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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**DELIA MAYNEZ and ARTURO
MAYNEZ,**)
)
Plaintiffs,)
)
v.)
)
ELIZABETH GARZA, CALEB J. KHAN,)
SUMMERFIELD MORTGAGE &)
REALTY, AMERICA’S WHOLESAL)
LENDER, and JOSE MORENO, and)
DOES 1 through 50, inclusive,)
)
Defendants.)
_____)

CIV-F-09-1422 AWI SMS

**ORDER REMANDING CASE TO
THE SUPERIOR COURT, COUNTY
OF FRESNO**

I. History¹

Plaintiffs Delia and Arturo Maynez live at 13401 East Ann Avenue in Parlier, CA. Plaintiffs refinanced the mortgage on their house. Defendant Countrywide Home Loans, doing business as America’s Wholesale Lender (“Countrywide”), was the lender on that transaction. Defendant Summerfield Mortgage & Realty (“Summerfield”) was the mortgage broker. Summerfield was owned by Defendant Caleb J. Khan. Defendant Elizabeth Garza was the loan processor. Defendant Jose Moreno was the notary public who notarized the refinancing

¹The factual history is provided for background only and does not form the basis of the court’s decision; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 documents. In discussing the deal, Defendant Garza promised Plaintiffs that they could refinance
2 at a rate of 6.5%. Plaintiffs signed the refinancing documents on April 20, 2006. Plaintiffs
3 discovered one year later that their interest rate had increased to 8.2%; they had an adjustable rate
4 mortgage. Looking through the documents, Plaintiffs found signatures and initials that were
5 forged. Plaintiffs contacted the Parlier Police Department. Investigation revealed that the
6 documents were notarized by Defendant Moreno outside of Plaintiffs' presence.

7 Plaintiffs filed suit in Superior Court, County of Fresno on October 17, 2008, alleging
8 eight causes of action: (1) violation of the Truth in Lending Act ("TILA"), (2) predatory lending,
9 (3) breach of fiduciary duty, (4) fraud and forgery, (5) violation of Cal. Bus. & Prof. Code
10 §17200, (6) intentional infliction of emotional distress, (7) negligent infliction of emotional
11 distress, and (8) conspiracy. Defendants removed the case to federal court based on federal
12 question jurisdiction over the TILA claim. Countrywide then filed a motion to dismiss to which
13 Plaintiffs filed no opposition. The matter was taken under submission without oral argument.

14 15 **II. Legal Standards**

16 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
17 plaintiff's "failure to state a claim upon which relief can be granted." A dismissal under Rule
18 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient
19 facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
20 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
21 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
22 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
23 of action will not do. Factual allegations must be enough to raise a right to relief above the
24 speculative level, on the assumption that all the allegations in the complaint are true (even if
25 doubtful in fact)....a well-pleaded complaint may proceed even if it strikes a savvy judge that
26 actual proof of those facts is improbable" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56
27 (2007), citations omitted. "[O]nly a complaint that states a plausible claim for relief survives a
28 motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the

1 Court of Appeals observed, be a context-specific task that requires the reviewing court to draw
2 on its judicial experience and common sense. But where the well-pleaded facts do not permit the
3 court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it
4 has not shown that the pleader is entitled to relief.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
5 (2009), citations omitted. The court is not required “to accept as true allegations that are merely
6 conclusory, unwarranted deductions of fact, or unreasonable inferences.” Sprewell v. Golden
7 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). The court must also assume that “general
8 allegations embrace those specific facts that are necessary to support the claim.” Lujan v. Nat’l
9 Wildlife Fed’n, 497 U.S. 871, 889 (1990), citing Conley v. Gibson, 355 U.S. 41, 47 (1957),
10 overruled on other grounds at 127 S. Ct. 1955, 1969. Thus, the determinative question is
11 whether there is any set of “facts that could be proved consistent with the allegations of the
12 complaint” that would entitle plaintiff to some relief. Swierkiewicz v. Sorema N.A., 534 U.S.
13 506, 514 (2002). At the other bound, courts will not assume that plaintiffs “can prove facts
14 which [they have] not alleged, or that the defendants have violated...laws in ways that have not
15 been alleged.” Associated General Contractors of California, Inc. v. California State Council of
16 Carpenters, 459 U.S. 519, 526 (1983).

17 In deciding whether to dismiss a claim under Rule 12(b)(6), the Court is generally limited
18 to reviewing only the complaint. “There are, however, two exceptions....First, a court may
19 consider material which is properly submitted as part of the complaint on a motion to dismiss...If
20 the documents are not physically attached to the complaint, they may be considered if the
21 documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them.
22 Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.”
23 Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), citations omitted. The Ninth
24 Circuit later gave a separate definition of “the ‘incorporation by reference’ doctrine, which
25 permits us to take into account documents whose contents are alleged in a complaint and whose
26 authenticity no party questions, but which are not physically attached to the plaintiff’s pleading.”
27 Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005), citations omitted. “[A] court may not
28 look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition

1 to a defendant’s motion to dismiss. Facts raised for the first time in opposition papers should be
2 considered by the court in determining whether to grant leave to amend or to dismiss the
3 complaint with or without prejudice.” Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003),
4 citations omitted.

5 The federal removal statute permits the removal from state court to federal court of cases
6 that might have been filed in federal court originally. See 28 U.S.C. §1441(a). “The burden of
7 establishing federal jurisdiction is on the party seeking removal, and the removal statute is
8 strictly construed against removal jurisdiction.” Prize Frize Inc. v. Matrix Inc., 167 F.3d 1261,
9 1265 (9th Cir. 1999). “If at any time prior to judgment it appears that the district court lacks
10 subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. §1447(c). A district court has
11 “a duty to establish subject matter jurisdiction over the removed action *sua sponte*, whether the
12 parties raised the issue or not.” United Investors Life Ins. Co. v. Waddell & Reed, Inc., 360 F.3d
13 960, 967 (9th Cir. 2004). “Thus, the court can, in fact must, dismiss a case when it determines
14 that it lacks subject matter jurisdiction, whether or not a party has a filed a motion.” Page v. City
15 of Southfield, 45 F.3d 128, 133 (6th Cir. 1995). In other words, a district court may remand a
16 removed case *sua sponte* if it determines that it lacks subject matter jurisdiction over the case.
17 See Parker v. Ho Sports Co., 2005 U.S. Dist. LEXIS 37289 at *1 (E.D. Cal. 2005); Knutson v.
18 Allis-Chalmers Corp., 358 F. Supp. 2d 983, 990 (D. Nev. 2005); Tortola Restaurants, L.P. v.
19 Kimberly-Clark Corp., 987 F. Supp. 1186, 1188 (N.D. Cal. 1997); cf. Kelton Arms Condo.
20 Homeowners Ass’n v. Homestead Ins. Co., 346 F.3d 1190, 1192-93 (9th Cir. 2003) (holding that
21 a court may not *sua sponte* remand for procedural defects in removal but noting a distinction
22 between procedural and jurisdictional defects and that a “district court must remand if it lacks
23 jurisdiction”).

24 25 **III. Discussion**

26 This case was removed to federal court because of the TILA claim. Plaintiffs allege
27 “DEFENDANTS, and each of them, violated the provisions of the Federal Truth in Lending Act
28 and Regulation Z under the Act in relation to the above-described transaction by failing to make

1 required disclosures, including but not limited to disclosures related to the finance charges,
2 charging excessive fees, entering into the contract without a good faith belief that Plaintiffs could
3 make the required payments....Plaintiffs [are] entitled to recover from DEFENDANTS, and each
4 of them, twice the amount of the finance charges imposed in connection with the above-
5 mentioned contracts.” Doc. 2, Ex. A, Complaint, at 7:15-24. Generally, TILA “requires creditors
6 to provide borrowers with clear and accurate disclosures of terms dealing with things like finance
7 charges, annual percentage rates of interest, and the borrower’s rights. Failure to satisfy the Act
8 subjects a lender to criminal penalties for noncompliance, as well as to statutory and actual
9 damages traceable to a lender’s failure to make the requisite disclosures, see §1640.” Beach v.
10 Ocwen Fed. Bank, 523 U.S. 410, 412 (1998), citations omitted. “Any action under this section
11 may be brought in any United States district court, or in any other court of competent
12 jurisdiction, within one year from the date of the occurrence of the violation.” 15 U.S.C.
13 §1640(e). The one-year limitations period “runs from the date of consummation of the
14 transaction but...the doctrine of equitable tolling may, in the appropriate circumstances, suspend
15 the limitations period until the borrower discovers or had reasonable opportunity to discover the
16 fraud or non-disclosures that form the basis of the TILA action.” King v. California, 784 F.2d
17 910, 915 (9th Cir. 1986). For purposes of TILA, “consummation” is defined as “the time that a
18 consumer becomes contractually obligated on a credit transaction.” 12 C.F.R. § 226.2(a)(13);
19 Grimes v. New Century Mortg. Corp., 340 F.3d 1007, 1009 (9th Cir. 2003).

20 Countrywide argues that the TILA claim is time-barred. Defendant Garza does not
21 appear to have been served in this case. The other Defendants have filed answers to the
22 complaint. They have all raised statute of limitations as an affirmative defense. See Doc. 13,
23 Moreno Answer, at 8:15-18; Doc. 18, Khan’s and Summerfield’s Answer, at 9:6-10.

24 In this case, Plaintiffs signed the refinancing documents on April 20, 2006. Plaintiffs
25 claim, “It was not until one year later that PLAINTIFFS realized they had been misled and
26 misinformed.” Doc. 2, Ex. A, Complaint, at 4:3-5. That is, it appears that Plaintiffs did not
27 realize that their mortgage was an adjustable rate mortgage until the interest reset after twelve
28 months. Accepting those allegations as true, the statute of limitations might be equitably tolled

1 for one year. Countrywide argues, “Any potential equitable tolling argument is also barred
2 because Plaintiffs specifically allege they discovered the alleged wrongdoing around April 2007
3 (Compl. ¶11), well over a year before the October 2008 lawsuit.” Doc. 12, Countrywide Brief, at
4 4:1-3. Plaintiffs have not filed any opposition to Countrywide’s brief to disagree with the
5 assertion that the statute of limitations has run out. Thus, it is clear that Plaintiffs filed their
6 TILA claim beyond the one-year limitations period.

7 Dismissal of the TILA claim against all Defendants is appropriate. As the remaining
8 claims are all rooted in state law, there is no longer any federal question jurisdiction. “If at any
9 time before final judgment it appears that the district court lacks subject matter jurisdiction, the
10 case shall be remanded.” 28 U.S.C. §1447(c).

11
12 **IV. Order**

13 Plaintiffs’ TILA claim, the first cause of action, is DISMISSED as to all Defendants. The
14 case is REMANDED to the Superior Court, County of Fresno.

15
16 IT IS SO ORDERED.

17 **Dated: May 4, 2010**

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE