

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

LESLI BURCH,
Plaintiff,
v.
GMAC MORTGAGE, LLC., and PAUL
FINANCIAL, LLC,
Defendants

No. C-09-4214 MMC

**ORDER GRANTING IN PART, DENYING
IN PART, AND DEFERRING RULING IN
PART ON DEFENDANTS' MOTIONS TO
DISMISS; VACATING MARCH 19, 2010
HEARING; SETTING FURTHER
BRIEFING SCHEDULE AND HEARING;
CONTINUING CASE MANAGEMENT
CONFERENCE**

Before the Court are two motions to dismiss the initial Complaint in the above-titled action: (1) defendant GMAC Mortgage, LLC's ("GMAC Mortgage") "Motion to Dismiss Plaintiffs' Complaint," filed November 30, 2009, as amended January 22, 2010; and (2) defendant Paul Financial, LLC's ("Paul Financial") "Motion to Dismiss Complaint or, Alternatively, Motion to Strike Portions of Complaint," filed January 12, 2010. Plaintiff Lesli Burch ("Burch") has filed opposition to each motion; neither defendant has filed a reply. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matters suitable for decision on the parties' respective filings, VACATES the hearing scheduled for March 19, 2010, and rules as follows.

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1 **BACKGROUND**

2 In her complaint, Burch alleges that, on June 1, 2007, she “refinanced the loan on
3 her principal residence located [in] San Rafael, California, 94903 with [] Paul Financial”
4 (see Compl. ¶ 5), and that, subsequent thereto, GMAC Mortgage “purchased [p]laintiff’s
5 loan” (see Compl. ¶ 11). Burch alleges that Paul Financial “fail[ed] to deliver” to Burch “two
6 copies of a notice of the right to rescind” the loan transaction. (See Compl. ¶ 16.) Further,
7 according to Burch, the loan she obtained was a “Negative Amortization loan,” and Paul
8 Financial “failed to adequately disclose” the loan’s “negative amortization feature” in the
9 “Truth In Lending Act Disclosure Statement.” (See Compl. ¶¶ 10, 17.)

10 Based on the above-described allegations, Burch asserts as her First Cause of
11 Action a claim for rescission under the Truth in Lending Act (“TILA”). As her Second Cause
12 of Action, Burch asserts a claim under § 17200 of the California Business & Professions
13 Code. Burch’s state law claim is based on the above-described alleged violations of TILA
14 (see Compl. ¶¶ 22-23), and, in addition, allegations that Burch’s mortgage broker, alleged
15 to be an agent of Paul Financial, made “misleading” statements about the loan (see Compl.
16 ¶¶ 7, 20), and that Paul Financial “advertised its loans as low interest loans with the intent
17 to mislead” consumers (see Compl. ¶ 21).

18 **DISCUSSION**

19 **A. Federal Claim**

20 Under TILA, a borrower has three business days following the consummation of a
21 loan transaction to rescind the transaction. See 15 U.S.C. § 1635(a). A borrower’s right of
22 rescission is extended to three years, however, if the lender (1) fails to deliver to the
23 borrower “all material disclosures,” see 12 C.F.R. § 226.23(a)(3), or (2) fails to deliver to
24 the borrower “two copies of [a] notice of the right to rescind,” see 12 C.F.R. §§226.23(a)(3),
25 226.23(b)(1).

26 **1. Failure to Provide Material Disclosures**

27 As noted, Burch alleges the Truth In Lending Act Disclosure Statement (“TILA
28 Disclosure Statement”) she received from Paul Financial did not adequately disclose the

1 negative amortization feature of her loan.

2 As one district court recently observed, “cases analyzing § 226.23(a)(3)’s materiality
3 provisions universally hold that a plaintiff is not entitled to rescind his loan transaction due
4 to defendants’ alleged failure to disclose a risk of negative amortization.” See Reagen v.
5 Aurora Loan Services, Inc., 2009 WL 3789997, *8 (E.D. Cal. 2009) (internal quotation and
6 citation omitted) (collecting cases). Burch cites no authority to the contrary, and the Court
7 has located none.

8 As explained by another district court, the only “material” disclosure required by TILA
9 that pertains to a variable-rate loan is that the “loan contain[s] a variable-rate feature.” See
10 Jordan v. Paul Financial, LLC, 644 F. Supp. 2d 1156, 1164 (N.D. Cal. 2009) (holding lender
11 complied with TILA where “a box [on TILA Disclosure Statement] labeled ‘Variable Rate
12 Mortgage’ was checked”; rejecting argument that “failing to adequately disclose the risk of
13 negative amortization” constituted failure to make “material” disclosure). Here, Burch does
14 not contend the TILA Disclosure Statement she received from Paul Financial failed to
15 disclose that her loan contained a variable-rate feature. Indeed, as in Jordan, a box
16 labeled “Variable Rate Mortgage” on Burch’s TILA Disclosure Statement was checked.
17 (See Compl. Ex. B.)

18 Accordingly, the First Cause of Action is subject to dismissal to the extent such
19 claim is based on a theory that Paul Financial failed to deliver to Burch material
20 disclosures.¹

21 **2. Failure to Provide Notice of Right to Rescind**

22 As noted, Burch alleges that Paul Financial failed to provide her with two copies of a
23 notice informing her of her right to rescind the transaction.

24 In support of their respective motions, defendants request that the Court take judicial
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26 ¹GMAC Mortgage’s alternative argument, that it cannot be held liable for a failure to
27 disclose by Paul Financial, is unpersuasive in light of Burch’s allegation that GMAC
28 Mortgage purchased the loan. See 15 U.S.C. § 1641(c) (providing that if consumer “has a
right to rescind a transaction under [TILA],” consumer may “rescind the transaction as
against any assignee of the obligation”).

1 notice of a copy of a document titled “Notice of Right to Cancel,” signed by Burch on June
2 4, 2007, which document sets forth in detail Burch’s right to rescind the transaction,
3 including an explanation of how, where, and under what circumstances Burch is entitled to
4 rescind. (See Frank Decl., filed January 12, 2010, ¶ 7, Ex. D; GMAC’s Req. for Judicial
5 Notice, filed November 30, 2009, Ex. 1.) Immediately above Burch’s signature, the subject
6 document includes the following acknowledgment: “The undersigned each acknowledge
7 receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth
8 in Lending Disclosure Statement. Each borrower/owner in this transaction has the right to
9 cancel. The exercise of this right by one borrower/owner shall be effective to all
10 borrowers/owners.” (See *id.*) (emphasis in original). Defendants argue that because Burch
11 has acknowledged receiving two copies of the notice, her TILA claim based on the alleged
12 lack of such receipt should be dismissed.

13 The precise issue presented by the instant motions has been addressed recently by
14 at least three other district judges in this district, two of whom expressly declined, in the
15 context of a motion to dismiss, to take judicial notice of a signed acknowledgment that the
16 plaintiff, contrary to an allegation in his or her complaint, had in fact received two copies of
17 a notice of the right to rescind the transaction. See Olivera v. American Home Mortgage
18 Servicing, Inc., 2010 WL 334848, *4 (N.D. Cal. 2010); Delaney v. Aurora Loan Servicing,
19 Inc., 2009 WL 5062339, *2 (N.D. Cal. 2009).² The Court agrees, for the reasons stated in
20 the above-cited cases, that taking judicial notice of the signed acknowledgment is not
21 proper on a motion to dismiss.

22 Accordingly, the First Cause of Action is not subject to dismissal to the extent such
23 claim is based on a theory that Burch was not provided with two copies of a notice of her
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26 ²In the third case, although the district court denied the motion to dismiss in a minute
27 order that does not include the court’s reasoning, see Civil Pretrial Minutes, Chetal v.
28 American Home Mortgage Servicing, No. C 09-2727 CRB, filed September 25, 2009, the
primary ground set forth in the plaintiff’s opposition to that motion was the impropriety of
taking judicial notice of the signed acknowledgment. (See Pl.’s Opp., filed September 4,
2009, Chetal v. American Home Mortgage Servicing, No. C 09-2727 CRB).

1 right to rescind the transaction.³

2 The Court, however, agrees with the district court’s reasoning in Delaney that the
3 signed acknowledgment “provide[s] evidence against plaintiff’s factual allegations,” and that
4 it is proper to convert a motion to dismiss, based on such a signed acknowledgment, into a
5 motion for summary judgment. See Delaney, 2009 WL 5062339, at *2. Indeed, the
6 evidence submitted by defendants “create[s] a rebuttable presumption of delivery.” See 15
7 U.S.C. § 1635(c).

8 Accordingly, the Court will set a further briefing schedule on the issue of whether
9 there exists evidence sufficient to rebut the presumption of delivery. See, generally, Order,
10 Delaney v. Aurora Loan Services, Inc., No. C 09-3131 VRW, filed March 1, 2010.

11 **B. State Law Claim**

12 Burch’s remaining claim arises under state law. Because Burch does not allege the
13 parties are diverse, the Court’s jurisdiction over the state law claim is supplemental in
14 nature. See 28 U.S.C. § 1367(a).

15 The Court will defer ruling on the sufficiency of plaintiff’s state law claim, pending its
16 determination of whether a triable issue of fact exists with respect to Burch’s federal claim.
17 See 28 U.S.C. § 1367(c)(3) (providing where sole cause of action over which district court
18 has original jurisdiction has been dismissed, the court may decline to exercise
19 supplemental jurisdiction over remaining claims).

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25 ³Further, the Court declines to dismiss on defendants’ additionally asserted ground
26 that Burch must show she has the ability to tender the profits of the loan, as she has
27 alleged. Although a court has the “equitable discretion” to “impose conditions on rescission
28 that assure that the borrower meets her obligations once the creditor has performed its
obligations,” see Yamamoto v. Bank of New York, 329 F.3d 1167, 1173 (9th Cir. 2003), the
Court finds it unnecessary to exercise such equitable power herein at the pleading stage. If
defendants, at a later stage, proffer evidence to support a finding that Burch, contrary to
her allegations, lacks the ability to tender, defendants may renew the request.

1 **CONCLUSION**

2 For the reasons stated above, the Court hereby GRANTS in part, DENIES in part,
3 and DEFERS in part ruling on the motions to dismiss as follows:

4 1. With respect to the First Cause of Action, the motions are hereby GRANTED to
5 the extent the First Cause of Action is based on a failure to deliver material disclosures,
6 and are hereby DENIED to the extent the First Cause of Action is based on a failure to
7 deliver two copies of a notice of the right to rescind.

8 2. With respect to the latter of the above two claims contained in the First Cause of
9 Action, to the extent the motions seek dismissal on the basis of Burch's signed
10 acknowledgment of the Notice of Right to Cancel, the Court will treat the motions as
11 motions for summary judgment, and hereby SETS the following briefing schedule and
12 hearing date:

13 a. No later than April 9, 2010, Burch shall submit any opposition, not to
14 exceed ten pages in length, exclusive of exhibits.

15 b. No later than April 23, 2010, defendants shall submit any reply, not to
16 exceed five pages in length.

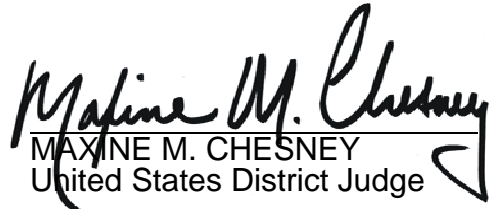
17 c. A hearing on the matter is scheduled for May 7, 2010.

18 3. To the extent the motions seek dismissal of the Second Cause of Action, ruling is
19 hereby DEFERRED.

20 4. The Case Management Conference is hereby CONTINUED from May 7, 2010 to
21 June 18, 2010. A Joint Case Management Statement shall be filed no later than June 11,
22 2010.

23 **IT IS SO ORDERED.**

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25 Dated: March 15, 2010

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27 MAXINE M. CHESNEY
28 United States District Judge