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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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BEVERLY J. WILSON,
Plaintiff

CIV. NO. S-08-2572 FCD/JFM

v.

MEMORANDUM AND ORDER

FIRST FRANKLIN FINANCIAL
CORP.,
Defendant.

_____ /

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This matter is before the court on the motion of defendant First Franklin Financial Corporation ("defendant" or "First Franklin") to dismiss plaintiff Beverly J. Wilson's ("plaintiff") first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motion. For the reasons set forth below,¹ defendant's motion is GRANTED.

///

¹ Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).

1 **BACKGROUND**

2 Plaintiff brought this action against First Franklin for
3 conduct arising out of two loans which First Franklin provided to
4 plaintiff in order to purchase her home. (Pl.'s First Am.
5 Complaint ("Compl."), filed Feb. 26, 2010, 1:18-19.) On or about
6 April 12, 2007, plaintiff entered into two concurrent loan
7 transactions, totaling \$434,851.77, with defendant. (Id. 1:19-
8 20.) Plaintiff alleges, *inter alia*, that First Franklin failed
9 to provide her with the proper disclosures as required by the
10 federal Truth in Lending Act ("TILA"), giving plaintiff the right
11 to rescind the loans. (Id. ¶ 16-26.) For instance, plaintiff
12 alleges: "Defendant failed to consider that Plaintiff had only
13 made \$9,500.00 in 2006, in violation of 15 U.S.C. § 1639(h)[,]"
14 which "was not enough to cover the property taxes and utilities,
15 let alone maintain a mortgage payment equaling to \$3,702.56 each
16 month for the first 24 months of [the] mortgage with her payments
17 then going to \$4,039.26 for the remaining life of the loan."
18 (Id. ¶ 18, 21.)

19 In her first amended complaint, plaintiff asserts claims
20 for: (1) violation of TILA, 15 U.S.C. §§ 1601 *et seq.*;
21 (2) violation of the Real Estate Settlement Procedures Act
22 ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*; (3) violation of the Home
23 Owners Equity Protection ACT ("HOEPA"); (4) violation of
24 Regulation Z, the regulations implementing TILA; (5) breach of
25 fiduciary duty; (6) violations of California Civil Code
26 §§ 1916.5, 1916.7, 1920, 1921, 2948.5(a), and 2923.5 *et seq.*;
27 (7) violation of California Business and Professions Code
28

1 § 10241.1; (8) real estate fraud; and (9) quiet title.²

2 Defendant moves to dismiss plaintiff's complaint for failure to
3 state cognizable claims.

4 **STANDARD**

5 Under Federal Rule of Civil Procedure 8(a), a pleading must
6 contain "a short and plain statement of the claim showing that
7 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
8 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
9 court, the complaint must "give the defendant fair notice of what
10 the claim is and the grounds upon which it rests." Bell Atlantic
11 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
12 omitted). "This simplified notice pleading standard relies on
13 liberal discovery rules and summary judgment motions to define
14 disputed facts and issues and to dispose of unmeritorious
15 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

16 On a motion to dismiss, the factual allegations of the
17 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
18 322 (1972). The court is bound to give plaintiff the benefit of
19 every reasonable inference to be drawn from the "well-pleaded"
20 allegations of the complaint. Retail Clerks Int'l Ass'n v.
21 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
22 allege "'specific facts' beyond those necessary to state his
23 claim and the grounds showing entitlement to relief." Twombly,
24 550 U.S. at 570. "A claim has facial plausibility when the
25 plaintiff pleads factual content that allows the court to draw

26
27 ² Plaintiff's complaint is not an exemplification of
28 clarity. It contains two twelfth and two eleventh causes of
action, while it does not include a fourth claim for relief at
all.

1 the reasonable inference that the defendant is liable for the
2 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

3 Nevertheless, the court "need not assume the truth of legal
4 conclusions cast in the form of factual allegations." United
5 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
6 Cir. 1986). While Rule 8(a) does not require detailed factual
7 allegations, "it demands more than an unadorned, the defendant-
8 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
9 pleading is insufficient if it offers mere "labels and
10 conclusions" or "a formulaic recitation of the elements of a
11 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
12 1950 ("Threadbare recitals of the elements of a cause of action,
13 supported by mere conclusory statements, do not suffice.").
14 Moreover, it is inappropriate to assume that the plaintiff "can
15 prove facts which it has not alleged or that the defendants have
16 violated the . . . laws in ways that have not been alleged."
17 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
18 of Carpenters, 459 U.S. 519, 526 (1983).

19 Ultimately, the court may not dismiss a complaint in which
20 the plaintiff has alleged "enough facts to state a claim to
21 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949
22 (citing Twombly, 550 U.S. at 570). Only where a plaintiff has
23 failed to "nudge [his or her] claims across the line from
24 conceivable to plausible," is the complaint properly dismissed.
25 Id. at 1952. While the plausibility requirement is not akin to a
26 probability requirement, it demands more than "a sheer
27 possibility that a defendant has acted unlawfully." Id. at 1949.
28 This plausibility inquiry is "a context-specific task that

1 requires the reviewing court to draw on its judicial experience
2 and common sense." Id. at 1950.

3 In ruling upon a motion to dismiss, the court may consider
4 only the complaint, any exhibits thereto, and matters which may
5 be judicially noticed pursuant to Federal Rule of Evidence 201.
6 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th
7 Cir. 1988); Isuzu Motors Ltd. V. Consumers Union of United
8 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

9 **ANALYSIS**

10 **A. Plaintiff's HOEPA Claim and Claims for Rescission Under TILA**
11 **and Regulation Z**

12 Plaintiff's first, third, and fifth claims for relief seek
13 rescission under the TILA, HOEPA, and Regulation Z, respectively.
14 Defendant contends, *inter alia*, that plaintiff's rescission
15 claims must be dismissed because plaintiff's loan was a purchase
16 money mortgage, as opposed to a refinance of an existing
17 mortgage, and is therefore not subject to the rescission remedy.

18 TILA's rescission remedy is found in 15 U.S.C. § 1635, which
19 expressly exempts from its reach "residential mortgage
20 transaction[s]." 15 U.S.C. § 1635(e). Regulation Z contains a
21 similar provision. 12 C.F.R. § 226.23(f)(1). Likewise,
22 explicitly and entirely exempted from the provisions of HOEPA are
23 "residential mortgage transactions." 15 U.S.C. § 1602(aa)(1).
24 A "residential mortgage transaction" is defined as "a transaction
25 in which a mortgage, deed of trust, purchase money security
26 interest arising under an installment sales contract, or
27 equivalent consensual security interest is created or retained
28 against the consumer's dwelling to finance the acquisition or

1 initial construction of such dwelling." 15 U.S.C. § 1602(w).
2 Based on the factual allegations in plaintiff's first amended
3 complaint, it is clear that the loans made from defendant to
4 plaintiff were for the purpose of financing the acquisition of
5 plaintiff's home. Plaintiff admits that she purchased her home
6 with the two mortgages issued by the defendant. (Compl. ¶ 7.)
7 She also admits that this is her primary residence. (Id. ¶ 6.)
8 Plaintiff explicitly states that "[her] First and second
9 Mortgages were not made as a result of refinancing a prior
10 mortgage or mortgages." (Id. ¶ 41.) Because the loans in
11 question meet the definition of a residential mortgage
12 transaction, plaintiff is precluded from bringing claims for
13 rescission under TILA and Regulation Z. Further, plaintiff is
14 entirely barred from seeking damages under HOEPA.

15 As such, defendant's motion to dismiss plaintiff's first
16 (TILA) and fifth (Regulation Z) claims for relief, to the extent
17 they seek rescission of plaintiff's loans, is GRANTED with
18 prejudice. Defendant's motion to dismiss plaintiff's third claim
19 for relief for violation of HOEPA is GRANTED with prejudice.

20 **B. Plaintiff's Claims for Damages under TILA and Regulation Z.**

21 Plaintiff's first and fifth claims for relief also seek
22 damages as a result of defendant's alleged violation of TILA and
23 Regulation Z. Defendant moves to dismiss these claims as time
24 barred by the statute of limitations. TILA violations include
25 the failure to provide the required disclosures mandated by 15
26 U.S.C. § 1631, and the failure to clearly and conspicuously
27 disclose information relating to the "annual percentage rate" and
28 the "finance charge" pursuant to 15 U.S.C. § 1632. To recover

1 damages arising from alleged TILA violations, a plaintiff must
2 file an action to recover damages "within one year from the date
3 of the occurrence of the violation." 15 U.S.C. § 1640(e).
4 However, in certain circumstances, equitable tolling of civil
5 damages claims brought under TILA is appropriate. See King v.
6 State of California, 784 F.2d 910, 915 (9th Cir. 1986). The
7 doctrine of equitable tolling may be appropriate when the
8 imposition of the statute of limitations would be unjust or would
9 frustrate TILA's purpose "to assure a meaningful disclosure of
10 credit terms so that the consumer will be able to . . . avoid the
11 uninformed use of credit." Id. (quoting 15 U.S.C. § 1601(a)).
12 District courts, therefore, have the discretion to evaluate
13 specific claims of equitable tolling and adjust the limitations
14 period accordingly when the borrower may not have had a
15 reasonable opportunity to discover the fraud or nondisclosures
16 that give rise to the TILA action. Id.

17 In this case, plaintiff alleges she consummated the loan on
18 or about April 12, 2007. (Compl. ¶ 11.) Accordingly, as
19 plaintiff did not bring the instant action until October 29,
20 2008, more than one year has passed since the alleged TILA
21 violations. Plaintiff, however, seeks application of the
22 doctrine of equitable tolling. However, the only allegation in
23 the first amended complaint which potentially asserts a factual
24 basis for equitable tolling is found in plaintiff's second claim
25 for relief for violation of RESPA: "Plaintiff was not aware of
26 the RESPA violations until she obtained a forensic loan audit of
27 her two mortgage notes on or about August 15, 2008." (Compl. ¶
28 31.)

1 To the extent plaintiff seeks application of equitable tolling on
2 the basis that she did not discover any disclosure errors until
3 August 2008, plaintiff's claim fails. Plaintiff pleads no facts
4 to explain why she could not otherwise have discovered the TILA
5 violations at the consummation of her loan. "Such factual
6 underpinnings are all the more important . . . since the vast
7 majority of [plaintiff's] alleged violations under TILA are
8 violations that are self-apparent at the consummation of the
9 transaction." Cervantes v. Countrywide Home Loans, Inc., 2009
10 U.S. Dist. LEXIS 87997, at **13-14 (D. Ariz. 2009) (holding that
11 equitable tolling was not appropriate when the plaintiffs simply
12 alleged that the defendants "fraudulently misrepresented and
13 concealed the true facts related to the items subject to
14 disclosure"). Without more factual information regarding why the
15 alleged disclosure violations were not, and could not have been,
16 reasonably discovered until August 2008, the court cannot
17 equitably toll the statute of limitations in this case.

18 As such, First Franklin's motion to dismiss plaintiff's
19 claim for damages as a result of violations of TILA and
20 Regulation Z is GRANTED with leave to amend.

21 **C. Real Estate Fraud**

22 Plaintiff's twelfth claim for relief³ alleges real estate
23 fraud against First Franklin. Because the claim alleges a form
24 of fraud, it is subject to the heightened pleading requirements
25

26 ³ Plaintiff's complaint includes two twelfth causes of
27 action--one for injunctive relief and one for real estate fraud.
28 This section deals only with plaintiff's claim for real estate
fraud. Plaintiff's claim for injunctive relief is discussed in
section E, *infra*.

1 of Fed. R. Civ. P. 9(b). A court may dismiss a claim grounded in
2 fraud when its allegations fail to satisfy Rule 9(b)'s heightened
3 pleading requirements. Vess v. Ciba-Geigy Corp. USA, 317 F.3d
4 1097, 1107 (9th Cir. 2003). Therefore, plaintiff "must state
5 with particularity the circumstances constituting fraud." Fed.
6 R. Civ. P. 9(b). In other words, the plaintiff must include "the
7 who, what, when, where, and how" of the fraud. Id. at 1106
8 (citations omitted). "The plaintiff must set forth what is false
9 or misleading about a statement, and why it is false." Decker v.
10 Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994). The purpose
11 of Rule 9(b) is to ensure that defendants accused of the conduct
12 specified have adequate notice of what they are alleged to have
13 done, so that they may defend against the accusations. Concha v.
14 London, 62 F.3d 1493, 1502 (9th Cir. 1995). "Without such
15 specificity, defendants in these cases would be put to an unfair
16 advantage, since at the early stages of the proceedings they
17 could do no more than generally deny any wrongdoing." Id.
18 (citing Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)).

19 Furthermore, when asserting a fraud claim against a
20 corporation, "the plaintiff's burden . . . is even greater. . . .
21 The plaintiff must 'allege the names of the persons who made the
22 allegedly fraudulent representations, their authority to speak,
23 to whom they spoke, what they said or wrote, and when it was said
24 or written.'" Lazar v. Superior Court, 12 Cal. 4th 631, 645
25 (1996) (quoting Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.
26 App. 4th 153, 157 (1991)); see also Edejer v. DHI Mortgage Comp.,
27 2009 U.S. Dist. LEXIS 52900, at *36 (N.D. Cal. June 12, 2009)
28 (dismissing a fraud claim where the plaintiff did not allege any

1 misrepresentation or false statements made by the defendants; did
2 not allege the names of the persons who made the allegedly
3 fraudulent representations and their authority to speak; and did
4 not allege with sufficient particularity or clarity what was
5 false or misleading about the statements); Mohammad Akhavein v.
6 Argent Mortgage Co., 2009 U.S. Dist. LEXIS 61796, at *10 (N.D.
7 Cal. July 17, 2009); Spencer v. DHI Mortgage Co., 2009 U.S. Dist.
8 LEXIS 55191, at *18 (E.D. Cal. June 30, 2009) (dismissing the
9 plaintiff's fraud claim without leave to amend because it failed
10 to satisfy Rule 9(b)'s "'who, what, when, where and how'
11 requirements" and was so deficient as to "suggest no potential
12 improvement from an attempt to amend").

13 Here, plaintiff fails to meet the heightened pleading
14 requirements of Rule 9(b). Specifically, plaintiff alleges fraud
15 against First Franklin, which is a corporation, but fails to
16 allege who actually made the supposedly false representations or
17 their ability to speak for the corporation. See Lazar, 12 Cal.
18 4th at 645; Tarmann, 2 Cal. App. 4th at 157. For example,
19 plaintiff alleges only that First Franklin "concealed facts
20 relevant to the validity of the property while under a clear
21 duty/obligation to disclose such facts to the Plaintiff[,]" and
22 "Defendants knowingly acted with a total disregard for the truth
23 of the material facts presented in the documents provided to
24 Plaintiff." (Compl. ¶¶ 100, 105.) These allegations do not
25 describe which individuals purportedly took such actions.

26 Therefore, the court must GRANT defendant's motion to
27 dismiss plaintiff's twelfth claim for relief for real estate
28 fraud. However, plaintiff is granted leave to amend with respect

1 to this claim.

2 **D. Quiet Title**

3 Plaintiff's thirteenth claim for relief seeks to quiet title
4 to the property which is the subject of this action. In support
5 of this claim, plaintiff alleges "[she] is the proper owner in
6 fee and is in possession and control of [the] real property."

7 While the court is required on a Rule 12(b)(6) motion to assume
8 the truth of plaintiff's allegations, it is not required to

9 accept allegations that contradict facts that may be judicially

10 noticed by the court. Shwarz v. United States, 234 F.3d 428, 435

11 (9th Cir. 2000). The subject grant deed, recorded on November 3,

12 2008, reflects that plaintiff transferred title to the property

13 to King Solomon II Archbishop Corp Sole. (Def.'s Request for

14 Judicial Notice, [Docket No. 45] filed March 15, 2010, Ex. E

15 [Grant Deed recorded in Sacramento County, California from

16 plaintiff to King Solomon II Archbishop Corp Sole].) Indeed,

17 while plaintiff asserts under this claim for relief that she is

18 the "proper owner in fee" of the property, she admits elsewhere

19 in the complaint that she *transferred* her interest in the

20 property. (Compl. 1:24-26 [alleging plaintiff "transferred title

21 of the house from herself to King Solomon II Archbishop Corp

22 Sole. The title transfer was recorded on or about November 3,

23 2008."].)

24 To proceed on a claim to quiet title, the plaintiff must

25 have a legal interest in the property. Here, by plaintiff's own

26 allegations and considering the subject grant deed, which the

27 court may judicially notice, plaintiff cannot allege a legal

28 interest in the property. See Lechuza Villas West v. California

1 Coastal Com., 60 Cal. App. 4th 218, 242 (1997)(citing Peterson v.
2 Gibbs, 147 Cal. 1, 5 (1905)); see also Melvin v. Melvin, 8 Cal.
3 App. 684, 687-88 (1908) (where the plaintiff no longer had any
4 title to the property, she failed to state a cause of action to
5 quiet title and the demurrer was properly sustained).

6 As such, defendant's motion to dismiss plaintiff's
7 thirteenth claim to quiet title is GRANTED without leave to
8 amend.

9 **E. Plaintiff's Remaining Claims**

10 Plaintiff's first amended complaint contains several
11 additional claims, some based on federal law (RESPA) and others
12 based on state law. Defendant addressed each of the claims set
13 forth in the first amended complaint in its motion to dismiss.
14 Plaintiff, however, addressed in her opposition only those claims
15 set forth above in Sections A through D of this order. The court
16 construes plaintiff's failure to respond to defendant's motion as
17 to the other claims for relief as a non-opposition to the motion
18 as to those claims. See E.D. Cal. L.R. 230(c). Therefore,
19 defendant's motion to dismiss as to plaintiff's RESPA claim and
20 state law claims for breach of fiduciary duty, various violations
21 of the California Civil Code and violation of California Business
22 and Professions Code § 10241.1 is GRANTED without leave to amend.

23 **CONCLUSION**

24 For the foregoing reasons, First Franklin's motion to
25 dismiss is GRANTED. Plaintiff is granted fifteen (15) days from
26 the date of this order to file a second amended complaint in
27 accordance with this order. Defendant is granted thirty (30)
28 days from the date of service of plaintiff's second amended

1 complaint to file a response thereto.

2 IT IS SO ORDERED.

3 DATED: May 25, 2010



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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