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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MERLINDA L. INES,

Plaintiff,

vs.

COUNTRYWIDE HOME LOANS, INC.;
et al.,

Defendants.

CASE NO. 08cv1267 WQH (NLS)

ORDER

HAYES, Judge:

The matter before the Court is the “Application to Set Aside Order to Dismiss Action Dated March 12, 2009 and Clerk’s Judgment” (Doc. # 27).

Background

This action arises out of the foreclosure on Plaintiff’s home. On July 15, 2008, Plaintiff initiated this action by filing the complaint (Doc. # 1). The complaint alleged that the “basis for suit is failure to comply with [Plaintiff’s] lawful demand to validate the alleged debt in good faith and fair dealing” in violation of the Rosenthal Fair Debt Collection Practices Act under California law, Cal. Civ. Code § 1788, *et seq.* (“RFDCPA”), and the Fair Debt Collection Practices Act under federal law, 15 U.S.C. § 1692 (“FDCPA”). *Id.*, ¶ 5. Plaintiff thereafter filed three motions for temporary restraining order (Docs. # 3, 19, 13), all of which the Court denied (Docs. # 7, 10, 14). On November 3, 2008, this Court issued an order granting Defendants’ motion to dismiss (Doc. # 18). The Court held that the complaint failed to allege facts sufficient to support a claim on which relief could be granted, and granted

1 Plaintiff leave to file an amended complaint. On November 26, 2008, Plaintiff filed a first
2 amended complaint (Doc. # 20). The first amended complaint alleged causes of action for
3 injunctive relief, statutory damages, quiet title, and declaratory relief. In support of the cause
4 of action for statutory damages, the first amended complaint alleged that Defendants violated
5 the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. 2605; the FDCPA; the
6 RFDCPA; 12 U.S.C. section 1831(2)(A); the Truth in Lending Act (“TILA”), 15 U.S.C.
7 section 1601, *et seq.*; and the following California state laws: “1) Business and Professions
8 Code 17200 for unfair and deceptive business practices; 2) unjust enrichment; 3) breach of
9 fiduciary duty; 4) conversion; 5) negligence . . . 6) violations of the California Consumer
10 Protection Act; 7) violations of California Civil Code 2943 for not supplying Payoff Demand
11 Statements.” *FAC*, ¶ 93. On March 12, 2009, this Court issued an order granting Defendants’
12 unopposed motion to dismiss the first amended complaint, and dismissing the case (Doc. # 22).
13 On March 13, 2009, judgment was entered in favor of Defendants and against Plaintiff (Doc.
14 # 23).

15 On April 21, 2009, Plaintiff filed the “Application to Set Aside Order to Dismiss Action
16 Dated March 12, 2009 and Clerk’s Judgment” (“Ex Parte Motion”). Plaintiff requests that the
17 Court set aside the March 12, 2009 order granting the motion to dismiss the first amended
18 complaint and the March 13, 2009 judgment on grounds that Plaintiff never received the
19 motion to dismiss the first amended complaint. Plaintiff states: “due process demands that the
20 matter be reopened, since Plaintiff did not receive Defendants [sic] motion to dismiss
21 documents and recently learned this matter was inadvertently dismissed after her non response
22 to Defendant’s motion to dismiss.” *Ex Parte Motion*, p. 4. In support of the Ex Parte Motion,
23 Plaintiff submitted her declaration. Plaintiff attests that she never received the motion to
24 dismiss the first amended complaint. *Ines Decl.*, ¶ 4.

25 On April 27, 2009, Defendants filed a response in opposition to the Ex Parte Motion
26 (Doc. # 28). Defendants state:

27 Plaintiff does not explain how or why she believes she failed to receive the
28 envelope containing Defendants’ Motion to Dismiss her First Amended
Complaint, when she has been receiving all of the other mail in this action
addressed to her at that address, nor does Plaintiff provide any credible evidence

1 to refute the Certificate of Service executed under penalty of perjury by counsel
2 for Defendants.

3 *Id.* at 3. Defendants emphasize that the Court’s order dismissing the first amended complaint
4 was based upon the merits of the motion to dismiss, not the fact that Plaintiff did not submit
5 any opposition to the motion. Defendants assert that Plaintiff has failed to demonstrate unusual
6 circumstance warrant reopening of her case, as required by Rule 60(b) of the Federal Rules of
7 Civil Procedure.

8 Applicable Law

9 Rule 60(b) of the Federal Rules of Civil Procedure provides for relief from a final
10 judgment, order or proceeding for the following reasons:

- 11 (1) mistake, inadvertence, surprise, or excusable neglect;
- 12 (2) newly discovered evidence that, with reasonable diligence, could not have
13 been discovered in time to move for a new trial under Rule 59(b);
- 14 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
15 misconduct by an opposing party;
- 16 (4) the judgment is void;
- 17 (5) the judgment has been satisfied, released, or discharged; it is based on an
18 earlier judgment that has been reversed or vacated; or applying it prospectively
19 is no longer equitable; or
- 20 (6) any other reason that justifies relief.

21 Fed. R. Civ. P. 60(b). The burden is on the party seeking relief from judgment to demonstrate
22 entitlement to such relief. *See, e.g., In re M/V Peacock*, 809 F.2d 1403 (9th Cir. 1987); *In re*
23 *Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986). In order to obtain relief under Rule
24 60(b)(6), the movant “must demonstrate both injury and circumstances beyond his control that
25 prevented him from proceeding with the action in a proper fashion.” *Latshaw v. Trainer*
26 *Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006) (internal quotations omitted). Rule
27 60(b)(6) is to be “used sparingly as an equitable remedy to prevent manifest injustice and is
28 to be utilized only where extraordinary circumstances prevented a party from taking timely
action to prevent or correct an erroneous judgment.” *Id.*

29 Ruling of the Court

30 Aside from Plaintiff’s general assertion that denial of the Ex Parte Motion will result
31 in injury to Plaintiff’s due process rights and will violate public policy, the Ex Parte Motion
32 does not specify a legal basis for Plaintiff’s entitlement to relief from judgment in this case.

1 Plaintiff asserts that she did not receive notice of the motion to dismiss the first amended
2 complaint. However, Plaintiff does not assert that judgment was entered in favor of
3 Defendants as a result of mistake, inadvertence, surprise or excusable neglect; as a result of
4 fraud on the part of Defendants; or as a result of some extraordinary circumstance. Plaintiff
5 does not assert that new facts or evidence have been discovered after judgment was entered.
6 Plaintiff does not assert that the proof of service on the motion to dismiss the first amended
7 complaint was somehow defective, or listed an incorrect address for service of process. To the
8 contrary, the address listed on the first amended complaint is 847 Rosa Court, Escondido, CA
9 92027. The motion to dismiss the first amended complaint was served at 847 Rosa Court,
10 Escondido, CA 92027. Plaintiff has the burden to demonstrate her entitlement to relief from
11 judgment in this case. *In re M/V Peacock*, 809 F.2d 1403. Plaintiff has failed to satisfy her
12 burden to demonstrate entitlement to relief from judgment because Plaintiff does not assert any
13 legal or factual basis for entitlement to relief.


14 The factual basis for Plaintiff’s action has not changed throughout the proceedings -
15 Plaintiff challenges the lawfulness of foreclosure on her home. In denying three motions for
16 temporary restraining order on the merits, and granting two motions to dismiss on the merits,
17 the Court has ruled five separate times on the merits of Plaintiff’s action. On each occasion
18 the Court has held that Plaintiff has failed to adequately allege facts to support a claim
19 challenging the lawfulness of the foreclosure on her home. The Court’s most recent order
20 dismissing the first amended complaint addressed the merits of each of Plaintiff’s claims. The
21 Ex Parte Motion does not assert that any of the findings in the order dismissing the first
22 amended complaint constituted clear error. The Court did not dismiss the first amended
23 complaint based on Plaintiff’s failure to file an opposition. Plaintiff’s due process rights have
24 not been violated by the dismissal of this action, and will not be violated by the Court’s denial
25 of Plaintiff’s request to reopen the case.

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IT IS HEREBY ORDERED that the “Application to Set Aside Order to Dismiss Action Dated March 12, 2009 and Clerk’s Judgment” (Doc. # 27) is **DENIED**.

DATED: June 4, 2009


WILLIAM Q. HAYES
United States District Judge