UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHAWN GORDON,

Plaintiff,

v.

U.S. BANK NATIONAL ASSOCIATION, et al.,

Defendants.

Case No. CV 18-10075-DMG (PLAx)

ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [104]

This matter is before the Court on the Motion for Summary Judgment ("MSJ") filed by Defendants Fay Servicing, LLC and U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust. [Doc.# 104.] The MSJ is now fully briefed. Opp. [Doc. # 107]; Reply [Doc. # 109].[1] For the following reasons, the Court **GRANTS** the MSJ in full.

[1] When Plaintiff failed to timely file his Opposition to the MSJ, the Court closed briefing on the matter and took the motion under submission. [Doc. # 105.] The Court then granted Plaintiff's *post hoc* request for an extension of his response deadline, but determined that the matter would remain under submission once the briefing concluded. [Doc. # 108.]

I.

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the mortgage loan taken out by Plaintiff Shawn Gordon for $440,000 in June 2005. SUF 1.[2] It is undisputed that Plaintiff is responsible for paying the mortgage, and that he is now in default. SUF 2-4, 114. Plaintiff's mortgage was transferred to U.S. Bank in 2011, and Plaintiff first became delinquent on the loan in 2014. SUF 7, 8. U.S. Bank recorded a Notice of Default shortly thereafter, caused a Notice of Trustee's Sale to be recorded against Plaintiff's property, and noticed the first of many attempted foreclosure sales for March 30, 2015. SUF 12. After U.S. Bank agreed to postpone that sale, Plaintiff filed his first lawsuit against U.S. Bank in June 2015. SUF 14. U.S. Bank cancelled the scheduled foreclosure during the pendency of that lawsuit and Plaintiff's subsequent appeal. *Id.*

After it prevailed before this Court and the Ninth Circuit in that lawsuit, however, U.S. Bank reinstated foreclosure proceedings against Plaintiff and scheduled a foreclosure sale for August 2018. SUF 17, 19. After Plaintiff delayed those proceedings by requesting a delay and filing for bankruptcy, he sent his first batch of loan modification materials to U.S. Bank on October 16, 2018. SUF 17-31. U.S. Bank and Plaintiff stayed in communication regarding Plaintiff's loan modification application for several weeks, during which time the Truman Trust purchased Plaintiff's loan from U.S. Bank, and Fay became Plaintiff's loan servicer. SUF 31-36.

U.S. Bank ultimately denied Plaintiff's loan modification application "because[,] based on Plaintiff's stated income and expenses[,] a payment plan could not be created within investor program guidelines." SUF 39. U.S. Bank informed Plaintiff that he had

[2] References to "SUF" are to Plaintiff's responses to Defendants' Statement of Undisputed Facts. [Doc. # 107-4.] Plaintiff has replied "undisputed" to many of Defendants' facts. He purports to dispute many others, but cites no evidence to support the disputes that he claims exist. *See, e.g.,* SUF 34, 48, 55. Many of the other purported disputes that Plaintiff raises are immaterial or pertain only to background facts. *See, e.g.,* SUF 39. The Court will therefore discuss only those disputes that Plaintiff supports with evidence, are material to the analysis of the MSJ, and affect the outcome of this Order.

until January 7, 2019 to appeal the denial of his application and, while Plaintiff was considering whether to appeal, Fay notified Plaintiff that the Truman Trust had purchased his loan. SUF 39, 41, 44. Plaintiff appealed the denial, and U.S. Bank affirmed its decision to deny Plaintiff a loan modification. SUF 45, 47.

After denying the loan modification, U.S. Bank tried again to pursue a foreclosure, but Plaintiff once again filed for bankruptcy in February 2019. SUF 55. When the bankruptcy court dismissed Plaintiff's petition in March 2019, Plaintiff's counsel submitted a second batch of loan modification materials to Fay on March 14, 2019. SUF 57, 59, 60. Fay determined that the loan modification application was incomplete and denied the application without changing the scheduled March 19, 2019 foreclosure. SUF 62-64.

