

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

RONALD C. PADILLA & EVA K. PADILLA,
Plaintiffs,
v.
ONE WEST BANK,
Defendant.

No. 10-04080 CW
ORDER GRANTING
DEFENDANT'S
MOTION TO DISMISS
AND VACATING CASE
MANAGEMENT
CONFERENCE

_____ /

This case involves Defendant's attempt to foreclose on a deed of trust that is secured by Plaintiffs' residence. Defendant One West Bank moves to dismiss all of the claim asserted in Plaintiffs' complaint. Plaintiffs Ronald C. and Eva K. Padilla, acting pro se, oppose the motion. The matter was taken under submission on the papers. Having considered all the papers filed by the parties, the Court grants the motion to dismiss and dismisses all claims without leave to amend, except that Plaintiffs are granted leave to amend their claim under the Real Estate Settlement Procedures Act.

BACKGROUND

Plaintiffs' complaint is composed, for the most part, of general allegations about the mortgage industry. The only specific allegations are that Plaintiffs "entered into a consumer contract for the refinance of a primary residence located at 2555 Spyglass

1 Hills Road, Livermore, California." Comp. at 1. The complaint
2 then alleges that "Defendants, acting in concert and collusion with
3 others, induced Petitioner to enter into a predatory loan agreement
4 with Defendant."¹ Plaintiffs do not identify Defendant One West
5 Bank and do not allege how One West Bank has caused the violations
6 they assert in their complaint.

7 From the documents submitted by Defendant One West Bank, of
8 which the Court takes judicial notice, the following facts can be
9 ascertained.² Plaintiffs purchased the Property in July, 2006.
10 Request for Judicial Notice (RJN), Ex. 1, Grant Deed recorded July
11 12, 2006. Also, on July 12, 2006, a Deed of Trust was recorded
12 against the Property, securing a mortgage loan in the amount of
13 \$467,100. RJN, Ex. 2, Deed of Trust. The Deed of Trust indicates
14 that Plaintiffs were the borrowers of the loan; Mortgageit, Inc.
15 was the lender; North American Title was the trustee; and Mortgage
16 Electronic Registration Systems, Inc. (MERS) was the beneficiary,
17 as nominee for the lender. Attached to the Deed of Trust is an
18 adjustable rate rider indicating that the loan contained provisions
19 that would allow the interest rate and monthly payments to change.

20 On April 1, 2010, after Plaintiffs accrued approximately
21 \$16,249 in mortgage payment arrearages, a notice of default was
22 recorded against the property. RJN, Exhibit 3. The notice
23 indicates that, to find out how much they must pay and to arrange
24 for payment to stop the foreclosure, Plaintiffs should contact the

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26 ¹Although Plaintiffs' allegations speak of "Defendants," they
name only one Defendant, One West Bank.

27 ²The Court grants Defendant's request for judicial notice.
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1 Bank of America, in care of Meridian Foreclosure Service. On April
2 21, 2010, a Substitution of Trustee form was signed by One West
3 Bank, on behalf of the Bank of America, to substitute Meridian
4 Trust Deed Service (MTDS) as Trustee on the Deed of Trust. RJN,
5 Exhibit 4. This Substitution of Trustee form was recorded on July
6 1, 2010. Id. On June 24, 2010, MERS, as nominee for Mortgageit,
7 Inc., assigned its beneficial interest in the Deed of Trust to the
8 Bank of America. RJN, Exhibit 6. This Assignment of Deed of Trust
9 was recorded on July 2, 2010. Id. On July 1, 2010, MTDS recorded
10 a Notice of Trustee's Sale of the Property, setting the foreclosure
11 sale date as July 23, 2010. RJN, Exhibit 5. One West Bank
12 indicates that the foreclosure sale has been postponed.

13 In its motion, One West Bank refers to itself as the servicer
14 of Plaintiffs' loan. In their opposition, Plaintiffs mention One
15 West Bank once, representing that they have alleged that One West
16 Bank "committed fraud by representing to the court that One West
17 Bank is a real party in interest in the contract of sale and has
18 standing to take said property from Defendant [sic] when no such
19 claim exists." Opp. at 7. This appears to be an attempt to argue
20 that the lack of the original loan document means One West Bank
21 lacks standing to foreclose. For the reasons discussed below, this
22 is insufficient to forestall foreclosure. It is also insufficient
23 to establish that One West Bank lacks standing to foreclose.
24 Although One West Bank does not provide a specific document in
25 which the Bank of America appoints it to be the servicer of
26 Plaintiffs' loan, the recorded documents establish that the Bank of
27 America is the assignee of the beneficial interest of the loan.

1 One West Bank has signed several of the documents on behalf of the
2 Bank of America, thus corroborating the former's statement that it
3 is the servicer of Plaintiffs' loan.

4 Plaintiffs assert the following causes of action: (1) breach
5 of fiduciary duty; (2) negligence and negligence per se; (3) fraud;
6 (4) breach of the covenant of good faith and fair dealing; (5)
7 violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et
8 seq.; and (6) intentional infliction of emotional distress.
9 Plaintiffs pray for damages in the amount of \$1,230,891, punitive
10 damages in the amount of \$3,692,675, rescission of the loan
11 contract, quiet title to the property and an injunction enjoining
12 Defendant(s) from engaging in fraudulent, deceptive, predatory and
13 negligent acts.³

14 LEGAL STANDARD

15 A complaint must contain a "short and plain statement of the
16 claim showing that the pleader is entitled to relief." Fed. R.
17 Civ. P. 8(a). When considering a motion to dismiss under Rule
18 12(b)(6) for failure to state a claim, dismissal is appropriate
19 only when the complaint does not give the defendant fair notice of
20 a legally cognizable claim and the grounds on which it rests.
21 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
22 considering whether the complaint is sufficient to state a claim,
23 the court will take all material allegations as true and construe
24 them in the light most favorable to the plaintiff. NL Indus., Inc.

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26 ³Plaintiffs allude to other statutes in the "General
27 Allegations" section of their complaint. However, only these six
28 causes of action are listed after the heading, "Causes of Action."

1 with the exception of the claim for violation of the Real Estate
2 Settlement Procedures Act (RESPA), as discussed below.⁵

3 I. Claims Predicated on Production of Original Promissory Note

4 One West Bank notes that Plaintiffs appear to premise their
5 causes of action on the fact that a trustee's sale would be
6 improper because One West Bank has not produced, upon Plaintiffs'
7 request, the original promissory note. Citing Moeller v. Lien, 25
8 Cal. App. 4th 822, 830 (1994), One West Bank argues that it has met
9 its legal obligations under California Civil Code §§ 2924 et seq.
10 by recording the Notice of Default in the Alameda County recorder's
11 office, thus beginning the non-judicial foreclosure sale process.
12 Plaintiffs, in their opposition, do not respond to this argument.
13 Moeller recited the procedures, under § 2924, that must take place
14 before a non-judicial foreclosure sale may proceed. Id. These
15 procedures include providing the debtor/trustor several
16 opportunities to cure the default and avoid the loss of the
17 property. Id. The statute does not require the beneficiary, or
18 its servicer, to produce the original note to the debtor/trustor.
19 Therefore, any general claim premised on the requirement that One
20 West Bank produce the original promissory note before foreclosure
21 may proceed is dismissed.

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24 ⁵Defendant also argues that all the claims must be dismissed
25 because Plaintiffs have failed to tender the amount of the secured
26 debt. Defendant's cases involve actions seeking to cancel a
27 voidable sale under a deed of trust, see e.g., Karlson v. American
28 Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117 (1971), and are not
applicable to the instant case where a sale has not yet occurred.
However, as discussed below, this defense is applicable to
Plaintiffs' claim for rescission under TILA.

1 II. Breach of Fiduciary Duty

2 Citing Oaks Mgmt. Corp. v. Superior Court, 145 Cal. App. 4th
3 453, 466 (2006), One West Bank argues that there is no fiduciary
4 relationship between a lender and a borrower. Plaintiffs, in their
5 opposition, do not respond to this argument. Oaks stated the rule
6 that, absent special circumstances, a loan transaction, like all
7 ordinary banking transactions, does not establish a fiduciary
8 relationship between the borrower and lender. Id. As One West
9 Bank correctly notes, it was not a party to the original loan
10 transaction and, therefore, had no duty to make any disclosures to
11 Plaintiffs regarding their loan. Furthermore, there is no
12 fiduciary relationship between a loan servicer and a borrower.
13 Castaneda v. Saxon Mortg. Servs., Inc., 2010 WL 726903, *7 (E.D.
14 Cal.) (applying California law). The motion to dismiss this claim
15 is granted. It is dismissed without leave to amend because
16 amendment would be futile.

17 III. Negligence and Negligence Per Se

18 Under their negligence causes of action, Plaintiffs allege
19 that Defendants [sic] owed a general duty of care to perform due
20 diligence as to their loan and to avoid marketing loans they knew
21 that borrowers could not afford.

22 The allegations of this cause of action focus on the original
23 loan agreement, which Plaintiffs entered into in 2006. One West
24 Bank was appointed as servicer of the deed of trust after the loan
25 was assigned to the Bank of America in 2010. Therefore, One West
26 Bank could not have undertaken any of the improper acts alleged in
27 this cause of action. Further, as correctly noted by One West

1 Bank, it owes Plaintiffs no legal duty of care, an essential
2 element of a claim based on negligence. Therefore, Plaintiffs'
3 negligence causes of action are dismissed without leave to amend,
4 because amendment would be futile.

5 IV. Fraud

6 In this cause of action, Plaintiffs allege that unnamed
7 "Agents" made misrepresentations with the intention of inducing
8 Plaintiffs to act in reliance on them.

9 Because all of Plaintiffs' allegations of fraud address the
10 loan origination and closing procedures, they do not implicate One
11 West Bank, which became the servicer of the loan after it was
12 assigned to the Bank of America. Therefore, One West Bank is not
13 the proper Defendant on this claim. Also, Plaintiffs' allegations
14 lack the specificity required under Federal Rule of Civil Procedure
15 9(b) for all claims sounding in fraud. See Fed. R. Civ. P. 9(b)
16 ("In all averments of fraud or mistake, the circumstances
17 constituting fraud or mistake shall be stated with
18 particularity."); also see, Wool v. Tandem Computers, Inc., 818
19 F.2d 1433, 1439 (9th Cir. 1987) (allegations must include the time,
20 place and nature of the alleged fraudulent activities). Therefore,
21 One West Bank's motion to dismiss this claim is granted. This
22 claim is dismissed without leave to amend because amendment would
23 be futile.

24 V. Breach of the Covenant of Good Faith and Fair Dealing

25 Under California law, "[t]he prerequisite for any action for
26 breach of the implied covenant of good faith and fair dealing is
27 the existence of a contractual relationship between the parties,
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1 since the covenant is an implied term in the contract." Smith v.
2 City & County of San Francisco, 225 Cal. App. 3d 38, 49 (1990).

3 Plaintiffs have not alleged that they have any direct
4 contractual relationship with One West Bank. In their opposition,
5 Plaintiffs do not address Defendant's argument on this point.
6 Therefore, Plaintiffs' claim for breach of the covenant of good
7 faith and fair dealing is dismissed without leave to amend, because
8 amendment would be futile.

9 V. Truth in Lending Act

10 TILA was enacted "to assure a meaningful disclosure of credit
11 terms so that the consumer will be able to compare more readily the
12 various credit terms available to him and avoid the uninformed use
13 of credit." Yamamoto v. Bank of New York, 329 F.3d 1167, 1169 (9th
14 Cir. 2003) (citing 15 U.S.C. § 1601(a)). If required disclosures
15 are not made, the consumer may obtain damages or seek to rescind the
16 loan. Id. at 1170; Martinez v. EMC Mortg. Corp., 2009 WL 2043013,
17 *5 (E.D. Cal.).

18 The only parties who can be liable for TILA violations are the
19 original creditor and assignees of that creditor. 15 U.S.C.
20 §§ 1640, 1641; Redic v. Gary H. Watts Realty Co., 762 F.2d 1181,
21 1185 (4th Cir. 1985); Nevis v. Wells Fargo Bank, 2007 WL 2601213, *2
22 (N.D. Cal.). Servicers of consumer obligations are not treated as
23 assignees for purposes of imposing liability unless they are also
24 the owner of the obligation. 15 U.S.C. § 1641(f); Chow v. Aegis
25 Mortg. Corp., 286 F. Supp. 2d 956, 959 (N.D. Ill. 2003).

26 Here, Mortgageit was the original lender of the loan and the
27 Bank of America is the assignee. One West Bank is the loan servicer

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1 on behalf of the Bank of America. Because One West Bank is not the
2 original lender or the assignee of the lender, it is not a proper
3 party to a TILA action, and, therefore, this claim is dismissed.

4 Moreover, One West Bank cannot be liable for damages because
5 the one-year statute of limitations has expired. 15 U.S.C.
6 § 1640(e). Plaintiffs executed the loan agreement in July, 2006 but
7 they filed their lawsuit in September, 2010. Thus, the claim for
8 damages is untimely.

9 Further, as One West Bank correctly argues, Plaintiffs' claim
10 for rescission fails because they have not alleged the present
11 ability to tender amounts owed under the loan. Courts have
12 discretion to condition rescission under TILA on tender by the
13 borrower of the property he received by the lender. Yamamoto, 329
14 F.3d at 1171; Martinez v. EMC Mortgage Corp., 2009 WL 2043013 *6
15 (E.D. Cal.) (noting "absent meaningful tender, TILA rescission is an
16 empty remedy, not capable of being granted"). Plaintiffs do not
17 respond to Defendant's argument that they must tender amounts owed
18 under the loan. Furthermore, the right of rescission under TILA
19 cannot be brought more than three years after the consummation of
20 the transaction. Beach v. Ocwen Federal Bank, 523 U.S. 410, 411
21 (1998) (15 U.S.C. § 1635(f) provides that right of rescission
22 expires three years after loan closes or upon the sale of secured
23 property, whichever is earlier). Because Plaintiffs' complaint was
24 filed more than three years after the consummation of the loan
25 transaction, the claim for rescission is untimely.

26 For all of the reasons above, the Court grants One West Bank's
27 motion to dismiss the TILA claim. Dismissal is without leave to
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1 amend because amendment would be futile.

2 VI. Real Estate Settlement Procedures Act (RESPA)

3 Although Plaintiffs do not include a claim for violation of
4 RESPA, 12 U.S.C. § 2601 et seq., in the section of the complaint
5 titled, "Causes of Action," the Court addresses it because
6 Plaintiffs mention it several times in the "General Allegations"
7 section of their complaint.

8 One West Bank argues that RESPA does not provide a private
9 right of action. This is incorrect. There are three sections in
10 RESPA that provide a private right of action: (1) § 2605 requires
11 disclosure to a loan applicant of whether the servicing of the loan
12 may be assigned, sold or transferred; notice to the borrower at the
13 time of transfer; and responses by the loan servicer to qualified
14 written requests by the borrower; (2) § 2607 prohibits kickbacks;
15 and (3) § 2608 prohibits sellers from requiring buyers to purchase
16 title insurance on a property as a condition of its sale.

17 Although Plaintiffs do not make clear under which sections of
18 RESPA they bring their claim, they allege that they made a request
19 for the production of the original promissory note and imply that
20 One West Bank did not respond. Comp. at 2. This may be a claim
21 under § 2605 for a response to a qualified written request.

22 The statute of limitation for § 2605 claims is three years, see
23 12 U.S.C. § 2614, and thus, a § 2605 claim premised on Plaintiffs'
24 request for documents from One West Bank is not time-barred. RESPA
25 places a duty upon loan servicers to respond to "qualified written
26 requests." Lawther v. Onewest Bank, 2010 WL 4936797, *6 (N.D. Cal.)
27 A qualified written request is one that includes identifying

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1 information about the borrower and provides "a statement of the
2 reasons for the belief of the borrower, to the extent applicable,
3 that the account is in error or provides sufficient detail to the
4 servicer regarding other information sought by the borrower." 12
5 U.S.C. § 2605(c)(1). The request must be related to the servicing
6 of the loan, and the servicer must provide a written response
7 acknowledging receipt of the correspondence within twenty days,
8 unless the requested action is taken within that period. Lawther,
9 2010 WL 4936797 at *6. A loan servicer must respond only if the
10 information requested is related to loan servicing. Id. If a loan
11 servicer fails to comply with the provisions of § 2605, a borrower
12 is entitled to any actual damages as a result of the failure. Id.
13 The plaintiff must include, at the pleading stage, a demonstration
14 of some actual pecuniary loss. Id. The plaintiff must also allege
15 a causal relationship between the alleged damages and the RESPA
16 violation. Id. at *7.

17 It is possible that Plaintiffs could state a claim under § 2605
18 against One West Bank as the servicer of their loan. However, they
19 have not alleged that they made a qualified request for information
20 related to the servicing of their loan, that One West Bank did not
21 respond to their request in accordance with § 2605 or that this
22 failure caused them to suffer damages. Therefore, the RESPA claim
23 is dismissed with leave to amend, if Plaintiffs can truthfully
24 correct these deficiencies.

25 VII. Intentional Infliction of Emotional Distress

26 The elements of a cause of action for intentional infliction of
27 emotional distress are (1) extreme and outrageous conduct

1 (2) intended to cause or done in reckless disregard for causing
2 (3) severe emotional distress and (4) actual and proximate
3 causation. Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 593
4 (1979). The conduct must be so extreme as to "exceed all bounds of
5 that usually tolerated in a civilized community," id., and the
6 distress so severe "that no reasonable man in a civilized society
7 should be expected to endure it," Fletcher v. Western National Life
8 Ins. Co., 10 Cal. App. 3d 376, 397 (1970). Plaintiffs have not
9 alleged such conduct by One West Bank, nor can they, except on the
10 basis of their putative RESPA claim, because One West Bank is not
11 the proper party against whom they can bring any other claim alleged
12 in their complaint. Therefore, One West Bank's motion to dismiss
13 this claim is granted. It is dismissed without leave to amend
14 because amendment would be futile.

15 VIII. Equitable Tolling

16 In their complaint, Plaintiffs make the general observation
17 that the statutes of limitations for RESPA and TILA claims are
18 subject to equitable tolling. In their opposition, Plaintiffs
19 assert that equitable tolling applies because: (1) they dealt only
20 with licensed individuals and, thus, Plaintiffs had cause to trust
21 their statements regarding the real estate market, the true value of
22 the property, and the propriety of the fees charged at loan closing;
23 (2) Defendants [sic] actively concealed the truth from Plaintiffs so
24 as to defraud them; and (3) Plaintiffs, once they learned of the
25 pervasive fraud affecting the real estate industry, acted
26 immediately and with due diligence to examine Defendants' [sic]
27 behavior and discovered the fraud alleged in the complaint. The

1 Court finds that these conclusory statements are insufficient to
2 establish that equitable tolling applies to Plaintiffs' claims.

3 Because the only claim that is cognizable against One West Bank
4 is the RESPA claim under § 2605, which is not time-barred,
5 Plaintiffs do not have to re-plead equitable tolling in their
6 amended complaint.

7 CONCLUSION

8 In summary, all claims are dismissed without leave to amend,
9 with the exception of the RESPA claim. The RESPA claim is dismissed
10 with leave to amend for Plaintiffs to remedy, if they truthfully can
11 do so, the deficiencies noted in this Order. If Plaintiffs choose
12 to file an amended complaint, they must do so within fourteen days
13 from the date of this Order. If they do not file an amended
14 complaint within this time, the RESPA claim will be dismissed for
15 failure to prosecute. In their amended complaint, Plaintiffs may
16 not add any other claims against Defendant. The case management
17 conference scheduled for December 21, 2010 is vacated.

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19 IT IS SO ORDERED.

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21 Dated: 12/20/2010


CLAUDIA WILKEN
United States District Judge