

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

RUBEN GARCIA, JR.,

Plaintiff,

v.

**OLD REPUBLIC DEFAULT
MANAGEMENT SERVICES, SAXON
MORTGAGE SERVICES, INC., and
DOES 1 through 50, inclusive,**

Defendants.

CV F 08-1879 AWI SMS

**NOTICE OF CONTINUANCE
OF DECISION ON
DEFENDANTS' MOTION TO
EXPUNGE NOTICE OF
PENDENCY OF ACTION**

This is an action for damages, injunctive and declaratory relief, rescission and quiet title by plaintiff Ruben Garcia ("Garcia") against defendants Old Republic Default Management Services ("Old Republic"), a default mortgage trustee, and Saxon Mortgage Services, Inc. ("Saxon"), a mortgage servicing company (collectively, "Defendants"). Concurrently with the filing of this action, Garcia filed a notice of pendency of action (hereinafter, "lis pendens") in the chain of title of property formerly owned by Garcia that was the subject of a non-judicial foreclosure. Currently pending before the court are a motion to dismiss the complaint as to Saxon and a motion to expunge the notice of lis pendens. The motion to expunge was taken under submission as of February 2, 2009. Defendants' motion to dismiss the First Amended Complaint is currently set for hearing on March 2, 2009. For the reasons that follow, the court will hold its decision on Defendants' motion to expunge the lis pendens in abeyance until it

1 announces its decision on Defendants' motion to dismiss.

2 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

3 This action was removed from the Superior Court of Tulare County by Saxon on
4 December 4, 2008. On December 10, 2008, Saxon filed a motion to dismiss the complaint. The
5 motion to expunge the notice of lis pendens was filed on December 16, 2008. Garcia filed no
6 opposition to Saxon's motions, but filed a First Amended Complaint ("FAC") on January 8,
7 2009. Saxon filed a motion to dismiss the FAC on January 23, 2009. Garcia's opposition to
8 Saxon's motion to dismiss has not been filed as of this writing and Garcia did not file a timely
9 opposition to the motion to expunge the lis pendens.

10 The FAC alleges a total of eight claims for relief. Of significance to the instant motion to
11 expunge notice of lis pendens, Garcia's fifth claim for relief requests that title to the subject
12 property be quieted in his name, the sixth claim for relief request the court declare the foreclosure
13 and any sale of the subject property to be illegal and void, and the seventh claim for relief
14 requests injunction against any effort by Defendants to take possession of the subject property
15 and directing Defendants to transfer any title claimed by Defendants to Garcia.

16 **LEGAL STANDARD**

17 Pursuant to California Code of Civil Procedure § 405.20 "[a] party to an action who
18 asserts a real property claim may record a notice of pendency of action [lis pendens] in which
19 that real property claim is alleged." The purpose if a lis pendens notice is to provide constructive
20 notice of a pending claim that may affect title or right to possession of the real property described
21 in the lis pendens notice. See LaPaglia v. Super. Ct., 215 Cal.App.3d 1322, 1326 (4th Dist.
22 1989) (abrogated on other grounds by Lewis v. Super. Ct., 19 Cal.4th 1232 (1999)). A lis
23 pendens notice "acts as a cloud against the property, effectively preventing sale or encumbrance
24 until the litigation is resolved or the lis pendens is expunged." Amalgamated Bank v. Super. Ct.,
25 149 Cal.App.4th 1003, 1011 (3rd Dist. 2007). Under California Code of Civil Pprocedure §
26 405.32, "a court shall order that notice of lis pendens 'be expunged if the court finds that the
27
28

1 claimant has not established by a preponderance if the evidence the probable validity of the real
2 property claim. Becerril v. Recontrust Co., 2008 WL 5450355 at *2 (C.D. Cal. 2008). In order
3 to prevent abuse by parties seeking to block lawful transfer of property, California enacted
4 changes to its lis pendens law in 1992 that, *inter alia*, require the party *opposing* the
5 expungement of a notice of lis pendens to “make a showing that he is *likely to prevail on the*
6 *merits*, in much the same fashion as one seeking an attachment must show the probable merit of
7 the underlying lawsuit. (See §§ 481.190, 484.090, subd. (a)(2).)” Amalgamated Bank, 149
8 Cal.App.4th at 1011 (italics in original).

9 “Section 405.32 requires trial court judges to ‘forecast, at some point before trial, the
10 “probable” outcome in the court trial.’ [Citation.]” Becerril, 2008 WL 5450355 at *2. This
11 determination involves a 2-step analysis that is somewhat akin to the analytical approach in a
12 motion to dismiss. First, the pleading is examined to determine if it states a claim to real
13 property. If the answer is affirmative, the court proceeds to determine whether, on the basis of
14 the pleading and facts that are subject to judicial notice, the claim is more probably than not
15 valid. See Dickey v. Auer, 2006 WL 1409623 at *4 (E.D. Cal. 2006) (likening the court’s
16 approach to motion to expunge lis pendens to a state court’s approach in demurrer).

17 DISCUSSION

18 As an initial matter, to the extent Saxon argues they are entitled to a grant of the motion
19 to expunge the notice of lis pendens based on Garcia’s failure to oppose the motion, that
20 argument must be rejected inasmuch as the court must look to the currently-operative pleading to
21 determine first whether Garcia has plead a claim to real property. The fact Garcia filed no
22 opposition means that he would not be able to oppose Saxon’s motion to expunge at oral
23 argument. Local Rule 78-230. It does not have any bearing on Saxon’s ultimate entitlement to
24 have the notice of lis pendens expunged.

25 Based on the Garcia’s prayer to quiet title, and based on the requested declaratory and
26 injunctive relief, there is no doubt the FAC asserts a claim for real property. Saxon does not
27

1 argue otherwise. In addition to Saxon's argument regarding Garcia's non-opposition, Saxon's
2 motion for expungement of the notice of lis pendens is based on the improbability of the success
3 of Garcia's claim. In this regard, Saxon makes essentially the same arguments regarding the
4 merits (or lack of same) regarding Garcia's real property claims in their motion to dismiss as in
5 their motion to expunge notice of lis pendens. The court finds it cannot address the substance of
6 the motion to expunge without implicitly addressing the substantial merits of the motion to
7 dismiss. The court is of the opinion its consideration of the motion to dismiss could be
8 prejudiced if it were to proceed on a decision on the motion to expunge first and without full
9 consideration of all materials submitted in support and opposition of the motion to dismiss. This
10 being the case, the court finds the interests of both procedural fairness and the efficient use of the
11 court's limited judicial resources are best served by holding the decision on the motion to
12 expunge in abeyance until all pleadings on Saxon's motion to dismiss have been received and
13 given full consideration. See Becerril, 2008 WL 5450355 at *2 (declining to grant motion to
14 expunge notice of lis pendens until decision is made on merits of motion to dismiss amended
15 complaint).

16 The court will hold its decision on Saxon's motion to expunge the notice of lis pendens in
17 abeyance until it has reviewed and reached a decision on Saxon's motion to dismiss. The court is
18 mindful of the possibility that defendant parties may be prejudiced if the notice of lis pendens is
19 not expunged timely. The court is also aware that issues pertaining to representation by
20 Plaintiff's counsel may have arisen. The court will proceed to resolve Saxon's motions in as
21 expeditious a manner as possible consistent with the court's duty to afford due process to all
22 parties.

23
24 IT IS SO ORDERED.

25 **Dated:** February 11, 2009

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE