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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KWANG JANG and AMY JANG,)	Case No. 2:11-CV-02427-JAM-GGH
)	
Plaintiffs,)	
)	ORDER GRANTING DEFENDANTS'
v.)	MOTION TO DISMISS
)	
1st UNITED BANK, formerly)	
Republic Federal Bank, N.A.,)	
formerly Hemisphere National)	
Bank, et al.)	
)	
Defendants.)	

This matter comes before the Court on Defendants 1st United Bank, formerly Republic Federal Bank, N.A., formerly Hemisphere National Bank, Mortgage Electronic Registration Systems, Inc. ("MERS") and U.S. Bank, N.A., as trustee for Morgan Stanley Mortgage Loan Trust 2006-1 AR's (collectively "Defendants") Motion to Dismiss (Doc. #12) Plaintiffs Amy and Kwang Jang's ("Plaintiffs") Complaint (Doc. #2), pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs oppose Defendants' motion.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was originally scheduled for May 2, 2012.

1 For the reasons set forth below, Defendants' Motion to Dismiss
2 is granted.

3
4 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

5 This action arises out of a nonjudicial foreclosure of real
6 property located at 840 Wedgwood Court in West Sacramento,
7 California ("Subject Property"). See Plaintiffs' Complaint, Doc.
8 #2 ("Comp.") at ¶¶ 1, 42, 48-49. In November 2005, Plaintiffs
9 borrowed an unspecified amount from an unspecified lender, which
10 was secured by the Subject Property. Id. at ¶¶ 22. Plaintiffs
11 subsequently defaulted on the loan sometime in November 2009, after
12 their March 2009 application for a loan modification was rejected.
13 Id. at ¶¶ 25-28, 33. Plaintiffs received a letter regarding their
14 default, and they subsequently applied again for a loan
15 modification. Id. at ¶¶ 33-38. Although Plaintiffs were told by
16 "Yuriko" at 1st United Bank that they had been approved for a
17 modification, the modified payments were even higher than the
18 existing payments Plaintiffs already could not afford. Id. at ¶¶
19 38-39. Plaintiffs' continued requests to the bank, to reduce the
20 principle owed, were denied. Id. at ¶ 40. Sometime in January or
21 February 2011, various defendants began the foreclosure process.
22 Id. at ¶¶ 42-61.

23 Through this suit, Plaintiffs "are seeking to discover who
24 owns their home and has the authority to modify it [sic]." Comp.
25 at ¶ 21. Plaintiffs allege Defendants "failed, refused and/or
26 neglected to work with [them] in any reasonable way to avoid
27 foreclosure . . . ," and "purposefully deceived" them in wrongfully
28 foreclosing on the Subject Property; for these reasons, Plaintiffs

1 allege they are entitled to equitable and monetary relief on their
2 nine asserted causes of action. Id. at ¶¶ 193-197.

3 On May 1, 2012, this Court issued an Order to Show Cause
4 regarding Plaintiffs' failure to serve named Defendants First
5 American Title and Cal-Western Reconveyance Corporation. Doc. #26.
6 Because Plaintiffs did not respond to this Court's Order, on May
7 14, 2012, this Court Ordered First American Title and Cal-Western
8 Reconveyance Corporation dismissed from this action pursuant to
9 Federal Rule of Civil Procedure 4(m).

11 II. OPINION

12 A. Legal Standard

13 A party may move to dismiss an action for failure to state a
14 claim upon which relief can be granted pursuant to Federal Rule of
15 Civil Procedure 12(b)(6). In considering a motion to dismiss, the
16 court must accept the allegations in the complaint as true and draw
17 all reasonable inferences in favor of the plaintiff. Scheuer v.
18 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
19 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
20 322 (1972). Assertions that are mere "legal conclusions," however,
21 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
22 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550
23 U.S. 544, 555 (2007)). To survive a motion to dismiss, a plaintiff
24 needs to plead "enough facts to state a claim to relief that is
25 plausible on its face." Twombly, 550 U.S. at 570. Dismissal is
26 appropriate where the plaintiff fails to state a claim supportable
27 by a cognizable legal theory. Balistreri v. Pacifica Police Dep't,
28 901 F.2d 696, 699 (9th Cir. 1990).

