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 COUNTRYWIDE HOME LOANS, INC.

7  
 8 UNITED STATES DISTRICT COURT  
 9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 10 SACRAMENTO DIVISION

11  
 12 JAMES SALONDAKA,

13 Plaintiff,

14 vs.

15 COUNTRYWIDE HOME LOANS, INC., a  
 business entity form unknown; MORTGAGE  
 16 ELECTRONIC REGISTRATIONS  
 SYSTEMS, INC., a business entity form  
 17 unknown; KIRSTEN WISE, an individual;  
 JULIE YOUNG, an individual; all persons or  
 18 entities unknown claiming any legal or  
 equitable right, title estate, lien or interest in  
 19 the property described in this Complaint  
 adverse to Plaintiff's title thereto, and DOES 1  
 20 through 25, inclusive,

21 Defendants.

Case No.: 2:09-cv-01550-JAM-JEM

**ORDER GRANTING COUNTRYWIDE  
 HOME LOANS, INC.'S MOTION TO  
 DISMISS PLAINTIFF'S FIRST  
 AMENDED COMPLAINT WITH  
 PREJUDICE**

22  
 23 The Motions of defendant Countrywide Home Loans, Inc. ("Countrywide" or  
 24 "Defendant") for an order dismissing the First Amended Complaint ("FAC") of plaintiff James  
 25 Salondaka ("Plaintiff") pursuant to Rules 41(b) and 12(b)(6) of the Federal Rules of Civil  
 26 Procedure, having been duly noticed and served on all interested parties, came on regularly for  
 27 hearing before this Court, on January 20, 2010, at 9:30 a.m., the Honorable John A. Mendez  
 28

1 presiding. Reuben L. Nocos, Esq. appeared on behalf of Plaintiff. Joshua E. Whitehair, Esq.  
2 appeared for Defendant.

3 All arguments, papers and evidence considered and good cause appearing, the Court  
4 hereby ORDERS as follows:

5 The FAC was filed two and a half weeks after the filing deadline set by the Court.  
6 Plaintiff did not seek leave of court to extend the filing deadline. He has raised and submitted  
7 reasons why he was late. But the fact is that he was in violation of the Court's order. And under  
8 the Federal Rules of the Civil Procedure 41(b), the Court does have the authority to dismiss the  
9 FAC for that reason alone.

10 The only argument against that is the argument that cases should be decided on the merits.  
11 Turning to the merits, in the FAC, there are a number of new allegations that were raised  
12 regarding the loan processing which actually hurt rather than help the Plaintiff in his case.  
13 Plaintiff is a broker who regularly processed loan applications that were submitted to Defendant.  
14 He was not allowed to process his own loan.

15 Therefore, it was processed by representatives of Defendant, Kristen Wise and Julie  
16 Young, who were named for the first time in the FAC but have not been served. Because  
17 Plaintiff was in a rush, he chose to drive to the title company, pick up the final loan documents  
18 that needed his signature, drive to the notary's office, sign the forms, and then return them to the  
19 title company, apparently without bothering to read the loan documents or get copies.

20 The FAC alleges that neither Wise, Young, nor any representative of Defendant was  
21 present when Plaintiff picked up or returned the documents at the title office. Despite this, the  
22 FAC goes on to allege that Plaintiff was not given an opportunity to read the documents before  
23 signing them, was not given copies, and was unaware of the true terms of the loan. The evidence  
24 obviously contradicts that.

25 The FAC also raises a number of new fraud based claims because of these alleged actions  
26 by the Defendant. Defendant has also brought a motion to strike which was not addressed in any  
27 way by the opposition. The Court is not going to reach the motion to strike because it grants the  
28 motion to dismiss in its entirety for each of the following reasons.

1 With respect to the Truth in Lending Act (“TILA”) claim, Count 1, Plaintiff alleges that  
2 the defendants have violated TILA, arguing and alleging that defendants did not provide the  
3 required disclosures. This allegation and the vague statement in the FAC are not sufficient to  
4 meet the pleading standards of the district courts.

5 The Court already found Plaintiff’s claim also to be time-barred. An action for damages  
6 under TILA, the Truth in Lending Act, must be brought within one year of the violation. 15  
7 U.S.C. § 1640(e). A TILA violation occurs on the date of consummation of the transaction.  
8 Consummation means the time that a consumer becomes contractually obligated on a credit  
9 transaction. The doctrine of equitable tolling may suspend the limitations period until the  
10 borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that  
11 form the basis of the TILA action. *King vs. California*, 784 F.2d 910 (9th Cir. 1986).

12 In order to claim equitable tolling, a plaintiff must allege circumstances showing that he or  
13 she could not have discovered the facts underlying the claim through the exercise of reasonable  
14 diligence, or that extraordinary circumstances beyond his control made it impossible to file the  
15 claim on time.

16 In this case, Plaintiff fails to allege facts upon which this Court could find equitable  
17 tolling. Plaintiff was a broker who regularly processed loans with Defendant, and, therefore, he  
18 would have known what disclosures were required by TILA and could have easily checked to see  
19 if the disclosures were there or not. Furthermore, Plaintiff alleged that he realized within days  
20 that his interest rate was higher than he thought it would be, but he failed to request copies of his  
21 loan documents for review for another five months. Higher than expected mortgage bills would  
22 put any reasonable person on notice of claims relating to the amount and terms of the loan  
23 agreement.

24 Equitable estoppel is another possible basis for tolling the statute of limitations, but that  
25 would require the plaintiff to plead with particularity active misconduct by defendant to prevent  
26 the plaintiff from suing in time, actual and reasonable reliance on the misconduct in failing to sue  
27 in time, and lack of actual or constructive knowledge of the facts constituting the claim, despite  
28 due diligence. *Guerrero vs. Gates*, 442 F.3d 697 (9th Cir. 2006). Plaintiff has not adequately

1 pled these requirements. He showed no diligence, despite being a broker and signing a \$1.8  
2 million loan. He has also not pled any misconduct by Defendant in attempting to prevent him  
3 from suing on time. For all these reasons, the TILA claim for damages is dismissed with  
4 prejudice.

5 Count 2 is a rescission or cancellation claim under California Civil Code 1689. Plaintiff is  
6 requesting rescission of his loan on the grounds that he was fraudulently induced into entering the  
7 loan, but he has failed to allege that he can and will tender the amount he borrowed. Tender is  
8 required for rescission, and rescission is a remedy, not a cause of action. *Hafiz v. Greenpoint*  
9 *Mortgage Funding, Inc.*, 652 F.Supp2d.1039 (N.D. Cal. 2009).

10 Furthermore, where the fraud claims fail, so does the claim for rescission based on fraud.  
11 Since all of the fraud claims brought by Plaintiff fail, and for these reasons, this rescission claim  
12 is dismissed with prejudice.

13 The third cause of action is for actual fraud under Civil Code Section 1572. This is one of  
14 many fraud based claims which Plaintiff has brought in his FAC. Plaintiff must plead the fraud  
15 allegations with the heightened particularity standard of the Ninth Circuit, including  
16 differentiating between the actions of multiple defendants. Plaintiff must also plead allegations  
17 that are facially plausible and that allow the Court to draw reasonable inferences that the  
18 defendant is liable for the misconduct alleged.

19 The allegations of fraud raised by plaintiff are simply not plausible claims for relief.  
20 Plaintiff alleges that terms of the loan were misrepresented and concealed, that he was prevented  
21 from reading the loan before signing, and that his income was misrepresented in the loan  
22 application documents. However, the interest rate and other loan terms were written on the loan  
23 documents, had he bothered to read them. Plaintiff claims that he was prevented from reading  
24 them. However, he was the one who picked them up, took them to a notary, and signed them. No  
25 representative of Defendant was present. Thus, it isn't plausible that Defendant prevented  
26 Plaintiff from reading the documents in his possession. Furthermore, though he claims his  
27 income and assets were falsified on the loan application, he signed the application with that  
28 allegedly false information. Everything that he claims was fraudulently misrepresented or

1 concealed was right there in his loan application and loan documents. A person who knows the  
2 true facts cannot be said to have reasonably relied on a misstatement of those facts. *Ostayan v.*  
3 *Serrano Reconveyance Co.*, 77 Cal.App.4th 1411 (2000).

4 The claims for intentional misrepresentation, the fourth cause of action, and for  
5 concealment, the fifth cause of action, are also fraud based. And, for the same reasons as the  
6 Court's reasons for dismissing Count 3 and the other fraud based claims, these claims, Counts 4  
7 and 5, are dismissed.

8 Count 6 is a claim under the California Business and Professions Code Section 17200, et  
9 seq., unfair business practice. To bring a claim under this section of unfair business practice, the  
10 plaintiff must allege some other violation that constitutes an unfair practice. Again, Plaintiff's  
11 claim is based on alleged fraudulent behavior by Defendant. Accordingly, just as all the fraud  
12 claims fail, this claim fails as well, and it is dismissed.

13 Count 7 is breach of fiduciary duty. The elements of this claim are: The existence of a  
14 fiduciary duty, a breach of that fiduciary duty, and resulting damage. *Pellegrini vs. Weiss*, 165  
15 Cal.App.4th 515 (2008). In the lending context, financial institutions owe no duty of care to a  
16 borrower when the institution's involvement in the loan transaction does not exceed the scope of  
17 its conventional role as a mere lender of money. *Nymark vs. Heart Federal Savings & Loan*  
18 *Association*, 231 Cal.App.3d 1089 (1991). Although California law imposes a fiduciary duty on a  
19 mortgage broker, no such duty is imposed on a lender. *Price vs. Wells Fargo Bank*, 213  
20 Cal.App.3d 465 (1989). That case holds that a debt is not a trust, and there is not a fiduciary  
21 relationship between the debtor and creditor as such. The same principle should apply with even  
22 greater clarity to the relationship between a bank and its loan customers. Defendant Countrywide  
23 is a lender, not a broker. Plaintiff argues that Defendant was acting like a mortgage broker, which  
24 isn't plausible since a broker is hired to negotiate with the lender. And, here, Plaintiff did not hire  
25 Defendant to negotiate with itself. This claim is dismissed.

26 In Count 8, Plaintiff raises a fraud in the execution allegations; namely, that the deed of  
27 trust and promissory note were not proper, and that he was misled and did not realize this at the  
28 time he signed them. He argues that he did not realize that the deed of trust contained payment

1 terms or created a legal relationship with Mortgage Electronic Registration Systems, and that he  
2 didn't realize that the note was a note. Again, the terms are contained in the documents, which  
3 are clearly labeled, and which he signed. Fraud allegations can be contradicted by judicially  
4 noticeable documents, and the Court has taken judicial notice of these documents. If Plaintiff had  
5 bothered to read the documents, he would have known about the terms, and he can't plausibly  
6 claim that he didn't understand what he was signing because he is a broker himself. This general  
7 claim of fraud fails for the same reason as the other fraud based claims and is dismissed.

8 Count 9 is a cause of action to void the contract. This claim is based on the same flawed  
9 theory about the terms of the deed of trust and promissory note which the Court previously  
10 discussed. And that claim failed, as does this one, and is dismissed.

11 Count 10 is a claim to void and cancel the deed of trust. This is, again, based on fraud  
12 and suffers from the same defect as the other fraud claims in this FAC, and it also is dismissed.

13 Count 11 is for slander of title. In this claim, Plaintiff alleges that Defendant slandered  
14 the property title by recording a notice of default. This, however, is a privileged act. The  
15 mailing, publication, and delivery of notice as required by this section constitute privileged  
16 communications pursuant to Section 47, citing California Civil Code Section 2924(d)(1). Notice  
17 of default is required by Section 2924(a)(1) and (3), and, hence, it is privileged conduct under  
18 Civil Code Section 47. There is a split in authority as to whether the privilege is absolute or  
19 qualified for nonjudicial foreclosures. However, even if the privilege is only qualified, Plaintiff  
20 must show actual malice on the part of defendant in order to evade the qualified privilege.

21 *Kachlon vs. Markowitz*, 168 Cal.App.4th 316 (2008).

22 Count 12 is to quiet title. But a borrower cannot quiet title without discharging his debt.  
23 The cloud upon title persists until the debt is paid. And, again, Plaintiff's claim for quiet title fails  
24 if, as in this case, he does not allege that he offered to return the principal amount. *Pagtalunan*  
25 *vs. Reunion Mortgage, Inc.*, 2009 W.L. 961995, \*5 (N.D. Cal. Apr. 8, 2009).

26 The FAC fails to allege Plaintiff offered to tender borrowed amounts or has the ability to  
27 so tender, and, therefore, this claim should be dismissed.

28

1 For all the reasons stated by the Court, the First Amended Complaint and each and every  
2 cause of action set forth therein is dismissed with prejudice. The motion to dismiss is granted in  
3 its entirety with prejudice.

4 IT IS SO ORDERED.

5 DATED: January 28, 2010

/s/ John A. Mendez  
United States District Court Judge

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8 Approved As To Form:

9  
10 /S/ Reuben L. Nocos  
11 Reuben L. Nocos, Esq.  
Attorney for Plaintiff

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