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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DONNA RUTH O'CONNOR ROSE, an individual,

NO. CIV. 2:12-225 WBS CMK

Plaintiff,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

J.P. MORGAN CHASE, N.A., a corporation,

Defendant.

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Plaintiff Donna Ruth O'Connor-Rose brought this action against defendant J.P. Morgan Chase ("Chase") stating claims arising from Chase's allegedly wrongful conduct related to a residential loan. Currently before the court is Chase's motion to dismiss plaintiff's constructive fraud claim in her Second Amended Complaint ("SAC") for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). (Docket No. 30.)

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1 I. Factual and Procedural Background

2 In December of 2005, plaintiff obtained a loan in the
3 amount of \$349,000 from Chase, which was secured by a Deed of
4 Trust encumbering property located at 3794 Mario Ave in Redding,
5 California ("the property"). (SAC ¶ 84 (Docket No. 27).)
6 Plaintiff alleges that "[p]er paragraph 3 of the subject loan,
7 Chase was the trustee of an escrow account which paid taxes,
8 insurance and so forth," and that "[f]rom that position Chase had
9 fiduciary duties over the periodic payments that the plaintiff
10 made." (Id. ¶ 7.)

11 According to plaintiff, from August to October of 2009
12 she fell behind on the monthly payments due under the loan. (Id.
13 ¶ 88.) Apart from this period of time, she alleges that she has
14 paid more than was required under the terms of the loan agreement
15 and is now current on her loan. (Id. ¶¶ 28, 53, 55, 75.) As a
16 result of Chase's "crooked accounting," plaintiff contends that
17 Chase repeatedly and falsely represented that her loan was in
18 default when in fact she had paid more than was due on the loan,
19 (e.g., id. ¶¶ 16, 24, 33, 59-61, Ex. 22), and caused two wrongful
20 Notices of Default to be recorded, (id. ¶¶ 23, 24, 32, 33, Exs.
21 8, 12). Chase rescinded each of these Notices of Default. (Id.
22 ¶¶ 26, 40, Exs. 10, 15.)

23 On March 1, 2012, Chase allegedly sent plaintiff a
24 statement indicating that she was two months past due on her
25 loan, which plaintiff alleges is not correct. (Id. ¶¶ 70, 71.)
26 On March 7, 2012, Chase caused another Notice of Default to be
27 recorded. (Id. ¶ 73, Ex. 29.) Plaintiff alleges she is current
28 on her loan, (id. ¶¶ 74, 75), but that since March 7, 2012, she

1 has not received any billing or notices and the bank refused to
2 accept a monthly payment in April 2012, (id. ¶¶ 77, 78).

3 Plaintiff additionally alleges that she was harmed
4 because Chase falsely reported to third parties that she was late
5 in making payments under the loan and in default and that credit
6 agencies have "picked up on this reporting." (Id. ¶¶ 76, 87, Ex.
7 30.)

8 Plaintiff filed her Complaint on December 28, 2011, in
9 state court, and the proceeding was removed to this court on
10 January 27, 2012. (Notice of Removal, Ex. A ("Compl.") (Docket
11 No. 1).) The court denied plaintiff's motion to remand and
12 granted in part Chase's motion to dismiss with leave to amend.
13 (Docket No. 15.) Plaintiff filed her First Amended Complaint,
14 (Docket No. 16), and the court granted Chase's motion to dismiss
15 plaintiff's constructive fraud claim with leave to amend.
16 (Docket No. 25.) Plaintiff filed her SAC on May 5, 2012,
17 realleging breach of contract and constructive fraud claims.
18 (Docket No. 27.) Plaintiff's only material amendments allege
19 that Chase did not pay plaintiff interest on her loan escrow
20 account, with the result that her payments should be considered
21 "special deposits." (SAC ¶¶ 7, 85.) Chase now moves to dismiss
22 plaintiff's constructive fraud claim for failure to state a claim
23 under Federal Rule of Civil Procedure 12(b)(6).

24 II. Discussion

25 To survive a motion to dismiss, a plaintiff must plead
26 "only enough facts to state a claim to relief that is plausible
27 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
28 (2007). This "plausibility standard," however, "asks for more

1 than a sheer possibility that a defendant has acted unlawfully,"
2 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and "[w]here a
3 complaint pleads facts that are 'merely consistent with' a
4 defendant's liability, it 'stops short of the line between
5 possibility and plausibility of entitlement to relief.'" Id.
6 (quoting Twombly, 550 U.S. at 557). In deciding whether a
7 plaintiff has stated a claim, the court must accept the
8 allegations in the complaint as true and draw all reasonable
9 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
10 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
11 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
12 (1972).

13 A. Constructive Fraud

14 To state a claim for constructive fraud under
15 California law, a plaintiff must allege (1) a fiduciary or
16 confidential relationship, (2) an act, omission, or concealment
17 involving a breach of that duty, (3) reliance, and (4) resulting
18 damages. Assilzadeh v. Cal. Fed. Bank, 82 Cal. App. 4th 399, 414
19 (2d Dist. 2000). "It is essential to the operation of the
20 doctrine of constructive fraud that there exist a fiduciary or
21 special relationship." Peterson Dev. Co. v. Torrey Pines Bank,
22 233 Cal. App. 3d 103, 116 (4th Dist. 1991). Under California
23 law, a financial institution does not, as a general rule, owe a
24 "duty of care to a borrower when the institution's involvement in
25 the loan transaction does not exceed the scope of its
26 conventional role as a mere lender of money." Nymark v. Heart
27 Fed. Savs. & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (3d Dist.
28 1991).

1 In its May 3, 2012, Order, this court held that Chase's
2 ancillary performance of escrow services did not give rise to a
3 fiduciary duty because Chase did not exceed its duties as a money
4 lender and that therefore plaintiff's constructive fraud claim
5 failed. Plaintiff now asserts that because Chase did not pay her
6 interest, her payments were special deposits that created a
7 fiduciary relationship between her and Chase.

8 "The payment of money may create either a debt or a
9 trust, depending upon the intention of the parties." Abrams v.
10 Crocker-Citizens Nat'l Bank, 41 Cal. App. 3d 55, 59 (1st Dist.
11 1974). Whether a deposit creates a trust or a debt "depends upon
12 the type of deposit made -- whether it is a general deposit or a
13 special one." Van de Kamp v. Bank of Am., 204 Cal. App. 3d 819,
14 858 (2d Dist. 1988). Special deposits may create a trust
15 relationship wherein the bank owes a fiduciary duty towards the
16 depositor. Goldblatt v. F.D.I.C., 105 F.3d 1325, 1329 (9th Cir.
17 1997).

18 When money is deposited in a bank without any special
19 agreement, the deposit is general and California law assumes a
20 creditor-debtor relationship is created between the bank and the
21 depositor. Van de Kamp, 204 Cal. App. 3d at 858. The burden is
22 on the depositor to overcome this presumption. Goldblatt, 105
23 F.3d at 1328 (citing Thompson v. Beitia, 69 F.2d 356, 358 (9th
24 Cir. 1934)). The depositor may overcome this presumption by
25 showing that "the parties' agreement provides that the exact
26 amount of money deposited was to be returned or the money was to
27 be paid out by the bank for a specific purpose, the money was to
28 be segregated from other assets rather than available for the

1 bank's general use, and the lender was not required to pay
2 interest to the depositor in consideration of its use of the
3 funds." Id. (citing Van de Kamp, 204 Cal. App. 3d at 858; Bank
4 of Am. Nat'l Trust & Savs. Ass'n v. Cal. Savs. & Commercial Bank,
5 218 Cal. 261, 272-79 (1933)).

6 In Goldblatt, the court found that although the parties
7 agreed that the plaintiff's deposit would be used by the bank for
8 a specific purpose, the plaintiff was unable to overcome the
9 presumption that his deposits were general because he allowed his
10 deposits to commingle with the bank's general funds. Goldblatt,
11 105 F.3d at 1328. The Ninth Circuit explained that under
12 California law, "[m]oney deposited with a bank for a particular
13 purpose but, with the depositor's consent, commingled with other
14 funds is a general deposit." Id. (quoting Bank of Am. Nat. Trust
15 & Savs. Ass'n v. Bd. of Supervisors of L.A. Cnty., 93 Cal. App.
16 2d 75, 80 (2d Dist. 1949)).

17 In Petherbridge v. Prudential Savings & Loan Ass'n, 79
18 Cal. App. 3d 509 (4th Dist. 1978), the plaintiff alleged that a
19 non-interest bearing impound account set up by her lender in her
20 Deed of Trust created a trust relationship. Id. at 516, 518.
21 The plaintiff asserted that her Deed of Trust created a fiduciary
22 relationship because it stated her deposits would be "held in
23 trust." Id. The court stated that whether there was a fiduciary
24 duty depended on "whether the parties intended a trust or debtor-
25 creditor relationship." Id. at 517. The manner in which the
26 plaintiff paid the impounds and the short time between the bank's
27 receipt of payments and payment of taxes, interest, and insurance
28 premiums all supported the conclusion that "the relationship

1 intended was that of debtor-creditor, not trustee-beneficiary."
2 Id. at 522-24. That the funds were commingled with defendant's
3 general funds and that, contrary to the purpose of a trust, the
4 impound account, which was put in place to enhance the security
5 of the Deed of Trust, was established for the security of the
6 defendant rather than for the security of the plaintiff further
7 evidenced that a trust was not created. Id.

8 The facts alleged here are similar to those alleged in
9 Petherbridge, where the court found that the parties did not have
10 a fiduciary relationship. The SAC does not allege that Chase
11 held onto her deposits for an extended period of time before
12 paying taxes, interest, and insurance premiums and, as in
13 Petherbridge, the purpose of the escrow account is to secure the
14 Deed of Trust and not to financially benefit plaintiff. Further,
15 there is no allegation that plaintiff's funds were to be
16 segregated from Chase's general funds.

17 In Marsh, on which plaintiff relies, the court noted
18 that a provision in a loan agreement stating that interest would
19 not be paid on impound account deposits supported the conclusion
20 that the parties intended to create a trust. Marsh v. Home Fed.
21 Savs. & Loan Ass'n, 66 Cal. App. 3d 674, 683 (4th Dist. 1977).
22 In Marsh, however, the court found that the express language in
23 the Deed of Trust and the parties' conduct indicated intent to
24 form a trust. Id. Here, there is no language in plaintiff's
25 Deed of Trust indicating intent to form a trust.

26 Plaintiff fails to allege facts sufficient to meet her
27 burden of demonstrating that her deposits were special deposits.
28 The creation of the escrow agreement to pay taxes and other

1 necessary fees did not give rise to a fiduciary relationship
2 between Chase and plaintiff because Chase's conduct did not
3 exceed the conventional role of a money lender. Accordingly,
4 plaintiff's constructive fraud claim fails and the court will
5 grant Chase's motion to dismiss the constructive fraud claim.

6 B. Leave to Amend

7 "Valid reasons for denying leave to amend include undue
8 delay, bad faith, prejudice, and futility." Cal. Architectural
9 Bldg. Prods. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th
10 Cir. 1988). Furthermore, while leave to amend must be freely
11 given, the court is not required to allow futile amendments. See
12 DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir.
13 1992); Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau,
14 701 F.2d 1276, 1293 (9th Cir. 1983); see also Reddy v. Litton
15 Indus., Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); Rutman Wine
16 Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987).

17 This is the second time that the court has dismissed
18 plaintiff's claim for constructive fraud for failure to state a
19 claim because plaintiff failed to allege a fiduciary duty. The
20 court also dismissed plaintiff's earlier fraud claim. Plaintiff
21 has therefore been given three chances to plead a claim alleging
22 some form of fraud, but is apparently unable to do so. Dismissal
23 without leave to amend is therefore appropriate.¹

24 IT IS THEREFORE ORDERED that Chase's motion to dismiss
25

26 ¹ At oral argument, plaintiff's counsel expressed an
27 interest in amending the SAC to include a new and different cause
28 of action based on recently discovered facts. The court
expresses no position on the merits of any such claim or the
process by which plaintiff could seek to bring such a claim.

1 plaintiff's constructive fraud claim be, and the same hereby is,
2 GRANTED WITH PREJUDICE.

3 DATED: August 2, 2012

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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