

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 16-15265  
Non-Argument Calendar

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D.C. Docket No. 8:16-cv-01022-MSS-MAP

COLETTE MARQUIS,

Plaintiff-Appellant,

versus

DEUTSCHE BANK NATIONAL TRUST COMPANY,  
As Trustee For Long Beach Mortgage  
Loan Trust 2006-WL3,  
SELECT PORTFOLIO SERVICING,  
CHASE BANK,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Middle District of Florida

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(February 2, 2018)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Plaintiff Colette Marquis filed a lawsuit against Defendants Deutsche Bank National Trust Company, Select Portfolio Servicing, and Chase Bank, seeking rescission of her mortgage under the Truth in Lending Act, 15 U.S.C. § 1635, an injunction to stop the foreclosure of her home, and damages. The district court *sua sponte* dismissed Plaintiff's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim. After careful review, we affirm.

**I. BACKGROUND**

In 2005, Plaintiff entered a loan agreement with Long Beach Mortgage Loan Company for the purchase of her first home. Chase Bank took over servicing of the loan in 2008. In 2012, it assigned the note and mortgage to Deutsche Bank National Trust Company and in <sup>2013</sup>~~2015~~ it assigned the servicing rights to Select Portfolio Servicing. Plaintiff stopped making payments on the loan in ~~2012~~ <sup>2010</sup> and the home is now in foreclosure proceedings. In 2016, Plaintiff sent the lenders a notice of rescission of the loan transaction.

That same year, she filed the present lawsuit against Defendants seeking rescission of the mortgage pursuant to the Truth in Lending Act, an injunction to

*2010*  
*Colette Marquis*  
*(JUDGE'S ERROR)*

stop the foreclosure of her home, and damages.<sup>1</sup> The district court dismissed Plaintiff's complaint pursuant to § 1915(e)(2)(B)(ii) for failure to state a claim. Specifically, the district court concluded that the subject loan transaction did not qualify for rescission under the Truth in Lending Act and therefore Plaintiff could not maintain an action to enforce that right. Because Plaintiff failed to state a claim upon which relief may be granted, the court concluded that she was not entitled to injunctive relief. This appeal followed.

## II. DISCUSSION

We review the district court's *sua sponte* dismissal for failure to state a claim under § 1915(e)(2)(B)(ii) *de novo*, viewing the allegations in the complaint as true. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008). The standards that govern dismissals under Federal Rule of Civil Procedure 12(b)(6) apply to dismissals under § 1915(e)(2)(B)(ii). *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997). Section 1915(e)(2)(B)(ii) provides that a district court shall dismiss a case *in forma pauperis* at any time if it determines that the action fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). To survive dismissal for failure to state a claim, a complaint must contain sufficient facts that, accepted as true, state a plausible claim for relief. *Ashcroft v. Iqbal*, 556

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<sup>1</sup> After Plaintiff filed an initial complaint and motion to proceed *in forma pauperis*, a magistrate judge denied the motion to proceed *in forma pauperis* without prejudice, concluding that Plaintiff's initial complaint failed to comply with Federal Rule of Civil Procedure 8. The magistrate judge directed Plaintiff to file an amended complaint that complied with Rule 8's pleading requirements.

U.S. 662, 678 (2009). A claim is plausible on its face when there is a “reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

The Truth and Lending Act provides that when a loan made in a consumer credit transaction is secured by the consumer’s principal dwelling, the consumer has the right to rescind the transaction within a certain time frame. 15 U.S.C. § 1635(a). However, the right to rescind does not apply to a “residential mortgage transaction,” which is defined as “a transaction in which a mortgage . . . is created or retained against the consumer’s dwelling to finance the acquisition or initial construction of such dwelling.” *Id.* § 1635(e); 15 U.S.C. § 1602(x). A “dwelling,” in turn, is defined as “a residential structure or mobile home which contains one to four family house units, or individual units of condominiums or cooperatives.” *Id.* § 1602(w).

Here, the district court did not err by dismissing Plaintiff’s complaint for failure to state a claim. The allegations in the complaint make clear that the subject loan was for the acquisition of Plaintiff’s primary residence and therefore met the definition of a residential mortgage transaction. Indeed, Plaintiff alleged that she began “co-ownership” of her home in 2005 and that it was she and her then-husband’s first home purchase. She further alleged that the property is “unique in that it is a residential home” and that she brought this action to prevent the foreclosure of the home that she had lived in with her children for the past ten

years. Because residential mortgage transactions are exempt from a right of rescission under the Truth in Lending Act, Plaintiff has no claim for relief to enforce that right. See 15 U.S.C. §§ 1635(a), (e), 1602(w)-(x). Moreover, given that Plaintiff asserts no claim for which relief may be granted, she is not entitled to injunctive relief. See *Klay v. United Healthgroup. Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004) (“For a traditional injunction to be even theoretically available, a plaintiff must be able to articulate a basis for relief that would withstand scrutiny under Fed. R. Civ. P. 12(b)(6) (failure to state a claim).”).

