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

ROBERT E. HUMMER,
Plaintiff,

No. CIV S-10-1690-FCD-CMK

vs.

FINDINGS AND RECOMMENDATIONS

EMC MORTGAGE CORPORATION,
et al.,
Defendants.

_____/

Plaintiff, proceeding in this action in propria persona, bring this civil action pursuant to, *inter alia*, the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2603, *et seq.*, and the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.* Pending before the court is the defendants’ motion to dismiss (Doc. 8). The hearing on the motion was taken off calendar as no opposition to the motion was filed.

I. Background

This is a pro se civil case involving plaintiff’s mortgage. Plaintiff alleges in his complaint that he entered into a mortgage contract and note with the defendants on or about October 20, 2006. He claims defendants breached their fiduciary duties by violating RESPA, TILA, and failing to provide him proper notices regarding his default and foreclosure. He sets

1 forth six claims: violations of TILA, the Uniform Commercial Code (UCC), and RESPA;
2 Breach of Contract, Unfair Deceptive Trade Practices, and Breach of Fiduciary Duty.

3 **II. Motion to Dismiss**

4 A. Motion

5 Defendant brings this motion to dismiss the complaint on the grounds that it fails
6 to state a claim and the claims are barred by the statute of limitations. No opposition to the
7 motion as been filed.

8 B. Standards

9 In considering a motion to dismiss, the court must accept all allegations of
10 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The
11 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer
12 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.
13 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All
14 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,
15 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual
16 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50
17 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by
18 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972). "Although a pro se litigant ... may be
19 entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must
20 meet some minimum threshold in providing a defendant with notice of what it is that it allegedly
21 did wrong." Brazil v. United States Dept of Navy, 66 F.3d 193, 199 (9th Cir. 1995).

22 Rule 8(a)(2) requires only "a short and plain statement of the claim showing that
23 the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is
24 and the grounds upon which it rests." Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)
25 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for
26 failure to state a claim under Rule 12(b)(6), a complaint must contain more than "a formulaic

1 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to
2 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain
3 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has
4 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
6 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
7 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.
8 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,
9 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.
10 (quoting Twombly, 550 U.S. at 557).

11 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials
12 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);
13 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)
14 documents whose contents are alleged in or attached to the complaint and whose authenticity no
15 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,
16 and upon which the complaint necessarily relies, but which are not attached to the complaint, see
17 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials
18 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.
19 1994).

20 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no
21 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
22 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

23 C. Discussion

24 Plaintiff’s actual claims are a bit unclear. At first it appears he is attempting to
25 form a “produce the note” type of claim, which is intended to delay a non-judicial foreclosure.
26 Such claims have universally been rejected. See e.g. Pagtalunan v. Reunion Mortgage Inc., 2009

1 WL 961995 (N.D. Cal. 2009); Puktari v. Reconstruct Trust Co., 2009 WL 32567 (S.D. Cal.
2 2009); see also California Trust Co. v. Smead Inv. Co., 6 Cal. App. 2d 432 (1935) (holding that
3 production of the original note is not required in a non-judicial foreclosure). To the extent he is
4 in fact attempting to make such a claim, this claim should be dismissed as non-cognizable.

5 Truth In Lending Act

6 Plaintiff's claim for violation of TILA is as follows:

7 Lender failed to provide the borrower with the required 3 day
8 cooling off period prior to the signing of the loan documents. A
9 complete set of loan documents were to be provided to borrower to
take home and review. Regulation Z. Part 226 and USC 15 § 1601
et seq.

10 In addition, under a heading of "Right to Rescind," plaintiff states: "Lender failed
11 to provide that two copies of the Right to Rescind were signed and dated at the time of
12 consummation pursuant to 15 USC § 1635(a) Reg. Z § 226.23(b)."

13 A lender's violation of TILA allows the borrower to seek damages or to rescind a
14 consumer loan secured by the borrower's primary dwelling. There is a one-year statute of
15 limitations applicable to TILA damages claims. See 15 U.S.C. § 1640(e). The limitations period
16 for damages is subject to equitable tolling. See King v. California, 784 F.2d 910, 915 (9th Cir.
17 1896). Here, plaintiff's TILA violations stem from the loan application process, wherein
18 plaintiff argues the defendants failed to provide plaintiff's the required amount of time to
19 exercise his right to rescind. Thus, the limitations period in this case accrued at the time plaintiff
20 signed the loan documents, in October 2006. See Meyer v. Ameritrust Mortg. Co., 342 F.3d
21 899, 902 (9th Cir.2003). Nothing in plaintiff's complaint indicates the applicability of equitable
22 tolling, nor does plaintiff argue that it should apply. See King v. California, 784 F.2d 910, 915
23 (1986). Accordingly, Plaintiff's claims for damages under TILA are now time-barred.

24 If, instead, Plaintiff is seeking rescission, "an obligor's right of rescission shall
25 expire three years after the date of consummation of the transaction or upon the sale of the
26 property, whichever occurs first[.]" 15 U.S.C. § 1635(f). Again, more than three years have

1 passed since the loan transaction was consummated. Thus, the right of rescission was
2 extinguished prior to plaintiff's initiation of this action. In addition, a claim for rescission
3 requires a plaintiff to allege the ability to tender the loan proceeds or ability to pay back what he
4 has received. See e.g., Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1170 (9th Cir. 2003), Garza
5 v. Am. Home Mortgage, 2009 WL 188604 at *5 (E.D. CA 2009). Nothing in plaintiff's
6 complaint alleges plaintiff's willingness to tender. Thus, plaintiff's claims under TILA are time
7 barred and should be dismissed.

8 Plaintiff's claims for violation of TILA, both his claim for damages and for
9 rescission, should be dismissed, without leave to amend, as barred by the statute of limitations.

10 Real Estate Settlement Procedures Act

11 Plaintiff's claim that defendants violated the Real Estate Settlement Procedures
12 Act is as follows:

13 Lender failed to provide what the cost of credit was
14 altogether or a good faith estimate.

15 Lender failed to disclose Yield Spread premium charged,
16 without proper disclosure of the overall cost over the term of the
17 loan. As opposed to allowing the borrower to pay the yield spread
18 as an up-front charge.

19 The Real Estate Settlement Procedure Act, at 12 U.S.C. § 2614, provides for a one
20 year statute of limitations for any violation of § 2607 or § 2608, and a three year statute of
21 limitations for any violation of § 2605. Section 2605 covers required disclosures and notices,
22 § 2607 includes prohibitions against kickbacks and unearned fees, and § 2608 prohibits a seller
23 from purchasing title insurance from any particular title company. Plaintiff does not clearly state
24 what section of RESPA defendants violated. Reading the complaint as broadly as possible, it
25 appears plaintiff may be claiming a violation of either § 2605 or § 2607, or both. Either way,
26 plaintiff had at most three years to bring this action. Plaintiff acknowledges the mortgage and
loan contract was entered into in October of 2006. This action was not brought until mid 2010,
more than three years after the contract was entered into. Thus, the statute of limitation on any

1 claim arising under RESPA has expired.

2 Accordingly, the claims for violation of RESPA should be dismissed, without
3 leave to amend, as barred by the statute of limitations.

4 Uniform Commercial Code

5 Plaintiff's claim under the UCC is: " Lender failed to acquire a UCC-1 lien on the
6 property as required and in contravention of Article 9 of the UCC." He also indicates that
7 borrowers are required to sign the UCC-1.

8 Article 9 generally applies to transactions that create a security interest in personal
9 property or fixtures, not real property. See UCC § 9-109. Thus, even if the defendants did not
10 file a UCC-1 form, doing so was unnecessary, and cannot form the basis of a claim in the context
11 of a non-judicial foreclosure. Plaintiff claim for violation of the UCC should therefore be
12 dismissed as non-cognizable.

13 Breach of Contract

14 As to plaintiff's breach of contract claim, he states:

15 The giving of notices of the foreclosure sale was not in
16 conformity with the contract of the parties (the deed of trust and
17 related documents from Closing), and Lenders thereby breached
18 such contract to Plaintiff's damage.

18 Breach of contract is a state cause of action, and is therefore governed by
19 California law. "The standard elements of a claim for breach of contract are: '(1) the contract,
20 (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4)
21 damage to plaintiff therefrom.'" Wall Street Network, Ltd. v. New York Times Co., 164 Cal.
22 App.4th 1171, 1178, 80 Cal. Rptr. 3d 6 (2008).

23 Here, plaintiff claims the defendants breached the contract by failing to provide
24 proper notice of foreclosure. However, he fails to identify what notice was given, or not given,
25 and what provision of the contract was breached. Plaintiff therefore fails to plead sufficient facts
26 to sustain his claim for breach of contract. Fed. R. Civ. Proc. 8. Indeed, it would appear based

1 on the statements made in his complaint as to being in default, that he was the one who breached
2 the contract, not the defendants. While the defects in this claim are perhaps curable, such a claim
3 is based on state law, and should be raised, if at all, in the state courts.

4 Unfair Deceptive Trade Practices

5 Plaintiff fails to identify the basis of this claim at all. He states:

6 It appears that the Lender mailed the Plaintiffs a monthly
7 statement after the default had occurred, which displayed no
8 evidence of a default and indicated that the Plaintiff was to make
9 his May 2010 payment as if the default had been cured.

9 Plaintiff fails to indicate how sending a statement was deceptive trade practices.

10 It is possible that plaintiff is attempting to state a claim for violation of California's Unfair
11 Competition Law. See Cal. Bus & Prof Code §§ 17200 *et seq.* "A plaintiff alleging unfair
12 business practices under these statutes [UCL] must state with reasonable particularity the facts
13 supporting the statutory elements of the violation." Khoury v. Maly's of California, Inc., 17 Cal.
14 Rptr. 2d 708, 712 (Cal. Ct. Ap. 1993). Here, plaintiff's vague allegations of receiving a
15 statement which failed to include the amount in default is insufficient. Again, the pleading
16 defects for this claim may be curable, but should be raised in state court.

17 Breach of Fiduciary Duty

18 Plaintiff claims the defendants breached their fiduciary duty as follows:

19 Arguably, the lender has the role of advisor and knows or
20 should have known the borrower trusted him. In the alternative,
21 the lender created a quasi-fiduciary relationship of trust and
22 confidence, which at least gives rise to a duty of disclosure. . . .

21 A fiduciary duty arose when Plaintiff, the weaker, less
22 informed party, in the sense of the liability to protect oneself,
23 placed his trust and confidence in the Lender. . . .

23 As a direct, proximate and foreseeable result of
24 Defendants' actions, Plaintiff is subject to loss of property and loss
25 of use and other damages caused by Defendants' actions.

25 As defendant points out, a lender has no fiduciary duty to borrowers. See Price v.
26 Wells Fargo Bank, 261 Cal. Rptr. 735, 740 (Cal. Ct. App. 1989) (finding no fiduciary relation

1 between a bank and its loan customers, just as there is no fiduciary relation between a debtor and
2 a creditor). Thus, plaintiff is unable to state a claim for breach of fiduciary duty in this case, and
3 the motion to dismiss that claim should be granted.

4 **III. CONCLUSION**

5 Plaintiff's claims under RESPA and TILA are barred by the applicable statute of
6 limitations. The remaining claims are based on California state law, and are insufficient as plead.
7 To the extent the state law claims are curable, they should be dismissed without prejudice to
8 raising such claims in a state law action.

9 Based on the foregoing, the undersigned recommends that defendant's motion to
10 dismiss (Doc. 8) be granted.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court. Responses to objections shall be filed within 14 days after service of
15 objections. Failure to file objections within the specified time may waive the right to appeal.

16 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: May 23, 2011

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20 **CRAIG M. KELLISON**
21 UNITED STATES MAGISTRATE JUDGE
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