

GLENN W. BEVER, KAREN L. BEVER, Plaintiffs,
v.
QUALITY LOAN SERVICE CORPORATION; CITIMORTGAGE, INC.;
DOES 1-10, Inclusive, Defendants.

[No. 1:16-cv-0079-AWI-BAM.](#)

United States District Court, E.D. California.

March 30, 2016.

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

**ORDER GRANTING MOTION TO SET ASIDE DEFAULT OF QUALITY
LOAN SERVICE CORPORATION**

**ORDER GRANTING CITIMORTGAGE'S MOTION TO DISMISS WITH
PREJUDICE**

(Docs. 16, 22, and 23)

ANTHONY W. ISHII, Senior District Judge.

I. Introduction

On January 19, 2016, Plaintiffs Glenn and Karen Bever brought suit against Defendants Quality Loan Service Corporation ("Quality") and CitiMortgage, Inc. ("Citi"), alleging that Defendants debt collection activities violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788 *et seq.*, and seeking a judicial declaration that Defendants have no enforceable interest in the real property located at 446 West Tenaya Avenue, Clovis, CA 93612 ("Tenaya Property"). Quality did not file a responsive pleading in the time provided by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(a). As a result, the Clerk of the Court entered default. Doc. 24. Plaintiffs now move for default judgment against Quality. Doc. 22. Quality asks the Court to set aside the default. Doc. 23. In the interest of judicial efficiency, the Court addresses both motions here.

II. Background

Plaintiffs claim to be fee simple owners of the Tenaya Property. Complaint at ¶ 1. Plaintiffs allege that they refinanced the property on June 4, 2003, with First Pacific Financial, Inc. ("First Pacific") as lender. Complaint at ¶ 7. On May 6, 2004, Plaintiffs sent a notice of rescission to the First Pacific, *see* 15 U.S.C. § 1635, purporting to "void[] the [promissory] note and deed of trust" and require First Pacific to "cancel the [promissory] note, release the deed of trust, and credit any and all payments, fees, and charges associated with the transaction to Plaintiffs' account." Complaint at ¶ 8. First Pacific is alleged to have taken no action in response. Complaint at ¶ 9.

After the purported rescission, First Pacific "is alleged to have sold the note and deed of trust." Complaint at ¶ 10. Citi is now the assignee and loan servicer. Complaint at ¶ 10. Plaintiffs allege that Quality and Citi as trustee and assignee, respectively, of the deed of trust, have "threatened to take actions against Plaintiffs that cannot be legally taken." Complaint at ¶¶ 11-12. Plaintiffs further allege that both Citi and Quality have "misrepresented the character and status of the debt by causing to notice, serve, post, and publish a notice of trustee's sale of the Tenaya Property." Complaint at ¶¶ 11-12.

Plaintiffs filed their complaint on January 19, 2016. They served the summons and complaint on both Defendants on January 25, 2016. *See* Docs. 18, 20.

Quality did not file any document in this matter until March 2, 2016, when it filed a motion to set aside default.

III. Legal Standard

Pursuant to Federal Rule of Civil Procedure 55(b)(2), a plaintiff can apply to the court for a default judgment against a defendant that has failed to plead or otherwise defend against the action. Fed. R. Civ. P. 55(b)(2). Determining whether to enter default judgment falls to the discretion of the trial court. [*Aldabe v. Aldabe*, 616 F.2d 1089, 1092 \(9th Cir. 1980\)](#). In exercising that discretion the court may consider:

(1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

[*Eitel v. McCool*, 782 F.2d 1470, 1471-72 \(9th Cir. 1986\)](#).

On the opposite side of the coin, a party seeking to set aside entry of default by the clerk of the court must show good cause. Fed. R. Civ. P. 55(c). In determining whether good cause to set aside a default exists the trial court should consider: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." [Falk v. Allen, 739 F.2d 461, 463 \(9th Cir. 1984\)](#); accord *Franchise Holding II, LLC. V. Huntington Restaurants Grp., Inc.*, 374 F.3d 922, 925-926 (9th Cir. 2004). Although the same test is applied in setting aside a default judgement under Rule 60(b), "the test is more liberally applied in the Rule 55(c) context." *Joe Hand Promotions, Inc. v. Williams*, 2015 WL 5923611, *2 (E.D. Cal. Oct. 9, 2015) (citation omitted).

In considering either motion, a trial court should be guided by the principal that default judgment "is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." [Falk, 739 F.2d at 463](#).

IV. Discussion

A. Motion for Default Judgment — The Eitel Factors

Having considered the *Eitel* factors as discussed below, the Court finds that default judgment is inappropriate as to Plaintiff's claims and that default should be set aside. Because the second and third *Eitel* factors require the Court to consider whether Plaintiff can state a claim, and because the Court concludes that Plaintiff cannot state a claim and that any amendment would be futile, this action will be dismissed with prejudice.

1. Possibility of Prejudice to Plaintiff

The first factor requires that the Court consider whether the plaintiff would suffer prejudice if default judgment is not entered. See *PepsiCo, Inc.*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Here, Plaintiffs would not suffer prejudice if the Court did not enter a default judgment. Quality has indicated its interest in being an active participant in this litigation. Absent entry of a default judgment, Plaintiffs would be able to litigate this matter. Accordingly, the first *Eitel* factor militates against entry of default judgment.

2. Substantive Merits and the Sufficiency of the Complaint

The Court considers the merits of Plaintiff's substantive claims and the sufficiency of the complaint together because of the relatedness of the two inquiries. Together,

those factors require that a plaintiff "state a claim on which relief may be granted." *Warner Bros. Home Entertainment Inc. v. FilmAndMusicUSA, LLC*, 2013 WL 4478956 (C.D. Cal. Aug. 20, 2013) (citing [Danning v. Lavine](#), 572 F.2d 1386, 1388 (9th Cir. 1978)). Because of the interrelated nature of this determination and Citi's motion to dismiss, the Court considers both now.

a. Legal Standard

A claim may be dismissed where a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. [Johnson v. Riverside Healthcare Sys.](#), 534 F.3d 1116, 1121 (9th Cir. 2008); [Navarro v. Block](#), 250 F.3d 729, 732 (9th Cir. 2001).

In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. [Mollett v. Netflix, Inc.](#), 795 F.3d 1062, 1065 (9th Cir. 2015); [Marceau v. Blackfeet Hous. Auth.](#), 540 F.3d 916, 919 (9th Cir. 2008). However, the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." [In re Gilead Scis. Sec. Litig.](#), 536 F.3d 1049, 1056-57 (9th Cir. 2008); [Sprewell v. Golden State Warriors](#), 266 F.3d 979, 988 (9th Cir. 2001). To avoid a Rule 12(b)(6) dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal](#), 556 U.S. 662, 278 (2009); see [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 570 (2007).

A "district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." [Lopez v. Smith](#), 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). In other words, leave to amend should be granted unless amendment would be futile. [Gompper v. VISX, Inc.](#), 298 F.3d 893, 898 (9th Cir. 2002); see [Petersen v. Boeing Co.](#), 715 F.3d 276, 282 (9th Cir. 2013) (requiring that "leave to amend . . . be granted with extreme liberality") (internal quotation marks omitted).

b. Analysis

As discussed below, the Court (1) has serious reservations about the timeliness of Plaintiffs' claims and (2) finds that Plaintiffs' claims are precluded.

All three of Plaintiffs' claims rest on the allegation that Defendants do not have standing to foreclose on the Tenaya Property. Plaintiffs raised and this Court rejected similar arguments regarding the same loan in *Bever v. Cal-Western Reconveyance Corp.*, Case No. 1:11-cv-1584-AWI-SKO. In the present action, Plaintiffs contend that a year after consummation of the loan and deed of trust transaction by First Pacific, Plaintiffs rescinded the loan. The Truth In Lending Act ("TILA") provides a borrower the right to rescind a loan by providing written notice within three business days of a borrower's receipt of required disclosures and forms. 15 U.S.C. § 1635(a). If the required disclosures are never given then a borrower has three years to rescind. 15 U.S.C. § 1635(a). The Supreme Court recently clarified in *Jesinoski* the three year period after consummation of the loan is the length of time a borrower has to give notice to a lender of its exercise of its right to rescind. See *Jesinoki v. Countrywide Home Loans*, 135 S.Ct. 790, 792-793 (2015). *Jesinoski* does not speak to the limitations period for a borrower to seek relief under TILA.

In this instance, Plaintiffs allege no facts that would tend to indicate that First Pacific failed to provide the required disclosures or forms. Assuming Plaintiffs' notice was filed, it appears to have been untimely. Even assuming that Plaintiffs' notice of rescission was filed and that it was timely, Plaintiffs do not explain the substantial delay—between May 6, 2004 and January 19, 2016—in bringing their rescission claim before the Court.

Further, **even if Plaintiffs' TILA rescission claim were timely, a right of rescission does not attach to residential mortgage transactions.** 15 U.S.C. § 1635(e)(1); see *Major v. Imortgage.com, Inc.*, 2016 WL 492740, *4 (C.D. Cal. Feb. 8, 2016) (citing *Gonzalez v. GMAC Mortg. LLC*, 2010 WL 3245818, at *3 (C.D. Cal. Aug. 17, 2010) ("Plaintiffs allege that the loan at issue was used to finance the acquisition of their home. Accordingly, the Court concludes the that the mortgage transaction at issue in this case was a residential mortgage transaction within the meaning of 15 U.S.C. § 1602(w), and thus Plaintiffs have no right to rescind under TILA.")).

Most significantly, as Citi points out, see Doc. 16 at 10, this Court has already entered a judgment against Glenn Bever regarding the ownership interest Citi and foreclosure authority of Citi and the former trustee. See *Bever v. Cal-Western Reconveyance*, Case No. 11-cv-1584 at Doc. 156. Because Plaintiff's present challenges are all premised upon a TILA rescission claim, and because the prior judgment was issued by this Court, the Court applies federal claim preclusion rules.^[1] See *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) cf *Brodheim v. Cry*, 584

[F.3d 1262, 1268 \(9th Cir. 2009\)](#) (finding that the district court erroneously applied federal "transactional nucleus of facts" standard which is "used to analyze the preclusive effect of prior federal court judgments.") Claim preclusion applies where there is "(1) identity of claims, (2) a final judgment on the merits, and (3) identity or privity between the parties." [Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 \(9th Cir. 2001\)](#). As to the first consideration, the court should determine whether the two suits arise out of the "same transactional nucleus of facts." [Owens, 244 F3d at 714](#). Stated another way, there is sufficient identity of claims if the present claim "could have been brought in the first action." [United States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1151 \(9th Cir. 2011\)](#) accord [Cell Therapeutics, Inc. v. Lash Group, Inc., 586, F.3d 1212 \(9th Cir. 2009\)](#). It appears that Plaintiffs could have raised this claim in the prior action. The prior action dealt with the same loan and addressed the lender's authority to foreclose on the Tenaya Property. Whether the loan had been rescinded prior to Citi's attempted foreclosure upon the property would naturally have fallen within the scope of that action.^[2]

Next, "[a] judgment issued by a federal court is final for purposes of res judicata" unless "reversed on appeal, [or] modified or set aside in the court of rendition." [Susilo v. Robertson](#), 2013 WL 989959, * 4 (C.D. Cal. Mar. 11, 2013) (citing, *inter alia*, [Stoll v. Gottlieb, 305 U.S. 165, 170 \(1938\)](#)) (internal quotation marks omitted); accord [Tripathi v. Henman, 857 F.2d 1366, 1367 \(9th Cir. 1988\)](#); see [Singh v. United States](#), 2015 WL 5817791, *3 (E.D. Cal. Sept. 30, 2015) (applying res judicata to a new set of claims although the judgment of the prior action was on appeal). This Court issued judgment in Plaintiffs' prior action. [Bever v. Cal-Western Reconveyance Corp.](#), 11-cv-1584 at Doc. 157. The fact that the judgment is now on appeal before the Ninth Circuit Court of Appeal does not impact the finality of that judgment.

Finally, the parties to the present action were the same as or in privity with the parties in the prior action. Citi and Glenn Bever were both parties to the prior action. See [Bever v. Cal-Western Reconveyance, Corp.](#), 11-cv-1584 at Doc. 156; see [Sharp v. Deutsche Bank National Trust Company](#), 623 Fed.Appx.425, 426 (9th Cir. 2015) (holding that spouses are in privity as to litigation regarding jointly held property) (citation omitted). As the Court explained, the former trustee had no independent right or interest in the real property. [Bever v. Cal Western Reconveyance Corp.](#), 11-cv-1584, Doc. 157 at 17 (citing, *inter alia*, [Duenas v. Ocwen Loan Serv'g, Inc.](#), 2014 WL 4627203, *15 (E.D. Cal. Sept. 16, 2014)). Quality and the prior trustee, in their roles as trustee, only have a right to foreclose insofar as Citi has a right to foreclose. For purposes of this action, the validity of

the note and deed of trust impacts all of the Defendants equally. The parties have shared identity or privity sufficient to apply claim preclusion.

In summary, Plaintiffs cannot state a claim upon which relief can be granted against either named defendant. Because Plaintiffs' claim is precluded and because their claim is tied to a residential mortgage to which TILA rescission does not apply, amendment would be futile. Citi's motion to dismiss will be granted. Also, that Plaintiffs cannot state a claim weighs against entering default judgment. *See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.*

3. The Sum of Money at Stake in the Action

Under the fourth factor, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D. Cal. 2003).* Where a large sum of money is involved, entry of default judgment is disfavored. *Chanel, Inc. v. Gupton*, 2015 WL 1094849 (N.D. Cal. Mar. 2, 2015) (citing, *inter alia*, *Eitel, 782 F.2d at 1472*). Here, Plaintiffs seek statutory damages in the amount of \$1,000.00, fees and costs in the amount of \$940.00, and a declaration that Defendants have no interest in the Tenaya Property.^[3] Although Plaintiffs do not seek a large sum of money, granting Plaintiffs a judgment declaring that Defendants have no interest in the property and not requiring Plaintiffs to make any further payments on the loan would result in a windfall. Especially when viewed through the lens of the questionable merit of this action, the amount of money sought in this action is substantially disproportionate to the alleged misconduct. This factor weighs against entry of default judgment.

4. The Possibility of a Dispute Concerning Material Facts

It is very likely that the material facts in this case will be disputed. Although Plaintiffs litigated a similar action regarding the same loan, no mention of a "notice of rescission" was previously made. Defendant Citi, although it accepts the facts of the complaint in its motion pursuant to Rule 12(b)(6), appears to suggest that a notice of rescission letter was never sent and that Plaintiff's present action is an additional delay tactic designed to "hinder Citi's ability to liquidate the [Tenaya] Property as expressly authorized by the Deed of Trust." Doc. 16 at 9.

This factor weighs against entry of default judgment.

5. Whether the Default Was Due to Excusable Neglect

Upon review of the record before the Court, the Court finds that the default was the result of excusable neglect. *See PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. Plaintiffs served Defendants with the summons and complaint on January 25, 2016. Doc. 18. At that point, the summons and complaint were forwarded to the Quality legal department where the legal assistant scanned and attempted to email those documents. Decl. of Julie Molteni, Doc. 23-2 at ¶ 6. The email failed to send. *Id.* On February 29, 2016, Corporate Counsel for Quality received Plaintiff's request for entry of default. *Id.* at ¶ 5. Three days later she filed a motion to set aside default. Doc. 23.

Thus, the record suggests that Defendants' failure to respond resulted from excusable neglect. Accordingly, this *Eitel* factor weighs against entry of a default judgment.

6. The Strong Policy Favoring Decisions on the Merits

"Cases should be decided upon their merits whenever reasonably possible." [*Eitel*, 782 F.2d at 1472](#). Because Quality has shown an interest in being party to this action, this case can be decided on its merits. This factor weighs against entry of default judgment.

7. Conclusion

Upon consideration of the *Eitel* factors, the Court concludes that Plaintiffs have failed to establish the merits of any alleged cause of action as would be required for entry of default judgment against Quality. *See Federal Nat. Mortg. Ass'n v. George*, 2015 WL 4127958, *3 (C.D. Cal. July 7, 2015) ("The merits of the plaintiff's substantive claim and the sufficiency of the complaint are often treated by courts as the most important *Eitel* factors.") (citation omitted). Moreover, the remaining *Eitel* factors weigh in favor of denying entry of default judgment. Accordingly, this Court will deny Plaintiff's motion for entry of default judgment.

B. Motion to Set Aside Default

The three considerations for whether default should be set aside—(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default—parallel *Eitel* factors one, two, three, and six. Because the Court has already determined that Plaintiffs will not be prejudiced if default is set aside, that Defendants have a complete and meritorious defense, and that Quality's default was a product of excusable neglect, the Court will grant Quality's motion to set aside default.

C. Motion to Dismiss

As discussed in *Section IV(A)(2)(b), supra*, Plaintiffs fail to state a claim. Their failure cannot be cured through amendment. This action will be dismissed with prejudice.

V. Order

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for default judgment is DENIED;
2. Quality's motion to set aside default is GRANTED;
3. Citi's motion to dismiss with prejudice is GRANTED. This action is dismissed in its entirety.

The Clerk of the Court is respectfully directed to close this case.

IT IS SO ORDERED.

[1] The predominant difference between California and Federal claims preclusion rules is that "federal courts apply a 'transactional nucleus of facts' test, [whereas] California courts employ the 'primary rights' theory to determine what constitutes the same cause of action. . . ." [Brodheim v. Cry, 584 F.3d 1262, 1268 \(9th Cir. 2009\)](#).

[2] The Court agrees with Citi that because the assignment of the deed of trust was the basis of Plaintiffs' prior action, their allegation that they could not have previously asserted their claims against Citi is false. Furthermore, the underlying basis for the claims in the present action—the cancelation of the note—allegedly took place in May of 2004, approximately seven years before initiation of the previous suit. *See* Complaint at ¶ 8.

[3] Although, there has been no evidence presented in this action of the remaining balance of the loan against the Tenaya Property, the original loan amount was \$211,850.00. *See* Doc. 12-1 at 3.