

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Mario Lozano,)
Plaintiff) Civil No.
v.) 14-13123-FDS
Suffolk Superior Court,)
Transcription Services)
Administration, Wells Fargo)
Bank, N.A., Freddie Mac,)
Defendants)

)

ORDER OF DISMISSAL
SAYLOR, J.

In accordance with the court's Memorandum
and Order of September 28, 2015, it is hereby
ORDERED that the above-entitled action be
dismissed.

SO ORDERED
BY THE COURT:
September 28, 2015 /s/ Lisa Pezzarossi
Date. Deputy Clerk

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 15-2196

Mario R. Lozano
Plaintiff, Appellant

v.

Suffolk Superior Court, Commonwealth of
Massachusetts; Office of Transcription Services,
Wells Fargo Bank, N.A.; Freddie Mac
Defendants, Appellees

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges

JUDGMENT
Entered: August 16, 2018

Pursuant to this court's order dated July 24, 2018, Mandate was recalled, the original judgment was vacated, and the appeal was assigned to the present panel for further review.

We have carefully considered the record and the arguments presented on appeal. Substantially for the reasons stated in the district court's Memorandum and Order entered on January 8, 2015, we affirm the judgment of the district court dismissing the claims against Suffolk Superior Court and the Office of

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Transcription Services. We otherwise affirm the judgment dismissing the claims against the remaining defendants: to the extent that the claims are not barred by the Rooker-Feldman doctrine, see *Federacion De Maestras de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 24 (1st Cir. 2005) (federal courts lack jurisdiction over claims brought after state proceedings have ended in which a plaintiff seeks review and rejection of state judgment) (citation omitted), we conclude, for substantially the reasons stated in the district court's Memorandum and order entered on September 28, 2015, that the claims were properly dismissed for failure to state a claim.

Affirmed. See 1st Cir. Loc. R. 27.0(c).

By the Court:
s/Margret Carter,
Clerk

cc: Mario R. Lozano
 Mark P. Sutliff
 Dennis D'Angelo
 Julianne Baliro
 Morgan T. Nickerson
 Michael Stanley
 Jeffrey Patterson

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Defendants, Appellees

MANDATE

Entered: September 10, 2018

In accordance with the judgment of August 24, 2016, and pursuant to Federal Rule of Appellate Procedure 41(a), this constitutes the formal mandate of this court.

By the Court:
s/Margret Carter,
Clerk

cc: Mario R. Lozano
 Mark P. Sutliff
 Dennis D'Angelo
 Julianne Baliro
 Morgan T. Nickerson
 Michael Stanley
 Jeffrey Patterson

APP19

UNITED STATES DISTRICT COURT
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MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS
SAYLOR, J.

This is an action arising from a homeowner's default on a home loan and resulting mortgage foreclosure. Plaintiff Mario R. Lozano, proceeding pro se, alleges that the defendants violated his civil rights and Massachusetts state law by conspiring to tamper with or otherwise alter certain transcripts of the state court proceedings.

The amended complaint asserts various causes of action, including constitutional and civil rights violations (Counts One, Three, Four, and Five); federal and state criminal violations (Count Two); and

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Massachusetts common-law claims for intentional infliction of emotional distress (Count Six), intentional infliction of mental anguish (Count Seven), and unjust enrichment (Count Eight). The remaining defendants in this case are Wells Fargo Bank, N.A. and Federal Home Loan Mortgage Corporation.

For the following reasons, defendants' motion to dismiss will be granted.

1. Background

A. Factual Background

The facts are set forth as alleged in the amended complaint.

In 2004, Mario Lozano obtained a loan and granted a mortgage on a property at 54 Bicknell Street in Dorchester, Ma. (Am. Compl. 28). The mortgage was subsequently assigned to defendant Wells Fargo. At some point in 2008 or 2009, Lozano became unable make the full monthly payments due on the mortgage and the loan was in default, Wells Fargo did not attempt to foreclose on the mortgage for a period of several years. (Am. Compl. 45). According to the complaint, Lozano continued to manage and improve the property following his default, and those improvements resulted in an increase in the property's value. (Id.). In 2012, Wells

Fargo initiated foreclosure proceedings. Lozano then filed a civil action in Suffolk Superior Court challenging the foreclosure.

Lozano claims that during the state court litigation, court transcripts were altered and docket entries falsified so as to provide a false basis for court orders in favor of Wells Fargo and Freddie Mac. (Id at 3,9).¹

After the conclusion of the Superior Court action, Lozano filed a complaint with this court against defendants Suffolk Superior Court, the Office of Transcription Services, Wells Fargo Bank. The complaint alleges that defendants violated Lozano's civil rights by conspiring to alter transcripts of Superior Court hearings in order to facilitate obtaining several illegal court orders and judgments against him.