Before the date of the foreclosure sale, however, Plaintiff applied for, and obtained, a Temporary Restraining Order ("TRO") from this Court to stop the sale. SUF 65. The next day, on March 19, 2019, Plaintiff submitted yet another batch of loan modification application materials to Fay. SUF 66. Plaintiff and Fay continued to communicate regarding the completeness of Plaintiff's application for several days until Fay determined that Plaintiff's application was complete on April 3, 2019. SUF 67-76. Fay then concluded that it could not grant Plaintiff's application "because of the excessive delinquent balance of the Loan which then encompassed approximately six years of nonpayment totaling approximately $115,381.79." SUF 76. It sent Plaintiff written confirmation of the denial. SUF 77.

On April 4, 2019, the Court entered a preliminary injunction in this action, which prevented Fay from proceeding with the foreclosure. SUF 78. Rather than appeal Fay's denial of his loan modification application, Plaintiff sent *another* application—his fourth—to Fay on May 23, 2019. SUF 83. Once again, Fay and Plaintiff communicated for several days regarding the contents of Plaintiff's application and, once Fay determined that the application was complete, it informed Plaintiff that it would deny the application because the "materials submitted by Plaintiff did not evidence a material change in his financial

circumstances since the date of the previous" application. SUF 83-90. Plaintiff did not appeal this decision and has not submitted a fifth loan modification application. SUF 92. On April 24, 2020, Defendants rescinded the Notices of Default that it recorded in 2014 and 2018. SUF 105.

After Plaintiff filed his Third Amended Complaint ("TAC") in this action, Defendants moved to dissolve the preliminary injunction "based upon a significant change in circumstances." SUF 97. The Court granted Defendants' motion and dissolved the preliminary injunction on January 13, 2020. SUF 99.

Attorney Lender Services became the trustee for Plaintiff's loan on April 7, 2020 and Rushmore Loan Management Services became the servicer for his loan on May 1, 2020. SUF 103, 106. As of the dates of these transfers, Plaintiff remained in default and owed a total of about $683,000 on his loan. SUF 108, 114.

Plaintiff brings two claims against Defendants: one for improper dual tracking under California Civil Code section 2923.6 and another for violations of the Truth in Lending Act ("TILA"). *See* TAC [Doc. # 77]. Defendants seek summary judgment on both claims.

II.
LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248.

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go

beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "Rather, it draws all inferences in the light most favorable to the nonmoving party." *Id.*

Where the issues before the Court are questions of law, the case is particularly "well suited" for summary judgment. *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1051 (E.D. Cal. 2013); *see also Asuncion v. Dist. Dir. Of U.S. Immigration & Naturalization Serv.*, 427 F.2d 523, 524 (9th Cir. 1970) (district court properly resolved motion for summary judgment where issues presented were comprised solely of questions of law).

III.
DISCUSSION

Defendants have shown that both of Plaintiff's claims must fail. The Court discusses each in turn.

A. Plaintiff's Dual Tracking Claim

California Civil Code section 2923.6 prohibits lenders and mortgage servicers from "dual tracking" a borrower's loan by reviewing a modification application at the same that it pursues a foreclosure sale. It states that:

> If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer at least five business days before a scheduled foreclosure sale, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A

> mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:
>
> (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired . . . .

Cal. Civ. Code § 2923.6(c). Plaintiffs may seek to enforce section 2923 through section 2924.12, which states that "[i]f a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section . . . 2923.6 . . . ." Cal. Civ. Code § 2924.12(a)(1). But section 2924.12 also provides that:

> A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not be liable for any violation that it has corrected and remedied prior to the recordation of the trustee's deed upon sale, or that has been corrected and remedied by third parties working on its behalf prior to the recordation of the trustee's deed upon sale.

Cal. Civ. Code § 2924.12(b).

Defendants claim that, to the extent that they ever ran afoul of section 2923.6, they have remedied any such violation before conducting the trustee's sale of Plaintiff's property. MSJ at 22. The Court agrees. Plaintiff's dual tracking allegations rest on the claim that Defendants pursued foreclosure of his property while they reviewed his sequential loan modification applications. *See* TAC at ¶¶ 29-46. But Defendants have not conducted a foreclosure sale to date. SUF 118. And, as discussed above, Defendants have denied each of Plaintiff's applications for loan modifications due to the amount of money he has failed to repay and his failure to demonstrate any significant change in financial circumstances that would warrant a modification. They have also rescinded the Notices of Default that they caused to be entered in 2014 and 2018.

While no court has discussed whether Defendants' specific actions are enough to remedy the section 2923.6 violations that Plaintiff allege, at least one court has determined

that similar remedial actions relieve a mortgage servicer from liability. In *Berman v. HSBC Bank USA, N.A.*, the plaintiff alleged that HSBC notified him that he had only 15 days to appeal its denial of his loan modification application, instead of the statutorily-mandated 30 days. 11 Cal. App. 5th 465, 473 (2017). The Court reasoned that the notice would constitute a section 2923.6 violation unless HSBC "corrected and remedied" the violation by issuing a new letter with the proper deadlines. *Id.*

Applying *Berman*'s reasoning to this case, it appears that Defendants have remedied any potential dual tracking violation that may have taken place by pausing all foreclosure procedures during the pendency of Plaintiff's loan modification applications and issuing final determinations on those applications before resuming foreclosure activity.

Plaintiff makes no attempt to address this argument in his Opposition. Instead, he merely recites section 2923.6's language, recounts the case's background facts, and concludes that Defendants are liable. *See* Opp. at 7-9. Because it appears that Defendants' actions fall within section 2924.12's safe harbor provision, they "shall not be liable for any violation" of 2923.6(c). Cal. Civ. Code § 2924.12(b). The Court **GRANTS** Defendants' MSJ as to Plaintiff's dual tracking claim.

B. Plaintiff's TILA Claim

Defendants' argument against Plaintiff's TILA claim is far simpler.

The TILA provides that a new creditor must notify a borrower of a change in his loan's ownership within 30 days of purchasing the borrower's loan. 15 U.S.C. § 1641(g). Plaintiff claims that U.S. Bank violated the TILA by failing to give Plaintiff notice of its transfer of ownership of his loan to the Truman Trust. TAC at ¶¶ 47-56. Defendants argue that the Truman Trust purchased the loan from U.S. Bank on November 19, 2018, and sent Plaintiff written notice of the transfer of ownership on December 7, 2018 through Fay, its agent. MSJ at 29-30. The letter sent to Plaintiff plainly states that Plaintiff's "lender information" has changed and lists the name, address, and telephone number of Plaintiff's new lender. Change of Ownership Letter [Doc. # 104-6]. Plaintiff cites no evidence to the

contrary—indeed, he admits that the Truman Trust notified him of the change in ownership. *See* SUF 44; Gordon Decl. at ¶ 24 [Doc. # 107-3].

Plaintiff's only argument on this issue is that the notice sent by Fay was invalid because Fay was not yet the official servicer of Plaintiff's loan at the time that it sent the notice. *See id.* But he provides no authority for the proposition that only the organization servicing a loan may act as a lender's agent in providing TILA notice of a change in ownership. Given the lack of support for Plaintiff's argument, and his concession that he, in fact, received actual notice of the change in ownership, his arguments against summary judgment on his TILA claim are unpersuasive. The Court **GRANTS** Defendants' MSJ as to Plaintiff's TILA claim.

IV.

CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' MSJ in full. Judgment shall be entered in favor of Defendants and against Plaintiff on his claims for violations of California Civil Code section 2923.6 and the TILA.

IT IS SO ORDERED.

DATED: July 21, 2020

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE