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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SHELLEY VON BRINCKEN,)	Case No. 2:10-CV-2153-JAM-KJN
)	
Plaintiff,)	<u>ORDER GRANTING DEFENDANTS'</u>
)	<u>MOTION TO DISMISS</u>
v.)	
)	
MORTGAGECLOSE.COM, INC.;)	
CALIFORNIA LAND COMPANY OF)	
NEVADA COUNTY; EXECUTIVE TRUSTEE)	
SERVICES, dba ETS SERVICES, LLC;)	
MORTGAGE ELECTRONIC REGISTRATION)	
SYSTEMS, INC.; GMAC MORTGAGE,)	
INC.; and DOES 1-20, inclusive,)	
)	
Defendants.)	
)	

This matter comes before the Court on Defendants' GMAC Mortgage, LLC, Executive Trustee Services, and Mortgage Electronic Registration Systems, Inc.'s (collectively "Defendants") Motion to Dismiss (Doc. #65) Plaintiff Shelley Von Brincken's ("Plaintiff") Second Amended Complaint ("SAC") (Doc. #62) for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6). Plaintiff opposes the motion (Doc. #67). Defendant Mortgageclose.com, Inc. joined in the Motion to Dismiss (Doc. #66). Plaintiff did not oppose the joinder, accordingly the Court will

1 consider Mortgageclose.com, Inc. as joined in the motion to dismiss
2 with Defendants. The motion was set for hearing on May 4, 2011,
3 but ordered submitted on the briefs without oral argument.¹
4

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Plaintiff borrowed \$220,000.00 on January 14, 2009 from
7 Mortgageclose.com, Inc. On the same date she signed a deed of
8 trust securing the property located 14738 Wolf Rd., Grass Valley,
9 California, as security for the loan. Plaintiff subsequently
10 defaulted on the loan, and a Notice of Default was recorded on
11 April 27, 2011. Thereafter, a Notice of Trustee's Sale was
12 recorded on July 28, 2010, and the property was sold and Trustee's
13 Deed Upon Sale recorded on September 3, 2010. Prior to the Sale on
14 August 11, 2010, Plaintiff filed a Notice of Pendency of Action
15 (Doc. #3) and filed an unsuccessful motion for a Temporary
16 Restraining Order (Doc. #9).

17 Plaintiff alleges that she is the victim of fraud, predatory
18 lending, and an unlawful foreclosure. Plaintiff was previously pro
19 se, but acquired counsel, who filed the SAC. The SAC alleges
20 problems with the chain of title and the Deed of Trust. Plaintiff
21 further alleges that the purported lender/servicer failed, refused
22 or neglected to work with her to avoid foreclosure. Defendants
23 contend that despite Plaintiff's slew of general allegations about
24 the mortgage banking industry, Plaintiff fails to state a claim
25 against Defendants.
26

27 _____
28 ¹ This motion was determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 230(g).

1 II. OPINION

2 A. Legal Standard

3 A party may move to dismiss an action for failure to state a
4 claim upon which relief can be granted pursuant to Federal Rules of
5 Civil Procedure 12(b)(6). In considering a motion to dismiss, the
6 court must accept the allegations in the complaint as true and draw
7 all reasonable inferences in favor of the plaintiff. Scheuer v.
8 Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by
9 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
10 322 (1972). Assertions that are mere "legal conclusions," however,
11 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
12 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly,
13 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a
14 plaintiff needs to plead "enough facts to state a claim to relief
15 that is plausible on its face." Twombly, 550 U.S. at 570.
16 Dismissal is appropriate where the plaintiff fails to state a claim
17 supportable by a cognizable legal theory. Balistreri v. Pacifica
18 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

19 Upon granting a motion to dismiss for failure to state a
20 claim, the court has discretion to allow leave to amend the
21 complaint pursuant to Federal Rules of Civil Procedure 15(a).
22 "Absent prejudice, or a strong showing of any [other relevant]
23 factor[], there exists a presumption under Rule 15(a) in favor of
24 granting leave to amend." Eminence Capital, L.L.C. v. Aspeon,
25 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with
26 prejudice and without leave to amend is not appropriate unless it
27 is clear . . . that the complaint could not be saved by amendment."
28 Id.

1 Generally, the court may not consider material beyond the
2 pleadings in ruling on a motion to dismiss for failure to state a
3 claim. There are two exceptions: when material is attached to the
4 complaint or relied on by the complaint, or when the court takes
5 judicial notice of matters of public record, provided the facts are
6 not subject to reasonable dispute. Sherman v. Stryker Corp., 2009
7 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations
8 omitted). In this case, Plaintiff has attached Exhibits A-N (Doc.
9 #62, Ex. 1) to the SAC. Plaintiff relies on these documents in her
10 Complaint (several of which are also public record as they are
11 recorded documents), and Defendants do not object to the Court
12 considering the attached documents. Accordingly, the Court will
13 consider documents A-N in ruling on the motion to dismiss.

14 B. Claims for Relief

15 1. Violation of the Home Ownership Equity Protection
16 Act

17 Plaintiff alleges that Defendants have violated the
18 Homeownership Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639.
19 The SAC seeks rescission and damages under HOEPA. The SAC lumps
20 all the defendants together and does not specifically identify the
21 defendant(s) to whom her allegations pertain. Defendants argue
22 that Plaintiff fails to state a claim for violation of HOEPA,
23 because her claim is barred by the statute of limitations and the
24 SAC does not sufficiently allege that her loan falls under HOEPA.
25 However, Defendants only attack the portion of Plaintiff's claim
26 seeking damages, and not her claim for rescission.

27 HOEPA is an amendment to the Truth in Lending Act ("TILA"),
28 and therefore is governed by the same remedial scheme and statutes

1 of limitations as TILA. Hensley v. Bank of New York Mellon, 2010
2 WL 5418862, *4 (E.D. Cal. Dec. 23, 2010); Wadhwa v. Aurora Loan
3 Services, LLC, 2011 WL 1601593, *2 (E.D. Cal. April 27, 2011). The
4 statute of limitations for TILA damages claim is one year from the
5 occurrence of a violation. 15 U.S.C. § 1640(e). Under 15 U.S.C.
6 § 1635(f), TILA rescission claims shall expire three years after
7 the date of consummation of the transaction, or upon sale of the
8 property, whichever occurs first. The limitations period runs from
9 the date of consummation of the transaction. Wadhwa, supra (citing
10 King v. California, 784 F.2d 910, 915 (9th Cir. 1986)).

11 The doctrine of equitable tolling may, in the
12 appropriate circumstance, suspend the limitation
13 period until the borrower discovers or had reasonable
14 opportunity to discover the fraud or nondisclosures
15 that form the basis of the TILA action. While the
16 applicability of the equitable tolling doctrine often
17 depends on matters outside the pleadings, dismissal
18 may be appropriate when a plaintiff fails to allege
19 facts suggesting that he did not have a reasonable
20 opportunity to discover the violation.

21 Wadhwa, 2011 WL 1601593 at *2 (internal citations omitted).

22 Here, the loan was issued on January 14, 2009, and Plaintiff
23 filed her complaint on August 11, 2010, more than one year later.
24 Plaintiff has included the cursory allegation throughout the SAC
25 that she did not learn of any violations until November 2009, and
26 thus any applicable statute of limitation should run from this
27 date. However, the SAC offers no factual support for Plaintiff's
28 allegation that she was unable to compare the allegedly improper
disclosure in the loan documents with the required disclosures
under HOEPA, nor does she explain why she could not have learned of
the alleged violations within the statutory period. See, e.g.,
Wadhwa, 2011 WL 1601593, at *2-3 (declining to apply equitable

1 tolling where plaintiffs did not allege why they could not compare
2 disclosure forms or discover the violation during the statutory
3 period). Accordingly, the statute of limitations for Plaintiff's
4 HOEPA damages claim has run, and the Court does not find from the
5 SAC's conclusory tolling allegation that equitable tolling applies.
6 While Plaintiff's HOEPA claim for rescission is timely, Plaintiff
7 has failed to tender the full amount of the loan or alleged ability
8 to tender. See e.g. Little v. Accent Conservatory and Sunroom
9 Designs, 2011 WL 2215816, *3 (S.D. Cal. June 7, 2011). As when
10 alleging a claim for rescission under TILA, plaintiffs must make an
11 offer of complete tender before seeking rescission of the loan. Id.

12 Additionally, Defendants argue that Plaintiff has not shown
13 that HOEPA applies to her loan. A loan is subject to HOEPA if the
14 loan's annual percentage rate at consummation exceeds by more than
15 ten percent the applicable yield on treasury securities, or the
16 total points and fees payable by the consumer at or before closing
17 exceeds eight percent of the total loan amount or \$400.00,
18 whichever is greater. 15 U.S.C. § 1602(aa)(1)(3); 12 C.F.R.
19 §226.32(a)(1). A HOEPA claim that fails to allege facts showing
20 that the plaintiff's loan satisfies one of the tests cannot
21 withstand a motion to dismiss. Rendon v. Countrywide Home Loans,
22 Inc., 2009 WL 3126400, *9 (E.D. Cal. 2009). The SAC states that
23 Plaintiff was required to pay excessive fees that exceeded ten
24 percent of the amount financed. Taking this allegation as true, as
25 the Court is required, Plaintiff has sufficiently alleged that
26 HOEPA may apply to her loan. However, because her claim for
27 damages is barred by the statute of limitations, and she has not
28 sufficiently alleged tender so as to maintain her claim for

1 rescission, the HOEPA claim is dismissed in its entirety.

2 2. Violation of the Real Estate Settlement Procedures
3 Act

4 Plaintiff alleges that Defendants violated the Real Estate
5 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, because
6 Defendants "accepted charges for the rendering of real estate
7 services which were in fact charges for other than services
8 actually performed." SAC ¶71. Defendants argue that the RESPA
9 claim is barred by the one year statute of limitations and fails to
10 state a claim.

11 The primary ill that section 2607 is designed to
12 remedy is the potential for unnecessarily high
13 settlement charges caused by kickbacks, fee-splitting,
14 and other practices that suppress price competition
15 for settlement services. This ill occurs, if at all,
16 when the plaintiff pays for the tainted service,
17 typically at the closing. 12 U.S.C. § 2614 provides
18 that a section 2607 claim may be brought within 1 year
19 from the date of the occurrence of the violation.
20 Barring extenuating circumstances, the date of the
21 occurrence of the violation is the date on which the
22 loan closed.

23 Solano v. America's Servicing Company, 2011 WL 1669735, *3 (E.D.
24 Cal. May 3, 2011) (internal citations omitted).

25 In this case, Plaintiff's loan was made on January 14, 2009.
26 Thus, her current claim is barred by the statute of limitations.
27 As discussed above, neither the SAC nor Plaintiff's opposition
28 brief discuss why she could not have discovered the alleged
violation within the one-year statutory period. Therefore,
Plaintiff has not shown that equitable tolling applies to her
claim. Moreover, the claim itself is devoid of factual support for
her conclusory allegation that Defendants violated RESPA, and is
thus insufficient to state a claim against Defendants. Because

1 Plaintiff lumps all Defendants together, it is unclear against whom
2 she intends to bring the claim. Defendants note in their reply
3 brief that none of them were the original lenders on the loan,
4 therefore none of them were involved at the time that the alleged
5 violations occurred. Accordingly, the RESPA claim is dismissed.

6 3. Violation of the Truth in Lending Act

7 Plaintiff alleges that Defendants violated TILA, 15 U.S.C. §
8 1601, et seq., by failing to disclose certain charges in the
9 finance charge shown on the TILA statement. Plaintiff seeks
10 rescission and alleges that the SAC serves as formal notice of her
11 intent to rescind her loan under TILA. Defendants assert that
12 Plaintiff cannot state a claim for rescission under TILA, without
13 first alleging that she can tender the amount due on the loan. To
14 the extent that Plaintiff seeks damages, Defendants argue damages
15 are barred by the one year statute of limitations.

16 The statute of limitations for rescission under TILA is three
17 years. Accordingly, Plaintiff's claim for rescission is timely.
18 However, as discussed in the HOEPA claim, her claim for damages
19 under TILA is barred, as the statute of limitations has run and she
20 has not made sufficient allegations as to why equitable tolling
21 should apply. Further, Defendants are correct that Plaintiff must
22 allege tender in order to bring her claim for rescission, and she
23 has not done so. (See, e.g., Rose v. American Home Mortg.
24 Servicing, Inc., 2011 WL 2074938, at *2 (E.D. Cal. May 25, 2011).
25 A tender must be one of full performance and must be unconditional
26 to be valid. Solano, 2011 WL 1669735, at *8. Plaintiff's
27 allegation that she offered to tender in the letter of rescission
28 (Ex. F. to the SAC), conditioned on receiving approximately 4

1 million dollars in damages from Defendants, is not sufficient.
2 Accordingly, the claim for TILA rescission and damages is
3 dismissed.

4 4. Violation of the Fair Credit Reporting Act

5 Plaintiff alleges that Defendants violated the Fair Credit
6 Reporting Act ("FCRA"), 15 U.S.C. § 1681 by reporting negative
7 information about Plaintiff to the major credit reporting agencies.
8 Defendants argue that Plaintiff has not properly alleged a
9 violation of the FRCA and therefore fails to state a claim against
10 Defendants.

11 There is a private right of action for violations of section
12 1681(S)(2)(b) of the FRCA. Matracia v. JP Morgan Chase Bank, 2011
13 WL 1833092, *3 (E.D. Cal. May 12, 2011). However, to succeed on
14 such a claim, a plaintiff must allege that she had a dispute with a
15 credit reporting agency regarding the accuracy of an account, that
16 the credit reporting agency notified the furnisher of the
17 information, and that the furnisher failed to take the remedial
18 measures outlined in the statute. Id. Here, Plaintiff fails to
19 allege any of these facts. Accordingly, the FRCA claim is
20 dismissed.

21 5. Fraudulent Misrepresentation

22 Plaintiff alleges that Defendants fraudulently concealed and
23 misrepresented information about her loan, before and after
24 closing. Defendants assert that Plaintiff's allegations do not
25 meet the heightened pleading standard for claims of fraud.

26 Rule 9(b)'s heightened pleading standard applies to averments
27 of fraud in all civil cases, regardless of whether or not fraud is
28 an essential element of the claim. Rule 9(b) proves that in

1 alleging fraud or mistake, a party must state with particularity
2 the circumstances constituting fraud or mistake. The required
3 specificity includes the time, place and specific content of the
4 false representations as well as the identities of the parties to
5 the misrepresentations. Further, in alleging fraud against
6 multiple defendants, Rule 9(b) does not allow a complaint to merely
7 lump multiple defendants together but requires plaintiff to
8 differentiate her allegations when suing more than one defendant.”
9 Solano, 2011 WL 1669735, *5-6 (internal citations omitted).

10 As the SAC does not differentiate between the named
11 defendants, and is not plead with the specificity required by Rule
12 9(b), Plaintiff’s claim for fraudulent misrepresentation is
13 dismissed.

14 6. Breach of Fiduciary Duty

15 Plaintiff alleges that Defendants breached their fiduciary
16 duty by inducing Plaintiff to enter into a mortgage that was
17 contrary to Plaintiff’s intentions and interests. Defendants move
18 to dismiss for failure to prove that a fiduciary relationship
19 existed.

20 To state a claim for breach of fiduciary duty, a plaintiff
21 must allege: (1) the existence of a fiduciary relationship; (2) the
22 breach of that relationship; and (3) damage proximately caused
23 thereby. Solano, supra, at *6. As a general rule, a loan
24 transaction is an at arms length transaction and there is no
25 fiduciary relationship between the borrower and lender. Further,
26 loan servicers typically do not have a fiduciary relationship with
27 borrowers. Id. The allegations in the SAC that Defendants
28 breached their fiduciary duty are identical to allegations of

1 breach of fiduciary duty previously dismissed in *Solano*, 2011 WL
2 1669735 at *6. As the allegations in the SAC do not show that
3 these defendants are indeed fiduciaries to Plaintiff, the claim for
4 Breach of Fiduciary Duty is dismissed.

5 7. Unjust Enrichment

6 Plaintiff alleges that Defendants have been unjustly enriched
7 by receiving fees and benefits from the loan transaction, at the
8 expense of Plaintiff. Defendants move to dismiss this claim,
9 asserting that that Plaintiff cannot bring a claim for unjust
10 enrichment, and has not shown any wrongful act by Defendants.
11 Under California law, it is well settled that an action based upon
12 an implied-in-fact contract or quasi-contract cannot lie where
13 there exists between the parties a valid express contract covering
14 the same subject matter. *Solano*, 2011 WL 1669735 at *7. Because
15 the SAC alleges the existence of an express contract between the
16 parties that governed the loan transaction, she cannot bring a
17 claim for unjust enrichment based on an alleged implied contract
18 covering the same loan transaction. Accordingly, the claim for
19 unjust enrichment is dismissed.

20 8. Civil Conspiracy

21 Plaintiff alleges that Defendants engaged in a conspiracy to
22 further illegal acts in the course of the loan transaction.
23 Defendants move to dismiss this claim, arguing that there is no
24 independent claim for civil conspiracy under California law.

25 Conspiracy is not a cause of action, but a legal doctrine that
26 imposes liability on persons who, although not actually committing
27 a tort themselves, share with the immediate tortfeasors a common
28 plan or design in its perpetration. Standing alone, a conspiracy

1 does no harm and engenders no tort liability. It must be activated
2 by the commission of an actual tort. Further, to allege a civil
3 conspiracy to defraud, a complaint must meet the particularity
4 requirement of Rule 9(b). Solano, supra at *10. Accordingly, as
5 Plaintiff does not set forth the basis for her claim of conspiracy,
6 and as this Court is dismissing all other claims in the SAC upon
7 which her conspiracy claim could possibly be based, the civil
8 conspiracy claim is dismissed.

9 9. Civil RICO Violations

10 Plaintiff alleges that Defendants participate in a RICO
11 conspiracy to defraud her. Defendants move to dismiss this claim,
12 arguing that it is not plead with particularity, Plaintiff has not
13 plead any facts to support her allegation of a RICO conspiracy, and
14 has not alleged that Defendants engaged in pattern of activities
15 affecting interstate commerce. To properly plead a RICO violation
16 for civil damages, a plaintiff must show that defendants, through
17 two or more acts constituting a pattern, participated in an
18 activity affecting interstate commerce. McAnelly v. PNC Mortgage,
19 2011 WL 318575, *3 (E.D. Cal. Feb. 1, 2011). As Plaintiff has
20 raised only conclusory allegations without any factual support, and
21 has failed to allege the essential elements of a RICO claim, her
22 RICO conspiracy claim is dismissed.

23 10. Quiet Title

24 Plaintiff brings a claim to quiet title to the property,
25 seeking full and clear title. Defendants move to dismiss the claim
26 because Plaintiff has not tendered the amount she owes. "Under
27 California law, it is well settled that a mortgagor cannot quiet
28 his title against the mortgagee without paying the debt secured."

1 Solano, 2011 WL 1669735 at *8. Therefore, to maintain a quiet
2 title claim a plaintiff is required to allege tender of the
3 proceeds of the loan at the pleading stage. A tender must be one
4 of full performance and must be unconditional to be valid. Id. As
5 previously discussed, Plaintiff has not sufficiently alleged
6 tender. Accordingly, the claim to quiet title is dismissed.

7 11. Usury and Fraud

8 Plaintiff alleges that Defendants have committed usury and fraud.
9 Defendants move to dismiss, arguing that Plaintiff lumps all
10 Defendants together, fails to plead with particularity and has not
11 set forth the basis for her usury claim. Under California law, the
12 elements of a fraud claims are (1) misrepresentation; (2) knowledge
13 of falsity; (3) intent to induce reliance; (4) justifiable
14 reliance; and (5) resulting damage. Solano, 2011 WL1669735 at *9.
15 A claim for fraud in federal court must satisfy Rule 9(b)'s
16 heightened pleading requirements. Id. The elements of a usury
17 claim are (1) the transaction must be a loan or forbearance;
18 (2) the interest to be paid must exceed the statutory maximum;
19 (3) the loan an interest must be absolutely repayable by the
20 borrower; and (4) the lender must have a willful intent to enter
21 into a usurious transaction. A loan that charges an interest rate
22 greater than 10 percent per annum is usurious. Id. As Plaintiff
23 has failed to plead her claim with the required particularity, and
24 has not set forth any facts to support her claim for usury and
25 fraud, the claim is dismissed.

26 12. Wrongful Foreclosure

27 Plaintiff alleges that Defendant wrongfully foreclosed on her
28 property, because Defendants are not the beneficiaries of the

1 mortgage. Defendants contend that Plaintiff must fully tender
2 before she can challenge the foreclosure sale. To state a wrongful
3 foreclosure claim, a plaintiff must allege a credible tender of the
4 amount of the secured debt. Solano, supra, at *10. As discussed
5 above, tender must be one of full performance and must be
6 unconditional to be valid. Plaintiff makes no such unconditional
7 tender in the SAC, accordingly, the motion to dismiss this claim is
8 granted.

9 13. Breach of Trust Instrument

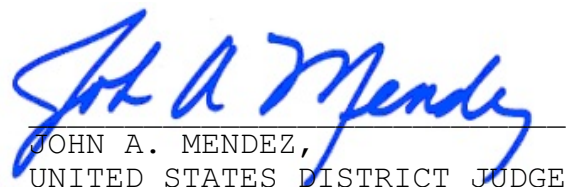
10 Lastly, Plaintiff brings a claim captioned "Breach of Trust
11 Instrument" in which she alleges that the security instrument was
12 breached. Defendants move to dismiss alleging that Plaintiff's
13 claim is vague, and that plaintiff has not set facts showing
14 wrongful acts or damages to support her claim. Identical
15 allegations were dismissed as conclusory, vague and insufficient to
16 inform each defendant of its liability for breach of the security
17 instrument in Matracia v. JP Morgan Chase Bank, 2011 WL 1833092,
18 at*6 (E.D. Cal. May 12, 2011) (dismissing a complaint brought by
19 Plaintiff's counsel). This Court likewise finds that Plaintiff has
20 failed to state claim for breach of the security instrument, and
21 the claim is dismissed.

22 III. ORDER

23 Plaintiff has already amended her complaint twice and has yet
24 to properly plead her claims. Thus it is clear that none of the
25 claims can be saved by further amendment. Accordingly, all of the
26 claims in the SAC are dismissed with prejudice.

27 IT IS SO ORDERED.

28 Dated: June 30, 2011


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE