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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Lida Cestro, through her guardian)  
Dominick Cestro, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LNV Corporation, a Nevada corporation, )  
et al., )  
 )  
Defendant. )  
 )  
 )  
 )

No. CV10-1507-PHX-NVW  
**ORDER AND OPINION**  
Re: Motion at Doc. 26

Before the Court is Defendant LNV Corporation’s Motion for Judgment on the Pleadings (Doc. 26), Plaintiff’s Response to Defendant’s Motion (Doc. 29), and Defendant’s Reply in Support of its Motion. (Doc. 33.) For the reasons stated below, the Court will grant Defendant’s motion to the extent it seeks dismissal of Defendant LNV Corporation with respect to Counts I and II of Plaintiff’s complaint.<sup>1</sup> Plaintiff will be granted leave to amend her complaint.

**I. Background**

On a motion under Federal Rule of Procedure 12(c), the Court takes all material allegations of the nonmoving party as true and construes the pleadings in the light most

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<sup>1</sup>Count III of Plaintiff’s complaint is directed only at Defendant Lender Services Direct, Inc., and accordingly is not discussed in this Order.

1 favorable to the nonmoving party. *Doyle v. Raley's, Inc.*, 158 F.3d 1012, 1014 (9th Cir.  
2 1998). The facts stated here represent the allegations in the complaint and are assumed to  
3 be true for purposes of this motion.

4 Plaintiff is Ms. Lida Cestro, an elderly woman with a residence at 4216 North 85<sup>th</sup>  
5 Drive, Phoenix, Arizona.<sup>2</sup> Ms. Cestro obtained a loan encumbering her residence in the  
6 amount of \$150,000.00 through Defendant Lender Services Direct, Inc. in December 2005.  
7 Lender Services Direct and its agent, Brandon Sanz, made false representations regarding  
8 Ms. Cestro's abilities to pay the loan and forged other documents to indicate that Ms. Cestro  
9 owned or was employed by an auto body shop. At the time the loan was obtained,  
10 Ms. Cestro had been deemed legally incapacitated for more than a year and was under the  
11 guardianship of the Maricopa County Public Fiduciary. (Doc. 29.) In May 2006,  
12 Ms. Cestro's son, Dominick Cestro, was appointed as Ms. Cestro's successor guardian.

13 Ms. Cestro made regular payments on the loan, although she alleges the payments  
14 were mishandled by the loan servicing company. In March 2008, Ms. Cestro's loan was  
15 assigned by Mortgage Electronic Registration System, Inc. (hereinafter "MERS") to  
16 Defendant LNV Corporation. The servicing of the loan was also transferred between GMAC  
17 Mortgage, Inc. and MGC Mortgage, Inc. in 2008. In October 2008, GMAC began debt  
18 collection efforts with respect to the loan on behalf of LNV Corporation for the \$5,321.36  
19 it alleged Plaintiff was in default. GMAC also notified Plaintiff that it would complete a full  
20 audit of Plaintiff's account to ensure that she had been given proper credit for all transactions  
21 on her loan since July 2008. In December 2008, GMAC notified Plaintiff that it was  
22 initiating a foreclosure action on her home.

23 In January 2009, Defendant Executive Trustee Services, LLC, was substituted as a  
24 trustee under the deed of trust; as trustee, Executive Trustee Services recorded a Notice of

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26 <sup>2</sup>Plaintiff is referred to as an eighty-five-year-old woman in the pleadings, but it is unclear  
27 whether she was eighty-five years old in 2005, when the loan was initially obtained, or  
28 whether she is currently eighty-five years old.

1 Trustee’s Sale scheduling Plaintiff’s property to be sold on May 11, 2009. In February 2009,  
2 Plaintiff provided GMAC with proof of her 2008 mortgage payments and explained her  
3 economic hardship. On May 1, 2009, Plaintiff requested injunctive relief in Maricopa  
4 County Superior Court to prevent the sale of her residence; that court entered a Stipulated  
5 Order enjoining the sale on October 29, 2009. Executive Trustee Services again scheduled  
6 a trustee’s sale of Plaintiff’s residence for July 21, 2010.

7 Plaintiff filed this complaint in Maricopa County Superior Court on July 6, 2010; the  
8 case was then removed to federal court on the basis of diversity jurisdiction on July 16, 2010.  
9 (Doc. 1.) Defendants LNV Corporation and MGC Mortgage, Inc. stipulated to enjoin the  
10 trustee’s sale on July 19, 2010 (Doc. 7). This Court issued an order enjoining the trustee’s  
11 sale on July 20, 2010. (Doc. 10.) Defendants LNV Corporation and MGC Mortgage, Inc.  
12 answered Plaintiff’s complaint on September 13, 2010. (Doc. 22.) Defendants LNV  
13 Corporation and MGC Mortgage, Inc. moved for judgment on the pleadings pursuant to  
14 Rule 12(c) of the Federal Rules of Civil Procedure to dismiss Plaintiff’s complaint, which is  
15 now before the Court.<sup>3</sup> (Doc. 26.)

16 **II. Legal Standard**

17 “After the pleadings are closed but within such time as not to delay the trial, any party  
18 may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). Because “Rules 12(b)(6)  
19 and 12(c) are substantially identical[,],” *Strigliabotti v. Franklin Resources, Inc.*, 398 F. Supp.  
20 2d 1094, 1097 (N.D. Cal. 2005), a motion for judgment on the pleadings is assessed under the  
21 standard applicable to a motion to dismiss for failure to state a claim upon which relief may  
22 be granted under Rule 12(b)(6). *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980).  
23 In ruling on a Rule 12(c) motion, a court must “determine whether the facts alleged in the  
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25 <sup>3</sup>Plaintiff stipulated to the dismissal of five of the seven defendants named in her complaint,  
26 including MGC Mortgage, Inc. (Doc. 29.) Those five defendants were dismissed in this  
27 Court’s October 15, 2010 order. (Doc. 30.) Defendant Lender Services Direct, Inc. has not  
28 yet made an appearance in this litigation.

1 complaint, to be taken for [the purposes of a Rule 12(c) motion] as true, entitle the plaintiff  
2 to a legal remedy.” *Strigliabotti*, 398 F. Supp. 2d at 1097. “If the complaint fails to articulate  
3 a legally sufficient claim, the complaint should be dismissed or judgment granted on the  
4 pleadings.” *Id.* A Rule 12(c) motion is thus properly granted when, taking all the allegations  
5 in the pleading as true, the moving party is entitled to judgment as a matter of law.  
6 *Knappenberger v. City of Phoenix*, 566 F.3d 936, 939 (9th Cir. 2009).

### 7 **III. Analysis**

8 Plaintiff seeks both declaratory and injunctive relief against Defendant LNV  
9 Corporation. However, Plaintiff’s complaint does not allege any wrongdoing on Defendant  
10 LNV Corporation’s part, nor has Plaintiff provided any legal basis on which the Court could  
11 issue a declaratory judgment that Defendant LNV Corporation does not have any legal interest  
12 in the loan note or deed of trust, or that the loan documents now held by Defendant LNV are  
13 unenforceable.

#### 14 **A. Count I for Declaratory Relief**

15 First, the only apparent claims of wrongdoing contained in Plaintiff’s complaint are  
16 directed toward Defendant Lender Services Direct. Plaintiff claims that Lender Services  
17 Direct and its agent, Brandon Sanz, falsified information on Plaintiff’s loan application and  
18 made various misrepresentations regarding the loan in 2005, when the loan was first obtained.  
19 (Doc. 1.) Defendant LNV Corporation only obtained an interest in the note in 2008, long after  
20 any alleged fraud was purported to have been committed. Plaintiff has therefore failed to  
21 state a claim against LNV Corporation, as she has not alleged wrongful conduct on LNV  
22 Corporation’s part that violated Plaintiff’s rights or caused her any injury.

23 To the extent the complaint raises a claim for fraud against Defendant Lender Services  
24 Direct that could support declaratory relief against Defendant LNV Corporation, Plaintiff has  
25 failed to plead fraud with the necessary particularity required by Rule 9(b) of the Rules of  
26 Civil Procedure. To satisfy Rule 9(b), a complaint must state the time, place, and specific  
27 content of the false representations and the identities of the parties to the misrepresentation.  
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1 *See Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106 (“Averments of fraud must be  
2 accompanied by the who, what, when, where, and how of the misconduct charged.”). Plaintiff  
3 has alleged that false representations were made regarding her income and employment but  
4 she has not indicated whether anyone relied on the truth of those representations and was  
5 entitled to do so. Plaintiff has also not adequately pled injury resulting from those  
6 representations. Plaintiff has therefore not adequately pled facts supporting all nine elements  
7 of fraud under Arizona law. *See Wagner v. Casteel*, 136 Ariz. 29, 31, 663 P.2d 1020, 1022  
8 (1983) (listing essential elements of fraud claim under Arizona law).

9 Defendant LNV Corporation argues in its reply brief that Plaintiff’s fraud claims are  
10 time-barred. Because this argument was not raised in defendant’s motion, the court will not  
11 rule on its substance. However, the court notes that A.R.S. § 12-543(3) sets a three-year  
12 statute of limitations for claims sounding in fraud. Plaintiff has not claimed that the alleged  
13 fraud was discovered sometime after its 2005 occurrence or asserted any basis for tolling.  
14 Plaintiff’s alleged incapacity could provide such a basis. *See Schreiber v. Distrib. Co. v. Sery-*  
15 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (noting leave to amend should be  
16 granted unless no other facts could possibly cure complaint’s deficiencies).

17 With respect to the various other legal theories asserted by Plaintiff, none provides a  
18 basis for this Court to declare that Defendant LNV Corporation does not have a legal interest  
19 in the loan note or deed of trust. Plaintiff argues that the underlying promissory note and deed  
20 of trust are voidable because Ms. Castro was legally incapacitated at the time the original loan  
21 transaction occurred. However, even if the Court were to find that the loan was void due to  
22 Ms. Castro’s incapacity, the equitable remedy of rescission would require Ms. Castro to tender  
23 the loan proceeds to Defendant LNV Corporation. *See Jennings v. Lee*, 105 Ariz. 167, 171,  
24 461 P.2d 161, 165 (1969) (“The general rule is that a party seeking to rescind a contract must  
25 restore or offer to restore to the other party that which he has received under the contract.”).  
26 Plaintiff states in her response that she is no longer in possession of the loan proceeds.  
27 Rescission is therefore unavailable. *See Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171  
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1 (9th Cir. 2003); *see also Dool v. First Nat'l Bank of Calxico*, 278 P. 233 (1929) (finding that  
2 a decedent's estate must repay bank proceeds of a loan executed by decedent when loan was  
3 later declared void due to decedent's incapacity at the time of execution).

4 Plaintiff maintains that she is not seeking to rescind the loan, but rather to have it  
5 declared unenforceable. Plaintiff's argument is without merit. Plaintiff cites to A.R.S. § 47-  
6 3305(A)—a UCC section dealing with the enforceability of negotiable instruments. However,  
7 Plaintiff “does not cite, nor is the court aware of, any controlling authority providing that the  
8 cited UCC section applies in non-judicial foreclosure proceedings in Arizona.” *Diessner v.*  
9 *Mortg. Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009).

10 **B. Count II for Injunctive Relief**

11 To the extent that Plaintiff's complaint seeks to enjoin the trustee's sale that was  
12 scheduled for July 21, 2010, that claim is moot; the pending trustee's sale was already  
13 enjoined by agreement of the parties and this Court's order. (Docs. 7, 10.) To the extent that  
14 Plaintiff's complaint seeks to permanently enjoin Defendant LNV Corporation from  
15 conducting any sale under the deed of trust, Plaintiff has not satisfied the requirements for  
16 injunctive relief. A person seeking preliminary injunctive relief “must demonstrate ‘that he  
17 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
18 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
19 public interest.’” *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010) (*quoting*  
20 *Winter v. Natural Res. Def. Council, Inc.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 374, 172 L.Ed.2d 249  
21 (2008)). Because Plaintiff's complaint has failed to sufficiently plead a claim against  
22 Defendant LNV Corporation, Plaintiff has not demonstrated that she is likely to succeed on  
23 the merits of her claim. Further, because Plaintiff has obtained the benefit of the loan and is  
24 not currently fulfilling any obligations under it, the balance of equities do not tip in her favor.  
25 Accordingly, the Court grants Defendant LNV Corporation's motion with respect to Count II.

1 IT IS THEREFORE ORDERED that Defendant LNV Corporation's Motion for  
2 Judgment on the Pleadings is granted to the extent it seeks dismissal of Defendant LNV  
3 Corporation with respect to Counts I and II of Plaintiff's complaint.

4 IT IS FURTHER ORDERED that Plaintiff is given leave to amend her complaint by  
5 **December 13, 2010**. If no amended complaint is filed by **December 13, 2010**, the Clerk shall  
6 enter judgment dismissing this action with prejudice as to Defendant LNV Corporation.

7 DATED this 9<sup>th</sup> day of November 2010.

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/s/ JOHN W. SEDWICK  
UNITED STATES DISTRICT JUDGE