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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DAVID L. DAVIS and KAREN A.
DAVIS,

Plaintiffs,

v.

MORTGAGEIT, INC., a subsidiary
of DEUTSCHE BANK SECURITIES,
INC.; HSBC BANK USA, N.A., as
Trustee for MORTGAGEIT
SECURITIES CORPORATION; and
Does 1-10,

Defendants.

_____ /

No. Civ. S-09-3028 FCD/GGH

MEMORANDUM AND ORDER

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This matter is before the court on the motions of defendants
MortgageIT, Inc. ("MortgageIT") and Deutsche Bank Securities,
Inc. ("Deutsche Bank") (collectively "defendants") to dismiss
plaintiffs David and Karen Davis' ("plaintiffs") Second Amended
Complaint ("SAC") pursuant to Federal Rule of Civil Procedure
12(b)(6) and/or to strike certain provisions of the SAC pursuant

1 to Rule 12(f).¹ Plaintiffs oppose the motion. For the reasons
2 set forth below,² defendants' motion to dismiss is GRANTED.

3 **BACKGROUND**

4 As the relevant factual background in this case remains
5 unchanged, the court adopts the factual and procedural background
6 set forth in its order granting defendants' motion to dismiss
7 plaintiff's First Amended Complaint ("FAC"). (Order on FAC
8 ("April 29 Order"), filed April 29, 2010 (Docket # 45)).
9 Plaintiffs have filed a SAC, alleging damages resulting from
10 defendants' violation of the Truth in Lending Act ("TILA"), 15
11 U.S.C § 1601 *et seq.*, and its implementing regulations at 12
12 C.F.R § 226 *et seq.* ("Regulation Z"). Pursuant to this court's
13 April 29 Order, Wells Fargo Bank, America's Servicing Company,
14 and NDEX West are no longer parties to this litigation.

15 **STANDARDS**

16 Under Federal Rule of Civil Procedure 8(a), a pleading must
17 contain "a short and plain statement of the claim showing that
18 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
19 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
20 court, the complaint must "give the defendant fair notice of what
21 the claim is and the grounds upon which it rests." Bell Atl.
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
23 omitted). "This simplified notice pleading standard relies on
24

25 ¹ Because the court grants defendants' motion to dismiss,
26 it does not reach the motion to strike. Said motion is DENIED as
MOOT.

27 ² Because oral argument will not be of material
28 assistance, the court orders these matters submitted on the
briefs. E.D. Cal. L.R. 230(g).

1 liberal discovery rules and summary judgment motions to define
2 disputed facts and issues and to dispose of unmeritorious
3 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

4 On a motion to dismiss, the factual allegations of the
5 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
6 322 (1972). The court is bound to give plaintiff the benefit of
7 every reasonable inference to be drawn from the "well-pleaded"
8 allegations of the complaint. Retail Clerks Int'l Ass'n v.
9 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
10 allege "'specific facts' beyond those necessary to state his
11 claim and the grounds showing entitlement to relief." Twombly,
12 550 U.S. at 570. "A claim has facial plausibility when the
13 plaintiff pleads factual content that allows the court to draw
14 the reasonable inference that the defendant is liable for the
15 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

16 Nevertheless, the court "need not assume the truth of legal
17 conclusions cast in the form of factual allegations." United
18 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
19 Cir. 1986). While Rule 8(a) does not require detailed factual
20 allegations, "it demands more than an unadorned, the defendant-
21 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
22 pleading is insufficient if it offers mere "labels and
23 conclusions" or "a formulaic recitation of the elements of a
24 cause of action." Id. at 1950 ("Threadbare recitals of the
25 elements of a cause of action, supported by mere conclusory
26 statements, do not suffice."); Twombly, 550 U.S. at 555.
27 Moreover, it is inappropriate to assume that the plaintiff "can
28 prove facts which it has not alleged or that the defendants have

1 violated the . . . laws in ways that have not been alleged."
2 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
3 of Carpenters, 459 U.S. 519, 526 (1983).

