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

MARSHA KILGORE,)	1:12-CV- 899 AWI SMS
)	
Plaintiff,)	ORDER GRANTING MOTION TO
v.)	DISMISS
)	
WELLS FARGO HOME MORTGAGE,)	ORDER DISMISSING ACTION
REGIONAL TRUSTEE SERVICES)	
CORPORATION, EMMITT LEWIS)	(Document #39)
FRED LACKER,)	
)	
Defendants.)	

BACKGROUND

On May 14, 2012, Plaintiff filed a complaint for damages in the Superior Court for the State of California, County of Fresno. The complaint concerns a loan and deed of trust against property located at 728 East Magill Avenue, Fresno, California 93710 (“the Property). Because the complaint raised causes of action brought under federal law, Defendant Wells Fargo Home Mortgage (“Defendant Wells Fargo”) removed the action to this court. The court dismissed the first amended complaint, and Plaintiff filed a second amended complaint. Defendant Wells Fargo then moved to dismiss the second amended complaint. Plaintiff has not opposed Defendant’s motion.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A

1 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the
2 absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside
3 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729, 732 (9th
4 Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all of the complaint’s material
5 allegations of fact are taken as true, and the facts are construed in the light most favorable to the
6 non-moving party. Marceau v. Balckfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008);
7 Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1999). The court must also assume that general
8 allegations embrace the necessary, specific facts to support the claim. Smith v. Pacific Prop. and
9 Dev. Corp., 358 F.3d 1097, 1106 (9th Cir. 2004). However, while such facts may provide the
10 framework of a complaint, legal conclusions are not accepted as true and “[t]hreadbare recitals of
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
12 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); see also Warren v. Fox Family Worldwide,
13 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). Thus, “a complaint must contain sufficient factual
14 matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 129 S.Ct. at
15 1949. “A claim has facial plausibility when the plaintiff pleads factual content that allows the
16 court draw the reasonable inference that the defendant is liable for the misconduct alleged.”
17 Iqbal, 129 S.Ct. at 1949.

18 DISCUSSION

19 The second amended complaint’s facts allege fraud surrounding the original loan
20 transaction in 2006 and Defendants’ alleged failure to honor Plaintiff’s notice of rescission.
21 Plaintiff alleges that Defendants Emmitt Lewis and Fred Lacker, along with other Defendants,
22 failed to provide Plaintiff with material disclosures required by the Truth in Lending Act
23 (“TILA”) when “explaining the pros and cons” of adjustable rate mortgages in language Plaintiff
24 could comprehend, failing to advise Plaintiff to compare similar loan products, and failing to
25 offer other loan alternatives that might be more advantageous to Plaintiff. In the second amended
26 complaint, Plaintiff alleges that Defendants Emmitt Lewis and Fred Lacker, along with other
27 Defendants, provided Plaintiff with misleading information to create a windfall in violation of
28 the Real Estate Settlement Procedures Act (“RESPA”). Plaintiff also alleges Defendant failed to

1 accept her notice of rescission. Finally, the second amended complaint alleges numerous counts of
2 fraud in violation of California law concerning the events surrounding Plaintiff's agreement to
3 the loan and Plaintiff's attempts in 2006 and 2007 to rescind the loan or seek a modification.

4 Defendant Wells Fargo contends that Plaintiff's TILA, RESPA, a fraud claims are barred
5 by the statute of limitations. As explained in the court's prior orders, there is a one-year statute
6 of limitations period in which an action for damages may be filed under TILA. See 15 U.S.C. §
7 1640(e); Beach v. Olwen Federal Bank, 523 U.S. 410, 412 (1998). A RESPA claim brought
8 under 12 U.S.C. § 2605 is subject to a three year statute of limitations period and a RESPA claim
9 brought under 12 U.S.C. § 2607 and § 2608 is subject to a one year statute of limitations.

10 Plaintiff's remaining claims allege fraud and misrepresentation under California law.
11 "The elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation
12 (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
13 intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."
14 Small v. Fritz Companies, Inc., 30 Cal.4th 167, 173 (2003); Lazar v. Superior Court, 12 Cal.4th
15 631, 638 (1996). The statute of limitations in California for fraud is three years. Cal. Civ. Pro.
16 Code § 338; Solomon v. North American Life and Cas. Ins. Co., 151 F.3d 1132, 1137-38 (9th Cir.
17 1998); General Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991).

18 According to the second amended complaint, Defendants made false statements to
19 Plaintiff that caused her to refinance a loan and sign a deed of trust against the Property in 2006.
20 The second amended complaint alleges the loan application was fabricated, listed the value of her
21 house as higher than it was worth, and inflated Plaintiff's income. Plaintiff alleges that she
22 never signed any loan application documents. The second amended complaint alleges that the
23 day she signed loan papers, Plaintiff was very ill, but told she had to sign the documents. The
24 second amended complaint then explains Plaintiff's repeated attempts to rescind the loan the day
25 after she signed the documents in 2006. The second amended complaint alleges Plaintiff again
26 tried to cancel in 2007 and then began attempting to unsuccessfully refinance her loan. The
27 second amended complaint alleges that from 2007 to 2008 Plaintiff was going through breast
28 cancer reconstruction, and Plaintiff was generally too ill or too heavily medicated to deal with the

1 loan. The second amended complaint makes allegations concerning equitable tolling based on
2 Plaintiff's medical history.

3 The complaint alleges Plaintiff was ill at the time the loan was signed in 2006 and
4 completely unable to litigate matters about the loan from 2007 to 2008. In general, a plaintiff
5 that seeks equitable tolling must establish two elements: (1) that she has been pursuing her rights
6 diligently, and (2) that some extraordinary circumstance stood in her way. Pace v. DiGuglielmo,
7 544 U.S. 408, 418 (2005). The doctrine of equitable tolling is to be applied sparingly. Scholar v.
8 Pac. Bell, 963 F.2d 264, 267-67 (9th Cir. 1992). It would appear Plaintiff's cancer and cancer
9 treatments were an extraordinary circumstance outside her control. However, assuming
10 Plaintiff's illness prevented her from litigating this action until the end of 2008, this action was
11 not filed until four years later, in 2012.

12 The court may also may apply "equitable tolling in situations where, despite all due
13 diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the
14 existence of the claim." Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1045-46
15 (9th Cir. 2011). In this action, Plaintiff knew the basic facts of Defendants' alleged fraud when
16 they convinced Plaintiff to sign the loan documents and Defendants' alleged failure honor
17 Plaintiff's notice to rescind in 2006. While Plaintiff continued to obtain additional evidence
18 confirming that there may have been fraud surrounding the loan until 2008, Plaintiff knew the
19 basic facts supporting her claims far earlier. Even if the court were to not start Plaintiff's statute
20 of limitations until 2008, this action was not filed until 2012.

21 This action is barred by the statute of limitations. Even if the court were to find several
22 years of equitable tolling appropriate, Plaintiff's claims concerning the original loan transaction
23 and the rescission are still barred by the statute of limitations. As Plaintiff has already been
24 allowed to amend the complaint once to allege equitable tolling, no further leave to amend will
25 be given.

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ORDER

Accordingly, the court ORDERS that:

1. The motion to dismiss is GRANTED; and
2. The complaint is DISMISSED;
3. All pending motions are denied as moot; and
4. The Clerk of the Court is DIRECTED to close this action.

IT IS SO ORDERED.

Dated: May 23, 2013



SENIOR DISTRICT JUDGE

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