

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 JAMES BRADLEY BAILEY,)
4)
5 Plaintiff,)
6 vs.)
7 AURORA LOAN SERVICES, LLC, et al.,)
8 Defendants.)
9

Case No.: 2:10-cv-02119-GMN-PAL

ORDER

10 Pending before the Court is Defendants Aurora Loan Services, LLC and Mortgage
11 Electronic Registration System’s (collectively, “Defendants”) Motion to Dismiss (ECF No.
12 6). Plaintiff has filed a Response (ECF No. 16), to which Defendants filed a Reply (ECF No.
13 17). For the reasons that follow, Plaintiff’s federal causes of action will be DISMISSED with
14 leave to amend, Plaintiff’s state-law claims will be DISMISSED without prejudice, and all
15 remaining motions will be DENIED as moot.

16 **I. BACKGROUND¹**

17 Plaintiff obtained a loan and entered into a Deed of Trust in April of 2005. (See
18 Compl. ¶ 3, ECF No. 1.) Plaintiff is listed as the Borrower on the Deed of Trust, Aegis
19 Wholesale Corporation is listed as the Lender, Lawyers Title of Nevada, Inc. is listed as
20 the Trustee, and Mortgage Electronic Registration System (“MERS”) is listed as the
21 Nominee. (Ex. B, Mot. to Dismiss, ECF No. 6-2.)

22 Plaintiff filed his Complaint (ECF No. 1) in this Court on December 6, 2010. Plaintiff
23 does not articulate why this Court has subject matter jurisdiction, but he appears to be
24 bringing the case on the basis of federal question jurisdiction, as the Fourth Cause of Action

25
¹ The Court will take judicial notice of the public records adduced by Defendants. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

1 contains allegations that Defendants violated the Truth in Lending Act (“TILA”) and the Fifth
2 Cause of Action contains allegations that Defendants violated the Real Estate Settlement
3 Procedures Act (“RESPA”). Plaintiff does not plead diversity jurisdiction, nor does he list the
4 citizenship of each party.

5 Plaintiff named as Defendants Aurora Loan Servicing, Cal-Western, Aegis Wholesale
6 Corporation, and MERS, alleging: (1) Declaratory Relief; (2) Injunctive Relief;
7 (3) Contractual Breach of Good Faith and Fair Dealing; (4) Violations of TILA;
8 (5) Violations of RESPA; (6) Rescission; (7) Unfair and Deceptive Acts and Practices;
9 (8) Breach of Fiduciary Duty; (9) Unconscionability; (10) Predatory Lending; (11) Quiet
10 Title; and (12) Lack of Standing. (See Compl., ECF No. 1.) Defendants Cal-Western and
11 Aegis Wholesale Corporation do not appear to have been properly served and have, therefore,
12 not yet made an appearance in this lawsuit.

13 **II. DISCUSSION**

14 **A. Rule 12(b)(6) Standard**

15 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of
16 the claim showing that the pleader is entitled to relief” in order to “give the defendant fair
17 notice of what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355
18 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a
19 cause of action that fails to state a claim upon which relief can be granted. A motion to
20 dismiss under Rule 12(b)(6) tests the complaint’s sufficiency. See *North Star Int’l. v. Arizona*
21 *Corp. Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss
22 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
23 complaint does not give the defendant fair notice of a legally cognizable claim and the
24 grounds on which it rests. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In
25 considering whether the complaint is sufficient to state a claim, the Court will take all

1 material allegations as true and construe them in the light most favorable to the plaintiff. See
2 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The Court, however, is not
3 required to accept as true allegations that are merely conclusory, unwarranted deductions of
4 fact, or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988
5 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not
6 sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible.
7 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555).

8 Mindful of the fact that the Supreme Court has “instructed the federal courts to
9 liberally construe the ‘inartful pleading’ of pro se litigants,” Eldridge v. Block, 832 F.2d 1132,
10 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of
11 leniency.

12 **B. Federal Claims**

13 The only federal claims contained in the Complaint arise under TILA and RESPA.
14 These are the only claims over which the Court has original jurisdiction.

15 1. TILA Claims

16 Plaintiff alleges that Defendant Aurora Loan Servicing violated TILA because it
17 “failed to issue TILA initial disclosures as mandated”; “failed to provide Plaintiffs with a
18 correct payment schedule, a properly disclosed interest rate, an accurate Good Faith Estimate
19 or a disclosure relating to Property/Hazard Insurance”; and failed to supply Plaintiffs with a
20 “CHARM booklet.” (Compl. ¶¶ 63, 64, & 66, ECF No. 1.) Plaintiff makes no TILA claim
21 against MERS.

22 TILA imposes a one-year statute of limitations within which a claim for
23 damages “may be brought.” 15 U.S.C. § 1640(e). “[A]s a general rule the limitations period
24 starts at the consummation of the transaction.” King v. California, 784 F.2d 910, 915 (9th Cir.
25 1986).

1 Equitable tolling may nonetheless apply in certain circumstances and can
2 operate to suspend the limitations period until the borrower discovers or has reasonable
3 opportunity to discover the fraud or non-disclosure that form the basis of the TILA action. See
4 King, 784 F.2d at 914-15. However, such equitable tolling is only appropriate when “despite
5 all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of
6 his claim.” Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000). Equitable tolling
7 does not apply when the plaintiff fails to allege facts demonstrating that she could not have
8 discovered the alleged violations by exercising reasonable diligence. Copeland v. Lehman
9 Bros. Bank, No. 09cv1774-WQH-RBB, 2011 WL 9503, *6 (S.D. Cal. Jan 3, 2011).
10 Additionally, where the basis of equitable tolling is fraudulent concealment, it must be pled
11 with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. 389 Orange Street
12 Partners v. Arnold, 179 F.3d 656, 662 (9th Cir. 1999).

13 Here, Plaintiff filed this lawsuit over five years after the consummation of the
14 underlying transaction and has pleaded no facts indicating that Defendant Aurora--or any
15 other Defendant--prevented Plaintiffs from discovering the alleged TILA violations or caused
16 Plaintiff to allow the filing deadline to pass. Although Plaintiff claims that the statute of
17 limitations was “tolled due to Defendants’ failure to effectively provide the required
18 disclosures and notices” (Compl. ¶ 65, ECF No. 1), Plaintiff does not explain why he could
19 not have discovered these alleged TILA violations by exercising reasonable diligence.
20 Accordingly, Plaintiff’s TILA damages claim is time-barred and will be dismissed.

21 To the extent that Plaintiff’s Sixth Cause of Action for Rescission is premised
22 on TILA violations, that claim must also be dismissed, as a TILA rescission claim has a three-
23 year statute of limitations that is not subject to equitable tolling. See Birk v. Gateway Funding
24 Corp., No. CIV S-10-1039-MCE-CMK, 2011 WL 590865, at *5 (E.D. Cal. Feb. 10, 2011).

25 Furthermore, Plaintiff may not maintain its TILA claims against Defendant

1 Aurora because Plaintiff has not alleged that Defendant Aurora was either the creditor or an
2 assignee of the creditor. TILA claims are only cognizable against creditors, see 15 U.S.C. §
3 1640(a), and assignees of creditors, see 15 U.S.C § 1641(a). See *Gorospe v. Security National*
4 *Mortgage*, CV No. 10-00506 DAE-BMK, 2011 WL 578844, at *6 (D. Hawaii Feb. 08, 2011).
5 Yet, Plaintiff has not pleaded that Defendant Aurora is a creditor or assignee of a creditor, but
6 rather “a servicing company.” (Compl. ¶ 6, ECF No. 1.) Accordingly, Plaintiff’s TILA cause
7 of action will be dismissed as to Defendants Aurora and MERS (to the extent it was pleaded
8 against MERS at all). Plaintiff may amend this claim, but only if he has an appropriate basis
9 for alleging that equitable tolling is appropriate and that Defendant Aurora is a creditor or an
10 assignee of a creditor.

11 2. RESPA Claims

12 RESPA imposes either a one-year or a three-year statute of limitations
13 depending on the violation alleged. 12 U.S.C. § 2614. Violations of sections 2607 and 2608
14 have a one-year statute of limitations, whereas violations of section 2605 have a three-year
15 statute of limitations. *Id.*

16 Plaintiff fails to cite which of these three provisions Defendants violated. Such
17 a failure may itself be sufficient grounds for the dismissal of a RESPA claim. See *Gorospe*,
18 2011 WL 578844, at *7. The Court and Defendants should not have to speculate as to which
19 provisions Plaintiff is suing under.

20 However, regardless of which RESPA provision Plaintiff is suing under, his
21 claims are time-barred because his claims arose out of the origination of his loan but the
22 lawsuit was filed more than three years after that transaction was consummated. Plaintiff has
23 also failed to argue that equitable tolling applies to this claim, nor has he pleaded any facts
24 that would support a finding of equitable tolling.

25 Accordingly, Plaintiff’s RESPA cause of action will be dismissed as to

1 Defendants Aurora and MERS. Plaintiff may amend this claim, but only if he has an
2 appropriate basis for alleging that equitable tolling is appropriate.

3 **C. State Law Claims**

4 Plaintiff's remaining claims arise under state law. Indeed, the heart of Plaintiff's case
5 focuses on what he believes was a procedurally improper foreclosure process. The exercise
6 of supplemental jurisdiction under 28 U.S.C. § 1367 is discretionary, and there is no longer
7 any reason to exercise that jurisdiction here, as the Court has dismissed all of the federal
8 claims pending against all of the properly-served Defendants in this case. See 28 U.S.C. §
9 1367(c)(3) (providing that a district court may decline to exercise supplemental jurisdiction
10 where it has "dismissed all claims over which it has original jurisdiction"); *Acri v. Varian*
11 *Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (a district court may exercise its
12 discretion and dismiss state law causes of action under 28 U.S.C. § 1367(c)). When a
13 lawsuit's federal-law claims are dismissed at an early stage of the litigation, district courts
14 have "a powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon*
15 *University v. Cohill*, 484 U.S. 343, 351 (1988).

16 The non-judicial foreclosure process in Nevada is a creation of state law, and it is
17 therefore appropriate to direct Plaintiff's remaining state-law claims to a state tribunal, should
18 he choose to pursue them further. Accordingly, Plaintiff's state law claims are dismissed
19 without prejudice.

20 **CONCLUSION**

21 **IT IS HEREBY ORDERED** that Plaintiff's TILA and RESPA claims are
22 **DISMISSED with leave to amend.** Plaintiff may file an Amended Complaint correcting the
23 deficiencies in his fourth and fifth causes of action **by August 29, 2011. This is a firm date**
24 **and no extensions will be given.** Failure to file an Amended Complaint by that date will
25 result in the dismissal of those causes of action with prejudice.