**AFFIRMED.**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

COLETTE MARQUIS,

Plaintiff,

v.

Case No: 8:16-cv-1022-T-35MAP

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, As Trustee For Long Beach  
Mortgage Loan Trust 2006-WL3,  
SELECT PORTFOLIO SERVICING, and  
CHASE BANK,

Defendants.

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**ORDER**

**THIS CAUSE** comes before the Court for consideration *sua sponte*. On May 3, 2016, United States Magistrate Judge Mark Pizzo denied Plaintiff's construed motion for leave to proceed *in forma pauperis* (Dkt. 2) without prejudice because Judge Pizzo found that Plaintiff's Complaint failed to comply with Federal Rule of Civil Procedure 8(2)(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." (Dkt. 3) In that order, Judge Pizzo granted Plaintiff fourteen (14) days to file an amended complaint that conforms to the pleading requirements contained in Rules 8 and 10 of the Federal Rules of Civil Procedure. (Id.) Plaintiff has now filed her Amended Complaint. (Dkt. 8) Upon review, the Court finds that Plaintiff's Amended Complaint is due to be dismissed because it fails to state a viable cause of action upon which relief may be granted.

Plaintiff's Amended Complaint states that it is premised on "the application of rescission procedures as specified in the Federal Truth in Lending Act, 15 U.S.C. § 1635

*et seq.* (hereinafter referred to as TILA)." (Dkt. 8 at P. 2) Although Plaintiff's original Complaint also included a claim for violations of the Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964, Plaintiff does not re-assert that claim in her Amended Complaint. In regard to her TILA claim, Plaintiff requests relief in the form of rescission of her note and mortgage, an injunction preventing foreclosure of the loan against her home, attorney's fees and costs, compensatory and punitive damages, and any other such relief the Court may deem proper. (Id. at P. 8-9)

In the Amended Complaint, Plaintiff seeks to enforce a right to rescission of her note and mortgage under TILA. Under TILA, the right to rescission extends to an obligor until midnight of the third business day after the consummation of the transaction. 15 U.S.C. § 1635(a). However, if certain disclosures are not delivered to the obligor at the time of closing, the right to rescission expires three (3) years after the date of consummation of the transaction or the sale of property, whichever occurs first. Id. at (f). The extended right of rescission ultimately expires after three (3) years even if the required disclosures were not provided to the obligor within the three (3) year period. Id.

In the order denying Plaintiff's construed motion for leave to proceed *in forma pauperis*, Judge Pizzo noted that if Plaintiff had failed to exercise the right of rescission within the three-year statute of repose, she would be barred from asserting her claim. (Dkt. 3 at P. 6, n. 2) Accordingly, Judge Pizzo directed Plaintiff to include in her amended complaint specific allegations setting forth the date(s) of the consummation of her loan transaction(s) so that the Court may determine whether her right to rescission had lapsed. (Id. at P. 3)

In her Amended Complaint, Plaintiff alleges that she entered into the subject loan

transaction in 2005. (Dkt. 8 at P. 2) Seemingly in recognition of the fact that her right of rescission may have expired under TILA, Plaintiff alleges that her lender committed various wrongful acts at the time of the transaction. Plaintiff appears to contend that such wrongful acts on the part of the lender give rise to the application of the doctrine of equitable tolling, thereby extending the time during which she may rescind the transaction. However, the Court need not reach the issues of whether the doctrine of equitable tolling applies<sup>1</sup> or whether Plaintiff timely requested rescission because the right to rescission under TILA does not apply to the loan transaction at issue in this case.

The right of rescission is found in 15 U.S.C. § 1635. That section also contains a list of “exempted transactions” to which the right of rescission does not apply. Id. at (e); see also 12 C.F. R. § 226.23(f). This list includes “residential mortgage transaction[s].” Id. A “residential mortgage transaction” is defined as “a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.” 15 U.S.C. § 1602(x). “Dwelling” is defined as “a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.” Id. at (w).

The factual allegations of the Amended Complaint establish that the purpose of the subject loan transaction at issue, which involved the execution of a note and creation

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<sup>1</sup> In any event, it appears that the Supreme Court has expressly held that the doctrine of equitable tolling, which may apply in some cases to extend statutes of limitation, does not apply to extend statutes of response, such as the statutory right of rescission under TILA. Beach v. Ocwen Federal Bank, 523 U.S. 410, 412 (1998) (“Equitable tolling does not apply to claims for rescission under TILA, because ‘§ 1635(f) completely extinguishes the right of rescission at the end of the 3-year period.’”).



of a mortgage against the home, was to finance Plaintiff's purchase of the home. For example, Plaintiff alleges that the "co-ownership" of her home home began in 2005 with a "loan agreement" through Long Beach Loan Company . . . involving a \$60,000.00 down payment on a home appraised at \$265,000.00. (Id.) Furthermore, she alleges that neither she nor her husband had ever purchased a home before. (Id. at P. 2-3) Additionally, she alleges that she has brought this action to prevent the impending foreclosure against her "homestead in which she and her two minor children reside, and which contains all of their worldly possessions," a home that she has "now owned, occupied, and been legally defending for over 10 years." (Id. at P. 2-4)

Because the subject loan transaction was entered into to finance the acquisition of Plaintiff's primary residence and because it involved the creation of a mortgage against the same residence, Plaintiff does not have a right of rescission under TILA. See, e.g., Meyer v. Wells Fargo Home Mortgage, Inc., No. 3:16CV17/MCR/EMT, 2016 WL 551803, at \*3 (N.D. Fla. Jan. 12, 2016), report and recommendation adopted, No. 3:16CV17/MCR/EMT, 2016 WL 589877 (N.D. Fla. Feb. 11, 2016) (finding no right of rescission under TILA where "Plaintiffs admit that in the transaction at issue, a mortgage, was created against their dwelling to finance the acquisition of the dwelling."); Infante v. Bank of Am. Corp., 680 F. Supp. 2d 1298, 1306-07 (S.D. Fla. 2009), aff'd, 468 F. App'x 918 (11th Cir. 2012) (dismissing TILA claim because mortgage at issue was an exempted "residential mortgage transaction"); Johnson v. Countrywide Home Loans, No. 08-60839-CIV, 2008 WL 4540449, at \*1 (S.D. Fla. Oct. 9, 2008) (same); In re Tomasevic, 275 B.R. 86, 101-02 (Bankr. M.D. Fla. 2001) (no right of rescission exists under TILA for a purchase money mortgage entered into for the purpose of financing the acquisition of a primary

residence).


Because there is no right to rescission for the loan transaction at issue, Plaintiff cannot maintain an action to enforce that right. Therefore, Plaintiff's claim for enforcement of her right of rescission under TILA (Count I) is **DISMISSED** for failure to state a claim upon which relief may be granted.

The other "Counts" included in Plaintiff's Amended Complaint are merely requests for injunctive relief premised on Plaintiff's TILA rescission claim. "[I]t is well-established that injunctive relief is not a proper claim for relief in and of itself, but rather a remedy that is available upon a finding of liability on a claim." Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1127 (11th Cir.2005), cert. denied, 547 U.S. 1192 (2006). Accordingly, Counts II and III of Plaintiff's Amended Complaint are also **DISMISSED**. Additionally, Plaintiff is not entitled to any form of injunctive relief because she cannot succeed on her TILA rescission claim for the reasons discussed above.

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff's Amended Complaint (Dkt. 8) is **DISMISSED**. The **CLERK** is **DIRECTED** to terminate any pending motions and **CLOSE** this case.

**DONE and ORDERED** in Tampa, Florida, this 6th day of July, 2016.

**Copies furnished to:**  
Counsel of Record  
Any Unrepresented Person

  
MARY S. SCRIVEN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 16-15265-DD

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COLETTE MARQUIS,

Plaintiff - Appellant,

versus

DEUTSCHE BANK NATIONAL TRUST COMPANY,  
As Trustee For Long Beach Mortgage  
Loan Trust 2006-WL3,  
SELECT PORTFOLIO SERVICING,  
CHASE BANK,

Defendants - Appellees.

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Appeal from the United States District Court  
for the Middle District of Florida

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BEFORE: MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by COLETTE MARQUIS is DENIED.

ENTERED FOR THE COURT:

  
UNITED STATES CIRCUIT JUDGE

ORD-41

**Additional material  
from this filing is  
available in the  
Clerk's Office.**