B. Procedural Background

On July 25, 2014, Lozano filed the original complaint in this action against named defendants Suffolk Superior Court, the Office of Transcription Services, Wells Fargo Bank, and Freddie Mac. On March 26, 2015, the court dismissed the claims against Suffolk

¹ The complaint does not indicate the outcome of the state court litigation, but it is apparent that it was not favorable to Lozano.

Superior Court and the Office of Transcription Services for lack of jurisdiction. The Court permitted Lozano to file an amended complaint, which he filed June 1, 2015. The amended complaint asserts eight counts against defendants Wells Fargo and Freddie Mac. Count One asserts violations of 42 U.S.C. s.1985 (2) and s.1985 (3). Count Two asserts Violations of federal and state criminal statutes prohibiting tampering with evidence. Counts Three and Four assert general claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Count Five asserts an additional civil rights claim under 42 U.S.C. s.1983. Count Six asserts a state law tort claim for intentional infliction of emotional distress. Count Seven asserts a separate claim for intentional infliction of mental anguish. Count Eight asserts a claim for unjust enrichment.

The amended complaint also purports to assert claims against Suffolk Superior Court and the “Transcription Services Administration,” presumably the Massachusetts Office of Transcription Services.

On June 18, 2015, Wells Fargo and Freddie Mac jointly moved to dismiss all claims against them under Fed. R. Civ. P. 12(b)(6). Lozano filed an opposition to defendants' motion on June 30, 2015.

II. Legal Standard

On a motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give...plaintiff the benefit of all reasonable inferences therefrom." Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1,5 (1st Cir. 2007) (citing Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). That is, "[f]actual allegations must be enough to raise a right relief above the speculative level,...on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556). Dismissal is appropriate if the complaint fails to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Gagliardi v. Sullivan, 513 F.3d 301, 305

(1st Cir. 2008) (quoting Centro Medico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005).

A document filed by a pro se party “is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” Erickson v. Pardus, 551 U.S. 89, 94 (2007)(quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted); see also Fed R. Civ. P. 8 (c) (“Pleadings must be construed so as to do justice.”).

III. Analysis

A. 42 U.S.C s.1985 (2) and s. 1985 (3) (Count One)

Count One Of the amended complaint actually alleges two similar but separate causes of action under 42 U.S.C. s. 1985 (2) and 42 U.S.C. s.1985 (3). Section 1985 (2) concerns access to state courts , creating a cause of action where “two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of laws.” 42 U.S.C. s. 1985 (2). Similarly, a claim under s.1985(3) requires proof of both a conspiracy and “a conspiratorial purpose to deprive the plaintiff of the equal protection of the laws.”

Perez-Sanchez v. Pub Bldg. Auth., 531 F.3d 104, 107 (1st Cir. 2008). (citing Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)). ²

Both s. 1985(2) and s. 1985(3) require the complaint to plead that a race or class based discriminatory motive lies behind the alleged conspirators' actions. See Kush v. Rutledge, 460 U.S. 719, 725-26 (1983) (citing Griffin v. Breckenridge, 403 U.S. 88, 91 (1971).

Defendants contend that the amended complaint fails to meet this requirement. It is true that the complaint fails to allege any facts in Count One establishing that the plaintiff is a member of a protected class or has suffered class-based discrimination. Yet in Count Five, the complaint does allege that "all...parties involved are Caucasians" and that defendants "utilized the solidarity of [r]ace and [e]thnicity" in violating Lozano's civil rights. (Am. Compl. 35). Keeping in mind the lower standards applied to pro se complaints under Erickson, this Court finds that the complaint, though disorganized, does allege both that Lozano is a member of

² A claim under s.1985(3) also requires proof of "an overt act in furtherance of the conspiracy" and "injury to the person or property, or a deprivation of a constitutionally protected right." Perez-Sanchez, 531 F.3d at 107.

a protected class and that defendants' actions were motivated by racial animus.

However, even under Erickson, the complaint fails to allege with specificity facts that, if true, would support a finding of a conspiracy. Although the thrust of the complaint alleges that Wells Fargo and Freddie Mac conspired with the Suffolk Superior Court and the Office of Transcription Services to alter transcripts in the state court case between the parties, Am Compl. 34, those allegations are conclusory and the Court is not required to credit them. See Twombly, 550 U.S. at 555 (plaintiff's obligation under Fed. R. Civ. P. 8(a) to provide grounds of his claim "requires more than labels and conclusions"); Dallas v. Holmes, 137 Fed. Appx. 746, 752 (6th Cir. 2005) (per curiam)(upholding dismissal under 28 U.S.C. s. 1915(e)(2)(B) of claims under s.1983 that private citizens conspired with law enforcement to perpetrate malicious prosecution: "Other than general allegations of conspiracy to cause and influence a wrongful criminal prosecution, Plaintiffs make no allegations of joint, concerted activity to deprive [plaintiff] of his civil rights.") Count One will therefore be dismissed.

