

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9
10 Allen C. Taylor and Lynell M. Taylor,

11 Plaintiffs,

12 v.

13 Deutsche Bank National Trust Company, as
14 Trustee for Morgan Stanley Capital 1 Inc.
15 Trust 2006-NC2 Mortgage Pass-Through
16 Certificates, Series 2006-NC2,

17 Defendant.

No. CV-16-01792-PHX-DLR

ORDER

18 Plaintiffs Allen and Lynell Taylor have appealed from the orders dismissing the
19 complaint and denying leave to amend and the entry of judgment in favor of Defendant
20 Deutsche Bank National Trust Company. (Docs. 20, 29, 30, 34.) Before the Court is
21 Plaintiffs' motion to stay judgment and enjoin trustee sale pending appeal. (Doc. 44.)
22 The motion is fully briefed, and neither side has requested oral argument. (Docs. 45, 46.)
23 For reasons stated below, the motion is denied.

24 **I. Background**

25 This suit arises out of a residential loan transaction more than ten years ago.
26 Plaintiffs claim to have rescinded the note and deed of trust in 2008, but entered into a
27 loan modification agreement two years later. Plaintiffs stopped making loan payments in
28 early 2016.

1 Plaintiffs filed suit against Defendant in state court in May 2016, and Defendant
2 removed the case to this Court one month later. (Doc. 1.) Plaintiffs thereafter filed a first
3 amended complaint purporting to assert three claims: quiet title, false recordings
4 perpetuated on rescinded loan, and violation of the Truth in Lending Act. (Doc. 10.)

5 In October 2016, the Court granted Defendant's motion to dismiss because
6 Plaintiffs' rescission theory failed and their claims otherwise were barred by the statute of
7 limitations and the loan modification agreement. (Doc. 20.) Three months later, the
8 Court denied Plaintiffs leave to file a second amended complaint and denied their motion
9 to vacate the dismissal order. (Doc. 29.) The Clerk then entered judgment in favor of
10 Defendant, noting that Plaintiffs were "to take nothing" and the "complaint and action are
11 dismissed." (Doc. 30.)

12 Given Plaintiffs' default on the loan, Defendant noticed a trustee's sale of the
13 subject property for August 9, 2017. Plaintiff then filed the present motion for a stay of
14 the judgment and to enjoin the trustee's sale pursuant to Federal Rule of Civil Procedure
15 62(c), (d) and (f). (Doc. 44.)

16 **I. Rule 62(c) Does Not Apply**

17 By its express terms, Rule 62(c) applies when an appeal is pending from an order
18 or judgment that "grants, dissolves, or denies an injunction[.]" The orders and judgment
19 appealed from in this case, however, do not involve an injunction. The Court recognizes
20 that Plaintiffs' claim for quiet title would, as a practical matter, preclude foreclosure if
21 proven to have merit. Dismissing a claim that would have the effect of avoiding a
22 potential future foreclosure, however, is not the equivalent of a court order denying an
23 injunction.

24 In short, "Rule 62(c) does not apply, because that rule applies to injunctions, and
25 no injunction is involved here." *Bank of N.Y. Mellon v. Worth*, No. 3:13-cv-1489 (MPS),
26 2015 WL 1780719, at *4 (D. Conn. Apr. 20, 2015); *see Jones v. Bd. of Supervisors of the*
27 *La. Univ. Sys.*, No. 14-2304, 2016 WL 5362700, at *1 n.2 (E.D. La. Sept. 26, 2016)
28 ("Rule 62(c) governs injunctions pending an appeal; there is no injunction in this case.").

1 The Court denies the request to enjoin the trustee sale under Rule 62(c).¹

2 It is worth noting that even if the Court's orders and judgment could be construed
3 as denying injunctive relief, Plaintiffs have not shown that an injunction pending appeal
4 is warranted. The standard for obtaining a Rule 62(c) injunction of a trustee's sale
5 pending appeal is the same as the standard for obtaining a preliminary injunction under
6 Rule 65. *RCC South LLC v. SFI Belmont LLC*, No. CV-11-2356-PHX-DGC, 2011WL
7 6019279, at *1 (D. Ariz. Dec. 5, 2011). The plaintiffs must show that they are likely to
8 succeed on appeal, will suffer irreparable harm without an injunction, the balance of
9 hardships weighs in their favor, and an injunction serves the public interest. *Ranchers*
10 *Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415
11 F.3d 1078, 1092 (9th Cir. 2005). Alternatively, the plaintiffs must "demonstrate *either* a
12 combination of probable success on the merits and the possibility of irreparable injury *or*
13 that serious questions are raised and the balance of hardships tips sharply in [their]
14 favor." *Id.* "Serious questions 'must involve a fair chance of success on the merits.'" *RCC South LLC*,
15 2011 WL 6019279 at *1 (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc)).

17 In this case, Plaintiffs have failed to raise serious questions going to the merits.
18 As previously explained, Plaintiffs' purported rescission of the loan was untimely and is
19 barred by the subsequent loan modification agreement. (Docs. 20 at 5-7, 29 at 3-4.) The
20 Court cannot conclude that Plaintiffs have a fair chance of success on appeal in this
21 regard.

22 Similarly, Plaintiffs have not demonstrated serious questions concerning the denial
23 of leave to amend. The Court denied leave to file a second amended complaint for a host

25 ¹ Plaintiffs assert that even though there was no prior injunction, the Court may
26 "enjoin the sale per Rule 62(g)" because Plaintiffs were still making loan payments when
27 this litigation began. (Doc. 44 at 5.) Rule 62(g), however, simply makes clear that the
28 power of the appellate court to issue injunctions or stay proceedings is not limited by the
other subsections of the rule. To the extent Plaintiffs meant to cite Rule 62(c), they
present no legal authority that the Court may enjoin the trustee's sale under that rule
absent a prior order granting or denying an injunction. *See Bank of N.Y. Mellon*, 2015
WL 1780719, at *4; *Jones*, 2016 WL 5362700, at *1 n.2.

1 of independent reasons: violations of Rule 8, futility, bad faith, undue delay, and the
2 prior opportunity to amend. (Doc. 29 at 2-9.) Plaintiffs simply do not have a fair chance
3 on appeal of showing that the Court abused its discretion and that justice requires leave to
4 amend in this case. The Court therefore declines to grant an injunction of the trustee’s
5 sale. *See RCC South LLC*, 2011 WL 6019279 at *3 (denying stay and request to enjoin
6 trustee’s sale pending appeal where the plaintiff failed to make the showing required for a
7 preliminary injunction).

8 **II. Rule 62(d) Does Not Apply**

9 Plaintiffs move to stay enforcement of the judgment in this case pursuant to Rule
10 62(d), which allows a losing party to obtain a stay by posting a bond. (Doc. 44 at 4.)
11 “The Ninth Circuit has found that Rule 62(d) applies only to money judgments.” *Cal.*
12 *Bank & Trust, LLC v. Shilo Inn*, No. CV-12-161-LRS, 2015 WL 12867067, at *2 (E.D.
13 Wash. Mar. 13, 2015) (citing *N.L.R.B. v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988));
14 *see Marcus I. v. Dep’t of Educ.*, No. 10-00381 SOM/BMK, 2012 WL 3686188, at *2 (D.
15 Haw. Aug. 24, 2012) (same); *GIB, LLC v. Salon Ware, Inc.*, No. CV 13-07191 (2014 WL
16 12560615, at *1 (C.D. Cal. May 13, 2014) (“Rule 62(d) is appropriate for monetary
17 judgments, and nonmonetary judgments are not entitled to an automatic stay.”); *United*
18 *States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1079 n.2 (9th Cir. 2004) (noting that Rule
19 62(d) “provides for an automatic stay in appeals of money judgments”). There was no
20 money judgment in this case. Moreover, a stay of the judgment that Plaintiffs shall
21 “take nothing” would serve no purpose and would not affect a stay of the trustee’s sale.
22 Plaintiffs’ request for a Rule 62(d) stay is denied because that rule is not implicated by
23 the Court’s non-monetary judgment in favor of Defendant.

24 **III. Rule 62(f) Does not Apply**

25 Plaintiffs assert that under Rule 62(f), a judgment debtor is entitled to the same
26 stay of execution the state court would give where “the judgment pertains to the
27 ‘judgment debtor’s property[.]’” (Doc. 44 at 4.) But Rule 62(f), by its express terms,
28 applies only “[i]f a judgment is a lien on the judgment debtor’s property[.]” Defendant

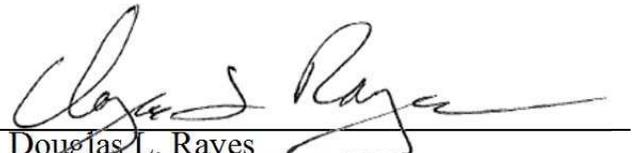
1 notes, correctly, that the judgment in this case does not serve as a lien on property. (Doc.
2 45 at 13.) Moreover, Plaintiffs are not “judgment debtors” in this case – their claims
3 were dismissed and Defendant asserted no counterclaims. Plaintiffs’ request for a Rule
4 62(f) stay is denied.

5 **IV. Conclusion**

6 In summary, Plaintiffs have not shown that a stay or injunction pending appeal is
7 appropriate under Rule 62 or otherwise. Their motion to stay the judgment and enjoin the
8 trustee’s sale therefore is denied.²

9 **IT IS ORDERED** that Plaintiffs’ motion to stay judgment and enjoin trustee sale
10 pending appeal (Doc. 44) is **DENIED**.

11 Dated this 2nd day of August, 2017.

12
13
14
15 
16 Douglas L. Rayes
17 United States District Judge
18
19
20
21
22
23
24
25

26 ² It is worth noting that Plaintiffs have not shown, or even alleged, that they could
27 post a sufficient bond pending appeal. As of December 2016, the outstanding deficiency
28 on the loan was more than \$18,000, and the amount to be repaid if Plaintiffs prevailed on
their rescission theory is \$277,500 (the amount of the loan). The Court rejects Plaintiffs’
contention that no bond should be required because the property serves as collateral for
the loan. (Doc. 44 at 13-14.)