

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HIEN LE DANG; and THANH HUNG NGUYEN,

Plaintiffs,

v.

FIRST HORIZON HOME LOAN CORP.; NATIONSTAR MORTGAGE, LLC; METLIFE BANK, NA; Does 1 to 1000,

Defendants.

Civil No.12cv0343 JAH(NLS)

ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS

[Doc. # 19]

INTRODUCTION

Currently pending before this Court is the motion to dismiss Plaintiffs’ first amended complaint filed by defendants First Horizon Loan Corporation (“First Horizon”) (a.k.a. “First Tennessee”) and Nationstar Mortgage, LLC (“Nationstar”) (collectively “defendants”). The motion has been fully briefed by the parties. After a careful review of the parties’ submissions, and for the following reasons, this Court **GRANTS** Defendants’ motion to dismiss.

BACKGROUND

I. Factual Background

Plaintiffs Hien Le Dang and Thanh Hung Nguyen (“Plaintiffs”) allege in their first amended complaint that, in October 2004, they obtained financing to purchase a home in San Diego, California through Defendant First Horizon. Doc. # 16 ¶ 10. Plaintiffs

1 allege that they understand little English and that both speak with heavy accents. Id. ¶ 11.
2 Plaintiffs allege that they were never “asked for any verification of income, nor [were they
3 asked to] provide any documentation of income during the entire application process.”
4 Id. ¶ 13. Plaintiffs further allege that when they asked a question to their loan officer that
5 the loan officer replied, “[d]on’t worry, just read and then sign.” Id. The loan documents
6 were executed on October 28, 2004. Id. ¶ 14. Sometime thereafter, Plaintiffs defaulted on
7 the loan. Id. On November 13 and 30, 2009, Plaintiffs received notices of default
8 (“NOD”) from Quality Loan Service Corporation, as Trustee for First Horizon. Id. ¶ 16.
9 On June 10, 2011, Defendant New Horizon sent Plaintiffs a notice of trustee sale
10 indicating a sale date of July 6, 2011, which stated that the foreclosing party was Metlife
11 Home Loans of Irving, Texas. Id. ¶ 17. Plaintiffs claim no notice of the transfer to Metlife
12 Home Loans was provided them. Id. The trustee sale was postponed to September 8,
13 2011, and New Horizon provided a notice of transfer of servicing rights to Nationstar
14 effective August 16, 2011. Id. ¶ 27. Plaintiff Nguyen filed for bankruptcy in September
15 2011. Id. ¶ 27. The bankruptcy court entered an order dismissing the bankruptcy petition
16 on October 27, 2011. Id. The record does not reflect that the trustee sale has been
17 conducted.

18 **II. Procedural History**

19 On December 12, 2011, Plaintiffs filed a complaint in Superior Court against
20 defendants First Horizon; Nationstar Mortgage; and Metlife Bank, N.A. (“Metlife”). *See*
21 Doc. # 1. On February 9, 2012, Defendant Metlife removed the action to this Court
22 citing diversity jurisdiction. *See id.* On February 16, 2012, Metlife filed a motion to
23 dismiss the complaint. *See* Doc. # 5. This motion was unopposed and the claims against
24 Metlife were dismissed without prejudice on April 10, 2012. *See* Doc. # 11. On February
25 16, 2012, First Horizon and Nationstar filed a motion to dismiss the claims against them.
26 *See* Doc. # 6.

27 On December 18, 2012, the Court dismissed the claims against First Horizon and
28 Nationstar without prejudice and with leave to amend, finding the claims were untimely

1 under the “gravamen of the action doctrine.” *See* Doc. # 14. The Court also found that
2 the delayed discovery rule, which would toll the statute of limitations, did not apply in this
3 case. *See id.* at 6.

4 On January 17, 2013, Plaintiffs filed a first amended complaint alleging: (1) breach
5 of covenant of good faith and fair dealing, (2) cancellation of contract, (3) unfair business
6 practices, (4) actual fraud, (5) negligent lending, (6) violation of Finance Lenders Law, and
7 (7) violation of the Rosenthal Fair Debt Collection Practices Act. *See* Doc. # 16. On
8 February 4, 2013, Defendants filed the instant motion to dismiss Plaintiffs’ first amended
9 complaint. *See* Doc. # 19-1. Plaintiffs filed an opposition¹ on February 22, 2013 and on
10 March 4, 2013, Defendants filed their reply. *See* Docs # 22, 25. This Court subsequently
11 took the motion under submission without oral argument. *See* CivLR 7.1(d.1).

