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E-Filed: February 14, 2014

NOT FOR CITATION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

HEATHER BROOKSBANK,

No. C13-02667 HRL

Plaintiff,

v.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT AND
DENYING AS MOOT DEFENDANT'S
MOTION TO DISMISS**

PRIVATE CAPITAL GROUP, LLC, ET
AL.,

Defendants.

[Re: Docket Nos. 40, 33]

_____/

Plaintiff Heather Brooksbank sues Defendant Private Capital Group ("PCG") for breach of contract and fraud in connection with PCG's foreclosure of Brooksbank's home after allegedly reneging on the parties' agreement to conduct a "short sale." Brooksbank, acting pro se, filed a complaint in Santa Cruz Superior Court in May 2013. PCG removed the case to federal district court and filed a motion to dismiss, which was set for hearing before the undersigned in July. *See* Dkt. 6. However, Brooksbank declined to proceed before a magistrate judge, the case was reassigned to a district judge, and a hearing was set for December. Brooksbank opposed the motion in July before eventually retaining counsel in October. Shortly thereafter, the parties consented to having all matters proceed before a magistrate judge, the case was reassigned to the undersigned, and a hearing on the motion to dismiss was reset for January. *See* Dkt. 33. With the motion to dismiss pending, Brooksbank (now represented by counsel) moved for leave to file an amended complaint. *See* Dkt. 36. However, presumably because she failed to attach the proposed amended

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For the Northern District of California

1 complaint, she withdrew that motion¹ and filed a second motion to which she did attach the
2 proposed amended complaint. *See* Dkts. 38, 40. PCG opposes the motion for leave to amend. *See*
3 Dkt. 41. Pursuant to Civil L.R. 7(b), Defendant’s motion to dismiss was previously taken under
4 submission without oral argument, and the hearing was vacated. Likewise, Brooksbank’s motion
5 for leave to file an amended complaint is deemed suitable for determination without oral argument,
6 and the hearing set for February 18, 2014, is vacated.²

7 “Four factors are commonly used to determine the propriety of a motion for leave to amend.
8 These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment.”
9 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183 (9th Cir. 1987). Brooksbank asserts that all four
10 factors weigh in favor of granting leave to amend. PCG addresses only the last factor, asserting that
11 leave to amend would be futile because the proposed amended complaint still fails to state a claim
12 for relief, essentially repeating the arguments set forth in the motion to dismiss. To find that
13 amendment would be futile here would essentially be to determine a partially briefed motion to
14 dismiss the amended complaint. The Court is reluctant to do so, however, because Brooksbank did
15 not have the benefit of counsel in opposing the arguments the first time around, nor does she have a
16 full and fair opportunity to respond to them now. Because the first three *Leighton* factors weigh in
17 Brooksbank’s favor, and the Court does not definitively find that amendment would be futile,
18 Brooksbank’s motion for leave to file the amended complaint is GRANTED. Accordingly,
19 Defendant’s motion to dismiss the original complaint is DENIED as moot. Brooksbank shall file
20 her attached proposed amended complaint forthwith, and in no case later than seven days from the
21 date of this order. Upon filing, pursuant to Rule 15(a)(3), PCG will have 14 days to move to
22 dismiss the amended complaint or otherwise respond.

23 **IT IS SO ORDERED.**

24 Dated: February 14, 2014

25 
26 _____
27 HOWARD R. LLOYD
28 UNITED STATES MAGISTRATE JUDGE

27 ¹ As correctly noted in her Notice of Withdrawal, pursuant to Civil L.R. 7-7(e), Brooksbank did not
28 require leave of court to withdraw her motion. However, because her Notice of Withdrawal was e-
filed as a motion and set for hearing, the hearing was vacated and the “motion” is hereby terminated.
² PCG’s motion to appear by telephone at the hearing is terminated as moot.

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Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.