

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHAD DILLON SANDRY,

Plaintiff,

v.

**FIRST FRANKLIN FINANCIAL
CORP., et al.,**

Defendants.

1:10-cv-01923-OWW-SKO

MEMORANDUM DECISION REGARDING
DEFENDANTS' MOTION TO DISMISS
(Doc. 7).

I. INTRODUCTION.

Plaintiff Chad Dillon Sandry ("Plaintiff") proceeds with an action for damages and injunctive relief. Plaintiff filed a complaint in California Superior Court on September 17, 2010, and Defendants removed the action to federal court on October 14, 2010. (Doc. 1).

Defendants First Franklin Financial Corp., Home Loan Services, Inc., and Mortgage Electronic Registration Systems, Inc. ("Defendants") filed a motion to dismiss the complaint on October 21, 2010. (Docs. 7, 8). Defendants also filed a motion to strike portions of the complaint and a request for judicial notice. (Docs. 9, 10, 11).

Plaintiff filed opposition to Defendants' motions on November 22, 2010. (Docs. 12, 13). Defendants filed replies to Plaintiff's

1 opposition on November 29, 2010. (Docs. 14, 15).

2 **II. FACTUAL BACKGROUND.**

3 This action arises out of a loan Plaintiff's obtained for the
4 purchase of their home in or about 2007 ("subject loan"). (Comp. at
5 9). Defendant First Franklin Financial Corp. ("FFFC") was
6 identified as the lender under a promissory note and Deed of Trust
7 for the subject loan. (Comp. at 2). FFFC was also the servicer of
8 the subject loan. (Comp. at 2). Defendant Loan Review
9 Incorporated ("LRI") was Plaintiff's mortgage broker for the
10 subject loan. (Comp. at 2).

11 In 2007, Plaintiffs met with David Hoggett, an employee of
12 LRI. (Comp. at 9). According to the complaint, Hogget submitted a
13 loan application to FFFC that inflated the property value by
14 \$95,000, pursuant to an agreement between FFFC and LRI whereby FFFC
15 would accept applications containing false information. (Comp. at
16 9). "Defendants" also failed to verify Plaintiffs' income. (Comp.
17 at 10). FFFC paid LRI for leading Plaintiffs into a loan for which
18 they did not qualify. (Comp. at 9). The complaint alleges that
19 FFFC and LRI knew that their conduct could cause Plaintiffs to lose
20 their home through foreclosure. (Comp. at 9).

21 "Defendants" told Plaintiffs that the subject loan was in
22 Plaintiffs' "best interests," but knew that it was not. (Comp. at
23 10). Plaintiffs placed trust and confidence in "Defendants."
24 (Comp. at 10). The full terms of the loan were not explained to
25 Plaintiffs, Plaintiffs were not given time to review the loan
26 documents, and Plaintiffs could not understand any of the documents
27 they signed. (Comp. at 10). Plaintiffs were charged a much
28 greater interest rate than promised, and "Defendants" concealed

1 from Plaintiffs that the loan was designed to cause negative
2 amortization to occur and included a stiff prepayment penalty.
3 (Comp. at 19).

4 **III. LEGAL STANDARD.**

5 Dismissal under Rule 12(b)(6) is appropriate where the
6 complaint lacks sufficient facts to support a cognizable legal
7 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
8 Cir.1990). To sufficiently state a claim to relief and survive a
9 12(b)(6) motion, the pleading "does not need detailed factual
10 allegations" but the "[f]actual allegations must be enough to raise
11 a right to relief above the speculative level." *Bell Atl. Corp. v.*
12 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
13 Mere "labels and conclusions" or a "formulaic recitation of the
14 elements of a cause of action will not do." *Id.* Rather, there must
15 be "enough facts to state a claim to relief that is plausible on
16 its face." *Id.* at 570. In other words, the "complaint must contain
17 sufficient factual matter, accepted as true, to state a claim to
18 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.
19 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
20 quotation marks omitted).

21 The Ninth Circuit has summarized the governing standard, in
22 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
23 survive a motion to dismiss, the nonconclusory factual content, and
24 reasonable inferences from that content, must be plausibly
25 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
26 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
27 quotation marks omitted). Apart from factual insufficiency, a
28 complaint is also subject to dismissal under Rule 12(b)(6) where it

1 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
2 where the allegations on their face "show that relief is barred"
3 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
4 910, 166 L.Ed.2d 798 (2007).

