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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Bryan W. Hummel and Sandra M. Dahl
10 Living Trust,

11 Plaintiff,

12 v.

13 Rushmore Loan Management, LLC and
14 DiTech Financial, LLC,

15 Defendants.

No. CV-17-08034-PCT-DGC

ORDER

16
17 The Brian W. Hummel and Sandra M. Dahl Living Trust (the “Trust” or
18 “Plaintiff”) has filed a motion for temporary restraining order (“TRO”) seeking to enjoin
19 Defendant Rushmore Loan Management, LLC from conducting a trustee’s sale of a home
20 owned by the Trust scheduled for Monday, June 5, 2017. Doc. 18. For the following
21 reasons, the Court will grant the TRO.

22 **I. Background.**

23 Plaintiff is a living trust organized under the laws of Arizona. Doc. 1, ¶ 2. The
24 Trust was created on September 19, 2007, and a certificate of trust was recorded with the
25 Mohave County, Arizona Recorder’s Office (“Mohave County”) on October 22, 2007.
26 *Id.* Plaintiff’s counsel Peter Dahl serves as successor trustee to the Trust. *Id.*, ¶ 1. The
27 Trust owns property located at 2692 Avenida Grande, Bullhead City, Arizona (the
28 “Property”). *Id.* Defendants Ditech Financial, LLC and Rushmore are both foreign

1 LLCs registered in the state of Delaware with offices in Maricopa County, Arizona. *Id.*,
2 ¶¶ 4-5.

3 On June 26, 2004, Bryan Hummel and Sandra Dahl (collectively “Borrowers”)
4 entered into a “mortgage/deed of trust/security deed/note” on the Property. *Id.*, ¶ 7. The
5 deed of trust (“DOT-1”) listed First National Bank of Arizona as the mortgage lender and
6 Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary. *Id.* On
7 August 17, 2005, Borrowers entered into a second deed of trust (“DOT-2”) with
8 Countrywide Bank. *Id.*, ¶ 9. On August 25, 2005, DOT-2 was recorded in Mohave
9 County. *Id.* On September 8, 2005, Borrowers paid off all debts secured by DOT-1 and
10 obtained a “deed of release and reconveyance” from MERS, which was recorded in
11 Mohave County. *Id.*, ¶ 8.

12 On February 26, 2007, Borrowers entered into a third deed of trust (“DOT-3”)
13 with MERS as the beneficiary. *Id.*, ¶ 11. On March 14, 2007, Borrowers paid off all
14 debts secured by DOT-2 and obtained a “deed of release and reconveyance” from
15 Countrywide Bank, which was recorded in Mohave County. *Id.*, ¶ 10. On March 30,
16 2007, DOT-3 was recorded in Mohave County. *Id.*, ¶ 11.

17 On September 19, 2007, Borrowers executed a warranty deed conveying the
18 Property to the Trust “for consideration.” *Id.*, ¶ 13. On October 22, 2007, this
19 conveyance was recorded in Mohave County. *Id.* On February 21, 2008, Borrowers, “in
20 their individual capacity and as husband and wife,” entered into another mortgage and
21 deed of trust agreement (“DOT-4”) with Countrywide. *Id.*, ¶ 15. On March 4, 2008,
22 DOT-4 “was recorded with the Maricopa County Recorder.” *Id.* (emphasis in original).
23 On March 17, 2008, Borrowers paid off all debts secured by DOT-3, and secured a deed
24 of release and reconveyance from MERS, which was recorded in Mohave County.
25 *Id.*, ¶ 12.

26 In January 2009, Borrowers “in their individual capacity defaulted on their
27 obligations under [DOT-4.]” *Id.*, ¶ 17. On February 17, 2009, Countrywide invoked the
28 acceleration clause contained in the mortgage contract that accompanied DOT-4. *Id.* On

1 May 25, 2011 – three years after entering into DOT-4 with Borrowers, and nearly four
2 years after the Property was conveyed to the Trust – Countrywide recorded DOT-4 in
3 Mohave County. *Id.*, ¶ 16.

4 In 2012, “Countrywide and its successor Bank of America, then assigned [DOT-4]
5 to Ocwen Loan Servicing, LLC” (*id.*, ¶ 18), which thereafter assigned DOT-4 to
6 Residential Credit Solutions (*id.*, ¶ 19). In September 2016, Residential Credit Solutions
7 assigned DOT-4 to Defendant Ditech. *Id.*, ¶ 20. In 2017, Ditech assigned DOT-4 to
8 Defendant Rushmore. *Id.*, ¶ 21. Currently, Rushmore “hold[s] [DOT-4] on the subject
9 property and claims that it is owed \$404,918.11.” *Id.*, ¶ 22. Soon thereafter, Rushmore
10 noticed a trustee’s sale for January 17, 2017, to be held at the Mohave County
11 Courthouse in Kingman, Arizona. *Id.*, ¶ 24. The trustee’s sale has been postponed on at
12 least three occasions – once until February 27, 2017 (*id.*, ¶ 25), then until April 10, 2017
13 (Doc. 7), and subsequently until June 5, 2017 (Doc. 18).

14 On February 23, 2017, the Trust initiated this action seeking a declaration that the
15 Trust is the Property’s lawful owner and that Defendants are precluded from foreclosing
16 on the Property because the statute of limitations for doing so has expired. *See* Doc. 1 at
17 4-6. On April 6, 2017, Rushmore filed a motion to dismiss the Trust’s complaint.
18 Doc. 13. That motion is fully briefed (Docs. 14, 15, 16, 17) and currently being
19 considered by the Court. On June 1, 2017, the Trust filed this motion for a TRO.
20 Doc. 18.

21 **II. Legal Standard.**

22 The standard for issuing a TRO is the same as that for issuing a preliminary
23 injunction. *Phillips v. Fremont Inv. & Loan*, No. CV-09-2585-PHX-GMS, 2009 WL
24 4898259, at *1 (D. Ariz. Dec. 11, 2009) (citing *Brown Jordan Int’l, Inc. v. The Mind’s*
25 *Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2007)). A plaintiff must show
26 that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm
27 without an injunction, (3) the balance of equities tips in its favor, and (4) an injunction is
28 in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “[I]f

1 a plaintiff can only show that there are ‘serious questions going to the merits’ – a lesser
2 showing than likelihood of success on the merits – then a preliminary injunction may still
3 issue if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two
4 *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281,
5 1291 (9th Cir. 2013) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
6 (9th Cir. 2011)). “Serious questions are ‘substantial, difficult and doubtful, as to make
7 them a fair ground for litigation and thus for more deliberative investigation.’” *Republic*
8 *of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir.1988) (en banc) (quoting
9 *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1952)).

10 **III. Analysis.**

11 The Trust’s complaint contains four counts: (1) Statute of Limitations,
12 (2) Declaratory Relief, (3) Slander of Title and Trespass to Real Property, and
13 (4) Common Law Fraud. Doc. 1 at 4-6, ¶¶ 1-26. The Trust asserts two reasons that that
14 it is likely to succeed on the merits. First, DOT-4, which was effected by Borrowers in
15 their individual capacity, “does not have any force and effect on the Trust which
16 purchased the [P]roperty for consideration in 2007.” Doc. 18 at 3. Second, the Trust
17 “has a reasonable probability of proving that the defendants are prohibited from
18 proceeding with the sale as they have delayed 8 years after accelerating the mortgage in
19 seeking to foreclose on the property[.]” *Id.*

20 In the pending motion to dismiss, Rushmore argues that the Trust’s claims fail as a
21 matter of law. *See* Doc. 13. Specifically, Rushmore contends that: (1) the Trust lacks
22 standing to assert a statute of limitations defense; (2) the Trust’s slander of title and
23 trespass claim fails as a matter of law because the Trust does not allege Defendant acted
24 with malice, a required element of the claim; (3) the Trust has failed to allege sufficient
25 facts to state a claim for fraud; and (4) a claim for declaratory relief cannot stand alone,
26 and must be dismissed because all other claims also fail. *Id.*

27 The Court cannot find that the Trust is likely to succeed on the merits of its claims.
28 In particular, the Court cannot decide without further research that the Trust’s first

1 argument – based on the lender’s failure to record DOT-4 and the Trust’s subsequent
2 recording of the warranty deed it obtained from the Borrowers – is completely meritless.
3 It is also unclear without further research whether the Trust may assert the statute of
4 limitations as a basis for preventing a non-judicial trustee’s sale. The pending motion to
5 dismiss may well resolve these issues, but, given the last-minute nature of the TRO
6 request, the Court requires additional time to address substantial questions and engage in
7 a more deliberative investigation. *Republic of the Philippines*, 862 F.2d at 1362.

8 The Trust owns the Property, and will be irreparably injured if the trustee’s sale
9 proceeds. In Arizona, if a homeowner fails to obtain a TRO enjoining a trustee’s sale, the
10 homeowner “waive[s] all defenses and objections to the sale.” A.R.S. § 33-811(C).

11 The balance of hardships tips sharply in Plaintiff’s favor. While Plaintiff will be
12 irreparably harmed if it loses the Property, Rushmore will only be delayed if the trustee’s
13 sale is postponed while the Court considers the merits of the Trust’s claim. What is
14 more, the parties have previously agreed to postpone the sale without Court intervention
15 several times. *See* Docs. 1, 7.

16 Public policy favors granting the TRO. If the Trust’s claim is correct, a trustee’s
17 sale of its Property would be unwarranted and improper.

18 Because the Trust has raised a serious question, the balance of hardships tips
19 sharply in its favor, and the other requirements for a TRO are satisfied, the Court will
20 grant a TRO.

21 **IT IS ORDERED:**

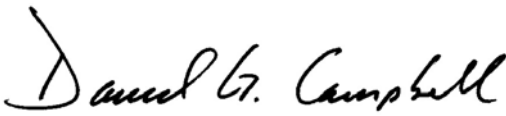
22 1. Plaintiff’s Motion for a Temporary Restraining Order (Doc. 18) is **granted**.
23 Defendants are enjoined from proceeding with the trustee’s sale of the real property
24 located at 2692 Avenida Grande, Bullhead City, Arizona, 86442.

25 2. This TRO shall remain in effect until **12:00 p.m. on June 15, 2017**.

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3. The Court will hold a preliminary injunction hearing on **June 14, 2017**, at **3:00 p.m.**

Dated this 2nd day of June, 2017.



David G. Campbell
United States District Judge