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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**BERNADETTE IRIGOYEN, personally)
and on behalf of all similarly situated,)**

Plaintiff,)

v.)

**AMERICAN BROKERS CONDUIT, ELS)
INC., JPMORGAN CHASE BANK, N.A.,)
CHASE HOME FINANCE, LLC, U.S.)
BANK NATIONAL ASSOCIATION, J.P.)
MORGAN ALTERNATIVE LOAN)
TRUST, 2007-A2, CALIFORNIA)
RECONVEYANCE COMPANY, AND)
NORTHWEST TRUSTEE SERVICES,)
INC.,)**

Defendants.)

CASE NO. 1:11-CV-1228 AWI DLB

**ORDER DENYING PLAINTIFF’S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

I. History¹

Plaintiff Bernadette Irigoyen is the owner of two rental properties (“Properties”): 7900 Kimberly Avenue, Bakersfield (“Kimberly Property”) and 7931 Jaime Avenue, Bakersfield (“Jayme Property”). In December 2006, she refinanced the mortgages on the Properties in order

¹The factual history is provided for background; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 to obtain \$50,000 in cash. ELS Inc. (“ELS”) was her mortgage broker and American Brokers
2 Conduit (“American”) was the lender for the two loans. Plaintiff had a preexisting loan of
3 \$161,835.88 on the Kimberly Property which was worth \$250,000 at the time. ELS stated the
4 Kimberly Property’s value was \$410,000 in order to arrange a loan for \$238,000. The Jayme
5 Property was encumbered by a preexisting mortgage of \$267,947.76 and was worth
6 approximately that amount. ESL arranged a refinance with a new loan for \$270,000 by stating
7 the Jayme Property was worth \$425,000. The new loans were 7.125% interest only loans for 5
8 years after which the interest rate was variable with a maximum of 12%. Plaintiff alleges that
9 American paid ELS a total of \$6,507.15 in yield spread premiums which acted as a kickback for
10 steering Plaintiff to this form of loan.

11 American then sold the two loans to either JPMorgan Chase Bank (“Chase Bank”) or
12 Chase Home Finance (“Chase Home”) who acted as attorney in fact for U.S. Bank National
13 Association (“U.S. Bank”), as trustee for J.P. Morgan Alternative Loan Trust, 2007-A2 (“J.P.
14 Trust 2007-A2”). The original trustee on both loans was the North American Title Company.
15 On August 27, 2010, California Reconveyance Company (“Reconveyance”) was substituted as
16 trustee on the Kimberly Property loan. On September 28, 2010, Northwest Trustee Services
17 (“Northwest”) was substituted as trustee on the Jayme Property loan.

18 Plaintiff fell behind on her mortgage payments in June 2009. Reconveyance recorded a
19 Notice of Default for the Kimberly Property on July 7, 2010 and a Notice of Trustee Sale on
20 December 8, 2010. Northwest recorded a Notice of Default for the Jayme Property on October 9,
21 2010 and a Notice of Trustee Sale on September 28, 2010. Plaintiff has neither explained nor
22 objected to this questionable timing regarding the two Notices for the Jayme Property. The
23 Kimberly Property is scheduled to be sold at public auction on August 1, 2011 and the Jayme
24 Property is scheduled to be auctioned on August 8, 2011.

25 Plaintiff has now filed suit against ELS, American, Chase Bank, Chase Home, U.S. Bank,
26 J.P. Trust 2007-A2, Reconveyance, and Northwest. Plaintiff alleges ELS violated California
27 Civil Code §2923.1(a) by breaching ELS’ fiduciary duty to Plaintiff and ELS unjustly enriched
28 itself at Plaintiff’s expense. Plaintiff alleges ELS and American jointly violated the Racketeer

1 Influenced and Corrupt Organizations Act (“RICO”) and California Business & Professions
2 Code §17200. Against all Defendants, Plaintiff seeks an injunction against sale of the Properties.
3 With her complaint, Plaintiff concurrently filed an ex parte request for temporary restraining
4 order, preventing the public sale of the Properties on August 1 and 8.

6 **II. Legal Standards**

7 Under Rule 65(b), a court may issue an *ex parte* temporary restraining order only if: (1) it
8 clearly appears . . . that immediate and irreparable injury, loss, or damage will result to the
9 applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the
10 applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to
11 give the notice and the reasons supporting the claim that notice should not be required. Fed. R.
12 Civ. Pro. 65(b); Reno Air Racing Ass'n v. McCord, 452 F.3d 1126, 1130 (9th Cir. 2006). Rule
13 65(b)’s requirements are “stringent,” and temporary restraining orders that are granted *ex parte*
14 are to be “restricted to serving their underlying purpose of preserving the status quo and
15 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.”
16 Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 438-39 (1974); McCord,
17 452 F.3d at 1131.

18 The substantive standard for granting a temporary restraining order is the same as the
19 standard for entering a preliminary injunction. Bronco Wine Co. v. U.S. Dep't of Treasury, 997
20 F.Supp. 1309, 1313 (E.D. Cal. 1996); Lockheed Missile & Space Co. v. Hughes Aircraft Co.,
21 887 F.Supp. 1320, 1323 (N.D. Cal. 1995); see also Welker v. Cicerone, 174 F.Supp.2d 1055,
22 1062 (C.D. Cal. 2001). A plaintiff seeking a preliminary injunction must establish: (1) that he is
23 likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of
24 preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in
25 the public interest. Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008); Park
26 Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1160 (9th Cir. 2011).
27 “Injunctive relief . . . must be tailored to remedy the specific harm alleged.” Park Vill., 636 F.3d
28 at 1160.

1
2 **III. Discussion**

3 Under the Local Rules of the Eastern District.

4 In considering a motion for a temporary restraining order, the Court will consider whether
5 the applicant could have sought relief by motion for preliminary injunction at an earlier
6 date without the necessity for seeking last-minute relief by motion for temporary
7 restraining order. Should the Court find that the applicant unduly delayed in seeking
injunctive relief, the Court may conclude that the delay constitutes laches or contradicts
the applicant's allegations of irreparable injury and may deny the motion solely on either
ground.

8 L.R. 231(b). From the record, Plaintiff was sent a Notice of Trustee's Sale for the Jayme
9 Property on September 28, 2010 and a Notice of Trustee's Sale for the Kimberley Property on
10 December 8, 2010. Doc. 3, Parts 3 and 10. Yet, Plaintiff waited until July 25, 2011 to file the
11 motion for ex parte TRO, stating "this matter cannot be heard on full notice because Plaintiff's
12 real estate properties subject to this action are scheduled to be sold at public auction, one on
13 August 1, 2011 at 10 a.m. and the other on August 8, 2011." Doc. 6, Motion at 1:22-26. That is,
14 Plaintiff waited until the week before the first sale to file a request for ex parte TRO. Plaintiff
15 has been on notice for months that the Third Parties have been actively trying to foreclose on the
16 Properties. Plaintiff has given no explanation for why she could not have filed a motion for
17 preliminary injunction before this time. She only states "I regret now having waited until this
18 last minute to say anything and for putting both my son and the Court in a position to help me on
19 this short notice." Doc. 5, Part 1, Plaintiff's Declaration, at 3:3-5. The court finds the motion for
20 ex parte TRO to be unduly delayed within the meaning of L.R. 231(b), meriting denial.

21 Further, Plaintiff has not shown a likelihood of success on the merits as she has provided
22 insufficient proof to support her requested injunction. Plaintiff argues that "ELS knew, or should
23 have known, that by using her to carry out its scheme Plaintiff was likely to default on the loan
24 and lose her properties." Doc. 5, Brief, at 3:12-14. She states that "by their very nature those
25 loans had a high probability of default." Doc. 5, Part 1, Plaintiff's Declaration, at 2:10-11.
26 However, Plaintiff has not explained how these loans lead to default. She has not even alleged
27 that the payments on the new loans were larger than the payments on her preexisting loans. This
28 question is particularly salient with respect to the loan on the Jayme Property which appears to

1 have been a pure refinance; the new loan for \$270,000 presumably had more favorable
2 conditions for Plaintiff than her old loan for \$267,947.26. The court can not assume that Plaintiff
3 signed an agreement that increased her monthly payments without some statement from Plaintiff
4 to that effect. Instead, Plaintiff's case appears to center on alleged kickbacks that American
5 supposedly paid ESL for arranging Plaintiff's loans. While that allegation could give rise to an
6 award for money damages, Plaintiff has not adequately shown how she would have avoided
7 foreclosure but for ESL's and American's actions.

8 This failure is particularly troubling since the injunction Plaintiff seeks does not affect
9 ESL and American, but rather the Chase Bank, Chase Home, U.S. Bank, J.P. Trust 2007-A2,
10 Reconveyance, and Northwest ("Other Defendants"). ELS never had any interest in the
11 Properties. Plaintiff represents that American has sold its interest in the Properties to Chase
12 Bank or Chase Home. Doc. 2, Complaint, at 6:24-7:3. Thus, the requested injunction would not
13 directly affect ELS or American, only the Other Defendants. Plaintiff's complaint, however,
14 states no actual causes of action against the Other Defendants; the four substantive claims are
15 solely against ESL and American. As plead, the Other Defendants should properly be considered
16 third parties to this suit as there are serious concerns as to whether the complaint could survive
17 motions to dismiss brought on their behalf. "When the reach of an injunction is narrow, limited
18 only to the parties, and has no impact on non-parties, the public interest will be at most a neutral
19 factor in the analysis rather than one that favors granting or denying the preliminary injunction.
20 If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential
21 for public consequences, the public interest will be relevant to whether the district court grants
22 the preliminary injunction." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138-1139 (9th Cir.
23 2009), quotations and citations omitted. This issue again highlights the problem with the timing
24 of the ex parte temporary restraining order request. These are concerns that could have been
25 alleviated had all parties been heard.

IV. Order

Plaintiff Bernadette Irigoyen's ex parte request for a temporary restraining order is DENIED.

IT IS SO ORDERED.

Dated: July 28, 2011



CHIEF UNITED STATES DISTRICT JUDGE

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