5 In deciding whether to grant a motion to dismiss, the court
6 must accept as true all "well-pleaded factual allegations" in the
7 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
8 however, "required to accept as true allegations that are merely
9 conclusory, unwarranted deductions of fact, or unreasonable
10 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
11 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
12 if a district court considers evidence outside the pleadings, it
13 must normally convert the 12(b)(6) motion into a Rule 56 motion for
14 summary judgment, and it must give the nonmoving party an
15 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
16 907 (9th Cir.2003). "A court may, however, consider certain
17 materials-documents attached to the complaint, documents
18 incorporated by reference in the complaint, or matters of judicial
19 notice-without converting the motion to dismiss into a motion for
20 summary judgment." *Id.* at 908.

21 **IV. DISCUSSION.**

22 **A. First Cause of Action: Fraud**

23 Plaintiffs first cause of action is for fraud against FFFC and
24 LRI only. Federal Rule of Civil Procedure 9(b) imposes an elevated
25 pleading standard with respect to fraud claims. Rule 9(b) provides:

26 In alleging fraud or mistake, a party must state with
27 particularity the circumstances constituting fraud or
28 mistake. Malice, intent, knowledge, and other conditions
of a person's mind may be alleged generally.

1 "To comply with Rule 9(b), allegations of fraud must be specific
2 enough to give defendants notice of the particular misconduct which
3 is alleged to constitute the fraud." *Swartz v. KPMG LLP*, 476 F.3d
4 756, 764 (9th Cir. 2007) (internal quotation marks omitted).
5 Allegations of fraud must include the "time, place, and specific
6 content of the false representations as well as the identities of
7 the parties to the misrepresentations." *Id.* (internal quotation
8 marks omitted). The "[a]llegations of fraud must be accompanied by
9 the who, what, when, where, and how of the misconduct charged."
10 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
11 (internal quotation marks omitted). A plaintiff alleging fraud
12 "must set forth more than the neutral facts necessary to identify
13 the transaction. The plaintiff must set forth what is false or
14 misleading about a statement, and why it is false." *Vess v.*
15 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

16 The complaint fails to satisfy Rule 9(b)'s particularity
17 requirement. The only allegations contained in the complaint that
18 approach compliance with Rule 9 concern allegedly false
19 representations made by Hogget, however, the complaint does not
20 contain sufficient factual allegations to permit Hogget's
21 statements to be attributed to Defendants. According to the
22 complaint, Hogget was an employee of LRI, and LRI was *Plaintiffs'*
23 mortgage broker, not the agent of the lender.

24 Plaintiffs' opposition to the motion to dismiss contends that
25 Hoggett was an agent of each Defendant named in the complaint.
26 (Opposition at 3-4). The complaint does not allege facts
27 sufficient to support Plaintiffs' conclusory allegation of agency.
28 An agency relationship exists where a principal authorizes an agent

1 to represent and bind the principal. See Cal. Civ. Code § 2295.
2 California law provides that an agency is either actual or
3 ostensible. Cal. Civ. Code § 2298. "An agency is actual when the
4 agent is really employed by the principal." Cal. Civ. Code § 2299.
5 "An agency is ostensible when the principal intentionally, or by
6 want of ordinary care, causes a third person to believe another to
7 be his agent who is not really employed by him." Cal. Civ. Code §
8 2300. Because a mortgage loan broker is customarily retained by a
9 borrower, generally, a mortgage broker is the borrower's agent.
10 See, e.g., *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 782 (Cal.
11 1979). The complaint fails to allege facts sufficient to support
12 an inference that Hogget was an agent of FFFC.

13 Plaintiff's fraud cause of action against Defendant's does not
14 meet Rule 9's particularity requirement and is DISMISSED, without
15 prejudice. As the complaint is factually deficient, analysis of
16 Defendants' statute of limitations argument is unnecessary.

17 **B. Second Cause of Action: Constructive Fraud**

18 The second cause of action is for constructive fraud.
19 Constructive fraud consists of "any breach of duty which, without
20 an actually fraudulent intent, gains an advantage to the person in
21 fault, or anyone claiming under him, by misleading another to his
22 prejudice, or to the prejudice of anyone claiming under him."
23 *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 981 n.
24 13 (Cal. 1997).¹ "Constructive fraud allows conduct insufficient

25
26 ¹ *Engalla* suggests that, in some circumstances, constructive fraud may be
27 applicable outside the context of a fiduciary relationship. See *id.*
28 ("[constructive fraud] is generally asserted against a fiduciary by one to whom
a fiduciary duty is owed) (emphasis added). As Plaintiffs do not oppose
Defendants' contention that the constructive fraud claim must be dismissed
because no fiduciary relationship is asserted, the court need not speculate on

1 to constitute actual fraud to be treated as such where the parties
2 stand in a fiduciary relationship." *Id.*

3 The complaint does not contain facts sufficient to allege that
4 either FFFC, HLI, or MERS owed Plaintiff a fiduciary duty.
5 "[A]bsent special circumstances...a loan transaction is at arm's
6 length and there is no fiduciary relationship between the borrower
7 and lender." *E.g. Oaks Management Corporation v. Superior Court* 145
8 Cal. App. 4th 453, 466 (Cal. Ct. App. 2006). Plaintiffs'
9 opposition does not dispute Defendants contention that the claim
10 for constructive fraud should be dismissed because the complaint
11 does not allege facts sufficient to support the existence of a
12 fiduciary relationship between Plaintiffs and Defendants. The
13 constructive fraud claim is DISMISSED, without prejudice.

14 **C. Third Cause of Action: Conspiracy to Defraud**

15 The third cause of action alleges conspiracy to defraud
16 Plaintiffs. There is no stand alone cause of action for civil
17 conspiracy recognized by California law. *E.g. Grisham v. Philip*
18 *Morris U.S.A., Inc.*, 40 Cal.4th 623, 632 (Cal. 2007). Allegations
19 of conspiracy must be pled with particularity. Fed. R. Civ. P.
20 9(b). The conclusory allegations of conspiracy advanced in the
21 complaint are insufficient under Rule 9(b). Plaintiffs' opposition
22 does not suggest that the conspiracy claim is sufficient.
23 Plaintiffs' conspiracy claim is DISMISSED, without prejudice.

24 **D. Fourth Cause of Action: Negligence**

25 Plaintiff's fourth cause of action is for negligence against
26 FFFC and LRI only. To prevail in an action for negligence, the

27 _____
28 the meaning of the California Supreme Court's suggestion in *Engalla*.

1 plaintiff must demonstrate that the defendant owed a duty to the
2 plaintiff, that the defendant breached that duty, and that the
3 breach proximately caused the plaintiff's injuries. *E.g. Wiener v.*
4 *Southcoast Childcare Centers, Inc.*, 32 Cal. 4th 1138, 1145 (2004).
5 As a general rule, a financial institution owes no duty of care to
6 a borrower when the institution's involvement in the loan
7 transaction does not exceed the scope of its conventional role as
8 a mere lender of money. *E.g. Nymark v. Heart Fed. Savings & Loan*
9 *Assn.*, 231 Cal. App. 3d 1089, 1096 (Cal. Ct. App. 1991).

10 Plaintiffs contend that the complaint establishes that FFFC
11 owed Plaintiffs a duty of care for two reasons: (1) FFFC acted
12 beyond the traditional scope of a mere lender; and (2) FFFC and
13 Plaintiffs were in a "special relationship" under the six-part test
14 established in *Nymark*. *Id.* at 1098.

15 Plaintiffs argue that FFFC acted beyond the traditional scope
16 of a lender because FFFC knowingly accepted an overstatement of
17 Plaintiffs' income. Plaintiffs cite no legal authority for this
18 proposition, and the complaint does not allege facts to support the
19 allegation that FFFC had reason to know that Plaintiffs' loan
20 application contained false information. Further, accepting
21 Plaintiffs' vague, conclusory allegation as true, the complaint is
22 deficient because it fails to allege how FFFC's acceptance of the
23 income figures *Plaintiffs* provided in their loan application could
24 possibly be the proximate cause of any injury to Plaintiffs.

25 Plaintiffs' invocation of the six-part *Nymark* test is
26 predicated on Plaintiffs' contentions that Defendants forced
27 Plaintiffs into the subject loan, which knowingly placed Plaintiffs
28 into a loan that was destined to fail, and "fraudulently enticed

1 [Plaintiffs] to enter into a loan Defendants knew they could not
2 repay." (Opposition at 7). In *Nymark*, the California Supreme
3 Court suggested that where a lender intends to induce a prospective
4 borrower into a loan by obtaining an appraisal of the borrower's
5 property, or to assure the borrower that her collateral is sound,
6 a duty of care may be imposed. 231 Cal. App. 3d at 1096. Assuming
7 *arguendo* that the conduct Plaintiffs complain of can support a
8 special relationship under *Nymark*, the complaint's conclusory
9 allegations of fraud, conspiracy, and agency are insufficient to
10 properly allege any such conduct on behalf of FFFC. Plaintiffs'
11 negligence claim is DISMISSED, without prejudice.

12 **E. Fifth Cause of Action: UCL Claims**

13 The fifth cause of action asserted in the complaint is for
14 violation of California's Unfair Competition Law (UCL).
15 Plaintiffs' opposition asserts the following basis for the UCL
16 claim: (1) Defendants violated the law by acting negligently,
17 breaching their fiduciary duty, and engaging in fraud; (2)
18 Defendants' agent, Hoggett, engaged in a scheme designed to deceive
19 the public by assuring borrowers that the loans he was extending
20 were the "best available on the market." (Opposition at 11). The
21 complaint does not contain the factual allegations necessary to
22 sustain any of the purported bases for Plaintiffs UCL claim against
23 either FFFC, HLS, or MERS. Plaintiffs' UCL claim is DISMISSED,
24 without prejudice.

25 **F. Sixth Cause of Action: California Civil Code section 2923.5**

26 Plaintiffs' sixth cause of action is for violation of
27 California Civil Code section 2923.5. The basis for Plaintiffs'
28 claim is that "Plaintiffs were never contacted...to assess their

1 financial situation and explore options to avoid foreclosure prior
2 to the date of the Notice of Default's filing." (Opposition at
3 12). However, the complaint fails to allege that a notice of
4 default was issued. Plaintiffs' claim under section 2923.5 is
5 DISMISSED, without prejudice.

6 **G. Seventh Cause of Action: TILA**

7 The seventh cause of action asserts violations of TILA.
8 Plaintiffs opposition does not contest Defendants' contention that
9 Plaintiffs' TILA claims must be dismissed because, among other
10 alleged deficiencies, the claims are time-barred. The absence of
11 opposition justifies the inference the claim is without merit.
12 Plaintiffs' TILA claims are DISMISSED, without prejudice.

13 **H. Eighth Cause of Action: RESPA**

14 The eighth cause of action asserts violations of RESPA.
15 Plaintiffs opposition does not contest Defendants' contention that
16 Plaintiffs' RESPA claims must be dismissed because, among other
17 alleged deficiencies, the claims are time-barred. Plaintiffs'
18 RESPA claims are DISMISSED, without prejudice.

19 **I. Ninth Cause of Action: Rescission and Restitution**

20 The ninth cause of action asserts claims for rescission and
21 restitution. Plaintiff must offer to tender the unpaid loan
22 balance. Plaintiffs opposition does not contest Defendants'
23 contention that Plaintiffs' claims must be dismissed because, among
24 other alleged deficiencies, the claims are time-barred.
25 Plaintiffs' rescission and restitution claims are DISMISSED,
26 without prejudice.

27 ///

28 **J. Tenth Cause of Action: Injunctive and Declaratory Relief**

1 The basis for Plaintiffs' tenth cause of action is the
2 discredited legal theory that only the holder of the note may
3 initiate a foreclosure action. (Comp. at 30-32). The complaint
4 advances no cognizable legal theory sufficient to support any claim
5 for declaratory or injunctive relief. The tenth cause of action is
6 DISMISSED, without prejudice.

7 **ORDER**

8 For reasons stated, IT IS ORDERED:

9 1) Plaintiffs' complaint is DISMISSED in its entirety, without
10 prejudice;

11 2) Defendants' Motion to Strike (Doc. 9) is MOOT;

12 3) Plaintiff shall file an amended complaint within fifteen
13 (15) days of service of the Memorandum Decision. Defendants
14 shall file a response within ten (10) days of service of the
15 amended complaint; and

16 4) Defendants shall submit a form of order consistent with
17 this Memorandum Decision within five (5) days following
18 electronic service of this decision.

19 IT IS SO ORDERED.

20 **Dated: December 10, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE