Therefore, Defendants, Plaintiff's furnishers, could not receive notice from the credit reporting agency that the Plaintiff disputed the information. Plaintiff's FCRA claim is hereby DISMISSED. Defendants' motions are granted.

Additionally, Plaintiff's state law fair credit reporting claim is DISMISSED because the FCRA provides the exclusive remedy for alleged inaccurate reporting by a credit furnisher. *See Howard v. Blue Ridge Bank*, 371 F.Supp.2d 1139, 1143 (N.D. Cal. 2005) ("While furnishers may be liable to private litigants under r 15 U.S.C. § 1681s-2(b) based on the information they provide to credit agencies it appears that Congress intended the FCRA to be the sole remedy against these furnishers."). Defendants' motions are granted.

For the above reason, the Court also DISMISSES Plaintiff's CUBPA claim because it is preempted by the FCRA. Plaintiff's CUBPA claim, like their CCCRA claim, alleges they were injured when Defendant's allegedly supplied "false information to credit bureaus." FAC ¶ 58. The FCRA is the exclusive remedy for this kind of injury. Defendants' motions are granted.

E. Plaintiff's Breach of Contract Claim

Plaintiff's breach of contract cause of action plead is insufficiently pled. In California, to properly state a claim for breach of contract, a plaintiff must specify, with particularity, which contractual provision the defendant allegedly breached. *See Staples v. Arthur Murray, Inc.*, 253 Cal. App. 2d 507, 513 (1967). Plaintiff fails to do so here. Plaintiff's cause of action for breach of contract is hereby DISMISSED.

V. DISPOSITION

Based on the foregoing, the Court GRANTS Defendants' motions and DISMISSES all sixteen causes of action Plaintiff brings in their First Amended Complaint.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11
CIVIL-GEN

Initials of Deputy Clerk: kd