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E-FILED 10-25-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JAIME MARCOS,
Plaintiff,
v.

No. C11-04000 HRL

EQUITY ONE LENDERS GROUP, aka
EQUITY ONE SALES CORPORATION, aka
EQUITY ONE LENDERS SERVICES, INC.,
aka DREAMMAKERS REAL ESTATE
SERVICES INC., aka EQUITY LENDERS
NETWORK INC., aka THE BARTON
FINANCIAL GROUP; JEFF B. BARTON;
CAMERON W. BARTON; HAMILTON
FINANCE, aka HAMILTON REALTY; BEE
LAY TAY, aka BEE HAMILTON; WELLS
FARGO HOME MORTGAGE, INC., a division
of WELLS FARGO BANK, N.A.; E*TRADE
MORTGAGE CORPORATION; BANK OF
AMERICA, N.A. and DOES 1 through 50,

**ORDER (1) GRANTING DEFENDANT
E*TRADE MORTGAGE
CORPORATION'S MOTION TO
DISMISS; AND (2) DENYING AS MOOT
E*TRADE MORTGAGE
CORPORATION'S MOTION TO
STRIKE**

[Re: Docket Nos. 12, 17]

Defendants.

In July 2006, plaintiff Jaime Marcos purchased a home in San Jose, California for \$970,000. The purchase resulted in two loans, both of which are secured by deeds of trust. According to the complaint, the second loan currently is held by defendant E*Trade Mortgage Corporation (E*Trade). Plaintiff admits he is in default on both loans.¹

¹ Plaintiff says that the first loan currently is held by defendant Wells Fargo Bank, N.A. (Wells Fargo). His claims against Wells Fargo and Bank of America, N.A. are the subject of a separate motion to dismiss, which will be addressed in another order.

1 On July 13, 2011, Marcos filed the instant action in Santa Clara County Superior Court
2 for alleged predatory lending practices in connection with his home mortgages. The third claim
3 seeks “Rescission and Damages Under TILA [the Truth in Lending Act (TILA), 15 U.S.C. §
4 1601, et seq.] and HOEPA [the Home Ownership and Equity Protection Act of 1994].” The
5 remainder of plaintiff’s claims are all based on state law. Bank of America and Wells Fargo
6 removed the matter here, asserting federal question jurisdiction.

7 Pursuant to Fed. R. Civ. P. 12(b)(6), E*Trade now moves to dismiss all claims asserted
8 against it. E*Trade also moves for an order striking certain portions of the complaint pursuant
9 to Fed. R. Civ. P. 12(f). Plaintiff opposes the motions. E*Trade and plaintiff have expressly
10 consented that all proceedings in this action may be heard and finally adjudicated by the
11 undersigned. 28 U.S.C. § 636(c); FED. R. CIV. P. 73. The matter is deemed appropriate for
12 determination without oral argument, and the November 1, 2011 hearing is vacated. CIV. L.R.
13 7-1(b). Upon consideration of the moving and responding papers, including the loan documents
14 and other related records submitted by defendant for judicial notice, this court grants the motion
15 as to the federal claim for relief, with leave to amend only as to some issues. The court declines
16 to exercise jurisdiction over plaintiff’s state law claims unless and until he pleads a viable
17 federal claim for relief. E*Trade’s motion to strike is denied as moot.

18 LEGAL STANDARD

19 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests
20 the legal sufficiency of the claims in the complaint. “Dismissal can be based on the lack of a
21 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
22 theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). In such a
23 motion, all material allegations in the complaint must be taken as true and construed in the light
24 most favorable to the claimant. See Balistreri, 901 F.2d at 699. However, “[t]hreadbare recitals
25 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”
26 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Moreover, “the court is not required to accept
27 legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably
28 be drawn from the facts alleged.” Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th

1 Cir. 1994). Documents which properly are the subject of judicial notice may be considered
2 along with the complaint when deciding a Fed. R. Civ. P. 12(b)(6) motion for failure to state a
3 claim for relief. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).

4 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
5 claim showing that the pleader is entitled to relief.” This means that the “[f]actual allegations
6 must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v.
7 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). See
8 also Iqbal, 129 S. Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief
9 survives a motion to dismiss.”). However, a complaint attacked by a Rule 12(b)(6) motion to
10 dismiss does not need detailed factual allegations and “heightened fact pleading of specifics” is
11 not required to survive a motion to dismiss. Bell Atlantic Corp., 550 U.S. at 570. Rather, the
12 complaint need only give “enough facts to state a claim to relief that is plausible on its face.”
13 Id.

14 While leave to amend generally is granted liberally, the court has discretion to dismiss a
15 claim without leave to amend if amendment would be futile. Rivera v. BAC Home Loans
16 Servicing, L.P., 756 F. Supp.2d 1193, 1997 (N.D. Cal. 2010) (citing Dumas v. Kipp, 90 F.3d
17 386, 393 (9th Cir. 1996)).

18 DISCUSSION

19 A. TILA/HOEPA Claim

20 1. HOEPA

21 Plaintiff’s third claim for relief, asserted against all defendants, is titled “Violation of the
22 Truth in Lending Act (TILA) and (HOEPA).” (Complaint at 12). However, plaintiff does not
23 identify any HOEPA sections defendant allegedly violated. Nor does he assert any facts stating
24 how or why E*Trade bears any liability for whatever HOEPA violations plaintiff believes have
25 occurred. If Marcos intends to state a claim under this statute, he must identify what sections of
26 the statute have been violated and what acts of which defendants are the bases for the alleged
27 violations. Plaintiff’s HOEPA claim is dismissed with leave to amend.

28

1 2. TILA

2 Plaintiff seeks rescission and damages under TILA because the loan in question
3 allegedly was “deceptive and/or lack[s] a meaningful disclosure of credit terms.” (Complaint ¶
4 29). The complaint alleges that the amount of the second loan was \$145,500.00. (Id. ¶ 24).
5 According to the allegations, the disclosure documents contained an inaccurate “amount
6 financed” because (1) the TILA documents disclose an “amount financed” of \$143,714.21,
7 which does not include \$1,785.79 in prepaid finance charges; and (2) the Final HUD 1
8 Settlement Statement identified the principal loan amount as \$145,500.00, but allegedly did not
9 disclose a sum certain for the prepaid finance charges. (Complaint ¶ 30). There are no
10 allegations disputing the identified principal loan amount or the amount of the prepaid finance
11 charges. Liberally construed, plaintiff might be claiming that these sums were not disclosed in
12 precisely the manner prescribed by TILA. See, e.g., 15 U.S.C. § 1638; 12 C.F.R. § 226.18.
13 But, this is not clear. On amendment, plaintiff shall clarify what sections of TILA he claims
14 have been violated and what acts of which defendants are the bases for the alleged violations.

15 For the reasons to be explained, plaintiff’s TILA claim, as currently pled, does not
16 survive dismissal in any event.

17 a. Rescission

18 E*Trade argues that plaintiff’s claim for rescission under TILA must be dismissed
19 because he has failed to allege tender of amounts required to cure his default. In the context of
20 claims arising under TILA, the Ninth Circuit has held that a district court may alter the statutory
21 rescission procedures and has “discretion to condition rescission on tender by the borrower of
22 the property he had received from the lender.” Yamamoto v. Bank of New York, 329 F.3d
23 1167, 1171 (9th Cir. 2003) (internal quotation marks and citation omitted). District courts
24 within the Ninth Circuit have adopted different understandings of Yamamoto; one line of cases
25 reads it to require a plaintiff to plead the present ability to tender the loan proceeds in order to
26 survive a motion to dismiss, while another line holds that it does not. See Kakogui v. Amer.
27 Brokers Conduit, No. C09-4841 JF (HRL), 2010 WL 1265201, at *4 (N.D. Cal. Mar. 30, 2010)
28 (collecting cases). This court agrees with those cases holding that, in the context of a TILA

1 claim, a plaintiff need not demonstrate the present ability to tender to survive a motion to
2 dismiss. See, e.g., Davenport v. Litton Loan Servicing, LP, 725 F. Supp. 2d 862, 880 (N.D.
3 Cal. 2010); Botelho v. U.S. Bank, N.A., 692 F. Supp.2d 1174 (N.D. Cal. 2010).

4 Nevertheless, plaintiff has no right of rescission under TILA. The right of rescission
5 under TILA does not apply to a “residential mortgage transaction”—i.e., a loan transaction to
6 finance the acquisition of the borrower’s residence. 15 U.S.C. § 1635(e)(1) and § 1602(w);
7 Rivera, 756 F. Supp.2d at 1198-99. The allegations of the complaint state that the loans at issue
8 were used to purchase plaintiff’s home. (Complaint ¶ 21). Accordingly, the right of rescission
9 does not apply.

10 Even if the rescission right did apply, that right expires three years after the date of
11 consummation of the transaction or upon the sale of the property, whichever occurs first. 15
12 U.S.C. § 1635(f). “[Section] 1635(f) completely extinguishes the right of rescission at the end
13 of the 3-year period.” Beach v. Ocwen Federal Bank, 523 U.S. 410, 412, 118 S. Ct. 1408, 140
14 L.Ed.2d 566 (1998). Moreover, section 1635(f) is an “absolute limitation on rescission
15 actions.” King v. California, 784 F.2d 910, 913 (9th Cir.1986). Indeed, the Ninth Circuit
16 construes section 1635(f) as a “statute of repose, depriving the courts of subject matter
17 jurisdiction when a § 1635 claim is brought outside the three-year limitation period.” Miguel v.
18 Country Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002). Here, the record indicates that
19 the mortgage transaction in question closed in July 2006. (Defendants’ RJN, Ex. A). The
20 instant lawsuit was not filed until nearly five years later. See Rivera, 756 F. Supp.2d at 1198
21 (stating that “if the borrower files his or her suit over three years *from the date of a loan’s*
22 *consummation*, a court is powerless to grant rescission.”) (quoting Miguel, 309 F.3d at 1165)).

23 Accordingly, plaintiff’s claim for rescission under TILA must be dismissed without
24 leave to amend.

25 b. Damages

26 Plaintiff alleges that E*Trade is not a proper assignee of the loan in question. (Id. ¶ 50).
27 However, to the extent E*Trade is found to be a proper assignee, plaintiff alleges that it bears
28 assignee liability for any claimed damages because the alleged TILA violations are apparent on

1 the face the disclosure. (Id.). TILA provides that, for voluntary assignments, a creditor's
2 assignee may be held liable for a creditor's TILA violations, but "only if the violation for which
3 such action or proceeding is brought is apparent on the face of the disclosure statement." 15
4 U.S.C. § 1641(a). Nevertheless, as discussed above, further facts are necessary as to how TILA
5 allegedly has been violated. The remaining allegations of the TILA claim are conclusory.

6 Even assuming Marcos could plead facts supporting E*Trade's liability, his damages
7 claim is time-barred. Claims for damages under TILA are barred by a one-year statute of
8 limitations, which begins to run "from the date of consummation of the transaction." See King,
9 784 F.2d at 915; see also 15 U.S.C. § 1640(e). In the instant case, plaintiff's TILA claims
10 arose, at the latest, at the closing of his mortgage transaction in July 2006. (Def't's RJN, Ex. 3).
11 He did not file the instant lawsuit until July 2011, several years after the limitations period
12 expired.

13 "[E]quitable tolling may, in the appropriate circumstances, suspend the limitations
14 period until the borrower discovers or had reasonable opportunity to discover the fraud or
15 nondisclosures that form the basis of the TILA action." King, 784 F.2d at 915. A motion to
16 dismiss on statute of limitations grounds should be granted only when the assertions of the
17 complaint, read with the required liberality, would not permit the plaintiff to prove that the
18 limitations period was tolled. See Plascencia v. Lending 1st Mortgage, 583 F. Supp.2d 1090,
19 1097 (N.D. Cal. 2008) (citing Durning v. First Boston Corp., 815 F.2d 1265, 1268 (9th Cir.
20 1987)). The doctrine of equitable tolling applies in situations where, despite all due diligence,
21 the party invoking the doctrine is unable to obtain vital information bearing on the existence of
22 the claim, or where he has been induced or tricked by his adversary's misconduct into allowing
23 the deadline to pass. Hensley v. United States, 531 F.3d 1052, 1057-58 (9th Cir. 2008). "The
24 doctrine is not available to avoid the consequences of one's own negligence and does not apply
25 when a late filing is due to claimant's failure to exercise due diligence in preserving his legal
26 rights." Id. at 1058 (citations omitted). Moreover, ignorance of the law, standing alone, is
27 insufficient to plausibly state a basis for tolling. Valdez v. America's Wholesale Lender, No.
28 C09-02778JF, 2009 WL 5114305 *6 (N.D. Cal., Dec. 18, 2009) (Fogel, J.).

1 Marcos' complaint does not present any plausible facts explaining why, in the exercise
2 of reasonable diligence, he was unable to discover the alleged improprieties within the
3 limitations period. Relying on Ralston v. Mortgage Investors Group, Inc., No. C08-536JF
4 (PVT), 2009 WL 688858 (N.D. Cal., Mar. 16, 2009), Marcos argues that alleged discrepancies
5 in his disclosure documents were so confusing and contradictory that he could not have
6 discovered them sooner than he did. Ralston, however, is readily distinguishable. There, the
7 loan documents in question allegedly failed to disclose, among other things, (1) the actual
8 interest rate, (2) that the initial "teaser" interest rate would increase after only 30 days; and (3)
9 that negative amortization was certain to occur. In sum, the loan documents and disclosures
10 were so confusing and contradictory that they obscured the true nature of the loan. Id.

11 There are no such allegations here. Instead, Marcos simply says that, having reviewed
12 the loan and disclosure documents, he noticed alleged discrepancies which, he claims, are
13 apparent on the face of the documents. As discussed above, the exact nature of the alleged
14 TILA violations are unclear. More to the point, there are no allegations suggesting that Marcos
15 was prevented from comparing the loan and disclosure documents sooner. See Hubbard v.
16 Fidelity Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996) (declining to apply equitable tolling where
17 "nothing prevented [plaintiff] from comparing the loan contract, [defendant's] initial
18 disclosures, and TILA's statutory and regulatory requirements."); Lyons v. Homecomings
19 Financial LLC, 770 F. Supp.2d 1163, 1166-67 (W.D. Wa. 2011) (finding that equitable tolling
20 did not apply where plaintiff admits he received and saw the requisite loan and disclosure
21 documents and offered no reason why he did not compare those documents before the statute of
22 limitations ran).

23 Accordingly, Marcos' claim for TILA damages will be dismissed. On the record
24 presented, it is doubtful whether he can plausibly and truthfully allege a basis for equitable
25 tolling. However, if plaintiff believes that he has a viable TILA damages claim against
26 E*Trade, and because the applicability of equitable tolling generally depends on matters outside
27 the pleadings, Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003-04 (9th Cir. 2006), he may
28

1 amend this claim if, in compliance with Fed. R. Civ. P. 11, he can truthfully allege facts that
2 would support a TILA damages claim, as well as equitable tolling of the limitations period.

3 B. Plaintiff's State Law Claims

4 In view of the dismissal of plaintiff's TILA/HOEPSA claim, the only asserted basis for
5 federal subject matter jurisdiction, the court declines to rule on defendant's motion to dismiss
6 plaintiff's state law claims. See 28 U.S.C. § 1367. And, this court will not exercise
7 supplemental jurisdiction over the state law claims unless and until plaintiff adequately states a
8 viable federal claim for relief. Because plaintiff is being given leave to amend his federal
9 claim, his state law claims are also dismissed, without prejudice to plaintiff to include them in
10 an amended complaint.

11 C. E*Trade's Motion to Strike

12 Because the complaint is being dismissed, E*Trade's separate motion to strike is denied
13 as moot.

14 ORDER

15 Based on the foregoing, IT IS ORDERED that:

- 16 1. Plaintiff's HOEPSA claim is dismissed with leave to amend.
- 17 2. Plaintiff's claim for rescission under TILA, is dismissed without leave to amend.
- 18 3. Plaintiff's claim for damages under TILA is dismissed with leave to amend.
- 19 4. Plaintiffs' state law claims are dismissed without prejudice to include them in an
20 amended complaint.
- 21 5. Plaintiff's amended complaint shall be filed within fourteen days from the date
22 of this order.
- 23 6. E*Trade's motion to strike is denied as moot.

24 SO ORDERED.

25 Dated: October 25, 2011

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27 _____
28 HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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