B. 18 U.S.C. 1506 and Mass. Gen. Laws ch. 268 s.13E (Count Two)

In Count Two, the complaint asserts a claim for violations of 18 U.S.C. 1506 and Mass. Gen. Laws ch. 268 s. 13(e). 18 U.S.C. 1506 is a federal criminal statute prohibiting the alteration of a record in a United States court. Mass. Gen. Laws ch. 268 s. 13E is a state criminal statute prohibiting the unauthorized alteration of a court record.

There is no private right of action for an alleged violation of 18 U.S.C. 1506. *Shahin v. Darling*, 606 F. Supp. 2^d 525, 538 (D. Del.) *Aff'd*, 350 F. App'x 605 (3d Cir. 2009); *Hamilton v. Reed*, 29 Fed App'x 202, 204 (6th Cir, 2002) (not reported). Nor may private parties bring claims to enforce Massachusetts criminal laws. *Morisette v. Superintendent of MCI Cedar Junction*, 2014 WL 3896722, at *3 (D. Mass. Aug 7, 2014). Count Two will therefore be dismissed.

C. Fourteenth Amendment Due Process Clause (Count Three) and Equal Protection Clause Count Four)

In Counts Three and Four, the complaint brings direct claims under the Due Process and Equal Protection Clauses of the United States Constitution.

However, “there is no direct cause of action under the Fourteenth Amendment, and s.1983 must be employed to bring such a claim.” Schomberg v. Johnson, 2009 WL 799466, at *2(D. Mass. Mar. 25, 2009); Sires v. Hefferman, 2011 WL 2516093, at *5 (D. Mass. June 21, 2011) (citing Arpin v. Santa Clara Valley Transp. Agency, 261 F. 3d 912, 925 (9th Cir. 2001) (“[A] litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but (rather) must utilize 42 U.S.C. s.1983”)). Counts Three and Four will therefore be dismissed.

D. 42 U.S.C. s1983 (Count Five)

Count Five asserts a cause of action under 42 U.S.C. s1983. Section 1983 creates a private cause of action through which plaintiffs may recover against state actors for constitutional violations. Goldstein v. Galvin, 719 F.3d 16, 24 (1st Cir. 2013). “A claim under s.1983 has two ‘essential elements’: the defendant must have acted under color of state law, and his or her conduct must have deprived the plaintiff of rights secured by the Constitution or by federal law.” Gagliardi, 513 F.3d at 306 (quoting Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997).

Defendants contend that the complaint does not establish the first element, that the conduct was taken under color of state law. However, although § 1983 ordinarily does not create a right of action against private parties, private conduct may be deemed to be "under color of state law" when it is "fairly attributable" to the state. *Lugar v. Edmiston Oil Co., Inc.*, 457 U.S. 922, 937 (1982). Private conduct may be attributable to the state when a private party conspires with a state actor. *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970).

However, as noted above, the complaint's allegations of a conspiracy are conclusory and therefore insufficient to establish that the defendants were acting under color of state law. See *Tapp v. Champagne*, 164 Fed Appx. 106, 108 (2d Cir. 2006) (conclusory statement that public defenders conspired with judges and district attorneys to effect a malicious prosecution was insufficient "even" at the pleadings stage" to establish that public defenders were acting under color of state law.); see also *Dye v. Radcliff*, 174 Fed. Appx. 480, 483 & n. 1 (11th Cir. 2006) (private individual who told law enforcement officers that the wanted to press charges against plaintiff was not a

“state actor” within the meaning of s.1983, despite plaintiff’s allegations that private individual had conspired with the officers). Count Five will therefore be dismissed.

E. Intentional Infliction of Emotional Distress (Count Six)

Count Six asserts a claim for intentional infliction of emotional distress. In Massachusetts, to state such a claim, a plaintiff must allege (1) that the defendant either intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the conduct caused the plaintiff emotional distress; and (4) that the emotional distress was severe and of a nature that no reasonable person could be expected to endure it. *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45 (1976).

