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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LYNN NICHALSON,

No. 2:10-cv-00598-MCE-EFB

Plaintiff,

v.

MEMORANDUM AND ORDER

FIRST FRANKLIN FINANCIAL
CORPORATION, et al.,

Defendants.

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This action arises out of a mortgage loan transaction in which Plaintiff Lynn Nicholson ("Plaintiff") financed her home in 2006. Presently before the Court is a Motion by Defendant First Franklin Financial Corporation ("Defendant") to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant has concurrently filed a Motion to Strike pursuant to Federal Rule of Civil Procedure 12(f). For the reasons set forth below, Defendant's Motion to Dismiss is granted with leave to amend, and Defendant's Motion to Strike is denied as moot.

1 **BACKGROUND**¹

2
3 This action arises out of activity surrounding a residential
4 loan transaction secured by property located at 9527 Clarke Farms
5 Drive, Elk Grove, California ("Property").

6 Plaintiff alleges that Defendant extended credit to her
7 without regard for her ability to pay. She contends that she
8 accurately reported her income on her loan application, but that
9 Defendant overstated her income without Plaintiff's knowledge or
10 consent. Furthermore, Plaintiff alleges that the loan's interest
11 rates were subject to increase, such that the monthly payments
12 exceeded Plaintiff's ability to pay. Nonetheless, as indicated
13 in the Deed of Trust, Plaintiff was approved for a loan in the
14 amount of \$534,800.00.

15 Plaintiff further alleges that Defendant awarded higher
16 commissions to its loan officers when they sold loans with high
17 yield spread premiums. This practice encouraged loan officers to
18 steer borrowers, Plaintiff included, into loans that they were
19 unable to repay.

20 The terms of the loan were memorialized in a Promissory
21 Note, which was secured by a Deed of Trust on the Property.
22 Plaintiff alleges that she has mailed to Defendant a Qualified
23 Written Request ("QWR") under the Real Estate Settlement
24 Procedures Act ("RESPA"), including a demand to rescind the loan
25 under the Truth In Lending Act ("TILA").

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28 ¹ The factual assertions in this section are based on the
allegations in Plaintiff's Complaint unless otherwise specified.

1 If the court grants a motion to dismiss a complaint, it must
2 then decide whether to grant leave to amend. The court should
3 "freely give[]" leave to amend when there is no "undue delay, bad
4 faith[,] dilatory motive on the part of the movant,...undue
5 prejudice to the opposing party by virtue of...the amendment,
6 [or] futility of the amendment...." Fed. R. Civ. P. 15(a); Foman
7 v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is
8 only denied when it is clear that the deficiencies of the
9 complaint cannot be cured by amendment. DeSoto v. Yellow Freight
10 Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

11 ANALYSIS

12 A. Truth in Lending Act ("TILA")

13 Plaintiff seeks to rescind her loan pursuant to the Truth in
14 Lending Act ("TILA"), 15 U.S.C. § 1600 et. seq., as well as a
15 termination of Defendant's security interest in the property,
16 statutory and punitive damages, costs, and attorney's fees. She
17 alleges that Defendant failed to provide material disclosures
18 regarding her loan as required under TILA. Defendant argues that
19 Plaintiff's claim for TILA violations is time-barred because
20 civil damages are subject to a one-year statute of limitations
21 and claims for rescission have a three-year statute of
22 limitations.

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1 With respect to civil damages for Defendant's failure to
2 provide disclosures mandated by TILA, the statute of limitations
3 allows Plaintiff to file suit within one year from the "date of
4 occurrence" of the alleged violation. 15 U.S.C. § 1640(e). The
5 "date of occurrence" is the date the transaction is consummated,
6 which in a mortgage loan case is when the Plaintiff closed on the
7 loan. See Walker v. Washington Mutual Bank FA, 63 F. App'x. 316,
8 317 (9th Cir. 2003). Plaintiff's Complaint alleges that the loan
9 transaction was completed in April 2007, but Defendant has
10 attached a copy of the Deed of Trust to its Motion to Dismiss
11 which indicates a loan completion date of November 22, 2006.²
12 Req. Jud. Not. Ex. A. This date triggers a statute of limitations
13 which expired on November 22, 2007, well before Plaintiff filed
14 her Complaint.

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19 ² If plaintiff fails to attach to the complaint a document
20 on which it is based, defendant may attach such documents to a
21 Rule 12(b)(6) motion to show that they do not support plaintiff's
22 claim. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)
23 (overruled on other grounds in Galbraith v. County of Santa
24 Clara, 307 F.3d 1119, 1127 (9th Cir. 2002)). Documents not
25 physically attached to the complaint may nonetheless be
26 considered by the court on a 12(b)(6) motion to dismiss if the
27 complaint refers to such document, the document is central to
28 plaintiff's claim, and no party questions the authenticity of the
copy attached to the 12(b)(6) motion. Id. at 454. This prevents
"a plaintiff with a legally deficient claim (from surviving) a
motion to dismiss simply by failing to attach a dispositive
document on which it relied." Pension Benefit Guar. Corp. v.
White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)
(parentheses added). This "incorporation by reference" doctrine
allows the court to look beyond the pleadings without converting
the 12(b)(6) motion into a motion for summary judgment. Knievel
v. ESPN, 393 F.3d 1068, 1076-77 (9th Cir. 2005).

1 Regarding Plaintiff's claim for rescission, pursuant to TILA
2 provisions codified at 15 U.S.C. § 1635(a), a consumer may elect
3 to cancel their residential mortgage loan within three days of
4 either the consummation of the transaction or delivery of
5 required disclosures and rescission forms. If the required
6 disclosures are not provided, then the right to cancel extends
7 three years after the date of the loan. Plaintiff's loan closed
8 on November 22, 2006. Her right to rescind, therefore, expired
9 on November 22, 2009. Once again, Plaintiff's claim is time-
10 barred.

11 However, to save her claims, Plaintiff argues that equitable
12 tolling should apply to suspend the statutes of limitations. The
13 Ninth Circuit has held that "the doctrine of equitable tolling
14 may, in appropriate circumstances, suspend the limitations period
15 until the borrower discovers or had reasonable opportunity to
16 discover the fraud or nondisclosures that form the basis of the
17 TILA action." King v. State of California, 784 F.2d 910, 915
18 (9th Cir. 1986). In determining justifiable application of the
19 equitable tolling doctrine, a court "focuses on excusable delay
20 by the plaintiff." Johnson v. Henderson, 314 F.3d 409, 414 (9th
21 Cir. 2002). To establish excusable delay, the plaintiff must
22 show "fraudulent conduct by the defendant resulting in
23 concealment of the operative facts, failure of the plaintiff to
24 discover the operative facts that are the basis of his cause of
25 action within the limitations period, and due diligence by the
26 plaintiff until discovery of those facts." Federal Election
27 Com'n v. Williams, 104 F.3d 237, 240-41 (9th Cir. 1996).

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1 Here, Plaintiff has failed to exhibit requisite due
2 diligence. The Plaintiff alleges that "the facts surrounding
3 this loan transaction were purposefully hidden to prevent the
4 Plaintiff from discovering the true nature of the transaction."
5 (Complaint ¶ 22.) This conclusory statement affords insufficient
6 basis to invoke this Court's application of equitable tolling.
7 Entertaining such justification would open the proverbial
8 floodgates of litigation, allowing endless TILA suits to survive
9 under the flimsy excuse that the alleged TILA violation did not
10 reveal itself before the running of the statute of limitations.

11 Plaintiff has failed to show any concealment of facts by the
12 Defendant beyond her bare allegations, nor has she shown a
13 scintilla of due diligence on her part. The excuses provided are
14 not grounds upon which the Court can equitably rescue Plaintiff's
15 claim from late filing.

16 Equitable tolling will not be applied, and thus the statute
17 of limitations period has run. Defendant's Motion to Dismiss
18 Plaintiff's TILA claim is granted.

19
20 **B. Real Estate Settlement Procedures Act ("RESPA")**

21 **1. Failure to Disclose**
22

23 Plaintiff alleges that the Defendant violated the Real
24 Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et.
25 seq., by failing to comply with "one or more of the disclosure
26 requirements provided therein." (Complaint ¶ 65.) Plaintiff
27 neglects to specify what disclosures Defendant failed to provide
28 or which sections of RESPA it violated.

1 RESPA provides a private right of action for violations of
2 § 2605, which imposes requirements on the servicing of mortgage
3 loans, § 2607, which prohibits kickbacks and unearned fees, and
4 § 2608, which prohibits seller-mandated title insurance.
5 12 U.S.C. § 2614. Because Plaintiff has failed to indicate which
6 of these provisions Defendant allegedly violated, Defendant has
7 not been afforded sufficient notice of the claims against it as
8 required by the pleading standard under Rule 12(b)(6).

9
10 **2. Qualified Written Request**

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12 Plaintiff also contends that she sent Defendant a Qualified
13 Written Request ("QWR") by mail, although Plaintiff does not
14 disclose the date on which this document was sent. For the
15 purposes of the Act, a QWR "shall be a written correspondence []
16 that... includes a statement of the reasons for the belief of the
17 borrower, to the extent applicable, that the account is in error
18 or provides sufficient detail to the servicer regarding other
19 information sought by the borrower." 12 U.S.C. § 2605 (1996).
20 RESPA requires mortgage loan servicers who receive a QWR for
21 information relating to the servicing of their loan to provide a
22 written response within twenty (20) days acknowledging receipt of
23 the correspondence. 12 U.S.C. § 2605(e)(1)(A).

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1 While Plaintiff describes her letter as a QWR, a request for
2 rescission does not qualify as a QWR as defined by RESPA.
3 Plaintiff's correspondence did not seek information or seek to
4 correct errors in her account. It therefore does not amount to a
5 QWR invoking the protection of RESPA.

6 Because Plaintiff's claim fails to put Defendant on adequate
7 notice, and because Plaintiff's correspondence does not
8 constitute a QWR, Plaintiff's RESPA claim does not meet the
9 requisite pleading standard. Defendant's Motion to Dismiss
10 Plaintiff's RESPA claim is GRANTED.

11
12 **C. Plaintiff's Remaining Causes of Action**

13
14 With Plaintiff's federal claims presently dismissed, the
15 Court declines to exercise supplemental jurisdiction over the
16 remaining state causes of action. The Court need not address the
17 merits of Defendant's Motion to Dismiss with respect to the
18 remaining state law causes of action as those issues are now
19 moot.

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1 **CONCLUSION**

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3 For the reasons stated above, Defendant's Motion to Dismiss
4 (Docket No. 7) is GRANTED with leave to amend. Defendant's
5 Motion to Strike (Docket No. 9) is DENIED as moot.³

6 Plaintiff may file an amended complaint not later than
7 twenty (20) days after the date this Memorandum and Order is
8 filed electronically. If no amended complaint is filed within
9 said twenty (20)-day period, without further notice, Plaintiff's
10 claims will be dismissed without leave to amend.

11 IT IS SO ORDERED.

12 Dated: June 11, 2010

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15 MORRISON C. ENGLAND, JR.
16 UNITED STATES DISTRICT JUDGE
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27 ³ Because oral argument will not be of material assistance,
28 the Court deemed this matter suitable for decision without oral
argument. E.D. Cal. Local Rule 230 (g).