4 Ultimately, the court may not dismiss a complaint in which
5 the plaintiff has alleged "enough facts to state a claim to
6 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949
7 (citing Bell Atl. Corp., 550 U.S. at 570). Only where a
8 plaintiff has failed to "nudge [his or her] claims across the
9 line from conceivable to plausible," is the complaint properly
10 dismissed. Id. at 1952. While the plausibility requirement is
11 not akin to a probability requirement, it demands more than "a
12 sheer possibility that a defendant has acted unlawfully." Id. at
13 1949. This plausibility inquiry is "a context-specific task that
14 requires the reviewing court to draw on its judicial experience
15 and common sense." Id. at 1950.

16 ANALYSIS

17 Plaintiffs allege defendants violated TILA and Regulation Z
18 by failing to provide all required disclosures prior to
19 consummating the loan. (SAC ¶ 42, i-iv.) Acknowledging their
20 claim is time barred, plaintiffs invoke the doctrine of equitable
21 tolling for their TILA damages claim, arguing defendants' TILA
22 violations made it impossible for plaintiffs to discover the
23 alleged fraud or non-disclosure within the one-year statute of
24 limitations, even through the use of due diligence. (Id. at
25 ¶ 44.) Defendants move to dismiss the claim, arguing, *inter*
26 *alia*, that plaintiffs have failed to allege specific facts to
27 justify tolling the statute of limitations set forth in 15 U.S.C.
28 § 1640(e). (Def.'s Mot. Dismiss Pl.'s SAC ("MTD"), filed June

1 10, 2010 (Docket # 47), 1.)

2 A party alleging damages under TILA must bring a claim
3 "within one year from the date of the occurrence of the
4 violation." 15 U.S.C. § 1640(e). As a general rule, the
5 statutory period "starts at the consummation of the [loan]
6 transaction." King v. California, 784 F.2d 910, 915 (9th Cir.
7 1986). The Ninth Circuit, however, has held that equitable
8 tolling of the TILA limitations period is authorized in
9 appropriate circumstances. Id. at 914-15. Such circumstances
10 exist where "a reasonable plaintiff would not have known of the
11 existence of a possible claim within the limitations period."
12 Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).
13 In such a case, the limitations period may be extended "until the
14 borrower discovers or had reasonable opportunity to discover the
15 fraud or non-disclosures that form the basis of the TILA action."
16 King, 784 F.2d at 915. Generally, a litigant seeking equitable
17 tolling of a limitations period bears the burden of establishing
18 entitlement to equitable tolling. See Pace v. DiGuiglielmo, 544
19 U.S. 408 (2005). However, "when a plaintiff does not allege any
20 facts demonstrating that he or she could have not discovered the
21 alleged violations by exercising due diligence, dismissal may be
22 appropriate." Blanco v. Am. Home Mortg. Servicing, Inc., 2009
23 U.S. Dist. LEXIS 119338, *8-9 (E.D. Cal. Dec. 3, 2009) (citing
24 Meyer v. Ameriquest Mortg. Co., 342 F.3d 899. 902-03 (9th Cir.
25 2003) (refusing to apply equitable tolling to TILA claim because
26 plaintiff was in full possession of all loan documents and did
27 not allege any actions that would have prevented discovery of the
28 alleged TILA violations)).

1 Here, because plaintiffs allege they consummated the loan on
2 February 26, 2007, and filed the instant lawsuit on October 29,
3 2009, their TILA damages claim is facially time-barred.
4 Plaintiffs, however, claim that equitable tolling should apply
5 because the nature of the violations rendered it, "impossible . .
6 . to discover [the TILA and Regulation Z violations] within the
7 one-year statutory period for civil damages . . ." (SAC ¶ 44.)
8 Plaintiffs contend that it was only after performing a Forensic
9 Loan Document Audit on the loan documents (admittedly in their
10 possession since the consummation of the loan) that they
11 discovered the violations, and hence, their claim for damages.
12 (Id.)

13 Plaintiffs have once again failed to allege facts sufficient
14 to establish their entitlement to equitable tolling. (April 29
15 Order at 15 (refusing to apply equitable tolling due to
16 plaintiffs' failure to allege sufficient facts to support the
17 application of that remedy).) The basis for plaintiffs' damages
18 claim involves defendants' failure to provide the required
19 disclosures at the consummation of the loan. (SAC ¶¶ 42, 43.)
20 Courts have routinely held that such an allegation, standing
21 alone, is insufficient to plausibly state a basis for tolling.
22 See, e.g., Garcia v. Wachovia Mortgage Corp., No. 2:09-cv-03925,
23 2009 WL 3837621, at *7-8 (C.D. Cal. Oct. 14, 2009) (finding that
24 the plaintiff did not "state facts plausibly indicating any basis
25 for tolling the statute of limitations" because "the mere
26 allegation of TILA disclosure violations does itself not toll the
27 statute"). Similarly here, plaintiffs have not alleged
28 additional facts in their SAC to sufficiently toll the statute of

1 limitations on their damages claim.

2 Furthermore, plaintiffs' bare contention that they were
3 unable to discover defendants' violations within the one-year
4 limitations period, without more, is insufficient proof of a
5 basis for equitable tolling. The complaint does not state
6 sufficient facts as to how defendants allegedly failed to
7 disclose the terms of the loan. See Lingad v. IndyMac Fed. Bank,
8 2:09-cv-02347, 2010 U.S. Dist. LEXIS 7350, at *7-8 (E.D. Cal.
9 Jan. 29, 2010) ("[W]hen a plaintiff fails to allege facts
10 demonstrating that the TILA violations alleged could not have
11 been discovered by due diligence during the one-year statutory
12 period, equitable tolling should not be applied and dismissal at
13 the pleading stage is appropriate."). Plaintiffs' conclusory
14 allegation that defendants' failure to comply with TILA and
15 Regulation Z "made it impossible" to discover the errors within
16 the one-year period is insufficient to apply the doctrine of
17 equitable tolling. See Rosales v. Downey S&L Ass'n, F.A., 2009
18 U.S. Dist. LEXIS 15923 (S.D. Cal Mar. 2, 2009) (declining to
19 allow equitable tolling due to the plaintiff's conclusory
20 allegations and failure to explain, with adequate specificity,
21 why the statute should be tolled).

22 This case is factually similar to Meyer v. Ameriquest Mortg.
23 Co., 342 F.3d at 899. In Meyer, the plaintiffs claimed damages
24 under TILA, alleging errors in the Right to Cancel Notice
25 provided at the consummation of the loan. The court affirmed the
26 defendant's motion for summary judgment, reasoning:

27 "[T]he failure to make the required disclosures
28 occurred, if at all, at the time the loan documents
were signed. The Meyers were *in full possession of all*

1 information relevant to the discovery of a TILA
2 violation and a § 1640(a) damages claim on the day the
3 loan papers were signed. The Meyers have produced no
4 evidence of undisclosed credit terms, or of fraudulent
5 concealment or other action on the part of Ameriquest
6 that prevented the Meyers from discovering their claim.
7 In the exercise of reasonable diligence the Meyers
8 should have discovered [within the statutory period]
9 the acts constituting the alleged violation. The
10 limitation period has run on their claim."

11 Id. at 902 (citation omitted)(emphasis added). As in Meyer, in
12 this case, plaintiffs were in possession of all documentation
13 that gave rise to their claim since 2007. At any time during the
14 statutory period, plaintiffs could have conducted an audit of
15 their documents, forensic or otherwise, that would have revealed
16 the alleged errors and inconsistencies. No adequate explanation
17 is presented as to why plaintiffs did not do so. Nor are there
18 any facts plead demonstrating any fraudulent concealment or other
19 conduct by defendants that prevented plaintiffs from discovering
20 their claim. In the exercise of reasonable diligence, plaintiffs
21 should have discovered the alleged violations giving rise to
22 their TILA claim within the statutory period.

23 Because plaintiffs fail to proffer allegations demonstrating
24 why the alleged TILA violations could not have been discovered
25 during the statutory period, this court cannot toll the statute
26 of limitations.

27 CONCLUSION

28 For the foregoing reasons, defendants' motion to dismiss is
GRANTED. Because plaintiffs were given "one final opportunity"
to amend in the court's April 29 Order and have failed to do so

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1 adequately, plaintiffs' claim is dismissed with prejudice.

2 IT IS SO ORDERED.

3 DATED: July 22, 2010

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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