

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 09-00309-CJC(MLGx)

Date: April 17, 2009

Title: LAURA EDELMAN v. BANK OF AMERICA CORP., CITIMORTGAGE CORP.,
SHALU MAHBOOBANI, & VINOD MAHBOOBANI et al.

PRESENT:

HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Michelle Urie
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR
DEFENDANT:

None Present

None Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS WITH LEAVE TO AMEND [filed 03/16/09].**

Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15. Accordingly, the hearing set for April 20, 2009 at 1:30 p.m. is hereby vacated and off calendar.

This case arises from the mortgage on Plaintiff Laura Edelman’s home at 7082 East Viewpoint Lane in Anaheim, California. On July 31, 2007, Ms. Edelman entered into a mortgage with Defendant Bank of America. (Compl. ¶ 9.) Ms. Edelman entered into this transaction as the alleged culmination of three successive mortgage transactions directed by Defendant Shalu Mahboobani, an agent of Defendant CitiMortgage, and her relative Defendant Vinod Mahboobani, an agent of Defendant Bank of America. (Compl. ¶ 45.) Defendant Bank of America allegedly did not provide proper disclosures to Ms. Edelman related to her mortgage, including an allegedly “unclear and inconspicuous” disclosure of the scheduled payment amount and interest rate. (Compl. ¶¶ 34-35.) Ms. Edelman also alleges that she was sent an insufficient notice of her right to cancel the loan. (Compl. ¶ 24.) Bank of America provided Ms. Edelman with two notices of her right to cancellation, but allegedly failed to write the date of expiration of the right of cancellation on the form. (Compl. Ex. B.) The form nonetheless stated that the right to cancel the loan expired the later of three days after the date that the notice was sent, the date of the transaction, or the

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date that the borrower received the TILA disclosures. (Compl. Ex. B.) From these facts, Ms. Edelman alleges claims for: (1) violation of the Federal Truth in Lending Act, 15 U.S.C. § 1601 et seq (“TILA”), (2) violation of California Bus. & Prof. Code § 17200; (3) violation of California Welfare & Inst. Code § 15610.30, (4) breach of the implied covenant of good faith and fair dealing, and (5) negligent misrepresentation. Bank of America now moves the Court to dismiss this action. The motion to dismiss is GRANTED WITH LEAVE TO AMEND.

Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Mayo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

Additionally, in cases where fraud is alleged, Federal Rule of Civil Procedure 9(b) requires that allegations be stated with particularity. Allegations of fraud must “state the time, place and specific content of the false representations as well as the parties to the misrepresentations.” *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986)). Similar pleading requirements apply to allegations of fraudulent conduct made under Cal. Bus. and Prof. Code § 17200. *Khoury v. Maly’s of California, Inc.*, 14 Cal. App. 4th 612, 619 (Cal. App. Ct. 1993) (“A plaintiff alleging unfair business

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practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation.”).

Analysis

A. TILA

Ms. Edelman has not stated a claim for rescission under TILA because she has failed to allege in her Complaint that she has tendered or intends to tender the borrowed funds back to Defendants. Rescission is an equitable doctrine. A claim for rescission requires a plaintiff to allege that the plaintiff can or will tender the borrowed funds back to the lender. *See Yamamoto v. Bank of New York*, 339 F.3d 1167 (9th Cir. 2003) (“Rescission should be conditioned on repayment of the amounts advanced by the lender.”) *See also Am. Mortgage Network v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) (“The equitable goal of rescission under TILA is to restore the parties to the status quo ante.”) (citations omitted).

Ms. Edelman argues that she has offered to pay the loan back in monthly installments on more favorable terms, or by modifying her loans. This is insufficient tender for purposes of rescission. *See Nichols v. Greenpoint Mortg. Funding Inc.*, 2008 WL 3891126, *5 (C.D. Cal., August 19, 2008) (“Plaintiff clearly is not entitled to a modification of the existing loan terms in the manner proposed. Rescission is not a means to create highly favorable loan terms for the party seeking rescission.”) Because Ms. Edelman’s offer of tender is defective, Bank of America had no obligation to rescind the mortgage.

Ms. Edelman’s claim for damages under TILA is time-barred. Actions by private individuals to collect damages under TILA must be brought within a year of the lender’s alleged violation of the law. 15 U.S.C. § 1640(e). “Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.” *Id.* In this case, Ms. Edelman entered into the loan agreement—the transaction in question— in July, 2007. She filed suit in February, 2009, more than a year later, after the expiration of the statute of limitations. Her claims under TILA are, therefore, time-barred.

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B. Cal. Bus. & Prof. Code § 17200

Ms. Edelman's claim for violation of Cal. Bus. & Prof. Code § 17200 is wholly based upon the alleged TILA violations and is devoid of any alleged facts aside from the statement that "Defendants acted unlawfully because they violated TILA." This claim fails because the TILA claims fail. Additionally, this claim does not meet the heightened pleading standards associated with Cal. Bus. & Prof. Code § 17200.

C. California Welfare & Inst. Code § 15610.30

Ms. Edelman, who was over 65 at the time of the transaction, claims that Defendants violated California Welfare & Inst. Code § 15610.30, a statute prohibiting elder abuse, by conspiring "to submit fraudulent information regarding the Plaintiff's employment, income and credit worthiness, to effect no less than three mortgage transactions, resulting in substantial financial and incidental damages to Plaintiff." Ms. Edelman admits in her memorandum of points and authorities in opposition to this motion that her claim is "based on defendant's misrepresentations about the terms of" her loans. (Compl. ¶ 45.) A claim that one was damaged through reliance on misrepresentations is a fraud claim, and is thus subject to the heightened pleading requirements of Rule 9(b). *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) ("In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)."). Here, the Complaint does not allege what the misstatements were, who uttered the misstatements, or when they were uttered. Thus, it is insufficient.

D. Negligent Misrepresentation

Like claims for violation of Cal. Bus. & Prof. Code 17200 and claims for state-law elder abuse that sound in fraud, a claim of negligent misrepresentation is also subject to heightened pleading standards. *See Neilson v. Union Bank of California, N.A.*, 290 F. Supp.2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth

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Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements.”) Ms. Edelman’s claim of negligent misrepresentation does not meet these heightened pleading requirements because it does not outline specific misstatements, does not identify who made those misstatements, and does not say when those misstatements were made.

E. Breach of the Covenant of Good Faith and Fair Dealing

Ms. Edelman alleges in a conclusory manner that Defendants breached the covenant of good faith and fair dealing by denying her “the benefits promised to her under the terms of the note, including providing clear and conspicuous disclosure of the date on which the right to rescind expired.” As an initial matter, although the Notice of Right to Cancel form was incomplete because the date of expiration of the right to cancel was left blank, the form was not unclear. Ms. Edelman undoubtedly knew the date of her mortgage transaction, the date she received her disclosures, and the date she received the faulty cancellation notice, and could easily calculate when three days had elapsed from the latest of those dates. However, this is not the only reason that this claim fails. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” *Price v. Wells Fargo Bank*, 213 Cal. App.3d 465, 478 (Cal. App. Ct. 1989). The duty to provide a notice of cancellation does not arise from the parties’ agreement. Rather, it arises from a federal statute. Thus, failure to provide this notice with the date of expiration filled in is not a failure to perform under the terms of the contract, nor is it a breach of the implied covenant of good faith and fair dealing.

Conclusion

For the foregoing reasons, Bank of America’s motion to dismiss is GRANTED WITH LEAVE TO AMEND. Ms. Edelman has twenty days leave to amend her complaint consistent with this order. Bank of America has twenty days thereafter to respond.

jls

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