12 DISCUSSION

13 Defendant moves to dismiss Plaintiff’s complaint pursuant to Rule 12(b)(6) of the
14 Federal Rules of Civil Procedure.

15 **I. Legal Standard**

16 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
17 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under
18 Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean
19 Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); *see* Neitzke v. Williams, 490
20 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis
21 of a dispositive issue of law.”). Alternatively, a complaint may be dismissed where it
22 presents a cognizable legal theory yet fails to plead essential facts under that theory.
23 Robertson, 749 F.2d at 534. While a plaintiff need not give “detailed factual allegations,”
24 he must plead sufficient facts that, if true, “raise a right to relief above the speculative
25 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

26
27 ¹Both Plaintiffs and Defendants filed requests for Judicial Notice requesting the Court judicially
28 notice certain facts contained in eight documents. *See* Docs #20, 22-4. Because this Court need not rely
upon these documents to make its determination, Plaintiffs’ and Defendants’ requests for judicial notice are
DENIED AS MOOT.

1 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
2 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
3 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
4 plausible when the factual allegations permit “the court to draw the reasonable inference
5 that the defendant is liable for the misconduct alleged.” Id. In other words, “the non-
6 conclusory ‘factual content,’ and reasonable inferences from that content, must be
7 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
8 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible
9 claim for relief will ... be a context-specific task that requires the reviewing court to draw
10 on its judicial experience and common sense.” Iqbal, 129 S.Ct. at 1950.

11 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
12 truth of all factual allegations and must construe all inferences from them in the light most
13 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.
14 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However,
15 legal conclusions need not be taken as true merely because they are cast in the form of
16 factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western
17 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion
18 to dismiss, the Court may consider the facts alleged in the complaint, documents attached
19 to the complaint, documents relied upon but not attached to the complaint when
20 authenticity is not contested, and matters of which the Court takes judicial notice. Lee
21 v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that
22 a complaint fails to state a claim, the court should grant leave to amend unless it
23 determines that the pleading could not possibly be cured by the allegation of other facts.
24 See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

25 //

26 //

27 //

28 //

1 **II. Analysis**

2 Defendants argue that (A) Plaintiffs' claims one through six are untimely; and (B)
3 Plaintiffs' seventh cause of action is inadequately pled.²

4 **A. Untimeliness**

5 Defendants advance the same arguments in their motion to dismiss Plaintiffs' first
6 amended complaint as they advanced in their motion to dismiss Plaintiffs' original
7 complaint. *See* Doc. # 6-1; *compare* Doc. # 19-1. Defendants again argue that Plaintiffs'
8 causes of action one through six which are "related to origination are barred by the statute
9 of limitations" because "allegations of fraudulent inducement at the time of the loan's
10 origination in October 2004 are the gravamen of the complaint." Doc. # 19-1 at 4-5. This
11 Court finds Plaintiffs have again failed to show that they have filed their claim within the
12 applicable statutes of limitations as to claims one through six.

13 To determine the statute of limitations that applies to a cause of action it is
14 necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of
15 action. *See City of Vista v. Robert Thomas Sec., Inc.*, 84 Cal. App. 4th 882 (2000); *In re*
16 *Asyst Techs. Inc. Derivative Litig.*, 2009 WL 2169021 (N.D. Cal. May 23, 2009). The
17 nature of the right sued upon, or the principal purpose of the action, rather than the form
18 of the action or the relief demanded, determines the applicable statute of limitations. *See*
19 *Davies v. Krasna*, 14 Cal.3d 502, 515 (1975). Defendants contend that, where the
20 "allegations of fraudulent inducement at the time of the loan's origination in October
21 2004 are the gravamen of the complaint," a three year statute of limitations applies. Doc.
22 # 19-1 at 5 (citing Cal. Civ. Proc. Code § 338).

23 In addition, Defendants argue that "even if the gravamen of the action theory were
24 not applied, the particular statutes of limitations applicable to various claims in the first
25 amended complaint show that each is time-barred as to any origination related conduct
26 by [First Horizon]." Doc. # 19-1 at 5. Defendants acknowledge Plaintiffs invoke the

27
28 ² Because this Court dismisses all of Plaintiffs' causes of action on other grounds, this Court does not address Defendants' arguments regarding judicial estoppel or whether Defendants had a duty to inform Plaintiffs of the affordability of the loan.

1 discovery rule, but argue that in order for the discovery rule to apply, “Plaintiffs must
2 allege ‘circumstances beyond their control that prevented them from seeking a translation
3 of the loan documents that they signed and received.’” Id. at 6 (quoting Cervantes v.
4 Countrywide Home Loans, Inc., 656 F.3d 1034, 1045 (9th Cir. 2011)). Defendants also
5 argue that equitable tolling should not apply because “Plaintiffs allege no such obstacles
6 in preventing them from obtaining the necessary translation.” Id. Further, Defendants
7 claim that if Plaintiffs did not understand their loan documents, they could have requested
8 a translation, or declined to sign the note and deed of trust. *See id.* Defendants conclude
9 that Plaintiffs’ first amended complaint does not present facts to warrant equitable tolling.
10 *See id.*

11 In opposition, Plaintiffs assert their claims are not time-barred under the discovery
12 rule which may toll the statute of limitations upon a showing of a defendant’s fraudulent
13 conduct resulting in concealment of operative facts underlying the cause of action along
14 with due diligence by the plaintiff until the discovery of those facts. *See* Doc. # 22 at 11
15 (citing Federal Election Com’n v. Williams, 104 F.3d 237, 240-41 (9th Cir. 1996)).
16 Under this theory, Plaintiffs claim they suffered an injury both at the origination stage and
17 at the loan modification stage alleging Plaintiffs did not receive original loan documents
18 and loan modification documents in their native language, thus preventing them from
19 discovering the violations alleged in their complaint within the statutory time period. *See*
20 id. at 11-12. Plaintiffs argue that when one’s “language comprehension ‘prevents him from
21 discovering the factual basis for his claim’ equitable tolling applies.” Id. at 13 (quoting
22 Bojorquez v. Gutierrez et al., 2010 WL 1223144 at *5 (N.D. Cal. July 26, 2010) (citing
23 Galindo v. Financo Fin., Inc., 2008 WL 4452344 (N.D. Cal. Oct. 3, 2008) (finding that
24 equitable tolling was appropriate where plaintiff could not read and had to rely on verbal
25 representations of a loan officer)).

26 In reply, Defendants argue Plaintiffs ignore cases that contradict their arguments
27 regarding equitable tolling and instead cite to unpublished cases that pre-date Defendants’
28 authority and are factually distinguishable. *See* Doc. # 25 at 3 (citing Cervantes v.

1 Countrywide Home Loans, Inc., 656 F.3d 1034, 1045 (9th Cir. 2011) (finding that the
2 fact native Spanish speakers were not given their loan documents in their native language
3 does not support a claim for equitable tolling); *see also* Nelmida v. Flagstar Bank, FSB,
4 2012 WL 10150 at *3 (N.D. Cal. Jan. 2, 2012) (citing Cervantes, 656 F.3d at 1045).

5 This Court's review of Plaintiffs' amended complaint reveals Defendants are correct
6 that Plaintiffs' six causes of action allege fraud. Plaintiffs allege that fraudulent
7 misrepresentations were made before, at the origination, and when Defendants refused to
8 modify Plaintiffs' loan. However, the harm allegedly done to Plaintiffs occurred as soon
9 as the loan was made, and all of the claims above are attributable to the original lending
10 documents. The complaint was filed seven years later, in December 2011, four years past
11 the expiration of the three year statute of limitations for fraud. As such, claims one
12 through six are barred under the gravamen of the action doctrine.

13 This Court also agrees with Defendants that speakers of foreign languages not
14 provided with loan documents in their native language do not support a claim for equitable
15 tolling. *See* Cervantes, 656 F.3d at 1045 (Plaintiffs did not allege circumstances beyond
16 their control that prevented them from seeking a translation of the loan documents that
17 they signed and received, and therefore, failed to state a basis for equitable tolling.)).

