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5 **UNITED STATES BANKRUPTCY COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7

8 In re:) Case No. 09-26400-D-13L
9 ANGELINA C. CHAVEZ,)
10)
11 Debtor.)
12 _____)
12 ANGELINA C. CHAVEZ,) Adv. Pro. No. 09-2283-D
13 Plaintiff,) Docket Control No. PD-2
14 v.)
15 BANK OF AMERICA, et al.,)
16 Defendants.) Date: August 18, 2009
17 _____) Time: 1:00 p.m.
Dept: D

18 **This memorandum decision is not approved for publication and may**
19 **not be cited except when relevant under the doctrine of law of**
20 **the case or the rules of claim preclusion or issue preclusion.**

21 **MEMORANDUM DECISION**

22 On July 13, 2009, the defendant herein, Bank of America,
23 N.A. (who will be referred to as "the bank"), filed a motion to
24 dismiss the complaint for lack of standing and for failure to
25 state a claim upon which relief can be granted, bearing Docket
26 Control No. PD-2 (the "Motion"). For the reasons set forth
below, the court will grant the Motion in part.

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1 analyzing the complaint before it in terms of whether it
2 contained enough factual allegations, taken as true, to plausibly
3 suggest that the plaintiff was entitled to relief. Bell Atl.
4 Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945
5 (2007). "[W]e do not require heightened fact pleading of
6 specifics, but only enough facts to state a claim to relief that
7 is plausible on its face." 127 S. Ct. at 1974.

8 The Court did not disturb its earlier pronouncement in
9 Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974), that on a
10 motion to dismiss, "[t]he issue is not whether a plaintiff will
11 ultimately prevail but whether the claimant is entitled to offer
12 evidence to support the claims." 416 U.S. at 236. Thus, "a
13 well-pleaded complaint may proceed even if it appears 'that a
14 recovery is very remote and unlikely.'" Bell Atl. Corp., 127 S.
15 Ct. at 1965, quoting and characterizing Scheuer v. Rhodes, 416
16 U.S. at 236.

17 B. The Debtor's Standing

18 The bank's first argument is that the debtor does not have
19 standing to pursue her claims against the bank because those
20 claims are property of the bankruptcy estate which the debtor may
21 not prosecute unless they are abandoned by the chapter 13
22 trustee. The bank relies on Bostonian v. Liberty Savings Bank,
23 52 Cal.App.4th 1075 (1997).

24 Bostonian involved a chapter 7 case and a chapter 7 trustee.
25 In contrast to chapter 7, a chapter 13 debtor retains possession
26 of property of the estate. 11 U.S.C. § 1306(b). Further,
27 chapter 13 trustees, unlike chapter 7 trustees, do not have the
28 duty to "collect and reduce to money the property of the estate."

1 §§ 1302(b)(1), 704(a)(1). For these and the other reasons set
2 forth in Houston v. Eiler (In re Cohen), 305 B.R. 886, 891-900
3 (9th Cir. BAP 2004), and based on the extensive analysis set
4 forth in that case, the court concludes that the debtor in the
5 present case has standing to pursue her causes of action against
6 the bank.

7 C. Claim for Rescission

8 Next, the bank contends that the complaint fails to state a
9 claim for rescission of the loan transaction and cancellation of
10 the bank's lien, because the debtor is unable to repay the loan
11 proceeds.

12 The various steps involved in the rescission process are set
13 forth in 15 U.S.C. § 1635(b). In general terms, the borrower
14 gives notice of rescission; within 20 days thereafter, the
15 creditor must terminate its security interest, and thereafter,
16 the borrower must tender to the creditor the property he received
17 in the loan transaction, less finance or other charges.

18 Despite this stated sequence of events, it is clear in this
19 circuit that the court has discretion to condition a borrower's
20 right to rescission on his or her tender of the loan proceeds,
21 less finance charges and other charges. See Yamamoto v. Bank of
22 New York, 329 F.3d 1167, 1173 (9th Cir. 2003) ["a court may
23 impose conditions on rescission that assure that the borrower
24 meets her obligations once the creditor has performed its
25 obligations."]; La Grone v. Johnson, 534 F.2d 1360, 1362 (9th
26 Cir. 1976); Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974).

27 The bank's argument in support of dismissal would, in
28 essence, require that a court always condition rescission on the

1 borrower's prior tender of the loan proceeds. As set forth
2 above, the sequence of the rescission procedures is a matter of
3 the court's discretion. For this reason, as to the debtor's
4 claim for rescission, the Motion will be denied.

5 Further, the bank's argument on this point focuses on
6 alleged facts beyond the face of the debtor's complaint, and
7 thus, is not a ground for dismissal under Rule 12(b)(6). Swartz
8 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The court notes
9 that in Yamamoto, the borrower's inability to tender repayment
10 was held to provide sufficient grounds for summary judgment.²

11 D. Claim for Damages

12 In addition to the remedy of rescission, TILA provides for
13 damages, which the debtor in this case also seeks:

14 In any action in which it is determined that a creditor
15 has violated this section, in addition to rescission
16 the court may award relief under section 1640 of this
title for violations of this subchapter not relating to
the right to rescind.

17 15 U.S.C. § 1635(g).

18 The bank contends that the debtor's claims for damages for
19 violation of TILA are barred by the one-year statute of
20 limitations of 15 U.S.C. § 1640(e).³ The court agrees. Hubbard
21 v. Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996); Brewer
22 v. Indymac Bank, 609 F.Supp.2d 1104 *15-16 (E.D. Cal. 2009);

24 2. "[I]n the circumstances of this case, the court did not
25 lack discretion to modify the sequence of rescission events to
26 assure that [the borrower] could repay the loan proceeds before
going through the empty (and expensive) exercise of a trial on
the merits." Yamamoto at 1173.

27 3. "Any action under this section may be brought . . .
28 within one year from the date of the occurrence of the
violation." 15 U.S.C. § 1640(e).

1 Garza v. American Home Mortgage, 2009 U.S. Dist. LEXIS 7448 *15-
2 16 (E.D. Cal. 2009).

3 The one year runs from the date of consummation of the
4 transaction, subject to considerations of equitable tolling.
5 King v. California, 784 F.2d 910, 915 (9th Cir. 1986). In the
6 present case, it appears undisputed that the loan transaction was
7 consummated on September 22, 2005. The debtor did not file her
8 complaint until May 13, 2009, over three years later; thus, her
9 claims for damages are barred.

10 The debtor has explicitly chosen not to assert equitable
11 tolling,⁴ contending instead that the one-year period runs from
12 the date of her notice of rescission, September 22, 2008.
13 Because the complaint was filed within one year from that date,
14 she argues, it is timely.

15 The debtor is not correct. The giving of a notice of
16 rescission within the three-year period of § 1635(f) provides the
17 borrower an additional one year from the creditor's refusal to
18 rescind in which to file suit for rescission (Miguel v. Country
19 Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002); Brewer, 609
20 F.Supp.2d at 1155); it does not commence a new one-year period
21 for seeking damages. Brewer, 609 F.Supp.2d at 1155 [expressly
22 rejecting the contention that the creditor's failure to cancel
23 the loan extends the statute of limitations for all TILA
24 violations]; see also Garza, at *15-16 [dismissing cause of
25 action for damages under one-year statute of limitations, even
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28 4. Debtor's response to the Motion, filed July 30, 2009,
8:11-12.

1 though borrower had given notice of rescission within the three-
2 year period].

3 Because the debtor's complaint in this case was filed after
4 the expiration of the one-year statute of limitations, her claims
5 for damages, whether denominated actual damages, compensatory
6 damages, or statutory damages, will be dismissed.⁵

7 E. Claim for Declaratory Relief

8 Next, the debtor seeks a declaration the bank has violated
9 15 U.S.C. § 1641(f)(2) by failing to respond to the debtor's
10 request for the name, address, and telephone number of the owner
11 or master servicer of the obligation secured by the deed of
12 trust. The bank moves to dismiss this cause of action on the
13 ground that the letter attached to the complaint, by which the
14 debtor purportedly made the request, does not in fact request the
15 information.

16 It is clear from the debtor's response that she
17 inadvertently failed to attach the referenced letter as an
18 exhibit. The court will permit the debtor to amend her complaint
19 to attach a copy of the relevant letter.

20 F. Claim for RESPA Damages

21 Finally, the bank challenges the debtor's claim for damages
22 under the Real Estate Settlement Procedures Act, 12 U.S.C. §§
23 2601, et seq. ("RESPA"), on the ground that the letter attached
24 to the debtor's complaint does not constitute a qualified written

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27 5. The debtor's ability to claim a credit for finance and
28 other charges remains a part of her rescission cause of action,
under 15 U.S.C. § 1635(b).

1 request for information, as that term is defined in 12 U.S.C. §
2 2605(e)(1)(B).

3 The debtor's response is, as above, that she failed to
4 attach the relevant letter to her complaint. The court will
5 permit the debtor to amend her complaint to attach a copy of the
6 letter.

7 The court agrees with the bank that the debtor has failed to
8 allege facts supporting her claim for actual damages for the
9 alleged RESPA violation, but will grant the debtor leave to
10 amend. As to statutory damages under RESPA, the debtor alleges
11 only a failure to respond to a single qualified written request.
12 This allegation, even if true, would not constitute a "pattern or
13 practice of noncompliance" sufficient to justify an award of
14 statutory damages under 12 U.S.C. § 2605(f)(1)(B). In re
15 Tomasevic, 273 B.R. 682, 686-87 (Bankr. M.D. Fla. 2002). Thus,
16 the bank's motion to dismiss the claim for statutory damages for
17 violation of RESPA will be granted.

18 III. CONCLUSION

19 For the foregoing reasons, the court concludes that the
20 debtor's claims for damages are barred by the one-year statute of
21 limitations of 15 U.S.C. § 1640(e), and as to those claims, the
22 court will grant the bank's Motion. As to the debtor's claim for
23 a declaration the bank has violated 15 U.S.C. § 1641(f)(2)
24 (request for contact information for owner or master servicer)
25 and her claim for actual damages under RESPA, the Motion will be
26 granted, but the debtor will be granted leave to amend her
27 complaint. As to the debtor's claim for statutory damages for

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1 violation of RESPA, the Motion will be granted. Except as set
2 forth above, the Motion will be denied.

3 The court will issue an appropriate order.

4 Dated: August 27, 2009

_____/s/_____
5 ROBERT S. BARDWIL
6 United States Bankruptcy Judge

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