

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

CHRISTIE HOLLOWELL,
Plaintiff,
v.
ALLIANCE BANCORP, INC., et al.,
Defendants.

No. C-10-1658 MMC

**ORDER GRANTING DEFENDANT
SELECT PORTFOLIO SERVICING'S
MOTION TO DISMISS; DISMISSING
COMPLAINT WITH LEAVE TO AMEND;
VACATING FEBRUARY 4, 2011
HEARING**

Before the Court is defendant Select Portfolio Servicing's ("SPS") "Motion to Dismiss Complaint Pursuant to FRCP 12(b)(6)," filed October 20, 2010, as amended December 13, 2010. Plaintiff Christie Hollowell ("Hollowell") has filed a response thereto, titled "Objection."¹ SPS has not filed a reply. Having read and considered the papers filed in support of and in response to the motion, the Court deems the matter suitable for decision on the parties' respective written submissions, VACATES the hearing scheduled for February 4, 2011, and rules as follows.

In her complaint, Hollowell alleges nine claims for relief, consisting of federal claims

¹By order filed January 21, 2011, the Court directed Hollowell to comply with General Order 45 and the Court's Standing Orders by submitting a chambers copy of her response to the motion. Hollowell, however, failed to comply. All parties are expected to comply with court orders without repeated reminders. Accordingly, Hollowell is hereby advised that for any further failure to comply with General Order 45, the Court will impose sanctions, including, but not limited to, striking from the record any electronically-filed document of which a chambers copy has not been timely provided to the Court.

1 brought under the Truth in Lending Act (“TILA”) and the Real Estate Settlement Procedures
2 Act (“RESPA”), as well as claims brought under state law,² each arising from the origination
3 of a loan secured by certain real property located in Oakland, California and owned by
4 Hollowell. SPS moves to dismiss the complaint on the ground that Hollowell fails, *inter alia*,
5 to allege sufficient facts to give notice to SPS as to the basis of any of the claims alleged
6 against it.

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
8 accepted as true, to state a claim that is plausible on its face.” *See Ashcroft v. Iqbal*, 129
9 S. Ct. 1937, 1949 (2009). “A claim has facial plausibility when the plaintiff pleads factual
10 content that allows the court to draw the reasonable inference that the defendant is liable
11 for the misconduct alleged.” *Id.* In determining whether a claim has facial plausibility,
12 courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”
13 *See id.* at 1950 (internal quotation and citation omitted).

14 Here, Hollowell’s claims, as presently pleaded, are based on legal conclusions and
15 conclusory statements couched as factual allegations. (*See, e.g.*, Compl. ¶ 53 (alleging
16 “[d]efendants engaged in unlawful, unfair and fraudulent business acts”); *see also, e.g., id.*
17 ¶ 19 (alleging “[d]efendants violated the law when they provided undisclosed financial
18 incentives, fees, payments and other things of value to their agents, account executives,
19 loan officers and brokers marketing and selling their product”).) Further, the factual
20 allegations in the complaint, whether conclusory or not, appear to relate solely to acts and
21 omissions of defendant Alliance Bankcorp. Inc. (“Alliance”). (*See, e.g., id.* ¶ 34 (alleging
22 Alliance, when it approved Hollowell for a loan, “failed to meaningfully disclose the
23 possibility of significant interest rate increases”).)³

25 ²The state law claims, as alleged in the complaint, appear to be derivative of
26 Hollowell’s TILA and/or RESPA claims.

27 ³SPS requests the Court take judicial notice of Hollowell’s deed of trust, which
28 identifies Alliance as the “lender” from whom Hollowell obtained the subject loan. (*See*
Def.’s Req. for Judicial Notice Ex. 1.) SPS’s request, which is unopposed by Hollowell, is
hereby GRANTED.

1 Moreover, Hollowell has failed to sufficiently allege either a TILA or RESPA claim
2 against SPS. First, Hollowell’s TILA claims against SPS fail as pleaded, for the reason that
3 Hollowell has not alleged any facts to support a finding that SPS is a “creditor” for purposes
4 of TILA. See 15 U.S.C. § 1640(a) (providing requirements imposed by TILA apply only to
5 “creditor”). Second, Hollowell’s RESPA claim against SPS, which is based on a theory that
6 improper “lender payments” were made to “mortgage brokers” (see Compl. ¶ 63), fails as
7 pleaded, for the reason that Hollowell has not alleged any facts to support a finding that
8 SPS was a lender, much less that SPS made payments to a mortgage broker. Finally,
9 because any violation of TILA or RESPA necessarily occurred at the time Hollowell entered
10 into the subject loan transaction in November 2006 (see Compl. ¶ 27), Hollowell’s claims
11 for damages under both TILA and RESPA are untimely, see 15 U.S.C. § 1640(e) (providing
12 claim seeking monetary relief under TILA must be brought within one year of date of
13 occurrence of violation); 12 U.S.C. § 2614 (providing RESPA claim based on improper
14 payments to mortgage broker must be brought within one year of date of occurrence of
15 violation), Hollowell having failed to allege any facts to support a finding that she is entitled
16 to equitable tolling.⁴

17 Accordingly, the Court finds the complaint is, as against SPS, subject to dismissal
18 for failure to state a claim.

19 In her response to the motion, Hollowell asserts that if afforded leave to amend, she
20 could allege facts to state, as against SPS, cognizable and timely TILA and RESPA claims,
21 as well as related state law claims. Although Hollowell fails to identify any of the new facts
22 she is prepared to allege, the Court will afford Hollowell the opportunity to amend her
23 complaint.

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27 ⁴The complaint initially was filed in Bankruptcy Court in November 2009, i.e.,
28 approximately three years after the date on which Hollowell entered into the subject loan
transaction.

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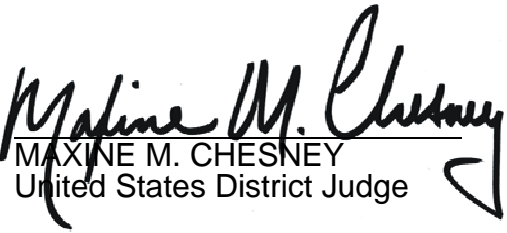
CONCLUSION

For the reasons stated above, SPS's motion to dismiss is hereby GRANTED, and the complaint, to the extent brought against SPS, is DISMISSED with leave to amend.

Any First Amended Complaint shall be filed no later than February 18, 2011. If Hollowell fails to timely file a First Amended Complaint, the instant action will consist of the claims alleged against Alliance in the initial complaint.

IT IS SO ORDERED.

Dated: January 27, 2011


MAXINE M. CHESNEY
United States District Judge