

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WENCESLAO BOJORQUEZ,

No. C 09-03684 SI

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**

v.

MARTHA GUTIERREZ, et al.,

Defendant.

Defendants’ motions to dismiss were scheduled for hearing on July 23, 2010. Pursuant to Civil Local Rule 7-1(b), the Court found these matters appropriate for resolution without oral argument and VACATED the hearing. Having considered the papers submitted, and for good cause shown, the Court hereby rules as follows.

BACKGROUND

Plaintiff filed this case on August 12, 2009, naming numerous defendants and alleging fourteen causes of action related to the purchase of real property in May 2005. Shortly thereafter, various defendants filed motions to dismiss the complaint pursuant to Rule 12(b)(6). Before a hearing was held on the motions, plaintiff voluntarily filed a First Amended Complaint (“FAC”) on December 16, 2009. Defendants moved to dismiss the FAC for failure to state a claim and on the ground that some of plaintiff’s claims were time-barred. In the order stemming from defendants’ motions to dismiss the FAC, the Court found that some of plaintiff’s claims were indeed time-barred and that while plaintiff stated a colorable basis for equitable tolling, the Court needed clarification on when plaintiff discovered facts giving rise to his claims and how diligently he pursued the claims. See March 25, 2010 Order

1 (Docket No. 61).

2 In the matter now before the Court, defendants Martha Gutierrez (“Ms. Gutierrez”), Marin 1
3 Real Estate, Inc. (“Marin 1”), and Ocwen Loan Servicing, LLC (“Ocwen”) bring separate motions to
4 dismiss plaintiff’s Second Amended Complaint (“SAC”). Ms. Gutierrez and Marin 1 move to dismiss
5 plaintiff’s Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Causes of Action
6 on the ground they are all are time-barred. Additionally, these defendants argue that plaintiff, once
7 becoming aware of the factual basis of his claims, did not pursue his claim diligently and is, therefore,
8 not entitled to equitable tolling of the statutes of limitations. Defendant Ocwen argues that plaintiff’s
9 Eighth Cause of Action for violation of the Fair Housing Act, 42 U.S.C. § 301, *et seq.*, the only cause
10 of action against Ocwen, is time-barred and that plaintiff is not eligible for equitable tolling of the
11 statute of limitations. Ocwen also argues the claim should be dismissed pursuant to Rule 12(b)(6) for
12 failure to state a claim.

13 This case arises out of events leading up to plaintiff’s purchase of a home in the spring of 2005,
14 and the eventual foreclosure and resale of that home in March 2008. Plaintiff alleges that he can neither
15 speak nor read English and is only marginally literate in Spanish, and alleges that all defendants are
16 aware of this fact. SAC ¶¶ 18, 19. Plaintiff dealt primarily with defendant Ms. Gutierrez, an agent of
17 defendant Marin 1 who often works with and allegedly targets Spanish-speaking clients. According to
18 plaintiff, all verbal negotiations regarding the loan and home sale transactions were in Spanish but all
19 of the documentation presented to him was in English. *Id.* ¶ 37, 40, 43. Plaintiff alleges that he
20 therefore relied on Ms. Gutierrez to translate the terms of any documentation related to the transaction.
21 *Id.* ¶¶ 25, 26, 28-40, 42, 43.

22 Plaintiff alleges that Ocwen, along with other defendants not presently before the Court, was part
23 of a joint enterprise/conspiracy to sell subprime mortgage-loan products with only English
24 documentation to people of Hispanic nationalities with limited or no ability to speak English. The
25 purported goals of the enterprise were to maximize sales by concealing unfavorable terms in English;
26 to give incentives to conspirators’ loan brokers to sell the subprime products; and to insulate the
27 conspirators from losing money by promptly assigning and securitizing the loans. *Id.* ¶ 22. Plaintiff
28 alleges that Ms. Gutierrez never disclosed to him the existence of these other entities involved in the

1 loan transaction. *Id.* ¶ 38.

2 Plaintiff alleges that, on or about June 15, 2007, he received a statement from Ocwen demanding
3 a mortgage payment of \$2420 rather than the \$1591 monthly payment he had been paying for the two
4 previous years. SAC ¶ 71. Two months later, the demand rose to \$2628/month. *Id.* Plaintiff states that
5 he did not know the reason for the increase because Ms. Gutierrez had concealed from him the correct
6 mortgage terms that provided for such an increase. *Id.* In July or August 2007, plaintiff purports to
7 have realized that Ms. Gutierrez had lied to him and to have stopped making mortgage payments. *Id.*
8 ¶ 72. Some time after October 15, 2007, plaintiff received a notice of default. *Id.* ¶ 73. He states that
9 he cooperated with the foreclosure proceedings that took place between October 2007 and March 2008,
10 despite suffering health problems. *Id.* ¶ 78(a).

11 Thereafter, plaintiff alleges that he contacted Legal Aid of Marin (“Legal Aid”) in April 2008
12 to seek legal assistance, and worked with Legal Aid attorneys for the following ten months or so until
13 he retained the attorney now representing him in this case in March or April 2009. *Id.* ¶ 78(b)-78(o).
14 Although the original complaint was filed on August 25, 2009, plaintiff was not able to obtain copies
15 of the original loan application and other documents until January 13, 2010, almost a month after he
16 filed the FAC previously dismissed in part by the Court. *Id.* ¶ 78(p).

17 Now before the Court is Ms. Gutierrez and Marin 1’s motion to dismiss the Second, Third,
18 Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Causes of Action, and Ocwen’s motion to
19 dismiss the Eighth Cause of Action.

20
21 **LEGAL STANDARD**

22 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
23 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,
24 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
25 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
26 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
27 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading
28 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative

1 level.” *Twombly*, 550 U.S. at 544, 555.

2 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court
3 must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the
4 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the
5 court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions
6 of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

7 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
8 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
9 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
10 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
11 quotation marks omitted).

12 DISCUSSION

13 I. Motion to Dismiss by Ocwen

14 Plaintiff’s Eighth Cause of Action against Ocwen alleges a violation of the Fair Housing Act
15 (“FHA”). The FHA provides that “[i]t shall be unlawful for any person or other entity whose business
16 includes engaging in residential real estate-related transactions to discriminate against any person in
17 making available such a transaction, or in the terms or conditions of such a transaction, because of race,
18 color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3605. Claims under the
19 FHA are evaluated using a Title VII discrimination analysis, and may be brought under a theory of
20 disparate treatment or disparate impact. *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).
21 Plaintiff’s claim for disparate treatment requires him to allege: “(1) plaintiff’s rights are protected under
22 the FHA; and (2) as a result of the defendant’s discriminatory conduct, plaintiff has suffered a distinct
23 and palpable injury.” *Id.*

24 Plaintiff alleges that Ocwen was part of a lending and servicing conspiracy that “conspired to
25 discriminate against Mr. Bojorquez on the basis of his race and national origin in the terms, conditions,
26 and privileges of the sale and financing of the Property.” *Id.* ¶ 147. Essentially, plaintiff’s theory is that
27 Ocwen conspired with the other defendants to target Spanish-speaking borrowers of Hispanic
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1 nationalities and fraudulently induce them to enter into unfavorable loans. *Id.* ¶¶ 147-151. In
2 dismissing a prior version of this claim from the FAC, the Court held that plaintiff had failed to plead
3 any facts tending to show that Ocwen played any role in the other defendants’ use of English-language
4 documentation, or that Ocwen’s actions were motivated by a discriminatory animus. In the SAC,
5 plaintiff clarifies that his theory under the FHA is that Ocwen and the other defendants conspired to
6 target plaintiff and other similarly-situated borrowers by providing loan documentation and subsequent
7 collection communications in English until such time as the borrower defaulted on the loan, at which
8 time Ocwen finally began sending collection letters in Spanish. SAC ¶ 147. As explained in plaintiff’s
9 opposition brief, his theory is that, pursuant to the conspiracy, “Ocwen made representations to those
10 non-English-speaker borrowers, including plaintiff, in English when they did not want the borrowers
11 to fully understand their rights and in Spanish when it wanted those borrowers to fully understand” the
12 fact of default and impending foreclosure. *Oppo.* at 6.

13 Ocwen argues that plaintiff’s Eighth Cause of Action for violation of the FHA should be
14 dismissed because it is insufficient to state a claim under the FHA and is time-barred. The Court
15 disagrees with Ocwen on both grounds. First, in the Court’s view, plaintiff’s amended allegations are
16 sufficient to state a claim. Plaintiff’s allegations establish that he is within a class of persons intended
17 to be protected by the FHA, and that defendant Ocwen, acting with its alleged coconspirators, targeted
18 him and caused him injury.

19 Second, although plaintiff’s allegations regarding the timing of defendant’s actions are not
20 always clear, it appears that plaintiff’s claim is timely. The statute of limitations for an FHA claim
21 brought by a private party is two years. *See* 42 U.S.C. § 3613(a)(1)(A). The statute begins to run upon
22 “the occurrence or the termination of an alleged discriminatory housing practice.” *Id.* Where, as here,
23 an FHA plaintiff “challenges not just one incident of conduct violative of the Act, but an unlawful
24 practice that continues into the limitations period, the complaint is timely when it is filed within [the
25 statutory period, running from] the last asserted occurrence of that practice.” *Garcia v. Brockway*, 526
26 F.3d 456, 462 (9th Cir. 2008) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982)
27 (footnote omitted)). Here, plaintiff’s claim is based on an alleged conspiracy that began in 2005 at the
28 time plaintiff began working with Ms. Gutierrez and continued at least until Ocwen began sending

1 Spanish-language default notices. Plaintiff alleges that he stopped making payments on the loan in July
2 or August 2007 and received a notice of default in October 2007. SAC ¶¶ 72-73. Even assuming that
3 the alleged conspiracy terminated when plaintiff received the initial notice of default, plaintiff would
4 be required to file his action by October 2009. As plaintiff filed his original complaint on August 12,
5 2009, his FHA claim is not time-barred. Ocwen’s motion to dismiss is therefore DENIED in its
6 entirety.

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8 **II. Motion to Dismiss by Ms. Gutierrez and Marin 1**

9 **A. Second Cause of Action: RESPA**

10 Plaintiff’s Second Cause of Action alleges that defendants Ms. Gutierrez and Marin 1 violated
11 the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2607, by failing to disclose the fact
12 that plaintiff was paying substantial origination and other fees, by accepting a portion of the these fees
13 as kickbacks, and by not disclosing to Mr. Bojorquez that they had both received commissions on the
14 sale of the property. SAC ¶¶ 90, 92-94. The statute of limitations for this provision of RESPA is one
15 year, and starts to run on the date the loan closes. *See* 12 U.S.C. §2614; *Garcia v. Wachovia Mortg.*
16 *Corp.*, 676 F. Supp. 2d 895, 907 (C.D. Cal. 2009) (citing *Snow v. First Am. Title Ins. Comp.*, 332 F.3d
17 356, 359 (5th Cir. 2003)).

18 Plaintiff alleges that the purchase transaction for the home closed on May 20, 2005. SAC ¶ 58.
19 However, plaintiff did not file his complaint until August 12, 2009, more than four years later.
20 Plaintiff’s RESPA claim is therefore untimely and must be dismissed unless plaintiff can plead a basis
21 for tolling the statute of limitations. “Equitable tolling may be applied if, despite all due diligence, a
22 plaintiff is unable to obtain vital information bearing on the existence of his claim.” *Santa Maria v.*
23 *Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).¹ The doctrine of equitable tolling “focuses on a
24 plaintiff’s excusable ignorance and lack of prejudice to the defendant.” *Leong v. Potter*, 347 F.3d 1117,
25 1123 (9th Cir. 2003). After showing that his failure to discover the facts giving rise to his claim was

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27 ¹*Socop-Gonzalez v. Immigration and Naturalization Service*, 272 F.3d 1176, 1194 (9th Cir.
28 2000) overruled *Santa Maria* on the related but different proposition that it is not necessary for the Court
to inquire if a plaintiff could have reasonably filed a motion or complaint within the remaining time in
a limitations period.

1 due to “excusable ignorance,” a plaintiff must also show that he pursued his claim diligently. *Id.*

2 The Court has previously stated that plaintiff’s lack of English proficiency and limited literacy
3 skills, combined with defendants’ alleged efforts to conceal the loan terms from him by providing oral
4 Spanish translations that were inconsistent with the English-language loan documentation, present a
5 colorable basis for equitable tolling. The Court held, however, that plaintiff did not plead sufficient
6 facts to enable the Court to determine when he discovered the basis for his claims, much less that he was
7 diligent in attempting to discover their basis.

8 In the SAC, plaintiff alleges that he became aware of the possible existence of his claims in July
9 or August 2007, when he realized as a result of sudden changes in his monthly payment amounts that
10 Ms. Gutierrez had misrepresented the terms of the loan. SAC ¶¶ 71-72. He then contends that after he
11 began to suspect that the details of the contract were different from what he had previously believed
12 them to be, he diligently pursued his claims by attempting to secure legal assistance from Legal Aid and
13 ultimately retaining the attorney now representing him. Plaintiff appears to assert that the start of the
14 applicable statutes of limitations should be tolled until January 2010, when, through his attorney, he
15 received copies of the loan documents and learned “what had actually transpired with respect to the
16 financing arranged by Ms. Gutierrez.” *Id.* ¶ 78(p). Under California law, however, the accrual of a
17 cause of action is not delayed until such time as the plaintiff becomes “aware, not only of his injuries,
18 but also of defendants’ specific wrongful conduct.” *Soliman v. Philip Morris Co.*, 311 F.3d 966, 971
19 (9th Cir. 2002). Rather, a claim accrues when the plaintiff “at least suspects a factual basis, as opposed
20 to a legal theory, for its elements, even if he lacks knowledge thereof – when, simply put, he at least
21 suspects that someone has done something wrong to him.” *Norgart v. Upjohn Co.*, 981 P.2d 79, 88
22 (Cal.1999) (quotation marks, citation, and alteration omitted).

23 Although the accrual of plaintiffs’ claims may be delayed until July or August 2007, when he
24 allegedly discovered his injuries, there is no basis for tolling the start of the statute until plaintiff
25 received copies of the loan documents and uncovered all the details of the transactions at issue. Because
26 the one-year statute on plaintiff’s RESPA claim expired in July or August 2008, one year before plaintiff
27 filed this action, his RESPA claim must be DISMISSED without leave to amend.

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1 **B. Third Cause of Action: California Civil Code §1632**

2 The Third Cause of Action alleges that defendants Ms. Gutierrez and Marin 1 violated the
3 Spanish Language Contract Act, California Civil Code §1632, by failing to provide plaintiff with
4 Spanish-language copies of the purchase contract, the first mortgage, the second mortgage, and the title
5 policy. SAC ¶¶ 103-04. Defendants assert that the relevant statute of limitations for this claim is four
6 years under California Civil Code § 1693. However, courts that have considered the issue have
7 generally held that the relevant statute of limitations is California Civil Procedure Code §340(a), which
8 requires filing within one year from the date of signing of a contract. *See Orozco v. Dhi Mortg. Co.*, No.
9 09-1894, 2010 WL 2757285, at *6 (S.D. Cal. Jul. 13, 2010); *Espinoza v. Recontrust Co., N.A.*, No.
10 09-1687, 2010 WL 1568551, at *10 (S.D. Cal. Apr. 19, 2010); *Castaneda v. Saxon Mortg. Servs.*, 687
11 F. Supp. 2d 1191, 1200 (E.D. Cal. 2009).² Plaintiff states that the purchase agreement was signed on
12 or about April 3, 2005 but does not give the exact dates for the signing of the mortgages or the title
13 policy. SAC ¶ 13. It does, however, appear from the SAC that these documents were completed around
14 the same time in 2005. *Id.* ¶¶ 43-44. Even assuming that plaintiff is entitled to equitable tolling of the
15 start of the statute of limitations until he discovered his injuries in July or August 2007, his claim under
16 California Civil Code § 1632 is still untimely, and is therefore DISMISSED without leave to amend.

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18 **C. Fourth, Sixth, Seventh, And Eleventh Causes of Action**

19 Plaintiff’s Fourth Cause of Action alleges that defendants engaged in constructive fraud by
20 failing to disclose terms of loans, purchase agreements, fees, and other important facts. *Id.* ¶ 109-111.
21 The Sixth Cause of Action, for fraud, alleges that defendants made false representations to plaintiff,
22 thereby inducing him to execute the documents for the purchase of the property and mortgages. *Id.*
23 ¶ 128-130. The Seventh Cause of Action, for deceit, alleges that defendants deceived plaintiff by

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26 ² The Court was able to locate one case, *Hernandez v. Sutter West Capital*, No. C 09-3658 CRB,
27 2010 WL 539133, at *3-4 (N.D. Cal. Feb. 8, 2010), in which the court found that § 340(a) was not
28 applicable to a claim brought under California Civil Code § 1632. In that case, however, punitive
damages were not being sought in connection with the claim, and the court reasoned that § 340(a),
which applies to actions “upon a statute for a penalty or forfeiture,” therefore did not apply. In the
present case, plaintiff does seek punitive damages in connection with his claim. The Court will
therefore follow the consensus among other courts and apply the limitations period set forth in § 340(a).

1 suppressing various facts related to the purchase of the property and the terms of the mortgage loans.
2 *Id.* ¶ 138. Finally, the Eleventh Cause of Action alleges a breach of defendants’ fiduciary duty to
3 plaintiff to protect him from unnecessary loss and to place his interests over their own. *Id.* ¶ 174, 175.
4 The statute of limitations for these causes of action is three years, and begins to run upon “the discovery,
5 by the aggrieved party, of the facts constituting the fraud or mistake.” Cal. Civ. Proc. Code § 338(d).

6 Plaintiff contends that by July or August 2007, he had realized “Gutierrez had lied to him,” at
7 which time the three-year period started to run. SAC ¶ 72. He filed the original complaint on August
8 12, 2009, well within the three-year limit that would afford him until July or August 2010. Plaintiff’s
9 Fourth, Sixth, Seventh, and Eleventh Causes of Action are not time-barred, and defendants’ motion to
10 dismiss these causes of action on statute of limitations grounds is therefore DENIED.

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12 **D. Fifth Cause of Action**

13 Plaintiff’s Fifth Cause of Action seeks equitable rescission of the sale of the property, the
14 mortgage loans, and any and all fees and payments under those contracts on the basis of the alleged
15 fraud and deceit discussed above. *Id.* ¶ 117-122. The statute of limitations for equitable rescission of
16 a written contract under California law is four years and “[w]here the ground for rescission is fraud or
17 mistake, the time does not begin to run until the discovery by the aggrieved party of the facts
18 constituting the fraud or mistake.” Cal. Civ. Proc. Code § 337(3). As discussed above, plaintiff did not
19 discover he had allegedly been lied to until July or August 2007, marking the starting point of the four-
20 year limitations period. Plaintiff filed this action on August 12, 2009, which is within the four-year
21 limit. Plaintiff’s claim is not time-barred and defendants’ motion to dismiss this cause of action is
22 DENIED.

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24 **E. Ninth and Tenth Causes of Action**

25 Plaintiff’s Ninth Cause of Action, for negligence, alleges that Ms. Gutierrez and Marin 1, along
26 with other defendants, had a duty to keep plaintiff properly informed of all terms of the purchasing and
27 financing of the property and breached this duty by arranging and executing the loan documents in such
28 a manner as to prevent plaintiff from knowing their terms. *Id.* ¶ 156, 157. The Tenth Cause of Action

1 alleges that defendants engaged in negligence per se by violating a number of state and federal statutes.

2 Under California law, claims for negligence and negligence per se have a statute of limitations
3 of two years, which begins to run when a plaintiff suspects that he has been wronged. Cal. Civ. Proc.
4 Code § 335.1; *Soliman*, 311 F.3d at 971-72 (applying California law). As stated above, plaintiff
5 allegedly did not discover that he had suffered any damage until July or August of 2007 and filed his
6 original complaint on August 12, 2009. Construing the facts in plaintiff's favor and assuming the
7 August date, it appears that plaintiff filed the original complaint within the two-year limit and his Ninth
8 and Tenth Causes of Action are therefore not time-barred. Defendants' motion to dismiss these causes
9 of action is therefore DENIED.

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11 **CONCLUSION**

12 For the foregoing reasons, and for good cause shown, the Court hereby GRANTS in part and
13 DENIES in part the motion to dismiss filed by defendants Ms. Gutierrez and Marin 1, and DENIES the
14 motion to dismiss filed by defendant Ocwen. (Docket Nos. 68, 76).

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16 **IT IS SO ORDERED.**

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18 Dated: July 26, 2010

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21 SUSAN ILLSTON
22 United States District Judge
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