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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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KRISTINE ROSE SANTOS,
Plaintiff,

v.

COUNTRYWIDE HOME LOANS,
RESURGENT CORP SERVICE,
RECONTRUST COMPANY, N.A., and
DOES 1-100, inclusive,

Defendants.

NO. CIV. 2:09-02642 WBS DAD

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

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Plaintiff Kristine Rose Santos filed this action against defendants Countrywide Home Loans ("CHL"), Resurgent Corp Service ("Resurgent"), and ReconTrust Company, N.A. ("ReconTrust") alleging various state and federal claims relating to loans she obtained to refinance her home in Stockton, California. CHL and ReconTrust move to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)

1 for failure to state a claim upon which relief can be granted.

2 Plaintiff did not oppose the motion. Nor did
3 plaintiff file a statement of non-opposition pursuant to Civil
4 Local Rule 78-230(c). Therefore, the hearing date of November 9,
5 2009 was vacated pursuant to Civil Local Rule 78-230(c), and the
6 court took defendants' motion to dismiss under submission without
7 oral argument.

8 The court has examined each of the claims in
9 plaintiff's complaint, and for the following reasons finds not
10 one of them sufficient to withstand defendants' motions to
11 dismiss.

12 A. Rescission and/or Reformation of Contract

13 Plaintiff's complaint alleges a cause of action for
14 rescission or reformation of her loan with defendants because she
15 was fraudulently induced into her loan agreement. (See Compl. ¶¶
16 18-23.) Rescission and reformation are remedies, not a cause of
17 action. Hafiz v. Greenpoint Mortgage Funding, Inc., --- F. Supp.
18 2d ----, No. C 09-01729 WHA, 2009 WL 2137393, at *7 (N.D. Cal.
19 July 16, 2009). Plaintiff's prayer to the court to rescind or
20 reform her loan is based on her fraud claim, where she claims she
21 was fraudulently induced into the loan. As plaintiff's fraud
22 claim fails, rescission and reformation are not available to
23 plaintiff.

24 Additionally, under California Civil Code section 1691,
25 a request for rescission requires the rescinding party to
26 "[r]estore to the other party everything of value which he has
27 received from him under the contract or offer to restore the same
28 upon condition that the other party do likewise." Cal. Civ. Code

1 § 1691. Plaintiff offers to "restore to [d]efendants the subject
2 property in return for defendants [sic] return to plaintiff all
3 monies paid to defendants in connection with the placement of the
4 loan, service of the loan, loan payments made, improvements made
5 to the property, and other costs and expenses plaintiff has
6 incurred in the maintenance and upkeep of the subject property."
7 (Compl. ¶ 27.) However, this offer does not restore defendants
8 to their former position by returning the consideration received
9 under the contract.

10 Rescission is also unavailable to plaintiff because the
11 accusations in her complaint address the actions of her lender,
12 Argent Mortgage Company, not defendants. Rescission is
13 unavailable as a remedy if "the rights of other have intervened
14 and circumstances have so far changed that rescission may not be
15 decreed without injury to [third] parties and their rights . . .
16 ." Gill v. Rich, 128 Cal. App. 4th 1254, 1265 (2005) (internal
17 quotation marks omitted). In this case CHL and ReconTrust's
18 rights have intervene, as Argent Mortgage Company assigned them
19 right to service the loan. The alleged wrongs in the complaint
20 are against plaintiff's lender, not the instant defendants.
21 Plaintiff has not alleged that defendants knew of the alleged
22 fraud of her lender, outside of conclusory allegations of
23 conspiracy. Defendants would be prejudiced if plaintiff were
24 permitted to rescind the loan, and accordingly rescission is
25 unavailable to plaintiff as a remedy.

26 Finally, plaintiff's prayer for reformation cannot
27 succeed. "A complaint for the reformation of a contract should
28 allege what the real agreement was, what the agreement as reduced

1 to writing was, and where the writing fails to embody the real
2 agreement. It is also necessary to aver facts showing how the
3 mistake was made, whose mistake it was and what brought it about,
4 so that mutuality may appear." Lane v. Davis, 172 Cal. App. 2d
5 302, 309 (1959). Plaintiff fails to allege any of these facts,
6 and accordingly has not stated an adequate prayer for
7 reformation. Plaintiff's first cause of action for rescission or
8 reformation will therefore be dismissed.