18 The facts Plaintiffs allege relate to the origination of the loan, and thus the statute
19 of limitations for each claim began to run when the loan was executed. Therefore, absent
20 tolling, the statute of limitations for each individual claim has expired and these claims are
21 dismissed as untimely. This Court finds Plaintiffs have failed to allege facts sufficient to
22 toll the statute of limitations.

23 Although Defendants seek dismissal of these claims with prejudice, this Court finds
24 Plaintiffs could possibly cure the deficiencies outlined herein by the allegations of other
25 facts. *See* Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). Accordingly, Plaintiffs'
26 causes of action one through six are **DISMISSED WITHOUT PREJUDICE**.

27 //

28 //

1 **B. Failure to State a Claim**

2 Defendants also argue that “Plaintiffs have fatally failed to rebut the proposition
3 that ‘foreclosure does not constitute debt collection’ in their FAC” under the Rosenthal
4 Fair Debt Collection Practices Act (“RFDCPA”) as presented in Plaintiffs’ seventh cause
5 of action. Doc. # 19-1 at 22 (quoting Altman v. PNC Mortg., 850 F. Supp. 2d 1057,
6 1071 (E.D. Cal. 2012)). To state a claim for violation of the RFDCPA, a plaintiff must
7 allege that a “debt collector,” as defined by statute, was engaged in “debt collection,” also
8 defined by statute. Cal. Civ. Code § 1788.1(2)(b) & (c). Defendants contend that
9 “[b]ecause Plaintiffs have failed to refute well-settled case law that foreclosing on a deed
10 of trust is not ‘debt collection’ for RFDCPA purposes, Plaintiffs failed to state a viable
11 RFDCPA claim.” Doc. #19 at 22.

12 In opposition, Plaintiffs argue that mortgage services can be liable for a violation of
13 the RFDCPA if allegations of harassment are presented. Doc. # 22 at 25 (citing Cal. Civ.
14 Code § 1788). In their amended complaint, Plaintiffs fail to assert allegations of conduct
15 by Defendants that constitute harassment under the RFDCPA. Instead, Plaintiffs allege
16 conduct by Quality Loan Services, acting as an agent and trustee on behalf of Metlife on
17 November 20, 2009, constituted harassment under the RFDCPA. *See* Doc # 16 ¶ 237-38.
18 Plaintiffs fail, however, to implicate Defendants First Horizon or Nationstar, the only
19 remaining Defendants here, in their RFDCPA claim.

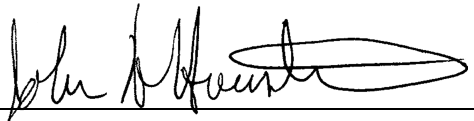
20 This Court finds Plaintiffs have failed to sufficiently plead an RFDCPA claim
21 pursuant to Cal. Civ. Code § 1788.1. As required by the RFDCPA, Plaintiffs allege
22 Defendants are “debt collectors” and that they were engaged in “debt collection,” but the
23 alleged debt collection is based solely on the foreclosure of Plaintiffs’ property. *See* Doc.
24 # 16 ¶ 237-39. As noted by Defendants, courts in the Ninth Circuit have found that
25 “foreclosure does not constitute debt collection.” Doc # 19-1 at 22 (quoting Altman, 850
26 F. Supp. 2d at 1071; Izenberg v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1199
27 (C.D.Cal.2008)). Thus, this Court finds Plaintiffs’ complaint fails to sufficiently allege
28

1 Defendants are debt collectors or that Defendants engaged in debt collection under the
2 RFDCPA. This Court finds Plaintiffs' complaint could possibly be cured by the allegation
3 of other facts regarding their RFDCPA claim. Therefore, this Court **GRANTS** Defendants'
4 motion to dismiss Plaintiffs' seventh cause of action, and **DISMISSES PLAINTIFFS'**
5 **RFDCPA CLAIM WITHOUT PREJUDICE.**

6 **CONCLUSION AND ORDER**

7 Based on the foregoing, IT IS HEREBY ORDERED that Defendants' motion to
8 dismiss [doc. # 19] is **GRANTED** and Plaintiffs' complaint is **DISMISSED WITHOUT**
9 **PREJUDICE.**

10
11 Dated: August 22, 2013

12 
13 _____
14 JOHN A. HOUSTON
15 United States District Judge
16
17
18
19
20
21
22
23
24
25
26
27
28