1 Upon granting a motion to dismiss for failure to state a
2 claim, the court has discretion to allow leave to amend the
3 complaint pursuant to Federal Rule of Civil Procedure 15(a).
4 "Dismissal with prejudice and without leave to amend is not
5 appropriate unless it is clear . . . that the complaint could not
6 be saved by amendment." Eminence Capital, L.L.C. v. Aspeon, Inc.,
7 316 F.3d 1048, 1052 (9th Cir. 2003).

8 B. Motion to Dismiss²

9 1. Federal Claims for Relief

10 a. Violations of the Truth in Lending Act ("TILA")

11 In their Complaint, Plaintiffs allege "Defendants failed to
12 include and disclose certain charges in the finance charge shown on
13 the TILA statement," in violation of 15 U.S.C. § 1601, *et seq.*, and
14 seek both rescission and damages. Comp. at ¶¶ 198-202. Defendants
15 argue that Plaintiffs' TILA claim must be dismissed because it is
16 barred by the applicable statute of limitations. See Defendants'
17 Motion to Dismiss, Doc. #12 ("MTD") at pg. 22-23.

18 The statute of limitations for a claim under TILA is one year
19 for damages and three years for rescission, see 15 U.S.C. §
20 1640(e), and as Defendants correctly note, Plaintiffs' Complaint
21 was filed well outside both. See Defs' MTD at pg. 22-23.

22 Plaintiffs acknowledge their TILA claim was filed outside of the

23 _____
24 ² The Court notes with great concern that all nine of Plaintiffs'
25 causes of action, as pled in their complaint, are identical or
26 substantially similar to those contained in other complaints filed
27 by Plaintiffs' former attorney in the Eastern District, all of
28 which have been dismissed for failure to state a claim. Compare,
e.g., Von Brincken v. Mortgageclose.com Inc., et al., 2011 WL
2621010 (E.D. Cal. June 30, 2011), 10-cv-02153 JAM-KJN, Docs. #1,
12, 62, 74, with Comp.; see also Hall v. Mortgage Investors Group,
2011 WL 4374995 (E.D. Cal. Sept. 19, 2011). Boilerplate or "cut
and paste" pleadings are strongly discouraged by this Court,
particularly pleadings that contain claims previously dismissed.

1 statute of limitations, but argue that this Court "should exercise
2 its discretion and use its equitable power in order to toll the
3 statute of limitations" because Plaintiffs, as lay persons, with
4 "no experience in investment banking, securities dealing, or
5 mortgage lending would not have been able to discover Defendants'
6 actions within the applicable statute[] of limitations."

7 Plaintiffs' Opposition to Defendants' Motion to Dismiss, Doc. #23
8 ("OPP") at pg. 4-5.

9 In the Ninth Circuit, "[e]quitable tolling may be applied if,
10 despite all due diligence, a plaintiff is unable to obtain vital
11 information bearing on the existence of his claim." Santa Maria v.
12 Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000) (citing Holmberg
13 v. Armbrecht, 327 U.S. 392, 397 (1946)). Importantly:

14 [E]quitable tolling does not depend on any wrongful
15 conduct by the defendant to prevent plaintiff from suing.
16 Instead it focuses on whether there was excusable delay
17 by the plaintiff. If a reasonable plaintiff would not
18 have known the existence of a possible claim within the
19 limitations period, then equitable tolling will serve to
20 extend the statute of limitations for filing suit until
21 plaintiff can gather what information he needs.

22 Id. (citing Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 268 (7th
23 Cir. 1995)) (other citations omitted). Plaintiffs' Complaint is
24 devoid of facts demonstrating that they exercised due diligence in
25 attempting to uncover information regarding their claims or
26 explaining why it was reasonable for them to not have known of the
27 existence of their claim. See Comp. at ¶¶ 181-89. Tellingly,
28 Plaintiffs do not direct the Court to any portion of the Complaint
to support their argument that the statute of limitations should be
tolled. OPP at pg. 4-5. Plaintiffs' conclusory statements
regarding equitable tolling lack the requisite factual specificity

1 to withstand Defendants' Motion to Dismiss, and therefore,
2 Plaintiffs' TILA claim is dismissed. See Von Brincken v.
3 Mortgageclose, et al., 2011 WL 2621010 at *2-3 (E.D. Cal. June 30,
4 2011) (finding the plaintiff's federal claims were barred by the
5 statute of limitations, as plaintiff had failed to plead facts
6 supporting the application of equitable tolling in his second
7 amended complaint).

8 The Court further finds that allowing Plaintiffs leave to
9 amend their TILA claim would be futile for two reasons. First, in
10 their Motion to Dismiss, Defendants address several other cases
11 brought by Plaintiffs' former attorney, where allegations identical
12 to Plaintiffs' regarding equitable tolling were found to be
13 insufficient at the pleading stage. MTD at pg. 22-23 (citing,
14 *inter alia*, Shapiro v. Bank of America, N.A., 2011 WL 4851145 (E.D.
15 Cal. 2011)). Plaintiffs do not respond to this in their
16 Opposition, and instead simply argue that their claim was
17 adequately pled. OPP at pg. 4-6. Plaintiffs' failure to rebut
18 Defendants' argument regarding prior dismissals on identical
19 pleadings demonstrates that there are no facts in this case that
20 would require the statute of limitations to be tolled. See
21 Rodriguez v. Wells Fargo Bank, N.A., 2011 WL 2946381 (E.D. Cal.
22 Jul. 21, 2011). Second, on the last page of their Opposition,
23 Plaintiffs ask this court to grant them leave to amend if it finds
24 that any claims are insufficiently pled. OPP at pg. 10. However,
25 Plaintiffs give no indication of what more they could plead to
26 state a claim under TILA, signaling that indeed there are no
27 additional facts Plaintiffs could include in their Complaint if
28 they were granted leave to amend. See, e.g., Rodriguez, 2011 WL

1 2946381 (granting defendants' motion to dismiss without leave to
2 amend because plaintiff's attorney had previously filed identical
3 complaints that did not satisfy Rule 8's pleading standard). For
4 these reasons, Plaintiffs' claim under TILA for rescission and
5 damages is dismissed with prejudice.

6 b. Violations of RESPA

7 Plaintiffs allege that Defendants violated the Real Estate
8 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, by
9 "accept[ing] charges for the rendering of real estate services
10 which were in fact charges services [sic] other than those actually
11 performed." Comp. at ¶ 205.

12 RESPA proscribes referral fees or fee splitting "in connection
13 with a transaction involving federally related mortgage loan." 12
14 U.S.C. § 2607(a), (b). As Defendants correctly point out,
15 Plaintiffs' RESPA claim is barred by the one-year statute of
16 limitations. MTD at pg. 24; 12 U.S.C. § 2614. Plaintiff makes the
17 same argument regarding the application of equitable tolling as he
18 did with his TILA claim, and it is defective for the same reasons
19 stated above. See supra at B.1.a. Accordingly, Plaintiffs' RESPA
20 claim is dismissed.

21 The Court further finds that allowing Plaintiffs leave to
22 amend their RESPA claim in this case would be futile, for the same
23 reasons leave to amend Plaintiffs' TILA claim was denied. See
24 supra at B.1.a.; see also Rodriguez, 2011 WL 2946381. Accordingly,
25 Plaintiffs' RESPA claim is dismissed with prejudice.

26 c. Violations of FCRA

27 Plaintiffs allege that Defendants violated the Fair Credit
28 Reporting Act ("FCRA"), 15 U.S.C. § 1681, by "wrongfully,

1 improperly, and illegally report[ing] negative information as to
2 [the Plaintiff] to one or more credit reporting agencies”
3 Comp. at ¶ 209.

4 There is a private right of action for violations of section
5 1681(S)(2)(b) of the FCRA. Matracia v. JP Morgan Chase Bank, 2011
6 WL 1833092 at *3 (E.D. Cal. May 12, 2011). However, to succeed on
7 such a claim, a plaintiff must allege that she had a dispute with a
8 credit reporting agency regarding the accuracy of an account, that
9 the credit reporting agency notified the furnisher of the
10 information, and that the furnisher failed to take the remedial
11 measures outlined in the statute. Id. As Defendants properly
12 argue, Plaintiffs have not pled any facts supporting the elements
13 of a cause of action under FCRA, and Plaintiffs do not rebut this
14 charge by pointing the Court to any facts pled in their Complaint
15 substantiating the FCRA claim. MTD at pg. 24; OPP at pg. 6-7.
16 Accordingly, Plaintiffs’ FCRA claim must be dismissed.

17 Plaintiffs’ attorney has previously pled claims under FCRA
18 that this Court has repeatedly found fail under Federal Rule of
19 Civil Procedure 12(b)(6). See, e.g., Hall v. Mortgage Investors
20 Group, 2011 WL 4374995 (E.D. Cal. Sept. 19, 2011). This, coupled
21 with the fact that Plaintiffs simply argue that their claim was
22 adequately pled, demonstrate that allowing Plaintiffs leave to
23 amend their FCRA claim would be futile. See Rodriguez, 2011 WL
24 2946381. For these reasons, Plaintiffs’ FCRA claim is dismissed
25 with prejudice.

26 2. State Law Claims for Relief

27 Plaintiffs assert six causes of action against Defendants
28 under California law for fraud, unjust enrichment, civil RICO

1 violations, breach of security instrument, wrongful foreclosure,
2 and to quiet title. See Comp. As set forth above, Plaintiffs'
3 claims under federal law have been dismissed without leave to
4 amend.

5 The Court has discretion to "decline to exercise supplemental
6 jurisdiction over [state law claims] if: . . . (3) [it] has
7 dismissed all claims over which it has original jurisdiction . .
8 . ." id. at § 1367(c), and it is appropriate to remand for lack of
9 subject matter jurisdiction "at any time before final judgment . .
10 . ." Id. at § 1447(c). Pursuant to 42 U.S.C. section 1367, this
11 Court exercises its discretion to decline supplemental jurisdiction
12 over Plaintiffs' remaining claims, which all arise under state law.
13 Accord Keen v. American Home Mortgage Servicing, Inc., 2010 WL
14 624306, at *1 (E.D. Cal. Feb. 18, 2010) ("In the usual case in
15 which federal law claims are eliminated before trial, the balance
16 of factors will point toward declining to exercise jurisdiction
17 over the remaining state law claims.") (internal citations
18 omitted).

19 Accordingly, this Court will not address the merits of the
20 remaining issues raised in Defendants' Motion to Dismiss.

23 III. ORDER

24 After carefully considering the papers submitted in this
25 matter, it is hereby ordered that Defendants' Motion to Dismiss is
26 GRANTED, as follows:

27 1. Plaintiffs' claim for violations of the Truth in Lending
28 Act is dismissed with prejudice;

1 2. Plaintiffs' claim for violations of the Real Estate
2 Settlement Procedures Act is dismissed with prejudice; and

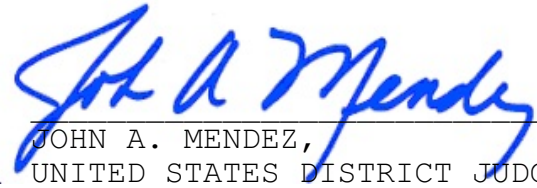
3 3. Plaintiffs' claim for violations of the Fair Credit
4 Reporting Act is dismissed with prejudice.

5 4. This Court declines to exercise supplemental jurisdiction
6 over Plaintiffs' remaining state law claims and dismisses these
7 claims without prejudice.

8 The Clerk shall close this case.

9 IT IS SO ORDERED.

10
11 Dated: July 19, 2012



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE