UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ING BANK, a federal savings bank,

            Plaintiff,

v.

JACOB A. KORN, et al.,

            Defendants.

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TATYANA KOTELEVSKIY, individually, also known as Tatyana Shpak, and IGOR KOTELEVSKIY, individually, and the marital community of Igor and Tatyana Kotelevskiy, et al.,

            Counter-claimants,

v.

 ING BANK, a federal savings bank,

            Counter-defendant.

No. C09-124Z

ORDER

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1   This matter comes before the Court on ING Bank's four nearly identical motions to

2   dismiss the first[1] and fifth[2] counterclaims of Sergey Kozhevnikov and Nadezhda Sedneva

3   (docket no. 68), Anatoliy and Vera Tislenok (docket no. 69), Dina and Valeriy Nayberger

4   (docket no. 70), and Oleg and Anastasia Tislenok (docket no. 71) (collectively referred to

5   herein as the "borrowers"), pursuant to Fed. R. Civ. P. 12(b)(6). Having considered the

6   briefs in support of and in opposition to the motions, and the Fed. R. Civ. P. 12(b)(6)

7   standard of review, the Court now GRANTS IN PART and DEFERS IN PART ING Bank's

8   motions, docket nos. 68, 69, 70, and 71, as follows.

9   (1)   The Court DISMISSES the first counterclaim for rescission under the Truth in

10   Lending Act ("TILA") of Sergey Kozhevnikov and Nadezhda Sedneva, Dina and Valeriy

11   Nayberger, and Oleg and Anastasia Tislenok, with leave to amend by **June 19, 2009**, to

12   allege, subject to Fed. R. Civ. P. 11(b) requirements, that the borrowers have the ability to

13   tender and pay back what they have received from ING Bank (less interest, finance charges,

14   etc.). See Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003)

15   (recognizing long-standing Ninth Circuit precedent that "a trial judge has the discretion to

16   condition rescission on tender by the borrower of the property he had received from the

17   lender"); Garza v. Am. Home Mortgage, 2009 WL 188604 at *5, No. CV F 08-1477 LJO

18   GSA (E.D. Cal. Jan. 27, 2009) (dismissing rescission claim, with leave to amend, on Fed. R.

19   Civ. P. 12(b)(6) motion where "the complaint fails to address head on [the borrower's] ability

20   to tender loan proceeds").

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23   [1] ING mistakenly referenced the "second" rather than the "first" counterclaim in some
     parts of its motion, and later clarified that it meant the "first" counterclaim. Pl.'s Reply, docket
24   no. 107, at 2 n.1.

25   [2] ING referenced the "fourth" counterclaim in its opening motion without realizing that
     the Answers contain two "fourth" counterclaims. Since ING is moving to dismiss the second
26   "fourth" counterclaim, ING called it the "fifth" counterclaim in its reply, docket no. 107, at 5
     n.4. The Court thus refers to this counterclaim as the "fifth" counterclaim.
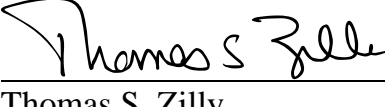
ORDER   -2-

1   (2)   The Court's DEFERS a ruling on the appropriate course of action with regard

2 to the rescission counterclaim under TILA of Anatoliy and Vera Tislenok, who assert in their

3 opposition brief, docket no. 102, at page 2, that they "refinanced a construction loan." ING's

4 reply argues that the refinancing of a construction loan is considered a "residential mortgage

5 transaction" that is exempt from the rescission remedy under TILA. Pl.'s Reply, docket no.

6 107, at 4-5 (citing <u>Jurgens v. Nat'l City Mortgage Co.</u>, 2009 WL 530115 at *3 (E.D. Cal.

7 Mar. 3, 2009) and <u>Perkins v. Central Mortgage Co.</u>, 422 F. Supp. 2d 487 (E.D. Pa. 2006));

8 <u>see</u> 12 C.F.R. § 226.23(f)(1) (outlining the transactions exempt from rescission as including a

9 "residential mortgage transaction"); 15 U.S.C. § 1602(w) (defining "residential mortgage

10 transaction"). The Court ORDERS Anatoliy and Vera Tislenok to SHOW CAUSE by **June

11 19, 2009** why the Court should not dismiss their rescission counterclaim with prejudice and

12 without leave to amend.

13   (3)   The Court STRIKES the borrowers' respective requests for alternative

14 "restructuring" relief under TILA. Answer, docket no. 47, at 27 ¶ 9; Answer, docket no. 48,

15 at 27 ¶ 9; Answer, docket no. 49, at 26 ¶ 9; Answer, docket no. 50, at 27 ¶ 9.

16   (4)   The Court DISMISSES with prejudice the borrowers' respective fifth

17 counterclaim for the production of the original promissory note. There is no legal basis for

18 such a counterclaim. Pursuant to an agreement of the parties in their briefing on ING Bank's

19 motions to dismiss and Fed. R. Civ. P. 8(c)(2), the borrowers' respective fifth counterclaim is

20 re-designated as an affirmative defense. No further action of the parties is necessary to

21 effectuate this re-designation.

22   IT IS SO ORDERED.

23   DATED this 22nd day of May, 2009.

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Thomas S. Zilly
United States District Judge

ORDER   -3-