9 B. Fraud

10 In California, the essential elements of a claim for
11 fraud are "(a) a misrepresentation (false representation,
12 concealment, or nondisclosure); (b) knowledge of falsity (or
13 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
14 justifiable reliance; and (e) resulting damage." In re Estate of
15 Young, 160 Cal. App. 4th 62, 79 (2008). Under the heightened
16 pleading requirements for claims of fraud under Federal Rule of
17 Civil Procedure 9(b), "a party must state with particularity the
18 circumstances constituting the fraud." Fed. R. Civ. P. 9(b).
19 The plaintiffs must include the "who, what, when, where, and how"
20 of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1006
21 (9th Cir. 2003) (citation omitted); Decker v. Glenfed, Inc., 42
22 F.3d 1541, 1548 (9th Cir. 1994). Additionally, "[w]here multiple
23 defendants are asked to respond to allegations of fraud, the
24 complaint must inform each defendant of his alleged participation
25 in the fraud." Ricon v. Reconstrust Co., No. 09-937, 2009 WL
26 2407396, at *3 (S.D. Cal. Aug. 4, 2009) (quoting DiVittorio v.
27 Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987)).

28 Plaintiff's fraud allegations do not even come close to

1 surviving a motion to dismiss. Plaintiff simply alleges that she
2 was not provided proper disclosures by "defendants" and was
3 "deliberately misled into believing she was entering into a
4 predatory loan with a much lower interest rate than was actually
5 imposed." (Compl. ¶¶ 32-33.) Plaintiff's conclusory statements
6 do not identify with any specificity what, if any,
7 representations were made, when they were made, who made them, or
8 why they were false. These sort of conclusory statements come
9 nowhere close to meeting the pleading standard generally required
10 under Rule 8, let alone the heightened pleading standard of Rule
11 9(b). See Iqbal, 129 S. Ct. at 1949; Vess, 317 F.3d at 1006.
12 Accordingly, the court will grant defendants' motion to dismiss
13 plaintiff's second cause of action for fraud against CHL and
14 ReconTrust.

15 C. Specific Performance to Modify Plaintiff's Loan

16 Plaintiff claims that she is entitled to specific
17 performance to force defendants to offer her a "reasonable and
18 feasible" loan modification. (Compl. ¶ 39.) Plaintiff bases
19 this demand for relief on California Civil Code section 2923.6,
20 which plaintiff asserts "requires California lenders to accept
21 loan modification upon owner-occupied residences upon home loans
22 made from January 1, 2003 through December 31, 2007," as well as
23 the Emergency Economic Stabilization Act of 2008 ("EESA"), 12
24 U.S.C. §§ 5201-61, and the Hope for Homeowners Act, Pub. L. 110-
25 289. (Id. at ¶ 37.) However, section 2923.6 indicates nothing
26 more than the California legislature's intent that a mortgagee
27 "offer the borrower a loan modification or workout plan if such
28 modification or plan is consistent with its contractual or other

1 authority." Cal. Civ. Code § 2923.6(b). Accordingly, "nothing
2 in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans
3 to modify the terms of loans or creates a private right of action
4 for borrowers." Farner v. Countrywide Home Loans, No. 08cv2193,
5 2009 WL 189025, at *2 (S.D. Cal. Jan. 26, 2009).

6 Plaintiff also has no private right of action against
7 defendants under the EESA or the Hope for Homeowners Act. The
8 EESA does not provide for a private right of action. Ramirez v.
9 Litton Loan Servicing, LP, No, CV-09-319-PHX-GMS, 2009 WL
10 1750617, at *1 (D. Ariz. June 22, 2009); Barrey v. Ocwen Loan
11 Servicing, LLC, No. CV-09-573-PHX-GMS, 2009 WL 1940717, at *1 (D.
12 Ariz. July 2, 2009). The Hope for Homeowners Act was intended to
13 help borrowers refinance their mortgages and obtain loans insured
14 by the Federal Housing Administration. It is unintelligible why
15 this act would entitle plaintiff to specific performance to
16 modify her loan. Accordingly, the court will grant CHL and
17 ReconTrust's motion to dismiss plaintiff's third cause of action
18 for specific performance.

19 D. Wrongful Threatened Foreclosure

20 Plaintiff's complaint purports to state a claim for
21 "wrongful threatened foreclosure" against defendants. Plaintiff
22 has failed to cite to any common law rule or authority providing
23 for a claim for "wrongful threatened foreclosure." Wrongful
24 foreclosure is an action in equity, where a plaintiff seeks to
25 set aside a foreclosure sale. See Abdallah v. United Sav. Bank,
26 43 Cal. App. 4th 1101, 1009 (1996); Karlsen v. American Sav. &
27 Loan Assn., 15 Cal. App. 3d 112, 117 (1971). However, there is
28 no cause of action for "wrongful threatened foreclosure." In

1 fact, in the overwhelming majority of states like California who
2 provide for nonjudicial foreclosure, do not recognize such a
3 cause of action. See Reese v. First Mo. Bank and Trust Co. of
4 Creve Couer, 736 S.W.2d 371, 373 n.4 (Mo. 1987) (finding that of
5 the twenty-nine states that conduct nonjudicial foreclosure sales
6 only Georgia, Massachusetts, and North Carolina have a cause of
7 action for attempted wrongful foreclosure).

