

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

DOLORES NIEVES, individually and as Trustee
of the Dolores L. Nieves Family Living Trust
Dated March 10, 2000,

No. C 11-05260 WHA

Plaintiff,

v.

JP MORGAN BANK, N.A., a Delaware
Corporation, CHASE HOME FINANCE LLC, a
New Jersey Limited Liability Company,
CALIFORNIA RECONVEYANCE COMPANY, a
California Corporation,

Defendants.

**ORDER DENYING MOTION
FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT,
GRANTING REQUEST FOR
JUDICIAL NOTICE, AND
VACATING HEARING**

INTRODUCTION

In this mortgage-loan dispute, plaintiff moves for leave to file a second amended
complaint. For the reasons stated below, the motion is **DENIED**.

STATEMENT

Plaintiff Dolores L. Nieves, who is represented by counsel, is the owner of real property
in Fremont, California. Defendants are JP Morgan Chase Bank, N.A., successor in interest to
Washington Mutual Bank, who issued the subject loan, Chase Home Finance, LLC, the current
beneficiary of the loan, and California Reconveyance Company, the trustee of the loan. Plaintiff
alleges that she was a victim of financial elder abuse, which resulted in her obtaining a \$250,000
loan against her residence, which was not previously subject to a mortgage.

1 The facts have been set forth in previous orders (Dkt. Nos. 21, 36). The gist of the
2 complaint is that plaintiff entered into a loan transaction with Washington Mutual and the loan
3 documents she received were defective, namely, they did not comply with numerous TILA
4 requirements. For example, the loan documents did not contain a “clear and conspicuous
5 disclosure of the date of the transaction and the date upon which the rescission right terminates,”
6 and the right-to-cancel notice omitted the date the cancellation period began and the final date to
7 cancel (Second Amd. Compl. ¶¶ 22–25). Due to these alleged deficiencies, among others,
8 plaintiff sought to rescind the loan on numerous occasions. Defendants JP Morgan Chase and
9 Chase Home Finance refused to accept the rescission.

10 Plaintiff’s first amended complaint, like her proposed second amended complaint seeks:
11 (1) rescission pursuant to TILA Section 1635; (2) quiet title and expungement of liens;
12 (3) cancellation of written instruments; (4) declaratory relief; (5) damages for financial abuse of
13 an elder pursuant to the California Elder Abuse and Dependent Adult Civil Protection Act
14 (“EADACPA”); and (6) rescission pursuant to California Civil Code Section 1689(b). What is at
15 issue in the instant motion is whether plaintiff should be allowed to amend the complaint to
16 include additional allegations in support of her request for punitive damages.

17 On April 25, 2012, all three defendants moved to dismiss plaintiff’s request for punitive
18 damages for the financial elder abuse claim. The complaint sought punitive damages under
19 California Civil Code Section 3294 and the EADACPA. In the briefing on the motion to
20 dismiss, plaintiff dropped her argument under Section 3294 and only addressed her request for
21 damages under the EADACPA. By order dated June 1, 2012, the motion to dismiss the request
22 for punitive damages was granted. The order stated (Dkt. No. 36 at 4):

23 Currently, the complaint contains a dearth of factual allegations
24 and instead relies on conclusory statements to support the claim
25 that defendants have been reckless in denying plaintiff’s request
26 for rescission. Merely noting that defendants have refused to grant
27 rescission and claiming that this refusal was harmful to plaintiff is
28 not enough to state a claim for recklessness. Plaintiff has not
provided specific factual allegations that might demonstrate why
defendants’ refusal to rescind was reckless rather than legitimate.

In the motion for leave to file a second amended complaint, plaintiff seeks to revive her
request for punitive damages based on California Civil Code Section 3294, arguing that the

1 newly alleged facts support a request for punitive damages thereunder.

2 **ANALYSIS**

3 **1. STANDARD.**

4 Pursuant to FRCP 15(a)(2), a district court should freely give leave to amend when
5 justice so requires, absent a showing of bad faith, dilatory motive, or undue prejudice to another
6 party. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Leave to amend may be denied, however, if
7 the proposed amendment is futile or would be subject to dismissal. *Saul v. United States*, 928
8 F.2d 829, 843 (9th Cir. 1991). To survive a motion to dismiss, a complaint must contain
9 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim is facially plausible when there are
11 sufficient factual allegations to draw a reasonable inference that the defendants are liable for the
12 misconduct alleged. “[C]onclusory allegations of law and unwarranted inferences are
13 insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy*
14 *Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citation omitted).

15 **2. PUNITIVE DAMAGES.**

16 Throughout the course of litigation, plaintiff has vacillated between two theories in
17 support of her request for punitive damages. The first theory is based on the EADACPA and the
18 second on California Civil Code Section 3294. To recover punitive damages for financial abuse
19 of an elder under the EADACPA, plaintiff must prove “by clear and convincing evidence” that
20 defendants have been guilty of “recklessness, oppression, fraud, or malice in the commission of
21 the abuse.” CAL. WELF. & INST. CODE § 15657.5(b). In the context of elder abuse, recklessness
22 involves “deliberate disregard of the high degree of probability that an injury will occur” and
23 “rises to the level of a conscious choice of a course of action . . . with knowledge of the serious
24 danger to others involved in it.” *Delaney v. Baker*, 20 Cal. 4th 23, 31–32 (1999). The previous
25 dismissal order explained that plaintiff is not entitled to rescission “without regard to whether the
26 law permits her to rescind on the grounds asserted.” *Yamamoto v. Bank of New York*, 329 F.3d
27 1167, 1172 (9th Cir. 2003). Thus, the order held that “[d]efendants cannot be said to have acted
28 recklessly merely because they have contested the grounds for plaintiff’s notice of rescission,”

1 which was plaintiff’s allegation (Dkt. No. 36 at 4).

2 Under Section 3294, punitive damages are permitted only “where defendant has been
3 guilty of oppression, fraud, or malice.” Malice is “despicable” conduct of the defendant with a
4 “willful and conscious disregard of the rights or safety of others.” Oppression is “despicable
5 conduct that subjects a person to cruel and unjust hardship in conscious disregard of that
6 person’s rights.” Fraud is “an intentional misrepresentation, deceit, or concealment of a material
7 fact known to the defendant with the intention on the part of the defendant of thereby depriving a
8 person of property or legal rights or otherwise causing injury.” CAL. CIV. CODE §§
9 3294(c)(1)–(3). In the previous motion to dismiss, plaintiff did not address the complaint’s
10 request for damages under Section 3294.

11 The second amended complaint contains new allegations. Plaintiff alleges that
12 defendants knowingly enforced their predecessor’s unconscionable loan contract with plaintiff.
13 In her moving papers plaintiff *argues* that the claims for punitive damages (Br. 3):

14 arise[] form [sic] the facts that Defendants continued to enforce a
15 contract that they knew or should have known was prima facially
16 unconscionable even after Defendants were notified of the facts of
17 the underlying mortgage agreement. It is not the Defendants’
refusal to grant rescission that is the basis of the punitive damages
claim but Defendants’ continued and knowing enforcement of the
unconscionable contract

18 The dismissal order specifically instructed that plaintiff must explain in her motion for leave to
19 amend how the proposed amendments cure the deficiencies identified therein. Plaintiff does not
20 explain how this new theory of unconscionability is supported in the complaint, which alleges
21 various TILA violations, namely that the loan documents she received did not comply with TILA
22 provisions that required the loan documents to contain a “clear and conspicuous disclosure of the
23 date of the transaction and the date upon which the rescission right terminates,” that the right-to-
24 cancel notice she received omitted the date the cancellation period began and the final date to
25 cancel, and that she only received one copy of the right-to-cancel notice, not two, as is required
26 by statute (Second Amd. Compl. ¶¶ 17, 22–25).

27 Specifically, in support of the request for punitive damages, the proposed second
28 amended complaint alleges, that defendants are (*id.* ¶ 96):

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

guilty of oppression, fraud and/or malice pursuant to Civ. Code § 3294(a) by (a) knowingly enforcing an unconscionable contract both before and after Plaintiff tendered payment of the loan balance, and (b) entered into a tolling agreement with Plaintiff that Defendants had no intention of honoring at the time it was entered into.

This conduct allegedly caused plaintiff, a senior citizen to “suffer loss or encumbrance of a primary residence.” Said conduct is alleged to be “despicable and subjected Plaintiff to cruel and unjust hardship in conscious disregard of Plaintiff’s rights by forcing an elderly woman to withstand years of unnecessary litigation in order to protect her basic rights” (*id.* ¶¶ 98, 101).

Still, the facts alleged are conclusory, reciting the language of the statute. Plaintiff has not sufficiently alleged why defendants actions were malicious, oppressive, or fraudulent. Neither has plaintiff alleged (or explained in her moving papers) how the complaint supports her theory that defendants can be liable for punitive damages based on “knowingly enforcing an unconscionable contract.” Here, the claim for rescission arises primarily from the alleged TILA violations; plaintiff does not raise unconscionability as a defense to enforcement of the contract itself or as a basis for rescission. The heart of the dispute, as alleged in the complaint is about whether defendants violated TILA. Furthermore, as stated in the previous dismissal order, defendants cannot be said to have acted recklessly because they contested the grounds for plaintiff’s notice of rescission, namely the alleged TILA violations. Allowing the proposed amendments would be futile as the request for punitive damages would be subject to dismissal.

Thus, the motion for leave to file a second amended complaint is **DENIED**. The deadline to amend the complaint set in the case management order has passed. Thus, no further amendments will be permitted.

3. REQUEST FOR JUDICIAL NOTICE.

Defendants request judicial notice of: (1) a copy of the deed of trust recorded by the Alameda County Recorder’s Office as instrument number 2007050041; (2) a copy of the Purchase and Assumption Agreement dated September 25, 2008; and (3) the Court’s order dated February 14, 2012, and (4) the Court’s order dated June 1, 2012. Plaintiff did not oppose. The request for judicial notice is **GRANTED**. FRE 201.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the above-stated reasons, the motion for leave to file a second amended complaint is **DENIED**. The hearing set for July 26, 2012, is hereby **VACATED**.

IT IS SO ORDERED.

Dated: July 12, 2012.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE