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

RACHEL PACRAY,	)	No. CV-F-09-1942 OWW/GSA
	)	
	)	MEMORANDUM DECISION AND
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR RECONSIDERATION
vs.	)	(Doc. 37)
	)	
SHEA MORTGAGE, INC., et al.,	)	
	)	
Defendants.	)	
	)	

By Memorandum Decision and Order filed on April 23, 2010, (April 23 Memorandum Decision, Doc. 31), Defendants' motions to dismiss the First Amended Complaint were granted as to the First, Second and Third Causes of Action with prejudice and without leave to amend. The motions to dismiss were granted with leave to amend as to the Fourth Cause of Action. The Fourth Cause of Action was captioned "Cancellation of Instrument" and alleged:

54. A written instrument that purports to be a Deed of Trust executed by plaintiff is presently in existence and under ALS's control.

1 55. The instrument, although apparently  
2 valid on its face, is voidable in that there  
3 is no enforceable underlying promissory note  
4 for the deed of trust to secure.

5 56. As a result, any obligation owed by  
6 PARCRAY to ALS is not secured by the  
7 underlying real property.

8 57. By this complaint, plaintiffs [sic]  
9 notify ALS of plaintiff's intent to cancel  
10 the deed of trust attached as Exhibit A.

11 In dismissing the Fourth Cause of Action with leave to amend, the  
12 Court ruled:

13 Defendants assert that the allegation that  
14 there is "no enforceable underlying  
15 promissory note for the deed of trust to  
16 secure" is conclusory and contradicted by the  
17 allegation in Paragraphs 5 and 19 that  
18 "Plaintiff purportedly entered into a loan  
19 repayment and security agreement on or about  
20 December 1, 2006 with Defendant SHEA . . . ,  
21 which required Plaintiff to repay a loan of  
22 \$462,550.00 to SHEA" and "Plaintiff is  
23 willing and able to tender the face value of  
24 the note minus equitable set off to the true  
25 holder of the underlying promissory note whom  
26 plaintiff believes to be Shea Mortgage."

It is apparent that Plaintiff's allegation in  
the Fourth Cause of Action is based on the  
premise that the original promissory note  
must be produced before a non-judicial  
foreclosure can proceed. As noted, Plaintiff  
now concedes that this contention is without  
legal merit. See, e.g., *Chilton v. Federal  
Nat. Mortg. Ass'n*, 2009 WL 5197869 (E.D.Cal.,  
Dec. 23, 2009) and cases cited therein.

California Civil Code § 3412 provides:

A written instrument, in respect to  
which there is a reasonable  
apprehension that if left  
outstanding it may cause serious  
injury to a person against whom it  
is void or voidable, may, upon his  
application, be so adjudged, and

1 ordered to be delivered up or  
2 cancelled.

3 Defendants assert that the FAC fails to  
4 establish that the Deed of Trust is void or  
5 voidable, or that the Deed of Trust must be  
6 cancelled to avoid serious injury to  
7 Plaintiff. The foreclosure sale occurred on  
8 July 8, 2009, before this action was  
9 commenced. Therefore, Defendants contend,  
10 Plaintiff is no longer obligated to make  
11 payments under the promissory note or Deed of  
12 Trust. In addition, in order to cancel a  
13 voidable instrument, Plaintiff must restore  
14 to the beneficiary the amounts she borrowed  
15 pursuant to the promissory note and Deed of  
16 Trust. See *Star Pacific Investments, Inc. v.*  
17 *Oro Hills Ranch, Inc.*, 121 Cal.App.3d 447,  
18 457 (1981). Defendants assert that Plaintiff  
19 has not repaid or offered to repay the amount  
20 loaned. See *discussion supra*.

21 The Fourth Cause of Action is DISMISSED WITH  
22 LEAVE TO AMEND to state equitable or legal  
23 grounds for the claim for cancellation of  
24 instrument within the purview of Rule 11,  
25 Federal Rules of Civil Procedure. If  
26 Plaintiff proceeds to amend the Fourth Cause  
of Action, Plaintiff must allege the tender  
of the loan amount or the present ability to  
tender the loan amount.

...

2. Plaintiff shall file a Second Amended  
Complaint within fifteen (15) days of  
electronic service of this Memorandum  
Decision and Order. Failure to timely comply  
will result in the dismissal of this action

....

Plaintiff did not file a Second Amended Complaint and Judgment of  
dismissal was entered on May 27, 2010. (Doc. 36).

On July 28, 2010, Plaintiff, now proceeding *in pro per*,  
filed a Motion for Reconsideration. Plaintiff's motion is  
supported by her declaration:

1 3. I have facts and circumstances which  
2 resulted in this adverse ruling that I would  
3 like the Court to consider in granting this  
4 motion. I was unable to meet the deadline  
5 given to file a second amended complaint due  
6 to the chaos in my personal life. First, I  
7 was dealing with the impending foreclosure of  
8 my home. Second, I was self-represented due  
9 to the fact that I lost my life savings which  
10 I invested in my home and therefore was  
11 unable to afford an attorney.

12 4. I intended on amending my complaint as  
13 instructed by the Court, however the  
14 financial stress I was experiencing along  
15 with looking for a new home unfortunately  
16 consumed all my emotional and physical  
17 energy. I have been adversely affected by  
18 the Court's decision to dismiss all claims  
19 against the Defendants in this case.

20 5. Due to the grave injustice that I would  
21 suffer should I be denied the opportunity to  
22 present my case before the Court, I  
23 respectfully request leave to amend my  
24 complaint and proceed with this case on its  
25 merits.

26 In support of her motion for reconsideration, Plaintiff  
cites and relies on California Code of Civil Procedure § 1008.  
California Code of Civil Procedure has no application to  
Plaintiff's motion because federal courts must apply federal  
procedural rules. See *Clark v. Allstate Ins. Co.*, 106 F.Supp.2d  
1016, 1018-1019 (S.D.Cal.2000). Plaintiff's motion for  
reconsideration is governed by Rule 60(b), Federal Rules of Civil  
Procedure. Rule 60(b) provides:

On motion and just terms, the court may  
relieve a party or its legal representative  
from a final judgment, order, or proceeding  
for the following reasons:

(1) mistake, inadvertence, surprise, or  
excusable neglect;

1 (2) newly discovered evidence that, with  
2 reasonable diligence, could not have been  
3 discovered in time to move for a new trial  
4 under Rule 59(b);

5 (3) fraud (whether previously called  
6 intrinsic or extrinsic), misrepresentation,  
7 or misconduct by the opposing party;

8 (4) the judgment is void;

9 (5) the judgment has been satisfied, released  
10 or discharged; it is based on an earlier  
11 judgment that has been reversed or vacated;  
12 or applying it prospectively is no longer  
13 equitable; or

14 (6) any other reason that justifies relief.

15 Given Plaintiff's declaration, the merits of her motion for  
16 reconsideration is governed by Rule 60(b) (1) and (b) (6) .

17 As noted, Rule 60(b) (1) allows a court to relieve a party  
18 from a final judgment because of "mistake, inadvertence,  
19 surprise, or excusable neglect." Such a motion must be made  
20 within a reasonable time, not more than one year after the  
21 judgment was entered. Here, Plaintiff's motion is timely, but  
22 she fails to establish that her failure to comply with the April  
23 Memorandum Decision was due to mistake, inadvertence, surprise  
24 or excusable neglect. Plaintiff's declaration makes clear that  
25 she did not comply with the April 23 Memorandum Decision because,  
26 due to personal issues, she chose not to do so for personal and  
emotional reasons. Plaintiff's averments that she was unable to  
afford counsel is belied by the fact that she was represented by  
counsel, Marc E. Visenat, throughout the pendency of this  
litigation. No withdrawal of counsel has been sought or ordered

1 after a valid motion to withdraw counsel of record. Her averment  
2 that she was unable to comply with the April 23 Memorandum  
3 Decision because she was dealing with the "impending foreclosure"  
4 of her home is contradicted by the fact, admitted at the hearing  
5 on the motions to dismiss, that Plaintiff's home had been  
6 foreclosed on July 8, 2009, before Plaintiff commenced this  
7 action on August 24, 2009 in the Stansilaus County Superior  
8 Court.

9 "A motion brought under Rule 60(b)(6) must be based on  
10 grounds other than those listed in the preceding clauses ...  
11 Clause 60(b)(6) is residual and 'must be read as being exclusive  
12 of the preceding clauses.' In addition, the clause is reserved  
13 for "extraordinary circumstances.'" *Lafarge Conseils Et Etudes,*  
14 *S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9<sup>th</sup>  
15 Cir.1986). A party merits relief under Rule 60(b)(6) if he  
16 demonstrates extraordinary circumstances which prevented or  
17 rendered him unable to prosecute his or her case. *Latshaw v.*  
18 *Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1102-1103 (9<sup>th</sup>  
19 Cir.2006); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d  
20 729, 730 (9<sup>th</sup> Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).  
21 The party must demonstrate both injury and circumstances beyond  
22 his control that prevented him from proceeding with the  
23 prosecution or defense of the action in a proper fashion. *United*  
24 *States v. Washington*, 593 F.3d 790, 796-797 (9<sup>th</sup> Cir.2010);  
25 *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049  
26 (9<sup>th</sup> Cir. 1993). Here, Plaintiff has made no such showing. The

1 circumstances she describes in her motion were well within her  
2 control. Further, as noted, the averments in her declaration are  
3 belied by the facts - she was represented by counsel and her home  
4 had already been foreclosed before this litigation was commenced.  
5 Finally, Plaintiff's declaration makes no showing that she can  
6 amend to allege, consistent with Rule 11, Federal Rules of Civil  
7 Procedure, that she can the tender the loan amount or the present  
8 ability to tender the loan amount, a prerequisite to the relief  
9 sought.

10 For the reasons stated, Plaintiff's motion for  
11 reconsideration is DENIED.

12 IT IS SO ORDERED.

13 Dated: July 30, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE