

United States District Court
For the Northern District of California

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

E-FILED on 7/1/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KIMBERLY A. BROCKINGTON, also
known as KIMBERLY A. SCHATZ, and
LALLY BROCKINGTON,

Plaintiffs,

v.

J.P. MORGAN CHASE BANK, N.A., a
National Banking Association, NDEX
WEST, LLC, a Texas Limited Liability
Company, and DOES 1 to 20, inclusive,

Defendants.

No. C-08-05795 RMW

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINT AND DENYING
PLAINTIFFS' REQUEST FOR JUDICIAL
NOTICE

[Re Docket No. 29]

On June 26, 2009, the court heard defendant J.P. Morgan Chase Bank N.A.'s motion to dismiss plaintiffs' First Amended Complaint. Having considered the papers submitted by the parties and the arguments of counsel, and for good cause appearing for the reasons set forth below, the court grants defendant's motion to dismiss.

I. BACKGROUND

Plaintiffs Kimberly A. Brockington and Lally Brockington filed this action in Santa Clara County Superior Court, asserting four causes of action arising out of a home refinancing transaction in which defendant J. P. Morgan Chase Bank, N.A. ("JP Morgan") was the lender. As

1 initially pleaded, the four causes of action were: Violation of Section 17200 of the California
2 Business and Professions Code; Violation of the federal Truth in Lending Act (15 U.S.C. § 1601 et
3 seq.) and Federal Reserve Regulation Z (12 C.F.R. §226 et seq.); Violation of the federal Real
4 Estate and Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Federal Reserve Regulation X
5 (24 C.F.R. §3500 et. seq.) and for the tort of concealment under California Civil Code §§1709-
6 1710. Defendant J.P. Morgan removed the action to this court under 28 U.S.C. §1441(b) pursuant
7 to the court's federal question jurisdiction and thereafter moved to dismiss for failure to state a
8 claim.

9 The court granted the motion to dismiss and also granted plaintiffs leave to amend.
10 Plaintiffs subsequently filed the First Amended Complaint, abandoning the TILA and RESPA
11 claims, and asserting three causes of action: 1) violation of Section 17200, 2) concealment; and 3)
12 injunctive relief. Defendant JP Morgan has again moved to dismiss under Rule 12(b)(6) of the
13 Federal Rules of Civil Procedure.

14 Kimberly Brockington is the daughter of Lally Brockington and A.J. The three together
15 live in a home commonly known as 4939 Arundel Court in San Jose, CA and have lived there for
16 the last 32 years. The First Amended Complaint alleges that Lally "is the equitable owner of the
17 property" who "transferred title to Kim on April 5, 2005 in order that Kim's credit be used to
18 qualify for refinancing the property for the purpose of paying tax liens and lowering loan interest
19 by repaying existing loans. No consideration was paid by Kim to acquire title to the property."
20 First Amended Complaint ("FAC") ¶12. In November 2006, the outstanding mortgage was
21 \$493,000 and was only in Kim's name. FAC¶14.

22 Vincent Eppstein was a family friend who managed Kim and Lally's finances and acted for
23 them as trustee. FAC ¶15. Eppstein's sister, Fran Davis, was a real estate licensee working for
24 Capitol Mortgage Corporation, a licensed California Real Estate Broker. *Id.* In November 2006,
25 Eppstein advised Kim that he and Davis had applied for and arranged for a loan on the property
26 because plaintiffs were running out of funds for living expenses and had exhausted funds from the
27 previous refinancing. FAC¶15. Eppstein represented that the paperwork had already been
28 prepared for the loan and that Kim should be prepared to go with him to escrow for signing papers

1 for the loan. *Id.* Kim accompanied Eppstein to the signing meeting at the title company, was
2 given documents to execute without time to review them. FAC ¶16. The application was for a 30-
3 year fixed-rate loan, in the principal amount of \$612,000, at an interest rate of 7.75%. The
4 complaint further alleges that "nothing was said to Kim regarding how much Davis or others were
5 receiving in loan fees" and that "Kim has no recollection of receiving or executing a right of
6 rescission acknowledgment." *Id.* It further alleges that at the time of execution of the documents,
7 "Kim did not notice that the application contained no information regarding her income." *Id.*

8 At the time of the close of escrow, Kim informed Eppstein and Davis that she and her
9 parents could not sustain the \$4,261.71 per month payments. FAC ¶16. Eppstein and Davis stated
10 that there was enough in the remaining funds from the loan to supplement the family's income to
11 cover payments for several years. *Id.* Plaintiffs subsequently discovered that Chase paid Davis
12 \$8,886.24 in previously undisclosed fees as an inducement and encouragement to make the loan.
13 FAC ¶21.

14 The loan funded on or about November 14, 2006, and proceeds of \$111,033.90 were
15 deposited into an account controlled by Eppstein, but within 60 days had disappeared from the
16 account.¹ Plaintiffs were unable to pay the monthly payments on the loan. FAC ¶19.

17 In July 2007, defendants JP Morgan and NDEX West recorded a Notice of Default and
18 commenced foreclosure proceedings. FAC ¶20. Foreclosure sale was set for November 24, 2008,
19 but was forestalled by the filing of this action and by plaintiffs initially obtaining an order
20 enjoining the sale pending hearing on a preliminary injunction, which has since been denied.

21 II. ANALYSIS

22 Rule 12(b)(6) allows a defendant to seek dismissal for failure to state a claim upon which
23 relief can be granted. FRCP 12(b)(6). Such a motion tests the legal sufficiency of a claim. In
24 considering a motion under Rule 12(b)(6), the court must construe the complaint in the light most
25 favorable to the plaintiff, accept as true all material allegations in the complaint as well as
26 reasonable inferences to be drawn from them, and determine if those facts, if proven, would

27 ¹ Despite their involvement in the facts and circumstances underlying this lawsuit, Plaintiffs have
28 not sued Eppstein or Davis in this action.

1 establish a valid claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). To survive
2 a motion to dismiss, a complaint must allege sufficient factual matter, accepted as true, to state a
3 claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
4 (quoting *Twombly*, 550 U.S. at 570).

5 1. Dismissal of all Claims by Plaintiff Lally Brockington for Lack of Standing

6 JP Morgan first seeks dismissal of all claims asserted by plaintiff Lally Brockington on the
7 ground that Lally Brockington does not have standing to assert any claims, renewing the
8 arguments it made in the first motion to dismiss.

9 Like the original Complaint, the First Amended Complaint, alleges that Kim Brockington
10 holds title to the property, that Lally Brockington is the "equitable owner" of the property and that
11 title was transferred to Kim "in order that Kim's credit be used to qualify for refinancing the
12 property for the purpose of paying tax liens and lowering loan interest by repaying existing loans."
13 FAC ¶12. Kim Brockington appears to be the sole named borrower on the 2006 refinancing
14 transaction that underlies the present dispute. The only newly alleged fact is that no consideration
15 was paid by Kim to acquire title to the property. FAC ¶12.

16 The issue thus is whether Lally Brockington, as the alleged "equitable owner" of the
17 property, has standing to challenge the conduct and representations allegedly made during the
18 underlying refinance transaction to which she was not a party. Defendant argues that because
19 Lally is not an owner of the property, nor a borrower on the loan, she has no standing to assert any
20 legal claim arising out of the loan transaction or the lender's efforts to seek enforcement.
21 Plaintiffs argue in opposition that because Lally Brockington is the equitable owner of the
22 property, she is a real party in interest with standing to assert claims.

23 A plaintiff's standing to sue is fundamental to federal court jurisdiction – absent standing,
24 there is no case or controversy under Article III of the Constitution. *United States v. Hays*, 515
25 U.S. 737, 742 (1995). "Standing does not refer simply to a party's capacity to appear in court.
26 Rather, standing is gauged by the specific common law, statutory or constitutional claims that a
27 party presents; i.e., 'whether the particular plaintiff is entitled to an adjudication of the particular
28 claims asserted.'" Schwarzer, Tashima and Wagstaffe, *Federal Civil Procedure Before Trial*,

1 §2:1204, quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added by treatise). The
2 three claims asserted in the First Amended Complaint are:

- 3 1) violation of California's Unfair Competition law (Section 17200 of the Business and
4 Professions Code) relating to defendant's lending practices;
- 5 2) concealment under California Civil Code Section 1709-1710, the gravamen of which is
6 defendants' alleged concealment of facts relating to the true monthly mortgage
7 obligation, the true interest rate of the loan, and other aspects of the loan transaction
8 including the alleged creation of an agency relationship with the mortgage broker; and,
- 9 3) injunctive relief to prevent the foreclosure of the property.

10 Lally Brockington was not a party to the loan transaction and has no standing to challenge
11 defendant's conduct in connection with extending the mortgage loan to Kimberly Brockington, or
12 to assert a claim for unlawful concealment of facts by the defendants in such transaction to which
13 she was not a party. She has no standing to assert a claim for injunctive relief because, as noted
14 below, "injunctive relief" is a remedy, not a separate cause of action, and must be predicated upon
15 a substantive claim. Accordingly, defendant's motion to dismiss the claims asserted by plaintiff
16 Lally Brockington is GRANTED. Plaintiff Lally Brockington has already had one opportunity to
17 amend the complaint and it appears that further amendment would be futile. Therefore, the claims
18 of Plaintiff Lally Brockington are dismissed without leave to amend.

19 2. Defendant's Motion to Dismiss the First Cause of Action under California Business
20 & Professions Code Section 17200, et seq.

21 Defendant seeks dismissal of the First Cause of Action for unfair competition under
22 Section 17200 of the California Business and Professions Code. Defendant asserts several
23 grounds for dismissal.

24 A. Lack of Standing

25 Defendant first argues that plaintiff Kim Brockington does not have standing to assert a
26 claim under Section 17200 because she has failed to allege that she has suffered any actual injury
27 or damage and instead alleges only that she is suffering the threat of injury or damage, which is
28 insufficient. Defendant cites *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal.4th 223,

1 228 (2006), for the proposition that a plaintiff who alleges that she will suffer the prospect of
2 injury, rather than having already suffered injury in fact, does not have standing to assert a claim
3 under the statutory Unfair Competition Law.

4 Plaintiff does not directly address this argument in opposition, arguing instead that
5 *Californians for Disability Rights* stands only for the proposition that the change in Section 17200
6 effectuated by Proposition 64 "was to limit abuses by prohibiting private attorneys from filing
7 lawsuits for unfair competition where they have no client who has been injured in fact."
8 Opposition at 5 (citations and internal quotations omitted). Plaintiff goes on to argue that in this
9 case,

10 "plaintiffs are clients (not attorneys) who have been injured in fact. Due to the acts
11 of Chase and its agents in making the subject loan, plaintiffs have sustained
12 monetary losses of \$111,033.90 in loan proceeds never received,² on a loan that was
13 unnecessary for them.³ In addition, plaintiffs have sustained monetary loss for
14 higher than usual interest in this subprime adjustable rate mortgage.⁴ As will be
15 seen, if not for Chase's unlawful, unfair and fraudulent business acts and practices,
16 plaintiffs would not have agreed to or even obtained this loan and would not have
17 agreed to the loan interest and payments.⁵"

18
19 ² Plaintiff's argument appears to be contradicted by other allegations in the First Amended
20 Complaint. The loan proceeds were paid to an account controlled by Eppstein (FAC ¶19) who is
21 elsewhere alleged to be managing plaintiff's finances and acting for plaintiff as a trustee (FAC ¶14).
22 The funds were later misappropriated. FAC ¶19. Fairly read, these allegations appear to admit that
23 plaintiff constructively received the loan proceeds when they were paid to Eppstein, her trustee.
24 Defendant does not raise this issue, however.

25 ³ This assertion, too, is contradicted by other allegations. Paragraph 15 alleges that Eppstein
26 advised plaintiff he had applied for the new loan because plaintiffs were running out of living
27 expenses and has exhausted the funds from the prior refinancing.

28 ⁴ This assertion, too, is somewhat contradicted by the allegations in Paragraph 16 of the First
Amended Complaint that the interest rate was 7.75% on a 30-year fixed mortgage, without any
indication that the rate was "higher than usual."

⁵ This assertion also appears to be contradicted by allegations in the First Amended Complaint.
Paragraph 16 alleges that at the time of escrow closing, plaintiff was aware that she and her parents
could not sustain the required monthly payment of \$4,261.71, but that "Eppstein and Davis said that
there was enough in remaining funds from the loan to supplement the family's income to cover

1 Opposition at 6.

2 *Californians for Disability Rights* does not draw a distinction, as defendant suggests,
3 between plaintiffs who have suffered actual injury and plaintiffs who are facing threatened injury,
4 although it does note that the revision to the law precludes an uninjured private person from suing
5 for restitution on behalf of others. 39 Cal.4th at 232. Nevertheless, a review of the First Amended
6 Complaint in light of Business & Professions Code Section 17204, demonstrates that plaintiff does
7 not have standing.

8 Under Section 17204, a private person has standing to sue only if he or she "has suffered
9 injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. &
10 Prof. Code §17204. Case law has construed the statute to require both an injury in fact as well as
11 the loss of money or property. *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171
12 Cal.App.4th 1, 22 (2009); *Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136 146-47
13 (2008) (plaintiff must have suffered economic injury to have standing). Moreover, the loss of
14 money or property must be of a type that is eligible for restitution. *Id.*; *Buckland v. Threshold*
15 *Enters.*, 155 Cal.App.4th 798 (2007). A plaintiff who cannot allege having suffered losses which
16 would entitle her to restitution has no standing to pursue a cause of action for unfair competition.
17 *Citizens of Humanity*, 171 Cal.App.4th at 22.

18 The First Cause of Action does not contain allegations that plaintiff has suffered any losses
19 which would entitle her to restitution, although paragraph 24 identifies the "on-going threat of
20 injury to plaintiffs by loss of their principal residence and all equity therein" along with the
21 threatened foreclosure as harm that plaintiff faces. Notably, plaintiff also does not seek
22 restitutionary relief. Additionally, it does not appear that the economic injuries she asserts in her
23 opposition papers would entitle her to restitution. Plaintiff argues that in the absence of
24 defendant's unfair/unlawful conduct, she would not have entered into the transaction, that she

25 _____
26 payments for several years." FAC ¶16. Plaintiff thus alleges that she went through with the escrow
27 knowing that she could not afford the loan. Her subsequent allegations that she would not have
28 entered into the loan had defendant disclosed the "true facts" regarding defendant's payment of a
yield spread premium, etc., seem to be contradicted by Paragraph 16. Again, however, Defendant
does not raise this issue.

1 would not have suffered the loss of \$111,033.90 in loan proceeds, suffered higher than usual
2 interest rates, or face the prospect of foreclosure. Opp. at 6. The misappropriated loan proceeds,
3 however, cannot be restored to her via restitution, particularly where there is no allegation that
4 defendant misappropriated the funds. The economic harm in the form of "suffering higher than
5 usual interest rates" could arguably suffice, but there is no allegation to that effect in the First
6 Amended Complaint. (See footnote 4, *supra*). Finally, the prospect of foreclosure does not give
7 rise to restitution, given the admissions that the loan proceeds were received by plaintiff's trustee
8 and were thereafter misappropriated, an intervening cause that precipitated her inability to make
9 the loan payments. FAC ¶16

10 Accordingly, plaintiff has not alleged a loss of money or property as a result of the unfair
11 competition which would entitle her to restitution and therefore does not have standing to pursue a
12 cause of action for unfair competition under Section 17200. *Citizens of Humanity*, 171
13 Cal.App.4th at 22.

14 B. Adequacy of Other Allegations:

15 Defendant also challenges the adequacy of the substantive allegations underlying the first
16 cause of action. The court agrees that the claim is not sufficiently pleaded.

17 The First Amended Complaint does not allege the specific conduct of defendant JP Morgan
18 Chase that plaintiff contends is unlawful, unfair, or fraudulent. Paragraph 23 recites a litany of
19 general practices but does not allege which of these practices defendant is alleged to have engaged
20 in with regard to the particular transaction involving plaintiff. Moreover, although Paragraph 23
21 recites that defendant's conduct violates TILA, RESPA, California Business & Professions Code
22 Section 17500 et seq., "and other applicable statutes," the amended complaint does not allege the
23 facts underlying these alleged violations of law. Plaintiff has not identified what facts give rise to
24 a violation of TILA, or of RESPA, or of Section 17500, much less "other applicable statutes." For
25 example, although the First Amended Complaint identifies defendant's payment of a yield spread
26 premium to the mortgage broker, a fact that plaintiff focused on heavily at oral argument, there is
27 no allegation that such a payment was unlawful or not in compliance with the statutory and
28 regulatory authorities. The pleading, as it stands, does not fairly apprise defendant JP Morgan

1 Chase of the accusations against it arising out of the transaction involving plaintiff. Accordingly,
2 it is appropriate to grant the motion to dismiss.

3 Plaintiff is granted leave to amend to allege the specific facts demonstrating the underlying
4 conduct that is alleged to be unlawful, or unfair, or fraudulent.

5 3. Defendant's Motion to Dismiss the Second Cause of Action for Concealment.

6 Defendant also seeks dismissal of the Second Cause of Action for Concealment on the
7 basis that defendant owed no duty of disclosure to plaintiff. Defendant cites *Nymark v. Heart*
8 *Federal Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1096 (1991), for the proposition that "as a
9 general rule, a financial institution owed no duty of care to a borrower when the institution's
10 involvement in the loan transaction does not exceed the scope of its conventional role as a mere
11 lender of money...." Defendant also cites *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476
12 (1989), for the proposition that there is no fiduciary relationship between a bank and its loan
13 customers. Motion at 7. Without a duty to disclose, defendant cannot be liable for concealment.
14 BAJI 12.35 (8th ed.) (identifying elements of concealment, including a duty to disclose).

15 Plaintiff does not meaningfully distinguish the legal authorities cited by defendant,
16 although she notes, without elaboration, that *Nymark* "restated a five part test regarding whether a
17 lender could be come a fiduciary." Opp. at 11. Plaintiff relies heavily on the assertion that the
18 mortgage broker was a dual agent of both plaintiff and defendant as a result of the payment of the
19 yield spread premium, which she contends is sufficient to create a duty owed to her by the
20 defendant to disclose all that was allegedly concealed.

21 Plaintiff, however, has cited no legal authority for the proposition that the mere payment
22 of a yield spread premium to the broker renders the broker a dual agent of both the borrower and
23 the lender. Moreover, a further deficiency in the concealment claim, although one not argued by
24 defendant, is that the factual allegations that plaintiff knew she could not afford the mortgage
25 payments but signed the documents at escrow and proceeded with the transaction anyway (FAC
26 ¶16) contradict the subsequent allegation that plaintiff "reasonably relied on defendants' deception
27 in proceeding with the loan." FAC ¶32. An essential element of a claim of concealment is that the
28 plaintiff would not have acted the way she did, had she known the concealed facts. BAJI No.

1 12.35. Here, the First Amended Complaint alleges that plaintiff had been advised by her trustee
2 (Eppstein) that she was out of funds for living expenses and that he had arranged for a refinance on
3 the property (FCA ¶15), that she knew she could not afford the new loan payments but that
4 Eppstein advised her the loan proceeds would be available to supplement the payments for several
5 years (FAC ¶16) and that she proceeded with the loan. Having alleged these facts, the subsequent
6 allegation at paragraph 32 that she would not have proceeded with the loan had the defendants not
7 concealed their lending practices is not plausible and, therefore, plaintiff has not adequately
8 pleaded that she is entitled to relief under a claim for concealment. *Ashcroft v. Iqbal*, 129 S. Ct.
9 1937, 1951 (2009).

10 The Second Cause of Action for Concealment is deficient. Under *Nymark* and *Price*, there
11 is no fiduciary duty owed between a lender and a borrower, and without a duty to disclose,
12 defendant cannot be liable for concealment. BAJI 12.35 (8th ed) (identifying elements of
13 concealment, including a duty to disclose). Plaintiff cannot state a claim against defendant for
14 concealment where defendant had no duty to disclose. Plaintiff also cannot state a claim for
15 concealment where the facts, as pleaded, do not give rise to a plausible claim. Accordingly, the
16 motion to dismiss the Second Cause of Action for Concealment is granted.

17 4. Defendant's Motion to Dismiss the Third Cause of Action for Injunctive Relief

18 Defendant seeks dismissal of the Third Cause of Action for Injunctive Relief on the basis
19 that plaintiffs have failed to demonstrate how defendant is liable under any of the claims asserted,
20 and therefore is unlikely to prevail on the merits at trial. Motion at 8. Plaintiff does not directly
21 address its Third Cause of Action, although it seeks to "renew" its prior motion to enjoin the
22 foreclosure. Opposition at 13.

23 The court agrees that the Third Cause of Action fails to state a claim. Injunctive relief is a
24 remedy, not a separate cause of action. *Shamsian v. Atl. Richfield Co.*, 107 Cal. App.4th 967, 984-
25 85 (2003); *Mamerto v. Deutsche Bank Nat. Trust Co.*, 2009 WL 1582911 (S.D. Cal. June 4, 2009);
26 *Watts v. Decision One Mortgage Co.*, 2009 WL 1657424 (S.D. Cal. June 11, 2009). Accordingly,
27 the third cause of action is dismissed.

28

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

5. Plaintiff's Request for Judicial Notice


In connection with her opposition papers, plaintiff submitted a request for judicial notice asking the court to take judicial notice of Complaints filed in two other actions not involving the parties to the present lawsuit, an article regarding a settlement of the Illinois lawsuit, and an Assignment of Deed of Trust. The request is denied. Judicial notice of the complaints and settlement does not appear to be proper under Rule 201(b) of the Federal Rules of Evidence. Judicial notice of the Assignment of Deed of Trust does not appear to be necessary at this time.

III. ORDER

For the foregoing reasons, the court grants and denies the motions as follows:

1. Defendant's motion to dismiss the claims of plaintiff Lally Brockington for lack of standing is GRANTED, without leave to amend.
2. With regard to the claims asserted by plaintiff Kimberly Brockington, Defendant's motion to dismiss the First and Second Causes of Action is GRANTED with twenty days leave to amend;
3. Defendants motion to dismiss the Third Cause of Action is GRANTED without leave to amend (this does not preclude plaintiff from seeking injunctive relief on remaining causes of action if they are successfully state a claim for such relief); and
4. Plaintiffs' Request for Judicial Notice is DENIED.

DATED: 7/1/09



RONALD M. WHYTE
United States District Judge

