

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

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

LORRAINE BROWN,)	
)	
Plaintiff,)	2:09-cv-03293-GEB-KJM
)	
v.)	<u>ORDER GRANTING IN PART AND</u>
)	<u>DENYING IN PART DEFENDANTS'</u>
GMAC MORTGAGE, LLC; GREENPOINT)	<u>MOTION TO DISMISS*</u>
MORTGAGE FUNDING, INC.; ETS)	
SERVICES, LLC,)	
)	
Defendants.)	
_____)	

Defendants GMAC Mortgage, LLC ("GMAC") and ETS Services, LLC ("ETS") (collectively, "Defendants") filed a motion to dismiss Plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant Greenpoint Mortgage Funding, Inc. filed a "Joinder of [GMAC and ETS'] Motion to Dismiss" which is stricken since it fails to comply with the notice requirement of the applicable Local Rule. For the following reasons, Defendants' motion is granted in part and denied in part.

I. FACTUAL ALLEGATIONS AND PLAINTIFF'S CLAIMS

This case concerns a mortgage loan Plaintiff obtained on her property and a subsequent foreclosure sale of her property. "On or about September 6, 2006, [P]laintiff executed a promissory note for \$313,600 in favor of Greenpoint, which . . . was secured against the

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 Property by a deed of trust recorded on September 27, 2006 as
2 instrument number 000452727453 in the office of the Sacramento County
3 Recorder." (Compl. ¶ 12.) "Thereafter, GMAC, in a capacity as
4 lender/beneficiary and loan servicer, and ETS, in a capacity as
5 trustee of the subject deed of trust, purportedly acquired an interest
6 in the aforesaid note and deed of trust by way of assignment,
7 endorsement, merger, or operation of law." (Id. ¶ 13.) "On May 29,
8 2009, at 8:30 a.m., [P]laintiff faxed defendants written notices of
9 rescission of the subject loan pursuant to the Truth in Lending Act .
10 . . ." (Id. ¶ 14.) "On May 29, 2009, at approximately 10:30 a.m.,
11 defendants . . . caused the property to be sold to GMAC at public
12 auction." (Id. ¶ 15.)

13 Plaintiff alleges the following five claims against GMAC:
14 (1) violation of the Home Ownership and Equity Protection Act, 15
15 U.S.C. § 1639 ("HOEPA"); (2) violation of the Truth in Lending Act, 15
16 U.S.C. §§ 1601, et seq. ("TILA"); (3) wrongful foreclosure; (4) breach
17 of the implied covenant of good faith and fair dealing; and (5) "set
18 aside trustee's sale". Plaintiff alleges the following two claims
19 against ETS: (1) wrongful foreclosure; and (2) "set aside trustee's
20 sale".

21 **II. Legal Standard**

22 A Rule 12(b)(6) motion "challenges a complaint's compliance
23 with . . . pleading requirements." Champlaie v. BAC Home Loans
24 Servicing, LP, No. S-09-1316 LKK/DAD, 2009 WL 3429622, at *1 (E.D.
25 Cal. Oct. 22, 2009). A pleading must contain "a short and plain
26 statement of the claim showing that the pleader is entitled to relief
27 . . ." Fed. R. Civ. P. 8(a)(2). The complaint must "give the
28 defendant fair notice of what the [plaintiff's] claim is and the

1 grounds upon which relief rests” Bell Atlantic Corp. v.
2 Twombly, 550 U.S. 544, 555 (2007). Further, “[a] pleading that offers
3 labels and conclusions or a formulaic recitation of the elements of a
4 cause of action will not do. Nor does a complaint suffice if it
5 tenders naked assertions devoid of further factual enhancement.”
6 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

7 To avoid dismissal, the plaintiff must allege “only enough
8 facts to state a claim to relief that is plausible on its face.”
9 Twombly, 550 U.S. at 547. “A claim has facial plausibility when the
10 plaintiff pleads factual content that allows the court to draw the
11 reasonable inference that the defendant is liable for the misconduct
12 alleged.” Iqbal, 129 S. Ct. at 1949. Plausibility, however, requires
13 more than “a sheer possibility that a defendant has acted unlawfully.”
14 Id. “When a complaint pleads facts that are merely consistent with a
15 defendant’s liability, it stops short of the line between possibility
16 and plausibility of entitlement to relief.” Id. (quotations and
17 citation omitted).

18 In evaluating a dismissal motion under Rule 12(b)(6), the
19 court “accept[s] as true all facts alleged in the complaint, and
20 draw[s] all reasonable inferences in favor of the plaintiff.” Al-Kidd
21 v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). However, neither
22 conclusory statements nor legal conclusions are entitled to a
23 presumption of truth. See Iqbal, 129 S. Ct. at 1949-50.

24 **III. Discussion**

25 **A. HOEPA**

26 Defendants seek dismissal of Plaintiff’s HOEPA claim,
27 arguing Plaintiff has not alleged facts showing that HOEPA is
28 applicable to her loan. (Defs.’ Mot. 5:13-6:5.) Plaintiff responds

1 she "has stated a claim for violation of HOEPA" but "to the extent she
2 has not adequately plead[ed] that the subject loan was covered under
3 HOEPA, she seeks leave to amend." (Opp'n 2:10-23.)

4 HOEPA applies only to "a special class of regulated loans
5 that are made at higher interest rates or with excessive costs and
6 fees." Lynch v. RKS Mortg. Inc., 588 F. Supp. 1254, 1260 (E.D. Cal.
7 2008) (quotations and citations omitted). "In order to be subject to
8 the protections afforded by HOEPA, one of two factors has to be
9 established. Either the annual percentage rate of the loan at
10 consummation must exceed by more than [8] percent the applicable yield
11 on treasury securities, or the total points and fees payable by the
12 consumer at or before the closing has to be greater than 8 percent of
13 the total loan amount, or \$400.00." Lynch, 588 F. Supp. 2d at 1260;
14 see also 12 C.F.R. § 226.32(a)(1)(i) (stating that the annual
15 percentage rate may not exceed the yield on treasury securities by
16 more than "8 percentage points for first-lien loans, or by more than
17 10 percentage points for subordinate lien loans.").

18 Plaintiff has not alleged facts "demonstrat[ing] that the
19 mortgage [she] obtained qualified for protection under HOEPA . . ."
20 Lynch, 588 F. Supp. 2d at 1260. Therefore, since Plaintiff has not
21 adequately pleaded her loan is covered by HOEPA, and she has requested
22 leave to amend this claim, Plaintiff's HOEPA claim is dismissed as to
23 all defendants in this action.

24 **B. TILA**

25 Defendants also seek dismissal of Plaintiff's TILA claim
26 for damages alleged against GMAC, arguing it is time-barred by the
27 one-year statute of limitations. (Defs.' Mot. 4:25, 6:19.) Plaintiff
28 does not respond to this portion of Defendants' motion. Rather,

1 Plaintiff argues she timely filed her notice of rescission of her
2 loan. However, Plaintiff has not stated a TILA rescission claim
3 against GMAC. Plaintiff alleges Greenpoint, not GMAC, owned the
4 property at the time she gave notice of rescission. Plaintiff has not
5 alleged that GMAC ever received a subsequent notice of rescission; nor
6 has she alleged that GMAC had notice of the first notice of
7 rescission. Further, Plaintiff does not allege she seeks rescission
8 under her TILA claim; nor does she allege she seeks rescission in her
9 Prayer for Relief. Rather, she alleges she seeks "economic and non-
10 economic damages." (Compl. ¶ 21.)

11 Actions under TILA for actual or statutory damages must be
12 brought "within one year from the date of the occurrence of the
13 violation." 15 U.S.C. § 1640(e). "[A]s a general rule[,] [this]
14 limitations period starts [to run] at the consummation of the
15 transaction." King v. California, 784 F.2d 910, 915 (9th Cir. 1986.)
16 "Consummation" is defined under TILA as "the time that a consumer
17 becomes contractually obligated on a credit transaction." Grimes v.
18 New Century Mortg. Corp., 340 F.3d 1007, 1009 (9th Cir. 2003) (quoting
19 12 C.F.R. § 226.2(a)(13)). However, the doctrine of equitable tolling
20 may "suspend the limitations period" "in certain circumstances," such
21 as where the allegations in the complaint permit a reasonable
22 inference that the borrower did not have a reasonable opportunity to
23 discover the alleged fraud or nondisclosures that form the basis of
24 the Plaintiff's TILA claim. Id. at 914-15; Al-Kidd, 580 F.3d at 956.

25 Plaintiff alleges the TILA violations occurred on September
26 6, 2006, the date Plaintiff entered into the loan agreement and
27 consummated the loan transaction. (Compl. ¶ 12.) Since Plaintiff did
28 not bring her TILA damages claim until August 28, 2009, which is well

1 over one year after the September 6, 2006 date on which the loan
2 transaction was consummated, Plaintiff brought this claim after the
3 one-year statute of limitations period. Further, Plaintiff fails to
4 allege any facts in her Complaint which would permit drawing a
5 reasonable inference that she did not have an opportunity to discover
6 the alleged fraud or nondisclosure that form the basis of her TILA
7 damages claim before the limitations period expired. Therefore,
8 Plaintiff's TILA damages claim against GMAC is dismissed.

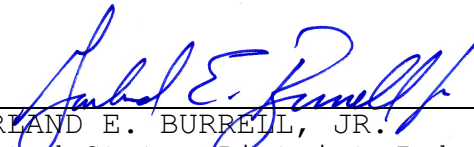
9 **C. Plaintiff's State Claims**

10 Defendants also seek dismissal of Plaintiff's state claims.
11 However, Defendants have not shown that these claims are
12 insufficiently plead. Therefore, Defendants' motion to dismiss
13 Plaintiff's state claims is denied.

14 **IV. Conclusion**

15 For the stated reasons, Defendants' motion to dismiss is
16 granted in part and denied in part. Plaintiff is granted leave to
17 amend any claim that has been dismissed, provided that the amended
18 complaint is filed within fourteen (14) days of the date on which this
19 order is filed.

20 Dated: May 21, 2010

21
22 
23 _____
GARLAND E. BURRELL, JR.
United States District Judge