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

SUVADA MAHMUTOVIC,

Plaintiff,

No. CIV S-08-2166 FCD KJM PS

vs.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., et al.,

Defendant.

FINDINGS AND RECOMMENDATIONS

_____/

Defendants’ motions to dismiss and strike came on regularly for hearing December 10, 2008. No appearance was made for plaintiff, who is proceeding in propria persona. Michael Brooks appeared for defendant Sand Canyon (successor in interest to Option One Mtg); Valerie Brennan appeared for defendants Mortgage Electronic Registration Systems (“MERS”), Chase Home, and U.S. Bank National Association; Martha Pasalaqua appeared for defendant First American Loanstar; and no appearance was made for defendant BNC Mortgage. Upon review of the documents in support and opposition, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AND ORDERS AS FOLLOWS:

In this action, removed from state court on the basis of federal question jurisdiction, plaintiff alleges claims under the Truth in Lending Act (“TILA”), the Real Estate

1 Settlement Procedures Act (“RESPA”), the Homeownership and Equity Protection Act
2 (“HOEPA”), and the Federal Fair Debt Collection Practices Act (“FCDPA”) related to the
3 mortgage for plaintiff’s residence. Plaintiff also alleges state causes of action for breach of
4 implied covenant of good faith and fair dealing, fraud, injunctive relief and declaratory relief.
5 All defendants have moved to dismiss. Motions to strike the punitive damages allegations and
6 plaintiff’s request for attorneys’ fees also are pending.

7 Prior to removal of this action, plaintiff’s action was consolidated with an
8 unlawful detainer action. As discussed below, the court will recommend dismissal of plaintiff’s
9 action. Inasmuch as the only remaining claim will be the unlawful detainer action, which raises
10 only state law issues and is a matter particularly suited to state court adjudication, the court will
11 recommend the unlawful detainer action be remanded under 28 U.S.C. § 1367(c).

12 After being allowed additional time to file opposition to the pending motions to
13 dismiss, plaintiff has filed opposition but addresses only the motions to dismiss insofar as they
14 address the claims under TILA. Plaintiff has not filed any substantive opposition to the motions
15 to dismiss the state claims and failed to appear at the hearing. In the order filed October 30, 2008
16 (docket no. 30), plaintiff was cautioned that failure to file opposition and appear at the hearing
17 would be deemed as a statement of non-opposition and would result in a recommendation that
18 the motions to dismiss be granted. Moreover, defendants’ arguments on the lack of merit in
19 plaintiff’s state law claims are well-taken and amendment appears to be futile. The court will
20 therefore recommend the state law claims be dismissed without leave to amend.

21 Defendants all contend that any federal claims plaintiff has alleged are time-
22 barred. In opposition to the motions to dismiss, plaintiff’s sole argument is that plaintiff is
23 entitled to invoke the equitable doctrine of recoupment and therefore the action is not time-
24 barred. Recoupment can be asserted only as a defense to reduce a plaintiff’s claim. Here,
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1 plaintiff is seeking damages, not a set-off against a claim made by defendants.¹ Recoupment
2 cannot be used to obtain affirmative relief.

3 It is undisputed that plaintiff entered into the mortgage transaction underlying all
4 the alleged claims on January 14, 2005. See Complaint, § 10. The instant action was filed in
5 state court on August 4, 2008. See Complaint (endorsement). The longest statute of limitations
6 for any of the federal claims is three years.² See generally Beach v. Ocwen Federal Bank, 523
7 U.S. 410, 417-19 (1998) (plaintiff cannot assert rescission after three year period provided under
8 TILA, 15 U.S.C. § 1635(f)). The federal claims therefore are time-barred and should be
9 dismissed. Because the entire action should be dismissed, defendants' motions to strike are moot
10 and should therefore be denied on that basis.

11 Accordingly, IT IS HEREBY RECOMMENDED that:

12 1. Defendants' motions to dismiss be granted and the motions to strike be denied
13 as moot.

14 2. The unlawful detainer action (state court no. 08UD04078) be remanded to the
15 Superior Court of California, County of Sacramento.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
21 shall be served and filed within ten days after service of the objections. The parties are advised

22
23 ¹ The subject property was sold at a nonjudicial foreclosure sale on February 27, 2008 to
24 defendant U.S. Bank Nat'l Assoc. Under California law, a nonjudicial foreclosure sale is not an
25 action and no creditor has sued the debtor for any deficiency. See Garretson v. Post, 156
26 Cal.App.4th 1508, 1520 (2007); see also Cal. Civ. Code § 2924; Cal. Code Civ. Proc. § 580a et
seq.

² See 15 U.S.C. §§1640(e), 1635(f) (TILA and HOEPA); 12 U.S.C. §§ 2605, 2607, 2614
(RESPA); 15 U.S.C. § 1692k(d) (FDCPA).

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: January 8, 2009.

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6 U.S. MAGISTRATE JUDGE
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