Here, the defendants’ conduct credibly alleged by the complaint does not rise to the level of “extreme and dangerous.” Conduct is “extreme and dangerous” only if it is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Foley v. Polaroid Corp.*, \$00 Mass. 82, 99 (1987). Recovery for an IIED claim generally “requires more than ‘that the defendant has acted with an intent which is tortious or even

criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.” Doyle v. Hasbro, Inc., 103 F.3d 186, 195 (1st Cir. 1996) (quoting Foley, 400 Mass. at 99). While “home foreclosure is a terrible event and likely fraught with unique emotions and angst,” foreclosures even ones that involve improper conduct, cannot readily be called “utterly intolerable in a civilized community” in the absence of extreme aggravating factors. Moore v. Mortgage Elec. Registration Sys., Inc., 848 F. Supp. 2d 107, 136 (D.N.H. 2012) (internal citations omitted).

Because the complaint does not credibly allege conduct sufficiently extreme and outrageous to support an IIED claim, Count Six will be dismissed.

F. Intentional Infliction of Mental Anguish (Count Seven)

Count Seven asserts a claim for “Intentional Infliction of Mental Anguish.” However, this Court has not been able to locate the existence of a cause of action for the intentional infliction of “mental anguish” in Massachusetts law, and the complaint makes no argument in favor of its creation. Accordingly, the Court reads this claim as a duplicate claim for intentional infliction of

emotional distress and Count Seven will be dismissed.

G. Unjust Enrichment (Count Eight)³

Massachusetts defines unjust enrichment as the “retention of money or property of another against the fundamental principles of justice or equity and good conscience.” *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329 (2005). To succeed on a claim for unjust enrichment, a plaintiff must show (1) a benefit conferred upon defendant by plaintiff, (2) an appreciation or knowledge by defendant of the benefit and (3) that the acceptance or retention of the benefit under the circumstances would be inequitable without payment for its value. See *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 57 (1st Cir. 2009).

Defendants have not challenged the complaint as insufficient to meet one of the necessary elements, but instead contend that a claim for unjust enrichment may not be maintained when a contract exists, pointing to the mortgage on the property at issue. “A plaintiff is not entitled to recovery on a theory of quantum meruit where there is a valid contract that defines the obligations of the parties.” *Boston Med. Ctr. Corp. v. Sec'y of Executive Office of Health & Human Servs.*, 463 Mass. 447, 462 (2012); see also

Restatement (Third) of Restitution and Unjust Enrichment s.2 (201) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any injury into unjust enrichment").

Here, it is clear that the mortgage contract and note define the rights of the parties. That is true even if (as is commonplace) the homeowner made improvements to the property while the mortgage debt was outstanding. Count Eight will therefore be dismissed.

H. Claims Against State Defendants

For the reasons stated in the Court's order of January 8, 2015, this Court does not have jurisdiction over the claims against Suffolk Superior Court and the Office Transcription Services. Any such claims will therefore be dismissed.

IV. Conclusion

Based on the foregoing reasons, defendants' motion to dismiss is GRANTED, and all claims in the amended complaint are hereby DISMISSED. So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV

Dated: September 28, 2015 United States
District Judge

APPENDIX B

14th Amendment of U.S. Constitution, section 1. Due Process of Law

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, Liberty, or Property, without Due Process of Law;”.

14th Amendment of U.S. Constitution, section 1. Equal Protection of Law

“Nor deny to any person within its jurisdiction the equal protection of laws”.

Declaration of Rights/ Article XII of Commonwealth of Massachusetts Constitution.

Due Process of Law

“And no subject shall be.....deprived of his property, immunities, or privileges.....or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land”.

Seventh Amendment of U.S. Constitution Right to a Jury Trial

(vii)

“In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.”.

Declaration of Rights/ Article XV of Commonwealth of Massachusetts Constitution

Right to a Jury Trial

“In all controversies concerning property, in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have the right to a trial by jury”.

Tampering/Altering Court Evidence, 18 USCA 1512(c)(1).

“(c) Whoever Corruptly- (1) alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding, Shall be fined under this title or imprisoned not more than twenty years, or both”.

Tampering/Altering Court Evidence, M.G.L. Ch. 268, s. 13E

“Whoever alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official

(viii)

proceeding, whether or not the proceeding is pending at the time, shall be punished by....”.

Conspiracy to Interfere with Civil Rights, 42 USCA 1985, section (2).

Section (2)- “if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protections of the laws, or injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protections of the law.”

Conspiracy to Violate Civil Rights, 18 USCA 242.

“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States... shall be fined under this title, or imprisoned...”.

Conspiracy to Violate Rights, 18 USCA 241.

“If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or

District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States or because of his having so exercised the same;They shall be fined under this title or imprisoned...”.

14th Amendment of the U.S. Constitution

Section 5, Power of Enforcement

“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

(x)