8 Even if such a cause of action were to exist, plaintiff
9 has not alleged any facts indicating why defendants' foreclosure
10 was wrongful, outside of the conclusory allegations that
11 "[d]efendants each of them or their agents did not have the right
12 to foreclose" and that "the sale was conducted without complying
13 with CA [sic] Civil Code Section 2924 et. seq." (Compl. ¶ 43.)
14 Such conclusory statements, without any facts to support them,
15 fall well short of the pleading requirements of Rule 8. See
16 Iqbal, 129 S. Ct. at 1949. Accordingly, plaintiff's fourth cause
17 of action for wrongful threatened foreclosure must be dismissed.

18 E. Threatened Wrongful Eviction

19 An action "for a threatened wrongful eviction is in
20 reality an action for malicious prosecution, an essential element
21 of which is want of probable cause." Asell v. Rodrigues, 32 Cal.
22 App. 3d 817, 824 n.3 (1973)(citing Gause v. McClelland, 102 Cal.
23 App. 2d 762, 764 (1951)); see Bisno v. Douglas Emmett Realty Fund
24 1988, 174 Cal. App. 4th 1534, 1544 (2009). A "complaint for
25 malicious prosecution must allege malice, lack of probable cause
26 and a favorable termination of the prior proceedings." Scannell
27 v. County of Riverside, 152 Cal. App. 3d 596, 611 (1984).

28 Plaintiff alleges no facts indicating that an eviction has been

1 threatened outside of the foreclosure sale, that defendants have
2 initiated a wrongful detainer action against her, or malice on
3 the part of defendants. Accordingly, plaintiff's fifth cause of
4 action for threatened wrongful eviction must be dismissed.

5 F. Quiet Title

6 The purpose of a quiet title action is to establish
7 one's title against adverse claims to real property. A basic
8 requirement of an action to quiet title is an allegation that
9 plaintiffs "are the rightful owners of the property, i.e., that
10 they have satisfied their obligations under the Deed of Trust."
11 Kelley v. Mortgage Elec. Reg. Sys., Inc., No. C 09-01538 SI, ---
12 F. Supp. 2d ----, 2009 WL 2475703, at *7 (N.D. Cal. Aug. 12,
13 2009). "[A] mortgagor cannot quiet his title against the
14 mortgagee without paying the debt secured." Watson v. MTC
15 Financial, Inc., No. 2:09-CV-01012 JAM-KJM, 2009 WL 2151782 (E.D.
16 Cal. Jul. 17, 2009)(quoting Shimpones v. Stickney, 219 Cal. 637,
17 649 (1934)). As plaintiff concedes that she has not paid the
18 debt secured by the mortgage, she cannot sustain a quiet title
19 action. Accordingly, the court must dismiss plaintiff's sixth
20 cause of action to quiet title.

21 G. Civil Conspiracy

22 "Civil conspiracy is not a cause of action, but a legal
23 doctrine that imposes liability on persons who, although not
24 actually committing a tort themselves, share with the immediate
25 tortfeasors a common plan or design in its preparation." Applied
26 Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-
27 11 (1994). Under California law, a party may be vicariously
28 liable for another's tort in a civil conspiracy where the

1 plaintiff shows "(1) formation and operation of the conspiracy
2 and (2) damage resulting to plaintiff (3) from a wrongful act
3 done in furtherance of the common design." Rusheen v. Cohen, 37
4 Cal. 4th 1048, 1062 (2006) (citing Doctors' Co. v. Superior
5 Court, 49 Cal. 3d 39, 44 (1989)).

6 Plaintiff has improperly alleged a cause of action for
7 conspiracy. Taking plaintiff's civil conspiracy claim as an
8 attempt to impose liability on defendants for the other torts
9 alleged in her complaint, plaintiff's claim still fails. First,
10 a claim for civil conspiracy is a derivative action that can only
11 succeed when based on an independent tortious act. Entm't
12 Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.2d
13 1211, 1228 (9th Cir. 1997)(citing Applied Equipment Corp., 7 Cal.
14 4th at 457). Since all of plaintiff's other causes of action
15 will be dismissed, she cannot allege a civil conspiracy. Second,
16 plaintiff's allegations of a civil conspiracy are conclusory and
17 inadequate. Plaintiff simply alleges that defendants acted "in
18 concert in defrauding plaintiff" without pleading any facts to
19 support this claim. (Compl. ¶ 54.) Asserting the bare legal
20 conclusion that defendants acted in a conspiratorial fashion,
21 without pleading further facts "stops short of the line between
22 possibility and plausibility." Iqbal, 129 S. Ct. at 1949. There
23 is nothing in the complaint to indicate that defendants were
24 doing anything other than simply asserting their legal rights
25 under the Note and Deed of Trust. Accordingly, plaintiff's
26 seventh cause of action for civil conspiracy will be dismissed.

27 H. Special and Punitive Damages

28 Plaintiff alleges a claim entitled "Special and

1 Punitive Damages," which are remedies, not a cause of action.
2 Plaintiff's claim simply states that plaintiff "belongs to the
3 protected class under the protective legislation to wit, the Fair
4 Debt Collections Practices Act, [EESA] in conjunction with the
5 Governmental Economic Stimulus Act of 2008 and the Hope for
6 Homeowners act [sic] of 2008." (Compl. ¶ 57.) It is absolutely
7 unclear why any of these statutes support a claim for punitive or
8 special damages against defendants and plaintiff has not alleged
9 how defendants violated any of these acts. Additionally,
10 plaintiff cannot sustain a claim for punitive or special damages
11 against defendants because plaintiff's prayer for special and
12 punitive damages rely on success on her other causes of action,
13 which will be dismissed. Accordingly, plaintiff's eighth "cause
14 of action" for special and punitive damages will be dismissed.

15 I. Declaratory and Injunctive Relief

16 Plaintiff's final claim is for declaratory and
17 injunctive relief. Declaratory and injunctive relief are not
18 independent claims, rather they are forms of relief. See
19 McDowell v. Watson, 59 Cal. App. 4th 1155, 1159 (1997)
20 ("Injunctive relief is a remedy and not, in itself a cause of
21 action" (internal quotation marks omitted)). Even
22 viewing plaintiff's cause of action as a request for declaratory
23 and injunctive relief as remedies, all of plaintiff's claims will
24 be dismissed, and accordingly plaintiff is not entitled to any
25 such relief. Therefore, plaintiff's ninth cause of action for
26 declaratory and injunctive relief will be dismissed.

27 J. Sanctions

28 If plaintiff's attorney could not draft a complaint

1 that contained a single claim upon which relief could be granted,
2 he could have at least complied with Local Rule 78-230(c) and
3 told the court he had no opposition to the granting of
4 defendants' motion. Instead, as he has done before, he ignored
5 the local rule and did nothing in response to the motion to
6 dismiss his complaint. Counsel's failure to comply with Local
7 Rule 78-230(c) and timely file any response to CHL and
8 ReconTrust's motion to dismiss is inexcusable, and has
9 inconvenienced the court by forcing it to nevertheless examine
10 the motion on the merits.

11 Local Rule 11-110 authorizes the court to impose
12 sanctions for "[f]ailure of counsel or of a party to comply with
13 these Rules." Therefore, the court will sanction plaintiff's
14 counsel, Richard A. Taguinod, \$200.00 payable to the Clerk of the
15 Court within ten days from the date of this Order, unless he
16 shows good cause for his failure to comply with the Local Rules.¹

17 IT IS THEREFORE ORDERED that CHL and ReconTrust's
18 motion to dismiss plaintiffs' complaint against CHL and
19 ReconTrust be, and the same hereby is, GRANTED.

20 IT IS FURTHER ORDERED that within ten days of the date
21

22 ¹ This is not the first Mr. Taguinod has failed to comply
23 with Local Rule 78-230(c). In Butera v. Countrywide Home Loans,
24 Inc., Mr. Taguinod similarly failed to file any papers in
25 response to a motion to dismiss. No. CV F 09-1677 LJO SMS, 2009
26 WL 348973, at *1 (E.D. Cal. Oct. 26, 2009). Such repeated
27 disregard for the Local Rules should not go unsanctioned.

28 In another case in this district, Judge O'Neill
dismissed a form complaint filed by Mr. Taguinod with prejudice.
Judge O'Neill also found that the action brought by plaintiff's
attorney was likely made in bad faith to delay or vex the
defendants, and ordered plaintiff to show cause why the complaint
should not be dismissed in its entirety, including against
defendants who had not yet appeared.

1 of this Order, Richard A. Taguinod shall either (1) pay sanctions
2 in the amount of \$200.00 to the Clerk of the Court or (2) show
3 good cause for his failure to comply with Local Rule 78-230(c).

4 Plaintiff has twenty days from the date of this Order
5 to file an amended complaint, if they can do so consistent with
6 this Order.

7 DATED: November 5, 2009

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10 WILLIAM B. SHUBB

11 UNITED STATES DISTRICT JUDGE
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