

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL LINCOLN, SHARON OWENS,)	Case No. CV 09-04871 DDP (PJWx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
)	
v.)	
)	[Motion filed on September 16, 2009]
GMAC MORTGAGE, LLC a Delaware limited liability company; EXECUTIVE TRUSTEE SERVICES, a limited liability company,)	
)	
Defendants.)	
_____)	

This matter comes before the Court on Defendants GMAC Mortgage, LLC ("GMAC") and Executive Trustees Services, LLC ("ETS")'s motion to dismiss Plaintiffs' First Amended Complaint ("FAC") for failure to state a claim. After reviewing the parties' moving papers, the Court grants the motion with respect to Plaintiffs' federal law claims, but grants them leave to amend their complaint. If Plaintiffs fail to amend the FAC such that it states a federal claim on which relief can be granted, the Court will likely decline to exercise supplemental jurisdiction over the pendent state law claims. See 28 U.S.C. § 1367(c).

1 **I. Background**

2 Plaintiffs are the owners of real property located at 3667
3 Olympiad Drive, Los Angeles, California, 90043. (FAC ¶ 6.) On or
4 about May 27, 2008, Plaintiffs entered into and signed a loan
5 modification agreement ("agreement") with GMAC. (FAC ¶ 35, Ex. A.)
6 Following approval and execution of the agreement, Plaintiffs
7 received letters from GMAC notifying them that their required
8 monthly payments would increase. (FAC ¶ 22, Ex. B.) Plaintiffs
9 contend that the agreement did not authorize GMAC to increase their
10 monthly payments. (FAC ¶ 23-24.)

11 GMAC sent several letters (dated August 4, 2008, August 11,
12 2008, September 2, 2008, September 11, 2008, October 2, 2008) to
13 Plaintiffs informing them their loan was in default, and a notice
14 of default was recorded on November 19, 2009. (FAC, Exhibits B &
15 D.) ETS, the trustee designated on the Deed of Trust, then
16 commenced non-judicial foreclosure proceedings. (FAC ¶ 23.)

17 In the FAC, Plaintiffs state the following causes of action:
18 (1) breach of contract; (2) breach of the covenant of good faith
19 and fair dealing; (3) violations of California Business &
20 Professions Code § 17200 *et seq.*; (4) negligent misrepresentation
21 and general negligence; (5) violations of the Real Estate
22 Settlement Procedures Act ("RESPA"); and (6) violations of
23 California Civil Code § 2924.

24 **II. Legal Standard**

25 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a
26 complaint is subject to dismissal when the Plaintiff's allegations
27 fail to state a claim upon which relief can be granted. When
28 considering a 12(b)(6) motion to dismiss for failure to state a

1 claim, "all allegations of material fact are accepted as true and
2 should be construed in the light most favorable to [the]
3 plaintiff." Resnick v. Hayes, 213 F.3d 433, 447 (9th Cir. 2000).

4 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the
5 Supreme Court explained that a court considering a 12(b)(6) motion
6 should first "identify[] pleadings that, because they are no more
7 than conclusions, are not entitled to the assumption of truth."
8 Id. Next, the court should identify the complaint's "well-pleaded
9 factual allegations, . . . assume their veracity and then determine
10 whether they plausibly give rise to an entitlement to relief."
11 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th
12 Cir. 2009) ("In sum, for a complaint to survive a motion to
13 dismiss, the non-conclusory factual content, and reasonable
14 inferences from that content, must be plausibly suggestive of a
15 claim entitling the plaintiff to relief" (internal quotation marks
16 omitted)).

17 **III. Discussion**

18 A. RESPA, 12 U.S.C. § 2605

19 Plaintiffs allege that Defendants violated RESPA by failing to
20 respond to "inquiries [made by Plaintiffs] in June, July, August,
21 September, October, December 2008 and in May 2009." (FAC ¶ 81.)

22 Section 2605(e)(1)(A) of the statute provides that loan
23 servicers that receive a "qualified written request from the
24 borrower (or an agent of the borrower) for information relating to
25 the servicing of such loan" must acknowledge receipt, investigate,
26 correct any errors, and respond. 12 U.S.C. § 2605(e)(1)(A). RESPA
27 defines a "qualified written request" as:

28 ///

1 a written correspondence, other than notice on a
2 payment coupon or other payment medium supplied by
the servicer, that-

3 (I) includes, or otherwise enables the
servicer to identify, the name and account of the
4 borrower; and

5 (ii) includes a statement of the reasons for
the belief of the borrower, to the extent
6 applicable, that the account is in error or
provides sufficient detail to the servicer
7 regarding other information sought by the
borrower.

8 Id. § 2605(e)(1)(B). Section 2605(e)(1)(A) requires loan servicers
9 to acknowledge receipt of qualified written requests within twenty
10 days. Id. § 2605(e)(1)(A). Following acknowledgment, servicers have
11 a duty to respond to the borrowers "not later than 60 days" in one
12 of three ways outlined in Section 2605(e)(2). Id. § 2605(e)(2).

13 The Court is persuaded that Plaintiffs' letters dated June 11,
14 2008, July 13, 2008, August 8, 2008, September 25, 2008 and October
15 29, 2008 were not qualified written requests within the meaning of
16 RESPA. (FAC, Exhibits C1-C5.) The letters object to the monthly
17 payment increase, and demand that GMAC present evidence of its
18 authority to enforce the terms of the loan. They do not, however,
19 identify any error in the servicing of the loan at issue.
20 Accordingly, the letters are not qualified written requests, and
21 GMAC had no duty under RESPA to respond.

22 The May 20, 2009 letter disputes the amount that Plaintiffs
23 owed to GMAC under the agreement, and contains a heading identifying
24 the letter as a "qualified written request." (FAC, Ex. C6.) Even
25 assuming that the letter satisfied § 2605(e)(1)(A)'s definitional
26 criteria, Plaintiffs' claim fails because they filed the present
27 lawsuit on June 15, 2009, and thus, the sixty window for responding
28 to qualified written requests had not yet elapsed. Accordingly, the

1 claim was premature. See Sicairos v. NDEX West, LLC, 2009 WL 385855
2 at *3 (S.D. Cal. 2009) (dismissing RESPA § 2605 claim where
3 plaintiff filed suit before sixty-day window for responding to
4 alleged qualified written request had elapsed).

5 Plaintiffs § 2605 claims against ETS must also be dismissed,
6 with prejudice, because Plaintiffs fail to allege facts indicating
7 that ETS is a loan servicer subject to the requirements of § 2605.

8 B. RESPA, 12 U.S.C. § 2609

9 Plaintiffs next allege that Defendants violated RESPA by
10 failing to "provide an explanation" for "increasing Plaintiffs
11 escrow account." (FAC ¶ 88.)

12 Pursuant to 12 U.S.C § 2609, lenders and servicers are
13 prohibited from requiring homeowners to maintain more than one-
14 twelfth of the estimated total yearly amount necessary for taxes,
15 insurance premiums, and other charges, plus an additional cushion of
16 one-sixth of the estimated total of such taxes, insurance premiums
17 and other charges. See 12 U.S.C. § 2609(a). In addition, the loan
18 servicer must notify the borrower "not less than annually of any
19 shortage of funds in the escrow account." Id. § 2609(b).

20 Plaintiffs fail to allege that the escrow amount GMAC required
21 was in excess of the level that RESPA permits, and they do not
22 allege that GMAC failed to provide the required notice of any
23 shortage of funds. The Court therefore concludes that the factual
24 allegations set forth in the FAC are not plausibly suggestive of a
25 claim entitling Plaintiffs to relief, and thus, their § 2609 claim
26 must be dismissed.

27 ///

28 ///

1 **IV. Conclusion**

2 For the reasons set forth above, the Court dismisses
3 Plaintiffs' claims arising under federal law. With respect to the
4 RESPA § 2609 claim, the Court grants Plaintiffs leave to amend the
5 FAC. Plaintiffs must file an amended complaint within twenty (20)
6 days of the date of this Order. Failure to do so will be deemed
7 consent to dismissal of Plaintiffs' federal law claims with
8 prejudice.

9
10
11 IT IS SO ORDERED.

12
13
14 Dated: December 18, 2009



15
16 DEAN D. PREGERSON
United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28