

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

RON VINCENT, et al.,

CASE NO. CV F 09-1825 LJO DLB

Plaintiffs,

**ORDER ON DEFENDANT'S F.R.Civ.P. 12
MOTION TO DISMISS**

vs.

(Doc. 5.)

WELLS FARGO BANK,

Defendant.

INTRODUCTION

Defendant Wells Fargo Bank, N.A. ("Wells Fargo"), seeks to dismiss as legally barred plaintiffs Ron Vincent and Susan Vincent's (collectively "plaintiffs") lender liability claims arising from Wells Fargo's failure to inspect plaintiffs' Modesto property ("property") prior to their property purchase with a Wells Fargo loan. Plaintiffs filed no papers to oppose dismissal of their claims. This Court considered Well Fargo's F.R.Civ.P. 12(b)(6) motion to dismiss on the record and VACATES the December 1, 2009 hearing, pursuant to Local Rule 78-230(c), (h). For the reasons discussed below, this Court DISMISSES this action.

BACKGROUND

Plaintiffs are husband and wife and own the property. Plaintiffs' complaint¹ alleges that under the Federal Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Wells Fargo was

¹ Plaintiffs filed their complaint on September 10, 2009 in Stanislaus County Superior Court prior to Wells Fargo's removal to this Court.

1 obligated to inspect and detect deficiencies in the property and which if discovered would provide
2 plaintiffs “with necessary information as to whether it was financially feasible to purchase the Property.”
3 The complaint further alleges that Wells Fargo’s failure to perform the “necessary inspections” resulted
4 in non-disclosure of numerous defects “which, if known, would have affected the desirability and
5 purchase price of the Property” to avoid plaintiffs’ expenditure of “large sums of money to repair the
6 Property.” The complaint suggests that plaintiffs would have invested “their money elsewhere in another
7 property” with inspection and disclosure of deficiencies.

8 DISCUSSION

9 F.R.Civ.P. 12(b)(6) Motion Standards

10 Wells Fargo contends that plaintiffs’ claims are barred by California and federal law to warrant
11 dismissal.

12 A F.R.Civ.P. 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set
13 forth in the complaint. “When a federal court reviews the sufficiency of a complaint, before the reception
14 of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not
15 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to
16 support the claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco*
17 *Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where
18 there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a
19 cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Graehling*
20 *v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995).

21 In resolving a F.R.Civ.P. 12(b)(6) motion, the court must: (1) construe the complaint in the light
22 most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
23 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
24 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required “to accept as
25 true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
26 *In re Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court
27 need not permit an attempt to amend a complaint if “it determines that the pleading could not possibly
28 be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911

1 F.2d 242, 247 (9th Cir. 1990). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does
2 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement
3 to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
4 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554,127 S. Ct. 1955, 1964-65 (2007)
5 (internal citations omitted). Moreover, a court “will dismiss any claim that, even when construed in the
6 light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action.”
7 *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). In practice, “a complaint
8 . . . must contain either direct or inferential allegations respecting all the material elements necessary to
9 sustain recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting
10 *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

11 In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937,1949 (2009), the U.S. Supreme Court recently
12 explained:

13 To survive a motion to dismiss, a complaint must contain sufficient factual
14 matter, accepted as true, to “state a claim to relief that is plausible on its face.” . . . A
15 claim has facial plausibility when the plaintiff pleads factual content that allows the court
16 to draw the reasonable inference that the defendant is liable for the misconduct alleged.

16 . . . Threadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice. (Citation omitted.)

17 With these standards in mind, this Court turns to Wells Fargo’s challenges to plaintiffs’ claims.

18 **California Law – Lender Liability**

19 The complaint alleges that “the duty to inspect” is “an ethical obligation, a legal obligation and
20 a fiduciary obligation.” Wells Fargo notes that under California law, “lenders do not owe their
21 borrowers a duty of care.”

22 ***Legal Duty***

23 “The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2)
24 breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff’s injury.”
25 *Mendoza v. City of Los Angeles*, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998) (citation
26 omitted). “The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to
27 establishing a claim for negligence.” *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d
28 1089, 1095, 283 Cal.Rptr. 53 (1991). “The existence of a legal duty to use reasonable care in a particular

1 factual situation is a question of law for the court to decide.” *Vasquez v. Residential Investments, Inc.*,
2 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 (2004) (citation omitted).

3 “The 'legal duty' of care may be of two general types: (a) the duty of a person to use ordinary care
4 in activities from which harm might reasonably be anticipated [, or] (b) [a]n affirmative duty where the
5 person occupies a particular relationship to others. . . . In the first situation, he is not liable unless he is
6 actively careless; in the second, he may be liable for failure to act affirmatively to prevent harm.”
7 *McGettigan v. Bay Area Rapid Transit Dist.*, 57 Cal.App.4th 1011, 1016-1017, 67 Cal.Rptr.2d 516
8 (1997).

9 There is no actionable duty between a lender and borrower in that loan transactions are arms-
10 length. A lender “owes no duty of care to the [borrowers] in approving their loan. Liability to a
11 borrower for negligence arises only when the lender ‘actively participates’ in the financed enterprise
12 ‘beyond the domain of the usual money lender.’” *Wagner v. Benson*, 101 Cal.App.3d 27, 35, 161
13 Cal.Rptr. 516 (1980) (citing several cases). “[A]s a general rule, a financial institution owes no duty of
14 care to a borrower when the institution's involvement in the loan transaction does not exceed the scope
15 of its conventional role as a mere lender of money.” *Nymark*, 231 Cal.App.3d at 1096, 283 Cal.Rptr.
16 53.

17 “Public policy does not impose upon the Bank absolute liability for the hardships which may
18 befall the [borrower] it finances.” *Wagner*, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516. The success of
19 a borrower’s investment “is not a benefit of the loan agreement which the Bank is under a duty to
20 protect.” *Wagner*, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516 (lender lacked duty to disclose “any
21 information it may have had”).

22 The complaint alleges no facts of Wells Fargo’s cognizable duty to plaintiffs to support a
23 negligence claim. “No such duty exists” for a lender “to determine the borrower's ability to repay the
24 loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for
25 the lender's protection, not the borrower's.” *Renteria v. United States*, 452 F.Supp.2d 910, 922-923 (D.
26 Ariz. 2006) (borrowers “had to rely on their own judgment and risk assessment to determine whether
27 or not to accept the loan”). The complaint lacks facts of special circumstances to impose duties on Wells
28 Fargo in that the complaint depicts an arms-length loan transaction, nothing more. The complaint fails

1 to substantiate a special lending relationship or an actionable breach of duty to substantiate a negligence
2 claim.

3 ***Fiduciary Duty***

4 Wells Fargo argues that since it “simply loaned plaintiffs the money” to buy the property it is
5 subject to no fiduciary duty.

6 “[T]o plead a cause of action for breach of fiduciary duty, there must be shown the existence of
7 a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any
8 one of these elements is fatal to the cause of action.” *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1101, 3
9 Cal.Rptr.2d 236 (1991).

10 “The relationship between a lending institution and its borrower-client is not fiduciary in nature.”
11 *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1093, n. 1, 283 Cal.Rptr. 53 (1991)
12 (citing *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476-478, 261 Cal.Rptr. 735 (1989)). A
13 commercial lender is entitled to pursue its own economic interests in a loan transaction. *Nymark*, 231
14 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53(citing *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67, 248
15 Cal.Rptr. 217 (1988)).

16 Absent “special circumstances” a loan transaction is “at arms-length and there is no fiduciary
17 relationship between the borrower and lender.” *Oaks Management Corp. v. Superior Court*, 145
18 Cal.App.4th 453, 466, 51 Cal.Rptr.3d 561 (2006) (“the bank is in no sense a true fiduciary”); *see*
19 *Downey v. Humphreys*, 102 Cal.App.2d 323, 332, 227 Cal.Rptr. 484 (1951) (“A debt is not a trust and
20 there is not a fiduciary relation between debtor and creditor as such.”). “[A]s a general rule, a financial
21 institution owes no duty of care to a borrower when the institution's involvement in the loan transaction
22 does not exceed the scope of its conventional role as a mere lender of money.” *Nymark*, 231 Cal.App.3d
23 at 1096, 283 Cal.Rptr. 53.

24 The complaint alleges no facts to support a fiduciary relationship. The complaint’s mere
25 reference to “fiduciary obligation” is insufficient to impose a fiduciary relationship on Wells Fargo.

26 **Federal Law – FIRREA**

27 Wells Fargo notes that the only section of FIRREA upon which plaintiffs could rely is 12 U.S.C.

28 ///

1 § 3331,² which requires qualified written appraisals in certain transactions, and Federal Deposit
2 Insurance Corporation (“FDIC”) regulations. Wells Fargo contends that the FDIC regulations do not
3 require inspections per se in that “they require qualified appraisals by someone not affiliated with the
4 lender.” Wells Fargo continues that even assuming that an appraisal required a duty to inspect, such duty
5 falls on the appraiser, not Wells Fargo.

6 Wells Fargo notes that the FDIC regulations do not provide for a private right of action. Wells
7 Fargo points to the enforcement mechanism of 12 C.F.R. § 323.7, which provides:

8 Institutions and institution-affiliated parties, including staff appraisers and fee
9 appraisers, may be subject to removal and/or prohibition orders, cease and desist orders,
10 and the imposition of civil money penalties pursuant to the Federal Deposit Insurance
11 Act, 12 U.S.C. 1811 et seq., as amended, or other applicable law.

11 “Like substantive federal law itself, private rights of action to enforce federal law must be created
12 by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511 (2001).

13 Wells Fargo concludes that the purpose of 12 U.S.C. § 3331 and FDIC regulations is to “rein in
14 irresponsible lending which had caused huge losses to FDIC, not to protect borrowers who made unwise
15 investments.”

16 No apparent federal statute or regulation imposes on Wells Fargo duties which the complaint
17 alleges. This Court construes plaintiffs’ failure to oppose dismissal as their concession of the absence
18 of a federal claim against Wells Fargo. In the absence of supporting law, plaintiffs lack a FIRREA or
19 other federal claim against Wells Fargo.

20 **CONCLUSION AND ORDER**

21 For the reasons discussed above, this Court:

- 22 1. DISMISSES with prejudice this action against Wells Fargo;

23
24 ² 12 U.S.C. § 3331 provides:

25 The purpose of this chapter is to provide that Federal financial and public policy interests in real estate
26 related transactions will be protected by requiring that real estate appraisals utilized in connection with
27 federally related transactions are performed in writing, in accordance with uniform standards, by
28 individuals whose competency has been demonstrated and whose professional conduct will be subject
to effective supervision.

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

2. DIRECTS the clerk to enter judgment in favor of Wells Fargo Bank, N.A., and against plaintiffs Ron Vincent and Susan Vincent; and
3. FURTHER DIRECTS the clerk to close this action.

IT IS SO ORDERED.

Dated: November 18, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE