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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ABU-ART ROBINSON and NADINE E.
ROBINSON,

NO. CIV. 2:10-3014 WBS GGH

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

WACHOVIA MORTGAGE; the
successors and assigns of
WORLD SAVINGS BANK; and DOES 1
through 20, inclusive,

Defendants.

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Plaintiffs Abu-Art Robinson and Nadine E. Robinson
filed this action against defendants Wachovia Mortgage and the
successors and assigns of World Savings Bank arising from their
residential mortgage. Wachovia Mortgage now moves to dismiss the
Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)
for failure to state a claim upon which relief can be granted.
Plaintiffs did not file an opposition or statement of

1 non-opposition to the motion.

2 I. Factual and Procedural Background

3 Plaintiffs entered into a loan agreement with World
4 Savings Bank in August of 2005 to purchase property at 1124
5 Martinson Court in Sacramento, California. (Compl. ¶ 2, Ex. A
6 (Docket No. 1).) The note was secured by a Deed of Trust. (Id.
7 Ex. A.) While the Complaint lacks specifics, it appears that
8 plaintiffs have defaulted on their loan agreement "by virtue of
9 their inability to make all payments as they came due" and the
10 foreclosure process has been initiated, but a foreclosure sale
11 has not taken place. (Id. ¶¶ 5-6, 10-11, 14, 20.)

12 Plaintiffs' claims are based on the loan origination
13 and the initiation of the foreclosure process. Plaintiffs allege
14 that defendants "fail[ed] to provide the Plaintiff(s) with a copy
15 of the loan application (form 1003), the actual fully filled-out
16 and executed promissory note, [and] the 3-day Right of
17 Rescission" and that "the Truth In Lending Disclosure statement
18 is very inaccurate and deceptive and fails to give notice to
19 Plaintiff(s) [regarding] the extent of the obligations." (Id. ¶
20 7.) Defendants allegedly gave plaintiffs "incomplete documents
21 that plaintiffs were told they must sign[] [and] insufficient
22 time to review the more than 50 pages the plaintiffs were
23 expected to read and sign in less than an hour." (Id. ¶ 8.)
24 While the Complaint does not allege what was misrepresented, the
25 Complaint alleges that misrepresentations induced plaintiffs "to
26 accept loan terms that they did not understand." (Id. ¶ 18.)

27 The Complaint alleges that the "plaintiffs were placed
28 in an inappropriate loan that they could barely afford before any

1 re-set of interest rate or payment." (Id. ¶ 8.) Plaintiffs
2 allege that the defendants had the "knowledge and experience to
3 evaluate the appropriateness of the loans and the standards of
4 the lending industry sufficient to determine if plaintiffs had
5 been dealt with fairly and if the selected loan product was
6 applicable for the plaintiffs." (Id. ¶ 12.)

7 Plaintiffs allegedly "have been threatened with
8 wrongfully [sic] and unlawfully [sic] dispossession of their real
9 property." (Id. ¶ 10.) The Complaint alleges that defendants
10 have "perpetrated fraud on the plaintiff(s), if the allegations
11 are true that defendants do not hold the original promissory note
12 secured by the deed of trust." (Id. ¶ 17.)

13 On September 28, 2010, plaintiffs filed this action in
14 state court, and defendants removed it on November 9, 2010. The
15 Complaint asserts nine claims: (1) breach of contract, (2)
16 declaratory relief, (3) fraud, (4) intentional misrepresentation,
17 (5) negligent misrepresentation, (6) rescission and restitution,
18 (7) declaration of resulting or constructive trust, (8) quiet
19 title, and (9) accounting. Wachovia Mortgage¹ now moves to
20 dismiss the Complaint pursuant to Rule 12(b)(6).

21 II. Discussion

22 To survive a motion to dismiss, a plaintiff must plead
23 "only enough facts to state a claim to relief that is plausible
24 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570

26 ¹ In the notice of removal, Wachovia Mortgage states that
27 it is a division of Wells Fargo Bank, N.A., formerly known as
28 Wachovia Mortgage, FSB, formerly known as World Savings Bank,
FSB, erroneously sued as the successor and assigns of World
Savings Bank. (Docket No. 1.)

1 (2007). This "plausibility standard," however, "asks for more
2 than a sheer possibility that a defendant has acted unlawfully,"
3 Ashcroft v. Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949
4 (2009), and where a complaint pleads facts that are "'merely
5 consistent with' a defendant's liability, it 'stops short of the
6 line between possibility and plausibility of entitlement to
7 relief.'" Id. (quoting Twombly, 550 U.S. at 557). In deciding
8 whether a plaintiff has stated a claim, the court must assume
9 that the plaintiff's allegations are true and draw all reasonable
10 inferences in the plaintiff's favor. Usher v. City of L.A., 828
11 F.2d 556, 561 (9th Cir. 1987). However, the court is not
12 required to accept as true "allegations that are merely
13 conclusory, unwarranted deductions of fact, or unreasonable
14 inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055
15 (9th Cir. 2008) (internal quotation mark omitted).

16 A. Breach of Contract Claim

17 While plaintiffs label their first claim as breach of
18 contract, plaintiffs actually appear to allege a breach of the
19 covenant of good faith and fair dealing. "Every contract imposes
20 upon each party a duty of good faith and fair dealing in its
21 performance and its enforcement." Marsu, B.V. v. Walt Disney
22 Co., 185 F.3d 932, 937 (9th Cir. 1999) (applying California law)
23 (internal quotation marks omitted). That duty, known as the
24 covenant of good faith and fair dealing, requires "that neither
25 party . . . do anything which will injure the right of the other
26 to receive the benefits of the agreement." Andrews v. Mobile
27 Aire Estates, 125 Cal. App. 4th 578, 589 (2d Dist. 2005)
28 (internal quotation marks omitted). "[T]he implied covenant is

1 limited to assuring compliance with the express terms of the
2 contract, and cannot be extended to create obligations not
3 contemplated in the contract." Racine & Laramie, Ltd. v. Dep't
4 of Parks & Recreation, 11 Cal. App. 4th 1026, 1032 (4th Dist.
5 1992). "[T]he implied covenant is a supplement to an existing
6 contract, and thus it does not require parties to negotiate in
7 good faith prior to any agreement." McClain v. Octagon Plaza,
8 LLC, 159 Cal. App. 4th 784, 799 (2d Dist. 2008).

9 Here, plaintiffs rest this claim primarily on
10 allegations about defendants' conduct during the negotiation and
11 formation of the agreement. However, defendants did not have a
12 duty of good faith and fair dealing during the loan origination.
13 See Lopez v. Wachovia Mortg., 2010 WL 2836823, No. C 10-01645, at
14 *8 (N.D. Cal. July 19, 2010) ("Thus, to the extent that the
15 complaint's allegations stem from the formation and negotiation
16 of the loan, plaintiff's claim for breach of the covenant must be
17 dismissed."); Madrid v. J.P. Morgan Chase Bank, N.A., No.
18 09-cv-00731 JAM GGH, 2009 WL 3255880, at *4 (E.D. Cal. Oct. 8,
19 2009). Plaintiffs have also failed to sufficiently allege a
20 breach of the covenant subsequent to the loan origination.
21 Accordingly, the court will grant Wachovia Mortgage's motion to
22 dismiss this claim.

23 B. Fraud, Intentional Misrepresentation, and Negligent
24 Misrepresentation Claims

25 "The elements of fraud are: (1) a misrepresentation
26 (false representation, concealment, or nondisclosure); (2)
27 knowledge of falsity (or scienter); (3) intent to defraud, i.e.,
28 to induce reliance; (4) justifiable reliance; and (5) resulting

1 damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal.
2 4th 979, 990 (2004). A claim for intentional misrepresentation
3 is a claim for fraud. See Anderson v. Deloitte & Touche, 56 Cal.
4 App. 4th 1468, 1474 (1st Dist. 1997). A claim for negligent
5 misrepresentation contains similar elements, but requires a
6 different state of mind. BNSF Ry. Co. v. San Joaquin Valley R.
7 Co., No. 1:08-cv-01086 AWI SMS, 2010 WL 5158879, at *7 (E.D. Cal.
8 Dec. 14, 2010). Negligent misrepresentation does not require an
9 intent to deceive, only an "assertion, as a fact, of that which
10 is not true, by one who has no reasonable ground for believing it
11 to be true," Cal. Civ. Code § 1710(2), or a "positive assertion,
12 in a manner not warranted by the information of the person making
13 it, of that which is not true, though he believes it to be true."
14 Cal. Civ. Code § 1572(2).

15 Under the heightened pleading requirements for claims
16 of fraud under Federal Rule of Civil Procedure Rule 9(b), "a
17 party must state with particularity the circumstances
18 constituting the fraud." Fed. R. Civ. P. 9(b). A plaintiff must
19 include the "who, what, when, where, and how" of the fraud. Vess
20 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).
21 Negligent misrepresentation "sounds in fraud" and thus is also
22 subject to these heightened pleading standards. Errico v.
23 Pacific Capital Bank, N.A., --- F. Supp. 2d ----, ----, No.
24 09-CV-04072, 2010 WL 4699394, at *13 (N.D. Cal. Nov. 9, 2010).

25 Here, the Complaint is devoid of allegations stated
26 with particularity. It is not even clear what representations
27 were made to plaintiffs. To the extent these claims rest on a
28 representation that defendants are entitled to foreclose on the

1 property despite not being the note holder, plaintiffs' claims
2 fail. See Arvizu v. GMAC Mortg., LLC, No. 1:10-cv-00990 OWW JLT,
3 2010 WL 3958666, 2010 WL 3958666, at *5 (E.D. Cal. Oct. 8, 2010);
4 Castaneda v. Saxon Mortgage Servs., Inc., 687 F. Supp. 2d 1191,
5 1201 (E.D. Cal. 2009) ("Under California law, there is no
6 requirement for the production of the original note to initiate a
7 non-judicial foreclosure"). Accordingly, the court will grant
8 Wachovia Mortgage's motion to dismiss these claims.

9 C. TILA Claim

10 The Complaint does not separately label a TILA claim.
11 However, plaintiffs allege TILA violations. (Compl. ¶ 7.) To the
12 extent plaintiffs assert a TILA claim, a TILA claim is
13 timed-barred because the loan was made in August of 2005 (Compl.
14 Ex. A) and the Complaint was filed over five years later. A TILA
15 damages claim has a one-year statute of limitations, 15 U.S.C. §
16 1640(e), and a TILA rescission claim has a three-year statute of
17 limitations. Id. § 1635(f). Although equitable tolling may
18 apply to a TILA damages claim, King v. California, 784 F.2d 910,
19 915 (9th Cir. 1986), plaintiffs do not allege facts suggesting
20 that equitable tolling applies. Accordingly, to the extent that
21 plaintiffs assert a TILA claim, the court will dismiss this
22 claim.

23 D. Quiet Title Claim

24 California Code of Civil Procedure section 761.020
25 states that a claim to quiet title requires: (1) a verified
26 complaint, (2) a description of the property, (3) the title to
27 which a determination is sought, (4) the adverse claims to the
28 title against which a determination is sought, (5) the date as of

1 which the determination is sought, and (6) a prayer for the
2 determination of the title. Cal. Code Civil Proc. § 761.020.

3 The tender rule applies to a quiet title action.
4 Kozhayev v. America's Wholesale Lender, No. CIV S-09-2841 FCD DAD
5 PS, 2010 WL 3036001, at *5 (E.D. Cal. Aug. 2, 2010); see also
6 Shimpones v. Stickney, 219 Cal. 637, 649 (1934). A "quiet title
7 action is doomed in the absence of Plaintiffs' tender of the full
8 amount owed." Gjurovich v. Cal., No. 1:10-cv-01871 LJO SMS, 2010
9 WL 4321604, at *8 (E.D. Cal. Oct. 26, 2010). Here, among other
10 deficiencies, plaintiffs have not alleged tender or the ability
11 to tender. Accordingly, the court will grant Wachovia Mortgage's
12 motion to dismiss the quiet title claim.

13 E. Remaining Claims

14 Plaintiffs' remaining claims are for declaratory
15 relief, rescission and restitution, declaration of resulting or
16 constructive trust, and accounting. These claims are either
17 duplicative or derivative of the claims that the court will
18 dismiss. Thus, because the court will dismiss the other claims,
19 the court will grant Wachovia Mortgage's motion to dismiss these
20 remaining claims.

21 IT IS THEREFORE ORDERED that Wachovia Mortgage's motion
22 to dismiss the Complaint be, and the same hereby is, GRANTED.

23 Plaintiffs have twenty days from the date of this Order

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1 to file an amended complaint, if they can do so consistent with
2 this Order.

3 DATED: January 28, 2011

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5 WILLIAM B. SHUBB
6 UNITED STATES DISTRICT JUDGE

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