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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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KIRA B. CHRISTENSEN,
Plaintiff,

NO. CIV. 2:10-CV-01024-FCD-KJN

v.

MEMORANDUM AND ORDER

AMERICAN HOME MORTGAGE
SERVICING, INC., DEUTSCHE BANK
NATIONAL TRUST COMPANY AS
TRUSTEE FOR AMERICAN HOME
MORTGAGE ASSETS TRUST 2006-1
MORTGAGE-BACKED PASS THROUGH
CERTIFICATES, SERIES 2006-1
and DOES 1 THROUGH 100,
INCLUSIVE,

Defendants.

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This matter is before the court on the motion of defendants' American Home Mortgage Servicing, Inc. ("AHMSI") and Deutsche Bank National Trust Company ("Deutsche Bank"), as trustee for American Home Mortgage Assets Trust, (collectively "defendants") to dismiss plaintiff Kira B. Christensen's ("plaintiff" or "Christensen") first amended complaint ("FAC") pursuant to

1 Federal Rules of Civil Procedure 12(b)(6), 8(a), and 9(b).¹
2 Plaintiff opposes the motion.² For the reasons set forth below,
3 defendants' motion is GRANTED.³

4 **BACKGROUND**

5 Plaintiff is the owner of a property located in Sacramento,
6 Ca., at 511 Knightsbridge Lane ("the property"). (Pl.'s First
7 Am. Compl. ("Compl."), filed Aug. 23, 2010, ¶ 11). In 2005
8 plaintiff, through her broker James Becker ("Becker"), submitted
9 an application to American Home Mortgage Acceptance, Inc.
10 ("AHMA") to refinance the existing loan secured by a deed of
11 trust against the property. (Compl. ¶ 12). Plaintiff alleges
12 that, at the consummation of the loan, Becker knowingly entered
13 false information on the application relating to plaintiff's
14 monthly income, misstated the value of the property, and
15 misrepresented, *inter alia*, the desirability of the loan, the
16 loan's premium, and plaintiff's ability to modify the loan in the
17 future. (Compl. ¶¶ 13-14). Plaintiff characterizes these
18 practices as predatory. (Compl. ¶ 21). Plaintiff alleges that
19 defendants had a duty to verify the accuracy of the information
20 on the loan application, the true value of the property, and the
21 information given to plaintiff by Becker regarding refinancing

22
23 ¹ Defendants also move to strike plaintiff's request for
24 punitive damages and attorneys' fees. Because the court
25 dismisses all claims against defendants, the court does not
address the merits of their motion to strike.

26 ² The court also construes plaintiff's opposition as a
motion for leave to amend the complaint.

27 ³ 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 the loan if she was not satisfied. (Compl. ¶¶ 16, 14(6)).

2 Plaintiff asserts that AHMA was the original lender and that
3 both AHMSI and Deutsche Bank are assignees, successors, and
4 servicers of the loan and current beneficiaries under the deed of
5 trust. (Compl. ¶¶ 6-8). Additionally, plaintiff contends, on
6 information and belief, that at all relevant times defendants
7 were, and still are, agents for one another, and acting under the
8 course and scope thereof, with knowledge and consent of each
9 other. (Id. ¶ 10). Plaintiff believes that defendants should be
10 liable for Becker's actions based on an agency relationship
11 between the defendants and Becker, and because defendants
12 "participated in," "were aware of," or "should have been aware
13 of" Becker's acts or omissions and because defendants did not
14 verify the plaintiff's correct income prior to the consummation
15 of the loan. (Compl. ¶¶ 13, 15).

16 Plaintiff originally filed a complaint against defendants in
17 April 2010. On August 3, 2010, the court granted defendants'
18 motion to dismiss because it concluded that plaintiff did not
19 allege any facts to demonstrate the applicability of equitable
20 tolling to her facially time barred claims for relief. Plaintiff
21 filed her FAC on August 23, 2010 seeking damages and injunctive
22 and equitable relief. (Id. ¶ 4).

23 **STANDARD**

24 Under Federal Rule of Civil Procedure 12(b)(6), a claim may
25 be dismissed because of the plaintiff's "failure to state a claim
26 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A
27 dismissal under Rule 12(b)(6) may be based on the lack of a
28 cognizable legal theory or on the absence of sufficient facts

1 alleged under a cognizable legal theory. Johnson v. Riverside
2 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v.
3 Block, 250 F.3d 729, 732 (9th Cir. 2001).

4 On a 12(b)(6) motion to dismiss, the factual allegations of
5 the complaint must be accepted as true. Cruz v. Beto, 405 U.S.
6 319, 322 (1972). The court is bound to give plaintiff the
7 benefit of every reasonable inference to be drawn from the
8 "well-pleaded" allegations of the complaint. Retail Clerks Int'l
9 Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff
10 need not allege "'specific facts' beyond those necessary to state
11 his claim and the grounds showing entitlement to relief." Bell
12 Atlantic v. Twombly, 550 U.S. 544, 570 (2007). "A claim has
13 facial plausibility when the plaintiff pleads factual content
14 that allows the court to draw the reasonable inference that the
15 defendant is liable for the misconduct alleged." Ashcroft v.
16 Iqbal, 129 S. Ct. 1937, 1949 (2009).

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

1 filed Sep. 24, 2010, at 2).

2 The application of the equitable tolling doctrine is
3 dependant on the plaintiff's "excusable ignorance of the
4 limitations period" and lack of prejudice to the defendant.

5 Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000).

6 It is well established that the doctrine of equitable tolling may
7 be applied in circumstances where a plaintiff's failure to comply
8 with the time limitations was because he had neither actual nor
9 constructive notice of the claim within the filing period.

10 Leorna v. U.S. Dep't of State, 105 F.3d 548, 551 (9th Cir. 1997);

11 see Santa Maria, 202 F.3d at 1178 ("If a reasonable plaintiff
12 would not have known of the existence of a possible claim within
13 the limitations period, then equitable tolling will serve to
14 extend the statute of limitations for filing suit until the
15 plaintiff can gather what information he needs."). Equitable
16 tolling focuses on the plaintiff's excusable ignorance, but the
17 doctrine is not available to avoid the consequences of a
18 plaintiff's own negligence. Lehman v. U.S., 154 F.3d 1010, 1016
19 (9th Cir. 1998); see Scholar v. Pacific Bell, 963 F.2d 264, 268
20 (9th Cir. 1992) (noting that courts are generally unforgiving
21 when a civil action is filed late due to the claimant's failure
22 to "exercise due diligence in preserving his legal rights")
23 (citations omitted).

24 Like plaintiff's original complaint, the allegations in the
25 FAC fail to demonstrate that she was unable to obtain the
26 information needed to file her claim until after the alleged
27 statutory period. Plaintiff's claims are premised on the alleged
28 wrongful conduct that took place at the *origination* of her loan,

1 including, *inter alia*, misstating her monthly income, excessive
2 fees, abusive prepayment penalties, kickbacks to brokers, and
3 over valuation of the property. (See Compl. ¶ 11-33). Plaintiff
4 further alleges that all the misrepresentations and allegations
5 made were discovered within the past year and that she was not
6 aware until within a year before filing the instant lawsuit that
7 overstating her income was wrongful or that the bank did not
8 verify her income with the IRS. (Id. ¶ 28). However, as noted
9 by the court in the previous order, there are facts which
10 indicate that plaintiff was aware of at least some, if not all,
11 of the alleged wrongful conduct at the time the loan originated.
12 Plaintiff acknowledges that she "was aware at the time the
13 application was submitted that it indicated income that was
14 grossly incorrectly overstated" and alleges that she questioned
15 the broker about the overstatement. (Id.). The court finds
16 plaintiff's allegations claiming that she discovered the
17 misrepresentations within the past year insufficient to establish
18 a factual predicate for plaintiff's excusable ignorance of the
19 statute of limitations period.

20 Because plaintiff's allegations fail to demonstrate the
21 applicability of equitable tolling to her facially time barred
22 claims for relief, defendants' motion to dismiss plaintiff's
23 complaint is GRANTED.⁵

24 **B. Leave to Amend**

25 Plaintiff seeks leave to amend her FAC based on her
26

27 ⁵ Because plaintiff did not allege sufficient facts to
28 support the doctrine of equitable tolling, the court need not
reach the other grounds for defendants' motion to dismiss.

1 assertion that the "continuing tort doctrine" applies in the
2 instant action. Specifically, plaintiff relies on Wyatt v. Union
3 Mortgage Company, 24 Cal. 3d 773 (1979), to support her assertion
4 that the "continuing tort doctrine" tolls the statute of
5 limitations in the instant action. (Opp'n at 4). Defendants
6 assert that plaintiff has already been given an opportunity to
7 overcome the court's finding that her claims are time barred and
8 that additional amendments in the instant action would be futile.
9 (Def.' Reply ["Reply"], filed Sep. 30, 2010, at 3). Defendants
10 argue that plaintiff cannot rely on the "last overt act" doctrine
11 accepted in Wyatt because she did not allege a conspiracy between
12 the defendants in the FAC. (Reply at 5).

13 Pursuant to Rule 15(a), "leave [to amend] is to be freely
14 given when justice so requires." "[L]eave to amend should be
15 granted unless amendment would cause prejudice to the opposing
16 party, is sought in bad faith, is futile, or creates undue
17 delay." Martinez v. Newport Beach, 125 F.3d 777, 785 (9th Cir.
18 1997).

19 The court finds plaintiff's reliance on Wyatt unpersuasive.
20 (See Opp'n at 4). In Wyatt the court tolled the statute of
21 limitations for the respondents' claims and held that the final
22 payment on the 1970 loan was the "last overt act" in defendants'
23 conspiracy to defraud the respondents. 24 Cal. 3d at 786.
24 Plaintiff asserts that the civil conspiracy at issue in Wyatt is
25 analogous to her case because it is a tort, like her negligence
26 and fraud claims. (Opp'n at 4). However, the court in Wyatt
27 expressly noted that its acceptance of the "last overt act"
28 doctrine did *not* mean it accepted the view that civil conspiracy

1 is, by itself, a tort. 24 Cal. 3d at 787 n.4. Rather, the court
2 noted, "it is precisely because the civil conspiracy is not a
3 tort or a cause of action itself that the tolling of the statute
4 of limitations on the underlying torts in this case becomes
5 relevant at all." Id. (emphasis added). Therefore, Wyatt does
6 not provide support for plaintiff's application of the
7 "continuing tort doctrine" to toll the statute of limitations in
8 the instant action.

9 Nonetheless, at this stage in the litigation, based on the
10 limited briefing on the issue, the court cannot determine that
11 amendment would be futile. Because under Rule 15 leave to amend
12 shall be freely given, the court grants plaintiff leave to amend
13 to allege a sufficient factual predicate to support the
14 application of the continuing tort doctrine to her facially time
15 barred claims for relief.⁶

16 **CONCLUSION**

17 For the foregoing reasons, defendants' motion to
18 dismiss is GRANTED. Plaintiff shall file a second amended
19 complaint in accordance with this order within twenty (20) days
20 of the date of this order. Defendants shall have twenty (20)
21 days after service thereof to file a response.

22 IT IS SO ORDERED.

23 DATED: October 18, 2010



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FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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28 ⁶ Nothing in this order prevents defendants from filing a
motion to dismiss based on the applicability of the "continuing
tort doctrine" to plaintiff's claims.