

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

OSVALDINA LIMA,
Plaintiff,
v.
AMERICAN HOME MORTGAGE SERVICING,
INC.; AHMSI DEFAULT SERVICES, INC.;
and FIDELITY NATIONAL TITLE COMPANY,
Defendants.

No. C 09-3561 CW
ORDER GRANTING
DEFENDANTS AMERICAN
HOME MORTGAGE
SERVICING, INC. AND
AHMSI DEFAULT
SERVICES, INC.'S
MOTION TO DISMISS
(Docket No. 5)

Plaintiff Osvaldina Lima charges Defendants American Home Mortgage Servicing, Inc. and AHMSI Default Services, Inc. with violations of various federal statutes and regulations in connection with a mortgage she obtained to finance her purchase of rental property. American Home and AHMSI (collectively, American Home) move to dismiss Plaintiff's complaint.¹ Plaintiff opposes the motion. The motion was decided on the papers. Having considered all of the papers submitted by the parties, the Court GRANTS American Home's motion and dismisses Plaintiff's Truth in Lending Act (TILA), Real Estate Settlement Procedures Act (RESPA), Equal Credit Opportunity Act (ECOA) and Fair & Accurate Credit Transactions Act (FACTA) claims with leave to amend. However, to the extent that Plaintiff seeks rescission under TILA and RESPA,

¹ Although Fidelity is named as a Defendant, it does not appear to have been served. Nor are any claims asserted against it in the body of the complaint. It did not join American Home's motion.

1 the Court dismisses those requests with prejudice. The Court
2 dismisses with prejudice Plaintiff's claim under the Gramm, Leach,
3 Biley Act (GLBA) because there is no private right of action under
4 that law.

5 BACKGROUND

6 On December 1, 2002, Plaintiff obtained a loan from Ameriquest
7 Mortgage Company to purchase a rental property in Oakland,
8 California. On or about January 29, 2009, Plaintiff received a
9 letter notifying her that she was in default on the loan.
10 Compl. Ex. B. A notice of default was filed in the official
11 records of Alameda County on February 2, 2009. Request for
12 Judicial Notice (RJN), Ex. 2.²

13 On April 28, 2009, Plaintiff sent American Home a letter,
14 requesting "a life of loan accounting and a copy" of her loan file.
15 Compl., Ex. D. She also alleged various "truth in lending/RESPA
16 violations." Id. The letter was labeled "Qualified Written
17 Request" and demanded a response within twenty days. Id.

18 American Home recorded a notice of trustee's sale on May 14,
19 2009, indicating that Plaintiff's property would be sold on June 2,
20 2009. RJN Ex. 5. In a letter dated May 24, 2009, Plaintiff
21 demanded cancellation and reasserted the statutory violations.
22 Compl., Ex. F. On June 3, 2009, American Home responded to her
23 letter, stating that, as loan servicers, they did not have the
24 information that she sought and that she should contact the
25 original lenders. Compl. ¶ 13; Opp'n at 2. Thereafter, Plaintiff
26

27 ² American Home's request for judicial notice is GRANTED. The
28 documents contain facts which are not subject to reasonable
dispute. Fed. R. Evid. 201.

1 sent letters to entities she identified as her lenders. Compl.
2 ¶ 14.

3 Plaintiff filed her complaint on July 29, 2009, asserting that
4 American Home violated TILA, RESPA, ECOA, GLBA and FACTA.
5 Plaintiff apparently premises her allegations on American Home's
6 failure to keep notices and other paperwork in the "title company
7 file." Compl. ¶ 12. She asserts a cause of action for
8 "injunction," and maintains that, pursuant to 12 U.S.C.
9 § 2603(e)(2), she is entitled to "rescission and penalties for the
10 violations." Compl. ¶ 17.

11 LEGAL STANDARD

12 A complaint must contain a "short and plain statement of the
13 claim showing that the pleader is entitled to relief." Fed. R.
14 Civ. P. 8(a). When considering a motion to dismiss under Rule
15 12(b)(6) for failure to state a claim, dismissal is appropriate
16 only when the complaint does not give the defendant fair notice of
17 a legally cognizable claim and the grounds on which it rests.
18 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
19 considering whether the complaint is sufficient to state a claim,
20 the court will take all material allegations as true and construe
21 them in the light most favorable to the plaintiff. NL Indus., Inc.
22 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
23 principle is inapplicable to legal conclusions; "threadbare
24 recitals of the elements of a cause of action, supported by mere
25 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
26 ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
27 U.S. at 555).

28 Although the court is generally confined to consideration of

1 the allegations in the pleadings, when the complaint is accompanied
2 by attached documents, such documents are deemed part of the
3 complaint and may be considered in evaluating the merits of a Rule
4 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,
5 1267 (9th Cir. 1987).

6 DISCUSSION

7 As stated above, Plaintiff's complaint asserts a cause of
8 action for "injunction" and states that she seeks a preliminary
9 injunction and rescission of her mortgage. American Home correctly
10 notes that an injunction is a remedy, not a cause of action.
11 However, other portions of the complaint allege violations of
12 federal statutes. Plaintiff's complaint is therefore construed to
13 raise causes of actions under these statutes and to seek rescission
14 of her mortgage, monetary damages and a preliminary and permanent
15 injunction against the trustee sale based on these violations. The
16 Court analyzes these claims accordingly.³

17 I. TILA Claim

18 Plaintiff alleges that there were several documents "not in
19 the title company's file," including a right of rescission notice,
20 an initial ARM disclosure and a final truth-in-lending statement.
21 Compl. at 3:9-10. Plaintiff appears to suggest that because these
22 documents were not in her loan file, they must not have been
23 properly disclosed at the time her loan was executed. To the

24
25 ³ American Home asserts that Plaintiff's complaint must be
26 dismissed because, in challenging the trustee's sale, she failed to
27 assert tender. However, tender is a requirement where a
28 foreclosure sale has already occurred. See, e.g., Abdallah v.
United Savings Bank, 43 Cal. App. 4th 1101, 1105 (1996); U.S. Cold
Storage v. Great W. Sav. & Loan Ass'n, 165 Cal. App. 3d 1214, 1220
(1985). Here, there is no evidence showing that the foreclosure
sale has already taken place.

1 extent that Plaintiff asserts a TILA claim, American Home argues
2 that it is untimely.

3 As alleged, Plaintiff's complaint does not state a claim under
4 TILA. Although TILA requires that certain disclosures be made in
5 the loan origination process, an allegation that these disclosures
6 are not in the title company's file is insufficient to allege
7 illegal non-disclosure.

8 Even if she properly asserted a TILA claim, she cannot seek
9 rescission. Generally, TILA provides obligors the right to rescind
10 a loan transaction "until midnight of the third business day
11 following the consummation of the transaction or the delivery of
12 the information and rescission forms required under this section
13 together with a statement containing" the required material
14 disclosures. 15 U.S.C. § 1635(a). If the required disclosures are
15 not provided, the right to rescission nonetheless expires "three
16 years after the date of consummation of the transaction or upon the
17 sale of the property, whichever occurs first" Id.
18 § 1635(f). Section 1635(f) "limits more than the time for bringing
19 a suit, by governing the life of the underlying right as well."
20 Beach v. Ocwen Federal Bank, 523 U.S. 410, 417 (1998). There is
21 "no federal right to rescind, defensively or otherwise, after the
22 3-year period of § 1635(f) has run." Id. at 419. Because
23 Plaintiff obtained her loan in December, 2002, her right to
24 rescission, to the extent she had one, expired in December, 2005.

25 Plaintiff attempts to resurrect her rescission right by citing
26 Matter of Coxson, 43 F.3d 189 (5th Cir. 1995). But Coxson is
27 distinguishable. That case addressed 15 U.S.C. § 1640(e), which
28 addresses TILA's one-year statute of limitations for damages. The

1 statute does not bar persons from raising a TILA violation as a
2 defense to an action against them "by recoupment or set-off in such
3 action." Id.; see also Coxson, 43 F.3d at 193. Here, Plaintiff
4 does not assert a defense of recoupment.

5 Similarly unavailing is Plaintiff's citation to King v. State
6 of California, 784 F.2d 910 (9th Cir. 1986). Like Coxson,
7 King addressed 15 U.S.C. § 1640(e). The court held that under
8 appropriate circumstances, including where fraud or non-disclosures
9 are alleged, TILA's statute of limitations for damages may be
10 equitably tolled. King, 784 F.2d at 915. Plaintiff asserts that
11 the limitations period should be equitably tolled, but does not
12 plead facts to justify tolling.

13 Accordingly, Plaintiff's TILA claim is dismissed with leave to
14 amend to plead facts showing that American Home failed to disclose
15 information in violation of TILA. Further, to the extent that she
16 seeks monetary damages, Plaintiff must plead facts supporting
17 equitable tolling. However, Plaintiff's request for rescission
18 based on her TILA claim is dismissed with prejudice because her
19 right to rescission expired in December, 2005.

20 II. RESPA Claims

21 A. American Home's Duty to Respond

22 Plaintiff asserts that American Home violated RESPA by failing
23 to respond to her qualified written requests (QWRs) in a timely
24 fashion.

25 A loan servicer that "receives a qualified written request
26 from the borrower (or an agent of the borrower) for information
27 relating to the servicing of such loan . . . shall provide a
28 written response acknowledging receipt of the correspondence within

1 20 days (excluding legal public holidays, Saturdays, and Sundays)."
2 12 U.S.C. § 2605(e)(1)(A). "Not later than 60 days (excluding
3 legal public holidays, Saturdays, and Sundays) after the receipt
4 from any borrower of any qualified written request," the servicer
5 shall, among other things, make appropriate adjustments to the
6 borrower's account and, if necessary, provide a "written
7 explanation or clarification" that explains "why the information
8 requested is unavailable or cannot be obtained by the service" and
9 "the name and telephone number of an individual employed by, or the
10 office or department of, the servicer who can provide assistance to
11 the borrower." Id. § 2605(e)(2). Individuals may seek actual
12 damages against loan servicers who fail to comply. 12 U.S.C.
13 § 2605(f).

14 Plaintiff's letters were not QWRs as defined by the statute.
15 The statute requires servicers, like American Home, to respond
16 promptly to requests "relating to the servicing" of loans.
17 Plaintiff's letters, however, alleged various violations and sought
18 documents associated with the loan's origination. Even if her
19 letters were QWRs, her complaint states that American Home provided
20 her a response on June 3, 2009; this is within the sixty-day period
21 that a loan servicer must provide a borrower with a substantive
22 response. Thus, to the extent there is a RESPA violation, it would
23 be based upon actual damage arising from American Home's failure to
24 acknowledge her April 20 letter within twenty days. See id.
25 § 2605(e)(1)(A). Plaintiff did not plead facts showing that she
26 was actually damaged by American Home's failure to acknowledge her
27 purported QWRs.

28 Plaintiff seeks "rescission and penalties" for American Home's

1 alleged RESPA violation. Although REPSA provides for monetary
2 damages, see id. § 2605(f), it does not offer relief in the form of
3 rescission. Plaintiff did not cite any authority showing the
4 contrary.

5 Accordingly, Plaintiff's RESPA claim for monetary damages is
6 dismissed with leave to amend to allege facts showing that her
7 letters were QWRs and that she suffered actual damage. To the
8 extent that this claim seeks rescission, it is dismissed with
9 prejudice.

10 B. Missing Documents

11 As in her TILA claim, Plaintiff alleges that several documents
12 required by RESPA were not contained in the title company's file.
13 As above, this is insufficient to allege a RESPA claim for non-
14 disclosure. And, as American Home notes, even if Plaintiff
15 properly alleged a claim for non-disclosure, her claim would be
16 barred by RESPA's statute of limitations. See 12 U.S.C. § 2614.
17 As noted above, Plaintiff cites King, which allows equitable
18 tolling of RESPA's statute of limitations. However, she has not
19 plead facts supporting the application of equitable tolling. Thus,
20 this RESPA claim is dismissed with leave to plead facts
21 showing that American Home unlawfully withheld information in
22 violation of RESPA and to allege facts supporting equitable
23 tolling. As above, to the extent that this RESPA claim seeks
24 rescission, it is dismissed with prejudice.

25 III. ECOA Claim

26 Plaintiff asserts that American Home violated Regulation B, 12
27 C.F.R. pt. 202, which implements ECOA, because various documents
28 are missing from the title company's file. She does not identify

1 which portion of Regulation B American Home violated. American
2 Home alleges that Plaintiff's action is time-barred.

3 Under 15 U.S.C. § 1691e, aggrieved applicants may bring
4 actions against any "creditor who fails to comply with any
5 requirement imposed" by the ECOA. Courts may "grant such equitable
6 and declaratory relief as is necessary to enforce the requirements
7 imposed under" ECOA. 15 U.S.C. § 1690e(c). However, actions under
8 ECOA by an individual must be brought "no later than two years from
9 the date of the occurrence of the violation." Id. § 1691e(f).

10 Plaintiff did not oppose American Home's argument on this
11 point. Accordingly, her claim under ECOA is dismissed with leave
12 to amend if she can remedy this deficiency.

13 IV. GLBA Claim

14 Plaintiff asserts that a "Privacy Policy Notice" is not
15 contained in the title company's file, which she maintains is a
16 violation of the GLBA. American Home argues that there is no
17 private right of action for an alleged violation of the GLBA. See
18 Dunmire v. Morgan Stanley DW, Inc., 475 F.3d 956 (8th Cir. 2007).
19 Because Plaintiff did not respond to this assertion, her GLBA claim
20 is dismissed with prejudice.

21 V. FACTA Claim

22 Plaintiff asserts that disclosures required by FACTA were not
23 contained in the title company's file. Plaintiff alleges that
24 these documents must be provided by "brokers/lenders." Compl.

25 ¶ 12. American Home asserts that Plaintiff's claim is untimely
26 because it was not brought within five years of the alleged
27 violation. See 15 U.S.C. § 1681p. Because Plaintiff did not
28 respond to American Home's argument, her FACTA claim is dismissed

1 with leave to amend if she can remedy this deficiency.

2 VI. Injunction

3 Plaintiff asserts a claim for "injunction" and asks the Court
4 to enjoin the trustee's sale of her property. She has not,
5 however, stated a basis on which the sale could be enjoined.
6 Further, her complaint is not clear on whether she seeks a
7 preliminary or permanent injunction.

8 If Plaintiff seeks a preliminary injunction, she must file a
9 motion for one and provide a basis for it to issue. If she seeks a
10 permanent injunction, she must state a claim on which a permanent
11 injunction could be granted and plead for such relief as a remedy
12 for that claim.

13 CONCLUSION

14 For the foregoing reasons, American Home's motion to dismiss
15 is GRANTED. In sum,

- 16 1. Plaintiff's TILA claim is dismissed with leave to amend
17 to plead facts showing that American Home and AHMSI
18 unlawfully withheld information in violation of TILA and
19 to plead facts that support equitable tolling. To the
20 extent Plaintiff seeks rescission under this claim, the
21 Court dismisses that request with prejudice.
- 22 2. Plaintiff's RESPA claim under 12 U.S.C. § 2605 is
23 dismissed with leave to amend to plead facts showing that
24 her letters were QWRs, to allege actual damage and to
25 plead facts supporting equitable tolling. To the extent
26 Plaintiff seeks rescission under this claim, the Court
27 dismisses that request with prejudice.
- 28 3. Plaintiff's RESPA claim for non-disclosure is dismissed

1 with leave to amend to plead facts showing that American
2 Home and AHMSI unlawfully withheld information in
3 violation of RESPA and to plead facts supporting
4 equitable tolling. To the extent Plaintiff seeks
5 rescission under this claim, the Court dismisses that
6 request with prejudice.

7 4. Plaintiff's ECOA and FACTA claims are dismissed with
8 leave to amend to plead facts that would show that her
9 claims are not barred by the relevant statutes of
10 limitations.

11 5. Plaintiff's GLBA claim is dismissed with prejudice
12 because there is no private right of action under the
13 GLBA.

14 6. Plaintiff's claim for "injunction" is dismissed with
15 leave to amend. If Plaintiff's intention is to request a
16 preliminary injunction, she must file a motion to request
17 one. If she intends to seek a permanent injunction, she
18 must state a claim on which a permanent injunction could
19 be granted and plead for such relief as a remedy for that
20 claim.

21 Plaintiff has fourteen days to file an amended complaint
22 addressing the abovementioned deficiencies. Further, because it
23 does not appear that Plaintiff has asserted claims against
24 Fidelity, she must plead claims against it in an amended complaint
25 or omit its name from the caption. If she fails to plead claims
26 against Fidelity but nonetheless names it as a defendant, the
27 complaint against it shall be dismissed with prejudice. Plaintiff
28 shall serve her complaint on all Defendants within seven days of

1 filing. Plaintiff's failure to comply with this order will result
2 in the dismissal of her claims with prejudice.

3 IT IS SO ORDERED.

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5 Dated: January 11, 2010



6 CLAUDIA WILKEN
United States District Judge

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