



Lansdown v. Bayview Loan Servicing, LLC et al

2022 | Cited 0 times | N.D. California | September 13, 2022

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

MELISSA LANSDOWN,

Plaintiff, v. BAYVIEW LOAN SERVICING, LLC, et al.,

Defendants.

Case No. 22-cv-00763-TSH

ORDER RE: MOTIONS TO DISMISS Re: Dkt. Nos. 18, 31

I. INTRODUCTION Pending before the Court are a Motion to Dismiss, filed by Defendants Bayview Loan os. 18,

31. For the reasons stated below, the Court GRANTS IN PART AND DENIES IN PART the Motion to Dismiss by Bayview and Shellpoint, and GRANTS 1

II. BACKGROUND A. Factual Background 2

On April 25, 2001, Lansdown and Ellis Greenberg signed a promissory note and deed of

1 The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). ECF Nos. 7, 13, 25, and 30. 2 On May 12, 2022, Lansdown filed an amendment to first amended complaint stating Lansdown BANA and New York Bank Mellon to the complaint. ECF No. 20. Defendants did not file an opposition addressing the deadline to add additional defendants. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 Once the district court had filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16 which established a timetable for amending pleadings that rule's standards controlled In all other cases, a party may amend its pleading only with the opposing parties written consent or the courts leave. The court

-20. In 2003, Greenberg executed a quit claim deed of his interest to Lansdown. Id. ¶¶ 21-22; 21-2, Exhibit 2 (Quitclaim Deed). On November 1, 2009, Lansdown fell behind on her mortgage payments because BANA allegedly told her that she needed to fall behind in payments to qualify for a loan modification. Id. ¶¶ 24- 26. On February 18, 2010, a Notice of Default was recorded against the



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Property with Bank of New York Mellon named as the creditor. Id. ¶ 27.

Lansdown filed a lawsuit in Sonoma County Superior Court against Bayview and BANA. Id. ¶ 28. On December 19, 2018, Lansdown and BANA signed a Memorandum of Understanding Re Settlement. Id. ¶ 28; 21-3, Exhibit 3 (Memorandum of Understanding). On January 28, 2019, Bayview sent Lansdown a Settlement Agreement and Loan Modification Agreement. Id. ¶ 29; 21- 4, Exhibit 4. On April 3, 2019 Lansdown signed the Settlement Agreement. Id. ¶ 32; 21-6, Exhibit 6 (Settlement Agreement). On May 13, 2019, Lansdown executed the Loan Modification Agreement. Id. ¶ 34; 21-8, Exhibit 8 (Loan Modification Agreement). Between February 2019 and August 2019, Lansdown made seven payments towards the Property. Id. ¶¶ 34-35. However, on the Property. Id. ¶ 36.

On January 8, 2020, Lansdown obtained a Temporary Restraining Order and prevented foreclosure on the Property. Id. Shellpoint on January 23, 2020. Id. or Preliminary Injunction was granted. Id. ¶ 39. Bayview and Shellpoint attempted to foreclose the Property on September 16, 2020. Id. ¶ 40. On September 21, 2020, Bayview cancelled the foreclosure sale. Id. ¶ 41. B. Procedural Background

On February 6, 2022, Lansdown filed the instant action against Defendants Bayview, Shellpoint, and DOES 1-10. ECF No. 1. On April 25, 2022, Lansdown filed a First Amended

should freely give leave when justice so requires. . Therefore, pursuant to Federal Rule of Civil Procedure 15, the Court GRANTS leave for Lansdown to file an amended complaint. The Court shall consider the first amended complaint, ECF No. 21, as the operative complaint in addressing the Motions to Dismiss.

Complaint. ECF No. 17. On May 13, 2022, Lansdown filed another First Amended Complaint aming Defendants Bayview, Shellpoint, BANA, and New York Bank Mellon. ECF No. 21. The FAC alleges the following causes of action: 1) violation of Federal Debt Collection Protection Act (against Bayview), 2) violation of Rosenthal Act (against Bayview), 3) intentional Bayview), 5) violation of Federal Debt Collection Protection Act (against Shellpoint), 6) violation

of Rosenthal Act (against Shellpoint), 7) IIED (against Shellpoint), 8) breach of contract (against Shellpoint), and 9) Rescission (against all defendants). ECF No. 21 ¶¶ 19-126. Lansdown seeks rescission of the Memorandum of Understanding, Settlement Agreement, and Loan Modification Agreement based on B the Property. Id. ¶ 125.

On May 9, 2022, Bayview and Shellpoint filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(7) and 12(b)(6). ECF No. 18. On May 23, 2022, Lansdown filed an opposition. ECF No. 26. On May 31, 2022, Bayview and Shellpoint filed a reply. ECF No. 28.

On June 6, 2022, BANA filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), ECF No. 31, and a request for judicial notice, ECF No. 32. On June 20, 2022, Lansdown filed



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an opposition. ECF No. 33. On June 27, 2022, BANA filed a reply. ECF No. 34.

On August 21, 2022, the Court ordered the parties to submit supplemental briefing addressing whether Cal. R. Ct. App. I Emergency Rule 9 extends the statute of limitations on a FDCPA claim. ECF No. 36. The parties submitted supplemental briefings on September 7, 2022. ECF Nos. 37-38.

III. LEGAL STANDARD A. 12(b)(7)

par provides a three-step process for determining whether

the court should dismiss an action for failure to join a purportedly indispensable party United

States v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999). First, the Court determines whether the absent party is necessary under Rule 19(a)(1). E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Id. Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed ch that the action must be dismissed Id. B. 12(b)(6)

Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (citations and quotations statement of Thus, a complaint Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Plausibility does not mean probability, but Ashcroft v. Iqbal, 556 U.S. 662,

687 (2009). A co the claims against it and the grounds for relief. Twombly, 550 U.S. at 555 (quotations and citation omitted).

In considering a motion to dismiss, the Court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008); Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). However,

Iqbal, 556 U.S. at 678. t as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

d even if no request to amend the pleading was made, unless it determines that the pleading could not possibly Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)

(citations and quotations omitted).

IV. DISCUSSION A. Motion to Dismiss by Bayview and Shellpoint



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Bayview and Shellpoint move to dismiss the FAC under Federal Rules of Civil Procedure 12(b)(7) and 12(b)(6). ECF No. 18.

1. 12(b)(7) Defendants argue Ellis Greenberg is a necessary party to the action because he is a signatory of the Deed of Trust, a co-borrower of the promissory note, and a co-borrower named on the Loan Modification Agreement. ECF Nos. 18 at 4-5; 28 at 4.

A party is necessary if: (a) complete relief cannot be granted in the party's absence; or (b) s participation is necessary to protect its legally cognizable interests or to protect other parties from a substantial risk of incurring multiple or Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 880 (9th Cir. 2004) (quoting Fed.R.Civ.P. 19(a)). formula for determining whether a particular nonparty should be joined under Rule 19(a) Peabody W. Coal Co., 610 F.3d at 1078 (quoting N. Alaska Env't Ctr. v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986)).

a. Whether Complete Relief Can be Granted Defendants argue that the Court cannot grant complete relief among the existing parties in because Greenberg is a signatory to the 2001 Deed of Trust and loan. ECF No. 18 at 5. Lansdown argues Greenberg is not a signatory of the contracts at issue in this case. ECF No. 26 at 6. rather than partial or hollow relief as to those already parties, and with precluding multiple

Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d Eldredge v. Carpenters 46

N. Cal. Counties Joint Apprenticeship and Training Comm., 662 F.2d 534, 537 (9th Cir. 1981) Disabled Rights Action Comm., 375 F.3d at 879.

Here, Lansdown seeks damages and rescission of the Memorandum of Understanding, Settlement Agreement, and Loan Modification Agreement. FAC ¶ 125. The FAC sufficiently pleads Greenberg is not a signatory of these contracts. See ECF Nos. 21-3 (Memorandum of Understanding); 21-6 (Settlement Agreement); and 21-8 (Loan Modification Agreement). Because Greenberg See Zhu v. Li, Case No. 19-cv-2534-JSW, 2021 WL absence of Mr. Li will not preclude relief to either party. . . . Mr. Li is not a signatory to the Sale

Royal Primo Corp. v. Whitewater West Industries, Ltd., Case No. 15-cv-4391-JCS, 2016 WL 4 [T]he SAC alleges that only Plaintiffs and Whitewater were parties to the oral contract and Plaintiffs claims for fraud, quasi contract and unfair business practices do not involve CDM. Thus, the Court can accord complete relief among existing parties in CDM's absence . . .). Moreover, if Lansdown prevails on damages, Defendants would be able to pay damages without the presence of Greenberg. See Zhu, 2021 WL 6200504 at

any required accounting, which they would be able to do w . Finally, although Greenberg signed the adequately pleads that Greenberg executed a Quit Claim Deed and transferred his interest to



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Lansdown. ECF No. 21 ¶ 20. The Court finds complete re

b. Whether Greenberg has Legally Cognizable Interests Defendants argue that Greenberg has an interest in the Loan Modification Agreement. ECF No. 18 at 5. Lansdown argues Greenberg has no interest because he is not a signatory of the Loan Modification Agreement. ECF No. 26 at 6.

Rule 19(a)(1)(B) requires the absent party *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043

Makah Indian Tribe v. Verity, 910 F.2d

555, 559 (9th Cir. 1990).

According to the FAC, Greenberg signed the Bayview promissory note and remains a co-borrower on the Bayview loan. ECF Nos. 21 at ¶¶ 19-20; 21-12, Exhibit 12 at 9. Therefore, Greenberg has an interest in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v.*

California, 547 F.3d 962, 970 (9th Cir. 2008). The FAC does not allege that Greenberg is involved in the alleged breach of the Loan Modification Agreement and Defendants have failed to See *Jamul Action Comm. v. Simermeyer*, 974

the absent party must be a legally protected interest and not merely some stake in the outcome of ; *Disabled Rights Action Comm.*, 375 F.3d at 880- .

Because Greenberg did not sign the Loan Modification Agreement, pleading stage rely on the [Loan Modification Agreement] to establish the existence of a *Gross Belsky Alonso LLP v. Henry Edelson*, Case No. 08-cv-4666-SBA, 2009 WL 1505284, at *5 (N.D. Cal. May 27, 2009).

Accordingly, the Court DENIES See *Sirna Therapeutics, Inc. v. Protiva Biotherapeutics, Inc.*, Case No. 06-cv-1361-MMC, 2006 WL 3491027, at *3 (N.D. Cal. Dec. 1, 2006) (Protiva USA is not a party to the Agreement and . . . does not claim any ownership interest in the intellectual property rights at issue therein. That Protiva USA ultimately may benefit financially . . . does not suffice to demonstrate that it has an .

2. 12(b)(6)

a. First and Fifth Causes of Action: FDCPA Defendants argue FDCPA claims are time-barred. ECF No. 18 at 6-7. Defendants also argue that neither Cal. R. App. I Emergency Rule 9 nor equitable tolling apply to

FDCPA claims, and that the COVID-19 pandemic warrants equitable tolling. ECF No. 37.



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Kaiser v. Cascade Capital, 989 F.3d 1127, 1133 (9th Cir. 2016); Naas v. Stolman, 130

F.3d 892, 893 (9th Cir. 1997) (citing Rotkiske v. Klemm, 140 S. Ct. 355, 357

(2019). The Court joins other courts in California in finding Emergency Rule 9 does not extend the statute of limitations on federal claims. See Shubin v. Universal Vacation Club, Case No. 22-cv-2748-RSWL-AGRx, 2022 WL 3577247, at *3 (C.D. Cal. Aug. 18, 2022). California federal courts have been hesitant to apply Emergency Rule 9, at least in cases exercising federal question jurisdiction . . . This hesitancy in part stems from the fact that Emergency Rule 9 was issued by the California Judicial Council, and not any federal court or body. Sholes v. Cates, Case No. 21-cv-1006-DAD- the Emergency Rule tolling of statutes of limitations for civil causes of action pending in California state court is Goerss v. Pacific Gas & Electric Co., Case No. 21-cv-4485-EMC, Ms. Goerss cannot rely on the California-issued emergency rule referenced above to get relief because she is not in state court. Regarding equitable tolling, Lansdown fails to argue how the facts as pled in the FAC establish the application of equitable tolling to her FDCPA claims. See Goerss, 2021 WL 1490919 [plaintiff] theoretically could argue that COVID-19 was still an

impediment to her, she would have to explain how the pandemic could justify her not filing until July 2021. She has not done so. Indeed, as indicated above, Ms. Goerss must show that she has acted with due diligence, and conditions in the Bay Area had certainly improved by the spring of 2021. ; Faircloth v. AR Resources, Case No. 19-cv-5830-JCS, 2020 WL 820307, at *8 (N.D. Cal. Feb. 19, 2020). Because the FAC does not plead facts showing that he pursued his rights diligently, Plaintiff is not entitled to the benefit of equitable tolling, and Defendant's motion to dismiss is GRANTED. Thus, construing the pleadings in the light most favorable to Lansdown, the last possible date a FDCPA violation occurred was September 21, 2020. 3

FAC ¶ 41. Lansdown filed the instant action on February 6, 2022 well over the one-year deadline of September 21, 2021. See Hernandez v. Specialized Loan Servicing LLC, 836 Fed.Appx. 480, 482 (9th Cir. 2020) (FDCPA requires that a plaintiff bring his action within one year of the date on which the alleged

violation occurred. Because the facts as pled in the FAC show that the federal claims are untimely, the Court GRANTS Defendant's motion to dismiss. In case could allege facts supporting this or some other tolling doctrine, the Court GRANTS Lansdown leave to amend. See Faircloth, 2020 WL 820307, at *8.

b. Second and Sixth Causes of Action: Violation of Rosenthal Act -barred. ECF No. 18 at 6. -year statute of limitations from the date of the Aliff et al. v. Vervent Inc. et al., Case No. 20-cv-697-DMS-AHG, 2022 WL 3588322, at *10 (S.D. Cal. Aug. 22, 2022) (citing Cal. Civ. Code § 1788.30(f)). Because the Rosenthal Act is a state law, the Court assumes that Emergency Rule 9 applies. Nonetheless, as discussed above in footnote 3, even with the application of Emergency Rule 9, Lansdown still filed her claims too



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3 still be time-barred. Emergency Rule 9 tolled the statute of limitations from April 6, 2020 to October 1, 2020. See Cal. Rules of Court, Emergency Rule 9. If the last FDCPA violation occurred on September 21, 2020, Emergency Rule 9 would extend the statute of limitations for from September 2021 instant action on February 6, 2022 is still well past the October 2021 deadline.

late. The Court GRANTS Rosenthal Act claims. The Court GRANTS Lansdown leave to amend.

c. Third and Seventh Causes of Action: IIED D an IIED claim may not arise from a breach of contract claim. ECF No. 18 at 7-8. Lansdown emotional distress. ECF No. 26 at 11.

A claim for IIED requires (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendants outrageous conduct. *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1245 (9th Cir. 2013) (citing *Hugh v. Pair*, 46 Cal.4th 1035, 1050-51 (2009)).

Hughes, 46 Cal.4th at 1050. mental -minute cancellation of foreclosure sales. ECF No. 21 ¶¶ Id. ¶¶ 63, 105. The Court finds these allegations to be conclusory and insufficient to plead an IIED claim. Compare *Faulks v. Wells Fargo & Co.*, Case No. 13-cv-2871-MEJ, 2015 WL 4914986, at *6 (N.D. Cal. Aug. 17, 2015) (finding IIED claim sufficient actions went beyond the typically emotionally-fraught foreclosure process engaged in a scheme to make it extremely difficult for him to ensure that all requested information was timely submitted and that a proper modification review could take place) with *Kennedy v. World Savings Bank, FSB*, Case No. 14-cv-5516-JCS, 2015 WL 1814634, at *9 (N.D. Cal. Apr. 21, 2015) (finding IIED claim not suffice lost [plaintiff] his property and ultimately led him to suffer severe emotional distress not allege any facts as to how the foreclosure was intended to cause him emotional distress specifically).

foreclosure proceedings conducted without threat or insult . . . do not give rise to an IIED claim. *Gustafson v. SunTrust Mortgage, Inc.*, 752 Fed.Appx. 495, 497 (9th Cir. 2019); see *Chang v. Wachovia Mortg., FSB*, Case No. 11-cv-1951, 2011 WL 5552899, at *8 (N.D. Cal. Nov. 15, 2011) (of a loan modification or other loss mitigation options. The fact that Defendants ultimately found

Plaintiff ineligible for a modification and exercised their legal right to sell the property does not .

Accordingly, the Court GRANTS claims. The Court GRANTS Lansdown leave to amend.

d. Fourth and Eighth Causes of Action: Breach of Contract Defendants argue the FAC fails to sufficiently allege Lansdown performed under the Memorandum of Understanding. ECF No. 18 at 9-10. Lansdown argues the FAC alleges the existence of the deed of trust, her performance of the Memorandum of Understanding, and breach of contract. ECF No. 26 at 14-15. The elements of a cause of action for breach of contract are: 1) the existence of the contract; 2) performance by the



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plaintiff or excuse for nonperformance; 3) breach by the defendant; and 4) damages. First Commercial Mortgage Co. v. Reece, 89 Cal.App.4th 731, 745 (2001). to allege generally that all conditions precedent have occurred or been performed.

FRCP 9(c), See Kiernan v. Zurich Companies plead plaintiff satisfied conditions precedent); Archer Western Contractors, Ltd. V. Liberty Mutual Ins. Co., Case No. 14-cv-3041-DMG under Rule 9(c)'s liberal pleading standard, AWC's allegation that it performed all covenants and conditions required of it

under the National Union Polic is sufficient to survive a motion to dismiss. Textainer Equip. Mgmt. (U.S.) Ltd. v. TRS Inc., Case No. 07-cv-01519 WHA, 2007 WL 1795695, at *2 (N.D. Cal. June 20, 2007) (plaintiff pleads that it has performed all obligations under the Lease Agreement due and owing to defendants and/or Lessee, except for those which Plaintiff was prevented or excused from performing has pleaded all the necessary elements The Court DENIES breach of contract claims.

e. Ninth Cause of Action: Rescission Defendants argue the FAC fails to state a cause of action for rescission because Lansdown failed to provide notice of intent to rescind and failed to restore items of value. ECF No. 18 at 10- 11. Lansdown argues she provided notice through service in the instant action, and restoration is not currently required because delay would not prejudice Defendants. ECF No. 26 at 16.

not otherwise been made, the service of a pleading in an action or proceeding that seeks relief Wong v. Stoler, 237 Cal. App. 4th 1375, 1385-86 (2015). Regarding restoration, Defendants argument concerning prejudice of delay under California Civil Code § 1693. See Cal.Civ.Code §

shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits In re Consolidated Pretrial Proceedings in Air West Securities Litig., 436 F. Supp. 1281, 1290 (N.D. seeking rescission of an act induced by duress is not a prerequisite plaintiff must establish; rather, it is the defendant who must assert that he is prejudiced by . Accordingly, the Court must DENY Motion to Dismiss rescission claim.

B. Motion to Dismiss by BANA 4

BANA argues there is no standalone cause of action for rescission and the FAC fails to sufficiently plead the basis for rescission. ECF No. 31 at 5-6. Lansdown fails to respond to any of BAN -11.

The Court GRANTS scission Claims. See Jozinovich v. JP Morgan Chase Bank, N.A., Case No. 09-cv-3326, 2010 WL 234895, at *7 (N.D. Cal. Jan. 14, 2010) Plaintiffs tenth cause of action is for rescission. Rescission is not an independent cause of action, but rather a remedy. .

V. CONCLUSION For the reasons stated above, the Court GRANTS IN PART AND DENIES IN



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PART the Motion to Dismiss by Bayview and Shellpoint, and GRANTS The Court GRANTS Lansdown leave to amend. Lansdown shall file a Second Amended Complaint within 30 days of the date of this order.

IT IS SO ORDERED.

Dated: September 13, 2022

THOMAS S. HIXSON United States Magistrate Judge

4 GRANTS See Rey ., .

